

INTERNATIONAL COURT OF JUSTICE

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

INDONESIA/MALAYSIA

**REPLY OF
MALAYSIA**

2 MARCH 2001

TABLE OF CONTENTS

		<u>Paragraph numbers</u>
Chapter 1	Introduction	1.1 - 1.19
	A. Malaysia's Case for Sovereignty over the Islands	1.3
	B. Indonesia's Case for Sovereignty over the Islands	1.4 - 1.10
	C. The Two Cases Compared	1.11 - 1.18
	D. Structure of this Reply	1.19
Chapter 2	Malaysia's Case as Established by the Evidence	
	A. Overview	2.1 - 2.4
	B. Concordance of the Evidence supporting Malaysia's Case	2.5 - 2.31
	C. Conclusion	2.32 - 2.34
Chapter 3	Ligitan and Sipadan did not Belong to Bulungan	
	A. Introduction	3.1
	B. Bulungan was a Small Land-based Sultanate	3.2 - 3.4
	C. The Dutch Contracts with Bulungan did not Extend to Ligitan and Sipadan	3.5 - 3.9
	D. Ligitan and Sipadan were never in dispute between the Netherlands and Great Britain	3.10 - 3.17
	E. No Map includes Ligitan and Sipadan within Bulungan	3.18 - 3.19
	F. Occasional Dutch Activities in the Area did not Involve Exercises of Jurisdiction or Claims to the Islands	3.20 - 3.31
	G. Conclusion	3.32 - 3.33
Chapter 4	No Title to the Islands can be based on the 1891 Boundary Convention	
	A. The 1891 Boundary Convention addresses the Land Boundary in Borneo Exclusively	4.1 - 4.6
	B. No Maritime Boundary was considered at the time by the Parties	4.7 - 4.21
	C. No Allocation Line was drawn by the 1891 Boundary Convention	4.22 - 4.33

D.	The Internal Dutch Map was not “Officially Communicated” to the British Government nor “Promulgated” by the Dutch Authorities: it was not an Agreement or an Instrument “accepted by the other party and related to the treaty”	4.34 – 4.45
E.	Subsequent Conduct, Practice and Agreements confirm that the 1891 Boundary Convention did not address the Issues of Maritime Delimitation and Allocation of Distant Islands	4.46 – 4.58
F.	Conclusion	4.59

Chapter 5 Possession and Administration of the Islands post-1891

A.	The Two Strands of Malaysia’s Case	5.1 – 5.6
B.	The Facts relating to Administration of the Islands	5.7 – 5.53
	(1) <i>Effectivités</i> of Britain/Malaysia	5.7 – 5.28
	(2) Absence of Dutch and Indonesian <i>effectivités</i>	5.29 – 5.45
	(3) Post-1969 activities of the Parties	5.46
	(4) The map evidence	5.47 – 5.53
C.	The Legal Significance of Long-extended British and Malaysian Conduct	5.54 – 5.64
D.	Conclusion	5.65 – 5.67

Submissions
List of Annexes

Table of Inserts

Insert	Description	Page
1.	North Borneo Coast, Sulu Archipelago, 1878 Sulu Grant and Territorial Dispute with the Netherlands	Opposite 7
2.	Sketch Map No. 2 from G. Irwin, <i>Nineteenth-Century Borneo. A Study in Diplomatic Rivalry</i> , The Hague, 1955	24
3.	Ethnical Map of Borneo (" <i>Volkenkaart van Borneo</i> ") by R.E. Kaltofen, 1917. Scale 1:2.500.000. On file with Royal Tropical Institute, Amsterdam, ISN 5996	26
4.	Small Islands belonging to Tarakan, Nunukan and Sebatik	28
5.	Sketch Map of East Borneo. Bulungan. Scale 1:750.000. 1930. (" <i>Schetskaart van Oost Borneo. Boeloengan. Schaal 1:750.000</i> "). On file with Royal Tropical Institute, Amsterdam, ISN 6041	34
6.	Boundary Lines referred to in letter Commander Naval Forces, 9 August 1922	48
7.	Map attached to the 1915 Agreement (Extracts)	59
8.	One of the maps annexed to the Convention of 26 June 1887 between China and France	61
9.	1916 Gazette Map belonging to the 1915 Agreement	63
10.	Base Points 36, 36a, 36b, 37, 38 and 39 of the Indonesian Baselines	80

Chapter 1

Introduction

1.1. This Reply is filed in accordance with the order of the Court of 19 October 2000. It summarises Malaysia's case, and responds to the arguments made by Indonesia in its Counter-Memorial.

1.2. It is useful to begin with a brief summary and comparison of the arguments of the two parties.

A. Malaysia's Case for Sovereignty over the Islands

1.3. Malaysia's sovereignty over the islands is clear and well established. It follows from the following propositions, which — as will be shown in detail in the following Chapters — Malaysia has demonstrated with full reference to the available evidence.

- (1) Like other islands off the east coast of Borneo (Danawan, Si Amil, Omodal, Mabul...), Sipadan and Ligitan were part of the dominions of the Sultanate of Sulu in the nineteenth century; the people of these islands owed allegiance to the Sultan, which allegiance they transferred to the BNBC from 1878.
- (2) After 1878 the BNBC administered the two islands, along with the rest of the Ligitan Group, even though they fell outside the scope of the Sulu grant of 1878.
- (3) The BNBC's administration of the offshore islands was not challenged by Spain or by the Netherlands. In particular, the Netherlands specifically disclaimed any title to territory or islands east of Batu Tinagat, in the negotiations for the 1891 Boundary Convention and subsequently.
- (4) The BNBC's administration was recognised as a fact by the United States when the *USS Quiros* claimed title to the islands in 1903, and it was regularised as a continuing right of BNBC administration by the Exchange of Notes of 1907.

- (5) The BNBC's right of administration was converted into a full right of British sovereignty as a result of the British-United States Treaty of 1930.
- (6) Malaysia succeeded to British sovereignty over the islands, and its sovereignty continues uninterrupted to the present day. The exercise of that sovereignty has taken a variety of forms, including nature conservation, regulation of natural resources and tourism, security and policing, and the construction and maintenance of lighthouses.

B. Indonesia's Case for Sovereignty over the Islands

1.4. By contrast, Indonesia's case for sovereignty over the islands depends on three propositions, *each* of which it has to establish in order to succeed. These are:

- (1) *First*, that the islands were part of the Sultanate of Bulungan under Dutch sovereignty.
- (2) *Secondly*, that the islands were allocated to the Netherlands by the 1891 Boundary Convention, which according to Indonesia "confirmed Dutch sovereignty over the islands".¹
- (3) *Thirdly*, that that sovereignty subsists, despite the fact that the BNBC, Britain and then Malaysia have continuously administered the two islands since 1891, without the slightest protest from the Netherlands or (until 1969) from Indonesia.

If Indonesia fails to establish any one of these three propositions, its case fails altogether. In fact it has failed to establish a single one of them. Its three-legged case fails on each leg.

There is no evidence whatever that the two islands were part of Bulungan

1.5. Indonesia repeatedly refers to a "presumption" that the two islands were part of Bulungan.² There is no basis for such an argument. Indonesia has to prove its case and it cannot rely on any self-proclaimed "presumption". If any presumption is applicable here, it is the presumption in favour of long possession: *quieta non movere*. That presumption favours Malaysia, not Indonesia.

¹ IC-M, vol. 1, p.42, para. 3.86.

² IC-M, vol. 1, p.40, para. 2.2, p.5, para. 3.81.

1.6. Leaving presumptions to one side, there is no factual basis for the assertion that the territory of Bulungan ever extended to the islands. As shown in Malaysia's pleadings:

- (1) No Dutch map ever depicted the islands as part of Bulungan.
- (2) They were not included in the official Dutch descriptions of the territory of Bulungan or in the Dutch contracts with Bulungan of 1850, 1878 and 1893.
- (3) There is no evidence that the Sultan of Bulungan ever exercised any jurisdiction over the two islands or any others in the vicinity.
- (4) The Dutch claim to territory in the period 1879-1891 was expressly limited to territory to the west of Batu Tinagat and did not extend to any land or islands eastwards of that point.

1.7. Indonesia's Counter-Memorial does not improve its case. No new document is annexed showing any administrative activity by Bulungan or the Netherlands over the two islands or any others nearby. No new map is produced which shows the two islands and attributes them to the Netherlands. Indonesia's sole evidence of sovereignty is the record of a few instances where Dutch naval vessels sailed past the islands, or mentioned them in a neutral way in dispatches. A State cannot establish sovereignty over islands (let alone displace an existing, long-standing administration) without any evidence. A State party to a Special Agreement before the Court cannot rely on a mere presumption. It has to prove its case. Indonesia fails completely to do so.³

There is no evidence that the islands were attributed to the Netherlands in 1891

1.8. There is no evidence of any kind that the islands were recognised as Dutch territory by the Boundary Convention of 1891. That Convention concerned no territory or islands to the east of Sebatik. As shown in Malaysia's pleadings:

³ Indonesia attempts to bolster its case by adducing a self-serving declaration made by "the present pretender to the Sultanate of Sulu" on 30 April 1997: IC-M, vol. 2, Annex 3. Even if the declarant was "one of the claimants to the North Borneo Territory" (which he is not), what probative value could possibly be attached to his mere assertions, made from the Philippines, unsupported even by the pretence that he had sought to acquaint himself with the underlying facts or by any trace of evidence? That Indonesia has felt it necessary to resort to evidence of such poor quality is indicative of the weakness of its case.

- (1) The 1891 Convention was intended to resolve a dispute over the land boundary “in Borneo”. On the east coast, the only area in dispute was that between Batu Tinagat and the Sibuko River, including the inshore island of Sebatik.
- (2) There was no intention to create an allocation line affecting islands 40 miles to the east of Sebatik. The text of the Convention is inconsistent with any such intention, and this is confirmed both by the *travaux préparatoires* and by the subsequent practice of the parties.
- (3) The internal Dutch map of 1891 does not support Indonesia’s claim, and even if it did it was not opposable to Great Britain and was never accepted by it.
- (4) Even if Britain had intended to grant sovereignty over the islands to the Netherlands, it could not have done so because they were more than 9 nautical miles from the coast, and thus fell outside the terms of the Sulu grant of 1878. As was confirmed in the Protocol of 1885, islands falling outside 9 nautical miles from the coast belonged to Spain.

1.9. Indeed, even if the two islands had been part of Bulungan before 1891, they would have been attributed to North Borneo by the Convention. The Netherlands explicitly did not claim any part of Borneo to the east of Batu Tinagat, and never subsequently asserted any claim to any land territory or off-shore islands to the east of the island of Sebatik.

The islands were never claimed or administered by the Netherlands or by Indonesia, before the invention of the dispute in 1969

1.10. There is no evidence whatever of any claim to the islands, by the Netherlands or by Indonesia, in the years 1891-1969. Nor is there any evidence of any Dutch or Indonesian administration of the two islands at any stage, up to the present day. As shown in Malaysia’s pleadings:

- (1) The Netherlands never claimed or administered the islands.
- (2) Dutch practice and Dutch maps are quite inconsistent with any Dutch claim to the islands.
- (3) Indonesia has never at any time administered the islands, which it only claimed 24 years after independence.
- (4) Indonesian practice and Indonesian maps are quite inconsistent with any claim to the islands.

C. The Two Cases Compared

1.11. Whereas Indonesia has to prove each and every element of its case in order to succeed, Malaysia's case is robust.

1.12. Even if (*quod non*) the islands were not part of Sulu, they are now Malaysian, since Malaysia and its predecessors in title have administered them for many years, and Malaysia continues to do so.

1.13. Even if (*quod non*) the islands had ever, even arguably, been part of Bulungan, they are now Malaysian, because no claim was made to them by the Netherlands in 1891 or at any later time.

1.14. Even if (*quod non*) they had been notionally allocated to the Netherlands in 1891, they are now Malaysian, because Britain could not have granted sovereignty over them in 1891, and thus the 1891 Convention is irrelevant as the basis for Indonesia's case.

1.15. Even if (*quod non*) the islands were simply abandoned by the United States after the *USS Quiros* laid claim to them in 1903, they would still be Malaysian, because they have been administered as part of North Borneo ever since.

1.16. Even if (*quod non*) the 1930 Treaty did not cover the islands, they are Malaysian because they were not ceded to any State other than Britain, which continued to administer them.

1.17. Even if (*quod non*) the Indonesian argument as to the 1891 Convention were tenable, the islands would now be Malaysian, because Britain and Malaysia subsequently consolidated their title to them.

1.18. Even if (*quod non*) Indonesia inherited from the Netherlands some vestige of historic title to them (which title the Netherlands never claimed), the islands would now be Malaysian because they have been administered by Malaysia and its predecessors for more than a century, and

that administration is what matters — not hitherto unformulated inferences from an unpublished map.

D. Structure of this Reply

1.19. This Reply consists of four further Chapters. Chapter 2 summarises and restates Malaysia's case for the islands, with cross-references to the documentary and other evidence. Chapter 3 refutes Indonesia's arguments based on the "sovereignty" of Bulungan. Chapter 4 refutes its arguments as to the 1891 Convention. Chapter 5 refutes its arguments based on *effectivités* since 1891. Malaysia's submissions follow.

Chapter 2

Malaysia's Case as Established by the Evidence

A. Overview

2.1. Given the complete lack of supporting evidence, Indonesia's assertion that its case is "straightforward" is surprising.¹ Indonesia seeks to bolster its case by attributing to Malaysia a series of arguments Malaysia does not make and by misrepresenting the arguments Malaysia does make.² It is necessary, therefore, to summarize that case, referring at the same time to the substantial documentary and other evidence adduced in the pleadings of both parties.

2.2. As noted in paragraph 1.3 above, Malaysia's case is based upon six basic propositions. Taken in historical and chronological order these are as follows:

- (1) Like other islands off the east coast of Borneo (Danawan, Si Amil, Omadal, Mabul...), Sipadan and Ligitan were part of the dominions of the Sultanate of Sulu in the nineteenth century; the people of these islands owed allegiance to the Sultan, which allegiance they transferred to the BNBC from 1878.
- (2) After 1878 the BNBC administered the two islands, along with the rest of the Ligitan Group, even though they fell outside the scope of the Sulu grant of 1878.
- (3) The BNBC's administration of the offshore islands was not challenged by Spain or by the Netherlands. In particular, the Netherlands specifically disclaimed any title to territory or islands east of Batu Tinagat, in the negotiations for the 1891 Boundary Convention and subsequently.

¹ IC-M, vol.1, p.5, para. 2.1.

² To take just two examples, Malaysia has never suggested that the two islands in dispute were ceded to the BNBC by the Sultan of Sulu (but see IC-M, vol.1, p.7, para. 2.10), or that there was a single "Bajau entity" on the east coast of Borneo (but see IC-M, vol.1, p.26, para. 3.41). Indonesia's extensive treatment of these "arguments" is off the point.

- (4) The BNBC's administration was recognised as a fact by the United States when the *USS Quiros* claimed title to the islands in 1903, and it was regularised as a continuing right of BNBC administration by the Exchange of Notes of 1907.
- (5) The BNBC's right of administration was converted into a full right of British sovereignty as a result of the British-United States Treaty of 1930.
- (6) Malaysia succeeded to British sovereignty over the islands, and its sovereignty continues uninterrupted to the present day. The exercise of that sovereignty has taken a variety of forms, including nature conservation, regulation of natural resources and tourism, security and policing, and the construction and maintenance of lighthouses.

2.3. Indonesia claims that the Malaysian case is "confused" and "contradictory".³ But there is nothing either confused or contradictory about these propositions. They present a coherent picture, reflected in the documentary record and consistent with the international law of the time.

2.4. It is true that there were, at various stages, disagreements between some of the actors. But these disagreements were resolved and the picture that emerges is both clear and historically-attested. Three temporary disagreements appear from the record, involving successively Spain, the Netherlands and the United States. They were as follows:

- The disagreement with Spain (1878-1885). Initially Spain did not recognise the validity of the Sulu grant of 1878, and after the final capitulation of the Sultanate later in that same year,⁴ it attempted to seize Sandakan, the principal BNBC administrative centre on the east coast.⁵ But the Spanish claim was opposed by the local leaders and by Britain, and its attempt failed.⁶ Subsequently, Spain expressly recognised British authority over North Borneo, to the full extent of the Sulu grant (i.e. down to the Sibuko River), by the Protocol of 1885.⁷
- The disagreement with the Netherlands (1878-1891). The Netherlands recognised BNBC authority over North Borneo but not to the full

³ IC-M, vol.1, p.1, para. 1.2.

⁴ MM, vol. 2, p.42, Annex 12 (referring to "all the Archipelago of Sulu and the dependencies thereof").

⁵ For the British protest at this attempt see MM, vol. 3, p.21, Annex 37.

⁶ See MM, vol. 4 Annexes 78 and 79.

⁷ MM, vol. 2 Annex 15.

extent of the 1878 grant.⁸ A dispute arose as to the territory between the Sibuko River and Batu Tinagat, which was resolved by the 1891 Boundary Convention. The only islands affected by that dispute were Sebatik and the immediately adjacent small islands or islets. There was no Dutch claim to islands or mainland territory east of Batu Tinagat.

- The disagreement with the United States (1900-1907). Following its acquisition of the Philippines in 1898-1900, the United States did not recognise the right of the BNBC to administer islands beyond 9 nautical miles. Nor did it recognise the validity of the 1903 Confirmation by the Sultan.⁹ The BNBC tried to argue on both points, but Great Britain (which had authority in the matter under the Protectorate of 1888) accepted the United States' view of the legal position. The matter was then regularised, first in the 1907 Exchange of Notes and then in the 1930 Convention.

These disagreements at the international level were well attested, were precisely formulated by the parties concerned, and were clearly resolved by the international agreements referred to, which were valid under the international law of the time. None of these transactions affected the fact of BNBC, British and later Malaysian administration of the islands, which has continued for 120 years.

B. Concordance of the evidence supporting Malaysia's case

2.5. It is proposed to take each of the six propositions set out in paragraph 2.2 above and to provide a brief guide to the documentary and other evidence in support of each, as contained in the pleadings.

Proposition 1. Like other islands off the east coast of Borneo (Danawan, Si Amil, Omadal, Mabul...), Sipadan and Ligitan were part of the dominions of the Sultanate of Sulu in the nineteenth century; the people of these islands owed allegiance to the Sultan, which allegiance they transferred to the BNBC from 1878.

2.6. In the mid-nineteenth century, the people inhabiting the coastal areas of north east Borneo owed allegiance to the Sultan of Sulu, and were

⁸ See the Dutch Colonial Minister's statement of 1879, specifying "Bato Tinagat Rock" as the border: MM, vol. 3, p.24, Annex 40.

⁹ MM, vol. 2 Annex 22.

part of the procurement economy of the Sultanate. These people included the Bajaus living on the islands around Darvel Bay, in particular Omadal and the Ligitan Group (Danawan, Ligitan, Si Amil and Sipadan).

2.7. It is clear from the evidence and from contemporary sources that the leaders of the communities along the north east coast were appointed by the Sultan and responded to his orders. Indeed after 1878 they often became local officials under the BNBC.¹⁰ The situation was one of considerable personal continuity, and clear evidence of the succession to leadership of these communities is contained in affidavits collected in the 1970s.¹¹

2.8. Indonesia tries to minimise the significance of these local communities by presenting the Bajaus as a single group of sea gypsies, wandering up and down the whole east coast and effectively beyond the jurisdiction of any of the States in the region, including the Sultan of Sulu.¹² It is true that there were Bajau communities along the coast, but these were distinct groups, not a single wandering tribe of nomads. The Bajaus of Darvel Bay had their own leaders and were based on the islands and reefs of the locality. They had a cemetery at Omadal, which still exists.¹³ Local leaders were appointed or confirmed by the Sultan of Sulu; they were often themselves Sulu by birth.¹⁴

¹⁰ For example Nakoda Gumbah was the "Agent of the Sultan of Sulu charged with the superintendence of the trade on the north-east coast of Borneo" in 1875: MM, vol. 4, p.1, Annex 76. In that capacity he was the channel for orders concerning the prosecution of Bajaus from Omadal who attacked an Austrian ship in May 1875: see also MM, vol. 4, p.3, Annex 77. He was one of the local chiefs who signed the protest against the attempted Spanish occupation of Sandakan in 1878: MM, vol. 4, p.4, Annex 78 ("the matter of the transfer of this country to an English Company having been referred to us by the Sultan six months ago, we have agreed to that transfer and are bound by it"). In 1882 he was appointed "Native Magistrate of Darvel Bay, a position requiring much tact in the management of the large Bajau population". He died in 1886: for his obituary notice in the *British North Borneo Herald* see MM, vol. 4, p.9, Annex 81. He is the first on the list of 34 "indigenous leaders of the east coast of North Borneo", appointed by the BNBC in this period, in J.F. Warren, *The North Borneo Chartered Company's Administration of the Bajau, 1878-1909* (Athens: Ohio University Centre for International Studies, Papers in International Studies, Southeast Asia Series No. 22, 1971), Appendix I, reprinted in MM, vol. 4, p.27, Annex 90.

¹¹ See the affidavits at MM, vol. 4, Annexes 117, p. 91; 118, p. 96; 119, p. 98; 120, p. 100. These indicate a degree of continuing allegiance to the Sultan of Sulu personally, even after 1878. Thus Abu Sari (appointed headman of Danawan around 1899) paid homage to the Sultan and was jailed by the BNBC for doing so: MM, vol. 4, pp.92-93, Annex 117; p.101, Annex 120.

¹² IC-M, vol.1, p.26, para. 3.41 (referring to the Bajau "in their entirety").

¹³ See the photograph in MM, vol.1, p. 26, and for a description of "The Bajau's Necropolis" see MM, vol. 3, p.23, Annex 88 (1903), recording a burial of a deceased person from Danawan.

¹⁴ As in the case of Nakoda Gumbah: above, note 10.

2.9. Sulu dominion over the east coast of Borneo and adjacent islands was recognised by other States interested in the region, and in particular by Spain and the Netherlands.

- (a) Spanish claims to supremacy over the Sulu Archipelago did not extend to Borneo. Under the Spain-Sulu Treaty of 1836, an express exception was made for “Sandakan and the other countries tributary to the Sultan [of Sulu] on the continent of Borneo”.¹⁵
- (b) The Netherlands accepted Sulu authority over territory and islands in the north-east of Borneo. The very limited extent of Dutch claims to the east coast was made explicit in the 1846 Resolution of the Governor-General of Netherlands India.¹⁶ The 1850 Contract with Bulungan claimed “the cape called Batu Tinagat and beyond the River Tanwan [*sic*]”, but accepted that beyond lay “the Zulu possessions on the sea-shore”.¹⁷ The 1878 Contract used similar language.¹⁸ Dutch maps of the period did not show the islands as part of Bulungan; if they were shown at all it was as part of the dominions of Sulu.¹⁹ Nor was there any attempt by the Netherlands to exercise any territorial jurisdiction over the islands east of Batu Tinagat.²⁰

2.10. Sulu dominion over the islands off-shore of Borneo was also recognised by contemporary writers on Sulu.²¹

2.11. The Sulu Grant of 22 January 1878 to the promoters of the BNBC extended “as far as the Sibuku River in the south” and included “all the islands included therein within nine miles of the coast”.²²

¹⁵ MM, vol. 2, p.1, Annex 1. The Additional Stipulations of 30 August 1850 applies to “the territory which forms the extent of islands situated within the limit of Spanish rights”: MM, vol. 2, p.4, Annex 2. The Renewed Act of Submission between Sulu and Spain of 19 April 1851 did not mention Borneo: MM, vol. 2, p.8, Annex 4. In the Protocol of Sulu, 30 May 1877, Great Britain and Germany only recognised the rights of Spain to control and tax trade in those parts of the Sulu Archipelago actually occupied by Spain: see MM, vol. 2, p.12, Annex 5.

¹⁶ IM, vol. 2, pp.59-60, Annex 10.

¹⁷ MM, vol. 2, p.5, Annex 3, Article II.

¹⁸ MM, vol. 2, p.41, Annex 11 (“Next the Solokh Possessions on sea the angle called Batoe Tinagat, and then the River Tawan”).

¹⁹ See MM, vol. 5, Map 3.

²⁰ For Indonesia’s claims based on the 1876 voyage of *HNLMS Admiraal van Kinsbergen* see below, paragraphs 3.23, 4.9, 5.29.

²¹ In his account of the Sulu archipelago in 1837, James Hunt specifically mentioned Pulo Gaya and “Separan with abundance of green turtle”: MM, vol. 3, p.15, Annex 34. “Separan” or “Siparan” was the earlier form of Sipadan.

²² MM, vol. 2, p.31, Annex 9. For the accompanying Commission to von Overbeck see MM, vol. 2, p.35, Annex 10. The Commission instructed “all the Dato’s, Nobles Governors

Proposition 2. After 1878 the BNBC administered the two islands, along with the rest of the Ligitan Group, even though they fell outside the scope of the Sulu grant of 1878.

2.12. The BNBC²³ extended its administration to the whole of the east coast, including off-shore islands beyond 9 nautical miles.

2.13. BNBC control was extended through a series of steps, including the following:

- Early punitive expeditions, where necessary to deter or punish crimes against settlements such as Silam;²⁴
- The appointment of prominent local Sulu and Bajau persons as magistrates and village headmen;²⁵
- The foundation in 1887 of the new settlement of Semporna, which became a local administrative and trading centre;²⁶
- In 1896, Bajau communities living in the surrounding islands were encouraged to move to a new boat settlement in Trusan Treacher, near Semporna.²⁷ the settlement exists to this day;
- In 1901 measures were introduced for the registration of all boats including native canoes and sailing boats.²⁸

Chiefs and officials who have received powers from us in the said coast lands” to accept von Overbeck and his successors “as supreme ruler over the said dominions”.

²³ The BNBC was incorporated by royal charter in 1881: MM, vol. 2, p.48, Annex 14. The Charter recited the terms of the Sulu grant of 1878 (“as far as the Sibuco River with all the islands within three leagues of the coast belonging thereto”). In 1888 the BNBC was brought under British protection: see the Agreement of 12 May 1888, MM, vol. 2, p.68, Annex 16.

²⁴ E.g. the operations of *HMS Zephyr* in 1886 against Omadal: MM, vol. 4 Annex 80, p. 7, described in the *British North Borneo Herald* as “the last Bajow stronghold”: MM, vol. 4, p.12, Annex 82. For subsequent measures see MM, vol. 4, p.15, Annex 83 (Danawan, 1892); MM, vol. 4, p.16, Annex 84 (Omadal, 1892).

²⁵ MM, vol. 4 Annex 90, p. 27. The headman of Danawan was Panglima Abu Sari (appointed ca. 1899). See the affidavit of his son, Tilaran Abdul Majid, made in 1975 when he was 80: MM, vol. 4 Annex 117, p. 91. Indonesia concedes that “it would not have been unusual for the Sultan of Sulu to have appointed chiefs on the island of Dinawan...”: IC-M, vol.1, p.30, para. 3.53.

²⁶ MM, vol. 4, pp.12-13, 14, Annex 82. The first Native Chief of Semporna was Panglima Udang, appointed in 1889: see MM, vol. 4, p.100, Annex 120. His jurisdiction extended to Danawan, Omadan and Ligitan. Subsequently he acquired from the original holders certain rights to collect turtle eggs on Sipadan: *ibid.*

²⁷ MM, vol. 4, p.18, Annex 86; p.26, Annex 89.

²⁸ MM, vol. 4, p.19, Annex 87 and see MM, para. 6.5, note 13.

2.14. As far as Sipadan is concerned, this island was considered an “appanage” of Danawan,²⁹ and as part of the Ligitan group of islands. The term “Ligitan group” was applied at the time to the four islands, Danawan, Si Amil, Ligitan and Sipadan.³⁰ It is not a Malaysian invention.³¹ Nor is it to be confused — as Indonesia apparently confuses it³² — with the Ligitan reefs (Terumbu Ligitan), further to the east.³³ The linkage between Danawan, Si Amil and Ligitan was obvious enough, because they were all located on the large star-shaped reef.³⁴ The linkage between Sipadan and Danawan arose in particular because residents of Danawan held the exclusive concession to collect turtle eggs on Sipadan, a concession originally granted by the Sultan of Sulu and subsequently reissued and regulated by the BNBC. The headman of Danawan had jurisdiction over the following islands and adjacent fishing grounds: Danawan, Ligitan, Si Amil, Kapalai and Sipadan.³⁵

2.15. Steps taken by the BNBC to regulate turtle egg collection — the principal activity carried out on Sipadan for many years — included the following:

- The resolution of disputes between the initial concession holders, Panglima Busari (Abu Sari) and Maharajah Mahmud;³⁶
- The earlier grant to collect turtle eggs on Sipadan was replaced by a grant (“*Surat Katrangan*”) issued at Lahad Dato on 6 May 1916 by the Acting Resident;³⁷

²⁹ MM, vol. 3, pp.145-146, Annex 63.

