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Mardi 4 juin 2002 à 10 heures

Tuesday 4 June 2002 at 10 a.m.

Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte et je donne la parole à M. Rodman R. Bundy au nom de la République d'Indonésie.

M. BUNDY : Merci, Monsieur le président.

Monsieur le président, Madame et Messieurs de la Cour, nous avons distribué quelques documents supplémentaires pour votre dossier, qui vous seront présentés après la plaidoirie de l'Indonésie ce matin, et vous trouverez sous le dernier onglet du dossier un résumé des exposés de l'Indonésie.

65. Hier après-midi, j'ai expliqué que rien n'étayait l'affirmation de la Malaisie selon laquelle le Sultan de Sulu ou l'Espagne auraient eu la souveraineté sur Sipadan et Ligitan. J'ai aussi montré que les Etats-Unis n'ont revendiqué la souveraineté sur Ligitan et Sipadan ni en 1903, ni par la suite. Cela étant, comme le montre la correspondance, les Etats-Unis reconnaissaient qu'il était important, et même nécessaire, de conclure, à un moment donné, un traité de frontière définitif avec la Grande-Bretagne. C'est de cela que je vais traiter ce matin.

d) ***L'échange de notes de 1907 n'est d'aucun secours pour la Malaisie en ce qui concerne la question de la souveraineté***

66. En 1907, les Etats-Unis et la Grande-Bretagne conclurent un arrangement temporaire sur la question. La Grande-Bretagne savait qu'elle ne détenait pas de titre sur les îles situées à plus de 9 milles de la côte en vertu de la concession faite à Dent et Overbeck en 1878 et du protocole de 1885. Toutefois, la BNBC administrait certaines îles situées à plus de 9 milles de la côte, dont Ligitan et Sipadan ne faisaient cependant pas partie. La BNBC voulait poursuivre cette administration, notamment pour mettre fin à la piraterie dans la région.

67. L'arrangement conclu avec les Etats-Unis a été consacré par un échange de notes entre les deux gouvernements, plus précisément entre l'ambassadeur de Grande-Bretagne à Washington et le secrétaire d'Etat par intérim des Etats-Unis, qui est reproduit sous l'onglet n° 47 de votre dossier (MI, annexes 113 et 114). Il prévoit que la BNBC pourra continuer comme auparavant à administrer certaines îles situées à plus de 9 milles de la côte à l'ouest d'une ligne tracée antérieurement par sir H. M. Durand, jusqu'à ce qu'un traité de frontière soit conclu entre les

deux parties. Néanmoins, le deuxième paragraphe de l'échange de notes indique très clairement qu'aucun droit territorial n'est associé à cette administration.

68. La carte jointe à l'échange de notes est projetée à l'écran. La ligne rouge — difficile à voir : c'est la ligne qui descend ici — est celle qui résulte de la proposition de Durand. Mais cette ligne n'a rien à voir avec les questions de souveraineté. La Malaisie soutient que, par l'échange de notes, la Grande-Bretagne a reconnu la souveraineté des Etats-Unis sur les îles situées à plus de 3 lieues marines — 9 milles — à l'ouest de cette ligne rouge (MM, par. 5.39). Cela est faux. L'échange de notes de 1907 est sans conséquence au regard de la souveraineté. Et même, le cinquième paragraphe de l'arrangement reconnaît expressément qu'un traité de frontière doit encore être conclu entre les Etats-Unis et la Grande-Bretagne, tandis que le deuxième paragraphe dispose qu'une éventuelle administration n'emportera aucun droit territorial.

69. La Malaisie affirme également que l'échange de notes de 1907 montre que les îles en question, Sipadan et Ligitan, étaient administrées par la Grande-Bretagne (CMM, par. 3.24). Cela est également faux. L'échange de notes ne cite expressément aucune des îles situées à plus de 9 milles de la côte que la BNBC administrait alors. Et, comme M. Pellet l'expliquera tout à l'heure, la BNBC n'administrait pas Sipadan et Ligitan en 1907 — et certainement pas en tant que souverain. La Malaisie, en s'appuyant sur l'échange de notes de 1907 comme s'il «créait» une administration britannique sur les îles en litige alors que cette administration n'existait pas, ne fait que formuler une pétition de principe.

70. Qui plus est, des mémorandums internes ultérieurs et la correspondance diplomatique échangée par la suite entre les Etats-Unis et la Grande-Bretagne, qui aboutit à la convention de 1930, montrent clairement que les îles qui faisaient effectivement l'objet de l'échange de notes de 1907 étaient les îles Turtle et les îles Mangsee, situées loin au nord.