³⁰ See the clear description of the Ligitan group in the authoritative British sailing directory of 1890: J.P. Maclear (comp.), *Eastern Archipelago, Part I (Eastern Part)* (London, Hydrographic Office, Admiralty, 1890) pp. 182-189; MC-M, , vol. 2, annex 1, cited in MC-M, para. 1.3. Sipadan is described as “the southernmost of the group”. The account of the survey voyage of *HMS Egeria* in the British North Borneo Herald in 1892 refers to “a clear channel established to the north of the Ligitan Group up to Si-Amil Island”: MM, vol. 4, Annex 85, p. 17; see also the full account of the Darvel Bay Survey, which is at IM, vol. 3 Annex 89, p. 232.

³¹ The phrase is used on Dutch maps, for example the 1941 map of North Borneo, where it clearly designates Ligitan, Siamil and Sipadan: see MC-M, vol. 2, p. 70 (Map 7).

³² IC-M, vol.1, p.127, para. 7.18.

³³ Captain Field of the *Egeria* clearly appreciated the distinction. In his hand-written notes of the *Egeria*’s survey of Darvel Bay, he treats Si Amil, Panawan [*sic*], Sipadan and an unnamed “small isle” in the location of Ligitan under the heading of the “Ligitan Group”, before going on to deal with the Ligitan Reefs: IM, vol. 3, pp. 240-242, Annex 90. In the attached sailing instructions he gives the “small isle” the name “Ligitan Islet”: *ibid.*, p. 245.

³⁴ See the satellite photographs in MM, vol.1, pp. 16, 20 and 23.

³⁵ MM, vol. 4, p.92, Annex 117.

³⁶ See the letter from the Assistant District Officer (Barrault), Semporna to the Resident, East Coast, 26 June 1910: MM, vol. 4 Annex 91, p. 29. Both Panglima Busari and Maharajah Mahmud are listed as indigenous leaders resident on Danawan by Warren: MM, vol. 4 Annex 90, p. 27; see also Annex 116, p. 90. The decision of the Assistant District Officer was approved by the Resident: MM, vol. 4 Annex 92, p. 31.

³⁷ MM, vol. 4, p.39, Annex 96. The grant was registered in the Magistrates office: MM, vol. 4, p.36, Annex 95.

- The Turtle Preservation Ordinance 1917 established Sipadan as a “native reserve for the collection of turtle eggs”; those entitled to collect eggs on such reserves were however “subject to any rules declared hereunder for the protection of the industry”;³⁸
- Subsequent agreements with respect to turtle egg collection on Sipadan were subject to approval by the Resident;³⁹
- Trade in turtle eggs from Sipadan was listed as produce of British North Borneo in official publications.⁴⁰

2.16. Indonesia does not dispute the facts about turtle egg collection by residents of Danawan.⁴¹ Instead it seeks to explain them away as “traditional usage” and as not involving the exercise of governmental authority.⁴² But this is not the point. The resolution of disputes, the re-issue of the permit, the management and conservation of the resource, the enactment of legislation with respect to turtle egg collection on Sipadan, the registration of succession and the approval of agreements, all were carried out by BNBC organs and officials acting as such. These are clear acts of government carried out *jure imperii*.

2.17. By implication if not expressly, Indonesia portrays Sipadan as an isolated, waterless, uninhabited spot. True, it had and has no permanent ground water supply. But turtle egg collection was carried out virtually every night of the season by people from Danawan, who divided the nights between them.⁴³ Both Sipadan and Ligitan were the subject of a complex and regular pattern of use by the local people, whose own affiliation was to Sulu and (from 1878) to the BNBC.

Proposition 3. The BNBC’s administration of the offshore islands was not challenged by Spain or by the Netherlands. In particular, the Netherlands specifically disclaimed any title to territory or islands east of Batu Tinagat, in the negotiations for the 1891 Boundary Convention and subsequently.

³⁸ MM, vol. 4, p.40, Annex 97. For the meaning and effect of the Ordinance see MC-M, vol.1, pp. 81-82, paras. 4.21-4.22.

³⁹ See the Agreement made at Semporna on 29 August 1918: MM, vol. 4, Annex 98, p.

43.

⁴⁰ MM, vol. 4, p.47, Annex 99 (1922).

⁴¹ IC-M, vol.1, p.129, para. 7.24. The only Indonesian citizen put forward as having collected turtle eggs there admits that he did so for two months at the request of a Malaysian Badjau living in Semporna: IC-M, vol. 2 Annex 31.

⁴² IC-M, vol. 1, p.128, paras. 7.20-7.21, pp. 130-131, para. 7.28.

⁴³ See MM, vol. 4, Annexes 98, 105.

2.18. Spain. In 1885 Spain expressly recognised British rights in Borneo under the Sulu grant of 1878, in return for British recognition of Spanish sovereignty over the Sulu Archipelago.⁴⁴ In accordance with the definitions contained in Articles II and III of the Protocol of 1885, the Sulu Archipelago included all islands between Borneo and Mindanao except those covered by the Sulu grant.⁴⁵

2.19. However there is no evidence that Spain paid any attention to the islands off the Borneo coast, whether within or outside the 9 nautical mile line. Indeed all the evidence is to the contrary.⁴⁶

2.20. The Netherlands. In accordance with the terms of the contracts with Bulungan of 1850 and 1878, the Dutch claimed only “Terakkan, Nenvoekkan and Sebittikh, together with the small islands [islets] belonging to them”.⁴⁷ Dutch maps showed its claim as stopping at Batu Tinagat,⁴⁸ and the most easterly point of Dutch occupation was the small base on the left bank of the Tawao River, which was established in 1879.

2.21. The following points may be noted:

⁴⁴ Great Britain-Germany-Spain, Protocol of 7 March 1885: MM, vol. 2, p.64, Annex 15.

⁴⁵ The “Sulu Archipelago” was defined in Art. II of the Protocol as including “all the islands which are found between the western extremity of the island of Mindanao... and the continent of Borneo... with the exception of those which are indicated in Article III”. Article III referred to the “territories of the continent of Borneo, which belong, or which have belonged in the part to the Sultan of Sulu... as well as all those [islands] comprised within a zone of three maritime leagues from the coast, and which form part of the territories administered by the company styled the ‘British North Borneo Company.’” Thus the Protocol expressly recognised BNBC administration and British claims of sovereignty over the territory covered by the Sulu grant of 1878, and it treated all other islands between Mindanao and Borneo as part of the Sulu Archipelago, over which Britain recognised Spanish sovereignty. Indonesia’s account (IC-M, vol.1, pp. 109-110, paras. 6.7-6.11) leaves out all reference to Article III of the Protocol and is thus valueless.

⁴⁶ See e.g. the BNBC’s letter to the Foreign Office, 13 July 1903: MM, vol. 3, p.132, Annex 59 (paras. 11, 15). The Foreign Office’s view is expressed in a memorandum of 10 March 1905: IM, vol. 3, p.420, Annex 109 (“The fact that the Spaniards did not interfere with the Company’s control over a few small islands lying within the limits of their possessions does not seem to need much explanation...”).

⁴⁷ MM, vol. 2, p.5, Annex 3, Article II. The 1878 Contract used the same language: MM, vol. 2, p.41, Annex 11. So too did the Dutch Minister for Foreign Affairs in his Note of 8 April 1881, referring to “Les Iles Terrakan, Manoeekan, et Sibittikh avec les îlots adjacents”: MM, vol. 3. p.27 Annex 41.

⁴⁸ For the portrayal of the Dutch claim see the maps at IM, Map Atlas, Map 2 (1885), Map 3 (1888) and the internal Dutch map itself: *ibid.*, Map 5.

- Malaysia has demonstrated the unreality of any Bulungan claim to islands so far away.⁴⁹ Indeed there is no evidence that the Sultan of Bulungan had any maritime capability at all.⁵⁰
- The Dutch occupation of Batu Tinagat in 1879 was protested by indigenous leaders as well as by the BNBC and the British Government.⁵¹
- The Dutch Note of 22 December 1888 specified Batu Tinagat as the “point extrême à l’est”.⁵² This position was consistently maintained in the subsequent negotiations, as further demonstrated in chapter 3 below.⁵³
- The small Dutch base on the Tawao River was withdrawn following the conclusion of 1891 Convention.⁵⁴
- The effect of the 1891 Convention was clearly reflected in two Dutch official maps of 1913,⁵⁵ as well as in all subsequent Dutch maps.⁵⁶ None of these make any claim whatever to islands east of Sebatik. If they show the two islands in dispute, they attribute them to North Borneo.

In short, the effect of the 1891 Convention was the *withdrawal* of the Dutch position southwards and westwards from Batu Tinagat, not its extension 40 miles eastwards to the two islands, as Indonesia now claims.

⁴⁹ See the expert report by Professor Houben, at MC-M, vol.1, p.72, Appendix.

⁵⁰ See the statement by Hageman (1855), cited in MC-M, para. 4.5.

⁵¹ See IC-M, vol. 2 Annex 15. One of those protesting was “Pangeran Belantie of Omardal”: *ibid.*

⁵² IM, vol. 2 Annex 37, p. 329. Earlier notes were to the same effect: e.g. Count de Bylandt to Earl Granville, 12 August 1882: IM, vol. 2 Annex 29, p. 271 (“la souveraineté territoriale Néerlandaise à la côte nord orientale de Bornéo... commence à la mer avec le Batoe Finigal [sic] et s’étend d’abord vers le nord, puis vers l’ouest jusqu’aux montagnes centrales de Bornéo”); Count de Bylandt to Earl Granville, 1 December 1882: IM, vol. 2 Annex 31, p. 280 (“fort probable que la rivière désignée dans les Concessions sous le nom de ‘Siboeboe’ est située à l’est de Batoe Tinigat et par conséquent en dehors du territoire Néerlandais”).

⁵³ See the Minutes of the three meetings of the British-Dutch Joint Commission in 1889: MM, vol. 3 Annexes 44-46, especially Annex 45 at pp. 51-52 (“Admitting that the statements of Mr. Treacher should be correct in so far as the regions are concerned to the eastward of Batoe Tinagat...”). The Dutch Explanatory Memorandum of 25 July 1891 correctly described Batu Tinagat “as starting-point [of the Dutch claim] at the Eastern Coast”: MM, vol. 3 Annex 51, p. 93. See further below, paragraphs 3.10-3.17.

⁵⁴ Evidently the base did not amount to much. The two responsible Dutch Ministers told the Dutch Parliament in 1891 that “[o]ur authority in Muara Tawao is solely represented by a native guard; we do not have very much there except for a small coal deposit”: MM, vol. 3 Annex 52, p. 100.

⁵⁵ For the Dutch East Indies map of 1913 see MM, vol. 5, Map 1. A less detailed map of the same year, attached to the administrative decision of 1 February 1913 determining the administrative structure of Eastern Borneo is reproduced at MC-M, p. 104. The boundary stops at the east coast of Sebatik, and the two islands now in dispute are not shown.

⁵⁶ For an analysis of the Dutch maps see MC-M, vol.1, pp.99-105, paras. 5.8-5.18.

2.22. Informed Dutch opinion, both before⁵⁷ and after⁵⁸ the 1891 Convention, doubted the validity of the Dutch claim to areas north of the Sibuko River, and in particular to Sebatik. There is no hint of an opinion that the territory of Bulungan extended to the coast of North Borneo and its islands 40-50 miles further east. As to actual administration of those islands by the Netherlands, there is no trace whatever.⁵⁹

2.23. At no stage subsequent to the 1891 Convention did the Netherlands ever make the slightest claim to islands east of Sebatik, nor did it ever claim that the Treaty established an “allocation line” to the east of Sebatik. In this regard the following may be noted:

- The Delimitation Agreement of 17 February 1913 and its annexed map is inconsistent with any such claim.⁶⁰
- So is the further Boundary Agreement of 28 September 1915.⁶¹
- The Dutch Resident’s letter of 1923 stated, accurately, that beyond Sebatik “there are no islands, only the open sea”.⁶²
- The Dutch discussions in the 1920s on the drawing of a territorial sea boundary east of Sebatik are inconsistent with a pre-existing treaty limit along the 4°10' parallel.⁶³

⁵⁷ See the opinion of M. Keuchenius in the Dutch parliamentary debate of 6 December 1881, that “the dominion of Holland did not extend to the territory which was the subject of the concession to Mr. Dent”: MM, vol. 3 Annex 42, p. 28. See also IC-M, vol. 2 Annex 6 (citing a Dutch article of 1882, according to which the area between the Sibuko and the Tarran River was “a strip of land destitute of inhabitants, where there was hence not a single native who desired Netherlands sovereignty”).

⁵⁸ See the opinion of the deputy assistant resident of Koetei, quoted with approval in the Dutch Explanatory Memorandum of 25 July 1891: MM, vol. 3 Annex 51, p. 91. See also the opinions reported by Sir Horace Rumbold to the Marquis of Salisbury, 9 March 1892: IM, vol. 3, Annex 83, p. 158.

⁵⁹ Indeed, in 1917 the Dutch Resident said that even the Tidoeng lands (attributed to The Netherlands by the 1891 Convention) “remain virtually excluded from the exercise of authority”: MM, vol. 3 Annex 69, p. 175.

⁶⁰ For the text of the Boundary Delimitation see MM, vol. 2 Annex 25 p. 95. For the annexed map see MM, vol. 5, Map 23. See also Sebatik Boundary Survey, Tawao, 6 May 1914: MM, vol. 2 Annex 26, p. 100. During this survey it was found that the existing pillars were not on the 4°10' line; the Parties agreed to use the pillars, not the parallel, without it occurring to anyone that (if Indonesia’s argument now is right) this could have consequences further east.

⁶¹ See MM, vol. 2 Annex 27 p. 104. For the annexed map see MM, vol. 5 Map 23.

⁶² MM, vol. 3 Annex 73, p. 186. Resident van Kempen also notes that fishing on Sebatik “is not in the hands of the indigenous population of Boeloengan” but is “performed by the well-known Badjaus from the Solo archipelago”. This confirms the position noted in the Dutch Explanatory Memorandum of 1891: MM, vol. 3 Annex 51, p. 91 (“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 disputes area and show no concern whatever for the Sultan van Boeloengan”).

⁶³ See MC-M, vol. 2 Annexes 4-8, and for discussion MC-M, vol.1, pp. 74-80, paras. 4.10-4.18.

Proposition 4. The BNBC's administration was recognised as a fact by the United States when the USS Quiros claimed title to the islands in 1903, and it was regularised as a continuing right of BNBC administration by the Exchange of Notes of 1907.

2.24. Subsequent to 1891, the Dutch never challenged the BNBC's administration of or right to the islands.⁶⁴ The only challenge to the BNBC's administration of the offshore islands came from the United States, as successor to Spain,⁶⁵ beginning in 1903. While acknowledging BNBC's *de facto* administration of the islands beyond 9 nautical miles, the United States claimed title to them.⁶⁶ The United Kingdom recognised the United States' title, but the BNBC was permitted to continue its administration of the islands under the 1907 Exchange of Notes.

2.25. These facts are evidenced by the following documents:

- The voyage of the USS "Quiros" and associated documents.⁶⁷ From these documents the following points emerge:
 - (a) Whatever the position in point of title, the islands concerned "have always been administered by us [sc. the BNBC] since our advent here".⁶⁸
 - (b) The islands in question included Sipadan and Ligitan, as well as Danawan and Si Amil (i.e. all the islands in the Ligitan Group).⁶⁹

⁶⁴ The surveying voyage of the Dutch vessel *HNLMS Makassar* in 1903 (MM, vol. 3 Annex 64, p. 165; IM, vol. 3 Annex 105 p. 392) treated all the points and islands mentioned as part of British North Borneo, including Mabul, Danawan, Si Amil, Ligitan and Sipadan. There is no suggestion in the report that any of the islands mentioned were Dutch. Similarly with the voyage of *HMS Lynx* in 1921: MM, vol. 3 Annex 71, p. 178 ("armed sloop was sent to land [Sipadan] for information", which does not imply that Sipadan was considered Dutch territory). The fuller report in IM, vol. 4 Annex 120, p. 10 is no different. See further below, paragraph 3.24.

⁶⁵ Following the War of 1898, the United States acquired the Spanish territories in the Philippines in two stages: first, by the Treaty of Paris, 10 December 1898: MM, vol. 2 Annex 19, p. 74, and then as to all additional islands by the Treaty of 7 November 1900: MM, vol. 2 Annex 21, p. 85 ("any and all islands of the Philippine archipelago lying outside of the lines described in Article III of the Treaty of Peace"). In the meantime the United States concluded an agreement with the Sultan of Sulu covering "the whole Archipelago of Jolo and its dependencies": MM, vol. 2 Annex 20, p. 81, Art. I.

⁶⁶ See the analysis of the legal position by Secretary Hay, 3 April 1903: MM, vol. 3 Annex 55, p. 115.

⁶⁷ See MM, vol. 3 Annexes 56-63; IM, vol. 3 Annexes 97-103.

⁶⁸ Resident, Lahad Dato to Lt. Boughter, 24 June 1903: MM, vol. 3 Annex 56, p. 128.

⁶⁹ See MM, vol. 3 Annex 60 (Danawan, Si Amil); Annex 61 (Sipadan), Annex 63 (Danawan, Si Amil, Sipidan, Ligitan).

- (c) Sipadan was considered an “appanage” of Danawan, with disputes over turtle egg collection being referred to the resident at Lahad Datu.⁷⁰
 - (d) All islands on which landings were made (including Sipadan) were claimed by the United States, and plates were affixed recording that claim.⁷¹
 - (e) There is no trace in these documents of any Dutch claim, influence, control or affiliation.
- The Sulu “Confirmation” of 1903. This was obtained from the Sultan by the BNBC, once it realised that its administration of islands beyond 9 nautical miles was challenged by the United States. The Confirmation⁷² included by name, among others, Omadal, Si Amil, Mabul and Danawan “and other islands near, or round, or lying between the said islands named above”. The United States and Great Britain agreed that the “Confirmation” could have no legal effect.⁷³ But it is contemporary evidence of the actual administration of the off-shore islands by the BNBC.
 - The United States map of 1903. Following the voyage of the *Quiros*, the US Hydrographic Office prepared a map which showed unequivocally the United States claim to the islands beyond 9 nautical miles, including Sipadan and Ligitan.⁷⁴ However the United States, aware of the competing BNBC claim, took “no steps... toward making good the title of the United States to those islands”.⁷⁵ In response, Great Britain conceded the United States title but asked for some “consideration for the fact that the North Borneo Company had during many years carried on the administration of them under the apparent belief that the islands formed part of the company’s territory”.⁷⁶ This was the basis for the conclusion of the 1907 Exchange of Notes.
 - The 1907 Exchange of Notes. The Exchange of Notes⁷⁷ regularised the BNBC’s “temporary occupation” of islands beyond 9 nautical miles from the coast, as shown on the “Durand” map, prepared by the

⁷⁰ MM, vol. 3 Annex 63, pp. 145-146.

⁷¹ For Sipadan see IM, vol. 3 Annex 101, pp. 345 (transcription), 363 (original). The log entry is dated 22 July 1903. It was notified to the U.S. Naval Department by cablegram dated 1 August 1903: IM, vol. 3 Annex 103 p. 377.

⁷² MM, vol. 2 Annex 22, p. 87.

⁷³ For the Foreign Office view see IM, vol. 3 Annex 109 pp. 424-5.

⁷⁴ MM, vol. 5 Map 5. See MC-M, para. 3.20.

⁷⁵ Secretary Hay to the British Ambassador, 10 December 1904: MM, vol. 3 Annex 65 p. 167. See also IM, vol. 3 Annex 104, p. 382.

⁷⁶ MM, vol. 3 Annex 66, p. 169. See also Annex 67, p. 170.

⁷⁷ MM, vol. 2 Annexes 23-24, pp. 93, 94.

BNBC and annexed to the Exchange of Notes.⁷⁸ There was no change in the territorial status quo as a result of the Exchange of Notes. All the islands administered by the BNBC continued to be administered by them, including Sipadan and Ligitan.

Proposition 5. The BNBC's right of administration was converted into a full right of British sovereignty as a result of the British-United States Treaty of 1930.

2.26. In 1930, the United States relinquished title to some of the offshore islands covered by the 1907 Exchange of Notes, including the islands of the Ligitan Group, in favour of Great Britain. Sovereignty over and administration of the islands was thereby reunited in the BNBC under British protection.

2.27. The Boundary Convention of 2 January 1930⁷⁹ established a line "separating the islands belonging to the Philippine Archipelago on the one hand and the islands belonging to the State of North Borneo which is under British protection on the other hand". The line was depicted in an annexed map.⁸⁰ Article III provided that "all islands to the south and west of the said line shall belong to the State of North Borneo". The islands of the Ligitan group (including the two disputed islands), which were to the south and west of the 1930 line, thereby passed in full sovereignty to North Borneo under British protection.

2.28. In earlier memoranda both United States and British officials had noted that the identification of the islands affected by the 9 nautical mile line was a difficult matter.⁸¹ The question was considered in more detail in preparing for the 1930 Convention.⁸² It was clearly noted that the United States' proposal, which became the allocation line under the Convention, would entail that...

⁷⁸ The first version of the map was attached to the BNBC's letter of 13 July 1903 (MM, vol. 3, Annex 59), to which the map attached to the 1907 Exchange of Notes makes express reference: MM, vol. 5, Map 6.

⁷⁹ MM, vol. 2, p. 117, Annex 29.

⁸⁰ MM, vol. 5 Map 25.

⁸¹ In his letter of 10 December 1904 (MM, vol. 3, p. 167, Annex 65), Secretary Hay pointed to the difficulties in tracing a 9 nautical mile line from "the windings of an irregular coast". For the British view see MM, vol. 3, p. 182, Annex 72, ("In the absence of any precise determination of this line it is impossible to say exactly how many of the islands are under American sovereignty and how many are under North Borneo sovereignty").

⁸² See the Admiralty memorandum of June 1927: IM, vol. 4 Annex 123, p. 62, analysed in MC-M, vol.1, p.67, para. 3.26.

“British North Borneo would receive Buaning, Lankayan, Mantatuan, Matakang and the Ligitan Islands, to none of which she has any valid claim.”⁸³

2.29. The clear effect of the 1930 Convention was to withdraw the United States’s claim to title over these islands in favour of Britain.⁸⁴ For nearly four decades thereafter, no State made any claim to any of them.

Proposition 6. Malaysia succeeded to British sovereignty over the islands, and its sovereignty continues uninterrupted to the present day. The exercise of that sovereignty has taken a variety of forms, including nature conservation, regulation of natural resources and tourism, security and policing, and the construction and maintenance of lighthouses.

2.30. The BNBC (1878-1946) and its successors, Britain (1946-1963) and Malaysia (1963-present) have administered the islands as sovereign territory, peacefully and without interruption, ever since.

2.31. Evidence of such administration includes the following:

- Designation of Sipadan as a “Megapode Preserve” under the Land Ordinance 1930;⁸⁵
- Issue and subsequent revocation of licenses to take turtles on Sipadan and Ligitan;⁸⁶
- Approval of succession to the right to collect turtle eggs;⁸⁷
- Construction and maintenance of lighthouses or light towers;⁸⁸

⁸³ MC-M, vol. 2, p. 18, Annex 3.

⁸⁴ The United States was concerned that no third State acquire any of the islands (cf. IC-M, vol. 2 Annex 30). The negotiations for the Treaty of 1930 were conducted on the basis that no third State had or claimed an interest in any of the islands concerned, including the Ligitan group: see MM, vol. 3, p. 182, Annex 72. In other words, the issue arose exclusively between the United States and Great Britain: see IM, vol. 4, p. 51, Annex 123.

⁸⁵ MM, vol. 4, p. 50, Annex 100; p. 51, Annex 101.

⁸⁶ MM, vol. 4, p. 52, Annex 102. The license was modified after complaints from Danawan: MM, vol. 4, p. 53, Annex 103; p.54, Annex 104. See also MM, vol. 4, p.75, Annex 112.

⁸⁷ MM, vol. 4, p.55, Annex 105(1957). See also p.61, Annex 106.

⁸⁸ Approved for Sipadan in 1960: MM, vol. 4, p.69, Annex 108. The current turtle egg licensee from Danawan protested against the proposed light (MM, vol. 4, p.70, Annex 109) but the objection was overridden (MM, vol. 4, p.73, Annex 110). For the Notice to Mariners

- Regulation of tourism;⁸⁹
- Additional measures to regulate housing⁹⁰ and to protect the environment.⁹¹

These matters are discussed further in Chapter 5 below.

C. Conclusion

2.32. For these reasons, each of the six propositions put forward by Malaysia is clearly established in the documentary record before the Court. By contrast, Indonesia can only put forward doubts and quibbles and no evidence — no evidence of any Dutch claim to the islands, no evidence of any Dutch or Indonesian administration, no evidence that any official at any time before 1969 entertained the possibility that the two islands belonged to Indonesia or its predecessors in title.

2.33. Yet Indonesia now claims only the two Malaysian islands because they are below the parallel of 4° 10'N. It may be noted that it would have been nonsensical for the Dutch in 1881 to have made any such claim. The 4° 10'N line derived from the decision taken in 1889 to divide the area in dispute by selecting a point on the coast, Broershoek, which happened to have that latitude and from the subsequent decision to divide Sebatik itself using the 4° 10'N line. It is obvious that that compromise did not *extend* the area in dispute further to the east. It settled a dispute, it did not create a new one. If there *had* been a Dutch claim to Sipadan and Ligitan before 1889, this could only have been as part of a larger claim to the coastline and to the whole group of adjacent islands — in effect, to the Semporna Peninsula itself and the islands to the south of Darvel Bay. It is transparent from the record that such a claim was never made.

2.34. Thus Indonesia's case is wholly lacking in any historical foundation, quite apart from its many other deficiencies. To these, as further manifested in Indonesia's Counter-Memorial, Malaysia now turns.

notifying the establishment of the light (1962), see MM, vol. 4, p.74, Annex 111. The equivalent notice for Ligitan (1963) is at MM, vol. 4, p.76, Annex 113. See also MM, vol. 4, p.87, Annex 115. The lights are still operational: see MM, vol.1, pp.69-70, paras. 6.25-6.29.

⁸⁹ See MM, vol.1, p.18 para. 3.19, p.71 paras. 6.30-6.31.

⁹⁰ See MM, vol. 4, Annex 122.

⁹¹ See MM, vol. 4, Annex 123.

Chapter 3

Ligitan and Sipadan did not Belong to Bulungan

A. Introduction

3.1. A striking difference in emphasis can be noted between Indonesia's Memorial and its Counter-Memorial as regards its reliance on Bulungan as a basis for its claim. Whereas the Memorial included lengthy, albeit inconclusive, chapters on the pre-1891 history, attempting to show that the islands of Ligitan and Sipadan were under the sway of the Sultan of Bulungan,¹ Indonesia's Counter-Memorial admits there was uncertainty as to the validity of such a claim.² It is right to do so. As this Chapter will recount, the Sultanate of Bulungan emerged only in the early 19th century and it remained a rather small, mainly land-based, entity in eastern Borneo. This Chapter will also show that the Dutch involvement with Bulungan from the mid-19th century up to the independence of Indonesia did not entail any Dutch claims east of Batu Tinagat, or to distant off-shore islands in north-eastern Borneo. Neither can occasional Dutch naval activities be viewed as claims to sovereignty or exercises of jurisdiction over the islands.

B. Bulungan was a Small, Land-Based Sultanate

3.2. In his expert study Professor Houben has described the evolution of the European presence in the region of South-East Asia, with particular reference to the Dutch colonial expansion, and at times retreat, in the Indonesian archipelago.³ As regards Borneo, he noted that notwithstanding its considerable size the island had been an almost neglected area so far as foreign powers were concerned. In the early part of the 19th century the Dutch slowly developed their colonial rule over the southern and

¹ See IM, vol. 1, pp. 55-60, paras. 4.55-4.72, pp. 61-78 paras. 5.2-5.33.

² See e.g. IC-M, vol. 1, p.41, para. 3.86: "Whatever may have been the pre-1891 situation..."; p.47, para 4.14: "...whatever ambiguities may have existed before 1891 as to the geographical scope of the territories belonging respectively to the Dutch, who succeeded to the rights and interests of the Sultan of Boeloengan, and British North Borneo..."; p.86, para. 5.69: "...the ownership of islands on either side of that line was at the time uncertain..."

³ Professor Vincent J.H. Houben, "The Regional History of Northeast Borneo in the Nineteenth Century with Special Reference to Bulungan", MC-M, vol. 1, Appendix.

Insert 2

Sketch Map No. 2 from G. Irwin, *Nineteenth-Century Borneo. A Study in Diplomatic Rivalry*, The Hague, 1955



western part of Borneo. Yet, even in mid-century the Dutch seriously contemplated selling their rights in Borneo to another European power.⁴ Active Dutch involvement with Borneo would always remain rather limited.⁵

3.3. As can be seen from **Insert 2** opposite, Bulungan was initially part of a bigger realm called Berau, which also included the areas of Sambialung and Gunung Tabur. Around 1800 Bulungan emerged as an independent political entity, ruled by its own Sultan. However, it always remained a rather small sultanate on the eastern coast of Borneo. The Tidung lands to the north of Bulungan were reputed to belong to it, but this was not without controversy.⁶

3.4. As depicted on the following page as **Insert 3**, Bulungan had a small, mixed population, consisting of Malays, Dayak and Bugis.⁷ It was mainly centred on the banks of rivers and interaction with the outside world was limited. Some barter trade took place between Bulungan and the Sulu region, whereby inhabitants from the latter traded slaves for forestry products and other goods.⁸

C. The Dutch Contracts of Vassalage with Bulungan did not Pertain to Ligitan and Sipadan

3.5. On 28 February 1846 the Governor-General of the Netherlands East Indies issued the first substantive administrative decision regarding Dutch Borneo, proclaiming the establishment of a centralised government for the parts of Borneo which were under Dutch control.⁹ Although this attempt failed,¹⁰ it is noteworthy that the northern limit of the Dutch administrative

⁴ H. Martin, *De Engelschen en de Nederlanders in den Indischen Archipel met terugzigt op eene besproken vestiging der Belgen op Borneo*, Amsterdam, 1866; C. Fasseur, *De weg naar het paradijs en andere Indische geschiedenissen*, Amsterdam, 1995, p. 56.

⁵ Cf. P.J. Drooglever, "The Netherlands Colonial Empire: Historical Outline and Some Legal Aspects", in H.P. van Panhuys et al., *International Law in The Netherlands*, 1978, vol. I, p. 127 at pp. 156-157.

⁶ See the statement by Sir Philip Currie in Proceedings of the First Meeting of the Joint Commission, 16 July 1889: MM, vol. 3, p. 40, Annex 44.

⁷ See also J.G.A. Gallois, "Korte aantekeningen gehouden gedurende eene reis langs de Oostkust van Borneo verrigt op last van het Nederlands Indisch Gouvernement, door den Resident der Zuid-en Oosterafdeeling van Borneo", in *Bijdragen tot de Taal-, Land- en Volkenkunde van Nederlands-Indië*, vol. 4 (1856), p. 253.

⁸ See also MM, vol. 1, p.74, para. 7.5.

⁹ Text in IM, vol. 2, p. 55, Annex 10.

¹⁰ G. Irwin, *Nineteenth-Century Borneo. A Study in Diplomatic Rivalry*, The Hague, Nijhoff, 1955, pp. 158-159.

division was determined to be at approximately 3° 20'N.¹¹ Subsequently, on 27 August 1849, the Governor-General established two independent administrative areas on Borneo: the Western Division and the Southern and Eastern Division. This Decree rather loosely incorporated Dutch claims from “*Berou* together with the realm of Banjermassin, up to the water - parting with the basin of the *Kapoeas* and up to *Soengei atas* on the north eastern coast, including the whole basin of *Berou*”.¹² The Decree did not refer to Bulungan, the Tidung lands or small islands in their vicinity, let alone to off-shore islands well away to the east.

3.6. Around the same time, the Government of the Netherlands East Indies concluded or renewed contracts with local rulers. Their main purport was to claim exclusive rights for the Dutch to establish themselves in the region and to conduct trade, to the exclusion of other powers. With the Sultan of Bulungan the first such contract was concluded on 12 November 1850.¹³ The northern boundary was determined as: “Towards the Zulu possessions on the sea-shore, the cape called Batoe Tinagat and beyond the River Tanwan”. The Contract continues by specifying: “The following islands shall belong to Boeloengan: Terakkan, Nenoekkan and Sebittikh, with the small islands belonging thereto”.¹⁴ The phrase “small islands belonging thereto” evidently referred only to the small configurations in the vicinity of the named islands, most notably those between the islands of Sebatik and Nunukan and the island of Tarakan. Most of these islets carry a name. As can be seen from **Insert 4**, on the following page, they include Bassan, Bukat, Ahus, Tembagan, Baru, Tibi and Bunju. No island much further to the north-east (Sipadan and Ligitan are 40-50 nm to the east of Sebatik) could fall within the scope of such a phrase.¹⁵

3.7. In a new Decree of the Governor-General of the Netherlands East Indies, dated 2 February 1877, the geographical extent of Bulungan as included in the 1850 Contract was confirmed to extend to Batu Tinagat.¹⁶ The description of the boundary was repeated in a new Contract of Vassalage dated

¹¹ See also IM, vol. 1, p. 12, para. 3.10.

¹² Dutch Cabinet decision of 27 August 1849, No. 8. Text in *Staatsblad*, 1849, No. 40; reproduced in IM, vol. 2, p. 71, Annex 12.

¹³ Text in ARA, *Min. of Colonies*, 2.10.03, inv. no. 10, reproduced in MM, vol. 2, Annex 3.

¹⁴ Full text in IM, vol. 2, p. 79, Annex 13.

¹⁵ Such an interpretation is in line with the decision of the Arbitral Tribunal in the *Guinea/Guinea Bissau: Dispute Concerning Delimitation of the Maritime Boundary*, Award of 14 February 1985, p. 34, para. 61, in *ILM*, 1986, vol. 25, p. 251.

¹⁶ Decree of the Governor-General of the Netherlands Indies amending the Territorial Subdivision of the Residency Southern and Eastern Division of Borneo, 2 February 1877: IM, vol. 2, Annex 14.

Insert 4

2 June 1878 between the Netherlands East Indies' Government and the new Sultan of Bulungan.¹⁷ This Contract was reported to the Dutch Parliament.

3.8. Following ratification of the 1891 Boundary Convention, the Dutch Government reported to Parliament in 1894 that the Convention had made it necessary to revise the description of the area of Bulungan appended to the 1878 Contract, in order to bring it in line with the newly-agreed boundary line. It submitted a supplementary agreement on the boundaries of Bulungan and the islands belonging to it which, following consultations with the administration of Bulungan, was concluded on 19 June 1893. This replaced the 1878 description of the area. In straightforward terms the 1893 supplementary agreement provided:¹⁸

“The Islands of Tarakan and Nanukan and that portion of the island of Sebatik, 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.”

It should be noted that the agreement refers in clear-cut terms to the text of the 1891 Convention as published in the Official Gazette 1892 of the Netherlands East Indies, No. 114 and in no way to the internal Dutch map.

3.9. No further agreements relating to the geographical extent of Bulungan were concluded between the Dutch colonial authorities and the Sultan of Bulungan.¹⁹

D. No Dutch Sovereignty was claimed east of Batu Tinagat: Ligitan and Sipadan were never addressed in any Anglo-Dutch Diplomatic Correspondence

3.10. In essence, the Indonesian Counter-Memorial concedes that there was never at any time any attempt by the Dutch negotiators to claim territory east of Batu Tinagat or islands eastwards of Sebatik.²⁰ Indonesia tries to explain away such statements by suggesting that they should be seen in the

¹⁷ Text in ARA, *Min. of Colonies*, 2.10.03, inv. no. 10: reproduced in MM, vol. 2, p.39, Annex 11; IM, vol. 2, p. 119, Annex 19.

¹⁸ See “Description of the Boundaries of the Territory of Boeloengan and List of the Islands Belonging Thereto”, signed 19 June 1893: in MM, vol. 3, p.114, Annex 54.

¹⁹ There is no mention of any further agreements in parliamentary papers or in J. Eisenberger, *Kroniek der Zuider- en Oosterafdeeling van Borneo*, Bandjermasin, 1936.

²⁰ IC-M, vol. 1, p. 84, para. 5.68.

context of the negotiations, and in particular as responses to the remarks of the British Acting Consul-General relating to the Dent-Overbeck Grant of 1878.²¹ The problem with this explanation — *inter alia* — is that it does not cover the many other instances of recognition by Dutch authorities of British sovereignty east of Batu Tinagat. As early as 1879, the estimates for Netherlands India for the financial year 1880 presented to the Second Chamber of the States-General, note that “the Bato Tinagat Rock is the point of demarcation”. The government statement is quite explicit:

“In order to avoid possible misunderstandings, the Indian Government has issued orders that the Netherlands flag shall be hoisted at the point of demarcation (the Bato Tinagat Rock, at the mouth of the Tawan River, which, according to the last survey, is situated in north latitude 4°19' and east longitude 117° 31'), and that for the present it shall be watched by a cruizer, while it has, moreover, addressed a request to the Sultan of Boulongan, to whose territories the said point of demarcation belongs, to place a Representative of his own in residence at that point.”²²

This official declaration is all the more interesting in that it explicitly refers to the “Sultan of Boulongan” and considers Batu Tinagat as the “point of demarcation” of the Bulungan territories.

3.11. Spurred by the Dent-Overbeck grant and the official recognition of the British North-Borneo Company as a chartered company, the Netherlands authorities sought to strengthen their claims north of the Seboekoe river, in the Tidung lands. In 1879, the Assistant Resident of Koetei was sent to this particular area, looking — sometimes in vain — for local heads willing to swear and to sign written statements that they considered themselves to be under the authority of the Sultan of Bulungan. The Assistant Resident reported that in the coastal area no such statements could be made and no Dutch flags could be delivered.²³

3.12. Count de Bylandt refers to Batu Tinagat as the extreme eastern claim of the Netherlands in his note dated 1 December 1882: “...la rivière désignée...est située à l'est de Batoe Tinagat et par conséquent en dehors du

²¹ Ibid. For Treacher's remarks see MM, vol. 3, p.19, Annex 36.

²² IC-M, vol. 2, Annex 16.

²³ See extract from Mailreport dated 23 June 1879 from Resident Meijer of Southern and Eastern Division of Borneo to Governor-General of the Netherlands East Indies, reporting on a mission of the Assistant Resident at Koetei to the Eastern Coast of Borneo: Annex MR 1, below pp. 1-2.

territoire Néerlandais”.²⁴ In similar vein, Foreign Minister Hartsen did so as many as five times in his note of 22 December 1888 to Count de Bylandt:²⁵

“La base que le Gouvernement Néerlandais désirerait faire admettre pour atteindre ce but et qui paraît d’ailleurs toute indiquée, en partant du point extrême à l’ouest :Tandjong Datoe, jusqu’au point extrême à l’est : Batoe Tinagat”

“...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...”

“Il en est de même du point extrême à l’est : Batoe Tinagat”

“...le territoire de Boeloengan s’étend jusqu’au point Batoe Tinagat”

“...le fait que les Pays-Bas exercent depuis longtemps des droits de souveraineté sur la côte orientale de Bornéo jusqu’à Batoe Tinagat ne saurait plus être contesté par le Gouvernement anglais.”

3.13. The Joint Commission, set up by the British and Dutch Governments to resolve the boundary issue, had to determine the outer limits of the territories of the Sultan of Sulu and the Sultan of Bulungan on the eastern coast of Borneo. The British Government maintained that the Sultan of Sulu claimed the territory of Tidung. The British delegate, Sir Philip Currie, contended that “the Sultan of Bulungan had ceded to the Dutch what he had no right to cede, Batoe Tinagat being to the north of Sibuco, and therefore within the territory of the Sultan of Sulu”.²⁶ In disagreement with this, the Dutch delegate Count de Bylandt emphasized that the Tidung lands did belong to Bulungan. During the course of the negotiations it was decided to settle the boundary question by way of an amicable compromise. An initial compromise proposal by the British was to take Broershoek, lying at 4° 10'N, as the boundary mark on the east coast, and to let the boundary run eastward between the islands of Sebatik and East Nunukan.²⁷ This proposal to include the whole of Sebatik within British North Borneo was unacceptable to the Dutch. Count de Bylandt also dismissed an informal British proposal to allow

²⁴ IM, vol. 2, p. 280, Annex 31.

²⁵ IM, vol. 2, p. 327, Annex 37.

²⁶ Proceedings of the Second Meeting, Joint Commission, 19 July 1889, pp. 9-10: MM, vol. 3, pp.50-61, Annex 45. See also Sir Philip Currie’s and Sir Edward Hertslet’s statements at the First Meeting of the Joint Commission, 16 July 1889, pp. 2-6: MM, vol. 3, pp. 38-49 Annex 44.

²⁷ Reproduced in MM, vol. 5, Map 2.

the Dutch Batu Tinagat by way of an enclave, since "...an enclave of an uninhabited and useless piece of ground can in future perhaps bring a hornets' nests of all sorts of difficulties and conflicts".²⁸ Finally, the negotiators agreed to split the island of Sebatik into two parts. This compromise was laid down in Article 4 of the Boundary Convention of June 1891, which will be addressed once more in the next Chapter of this Reply.

3.14. When tabling the draft law to approve the ratification of the 1891 Boundary Convention, the Dutch Ministers of Colonies and Foreign Affairs frankly admitted that...

"the Dutch Government has never paid much attention to this outpost of its territory on the east coast of Borneo, which was unknown to her and moreover totally uninhabited; that the rights of the Sultan of Bulungan with regard to the disputed area cannot be called totally indisputable and, finally, that instead of a highly uncertain boundary through an unknown and almost inaccessible area, a very precisely described boundary has now been defined, which will dispense with all future difficulties, not only concerning that part of Borneo connected with the border dispute, but with regard to the entire island."²⁹

3.15. The internal Dutch map attached to the Explanatory Memorandum itself clearly depicted the Dutch claim as stopping at Batu Tinagat.³⁰ The first draft of the internal map, as retrieved by Malaysia, does the same.³¹ Indonesia fails to note that the boundary claimed by the Netherlands and depicted on these maps stops at Batu Tinagat.³²

3.16. Furthermore, the internal Dutch map does not show Sipadan at all. Ligitan appears to be shown, but is unnamed and is located to the north of 4° 10'N. Hence, there is no question of this map (whatever its status) allocating the two islands to Bulungan or the Netherlands. Even the map produced as Annex 1 of the Indonesian Counter-Memorial, showing the territory alleged to have been relinquished by the Netherlands as a consequence of "the 1892 Convention", stops at Batu Tinagat.³³

²⁸ Count de Bylandt to Minister Hartzen of Foreign Affairs, 28 July 1889, extract in MM, vol. 3, p. 66, Annex 47.

²⁹ Memorandum of Explanation, Proceedings States-General 1890-1891, no. 187, no. 3, p. 1: MM, vol. 3, p.89, Annex 51.

³⁰ MM, vol. 5, Map 2.

³¹ MM, vol. 1, p. 98.

³² See also IC-M, vol. 1, p.78, para. 5.48.

³³ IC-M, vol. 2, Annex 1.

3.17. In sum, it was wholly understandable that the Minister of Foreign Affairs during the ratification debate noted that the claims of Bulungan to Batu Tinagat “could not be proved and were in reality imaginary”.³⁴ *A fortiori*, the Dutch authorities never presented any claim as to the islands around Darvel Bay. The Indonesian Counter-Memorial does not come up with a shred of evidence to the contrary. It takes great pains to explain that the 1891 Boundary Convention concerned islands as well as the mainland. But it does not produce a single statement, either during the negotiations or during the ratification debate, hinting at the extension of Dutch sovereignty over any islands situated off the British North Borneo coast.

E. No Map includes Ligitan or Sipadan within Bulungan

3.18. Malaysia has submitted a number of maps of the Bulungan area prepared during the colonial era. These point unequivocally to the same conclusion. No matter whether they were prepared or issued under Dutch official auspices (e.g. the 1849 Versteeg map,³⁵ the *Island of Palmas* Survey Map of the Netherlands East Indies Archipelago, 1897-1904,³⁶ the hydrographical map of 1905 and its update of 1915³⁷ and the 1913 official Residence map³⁸) or were published by private bodies,³⁹ and no matter whether they came before or after 1891, not one single map includes the two islands as part of the Sultanate of Bulungan. This is small wonder in view of the difficulties the sultans had in maintaining their authority over the mainland of Bulungan and in view of the merely latent interest of the Dutch in this particular area.⁴⁰

3.19. **Insert 5**, on the following page, is a sketch map of Bulungan. Prepared in 1930, it clearly shows the contraction of the Sultanate. This confirms the weakness of the authority of the Sultans of Bulungan at the time. The northern boundaries of Bulungan appear to be at the river Sesajab, just north of the islands of Baru, Tarakan and Bunju, well south of Sebatik and the international boundary. Against this background, there could be no question of inclusion of Sipadan and Ligitan within the realm of Bulungan.

³⁴ MC-M, vol. 1, p. 15, para. 2.16.

³⁵ MM, vol. 5, Map 3.

³⁶ MC-M, vol. 2, p. 59, Map 1.

³⁷ MC-M, vol. 2, pp. 60-63, Maps 2 and 3.

³⁸ MM, vol. 5, Map 1.

³⁹ See e.g. the inaccurate 1901 map in the *Journal of the Royal Netherlands Geographical Society*, IC-M, vol. 2, Annex 1.

⁴⁰ See the expert study of Professor Houben, appended to MC-M, vol. 1.

F. Occasional Dutch Naval Activities in the Area did not involve Exercises of Jurisdiction or Claims to the Islands

3.20. Although the Dutch colonial administration of Bulungan spanned a period of nearly 100 years, Indonesia has so far failed to provide a single example of the actual exercises of jurisdiction by Dutch naval vessels off the coast of Northeast Borneo. Research by Malaysia in the archives of the Dutch ministries of Colonies, Navy and Foreign Affairs as well as in reports by colonial officers and the annual Reports on the Colonies provides no indication that any such activities actually took place. In view of the comprehensiveness of the Dutch colonial archives and their excellent state of preservation, any such exercise of jurisdiction would have been reported, and any such report would have survived. The only possible inference is that no relevant power in the region considered this part of the Sulu region to be under the Sultan of Bulungan or the Netherlands East Indies. Neither did the Dutch themselves take that view.

3.21. In its Counter-Memorial Indonesia reports on its search for Dutch administration. Obviously, Bulungan forces and officials itself never went out to sea since Bulungan was not a maritime power.⁴¹ As far as the Netherlands is concerned, all Indonesia can submit is a one-page list of ships that cruised through this region during the period 1895-1928, as well as a few reports on instances of naval activities before that period.⁴² Passing through or surveying a particular area, even if it is for the sake of combating piracy *jure gentium*, must not be confused with the exercise of territorial sovereignty. But that is what Indonesia does. In the *Island of Palmas* case, Arbitrator Huber succinctly stated that:

“Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State... Territorial sovereignty involves the exclusive right to display the activities of a State.”⁴³

Who could ever maintain that the occasional cruises of Dutch ships in this particular region meet the classical criteria of displaying exclusive authority?

⁴¹ J. Hageman, “Aantekeningen omtrent een gedeelte der Oostkust van Borneo”, in *Tijdschrift voor de Indische Taal-, Land- en Volkenkunde*, vol. 4 (1855), p. 78 reported that the Sultan of Bulungan did not even have “praus”, i.e. local boats. See also Houben, MC-M, vol. 1, Appendix, pp. 13-14, para. 6.4.

⁴² See IC-M, vol. 2, Annex 32.

⁴³ *Island of Palmas* case, in *Reports of International Arbitral Awards*, vol. 2, p. 829.

3.22. Scattered examples of a Dutch boat getting a view of Sipadan (Ligitan is rarely mentioned) cannot be regarded as serious examples of Bulungan's or for that matter the Netherlands' title. What do these few cases actually amount to?

3.23. Taking them in chronological order, the first was in 1876, when the HNLMS *Admiraal van Kinsbergen* steamed through the area, occasionally taking soundings and anchoring. The log does not more than mention that the ship "steamed ESE below Poeloe Sipadan", with no implication that the island was considered as part of Bulungan.⁴⁴ A landing took place on Mabul, not on Sipadan. Indonesia goes as far as to argue that this "shows that at the time the Dutch considered that the island [i.e., Mabul] belonged to the Sultan of Boeloengan",⁴⁵ but there is no suggestion in the record of this idea. Indonesia's argument is hardly advanced by its presentation of the relevant passage:

Original: "Admiraal van Kinsbergen in Solozee, van Sesajab naar Kobong"

Indonesia's version: "Admiraal van Kinsbergen on patrol off the coast of Boeloengan"

Correct translation: "Admiraal van Kinsbergen in the Sulu sea, from Sesajab to Kobong"

3.24. The next event was nearly three decades later and concerned the surveying activities by HNLMS *Macasser* in 1903.⁴⁶ In its Counter-Memorial Indonesia takes issue with "the Malaysian interpretation of the report by the commanding officer, i.e. that he appeared to treat all islands mentioned (including Sipadan and Ligitan) as being part of British North Borneo".⁴⁷ However, Malaysia simply reports, as it did in the *Admiraal van Kinsbergen* case, what is in the detailed report by Commanding Officer Van Straaten on his activities in "British North-Borneo, 21-27 October 1903".⁴⁸ Indonesia notes that the survey of the *Macasser* resulted in the 1905 map on the "East Coast of Borneo: Island of Tarakan up to Dutch-English Boundary". Yet the Dutch-British boundary line stops on this map in accordance with the 1891 Convention at the east coast of Sebatik.⁴⁹ The position is exactly the

⁴⁴ IC-M, vol. 2, Annex 12.

⁴⁵ IC-M, vol. 1, p.34, para. 3.67.

⁴⁶ See MM, vol. 1, pp. 74-75, paras. 7.5-7.6; vol. 3, pp. 163-166, Annex 64.

⁴⁷ IC-M, vol. 1, p.137, para. 7.50.

⁴⁸ See MM, vol. 3, pp. 163-166, Annex 64.

⁴⁹ As reported in MC-M, vol. 1, p. 103, para. 5.14.

same on the 1915 updated version of the map, to which Indonesia refers in rather general terms in its Counter-Memorial.⁵⁰

3.25. Indonesia also relies on a 1910 patrol of the HNLMS *Koetei* in St. Lucia Bay. This ship indeed cruised south of Sipadan and caught sight of the island on 30 September 1910.⁵¹ Indonesia fails to mention that when reporting on its surveying activities in the neighbourhood of East Nunukan and Sebitik on 27 September 1910, the logbook notes the ship's arrival in the waters "at boundary line", where the *Koetei* anchored and where it was decided who would be in charge of the watch.⁵² Subsequently, the *Koetei* passed the Anglo-Dutch border and patrolled St. Lucia Bay, including the area near Sipadan, Mabul and Omadan on 30 September. On the very same day it arrived at Lahad Datu where the logbook reports an "official visit of British civil authorities" (which Indonesia did not see fit to include in its translation of the log of 30 September 1910).⁵³ Obviously, the case of the *Koetei* is another example of confusing the patrolling and the surveying of an area with exercising State jurisdiction.

3.26. The last event in the "series" is what Indonesia in its Counter-Memorial depicts as "the highly significant *Lynx* expedition" of November 1921.⁵⁴ The *Lynx* was engaged in combating piracy, and was pursuing a suspect fleet of 30 praus. It put a boat ashore on Sipadan seeking information of their whereabouts. Subsequently it went to Si Amil, where the praus could be seen from a considerable distance. But jurisdiction over pirates cannot be exercised within territorial waters, hence it stayed outside the three mile limit. This was no implied contrast with its conduct on Sipadan but a reflection of the limits on its competence to arrest in British waters. In fact the British authorities at Tawao were happy to help, offering to accompany the *Lynx* back to Si Amil.⁵⁵ But the Dutch authorities at Tarrakan thought it unnecessary to pursue the matter further, the pirate fleet being so far from Dutch territory.⁵⁶ The incident has nothing to do with Dutch territorial jurisdiction over any islands whatever.

⁵⁰ IC-M, para. 7.50. The 1905 map and its 1915 update are reproduced in MC-M, vol. 2, pp. 60-63, Maps 2 and 3.

⁵¹ See the extract of the logbook and its translation in IC-M, vol. 2, Annex 33.

⁵² See Annex MR 2, below, pp. 3-5.

⁵³ IC-M, vol. 2, Annex 33 includes this particular information on the last page, Folio 196, of the extract of the logbook of the *Koetei* for 30 September 1910 at the middle of the page. In translation the relevant part reads: "Sea-watch of Friday 3 September 1910. 2.30 hrs. Peeling potatoes. Patching and sewing. 4 hrs. Fixing. 4.30. Tea water. Receive official visit British civil authorities. 5.55 hrs. At sunset lowering the flag."

⁵⁴ IC-M, vol. 1, pp. 81-82, para. 7.51.

⁵⁵ See IM, vol. 4, p. 12, Annex 120.

⁵⁶ *Ibid.*, p. 11.

3.27. The voyage did, however, give rise to extensive discussions among the Dutch authorities as to the existence of a maritime boundary east of Sebatik.⁵⁷ The Dutch authorities were clearly of the view that none had been established so far. Vice-Admiral Umbgrove, Commander of the Naval Forces and Head of the Department of Navy in the Netherlands Indies, reported on 4 January 1922 that:

“In the convention concluded between the British and Dutch Governments (see Decree of the Governor-General, included in *Staatsblad* 1916 No. 145) concerning the boundary line between the Netherlands and the British protectorate on Borneo no boundary line is set forth which separates the territorial sea of the Netherlands and the protectorate in question.”⁵⁸

3.28. Out of caution, the Vice-Admiral had instructed the Commander of the *Lynx* to “consider the prolonged land boundary to be the northern boundary [in] the territorial sea of Sebatik”, he subsequently preferred a line perpendicular to the coast.⁵⁹ In his letter of 10 December 1922 to the Minister of Colonies, the Governor-General of the Netherlands East Indies the Governor-General supported this solution as “the fairest and most defensible”.⁶⁰

3.29. The internal Dutch map of 1891 was also referred to in these Dutch deliberations, but the Head of the Legal Department of the Netherlands’ Ministry of Foreign Affairs advised: “As far as I could ascertain, this map does not result from actual consultation between the Netherlands and Great Britain”.⁶¹ Hence, in his view the Netherlands would be free to opt for a perpendicular line, to be constructed on the eastern coast of Sebatik in a much more northern direction. Not a single reference in these well-documented five-year long Dutch internal deliberations were made to any impact on a claim to Ligitan and Sipadan. This was simply because at the time the Dutch made no such claim at all. The fact is that the Dutch preferred a maritime delimitation between Dutch and British waters according to a line perpendicular to the coast line of Sebatik. Of an allocation line along the 4°10’N parallel there is no trace.

⁵⁷ MM, vol. 1, pp. 81-82, paras. 7.15-7.16; MC-M, vol. 1, pp. 73-80, paras. 4.8-4.18.

⁵⁸ Text in ARA, *Min. of Col.*, 2.10.36.04, inv. No. 2495; Annex MR 4, below, pp. 9-12.

⁵⁹ See MC-M, vol. 1, pp. 74-80.

⁶⁰ MC-M, vol. 2, pp. 19-25, Annex 4.

⁶¹ Memorandum with attachments, Legal Department, Netherlands’ Ministry of Foreign Affairs, 8 August 1923: MC-M, vol. 2, pp. 27-43, Annex 5.

3.30. These few examples can be supplemented with the information which the logbooks of other ships provide. For example, when the *Soembing* patrolled in October 1891 in Bulungan its Commander reported that “with the arrival at the passage between East Nanukan and Sebatik” the ship had reached “the outer limit of our territory”.⁶² Subsequently, the ship started its return journey.

3.31. Intensive scrutiny of Dutch naval activities by both Indonesia and Malaysia presents the Court with a mere half dozen instances of Dutch ships patrolling off the coast of North-East Borneo. None of these instances amounts to a display of authority over territory or an exercise of territorial jurisdiction. They provide no evidence for Indonesia’s claim to sovereignty over the two islands.

G. Conclusion

3.32. In sum, in all the documents under review in this Chapter there is not a single sentence, phrase or word which involves a claim on the part of the Sultan of Bulungan or the Dutch authorities to the east of Batu Tinagat or to offshore islands off Darvel Bay. Nor is anything reported to that effect in the Dutch Annual Reports on the Colonies, in other official colonial documents such as mail reports or memoranda of transfer by local Residents, or in travel accounts. The cupboard of Dutch claims to the islands is completely bare.

3.33. For all these reasons, it can be conclusively stated that the islands of Ligitan and Sipadan were never under the authority of the Sultanate of Bulungan and that the Netherlands at no time advanced claims to territory east of Batu Tinagat, or to off-shore islands of Borneo eastwards of the island of Sebatik.

⁶² Text in ARA, *Min. of Navy*, 2.12.01, inv. 2703, p. 11. See Annex MR 3, below, pp. 6-8.

Chapter 4

No Title to the Islands can be based on the 1891 Boundary Convention

A. The 1891 Boundary Convention addresses the Land Boundary in Borneo Exclusively

4.1. Indonesia still considers that the 1891 Boundary Convention fixed a boundary allocating distant islands between the two Parties, even though it does not now rely so heavily on the Boundary Convention as the sole or even main basis of its title to Sipadan and Ligitan.¹ The Indonesian Counter-Memorial offers no new evidence to support the contention and reads into the Convention words that just are not there.

4.2. The actual text of the Convention addresses the issue of the land boundary, exclusively. Malaysia has already examined questions relating to the interpretation of the text of the Boundary Convention and respectfully refers the Court to its Memorial (vol. 1, Chapter 8, pp. 87-95) and Counter-Memorial (vol. 1, Chapter 2, pp. 9-49).

4.3. The Indonesian Counter-Memorial correctly points out that:

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

¹ IM, vol.1, p. 3, para. 1.11: “... the differences of opinion between the British and Dutch authorities concerning the extent of their respective jurisdictions were resolved by the 1891 Convention.”; IM, vol. 1, p. 98, para. 5.69: “It follows that *title to the islands now in dispute was settled in favour of The Netherlands*, and now (by way of succession) in favour of Indonesia, by virtue of the treaty settlement embodied in the 1891 Convention.” To be compared with IC-M, vol. 1, p. 5, para. 2.1: “The basis of Indonesia’s sovereignty over Pulau Ligitan and Pulau Sipadan is straightforward. Indonesia inherited its title from The Netherlands, whose *title over the islands was confirmed* by the 1891 Anglo-Dutch Convention.” (Emphasis added.)

‘proceed without delay to define, short of making an actual survey, and marking the boundary on the spot, *the inland boundary-lines...*’²

Right from the inception of the agreement, it was agreed that the Boundary Convention should address solely the issue of inland boundary-lines, as Sir Philip Currie noted on 16 July 1889 at the first meeting of the Joint Commission.³

4.4. The text of the Convention confirms this initial agreement. The Boundary Convention is designated as a “Convention between Great Britain and The Netherlands defining Boundaries *in Borneo*”.⁴ The preamble states that the two Parties, “being desirous of defining the boundaries between the Netherland possessions *in the Island of Borneo* and the States in that island which are under British protection, have resolved to conclude a Convention to that effect”.⁵

4.5. Article I adds: “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.”⁶ Article IV states: “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.”⁷ As was previously explained, the Island of Sebatik was specifically included in the delimitation in order to ensure access to the rivers in mainland Borneo. Sebatik is little more than one nautical mile off the mainland, well within the three-mile limit of territorial waters then accepted by both Parties. The delimitation itself concerns allocation of “portions” of the island to the two Parties. No mention is made anywhere in the treaty of other islands or of any maritime delimitation.

4.6. The Indonesian Counter-Memorial does try to contrast Article IV with Article III, which stipulated a terminal point for the line by providing that the boundary should follow a certain route “to Tandjong-Datoe on the west coast of Borneo”.⁸ It comments: “No equivalent terminal point was

² IC-M, vol. 1, p. 99, para. 5.102 (emphasis added).

³ IM, vol. 1, p. 70, para. 5.18.

⁴ IM, vol. 3, p. 107, Annex 75 (emphasis added).

⁵ Emphasis added.

⁶ Emphasis added.

⁷ Emphasis added.

⁸ IC-M, vol. 1, p. 65, para. 5.21.

stipulated in Article IV for the eastward continuation of the line”.⁹ Malaysia considers that the terms used by the boundary convention for the eastern end of the boundary, i.e. “across the Island of Sebittik”, are just as clear and “terminal” as those used for the western coast. Moreover, the 1915 Agreement starts the boundary from the east coast of the island of Sebatik and describes its course westward:

“(1) Traversing the island of Sibetik, the frontier line follows the parallel of 4° 10' north latitude...”

A starting point is a terminal point in reverse.

B. No Maritime Boundary was considered at the time by the Parties

4.7. The Parties to the 1891 Boundary Convention never contemplated any sort of maritime boundary or any prolongation of the 4° 10' N parallel out to the sea. At the turn of the 19th century, the distinction between maritime boundaries and allocation lines was well established in international law.¹⁰ Neither was proposed and agreed by the parties. The Indonesian Counter-Memorial does not come up with any fresh evidence to the contrary. The negotiations and parliamentary debate do not indicate any awareness of a problem of that nature. The internal Dutch map is the only suggestion of a possibility of an extension of the boundary beyond the land boundary of the islands of Borneo and Sebatik. Malaysia will return to that specific issue later (see below, section D).

4.8. Maritime delimitation was not a usual clause in boundary treaties at the time. The generally accepted three-mile limit of territorial waters did not call for complex delimitation off shore. In case of adjacent territorial waters, equidistance, i.e. in most cases the line perpendicular to the coast, would generally solve any difficulties. And opposite stretches of land were generally further apart than twice the breadth of territorial waters. The rare maritime delimitation agreements of the time concerned Europe, America and Africa. None were signed in South-East Asia.¹¹

4.9. The Indonesian Counter-Memorial does try to make something out of a cruise of HNLMS *Admiraal van Kinsbergen* in 1876 in the vicinity of

⁹ Ibid.

¹⁰ See below, paragraph 4.22 and ff.

¹¹ Sang-Myon Rhee, “Sea Boundary Delimitation between States before World War II”, *A.J.I.L.*, 1982, vol. 76 pp. 555-588; D.W. Bowett. *The Legal Regime of Islands in International Law*, 1979, pp. 300-311.

the island of Mabul. The cruise is presented as an “incident”. It has been examined above.¹² As the cruise went unnoticed by the British North-Borneo authorities, it hardly qualifies as an incident. It was part of the general effort of both British and Dutch authorities to combat piracy in the region and can certainly not be construed as a claim to sovereignty on Mabul or the other islands in the vicinity. No mention of the *Admiraal van Kinsbergen* or of Mabul appears in the lengthy negotiations and diplomatic correspondence that led to the 1891 Boundary Convention. If there had been any incident, or any claim to sovereignty, it would certainly have surfaced at that time.

4.10. The only new elements advanced in support of a maritime delimitation are a certain number of sketches and maps which show a line traced along the 4° 10' N parallel. They are completely misread by the Indonesian Counter-Memorial. True, the line traced by Count de Bylandt does show a pencil line running eastward along the 4° 10' N parallel out to the margin of the map.¹³ Unfortunately for Indonesia’s case, it also runs out *westward* to the other margin of the map, and that never was a boundary proposal contemplated by Count de Bylandt. The simple truth is that Count de Bylandt used a pencil and ruler to trace the 4° 10' N parallel right across the map. The same is true of the Dutch map reporting the proposal by Admiral Mayne. Here again, the 4° 10' N line extends eastward to the margin of the map, but also westward deep into mainland Borneo, which never was a boundary line contemplated by the Admiral.¹⁴

4.11. Indonesia places great stress upon the map attached by Lt. Cmdr. R. Posthumus Meyjes to the paper published in 1901 in the Journal of the Royal Netherlands Geographical Society.¹⁵ The “Grenslijn”, indicated in bold red, runs along the 4° 10' N parallel, to the edge of the map, which ends well before reaching Sipadan or Ligitan. But here again, the red line runs west as well as east, in clear contradiction with the terms of the 1891 Boundary Convention. Article II of the Convention states that “The boundary line shall be continued westward from the 4° 10' north latitude, *and follow a west-north-west direction*, between the Rivers Simengaris and Soedang...”¹⁶ The line clearly described by the Convention is in no way a parallel. In any event Lt. Cmdr. Meyjes seems quite uncertain as to the 1891 Boundary Convention itself. On the map, the legend describes the boundary in the following terms:

¹² See above, para. 3.23.

¹³ The map appears in IC-M, vol. 1, p. 87, para. 5.70 and vol. 2, Annex 22.

¹⁴ IC-M, vol. 1, p. 88, para. 5.71 and vol. 2, Annex 23.

¹⁵ IC-M, vol. 1, p. 92, para. 5.84 and vol. 2, Annex 1.

¹⁶ Emphasis added.

“Boundary line (with landmarks) adopted by the Convention of 1892 between The Netherlands and British North-East Borneo.”¹⁷

The confusion is patent. There never was any boundary convention dated 1892 or signed by the Netherlands with British North-Borneo. The error as to the description of the *Grenslijn* is more serious. Such a contradiction with the terms of the Convention disqualifies the Map as an accurate depiction of the 1891 boundary.

4.12. Maritime delimitation by prolongation of a land boundary was not a feature of State practice at the time and has never since been considered as a rule of international law.¹⁸ State practice is very variable.¹⁹ Courts and arbitral tribunals have been reluctant to accept prolongation of the land boundary. In the *Grisbadarna* case, the Permanent Court of Arbitration refused to consider prolongation of the land boundary for the purpose of maritime delimitation. It hinted at the possibility of a line perpendicular to the coast.²⁰ In the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, the Court rejected the Libyan argument of prolongation of the land boundary. It stated:

“85. The Court regards the 1910 Convention as important for the consideration of the present case, because it definitively established the land frontier between the two countries. The Court is however not able to accept the suggestion based upon it in the Libyan Memorial that the ‘boundary on the seaward side of Ras Adjir would continue, or would be expected to continue’ in the northward direction of the land frontier.”²¹

4.13. As judge *ad hoc* Evensen pointed out:

“Another difficulty encountered in attempts to project a land boundary seawards is plainly apparent in the present case. *What segments of the land boundary shall have a bearing on the direction of the seaward projection?* Land boundaries are frequently irregular for a number of reasons. A land boundary

¹⁷ IC-M, vol. 2, Annex 1. The original text in Dutch reads: “*Grenslijn (met grensteekens) bij tractaat van 1892 aangenomen tusschen Nederlandsch en Britsch Noord-Oost Borneo.*”

¹⁸ For a review of early practice by the Dutch authorities, see MC-M, vol. 2, pp. 27-43, Annex 5.

¹⁹ D. Bardonnet, “Frontières terrestres et frontières maritimes”, *A.F.D.I.*, 1989, pp. 22-38.

²⁰ *R.I.A.A.*, vol. XI, pp. 147-166 at pp. 159, 160.

²¹ *I.C.J. Reports* 1982, p. 66, para. 85.

has minor and major curvatures, often a host of different directions along the various parts of the boundary. Is it solely the last segment of the land boundary ending in the terminal point of the coast that is relevant? How large must this segment be to count in order to project a dividing line perhaps over very extensive maritime areas? Or should such a projection be drawn from the average direction of the whole border? It seems to follow that at least in the present case as in a number of others, the seaward projection of the land boundary would be a rather haphazard element to introduce as a criterion for drawing the line of delimitation.”²²

4.14. In the *Gulf of Maine* case, the Chamber of the Court declined to grant any significance to political geography for the purpose of maritime delimitation. It declared:

“Political geography has been employed solely for the purpose of noting the location within the area in question of the international boundary terminus.”²³

The Chamber did not take into account the direction of the land boundary to determine the maritime delimitation. Quite to the contrary, it noted:

“it is hard to imagine a case less conducive to the application of [the coastal perpendicular] method of delimitation than the *Gulf of Maine* Case, in which the starting point of the line to be drawn is situated in one of the angles of the rectangle in which the delimitation is to be effected.”²⁴

4.15. The problem of delimitation east of Sebatik is not without some resemblance to the *Gulf of Maine* configuration, with a starting point situated in the angle of a rectangle. Any maritime delimitation — the same is true of an allocation line — departing from equitable considerations would certainly call for a very explicit agreement between the Parties, which is not the case here.

4.16. The Dutch authorities themselves were convinced that there was no rule of international law in the matter and that the 1891 Boundary Convention did not extend out to the sea. The thorough internal Dutch discussions of the 1920s on maritime delimitation off Sebatik certainly prove

²² ICJ Reports 1982, p. 309, para. 21.

²³ ICJ Reports 1984, para. 42.

²⁴ Ibid.

the point. They have been examined at length in the Malaysian Counter-Memorial.²⁵ But a recently discovered letter sheds some new light on the position of the Dutch authorities and, incidentally, on the cruise of the *Lynx*.²⁶

4.17. In 1922, the Dutch Navy called for a boundary line delimiting territorial waters east of Sebatik. All Dutch services concerned considered that the boundary had not been delimited beyond the east coast of Sebatik. Vice-Admiral Umbgrove, Commander of the Naval Forces and Head of the Department of Navy in the Netherlands Indies had given temporary instructions to the Commander of the *Lynx*, in charge of control of the Dutch territorial waters and search for Bajau fleets. Umbgrove decided that the Commander should consider the prolonged land boundary to be the northern boundary in the territorial waters surrounding Sebatik.

4.18. Umbgrove fully realised that no boundary line had been set forth by the 1891 Convention. He submitted the question to the Governor-General in the following terms:

“May I be allowed to raise in this context one other matter which according to me deserves to be addressed. In the Convention concluded between the British and Dutch Government (see Decree of the Governor-General, included in *Staatsblad* 1916 N^o 145) concerning the boundary line between the Netherlands and the British protectorate on Borneo no boundary line is set forth which separates the territorial sea of the Netherlands and the protectorate in question.

When searching for Bajau fleets near Tarakan it was as a matter of course necessary that the Commander of HM *Lynx* was familiar with the course of the boundary. At that time I have decided that he should consider the prolonged land boundary to be the northern boundary [in] the territorial sea of Sebatik.

Yet it occurs to me that this matter which shows some similarity with the question how the course of the boundary should be in the Wielingen, should be settled in definite terms. Also in cases of maintenance of neutrality an unsettled situation can not be accepted in view of the great interest of St Lucia bay (petroleum fields).

²⁵ MC-M, vol. 1, pp. 74-80, paras. 4.10-4.18; vol. 2, Annexes MCM-4-8, pp. 19-56.

²⁶ Indonesia refers to the letter in the heading of its Annex, IM, vol. 4, p. 5, Annex 120, but fails to produce the text of the letter.

Insert 6

Hence I may give your Excellency into consideration to propose the supreme administration to take steps to supplement the treaty in question to that effect.”²⁷

4.19. Subsequently the question was examined by the Navy, the Governor-General of the Netherlands East Indies, the Minister of Foreign Affairs and the Minister of Colonies. The Navy was not in favour of a line running out to sea for three miles following the 4° 10' N parallel (line A-B), but in favour of a line perpendicular to the coast (line A-D), as shown as **Insert 6** opposite.²⁸ The Legal Department of the Ministry of Foreign Affairs examined the doctrine and jurisprudence on the question. It considered that both solutions were admissible and that “it was not a question for international law to decide”.²⁹ After careful consideration, the Minister of Colonies decided in 1926 not to press the point with the British authorities. The matter could be left in abeyance.³⁰

4.20. The Dutch authorities would not have risked jeopardising a claim to Sipadan and Ligitan by pressing for a line perpendicular to the coast of Sebatik Island if they had thought Dutch sovereignty over the islands was at stake. A perpendicular line delimiting territorial waters obviously would have made more difficult a claim to a 4° 10' N parallel allocation line of distant islands. The concerned Dutch authorities would at least have given careful consideration to the matter on the basis of the report of the *Lynx* cruise, which had been forwarded to the Vice-Admiral and to the Governor-General. But the issue just was not considered during the years of internal Dutch debate.

4.21. The Dutch authorities thus clearly concluded in 1926 that no maritime delimitation concerning territorial waters, let alone an allocation line, had been decided between the Netherlands and Britain in 1891 or later. They further considered that no rule of international law called for prolongation of the 4° 10' N land boundary beyond the east coast of Sebatik and certainly did not favour such an outcome, which they considered contrary to Dutch interests. Finally, they concluded it was not worth taking up the issue with the British authorities.

²⁷ Letter of the Vice-Admiral to the Governor-General of the Netherlands Indies, 4 January 1922, Annex MR 4, below, pp. 9-12.

²⁸ MC-M, vol. 1, p. 75, para. 4.12.

²⁹ MC-M, vol. 2, pp. 27-43, Annex 5.

³⁰ MC-M, vol. 2, pp. 51-55, Annex 8.

C. No Allocation Line was drawn by the 1891 Boundary Convention

4.22. If maritime delimitation agreements were scarce at the end of the 19th century, the notion of allocation lines was well known. As Mervyn Jones defined them:

“Lines of allocation are delimited through the high seas or unexplored areas for the purpose of allocating lands without conveying sovereignty over the high seas.”³¹

4.23. International law makes a clear distinction between maritime delimitation and allocation lines. Boggs remarks:

“Most lines in water areas which are defined in treaties are not boundaries between waters under the jurisdiction of the contracting parties, but a cartographic device to simplify the description of the land areas involved.”³²

4.24. The distinction between maritime delimitation and allocation lines was at the heart of the decision of the Tribunal in *Guinea/Guinea Bissau: Dispute Concerning Delimitation of the Maritime Boundary*.³³ In that case, one of the major questions was whether an allocation line clearly set by the relevant Convention was also considered to be a maritime delimitation. The Tribunal considered that the Convention of 12 May 1886 was concerned essentially with land possessions. As it noted:

“In another respect, it seems to the Tribunal that the main purpose of the Convention was the distribution, cession (Art. VI), exchange or eventual occupation (Art. IV) of territories, and that delimitation was but one aspect or one means of distribution of territories which were never mentioned as possibly being maritime.”³⁴

4.25. Contemporary practice was well established in 1891. Britain and the Netherlands were used to such a form of delimitation. Britain had

³¹ JM Jones, *Boundary-Making. A Handbook for Statesmen, Treaty Editors and Boundary Commissioners*, Washington, Carnegie Endowment for International Peace, 1945, p. 149.

³² “Delimitation of Seaward Areas under National Jurisdiction”, *A.J.I.L.*, 1951, vol. 45, p. 240, note 2.

³³ ILM, 1986, vol. 25, pp. 251 and ff.

³⁴ *Ibid.*, para. 56, p. 279.

drawn an allocation line separating its possession from those of the United States in the sector of Passamaquoddy Bay as early as the 18th century by the Treaty of Paris of 3 September 1783, Article II.³⁵ It had, more recently, done so with France by the Convention of 28 June 1882 delimiting the respective possessions of the two Parties on the west coast of Africa, north of Sierra Leone.³⁶ In Southeast Asia, China and France signed a Boundary Convention on 26 June 1887 delimiting their respective possessions between Tonkin and China and drawing an allocation line relating to the islands.³⁷

4.26. In the years following the 1891 Boundary Convention, quite a few conventions drawing allocation lines in south-east Asia were concluded. China signed the Convention of 9 June 1898 with Britain extending Hong Kong territory.³⁸ The United States signed the Treaty of Paris with Spain on 10 December 1898.³⁹ And of course the United-States and Britain signed the 2 January 1930 Convention relating to the boundary between the Philippines and North Borneo.⁴⁰ Examples abounded. Had the Parties so wished, they could have drawn an allocation line. And they would have said they were doing so.

4.27. Explicit allocation is the rule. All the examples mentioned by the Indonesian Counter-Memorial⁴¹ draw explicit allocation lines. Not one simply suggests an allocation through prolongation of a land boundary.

4.28. The Indonesian Counter-Memorial cites the Sultan of Sulu's grant to Dent and Overbeck on 22 January 1878. In fact this was not a case of an actual line but rather a distance criterion for the allocation of territories. For present purposes what matters is that the element of allocation was explicit. The grant *explicitly* includes:

“... all the other territories and coast ands to the southward thereof on the coast of Darvel Bay as far as the Sibuku River together with all the islands included therein within nine miles of the coast.”⁴²

³⁵ De Martens, Recueil des Traités, t. III, pp. 553-559.

³⁶ British & Foreign State Papers, vol. 77 (1885-1886) pp. 1007-1012.

³⁷ IC-M, vol. 2, Annex 18.

³⁸ U.S. Department of State, China-Hong-Kong Boundary n° 13, 5 April 1962.

³⁹ Martens, NRG, 2^{ème} série, vol. 32, p. 74.

⁴⁰ IM, vol. 4, p.49, Annex 123.

⁴¹ IC-M, vol. 1, pp. 62-63, paras. 5.12-5.14.

⁴² MM, vol. 2, p. 29, Annex 9.

4.29. The Convention of 26 June 1887 between France and China *explicitly* provides:

“2. ... The islands which are east of the Paris meridian of 105° 43' east (108° 3' east of Greenwich), that is to say the north-south line passing through the eastern point of the island of Tch'a Kou or Ouan-Chan (Tra-co), which forms the boundary, are also allocated to China. The island of Gotho and other islands west of this meridian belong to Annam.”⁴³

4.30. The Treaty of Paris of 10 December 1898 between Spain and the United States *explicitly* declares:

“Article III. Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending the islands lying within the following line:

A line running from west to east along or near the twentieth parallel of north latitude, and through the middle of the navigable channel of Bachi...”

4.31. The Convention of 2 January 1930 between Britain and the United States *explicitly* declares:

“It is hereby agreed and declared that the line separating the islands belonging to the Philippine Archipelago on the one hand and the islands belonging to the State of North Borneo which is under British protection on the other hand shall be and is here established as follows: ...”⁴⁴

4.32. Likewise, the Convention of 12 May 1886 between France and Portugal cited in the Guinea/Guinea Bissau arbitration *explicitly* drew an allocation line for purpose of determining territorial sovereignty over islands. Article IV, paragraph 2 stated:

“Shall belong to Portugal all the islands located between the Cape Roxo meridian, the coast and the southern limit represented by a line which will follow the thalweg of the Cajet river, and go in a southwesterly direction through the Pilot's Pass to reach

⁴³ IC-M, vol. 2, Annex 18.

⁴⁴ MM, vol. 2, p.116, Annex 29, Art. I.

10°40' north latitude, which it will follow up to the Cape Roxo meridian.”⁴⁵

4.33. The point is that all the treaties mentioned *explicitly* purport to apportion maritime areas or to allocate islands. If such had been the intention of Great Britain and the Netherlands in 1891, no doubt they would have said so. A specific delimitation of possessions was possible, but it would have been qualified as such. No such delimitation was contemplated by the Parties in 1891 or the following years. They certainly did not consider allocation of sovereignty over distant islands — beyond the area of the dispute — was one of the purposes of the Boundary Convention. To read into the 1891 Boundary Convention a clause comparable to the explicit clauses included in the aforementioned treaties is an act of mere imagination.

D. The Internal Dutch Map was not “Officially Communicated” to the British Government nor “Promulgated” by the Dutch Authorities: it was not an Agreement or an Instrument “accepted by the other party and related to the treaty”

4.34. Indonesia insists on communication of the internal map by the Dutch authorities to Britain. The Counter-Memorial repeatedly declares that map was officially communicated to the British authorities:

“... a map that was forwarded to Great Britain and which did not provoke any adverse reaction.”⁴⁶

“This map ...was communicated to the British authorities who raised no objection.”⁴⁷

“...it was officially known to the British Government at the time in the context of the 1891 Convention.”⁴⁸

“The production of the Map as part of that process was thus an official and public act of the Dutch Government in the application of the Convention, known to and acquiesced in by the British Government.”⁴⁹

⁴⁵ ILM, 1986, vol. 25, p. 274, para. 45.

⁴⁶ IC-M, vol. 1, p. 51, para. 4.22.

⁴⁷ IC-M, vol. 1, p.145, para. 7.73.

⁴⁸ IC-M, vol. 1, p.71, para. 5.32.

⁴⁹ IC-M, vol. 1, p.78, para. 5.48.

4.35. Indonesia thus tries to convey the impression that the internal map was officially communicated to the British Government and was acquiesced in by the British authorities. Again this is pure invention. There is no trace, either in the British archives or in the Netherlands archives, of any communication by the Dutch Government to the British Government of the internal map. In the absence of any such official communication, the map did not call for any particular reaction.

4.36. Moreover, the map did not indicate any allocation of Sipadan and Ligitan to the Netherlands. The red line stops at “P. Maboel” and is not drawn as far as Ligitan. Knowledge of the geography of the vicinity at the time did not allow for any claim on the islands by the Netherlands. The contemporary Sailing Directory published in London in 1890 shows Ligitan at 4°12 ½' N, well north of 4° 10' N parallel.⁵⁰ As for Sipadan, it does not show on the map at all. If the negotiators knew about the existence of Ligitan and Sipadan, they could not imagine that they were affected by an eventual maritime delimitation along the 4° 10' N parallel. The two islands could not have been implicitly allocated to the Netherlands in these conditions, even if the internal Dutch map was considered as having any legal relevance.

4.37. Indonesia pretends the internal map annexed to the explanatory memorandum was an agreement, “constituted by the official and public promulgation of the Explanatory Memorandum Map”.⁵¹ The expression used is intriguing. “Promulgation” is a precise procedure of introduction of treaties into domestic law.⁵² It calls for a formal act by or on behalf of the head of State — generally a decree — and applies only to the text of the treaty as agreed, certainly not to *travaux préparatoires*, explanatory memoranda, parliamentary debates, etc.⁵³ There is no indication whatsoever of the promulgation, either by the Dutch or by the British authorities, of the internal map. In fact, the Dutch Constitution as revised in 1887, applicable at the time of the Boundary Convention, did not call for promulgation of treaties. Article 59 of the Constitution, provided that the King concluded and ratified all treaties, subject to approval by the States-General of treaties which entail a change in the State territory, impose financial obligations or contain any other provision relating to legal rights. Only as from 1953 did the Dutch

⁵⁰ MC-M, vol. 1, pp. 1-3.

⁵¹ IC-M, vol. 1, p. 77, para. 5.47.

⁵² C. Rousseau, *Droit international public*, t. I, Paris, 1970, para. 148, pp. 167-169;

Carré de Malberg, *La loi, expression de la volonté générale*, Paris, 1931, pp. 166-173.

⁵³ On the Dutch practice before 1950 see A.M. Stuyt, *Formeel Tractatenrecht. Overzicht aan de hand van de Nederlandse praktijk*, The Hague, 1966, pp. 133-138.

constitution come to include provisions on the promulgation of treaties.⁵⁴ The Indonesian Counter-Memorial gives no reference as to a procedure of promulgation. The lax wording is probably used here to shore up the legal importance Indonesia tries to bestow on the internal map.

4.38. The play on the word “official” by the Indonesian Counter-Memorial is quite misplaced. Sir Horace Rumbold and the British embassy staff followed the Dutch parliamentary debate in their professional capacity and reported to the Foreign Office in London. But it is not because the “officials” knew about the internal Dutch map that it was “communicated” to the British Government or “officially known” by the British authorities. At no moment during the negotiations or after signature or ratification of the Boundary Convention did any representative of the Netherlands officially call the attention of Great Britain to the internal map, let alone formulate any claim beyond the east coast of Sebatik. There certainly was no obligation to react to every piece of information picked up by a diplomat.

4.39. Indonesia quotes the Court in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility)* case.⁵⁵ But the Doha minutes were negotiated by the respective authorities of the two Parties. The internal Dutch map was never produced during the negotiation with Great Britain or communicated for observations after signature of the Boundary Convention.

4.40. By no standards can the internal Dutch map be considered as an “agreement relating to the treaty” in the sense of article 31 (2) (a) of the Vienna Convention or as an instrument “accepted by the other parties as an instrument related to the treaty” in the sense of article 31 (2) (b) of the Convention, as alleged by Indonesia in its Counter-Memorial.⁵⁶ Oppenheim notes:

“For this purpose [i.e. interpretation] the context of a treaty includes not only its text, preamble and annexes, but also any agreement relating to the treaty and made between all the parties

⁵⁴ See Articles 65-66 of the Dutch constitution of 1953, revised in 1956. See on the various changes in the constitutional provisions on promulgation of treaties, J.G. Brouwer, *Verdragsrecht in Nederland. Een studie naar de verhouding tussen internationaal en nationaal recht in een historisch perspectief*, Zwolle, 1992 and H.H.M. Sondaal, *De Nederlandse Verdragspraktijk*, The Hague, 1986, pp. 203-221. See on the background and contents of the current parliamentary act of 1994 on approval and promulgation of treaties E.W. Vierdag, *Het Nederlandse Verdragenrecht*, Zwolle, 1995, pp. 98-102.

⁵⁵ IC-M, vol. 1, pp. 69-70, para. 5.29, p. 73, para. 5.39.

⁵⁶ IC-M, vol. 1, pp. 70-72, paras. 5.31-5.36.

in connection with the conclusion of the treaty, and any instrument made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”⁵⁷

4.41. The context must proceed from the consent of all the parties concerned, whatever the form and modalities of that consent.⁵⁸ Acceptance by all parties is essential. As the International Law Commission remarked in its report to the General Assembly:

“The principle on which this provision is based is that a unilateral document cannot be regarded as forming part of the “context” within the meaning of article 27 unless not only was it made in connection with the conclusion of the treaty but its relation to the treaty was accepted in the same manner by the other parties.”⁵⁹

4.42. Indonesia does not produce the slightest evidence of British consent to the map either as embodying an agreement relating to the treaty or as an instrument related to the treaty. The internal Dutch map certainly does not qualify as part of the context of the 1891 Boundary Convention.

4.43. The comparison with the *Livre jaune* map considered in the *Libya/Chad* case does not resist examination. The *Livre jaune* map was considered by the Parties as part and parcel of the treaty arrangements. Annex I of the 1955 Treaty between France and Libya considered “the Franco-Italian agreements of 1902” as an international instrument in force for the purpose of delimiting the boundary. The exchange of letters constituting these agreements states that:

⁵⁷ *Oppenheim's International Law*, 9th edition, 1992, vol. 1, pp. 1273-4. See also T.O.Elias, *The Modern Law of Treaties*, 1974, p. 75: “In other words, for a document to be regarded as forming part of the context of a treaty for the purpose of its interpretation, it must be the result of an agreement by all the parties to the treaty, must have been made in connection with the conclusion of the treaty and must be understood as such by all of them”; I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edn, 1984, p. 129; M. Yasseen, *RCADI*, 1976, III, vol. 151, p. 37; P. Reuter et P. Cahier, *Introduction au droit des traités*, 3^e édition, 1995, p. 89-90, para. 144.

⁵⁸ “Cependant, la Convention de Vienne traduit une conception extensive de la notion de contexte, puisque, aux termes de son article 31, §2, celui-ci comprend outre l'ensemble du texte du traité, le préambule et les annexes ainsi que tout instrument ‘ayant rapport au traité accepté comme tel par l'ensemble des parties’, ce qui inclut bien sûr les accords interprétatifs, mais ne s'y limite pas.” A. Pellet et P. Daillier, *Droit international public*, 6^e édition, 1999, p. 258, para. 169.

⁵⁹ ILC Ybk., 1966, vol. II, part II, p. 221.

“the limit to the French expansion in North Africa, as referred to in the above mentioned letter ... dated 14 December 1900, is to be taken as corresponding to the frontier of Tripolitania as shown on the map annexed to the Declaration of 21 March 1899.”⁶⁰

The Court concluded: “The map referred to could only be the map in the *Livre jaune* which showed a pecked line indicating the frontier of Tripolitania.”⁶¹ In short, the *Livre jaune* map was explicitly referred to by the 1902 agreements and was thus considered by the Court as an instrument accepted by the parties to the main agreement. It was incorporated as an *instrumentum* to the 1955 treaty. There is nothing of the sort in the 1891 Boundary Convention. One can only conclude that:

“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 concerning the validity of a boundary depicted on a map ... the Court considers itself unable to draw conclusions from the map evidence submitted in this case.”⁶²

4.44. The Dutch authorities knew well that the internal map had no special authority and carried no legal weight. On 8 August 1923, the Minister of Foreign Affairs wrote to the Minister of Colonies. He noted:

“Another circumstance in favour of extending the land border of Sebetik into the sea is a map, submitted with the bill mentioned above, on which the border between the areas under Dutch and British jurisdiction on land and sea is extended along the parallel 4°10'N. As far as I could ascertain, this map does not result from actual consultation between the Netherlands and Great Britain; however, I regard it as not impossible that that this map is known to the British Government.”⁶³

4.45. The Minister thus clearly admitted that the map had never been communicated to the British authorities. He went on to suggest the Government drop the idea of seeking a delimitation of the territorial waters, so as to avoid any “possible rebuff from the British Government.”⁶⁴ His view

⁶⁰ ICJ Reports, 1994, para. 61.

⁶¹ Ibid.

⁶² ICJ Reports, 1999, *Kasikili/Sedudu*, para. 87. In the present case, there is an official map, annexed to the 1915 agreement, but none “officially reflecting the intentions of the parties” in 1891.

⁶³ MC-M, vol. 2, pp. 27-28, Annex MCM 5.

⁶⁴ Ibid.

was that the internal map had not settled the matter of delimitation off Sebatik and that there had been no agreement on the map.

E. Subsequent Conduct, Practice and Agreements confirm that the 1891 Boundary Convention did not address the Issues of Maritime Delimitation and Allocation of Distant Islands

4.46. The negotiations leading to the 1915 Agreement and official map certainly provided the opportunity for both Parties to clarify the situation of the distant offshore islands if they had been of any concern. The state of geographical knowledge had progressed considerably since 1891, both on mainland Borneo and in chartering the surrounding waters and islands.⁶⁵ The British, Dutch and American naval surveys off North Borneo had in particular located very precisely the two islands of Pulau Sipadan and Pulau Ligitan, ignored or mislocated before 1891. The negotiations leading to the 1915 Agreement presented a unique opportunity to allocate the islands to one or the other Party if they so decided. Commissioners had been appointed. An official map was prepared, signed by the four Commissioners and annexed to the Agreement. It would have been quite simple to draw the allocation line on the map and to locate the islands in reference to the line. As pointed out by Malaysia, not only was this not the case, but the terms of the 1915 Agreement and the map annexed to it clearly show that the intention of the Parties was to determine the boundary up the east coast of Sebatik and no further.⁶⁶

4.47. The Joint Report,⁶⁷ signed by Messrs. Schepers and Vreede for the Netherlands and Bunbury and Kendell for Britain, determined by mutual agreement the position of the boundary line. The Parties gave a free hand to the Commissioners. The Commissioners did not hesitate to depart from the strict text of the 1891 Boundary Convention if necessary and, for instance, changed the boundary line in the channel between the west coast of Sebatik and mainland Borneo, in order to reach the middle of the mouth of the river Troesan Tamboe.

4.48. The report determines the boundary as traversing the island of Sibetik, following the parallel of 4° 10' north latitude, as already fixed by Article 4 of the Boundary Convention and marked on the east and west coast by boundary pillars. There is no question of any extension of the boundary line east out to sea, nor a reference to a further delimitation as provided by the

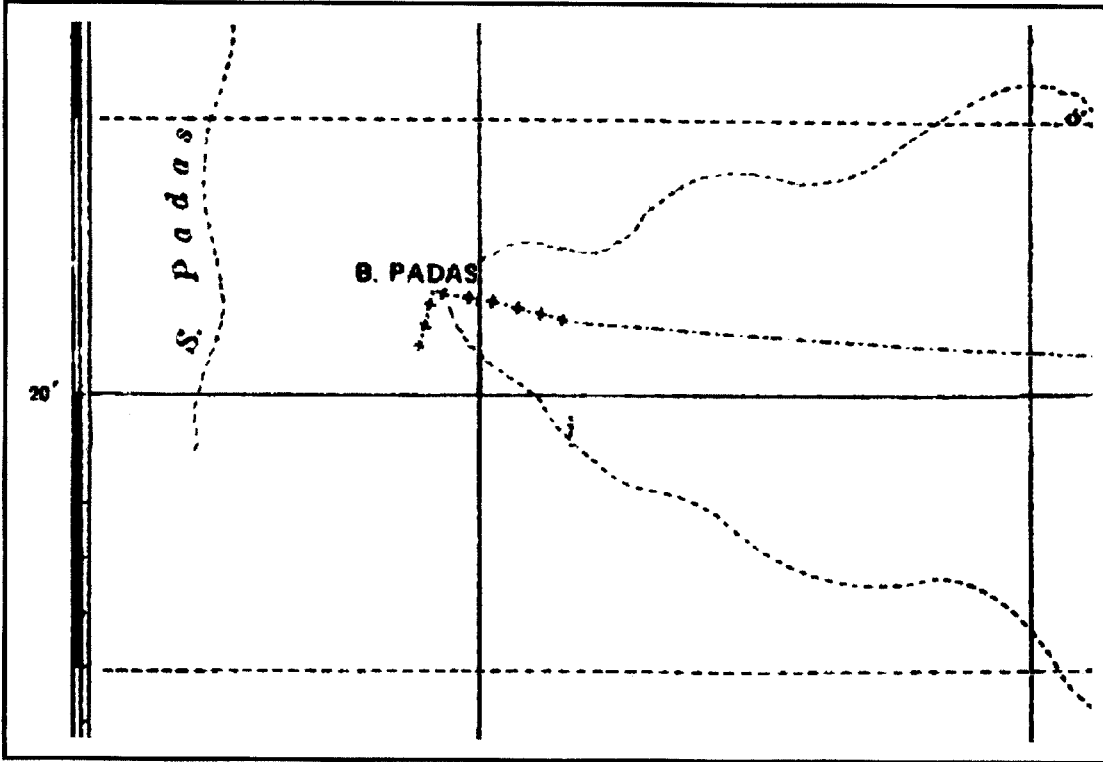
⁶⁵ IC-M, vol. 1, p. 99, para. 5.101.

⁶⁶ MC-M, vol. 1, pp. 42-48, paras. 2.67-2.78.

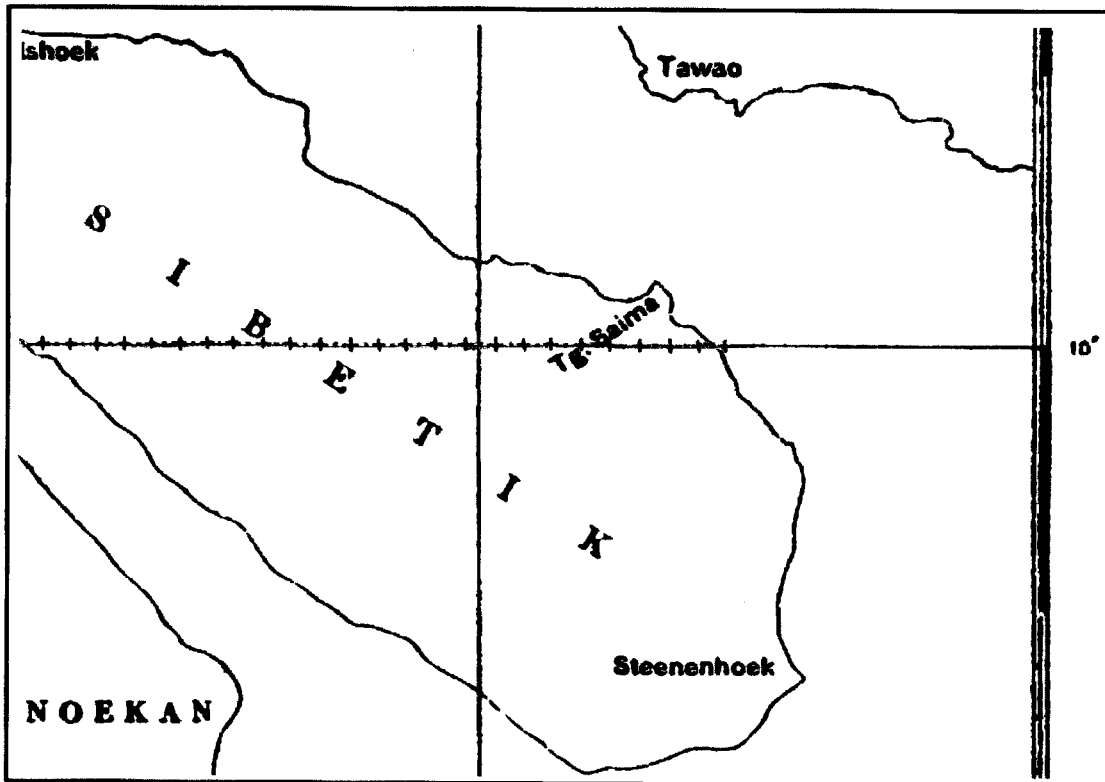
⁶⁷ IC-M, vol. 2, Annex 25.

Insert 7

Map attached to the 1915 Agreement (Extracts)



Western terminal point of the boundary-line as agreed



Eastern terminal point of the boundary-line as agreed

Boundary Convention. On the other hand, the western end of the delimitation by the Joint Commission is so described:

“(g). The last-named watershed, or series of watersheds (and, if necessary, the watershed between the Sedalir and the Sesajap Rivers), until they meet the main watershed described in Article 3 of the Treaty.”

The reference here is to the continuation of the boundary line westward, as provided by Article 3 of the Boundary Convention. If the Commissioners had considered the boundary line was prolonged eastward, they would have said so.

4.49. The map annexed to the 1915 Agreement confirms that the boundary line stopped at the east coast of Sebatik Island. Signed by the four Commissioners, it is an *instrumentum* of the 1915 agreement and binds the Parties as such. It is explicit. The terminal point of the boundary line eastwards is on the east coast of Sebatik. There is no sign of prolongation of the line out to sea. On the other hand, the western terminal point of the boundary line, where the line meets “the main watershed described in Article 3 of the Treaty”,⁶⁸ located on the map at Boekit Padas (a major summit on the range of mountains), indicates a continuation due south, in accordance with article 3 of the Boundary Convention. If the Commissioners had thought the treaty provided for an extension of the boundary line eastwards by an allocation line, they would have likewise indicated the beginning of such a line in the same way as they did westwards. They chose not to do so and to indicate the end of the boundary line on the map by a red cross. The contrast can be seen on **Insert 7** on the preceding page.

4.50. Allocation lines were indicated on maps annexed to boundary treaties at the time. Such a map showing the allocation line is annexed to the Convention of 12 May 1886 delimiting the French and Portuguese possessions in West Africa. The map is explicitly referred to as Map n° 1 in Article 1 of the Convention.⁶⁹ Likewise the Convention of 26 June 1887 between China and France relating to the delimitation of the boundary between China and Tonkin included as an annex three maps “in two copies, signed and sealed by the two parties”. On one of the maps, the allocation line in the Gulf of Tonkin was “marked by a red line”: this is shown as **Insert 8** opposite.

⁶⁸ Tawao Report, sub. (8) (g.)

⁶⁹ Award of the Arbitral Tribunal, para. 45.

4.51. The lesson is clear. If the Commissioners had thought that such an allocation line existed to the east of Sebatik, they would have at least indicated it on the map. If they had omitted to do so, the concerned foreign ministries would have specified the boundary in the Agreement, given the information available in 1915.

4.52. The 1922-1926 internal Dutch discussions certainly prove that, in the view of all the Dutch authorities, the 1891 Boundary Convention had not settled the boundary beyond the east coast of Sebatik Island. The Dutch Navy was pressing for a delimitation. It was arguing against prolongation of the 4° 10' N parallel through the territorial sea. It considered a boundary along the parallel as contrary to Dutch defence interests. The Governor-General concurred and considered such a proposal as "absurd". He agreed that a delimitation perpendicular to the coast of Sebatik was the only reasonable solution.

4.53. If the Dutch authorities had thought that the 1891 Boundary Convention extended out to the sea to include Sipadan and Ligitan, they obviously would have taken that element into consideration. They would certainly not have considered a modification of the 4°10' N line in the territorial waters, thus risking jeopardy of the allocation of the islands in the diplomatic discussions to come. They would at least have examined the issue with attention. They simply did not envisage it.

4.54. By Decree of 27 January 1916 of the Governor-General of the Netherlands East Indies, the 1915 Agreement, attached Report and Map, were made publicly known and published in the *Indisch Staatsblad*, 1916, no 145. This follows explicitly from the text of the Agreement as well as from the Decree of the Governor-General.⁷⁰ There can be no doubt that the Map was part of the agreed text and, as such, was the official description of the boundary. This can be seen from the map, which is shown as **Insert 9** on the following page. The status of the 1913-15 Map thus contrasts sharply with the unilateral internal Dutch map of 1891, which never received such an official endorsement. The latter map never was officially published in the Official Gazette as an annex to the 1891 Boundary Convention.⁷¹

⁷⁰ MR, Annex 5, below, pp. 13-14.

⁷¹ See the text of the 1891 Boundary Convention as published in the *Indisch Staatsblad*, 1892, no. 114.

4.55. To sum up the positions of Indonesia and Malaysia on the 28 September 1915 Agreement and official Map: (a) both Parties accept the existence, status and authority of the 1915 Agreement and Map, signed by the four Commissioners and embodied in the international agreement, as an international obligation; (b) both Parties agree that the boundary determined by the Agreement and Map stops (or starts) at the point where the 4° 10' N parallel intersects with the east coast of the island of Sebatik; and (c) both agree that the 1915 Agreement and Map do not determine any boundary line within territorial waters or allocation line beyond.

4.56. Where the Parties disagree is on the legal conclusions to be drawn from the agreed facts. Indonesia argues that:

“Accordingly, the fact that the 1915 Agreement, and the 1913 Report incorporated into it, said nothing about the boundary eastwards from the island of Sebatik, i.e. out to sea in the direction of, and to the north of, Sipadan and Ligitan, carries with it no implication that the 1891 Agreement did not make provision for the eastward course of the boundary out to sea.”⁷²

4.57. Malaysia considers that the 1915 Agreement and Map constitute an authentic interpretation of the treaty. In fact, the Map is the only official map relating to the area and annexed to the treaty settlement. The Agreement and Map embody a “subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions” in the sense of article 31 (3) (a) of the Vienna Convention and, as such, “override general rules of interpretation”⁷³ if necessary. The 1915 Agreement and Map were implemented by the Parties with no difficulty for more than fifty years. Indonesia “has, for fifty years, enjoyed such benefits as the Treaty of [1915] conferred upon her, if only the benefit of a stable frontier... It is not now open to [Indonesia], while continuing to claim and enjoy the benefits of the settlement, to deny that she was ever a consenting party to it.”⁷⁴

4.58. The negotiations opened for the second Agreement pursuant to the 1891 Boundary Convention were concluded two years later, in 1928.⁷⁵ If the Government of the Netherlands had any doubts or second thoughts after

⁷² IC-M, vol. 1, p. 103, para. 5.111.

⁷³ *Oppenheim's International Law*, 9th edition, vol. 1, p. 1268, para. 630.

⁷⁴ *Temple of Preah Vihear (Cambodia v. Thailand)*, ICJ Reports, 1962, p. 32.

⁷⁵ Indonesia rightly insists on the importance of the issue and states that Malaysia fails to mention the 1928 Agreement “in this context”. IC-M, vol. 1, para. 5.98, p. 98. But see MC-M, vol. 1, p. 46, para. 2.77.

the lengthy internal discussions about the issues of maritime delimitation and allocation of islands, the obvious opportunity was there. The Government decided not to raise the issue and to stay content with the Convention as it was in the vicinity of Sebatik, with no extension to territorial waters or, indeed, beyond.

F. Conclusion

4.59. In conclusion:

- (a) The 1891 Boundary Convention addressed the issue of the land boundary in Borneo.
- (b) No maritime delimitation was considered by the Parties during the conclusion of the 1891 Boundary Convention.
- (c) Allocation lines were a current practice in 1891 and the years following. But there is no indication whatsoever that the Parties considered drawing an allocation line concerning distant islands off the coast of British North Borneo in 1891.
- (d) The internal Dutch map was never “officially communicated” to the British Government or “promulgated” by the Netherlands. It never constituted an agreement or an instrument accepted by the other Party in relation to the treaty in the sense of the Vienna Convention.
- (e) Subsequent conduct, practice and agreements confirm that the 1891 Boundary Convention did not address the issue of maritime delimitation beyond the coast of Sebatik, much less the issue of allocation of distant islands.

Chapter 5

Possession and Administration of the Islands post-1891

A. The Two Strands of Malaysia's Case

5.1. Chapter 6 of the Malaysian Memorial demonstrated in detail the continuous peaceful possession and administration of the islands by Malaysia and its predecessors in title. This was expressed to be “a second and parallel basis for upholding Malaysia’s title”.¹ The first basis was that “title to the islands was acquired by grant of the previous sovereign, a situation which was recognised by and was opposable to all relevant states in the region as a result of published treaties”. Malaysia emphasised that “each of these strands is by itself sufficient to uphold Malaysia’s position against Indonesia”.² Malaysia’s sovereignty over the offshore islands of North Borneo (now Sabah) is thus based on transactions with Sulu, Spain and the United States *and* on the continuous administration and exercise of authority over the islands in question, an administration going back to the late nineteenth century.

5.2. As to the first strand, the title to the islands based on the United States grants of 1907 and 1930, the position has already been thoroughly canvassed in earlier Malaysian pleadings.³ It is summarised with references to the evidence in Chapter 2 above.⁴ On these issues, Indonesia has relatively little to say in its Counter-Memorial,⁵ and what it does say is of little value. It is accordingly not necessary to deal with these issues yet again *in extenso*. Before turning to the second strand of Malaysia’s case, only a few remarks are called for.

5.3. Indonesia seeks to argue that the 1885 Protocol did not extend to the islands, relying on later, purely geographical definitions of the Sulu Archipelago and without paying any regard to the diplomatic history, in

¹ MM, vol.1, p.60, para. 6.1.

² MM, vol.1, p.29, para. 5.1.

³ See MM, vol.1, ch. 5; MC-M, ch. 3.

⁴ See above, paragraphs 2.4, 2.24-2.29.

⁵ See IC-M, vol.1, ch. 6.

particular Article III of the very same Protocol.⁶ It also seeks to rely on the United States uncertainty about the position following the voyage of the *Quiros*, and its non-distribution of the 1903 Hydrographic Office map.⁷ But it is clear both from the context and from the correspondence that the uncertainty about which islands were affected (an uncertainty which Britain and the United States shared) had nothing to do with putative Dutch territory or putative Dutch claims. The *difficulty* related to the problem of drawing a 9 nautical mile line along a complex coastline with many inshore islands. The *issue* was perfectly clear: whatever islands did not belong to the North Borneo belonged to the United States.⁸ In this discussion the Netherlands, although aware of the question of the outlying islands,⁹ neither was nor sought to be an interlocutor.

5.4. More generally, Indonesia still fails to grapple with an essential difficulty in its case. It denies that the Sultan of Sulu could have retained authority over the islands in dispute.¹⁰ But it ignores the point that the Dutch authorities in 1891 *recognised* the effect of the Sultan's grant so far as concerned mainland and islands (including Sebatik itself) 40 miles further east. How could the Sultan of Sulu have granted title to Darvel Bay and its islands, to Batu Tinagat and to the territory of Borneo as far west as the mainland opposite Sebatik, and not have retained title over islands more than 9 miles from Semporna? In 1878, no-one had the slightest idea about a 4° 10' line. No doubt Britain, if it had by 1890 acquired title to the islands beyond 9 nautical miles (either by occupation of *terra nullius* or adverse possession) could have ceded them to the Netherlands in 1891. But this is not Indonesia's case, and understandably so, since — quite apart from other considerations — there was no question in the negotiations in 1889-1891 that Britain was ceding any of its eastern islands to the Dutch. No more was it suggested that the Dutch were ceding Omodal or Mabul to the British!

5.5. Faced with this fundamental lacuna in Indonesia's case (a case based upon a title the origins of which are now entirely mysterious¹¹), there is nothing more to be said on the first strand of Malaysia's case at this stage. It is however necessary to say something more about the second strand of Malaysia's case, based on its long-standing administration of the islands in

⁶ IC-M, vol.1, pp.109-110, paras. 6.7-6.11. In the circumstances the conclusion at para. 6.11 is the merest assertion.

⁷ IC-M, vol.1, pp.113-115, paras. 6.23-6.28.

⁸ See MC-M, vol.1, p.67, para. 3.26.

⁹ As shown in correspondence helpfully annexed by Indonesia: IC-M, vol. 2, Annexes 28-29.

¹⁰ IC-M, vol.1, p.52, para. 4.26.

¹¹ Indonesia now accepts that it is doubtful whether Bulungan had any title to the area in dispute: see above, paragraph 3.1 and references.

question. To this issue Indonesia devotes Chapter VII of its Counter-Memorial.

5.6. The evidence of the continuous possession and administration of the islands by Malaysia and its predecessors was set out in Chapter 6 of the Malaysian Memorial and summarised in Chapter 2 of this Reply.¹² That evidence is compelling. Neither Indonesia's comments thereon, nor its assertion of alleged countervailing manifestations of title by the Netherlands, in any way succeed in diminishing the legal force of the conduct of Malaysia and its predecessors.

B. The Facts relating to Administration of the Islands

5.7. In section 2 of Chapter VII of its Counter-Memorial, Indonesia purports to examine the acts identified by Malaysia as evidence of the administration of the islands by the BNBC, the British colonial authorities or itself. It begins¹³ by referring to the opening paragraphs of the relevant section of the Malaysian Memorial, in which Malaysia describes the administrative structure of the region of which the islands are evidently a part. The principal points in this introductory description, namely, the demonstration of the authority of North Borneo over the Bajau communities on the various islands lying off-shore the Semporna peninsula¹⁴ and the co-option of the local leaders, appear not to have been understood by Indonesia. For the principal response made by Indonesia is that none of the acts concerned either Ligitan or Sipadan because they all related to towns or islands located north of the 4°10' line.¹⁵

5.8. Once again, this approach demonstrates Indonesia's inability to adopt as a starting point of its argument anything other than the conclusion that it must prove. Indonesia starts from the proposition that the line of 4° 10' is an "allocation" line by which the 1891 Convention allocated to Britain the places north of the line. This "allocation" argument has been disposed of in Chapter 4.¹⁶ The 1891 Convention line was not an allocation line and nothing in it attributed to the Netherlands those islands clearly associated with the Semporna peninsula that happened to lie south of that line.

¹² See above, paragraphs 2.13-2.31.

¹³ IC-M, vol. 1, p.126, para. 7.16.

¹⁴ MM, vol. 1, pp.63-64, para. 6.6.

¹⁵ IC-M, vol. 1, pp.126-127, para. 7.17.

¹⁶ See above, paragraphs 4.22-4.33.

5.9. Indonesia seeks to further its case by suggesting that the Bajau “did not meekly accept the administration imposed by the BNBC”.¹⁷ That is neither here nor there. The fact is that the BNBC asserted authority over the Bajaus and subdued them. That the latter may on occasion have disobeyed that authority does not diminish the legal significance of the authority thus asserted.¹⁸ This is especially so since the BNBC’s authority over the local people was consolidated and increasingly accepted, especially after the foundation of Semporna in 1887. Increasingly, the BNBC assumed a protective role, which was of special importance for outlying islands such as those of the Ligitan Group.¹⁹

5.10. Indonesia comments on the reference made by Malaysia to “the co-optation of local leaders” such as Panglima Udang.²⁰ But in suggesting that Panglima Udang was merely “a high-ranking local to whom the inhabitants of Semporna would turn in case of disputes concerning precisely the gathering of turtle eggs and nothing more”,²¹ Indonesia disregards (and therefore does not deny) the fact²² that “the Company appointed Panglima Udang... as the Native Magistrate of Darvel Bay, that his jurisdiction included Sipadan and that he visited these places every two or three months”.²³

(1) *Effectivités of Britain/Malaysia*

5.11. It is now appropriate to turn to the discussion of the specific *effectivités* presented by Malaysia and on which Indonesia has sought to comment.

(a) Collection of turtle eggs

5.12. In its Memorial Malaysia set out the facts relating to the collection of turtle eggs and specifically identified the manner and extent of the

¹⁷ IC-M, vol. 1, p.127, para. 7.19.

¹⁸ See MM, vol. 1, p. 61-64, paras. 6.5-6.6.

¹⁹ See the attached documents relating to protective measures necessary because of raids on Si Amil and other Darvel Bay islands in 1962. As a result the people of Danawan petitioned for greater protection, successfully. See MR, Annex 6, below, pp. 15-22.

²⁰ MM, vol. 1, p.64, para. 6.7.

²¹ IC-M, vol. 1, p.128, para. 7.20.

²² Clearly recorded in MM, vol. 1, p.64, para. 6.7, and evidenced *inter alia* by the Affidavits of Panglima Imam Malang, 23 January 1975, MM, vol. 4, Annex 116, p. 90, para. 14 and of Tilaran Haji Adbul Majid, *ibid.* Annex 117, p. 92, para. 8, as well as the Affidavit of his son, Datuk Panglima Abdullah: *ibid.* Annex 120, p. 100, para. 2.

²³ Governor C.V. Creagh’s patent appointing Panglima Udang was written in Malay using Arabic characters. An English translation appears as MR, Annex 7, below, pp. 23-24. Not all the words in the patent are legible.

involvement of the British authorities in the East Coast Residency at Tawao and Semporna.²⁴ It was noted, moreover, that there was never any Dutch or Indonesian involvement in the matter.²⁵

5.13. Indonesia expressly states that it “does not contest these facts”, though it goes on to say that “Malaysia exaggerates these acts and gives them a legal significance they do not deserve”.²⁶ Neither of these criticisms can be sustained.

5.14. There is no exaggeration in the statement of the facts. Indonesia’s assertion that “Malaysia ignores the fact that Indonesians too used to collect turtle eggs on Sipadan before the occupation of the island by Malaysia”²⁷ is not supported by any evidence. Indonesia pretends to find some support in the affidavits attached to its Memorial which establish that Indonesian fishermen also used to fish in the waters around Sipadan.²⁸ But that is certainly not evidence that Indonesia ever collected turtle eggs there. Nor does the affidavit of Mr Paraggam²⁹ help Indonesia. It says only that “Circa 1960s I was asked by my relative, Haji Abdul Hamid, a Bajau Tribe from Sampurna, Malaysia, to look after turtle eggs at Sipadan Island, where I stayed for two months”. On the basis of this affidavit, clearly dredged up by Indonesia at the last moment (as it is dated 6 February 2000), Indonesia now suggests that the collection of turtle eggs was a “Bajau matter which had nothing to do with sovereignty over the island”³⁰. If it was a Bajau matter, surely that is indicative of the absence of any Dutch or Indonesian authority in that region. In fact, however, the affidavit, for all its vagueness about dates and details, again shows that the title to collect turtle eggs on Sipadan came from the Darvel Bay Badjau community, and not from Bulungan or the Netherlands or Indonesia.

5.15. More significantly, the Indonesian suggestion passes over in total silence the fact, set out in detail by Malaysia, that as early as 1914 Britain took steps to regulate and control the collection of turtle eggs on Ligitan and Sipadan and continued to deal officially with matters related thereto.³¹ And then, as if to denigrate the significance of the evidence of British official

²⁴ MM, vol. 1, pp.65-69, para. 6.9-6.23.

²⁵ MM, vol. 1, p.65, para. 6.10.

²⁶ IC-M, vol. 1, p.129, para. 7.24.

²⁷ IC-M, vol. 1, p.129, para. 7.24.

²⁸ IC-M, vol. 1, p.130, para. 7.28.

²⁹ Ibid.

³⁰ IC-M, vol. 1, p.131, para. 7.28.

³¹ See MM, vol. 1, pp.65-68, para. 6.10-6.20, and see the summary, above, paragraph 2.15 with reference to the documents.

conduct, Indonesia pretends that the regulations issued by Britain were merely an extension of personal not territorial jurisdiction — a contention that is manifestly not in accordance with the facts.

5.16. Equally to be rejected is the following unparticularised allegation by Indonesia: “It is true that Malaysia refers to various documents that it misleadingly tries to use as proof that the British authorities acted as though they considered that the island of Sipadan belonged to them. However, this is not the case.”³² It is clear on the face of the documents in question³³ that, contrary to the Indonesian contention, they demonstrate the British view that Sipadan was within British territorial jurisdiction. Why else would the British Assistant District Officer of Semporna have concerned himself for many years with the regulation of turtle egg collection on Sipadan?³⁴ Why would Panglima Abu Sari, as reported in the same letter, have said he thought that “it was a Government Order” that Panglima Udang should have a share in the eggs? And on what basis would the British Assistant District Officer have had authority tell Panglima Udang to stop collecting eggs on Sipadan in the absence of a licence? It is to be noted that in identifying the so-called “misleading” documents, Indonesia mentions only two³⁵ and omits to mention those documents cited in other paragraphs of the same part of Malaysia’s Memorial.³⁶

5.17. Indonesia seeks to place an wholly unsupportable construction on the terms of the British Turtle Preservation Ordinance 1917,³⁷ pretending that the mention of Ligitan and Sipadan as “native reserves” meant that they were not subject to British sovereignty. The words of the Ordinance do not support such a construction. Section 2 of the Ordinance makes it clear that it applies to the collection of turtle eggs “within the State or the territorial waters thereof”. Section 3 is an exception clause relating to native reserves within the State. Such a clause would have been entirely unnecessary if such reserves had not been subject to British jurisdiction as part of the State. This is clearly confirmed by the fact that the other native reserves listed in Schedule C of the Ordinance, namely, the area from Nosong Point in Kimanis Bay to Jesselton, including Pulau Tiya and Gaya Island and Kudat District, including the islands therein, were and are incontrovertibly parts of the State far removed from any area that could be the subject of territorial dispute. What matters about the

³² IC-M, vol. 1, p.131, para. 7.31.

³³ MM, Annexes, vol. 4 Annexes 91-99.

³⁴ MM, Annexes, vol. 4 Annex 91.

³⁵ Those mentioned in MM, vol. 1, pp.65,67 paras. 6.11, 6.16.

³⁶ See MM, vol.1, pp.66-68, paras. 6.13, 6.14, 6.15, 6.18, 6.19, 6.20.

³⁷ MM, vol. 4, Annex 97.

1917 Ordinance is that in identifying Sipadan Island as a native reserve, it is treating it as part of British territory.

5.18. If any additional evidence is required of the fact that Britain regarded the native reserves as subject to its sovereignty and jurisdiction, it is to be found in the proviso that appears in the last two lines of Section 3 of the Ordinance:

“... provided that natives collecting turtle eggs in such areas shall be subject to any rules declared hereunder for the protection of the industry.”

5.19. Indonesia attempts to denigrate the significance of the mention of Sipadan as one of “our islands” in the official 1922 report on “Commercial Sea Products from the Coast of British Borneo”, complaining that “no details of the author... are given nor are any details provided about who was involved in the study”.³⁸ But the document on its face has an official provenance and has obviously been carefully prepared on the basis of governmental records. And the complaint that the report is “a one-off document”³⁹ really scrapes the bottom of the barrel. What is wrong with a “one-off” document if its official character is manifest, it evidences the understanding of the British authorities regarding the extent of their territory in that year and was obviously not prepared for the purposes of the present litigation?

5.20. Finally, Malaysia is bound to draw attention to Indonesia’s suggestion that the British authorities “lacked a clear idea as to who was the owner of Sipadan”.⁴⁰ This suggestion is totally contradicted by the hard evidence of Britain’s activities in relation to Sipadan in respect of the principal economic activity relevant to that island at that time, namely, the collection of turtle eggs. And the insufficiency of the Indonesian argument becomes the plainer when one recalls that at no time and in no respect whatsoever did the Netherlands give any indication of its claim to title over Sipadan. The use of the words “in fact” to introduce the Indonesian assertion that the local inhabitants “were used to gathering turtle eggs in full co-operation with local Bajau inhabitants who were governed by the Dutch administration” is a totally unfounded and unsupported invention. The local inhabitants who gathered turtle eggs were from Danawan, one of the Ligitan Group. They looked to Lahad Datu and Semporna for assistance in the resolution of disputes and

³⁸ IC-M, vol.1, p.132, para. 7.34.

³⁹ Ibid.

⁴⁰ IC-M, vol.1, p.133, para. 7.35.

confirmation of their rights.⁴¹ Indonesia produces no evidence at all to support its suggestion that any of the inhabitants in that locality “were governed by the Dutch administration”.

(b) Bird Sanctuary

5.21. The next example given by Malaysia of British official activity in relation to Sipadan was the action of the Conservator of the Forests at Sandakan in proposing in 1932 the establishment of a megapode preserve on Sipadan, and the subsequent implementation of the proposal in a notification in the Official Gazette in 1933.⁴² Indonesia centres its comment on the 1935 map of the District of Lahad Datu which shows Sipadan as a “bird sanctuary”. Indonesia’s comment on the map (which, of course, has nothing to do with the legal significance of the actions taken by Britain in 1933) is that it does not include Sipadan within the lines “which seem to demonstrate the extent of the administrative boundaries”.⁴³ Irrelevant as this comment is to the significance of the British actions of 1933, it provides yet another example of Indonesia’s inclination to rest its contentions on a misdescription of the facts. The same sentence in which Indonesia mentions the fact that Sipadan is not surrounded by the lines which demarcate the extent of the administrative boundaries also includes the statement that in this respect Sipadan is “unlike all the other islands situated north of latitude 4°10' N”. This statement, with its implication that because Sipadan did not fall within administrative boundary lines drawn on the map, therefore it was not regarded as part of British North Borneo, is simply wrong. Sipadan is not “unlike all the other islands situated north of latitude 4° 10' N”. Moving from west to east across the waters south of the Semporna Peninsula, the map shows that the following islands, all lying north of the 4° 10' N line, are not included in the limits depicting Semporna: Gusungan, Mabul, Kapalai, Danawan and Si Amil. There has been no challenge to Malaysian title over these islands on the ground that they were outside the limits of Semporna. There is no reason why Sipadan and Ligitan should be regarded differently.

⁴¹ It may be noted that Malaysian concern for conservation of turtles nesting on Sipadan continues to the present day. In 1993, on instruction of the Malaysian Government, the companies which conduct tourist operations on Sipadan entered into an agreement with the two Semporna residents who continue to have the right to collect turtle eggs on Sipadan. Under the Agreement, an annual payment is made to these two persons, Alukan bin Kaneh and Munting bin Pg. Abu Sari, and they agree not to exercise their right to collect eggs on Sipadan. Both parties to the Agreement “covenant that they shall endeavour to ensure that all turtle eggs laid shall remain in situ for the natural hatching and there shall be no removal of the same save in accordance with the instructions from the Department of Wildlife” (Clause 7) For the Agreement see MR, Annex 8, below pp. 25-29.

⁴² MM, vol. 1, p.69, para. 6.24, supported by MM, vol. 4, Annexes 100, 101.

⁴³ IC-M, vol.1, p.133, para.7.37.

5.22. Finally, in this connection, Indonesia contends that the actions of the British authorities in relation to megapodes do “not amount to proof of the colonial authorities’ wish to behave *à titre de souverain* over Sipadan”.⁴⁴ It is difficult to know what content Indonesia would give to the concept of “*à titre de souverain*” if it does not include governmental legislation and other official actions implementing such legislation adopted as a matter of public interest, namely the protection of the environment.⁴⁵ As was said in the *Eritrea/Yemen* case:

“Evidence of intention to claim the Islands *à titre de souverain* is an essential element in the consolidation of title. The intention can be evidenced by showing a public claim of right or assertion of sovereignty over the Islands as well as legislative acts openly seeking to regulate activity on the Islands.”⁴⁶

(c) Construction and maintenance of lighthouses

5.23. As further evidence of British/Malaysian governmental activity in relation to Sipadan and Ligitan, Malaysia refers to the construction, notification and maintenance by the North Borneo Government of navigational aids and lights on the islands from 1962 onwards.⁴⁷

5.24. Indonesia’s response falls into two parts. The first purports to be an explanation of why Indonesia did not object to the construction of the lights in 1962 and 1963.⁴⁸ But even if the excuses produced by Indonesia for its silence in 1962 and 1963 were valid (and Malaysia sees no point in debating the political conditions of that time or the then policy of Confrontation which was the source of so many difficulties), Indonesia does not assert that they extended beyond the first half of the 1960s. No explanation is offered by Indonesia as to why it did not raise any objection to the lights after that time.

5.25. The second part of the Indonesian response draws upon two cases — the *Eritrea/Yemen* case and the *Minquiers and Ecrehos* case — to support the contention that the establishment of lights and buoys is not normally taken as a test of sovereignty and does not constitute proof of occupation *à titre de souverain*.⁴⁹ It is true that in those two cases the Arbitral Tribunal and this Court respectively did not find that the construction of the

⁴⁴ IC-M, vol.1, p.133, para.7.38.

⁴⁵ See MM, vol. 4, Annex 101.

⁴⁶ 114 International Law Reports, p. 69, para. 241.

⁴⁷ See MM, vol. 1, pp.69-70, paras. 6.25-6.29. The supporting evidence is in MM, vol. 4, Annexes 108-111, 113.

⁴⁸ IC-M, vol. 1, p.134, para. 7.39.

⁴⁹ IC-M, vol. 1, pp.134-135, paras. 7.40-7.43.

lights was sufficient evidence of the intention of the Government concerned to act as sovereign over the territorial location of the lights. But that conclusion was reached on the basis of the facts particular to each of the two cases, and cannot be applied to the two islands here.

5.26. The circumstances in which the Tribunal in the *Eritrea/Yemen* case made its remarks about the effect of the establishment of lighthouses are peculiar to that case, whereas a reading of the whole of the relevant part of the Award, and not merely the lifting of a line out of context, shows that the States concerned did not, in their special situation, regard the construction of a lighthouse with the knowledge and consent of the other interested States as leading to the conclusion that the State constructing the light thereby intended to act *à titre de souverain* in respect of the location of the light.⁵⁰ In the present case there was no such situation. There was no discussion between Britain/Malaysia and Indonesia regarding the construction of the lights. There was no question of whether Indonesia might construct the lights instead of Malaysia. The construction of the lights was a straightforward reflection of the sovereign authority of Britain/Malaysia. That authority was duly publicised and was never challenged by Indonesia.

(d) Control of tourism

5.27. By way of indication of the continuity of the exercise of its authority over Sipadan, Malaysia has described the development of Sipadan as an attraction to tourists, especially scuba divers.⁵¹ Indonesia admits these facts, but claims that it “has protested on many occasions about these developments”.⁵² Examination of the passages to which the Indonesia refers shows that Indonesia made no protest on this subject before May 1988;⁵³ and that the only subsequent Indonesian protests were made in 1992, 1993 and 1994. There is also an element of exaggeration in Indonesia’s description of its protests. For example, it lists under what it calls its numerous “notes verbales” a report of 1999 which was purely an internal report of the Indonesian Navy.⁵⁴

5.28. But the important point to be made about these protests is that they did not begin until 1988, apart from the discussion between the two sides in 1969. No protest of any kind was made by Indonesia until 1980⁵⁵ and this related not to tourism but to Malaysia’s map of 1979 showing the limit of

⁵⁰ See e.g. 114 International Law Reports, at p. 66, para. 228.

⁵¹ MM, vol. 1, pp.18, 71, paras. 3.19, 6.30-6.31.

⁵² IC-M, vol. 1, p.135, para. 7.45.

⁵³ IM, vol. 1, p.171, para. 8.71.

⁵⁴ IM, vol. 4, p.461, Annex 182.

⁵⁵ IM, vol. 4, p.235, Annex 140.

Malaysia's territorial waters and continental shelf. As can be seen from the annexes to Indonesia's own Memorial, each of these protests was rejected by Malaysia.⁵⁶

(2) Absence of Dutch and Indonesian *effectivités*

5.29. It is now necessary to turn to what the ICM calls "Dutch and Indonesian activities relating to the Islands" — a description which is remarkable having regard to the paucity of positive evidence that the section contains. Once again the Court is treated to the spectacle of Indonesia attempting to make a soufflé without eggs.

5.30. The opening substantive paragraph begins with the statement: "After the entry into force of the 1891 Convention the Dutch activities continued..."⁵⁷ A footnote refers to the so-called pre-1891 activities. Examination of this reference shows that only one of the items in question even alludes to Sipadan. "During the period from 1875 to 1877 the Dutch vessel HNLMS *Admiral van Kinsbergen* conducted patrolling activities both around the island of Sipadan and even around islands lying further to the north". The only item of evidence adduced in support of this assertion is an extract from the ship's log book, misleadingly described as "Extract from the log-book of HNLMS *Admiral van Kinsbergen* for 10 and 11 June 1876 *on patrol off the coast of Boeloengan*" (emphasis supplied).⁵⁸ As has been shown, the original manuscript text of the logbook in the Dutch language contains no mention of the italicised words. Indeed, the general location is described as "Solozee".⁵⁹

5.31. So much (or so little) then for "activity before 1891". What about activity after 1891?

5.32. Taken in chronological order, Indonesia refers first to the surveying activities of HNLMS *Macasser* in 1903. The "real significance" attached by Indonesia to this survey "is that it shows Dutch activities in the area, demonstrating that the Dutch had interests there".⁶⁰ If isolated naval surveying and cartographic activity is sufficient to establish an "interest" in an area, and such display of interest is in its turn sufficient to evidence title to the

⁵⁶ See IM, vol. 4, Annexes 141, 146, 148, 149, 150, 151, 153, 154, 156, 157, 159, 165, 166, 167, 168, 171, 172, 174.

⁵⁷ IC-M, vol. 1, p.136, para. 7.47, referring back to IC-M, para. 4.16.

⁵⁸ IC-M, vol. 2, Annex 12.

⁵⁹ See above, paragraph 3.23.

⁶⁰ IC-M, vol. 1, p.137, para. 7.50.

area surveyed, then it should be compared with the activity of the British Navy which constantly surveyed and mapped the coasts of thousands of miles of foreign territory without Britain seeking to assert title thereto on the basis of such activity. If the surveys of the *Macasser* off British North Borneo had revealed the existence of Dutch islands in the area, these would have been shown in the Dutch chart of 1905 and its 1915 revision, which used the *Macasser*'s data. But of course they were not: no Dutch claim emerged from this voyage.⁶¹

5.33. Indonesia next asserts in very general terms that "the Dutch Navy periodically patrolled the seas around islands located off the north-east Borneo coast which were considered to be under Dutch sovereignty".⁶² Needless to say, mere patrolling off the coast of an island does not evidence sovereignty over it.

5.34. But even the evidence of such patrolling provided by Indonesia is flimsy in the extreme. Indonesia merely says that this patrolling "is shown by the considerable number of warships listed in the *Koloniale Verslagen* (Annual Report on the Colonies presented to Parliament by the Dutch Government) which are shown to have been present off the coast of north-eastern Borneo. The islands considered to be under Dutch sovereignty included Sipadan and Ligitan, as is shown by the log-books of ships conducting these patrols."⁶³ The only material produced in support of these rather large propositions consists of Annex 32,⁶⁴ entitled "List of ships of the Royal Netherlands Navy present off the coast of Northeast Borneo during the period 1895-1928".⁶⁵ The source given for this list is the *Koloniale Verslagen* just mentioned. The ICM provides no backing for this list, except in two cases, the *Lynx* in 1921⁶⁶ and HNLMS *Koetei* in 1910.⁶⁷ The Annex produced in support of the presence of the *Koetei* is merely an extract from its log-book which does no more than give details of the course it pursued on 30 September 1910, a course which, it seems, involved passing by Sipadan with a corresponding passing mention.⁶⁸ No supporting details are given regarding the other 29 instances listed in Annex 32. To these, therefore, no significance at all can be attached.

⁶¹ See the Dutch maps shown in MC-M, vol. 2, Maps 2 & 3.

⁶² IC-M, vol. 1, p.136, para.7.47.

⁶³ Ibid.

⁶⁴ IC-M, vol. 2, Annex 32.

⁶⁵ Ibid.

⁶⁶ See also MM, vol. 1, pp.81-82, paras.7.15-7.16; MC-M, vol. 1, pp.73-74, paras. 4.8-4.9.

⁶⁷ See IC-M, vol. 2, Annex 33.

⁶⁸ See further above, paragraph 3.25.

5.35. Even so, it may be noted that the “presence” said to have been manifested by these ships was not a regular presence but appears to have rather occasional and intermittent. This kind of intermittent “presence” proves nothing except that the area was evidently of only limited and occasional concern to the Netherlands Navy. Moreover, Indonesia provides no information at all on Dutch naval practice (if any) after 1928.

5.36. Indonesia then passes once more to what it describes as the “highly significant *Lynx* expedition” of November 1921. There is no need for Malaysia to repeat the comments that it has already made on this episode.⁶⁹ The crucial question, as with the *Makasser*, is: what happened next? In the case of the *Makasser*, the answer is: nothing. No claim was made on the ensuing maps.⁷⁰ The *Lynx* episode led to internal Dutch deliberations of 1922-1926, described already.⁷¹ These indicate clearly that it did not occur to the Dutch naval authorities at that time that the boundary extended seaward of the territorial sea of Sebatik or that Sipadan fell within any area over which the Netherlands possessed title. As the Vice-Admiral of the Netherlands Indies and the Governor-General of the Netherlands Indies both said: “... it would hence be absurd to take the - merely accidental - last course of the land boundary as the determining factor for the maritime boundary”.⁷²

5.37. As regards the significance of the Indonesian Act of 16 February 1960, Malaysia has little to add to its earlier account.⁷³ Indonesia seeks in two ways to escape from the implications of its non-use in 1960 of Sipadan and Ligitan in the process of drawing its archipelagic baselines.⁷⁴

5.38. The first is by stressing that international law does not require States when establishing archipelagic waters to use all permitted base points permitted under international law. This is a highly questionable proposition. The 1982 Convention on the Law of the Sea provides in article 47(1) that “an archipelagic State may draw straight baselines joining the outermost points of the *outermost* islands and drying reefs of the archipelago” (emphasis supplied).

⁶⁹ See MM, vol. 1, pp.81-82, paras.7.15-7.16; MC-M, vol.1, pp.73-74, paras.4.8-4.9, and see above, paragraphs 3.26-3.29.

⁷⁰ See above, paragraph 5.31.

⁷¹ See MC-M, vol. 1, pp.74-80, paras. 4.10-4.18, and see also above, paragraphs 3.26-3.29.

⁷² See MC-M, vol. 1, pp. 74-75, paras. 4.11-4.12.

⁷³ MC-M, vol. 1, pp.83-86, paras. 4.25-4.31.

⁷⁴ See IC-M, vol. 1, pp.138.139, para.7.54-7.55.

“Outermost” means just what it says – outermost.⁷⁵ The assumption must be that in the absence of an express reservation, the islands selected as base points are in fact the outermost islands and that there are no more islands lying beyond them that are claimed as part of the archipelago or as being subject to sovereignty of the archipelagic State. Indonesia made no such reservation in 1960 and Malaysia was fully entitled, therefore, to believe that Sipadan and Ligitan were not claimed as part of the Indonesia archipelago.

5.39. The second device Indonesia uses to avoid the implications of its non-use of Sipadan and Ligitan is to compare Indonesia’s failure to use Sipadan and Ligitan as base points to Malaysia’s alleged non-use of the same islands in determining the extent of its territorial sea before 1969. But the two situations were not the same. Malaysia had not — and still has not — published a detailed map of its baselines. It has of course published its continental shelf boundaries, in 1979, in a way which takes full account of the two islands in question.⁷⁶ In the meantime it relies on the rules of the law of the sea relating to its land and island territories.

5.40. For Indonesia, by contrast, the task was one of implementing new legislation that sought to represent all the islands and the waters lying between them as a single unit, to be treated as Indonesian national waters subject to its sovereignty. The coverage of the legislation was intended to be thorough.⁷⁷

5.41. In stating that it could also have claimed Sipadan and Ligitan as base points, but did not do so, the only explanation Indonesia offers is that the 1960 Act “was the result of injudicious haste in the legislative process” and that the use of small-scale maps which were not able to depict certain Indonesian islands.⁷⁸ This is hardly plausible, especially having regard to the fact, of which Indonesia makes no mention, that the 1960 Act was foreshadowed on 14 December 1957 by a major announcement on the part of

⁷⁵ There is no suggestion in the preparatory work of UNCLOS that “outermost” is used other than in its ordinary meaning. See the *Virginia Commentary* on UNCLOS, 1982, vol. 2, pp. 399-432.

⁷⁶ See MM, vol. 5 Map 19.

⁷⁷ Indonesia has stated that certain islands not identified in the 1960 Act were nonetheless accepted by Malaysia as basepoints in subsequent negotiations. These were the islands of Pulan Tokoing Boro and Pulan Penjibu (in the South China Sea) and Tandjing Parit and Pulan Batu Mandi in the Malacca Strait. In fact they are so close to the Indonesian base lines as drawn that they would fall within the Indonesian territorial sea. Sipadan and Ligitan do not lie in the same geographical relationship to the coasts of Indonesia as do the other islands claimed by Indonesia in earlier negotiations.

⁷⁸ Affidavit of Admiral Adi Sumardiman, IM, vol. 5, p.9, Annex B.

the Council of Ministers stating that “all waters around, between and connecting, the islands or parts of islands belonging to the Indonesian archipelago irrespective of their width or dimensions are natural appurtenances of its land territory and therefore an integral part of the inland or national waters subject to the absolute sovereignty of Indonesia”.⁷⁹ Can the product of over two years preparation for the implementation of the 1957 announcement be called “the result of injudicious haste”? In a matter of such national importance, would the Indonesian authorities have worked on the basis of small-scale maps?⁸⁰ The truth of the matter is that the 1960 Law was carefully prepared over several years, was intended by Indonesia to be highly significant and was regarded internationally as such. To pretend now that it was prepared carelessly and in haste is absurd.

5.42. Nor does Indonesia grapple with the consequences that would have followed if Sipadan and Ligitan had replaced point 36b in the Indonesian baseline. The point can be seen from **Insert 10**, on the preceding page. Where would the line have run if Sipadan and Ligitan had been 36b and 36c respectively? Would it have run back to the present point 37 or would it have run to 38 or 39? If such possibilities existed of thus significantly enlarging the area of Indonesian national waters, does not the argument of injudicious haste and the use of small-scale maps ring even more hollow? Is not the more likely explanation that because of the absolute lack of contact both then and in earlier years between Indonesia and Sipadan and Ligitan, they were not thought of as belonging to Indonesia at all?

5.43. Indonesia seeks to compare the deficiencies of its 1960 claim with certain omissions from Malaysia’s continental shelf maps. But the comparison is inexact. In contrast to Indonesia which was obliged to use its “outermost islands”, no such obligation rested upon Malaysia. Malaysia’s task was a much more limited one. In any case, as noted, Malaysia has never produced a base-line map and has, therefore, not made to Indonesia any representation comparable to those made by Indonesia.

5.44. Turning to Indonesia’s treatment of the oil concessions granted by it, mention should be made of the misleading manner in which the subject is introduced: “The oil concessions issued by Indonesia *are the other instance mentioned by Malaysia* as allegedly showing an absence of administration by

⁷⁹ See Whiteman’s *Digest of International Law*, vol. 4, p. 284.

⁸⁰ The schedule to the 1960 Act (IM, vol. 4, p. 121, Annex 128) contains a list of 201 points with names and coordinates specified. It was evidently prepared with care.

Indonesia after independence”.⁸¹ That is hardly the correct way of reflecting Malaysia’s general contention that Indonesia has not performed *any* acts of administration of the islands after independence. It is not for Malaysia to prove a negative. The expression of Indonesia’s claims to its archipelagic waters and its claim to potential oil-bearing areas are but two examples of Indonesia’s conduct, selected because in those contexts we might have expected a more positive approach. But it is not necessary for Malaysia to list a whole range of activities that Indonesia might have pursued and then point out that Indonesia has not pursued any of them. Such limited items as Indonesia has mentioned have already been dealt with.⁸² In its Counter-Memorial, Indonesia provides nothing more, nothing new.

5.45. In short, Indonesia’s pretensions to activity demonstrating Dutch/Indonesian authority over the islands boil down to four episodes — one in 1876, when the HNLMS *Admiral van Kinsbergen* sailed near Sipadan, but not Ligitan; a second, in 1903, when HNLMS *Macassar* carried out some surveys of the coastal areas in North Borneo waters but seems not to have landed on the disputed islands; a third, in 1910, when HNLMS *Koetei* was present in the area, and a fourth, in 1921, involving HNLMS *Lynx*. This is not evidence of the exercise of governmental activity in and in relation to Sipadan and Ligitan indicative of any claim of title to the islands, let alone a claim that compares with the significant and continuing administrative acts of Britain and Malaysia relating to both islands.

(3) Post-1969 Activities of the Parties

5.46. Malaysia notes Indonesia’s acknowledgement that activities of the Parties after “the critical date... may confirm the legal situation existing when the dispute crystallised”.⁸³ In fact in the present case Indonesia cites no governmental activities of any kind after 1969, while it admits that Malaysia has continued and intensified its administration of the islands (indeed, it complains of the fact). Even on the relatively restricted view taken by Indonesia of the scope of post-1969 activities,⁸⁴ it is the case that Malaysia’s activities strongly confirm the legal situation existing in 1969.

⁸¹ IC-M, vol. 1, p.139,para.7.56 (emphasis added).

⁸² MC-M, vol. 1, pp.93-95, paras. 4.46-4.48.

⁸³ IC-M, vol. 1, p.140, para.7.60.

⁸⁴ However tribunals have taken a more expansive view. In this connection, Malaysia strongly prefers the approach of the Tribunal in the *Palena* case, 38 ILR, at pp 79-80. There the President, Lord McNair, noted “that the Court has considered the notices of the critical date to be of little value in the present litigation and has examined all the evidence submitted to it irrespective of the date of the acts to which such evidence relates”.

(4) The map evidence

5.47. There is only one official map reflecting the agreed views of the two Parties: the map attached to the 1915 Agreement. On that map, the terminal point of the boundary line is on the east coast of the island of Sebatik. No continuation of the line out to sea is shown. The map is a vital indication of how the Parties interpreted and applied the 1891 Convention. Its importance has been fully analysed in Chapter 4.⁸⁵

5.48. So far as the other maps are concerned, there appears to be no great difference between the Parties regarding the value of map evidence. As Indonesia has said: "... the map evidence is relevant in assessing what the views of the interested parties were with respect to the territorial situation in the area of concern".⁸⁶ Subject to the observations which it has made in its Counter-Memorial, Malaysia is able to accept this statement.⁸⁷ But the question remains: what do the maps actually show regarding the views of the interested parties with respect to the territorial situation in the area of concern?

5.49. In this connection, five maps in particular may be recalled. Each is an official map prepared by the government either in the Netherlands or the Netherlands Indies.⁸⁸ Their provenance, authenticity and effect cannot be questioned. Each of these maps clearly contradicts the Indonesian thesis and supports that of Malaysia. On each of the maps, the boundary line can clearly be seen as crossing the island of Sebatik and terminating on its eastern coast. In none of them does the boundary extend into the sea in such a manner as to allocate or attribute Sipadan and Ligitan to the Netherlands. The maps in question are the following:

- (i) The Dutch "Survey Map of the Netherlands East Indies Archipelago", prepared in 1897-1904 by the Topographical Bureau at Batavia. This was described in and attached to the Malaysian Counter-Memorial.⁸⁹

⁸⁵ See above, paragraphs 4.46-4.57.

⁸⁶ IC-M, vol. 1, p.143, para.7.71.

⁸⁷ MC-M, vol. 1, pp.117-121, paras. 5.31-5.39.

⁸⁸ Malaysia does not mean to disregard the Dutch "Explanatory Memorandum" map, prepared in 1891, which appears to form the basis of Indonesia's case. But Malaysia has commented on it at length (See MM, vol. 1, pp.96-99, paras. 9.3-9.9 and MC-M, vol. 1, pp.99-100, para. 5.8) and those comments need not be repeated here.

⁸⁹ MC-M, vol. 1, p.103, para. 5.15, p.100, Insert 10 and MC-M, vol. 2, p.59, Map 1.

- (ii) The Dutch map published in 1905 by the Department of Hydrography of the Dutch Ministry of the Navy. This too was described and produced in Malaysia's Counter-Memorial.⁹⁰
- (iii) The first official map of the Southern and Eastern Division of Borneo, published in 1913.⁹¹
- (iv) The map of the Administrative Structure of the Southern and Eastern Borneo Residence, 1913.⁹²
- (v) The 1905 Dutch map, updated in 1915.⁹³

5.50. The clarity of the position demonstrated on these maps, which all show the boundary terminating at the east coast of Sebatik Island, cannot be questioned. They stand as official declarations of the Netherlands Government. They constitute a total and comprehensive rejection of the arguments founded by Indonesia as the basis of the 1891 Convention. The Indonesian contention that the 1891 Explanatory Memorandum map is of "considerable, if not dispositive, probative value"⁹⁴ simply cannot stand.

5.51. Compared to this impressive and consistent series of maps, those introduced in the Indonesian Counter-Memorial as "Certain Key aspects of the Map Evidence"⁹⁵ provide no support for the Indonesian case. In particular, it is difficult to understand why Indonesia should have wished to give such prominence to one map that so clearly contradicts its own position. It hangs a complex interpretation upon Stanford's 1903 map.⁹⁶ This is said to be "highly pertinent" because it "depicted the southern limits of Elphinstone Province as extending seaward from the Island of Sebatik along the 4°10' N line of latitude to a point to the north and east of the islands of Sipadan and Ligitan".⁹⁷ However, what Indonesia has chosen to overlook is the fact that the heavy red line that depicts the agreed international boundary clearly terminates at the east coast of Sebatik Island. Whatever the map may show about the administrative limits of Elphinstone Province is of no importance when the line that marks the international boundary is so clearly defined. Substantially the same map, published by Stanford in 1906,⁹⁸ was used to illustrate the 1907

⁹⁰ MC-M, vol. 1, p.103, para. 5.14; vol.2, p.60, Map 2.

⁹¹ MM, vol. 5, p.1, Map 1; see also MM, vol. 1, pp.4,108, paras. 2.6, 10.5.

⁹² MC-M, vol. 1, p.103, para.5.15 and Insert 11.

⁹³ See MC-M, vol. 1, p.103, para.5.15 and MC-M, vol. 2, p.62, Map 3.

⁹⁴ IC-M, vol. 1, p.144, para.7.73.

⁹⁵ Ibid.

⁹⁶ IC-M, p.145, para.7.74, For the map see IM, vol. 1, map 6.4, opposite p. 118; IC-M, vol. 1, map 4.1, opposite p. 54.

⁹⁷ IC-M, vol. 1, p.145, para.7.74 (a).

⁹⁸ See MM, vol. 5, p.6, Map 6.

Exchange of Notes between Britain and the United States,⁹⁹ and once again it showed the international boundary as ending on the east coast of Sebatik Island. Moreover, this map, though clearly showing Elphinstone Province, as in the 1903 map, does not show any southern limit to that Province drawn in the sea.

5.52. Indonesia devotes considerable attention to one Malaysian map which, in its view, “merits particular attention” — the map published by the Malaysian Ministry of Lands and Mines in 1968.¹⁰⁰ It claims to see in this map, as well as in others, a representation of the seaward extension of the 4° 10' line as the international boundary and maintains that these maps constitute an admission against interest by the Malaysian Government.¹⁰¹ But this is a highly generalised map which does not show any islands south of Semporna at all.¹⁰² In any event, the important point to note is that Indonesia sees the significance of these maps as showing that “Malaysia was of the view that a line of territorial allocation existed with Indonesia in the area and that that line was the boundary fixed by the 1891 Convention”.¹⁰³ Indonesia thus sees these maps as contributing to the *interpretation* of the 1891 Convention. It does not see the Malaysian maps as introducing a modification of that Convention, nor could it have done so. It is necessary, therefore, to weigh against each other the interpretative value of the maps invoked by each side. Such a process of weighing must lead, in Malaysia’s submission, to the conclusion that the maps cited by Malaysia — particularly the cardinal maps identified in paragraph 5.48 above — overwhelmingly support the position understood by both Parties to the 1891 Convention, viz. that the boundary line stopped at the east coast of Sebatik Island and did not allocate to the Netherlands/Indonesia any islands further east.

5.53. In conclusion, some comment is required in respect of Indonesia’s attempt to deny significance to the fact adduced by Malaysia that so many maps show the 1891 line as not extending out to sea. Indonesia’s position is that “these maps are entirely neutral with respect to the territorial attribution of the islands of Sipadan or Ligitan”.¹⁰⁴ Malaysia finds it hard to reconcile this statement with what follows only five paragraphs later¹⁰⁵ where Indonesia appears to be restating its fundamental position, namely, that “it was no accident that the line was placed on key maps of the area. Its persistent

⁹⁹ See MM, vol. 1, p.109, para. 10.8.

¹⁰⁰ IC-M, vol. 1, p.146, para.7.76.

¹⁰¹ IC-M, vol. 1, p.147, para.7.80.

¹⁰² As noted in MC-M, vol.1, pp.88-93,109, paras. 4.37-4.45, 5.21.

¹⁰³ IC-M, vol. 1, p.148, para. 7.84.

¹⁰⁴ IC-M, vol. 1, p.149, para. 7.88.

¹⁰⁵ IC-M, vol. 1, p.151, para. 7.93.

appearance... conclusively confirms Indonesia's sovereignty over the islands of Sipadan and Ligitan".¹⁰⁶ Malaysia has always understood Indonesia's basic argument to be that the boundary runs seaward along the line of 4° 10' N because that was what was represented on the 1891 Explanatory Memorandum map. Are we now being told that the non-appearance of the boundary line beyond the east coast of Sebatik Island does not matter?

C. The Legal Significance of Long-extended British/Malaysian Conduct

5.54. The facts of the matter are thus clear. Malaysia and its predecessors in title have administered the two islands, as well as others in the vicinity, since the late nineteenth century. Indonesia and its predecessors in title have not done so, and until 1969 gave no appearance of even an abstract claim to do so. What are the legal consequences to be drawn from these facts?

5.55. The first point to note, of course, is the conjunction of the facts of long-standing Britain and Malaysian administration of the islands and the grant to Malaysia's predecessors, Britain and the BNBC, of title over them. With the conclusion of the 1930 Convention, the only other State with any claim to the islands, the United States, stepped out of the picture, and British/Malaysian authority over the islands was not challenged then for nearly 40 years.

5.56. But for the sake of argument, let us consider what the position would be on a strictly bilateral basis, as between Britain and the Netherlands or, now, as between Malaysia and Indonesia, leaving to one side all considerations of the significance of the transactions with the United States in the period 1903-1931. Even on that (hypothetical) basis, British and now Malaysian sovereignty over the islands would be clearly established. The legal significance of the presence in the islands of Malaysia and its predecessors would derive from the now widely recognised concept of historical consolidation of title.

5.57. Some remarks on the subject expressed by Sir Robert Jennings in his authoritative work on *The Acquisition of Territory in International Law* may usefully be recalled at this point:

¹⁰⁶ Ibid.

“HISTORICAL CONSOLIDATION OF TITLE

This ambiguity in actual cases based essentially on effective possession suggests the question whether the various factors contributing to building a title cannot usefully and instructively be subsumed under the one heading of a process of ‘consolidation’, and regarded as being for essential purposes all part of one legal process, or ‘mode’ of acquisition of territorial sovereignty. This possibility has been advocated by Professor Charles de Visscher, elaborating a formula used in the *Norwegian Fisheries* case... The passage is of such importance that it may be useful to cite it at some length:

‘4. *Consolidation by Historic Titles.* The fundamental interest of the stability of territorial situations from the point of view of order and peace explains the place that consolidation by historic title holds in international law and the suppleness with which the principle is applied. It is for these situations, especially, that arbitral decisions have sanctioned the principle *quieta non movere*, as much out of consideration for the importance of these situations in themselves in the relations of States as for the political gravity of disputes concerning them. This consolidation, which may have practical importance for territories not yet finally organised under a State regime as well as for certain stretches of sea-like bays, is not subject to the conditions specifically required in other modes of acquiring territory. Proven long use, which is its foundation, merely represents a complex of interests and relations which in themselves have the effect of attaching a territory or an expanse of sea to a given State. It is these interests and relations, varying from one case to another, and not the passage of a fixed term, unknown in any event to international law, that are taken into direct account by the judge to decide *in concreto* on the existence or non-existence of a consolidation by historic titles.’

... Thus, as Professor Johnson says, Professor de Visscher has ‘embraced under a single heading the notion of straightforward possession on the one hand and of adverse possession on the other hand...’ Under the single heading of ‘consolidation’ it is now possible... to include both ‘straightforward possession’ and ‘adverse possession’...

Now it must be acknowledged at once that this passage from Professor de Visscher’s analysis is not just a suggestion *de lege ferenda*; it is a penetrating and illuminating observation of the

way Courts actually tackle questions of title to territorial sovereignty. Thus it makes clear how recognition in varying forms, and acquiescence, and estoppel perhaps are given an important place in this scheme of things; and this is no doubt right.

...it must be emphasised that however important all these various consolidating factors may be, it is still the fact of possession that is the foundation and the *sine qua non* of this process of consolidation.

...It should be made quite clear, therefore, that the process of consolidation cannot begin unless and until actual possession is already an accomplished fact and that, although no time is laid down, it remains true that it cannot be completed until after a considerable period of possession as of a sovereign.

... the whole tendency of consolidation is to make the origin of the possession of ever-diminishing importance. No doubt this is in a sense realistic.

... What is of decisive importance... is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the *Ecrehos and Minquiers* groups.”¹⁰⁷

5.58. A recent acknowledgement of the concept of consolidation is to be found in the first Award of the eminent Arbitral Tribunal in the *Eritrea/Yemen* case.¹⁰⁸ There, the Tribunal said that “Evidence of intention to claim the islands *à titre de souverain* is an essential element of the process of *consolidation* of title”.¹⁰⁹ This passage relates back to an earlier one where the Tribunal said:

“The modern international law of the acquisition (or attribution) of territory generally requires that there be an intentional display of power and authority over the territory, by the exercise of jurisdiction and State functions, on a continuous and peaceful basis. The latter two criteria are tempered to suit the nature of the territory and the size of its population, if any”.¹¹⁰

It is this concept which underlies Malaysia’s reliance upon “long, peaceful and undisputed administration” of the islands.¹¹¹

¹⁰⁷ *The Acquisition of Territory in International Law*, Manchester, Manchester University Press, 1963, pp. 23-27. The concept has been more recently affirmed in *Oppenheim’s International Law* (9th edition, by Jennings and Watts, 1992), pp. 709-710, para. 272.

¹⁰⁸ 114 ILR at p. 69, paras. 239-241.

¹⁰⁹ *Ibid.*, para. 241 (emphasis added).

¹¹⁰ *Ibid.*, para. 239.

¹¹¹ MM, vol.1, p.60, para. 6.3.

5.59. Indonesia seeks to escape from the crippling impact of the history of the islands by pretending that “the entire reasoning behind Malaysia’s argument is based on a fundamentally flawed premise: that Indonesia lacks territorial title to the islands”. It is true that Malaysia asserts, in the first place, that Indonesia and before it the Netherlands not only lacks title to the islands but also that neither of them ever possessed it. What Malaysia does not accept is that this assertion by Malaysia is “fundamentally flawed”.

5.60. Another remarkable feature of Indonesia’s argument is its reservation of “its position on the question of whether a transfer of sovereignty may result from a long period of undisputed occupation”.¹¹² This statement amounts, in effect, to abandonment of any response by Indonesia to that aspect of Malaysia’s case based on long and undisputed occupation and administration of the islands. It is a strange reservation to make in a pleading which, if Indonesia’s basic contentions regarding its sovereignty were correct, should have been supported by detailed consideration of precisely this question.

5.61. Indonesia seeks to introduce further confusion into the case by stating that “further discussion on this point [that is of the effect of acquisitive prescription or the consequences of undisputed occupation] is of little relevance given that Malaysia specifically dismisses this line of argument”.¹¹³ Once again Indonesia significantly misstates Malaysia’s argument. Far from excluding recourse to prescription, Malaysia specifically asserts it as an *alternative* argument.¹¹⁴ In a sentence that immediately follows the one quoted but disregarded by Indonesia, Malaysia expressly said: “Only if the Court should find that somehow the Netherlands had acquired title to the islands at some earlier stage, would Malaysia need to invoke prescription as the basis for converting its long time possession into a prescriptive title.”¹¹⁵

5.62. In short, Malaysia has from the beginning made it clear that its demonstration of Malaysian *effectivités* over the islands serves a dual function: first, it confirms Malaysia’s title which is independently based on a series of valid legal instruments; second, even if — in a manner by no means clear or

¹¹² IC-M, vol. 1, p.122, para. 7.5.

¹¹³ IC-M, vol. 1, p.122, para. 7.5.

¹¹⁴ MM, vol. 1, pp. 29,60, paras. 5.1, 6.1.

¹¹⁵ MM, vol. 1, p.60, para. 6.3.

established — the Netherlands had at one time possessed title to the islands, such title has been displaced by British/Malaysian *effectivités* over the years.

5.63. Indonesia goes so far as to express doubts about the validity of the concept of acquisitive prescription in international law.¹¹⁶ The authorities cited in support of this suggestion have been relegated by Indonesia to a footnote, and Malaysia will respond to them in the same manner.¹¹⁷ The real

¹¹⁶ Ibid.

¹¹⁷ (i) Indonesia refers, first, to Judge Moreno Quintana's dissenting opinion in the case concerning *Rights of Passage over Indian Territory* where he said that acquisitive prescription was "a private law institution which I consider finds no place in international law". However, it is clear from the context that in Judge Moreno Quintana's understanding the majority of the Court did accept the concept of acquisitive prescription. On examining the relevant paragraph in his dissenting opinion it may be observed that the sentence in question follows his own statement that "there follows from the majority opinion a legal premise that I cannot accept". And he continued: "... it implies by definition a recognition that territorial sovereignty can be acquired by prescription". This citation, far from strengthening Indonesia's argument, serves only to weaken it.

(ii) The *Kasikili* case – Indonesia invokes the Court's allegedly "cautious approach" in the *Kasikili* case as supporting Indonesia's doubts about the existence of the concept of acquisitive prescription in international law. In truth, however, the Court expressed no view about acquisitive prescription beyond saying that it "need not concern itself with the status of that concept" since the conditions cited by Namibia itself were not satisfied in this case.

(iii) Nor is Indonesia assisted by the citation of "the careful consideration of the issue in the edition of Oppenheim's *International Law* by Sir Robert Jennings and Sir Arthur Watts". Nothing could be clearer than the following statement that appears at p. 706:

"... Again, others, whilst not requiring possession from time immemorial, held that undisturbed continuous possession could under certain conditions produce a title for the possessor, if the possession had lasted for some length of time. This latter opinion seems to be in accordance with practice. There is no doubt that, in international practice, a state has been considered to be the lawful owner even of those parts of its territory of which originally it took possession wrongfully, provided that the possessor has been in undisturbed possession for so long as to create the general conviction that the present condition of things is in conformity with international order. Prescription in international law was therefore defined in the previous edition of this work, as *the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order.*" (Emphasis in original)

In short, the view expressed in Oppenheim clearly favours the existence of the concept of acquisitive prescription, though it acknowledges that no general rule can be laid down as regards the length of time and other circumstances necessary to create such a title by prescription. "Everything depended upon the individual case." (Oppenheim, p. 706, para. 270). Malaysia will shortly review the activities of Britain and Malaysia against the conditions mentioned in Oppenheim. This review will show that, in so far as prescription should need to be claimed as an element in Malaysia's title (which is not admitted), the relevant conditions are fully satisfied.

What has just been said about the acknowledgement of the existence of the concept of acquisitive prescription is fully borne out by the references made by Indonesia in the same footnote to the works of Professor Brownlie and Dr Kohen. Thus, so far as Professor Brownlie is concerned, the denial of the existence of a doctrine of acquisitive prescription is essentially a

reason why Indonesia objects to the operation of prescription, and indeed of any other assessment of title based on the conduct of Britain and Malaysia, is that, quite simply, Indonesia has no facts that it can employ to counter the legal effects of the long administration by Britain and Malaysia of the islands in question.

5.64. Malaysia does not consider it necessary to enter into a discussion of whether its acts are of a nature to displace or to confirm an existing title. Such a discussion, at any rate as presented by Indonesia,¹¹⁸ assumes what it has to prove, namely, that Indonesia at a material time possessed title to the two islands. But all that matters for the purposes of the present case are the facts of prolonged British and Malaysian conduct and of the absence of any material Dutch or Indonesian conduct. Malaysia intends no disrespect to the Court in submitting that the distinctions drawn by the Chamber of the Court in the *Frontier Dispute* case between Burkina Faso and Mali¹¹⁹ do not assist in the present case. This is the more true when, in identifying which of the four hypotheses suggested by the Court is applicable to this case, Indonesia takes as its starting point the very conclusion that it has to reach, namely, that it is the holder of the legal title.

D. Conclusion

5.65. It remains only to recall the activities of Britain and the Netherlands, as well as of the Parties themselves, that show that the requirements for historical consolidation of title, no less than of prescription, (insofar as this needs to be invoked) mentioned in Oppenheim¹²⁰ have been

semantic objection, (he himself later admits that “the question ends as a matter of terminology”), since he quite clearly accepts that rights comparable to acquisitive prescription may be derived from acquiescence and estoppel. Indeed, he sets out a number of conditions for acquisitive prescription. These are that possession must be expressed *à titre de souverain*, must be peaceful and uninterrupted, must be public, and must persist. As will be seen, all these conditions are satisfied if the conduct of Britain and Malaysia needs be to viewed in terms of acquisitive prescription.

Finally, Indonesia refers to “the very comprehensive presentation of the whole problem” by Dr Kohen. The reference scarcely supports Indonesia’s attack upon the concept of acquisitive prescription in a manner that is of any value to Indonesia. Although Dr Kohen objectively describes the various points of view on the subject, the most important part of his presentation is the section on “*La Jurisprudence*” (pp. 60-68). This makes it clear that whatever words may be used to describe the process, international tribunals will accept the conduct of one State as capable of defeating the title of another (if ever it existed) by reference to the nature of the conduct, its duration, the attitude and behaviour of the other State concerned and the views of third States.

¹¹⁸ As is suggested by IC-M, vol.1, p.122, para. 7.5.

¹¹⁹ IC-M, vol.1, p.123, para. 7.8.

¹²⁰ See above, note 116 (iii).

satisfied. Britain, from before 1891, and Malaysia, since 1963, have exercised sovereignty over the islands continuously, peacefully and without disturbance. The Netherlands and, more recently Indonesia, have never exercised any degree of sovereignty over the islands. The period during which this sovereignty has been exercised has endured for the best part of a century even before the year 1969 which Indonesia claims is the “critical” date.

5.66. There is no doubt that amongst the States most closely concerned, particularly Spain and the United States, there has been a general conviction that the present condition of things is in conformity with international order. Indeed, as the Court will no doubt have remarked, during the period since the taking in 2000 by terrorists of a number of hostages from Sipadan, the episode has always been referred to in the world press as having occurred on the *Malaysian* island of Sipadan. The evidence of this recognition has been provided by Indonesia itself in a passage in which it mentions the many protests that it has felt obliged to issue in relation to press reports in France, Belgium, Thailand, Republic of Korea, Singapore, India and Saudi Arabia¹²¹ which have uniformly described Sipadan as Malaysian.

5.67. In short, the facts, in and of themselves, show conclusively that Sipadan and Ligitan belong to Malaysia.

¹²¹ IC-M, vol. 1, p.142, para.7.69 and vol. 2, Annex 35.

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 March 2001

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 March 2001

List of Annexes

<u>Annex</u>	<u>Description</u>	<u>Page</u>
1.	Extract from mail report dated 23 June 1879 from Resident Meijer of Southern and Eastern Division of Borneo to Governor-General of the Netherlands East Indies, reporting on a mission of the Assistant Resident at Koetei to the Eastern Coast of Borneo	1 - 2
2.	Extract from the log-book of HNLMS <i>Koetei</i> for 27 September 1910	3 - 5
3.	Extract from log-book of <i>Soembing</i> for 16 October 1891	6 - 8
4.	Letter from Vice-Admiral Umbgrove to Governor-General of the Netherlands East Indies, 4 January 1922	9 - 12
5.	Decree of the Governor-General Netherlands East Indies, dated 27 January 1916, on promulgation 1915 Agreement with Tawao report and Map in <i>Indisch Staatsblad</i> , 1916	13 - 14
6.	Documents relating to protective measures necessary because of raids on Si Amil and other Darvel Bay Islands in 1962	15 - 22
7.	Governor C.V Creagh patent appointing Panglima Undang	23 - 24
8.	Agreement between Borneo Divers and Sea Sports (Sabah) Sdn. Bhd., Pulau Sipadan Resort & Tours Sdn. Bhd. and Sipadan Dive Centre Sdn. Bhd. <u>and</u> Alukan bin Kaneh and Munting bin Pg Abu Sari	25 - 29

ANNEX 1

Extract from mail report dated 23 June 1879 from Resident Meijer of Southern and Eastern Division of Borneo to Governor-General of the Netherlands East Indies, reporting on a mission of the Assistant Resident at Koetei to the Eastern Coast of Borneo

Source: ARA, *Min. of Col., Mail Reports 1879*, Microfiche 585, No. 400, [sheet no. 2]

Extract of the text in Dutch:

"Uit verder ingewonnen informatie bleek, helaas, dat de kuststrook van Seboekoe tot aan den Batoe Tinagat geheel onbewoond is en zich slechts diep in het gebergte Daijaksche stammen ophouden. Ook de bewoners van Seboekoe zouden dat eiland verlaten en zich in de benoorden Gerbang gelegen kampong Sagangan gevestigd hebben, terwijl de bevolking van het eiland Nanoekan zich naar Boeloengan terug getrokken heeft.

Volgende dag verder reis naar Batoe Tinagat voortgezet met het doel om plaatselijk te onderzoeken of die streek werkelijk onbewoond was.... De 24e werd met een gewapende sloep de Tawaurivier opgevaren doch nergens enig spoor van een nederzetting ontdekt, zodat geen gevolg is kunnen worden gegeven aan het verlangen der Regering om verklaringen af te nemen van en Nederlandse vlaggen uit te reiken aan hoofden van nederzettingen of kampongs...."

Translation by Malaysia:

"From additional information gathered, it appeared unfortunately that the coastal area from Sebuku up to Batu Tinagat is totally uninhabited and that only deep into the mountain area there are Dayak tribes. Also the inhabitants of Sebuku have reportedly left this island and settled in the kampong Sagangan situated north of Gerbang, while the population of the island of Nunukan has withdrawn to Bulungan.

Next day we traveled on to Batu Tinagat in order to investigate on the spot whether this region was indeed uninhabited.... On the 24th we ascended the Tawau river by armed sloop but failed to find any trace of a settlement, so that no effect could be given to the wish of the Government to record declarations from the Chiefs of settlements or kampongs and to issue Dutch flags to them...."

ANNEX 2

Extract from the log-book of HNLMS *Koetei* for 27 September 1910

Source: ARA, *Min. of Navy*, 2.12.03, inv. No. 2336

Extract of text in Dutch reads:

“Houden peiling bestek van eilanden en omgeving St Lucia-baai. Stoomen op peiling tusschen Oost-Noenoekan en Sibetik door. Zijn te 10 u 30 dwars van Steenenhoek. Te 12 u van Deliberg. Houden lood aan S.B. gaande. Komen te 12u 45 ten anker voor 35 vm B.B. in 10 ¼ vm water bij grenslijn. Bepalen zeewacht.”

Translation provided by Malaysia:

“Determining the position of island and the surroundings of St. Lucia Bay. Steaming onwards on bearing between East Nunukan and Sebatik. At 10.30 hrs a.m. athwart *Steenenhoek*. At 12 hrs athwart *Deliberg*. Keeping the sounding-lead at starboard. At 12.45 p.m. anchoring with 35 fathom abeam at portside in 10 1/4 fathom water near the boundary line. Fixing the watches.

ANNEX 3

Extract from report on activities paddle steamer *Soembing*, dated 16 October 1891

Source: ARA, *Min. of Navy*, 2.12.01, inv. No. 2703.

Relevant part of the report in Dutch reads:

Folio 20 A: “De Sesajab stoomde men den 19e neder af en daarna door de Moeara Salindarin naar zee. Om de N. koersende bereikte men den volgenden dag de passage tusschen Oost-Noenoekan en Sebetik op en alzo de uiterste grens van ons gebied. Den 22^e werd de terugtocht aangenomen, den 24e de Koetei-rivier ingestoomd en den volgenden dag te *Samarinde* geankerd”.

Translation provided by Malaysia:

“On the 19th they steamed seawards down the *Sesajab* and subsequently through the *Moeara Salindarin*. The next day, sailing north about they reached the passage between East Nunukan and Sebatik and thus the outer limit of our territory. On the 22nd they started on the return-journey, on the 24th they steamed into the *Koetei* river and the next day they anchored at *Samarinda*”.

in omliggend van de Koetoe rivier: en loodde den 19
de baai van de Koetoe rivier. Waar men door de
dikke lucht geen verre zichten kon krijgen, maar hier
verre en door volgenden morgen met beter zien
de oant aangehoopen in de rivier opgestroomd.

Door het zware afluopen de bij ontkomend men
moeijelijkheid bij het maken van de schepen, kon
men bluizen in de rivier.

Op den 26. van den 22. maende werd men in
de kolonies de te Boetongari.

Den 26. maende de reis voortgezet en den 27.
de Desajab bereikt.

De Desajab stroomde men den 19. maende af
en daerde door de Boeiea Salindariv naar de
Onder de N. toerende bereikte men den 20. maende
den de provincie tuaftom boet toerokare en de
te en altes de interste grans van ons gebied.

Den 25. maende de tuangtoekt aangewomen, den
27. de Koetoe rivier ingestroomd en den volgenden dag
te Samarinde gearbeid.

De aanwelling van de Koetoe rivier
vervolgde met den 28. de reis en anderde den
30. bij Kakka Wassa, alwaar men ook den 31.
verbleef.

Spaektoekrefers

26. 27. Opedek, onder bevel van den Kapitein
te den H. vander-Wee, was gestationeerd te
Fandjang Priok

ANNEX 4

**Letter from Vice-Admiral Umbgrove to Governor-General Netherlands East Indies,
dated 4 January 1922**

Source: ARA, *Min. of Col.*, 2.10.36.04, inv. No. 2495.

Translation provided by Malaysia:

Copy:

Department of Navy
in the Netherlands East Indies

Weltevreden, 4 January 1922

To H.E. the Governor-General
of the Netherlands East Indies

As a follow-up to my letters dated 8 December N. 12329/VIII, 1 December No. 12096/VIII and 26 November No. 11934/VIII, I have the honour respectfully to send you an extract from the report of the Commander of HMS *Lynx* with the account of the controller of Bulungan belonging to it.

When now considering this question, I have the impression that the wording of the second cable dated 15 November of the acting Resident at Bandjermasin in which reference is made among other things to unreliable objectives, is causing the question to look somewhat gloomy. Nevertheless, I learn that great importance should be attached to the visit of HMS *Lynx* with the aeroplane to Tarakan and surroundings as a demonstration of authority. After taking note of these reports I take the view that there is every reason to act upon this incident as I thought I had indicated in my letter dated 8 December No. 12329/VIII.

I may be allowed to raise in this context one other matter which according to me deserves to be addressed. In the Convention concluded between the British and Dutch Governments (see Decree of the Governor-General, published in *Staatsblad* 1916 No. 145) concerning the boundary line between the Netherlands and the British protectorate in Borneo no boundary line is set forth which separates the territorial seas of the Netherlands and the protectorate in question.

When searching for Bajau fleets near Tarakan it was naturally necessary for the Commander of HMS *Lynx* to be familiar with the course of the boundary. At that time I decided that he should consider a prolongation of the land boundary to be the northern boundary of the territorial sea of Sebatik.

Yet it occurs to me that this matter which shows some similarity to the question how the course of the boundary should be in the Wielingen, should be settled in definite terms. Also in cases of maintenance of neutrality an unsettled situation cannot be accepted with a view of the great interest of St Lucia bay (petroleum fields).

Hence, I suggest that your Excellency should propose for government at the highest level to take steps to supplement the Convention in question to that effect.

The Vice Admiral
Commander of the Naval Forces and Head of the
Department of the Navy in the Netherlands East
Indies
(signed) W.J.G. Umbgrove
for a similar copy
the government's secretary (signed).

Departement der Marine
in Nederlandsch Indie.

-----0-----

N^o 106/VIII

Meltevreden, den 4den Januari 1922.-

Ik heb de¹⁾er U²⁾wer Excellentie ten verfolge op mijne
brieven dd. 8 December No. 12329/VIII, 1 December No. 12096/VIII
en 26 November No. 11934/VIII hierbij beleefd aan te bieden
extract uit het schrijven van den Commandant van Hr. Ms.
"Lijnx" met bijbehorend relaas opgemaakt door den controleur
van Boelongan.

airrapp.
11/21;
airrapp.
47/21
airrapp.
1/21
airrapp.
5/21.

Deze aangelegenheid thans beschou^{en}de krijg ik den
indruk dat de be⁴⁾woordingen van het tweede telegram dd. 15
November j.l., van den fd. Resident te Bandjermasin waarin
o. m. gestoken worden van onbetrouwbare bedoelingen, de zaak
wel wat donker hebben weergegeven. Toch vermeen ik dat aan het
bezoek van Hr. Ms. "Lijnx" met het vliegtuig aan Tarakan en
omgeving als gezagsdemonstratie groote waarde moet worden toe-
gekend. Het wil mij na kennismeming dezer rapporten voorkomen
dat er alle aanleiding bestaat ter zake van het gebeurde te
handelen als ik in mijn brief dd. 8 December j.l. No. 12329/VIII
in overweging meende te moeten geven.

Het zij mij vergund nog eene aangelegenheid hierby
ter sprake te brengen welke m. i. voorziening behoeft. In het
tractaat tusschen de Britsche en de Nederlandsche Regeering
gesloten (zie Besluit van den Gouverneur Generaal, vervat in

Staatsblad

Aan

Mijne Excellentie den Gouverneur Generaal
van Nederlandsch Indie.-

Staatsblad 1916 No. 145) betreffende de grenslijn tusschen Nederland en het Britsch protectoraat op Borneo is niet vermeld de grenslijn die de terr. zee van Nederland en bedoeld protectoraat scheidt.

Bij het zoeken naar de ^{Radjan}radjavloten nabij Tarakan was het uiteraard noodig dat de Commandant van Hr. Ms. "Lijnx" bekend was met het beloop dier grens. Ik heb toen bepaald dat hij de verlengde landgrens als Noordgrens de terr. zee van Sibetik had te beschouwen.

Het wil mij echter voorkomen dat deze aangelegenheid, welke eenige overeenkomst vertoont met de kwestie hoe de terr. grens in de Wielingen behoort te loopen, definitief moet worden geregeld. Ook in gevallen van neutr. handhaving kan een ongeregelde toestand met het oog op het groote belang der St. Lucia baai (petroleum terreinen) niet worden aanvaard.

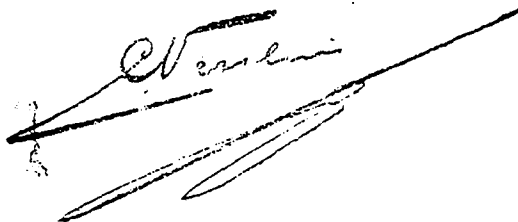
Ik woge Uwer Excellentie mitsdien in overweging geven het opperbestuur voor te stellen stappen te doen om het bewuste tractaat in dien zin te doen aanvullen.-

De Vice-Admiraal,
Commandant der Zeemacht en Hoofd van het Departement der Marine in Nederlandsch Indie.

(w.g) W. J. G. Umbogrove.

Voor eensluidend afschrift:

De Gouvernements Secretaris,



ANNEX 5

Decree of the Governor-General of the Netherlands East Indies, dated 27 January 1916

Source: *Official Gazette Netherlands East Indies 1916*, No. 145.

Translation provided by Malaysia:

“OFFICIAL GAZETTE OF THE NETHERLANDS EAST INDIES

1916 No. 145. TREATIES. BOUNDARIES. BORNEO. Publication in the Official Gazette of the Protocol signed in London on 28 September 1915, with accompanying map, on the demarcation of the boundary between the Netherlands territory in the island of Borneo and British North-Borneo.

Decree of the Governor-General of the Netherlands East Indies of 27 January 1916 No. 28.

Having read the official letter of the Minister of Colonies of 13 November 1915, Dpt. A3, No. 17/2279 and appendix, it appears that by Protocol, signed at London on 28 September 1915, on behalf of the mutual Governments, approval has been given to the official report, with accompanying map, of the Anglo-Dutch commission, based on Article V of the Convention mentioned below charged with the demarcation of the boundary line, as far as necessary, in the area referred to in the Convention concluded in London on 20 June 1891 between the Netherlands and the United Kingdom of Great Britain and Ireland for the determination of the boundaries between the Netherlands possessions and the states in that island which are under British protection (Official Gazette of the Netherlands East Indies 1892 No.211)

It has been approved and it is understood that:

The above shall be taken into account and that the Protocol, with the accompanying map, as referred to above, shall be made public by publishing this Decree with the annexed copies of the above-mentioned documents in the Official Gazette of the Netherlands East Indies.

Copy etc.

On the order of the Governor-General of the Netherlands East Indies
The General Secretary,

HULSHOFF POL.

Issued 15 February 1916.
The General Secretary
HULSHOFF POL”

STAATSBLAD VAN NEDERLANDSCH-INDIË.

1916 No. 145. TRACTATEN. GRENZEN. BORNEO. Plaatsing in het Staatsblad van het te Londen op 28 September 1915 ondertekend protocol met bijbehorende kaart, inzake de uitzetting van de grens tusschen het Nederlandsch gebied op het eiland Borneo en Britsch Noord-Borneo.

Besluit van den Gouverneur-Generaal van Nederlandsch-Indië van 27 Januari 1916 N° 28.

Gelezen de missive van den Minister van Koloniën van 13 November 1915, Afd. A^o. N° 17/2279 en bijlage, waaruit blijkt dat bij protocol, ondertekend te Londen den 28^{sten} September 1915, namens de wederzijdsche Regeeringen is goedgekeurd het proces-verbaal, met bijbehorende kaart, van de Nederlandsch-Britsche commissie, ingevolge artikel V van het na te noemen tractaat aangewezen tot uitzetting op het terrein v.z.n. van de grenslijn bedoeld in de op 20 Juni 1891 te Londen tusschen Nederland en het Vereenigd Koninkrijk Groot-Brittannië en Ierland gesloten overeenkomst tot vaststelling der grenzen tusschen de Nederlandsche bezittingen op het eiland Borneo en de staten op dat eiland die onder Britsch protectoraat staan (Indisch Staatsblad 1892 N° 211);

Is goedgevonden en verstaan:

Van het vorenstaande aantekening te houden en te gelasten dat het protocol, met bijbehorende kaart, hierboven bedoeld, zullen worden openbaar gemaakt door plaatsing van dit besluit met de daaraan gehechte afdrukken van voormelde stukken in het Staatsblad van Nederlandsch-Indië.

Afschrift enz.

Ter ordonnantie van den Gouverneur-Generaal van Nederlandsch-Indië:

De Algemeene Secretaris,
HULSHOFF POL.

Uitgegeven den vijftienden Februari 1916.

De Algemeene Secretaris,
HULSHOFF POL.

ANNEX 6



Certified correct translation
of the original document:

A. J. S. 7/2/62

NOR AZMAH SHEHIDAN
Hon. Asst. Secretary
Malaysian Translators Association
c/o Dewan Bahasa & Pustaka
P. O. Box 10803
50926 Kuala Lumpur.

O.T. Haji Moham'mad Noor Bin
Osman,
Pulau Danawan,
Semporna.

26 December 1962

The Hon. District Officer,
Semporna District Office.

Appeal for Assistance

Dear Sir,

With full respect I am glad to present this letter which please consider as words coming from our own hearts and mouths.

We hereby appeal for your consideration over the hardship we face in confronting pirates in our vicinity. We sincerely hope you would grant our appeal.

Initially we fervently request for a patrol service daily between 3.30 p.m. and 7.00 p.m. around Siamil-Danawan while considering other kinds of assistance by the administration. We have managed to gather 1120 people at a meeting held at 10.00 a.m. on the 25 December 1962 which proposed we appeal for your assistance immediately.

I, Haji Moham'mad Noor have made a survey and discovered that 90% of the villagers live in fear and are considering to move away, but I have advised them not to do so and that I would strongly appeal for assistance from the government, with high hopes that it would be granted.

The masses have given me their confidence provided they are offered the above assistance.

Respectfully I end this letter and pray for a favourable outcome.

Yours sincerely,

(O.T. MOHAM'MAD NOOR)

O.T.Haji' Moham'mad Noor Bin Osman,
Pulau Danawan,
Semporna.
26th December 1962.

Teng Berhormat,
Tuan D.O. District Office,
Semporna.

MEMOHON KAN BENTUAN.

Tuan.

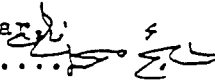
Dengan hormat-nya di-ma'alumkan kepada tuan. Behua surat ini ia-lah sa-bagai ganti mulut kami berkata-kata di-hadapan tuan mementah pertimbangan di-atas ka-susahan kami fasal perompak kerana sudah ka-jadian di-siamil ini-lah permenta'an kami di-harap supaya di-benarkan.

Permenta'an kami di-waktu singkat ini saban waktu jam pukul 3.30.petang hingga 7.00.malam petrol akan di-adakan di-siamil danawan sebelum perentah memberi bentuen yang lain dari pada ini, dan yang lain-lain. dan ini-lah ka-mettingan kami perlu di-mentah di-pertimbangkan dengan chapat-nya,kerana kami sudah meeting pada 25/12/62. jam pukul 10.00.pagi yang hadzil 1120rang pada waktu meeting.

Saya Haji Moham'mad Noor sudah fikir dan siasat 90% yang takut mahu berpenda, saya chakap jikalau kamu turut pada saya jangan berpenda. saya sokong mentah ~~xxxxxx~~ bentuan kepada perentah...supaya di-benarkan permenta'an kita oleh perentah.

Suara ra'yat terus mengaku pada pembichara'an saya asal di-adakan ka-perti permenta'an kami yang tersebut di-atas.

Sakian-lah dengan hormat-nya sa-moga berhasil.

Yang Benar 
.....
O.T.Moham'mad Noor.

SECRET

<CREST >

Resident Tawau

OFFICE OF District Officer
Semporna

COLONY OF NORTH BORNEO

Date : 27/12/62, 19_____

Ref 10/1

Piracy at Si-Amil

I enclose a letter from O.T. Haji Md. Noor indicating that the Kg. Dinawan people all wish to leave the Island.

A precipitate move could be disastrous at this stage, both for morale and because the island is well set up with a good school, relatively good income from bearing coconuts, and near-ness to good fishing grounds. Raids would tend to increase once the pirates realised they were driving the people from their homes.

I would be grateful if you will inform me as to what extra security measures will be taken to protect this Island so that I can re-assure the O.T and the people. May I suggest something on the following lines :-

1. The continual use of Si-Amil as a patrolling base for security forces. One section "off" (i.e sentry duty on Dinawan and Si-Amil), the other section on sea patrol, or one section split in this manner.
2. The training of a Si-Amil Home Guard, equipped with automatic weapons. Dinawan people should be allowed to participate in the training, but I recommend that arms be stored on Si-Amil.
3. The provision of an alarm on Dinawan to alert Si-Amil in the event of a silent raid on Dinawan. A boat for ferrying Home Guard would also be necessary; perhaps the Company could provide this.
4. Improved radio communications Si-Amil/Semporna. The present system of obtaining Si-Amil through Tawau is very unsatisfactory. A Si-Amil Bohey-Dulong link is also vital.

These measures would have the following advantages :-

1. The sea patrols would act as an extension of Bohey-Dulong. Good radio communications between Bohey-Dulong and Si-Amil and patrolling craft, would make Bohey-Dulong more effective. A point not to be overlooked is that there are good harbour facilities at Si-Amil, with ship and workshop.
2. The shore guard (security forces) could be withdrawn once the Home Guard is trained and equipped.

< Signed >
District Officer
Semporna

SECRET

OFFICE OF District OfficerSemporna.

Resident Tawau.

COLONY OF NORTH BORNEO

Date 17/12/60, 1960F. No. 10/1Piracy at Si-Amil

I enclose a letter from U. R. Haji Md. Noor indicating that the Kr. Dinawan people all wish to leave the Island.

Appropriate news could be disseminated at this stage, both for morale and because the island is rich with a good school, relatively good income from banking accounts, and proximity to good fishing grounds. Raids would tend to increase, since the pirates realised they were driving the people from their homes.

I would be grateful if you will inform me as to what extra security measures will be taken to protect this Island so that I can re-assure the O.F. and the people. I suggest something on the following lines:-

1. The continued use of Si-Amil as a patrolling base for security forces. One section "off" (i.e. sentry duty on Dinawan and Si-Amil), the other section on sea patrol, or one section split in this manner.
2. The training of a Si-Amil Home Guard, equipped with automatic weapons. Dinawan people should be allowed to participate in the training, but I recommend that arms be stored on Si-Amil.
3. The provision of an alarm on Dinawan to alert Si-Amil in the event of a silent raid on Dinawan. Alert for ferrying Home Guard would also be necessary; perhaps the Company could provide this.
4. Improved radio communications Si-Amil / Semporna. The present system of obtaining Si-Amil through Tawau is very unsatisfactory. A Si-Amil / Bchey-Dulong link is also vital.

These measures would have the following advantages:-

1. The sea patrols would act as an extension of Bchey-Dulong. Good radio communications between Bchey-Dulong and Si-Amil and patrolling craft, would make Bchey-Dulong more effective. A point not to be overlooked is that there are good harbour facilities at Si-Amil, with ship and workshop.
2. The shore guard (security forces) could be withdrawn once the Home Guard is trained and equipped.

[Signature]
District Officer

Semporna.

SECRET

RESIDENTS OFFICE TAWAU	
RECEIVED 21/1/63	
SEEN	ANSWERED

Mr. [unclear] with Mr. Saito

S.200.02.4

4th January 63.

District Officer,
Semporna.

Piracy at Si-Amil
Your DOS, Sec. 10/1 dated
27th December 1962 refers

Thank you for your letter; I am in full sympathy with the people of Dinawan and you may tell O.T. Haji Mohammed Noor of the following recommendations made by the Divisional Commander to the Commissioner of Police:-

Si-Amil: The fishing company will build two strong points cum block houses one on each side of the wharf. They have already been armed with 12 rifles and it is recommended that they should be issued with a further two stem guns. In addition, there are seven privately owned shotguns. The present Police post, comprising either Police or troops will remain at Si-Amil until the Home Guard is trained. Arrangements are in hand to improve radio communication.

Dinawan: It has been recommended that a section of nine Special Constables be formed armed with rifles and trained accordingly. A system of mutual protection with Si-Amil possibly by using signal pistol will be arranged. In addition I have asked the Commissioner of Police to examine further the provision of "press button" alarms. If these are obtained, I would allocate one to Dinawan.

2. A little over a week ago I had asked for a progress report on the East Coast security measures which have been approved by Government, in particular asking when sea transport would be made available. I have suggested to the Commissioner that if there is going to be delay in the construction or purchase of patrol boats to the specifications we require, then we will have to charter the most suitable local craft on a permanent basis and pay the cost.

RESIDENT, TAWAU.

E/s

c.c.: Divisional Commander, Tawau.
Files - RTC, 240.02.02
RTC, 240.02.01

THE
Divisional Police Headquarters,
Tawau.

PDCT/CR.(1)/63/14.

4th January,

63.

CONFIDENTIAL

The Commissioner of Police, (2)
Jesselton.

RESIDENTS' OFFICE TAWAU	
RECEIVED 5/1/63	
SEEN	ANSWERED

PULAU SIAMIL - GANG ROBBERY WITH MURDER

On 24th December, 1962 at 0020 hours a report was lodged at SEMPORNA Police Station by an employee of TAIYO INDUSTRIES on Pulau SIAMIL to the effect that the island had been robbed by armed raiders on 23rd December, 1962. This employee had arrived on a fishing vessel from the island, and the O.C.P.D., plus a police and army party, immediately proceeded to the scene with this vessel, arriving on the island at 0545 hours.

2. It was the height of misfortune, or the depths rather, that at 0800 hours on 23rd December an army patrol on a hired barter trade boat left SEMPORNA for SIAMIL, but due to engine trouble they had to turn back, and did not reach the island until 2½ hours after the pirates had left.

3. Investigations reveal that the party of armed raiders landed on the island at a point below the hospital at 1615 hours on 23rd December. They landed unobserved, and were able to infiltrate the installation area without encountering any resistance. The 3 rifles with which the camp were armed were, in spite of police advice to the contrary, under lock and key and thus not readily to hand. The pirates fired shots in the air, and all the inhabitants of the camp either ran off to the jungle or took cover under floors etc. A clerk in the office sounded the siren before fleeing, and the wireless operator tried to raise his office in Tawau without success. Exactly what happened next is not clear, but it would appear that a 57 year-old Japanese carpenter, YUKICHI IKSHARA, was shot as he tried to hide under the messing hut. He was killed instantly with gunshot wounds in his left lower scapula region and in the back of his skull. A Japanese clerk, 33 year-old HUMIHIRO YAMAGAMI, ran into one of the kongsi houses past the messing hut where he slammed the door and tried to hold it from the inside. The raiders fired through the door, shooting YAMAGAMI 3 times through the back. They then entered the kongsi house, and brutally mutilated YAMAGAMI's body - he must have been killed instantly by the gunshot wounds - with their parangs. They remained in the area for about 2½ hours, plundering the offices and kongsi houses of everything of value. The loot was made up as follows :-

Company goods and cash	-	11,682.00
Japanese workmen's personal goods and cash	-	6,850.40
Native workmen's personal goods and cash	-	2,369.50

21 Total: \$ 20,901.90

CONFIDENTIAL

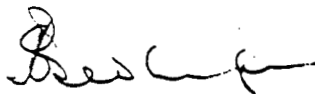
2.

4. On their way out of the island, the raiders stopped three Bajau fishing boats who were on their way home to Pulau DIHAWAN, SIAMIL's "twin". All three boats were powered with British Anzani 4 h.p. outboard engines, which were all taken by the raiders. One of the fishing boats was also taken away. The occupants of the fishing boats were able to give a fair description of the pirates and their vessel. The latter was a 20-foot kumpit-type boat, painted black and blue and powered with what looked like a 40 h.p. outboard engine. It had no super-structure nor the usual attap roofing. The raiders were around 15 in number, and spoke in the Filipino Suluk dialect (Bajau Laut). They were all described as being dressed in an olive green uniform, without insignia of any kind. After taking the outboard engines and one of the three lipa-lipa, the raiders left in the direction of the Philippines. Their speed was said to be "not fast".

5. This question of "uniformed" raiders has cropped up over and over again, and my interpretation is that it is quite probable that the soi-disant "Mayor's Political Police" (see the report on the recent liaison visit to BATU-BATU) are involved. In view of this recent upsurge of armed raids, I feel that another liaison visit to the Philippines is most necessary to try and stimulate some form of activity, and unless you order to the contrary I will make arrangements to go in the immediate future.

6. Apart from police action from SEMPORNA as detailed above, PL SARAHAN and H.M.S. BARROSA left for the area from TAWAU immediately the report was received, and the latter, with her high speed, was able to patrol into the SIBUTU/SITANGKAI area very quickly. A number of suspicious contacts were made, but they were unfortunately unable to make their escape through the coral reefs into SIBUTU Island.

7. The camp at SIAMIL is now armed with 12 rifles and 7 shotguns, strongpoints are being built and a section of Police Mobile Force is engaged in training Japanese in the use of their firearms. Chrystals to bring the camp wireless set onto the police network have been ordered from SINGAPORE.



(S. S. Bedlington)
Divisional Commander, Tawau.

c.c. The Resident, Tawau,
The O.C.P.D., Semporna. Your I.P. is returned herewith.

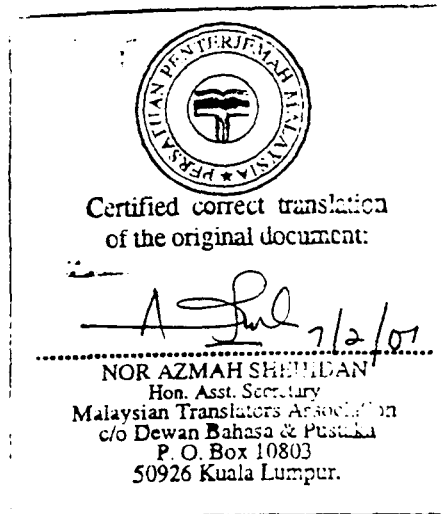
ANNEX 7

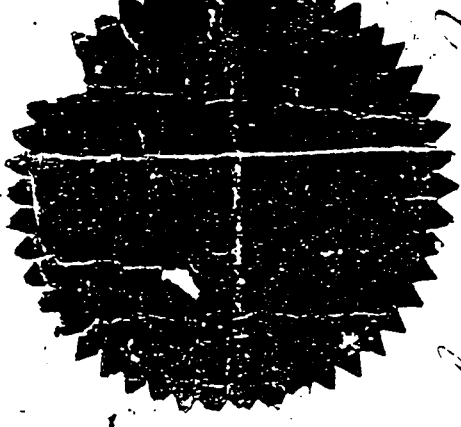
That we, His Excellency C.V. Creagh, the Governor and highest official of the Colony of Sabak, hereby proclaim with the powers conferred on me by the officers of the British North Borneo Company, that we have bestowed the title of 'chief' to our friend named Udang who lives in Semporna for his admirable assistance to the government, and in this respect we confirm that he has been honoured with this title.

Written based on the Day of June in the year

(signed)

(C.V. Creagh)





کمیٹی کے لیے ایک رپورٹ تیار کرنے کے لیے ایک کمیٹی تشکیل دی گئی ہے۔
اس کمیٹی کے رکنوں میں ایک سربراہ اور دو اراکین شامل ہیں۔
ان اراکین میں سے ایک ایک سربراہ اور ایک اراکین ہیں۔
ان اراکین میں سے ایک ایک سربراہ اور ایک اراکین ہیں۔
ان اراکین میں سے ایک ایک سربراہ اور ایک اراکین ہیں۔

Ultra
Governing

تقریباً ایک سال کے اندر ایک رپورٹ تیار کرنے کی ضرورت ہے۔

ANNEX 8

DATED THIS DAY OF 1993

BETWEEN

BORNEO DIVERS AND SEA SPORTS (SABAH) SDN. BHD.
PULAU SIPADAN RESORT & TOURS SDN. BHD.
and
SIPADAN DIVE CENTRE SDN. BHD.

AND

ALUKAN BIN KANEH
and
MUNTING BIN PG ABU SARI

SALE & PURCHASE AGREEMENT

MESSRS LEE & THONG
ADVOCATES & SOLICITORS
COMMISSIONERS FOR OATHS
NOTARY PUBLIC
76, JALAN GAYA (2ND FLOOR)
88000 KOTA KINABALU SABAH MALAYSIA

P. O. BOX NO. 11037
88811 KOTA KINABALU SABAH MALAYSIA

TELEPHONE NOS.: 53238 & 225127
FAX : 233634

SPLHF/SALEPUR1.EGG/e.

SALE AND PURCHASE AGREEMENT

BETWEEN BORNEO DIVERS AND SEA SPORTS (SABAH) SDN. BHD. of Rooms 401-409, 4th Floor, Wisma Sabah, Kota Kinabalu, Sabah, PULAU SIPADAN RESORT & TOURS SDN. BHD. of 1st Floor, No. 484, Bandar Sabindo, Peti Surat 61120, 91021 Tawau, Sabah And SIPADAN DIVE CENTRE SDN. BHD. of A1026, 10th Floor, Wisma Merdeka, Jalan Razak, 88000 Kota Kinabalu, Sabah Malaysia (hereinafter collectively referred to as the 'Purchasers') of one part

AND

ALUKAN BIN KANEH and MUNTING BIN PG ABU SARI both of Semporna, Sabah, Malaysia (hereinafter referred to as the 'Vendors' which expression shall where the context so admits include their successors in title and assigns) of the other part.

WHEREAS the Purchasers are companies incorporated in Malaysia and having their business as dive and resort operators on Pulau Sipadan.

WHEREAS the Vendors are the acknowledged traditional turtle egg collectors and having possessed the right to collect turtle eggs on Pulau Sipadan and the right to dispose and sell the same.

AND WHEREAS the Purchasers are desirous of purchasing all the turtle eggs laid on Pulau Sipadan and the Vendors are desirous of selling the same to the Purchasers upon the terms and conditions hereinafter appearing.

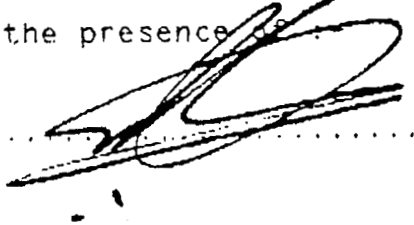
NOW THIS AGREEMENT WITNESSETH as follows :-


1. In consideration of a yearly sum of Ringgit Malaysia Fifty thousand (RM50,000.00) only, the Vendors shall sell and the Purchasers shall purchase all the turtle eggs laid on Pulau Sipadan.
2. Upon signing of this Agreement the Purchasers shall pay to the Vendors the sum of Ringgit Malaysia Fifty Thousand (RM50,000.00) only, the receipt whereof the Vendors hereby acknowledge.

3. This Agreement shall remain in force for 4 years from the date hereof and shall not be terminated by the Vendors save where the Purchasers fail to pay the said Ringgit Malaysia Fifty Thousand (RM50,000.00) on the due date and upon expiry of a written notice of demand of not less than 21 days.
4. The next payment and subsequent payments of the said Ringgit Malaysia Fifty Thousand (RM50,000.00) shall be paid on or before the expiry of 12 calendar months from the date hereof.
5. Upon the signing of this Agreement the Vendors shall cease immediately all collection of turtle eggs on Pulau Sipadan. All eggs already collected shall be removed immediately out of Pulau Sipadan.
6. During the currency of this Agreement the Vendors, their families, employees or servants and assigns shall not collect, remove, dispose or in any manner disturb any nest or eggs laid on Pulau Sipadan.
7. The Purchasers and Vendors both covenant that they shall endeavour to ensure that all turtle eggs laid shall remain in situ for the natural hatching and there shall be no removal of the same save in accordance with instructions from the Department of Wildlife.
8. The Purchasers and Vendors shall assist the Department of Wildlife to ensure the turtle eggs nest are not disturbed.
9. In the event of a dispute arising out of this Agreement, it shall be referred to the Director of Wildlife Department for arbitration whose decision on the matter shall be final.

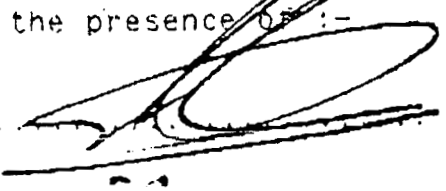
IN WITNESS WHEREOF the Parties have hereunto set their hands and seals the day and year first above written.

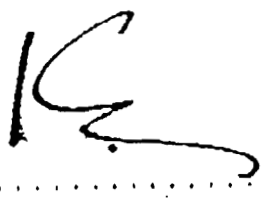
Signed by for and on behalf)
of the said BORNEO DIVERS AND)
SEA SPORTS (SABAH) SDN. BHD.)
in the presence of :-)


.....

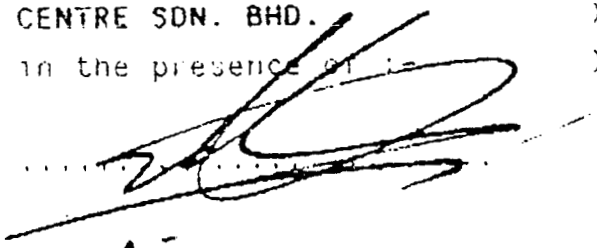

.....

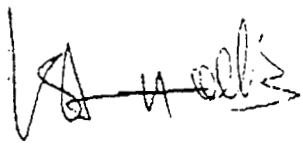
Signed for and on behalf)
of the said PULAU SIPADAN)
RESORT & TOURS SDN. BHD.)
in the presence of :-)


.....

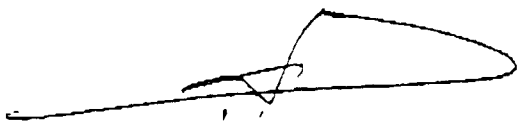

.....

Signed for and on behalf)
of the said SIPADAN DIVE)
CENTRE SDN. BHD.)
in the presence of :-)


.....


.....

SIGNED by the said)
 ABDUL RAUF BIN MAHAJUD)
 (NRIC. NO. H0434507))
 for and on behalf of)
 ALUKAN BIN KANEH)
 in the presence of :-)





 ABDUL RAUF BIN MAHAJUD

(NRIC. NO. H0434507)

PA - Mahkamah Anak Negeri

Semporna Ref. No. 12/93

.....

SIGNED by the said)
 MUNTING BIN PG ABU SARI)
 in the presence of :-)




.....