71. En mai 1927, par exemple, M. Frank Kellogg, du département d'Etat, envoie une lettre au président des Etats-Unis qui éclaire le point de vue des Etats-Unis sur la portée de l'échange de notes de 1907 (RI, annexe 13). La partie pertinente de la lettre adressée au président par M. Kellog se lit comme suit :

> «Un accord provisoire passé en 1907 entre les Etats-Unis d'Amérique et la Grande-Bretagne prévoyait que l'administration de certaines îles *(connues sous le nom de groupe des îles Turtle*) situées près de la côte nord du Nord-Bornéo britannique

> serait laissée à la BNBC, jusqu'à ce que les Gouvernements aient délimité, par traité, les frontières entre leurs territoires respectifs ... Cet accord a été conclu parce qu'il était alors impossible de parvenir à un accord définitif concernant la frontière entre les possessions des Etats-Unis d'Amérique et de la Grande-Bretagne dans cette région, et également parce que le Gouvernement des Philippines n'était pas en mesure d'assumer l'administration des îles en question, même si les parties avaient pu s'entendre sur les îles qui seraient administrées comme relevant du groupe des Philippines.»

72. Comme il ressort clairement de cette lettre, les îles Turtle sont les îles situées à plus de 9 milles de la côte temporairement administrées par la BNBC. Ce sont elles qui étaient l'objet de l'échange de notes de 1907. Pourtant, comme on le voit sur la carte, les îles Turtle se trouvent bien au nord de Ligitan et de Sipadan, et même au nord de l'île de Sibutu dont, vous vous en souviendrez, le secrétaire d'Etat des Etats-Unis avait dit en octobre 1903 qu'elle constituait la limite méridionale des possessions acquises de l'Espagne par les Etats-Unis. Les Etats-Unis n'avaient aucune prétention sur des îles situées au sud de Sibutu comme Ligitan et Sipadan.

73. Il est intéressant de constater que le Gouvernement britannique adoptait la même position. Dans le cadre de la correspondance échangée à l'époque de la signature de la convention de 1930, l'ambassadeur de Grande-Bretagne à Washington écrit ce qui suit au secrétaire d'Etat américain, Henry Stimson (RI, annexe 20) :

> «[l]a convention conclue entre le président des Etats-Unis d'Amérique et Sa Majesté britannique en vue de délimiter la frontière entre l'archipel des Philippines, d'une part, et l'Etat de Bornéo du Nord [britannique] sous mandat britannique, d'autre part, a formellement reconnu la souveraineté des Etats-Unis d'Amérique sur certaines îles qui sont, depuis de nombreuses années, administrées par la «British North Borneo Company». *Ces îles, qui ont fait l'objet de l'arrangement conclu par un échange de notes entre le gouvernement de Sa Majesté et le Gouvernement des Etats-Unis les 3 et 10 juillet 1907, sont les suivantes :*
>
> [le mémorandum énumère ensuite les îles]
>
> 1) Sibaung, Boaan, Lihiman, Langaan, Great Bakkungaan, Taganak et Baguan dans le groupe d'îles connu sous le nom de Turtle Islands.
>
> 2) Les îles Mangsee.»

74. Voilà donc les îles qui faisaient l'objet de l'échange de notes de 1907 et, une fois de plus, la carte est instructive. Les îles Turtle, comme je l'ai dit tout à l'heure, se trouvent ici. Les îles Mangsee sont au nord.

75. Comme cette correspondance le montre, l'échange de notes de 1907 concernait les droits des Etats-Unis sur les îles Turtle et les îles Mangsee, ainsi que l'administration de celles-ci par la

BNBC. Il ne disait rien au sujet de Ligitan et de Sipadan pour la simple raison que les Etats-Unis ne considéraient pas que ces îles relevaient des possessions qu'ils avaient héritées de l'Espagne. En fait, comme l'a expliqué M. Soons, les Néerlandais avaient entre-temps pris des mesures pour confirmer leur titre sur Sipadan et Ligitan par une manifestation concrète de la souveraineté néerlandaise, en envoyant le *Lynx* et son hydravion dans les îles en 1921. Dans ces conditions, il est parfaitement compréhensible, me semble-t-il, que les Etats-Unis ne se soient pas émus de la visite du *Lynx* et n'aient pas émis de protestation.

4. La convention anglo-américaine de 1930 n'a pas emporté cession des îles à la Grande-Bretagne

76. Le dernier maillon de la chaîne conventionnelle du titre invoquée par la Malaisie est la convention anglo-américaine de 1930, reproduite à l'onglet n° 48 de votre dossier. La Malaisie soutient que, par cet instrument, les Etats-Unis ont volontairement cédé Ligitan et Sipadan à la Grande-Bretagne parce qu'ils ne souhaitaient plus conserver ni l'une ni l'autre, et que la Grande-Bretagne a ainsi acquis sur ces îles la souveraineté qu'elle a par la suite transmise à la Malaisie (CMM, par. 3.25).

77. Cette hypothèse présente deux défauts fondamentaux. En premier lieu, comme l'Indonésie l'a montré et comme je l'ai expliqué hier après-midi, les Etats-Unis n'ont jamais détenu de titre sur les îles en question. Celles-ci ne faisaient pas partie des anciennes possessions espagnoles de la région acquises par les Etats-Unis dans la région, et les Etats-Unis ne les ont pas revendiquées. On ne voit donc pas comment ils auraient pu les céder à la Grande-Bretagne. En second lieu, la convention de 1930 n'était en aucune façon un traité de cession. A l'époque, le Gouvernement naissant des Philippines faisait fortement pression sur les Etats-Unis pour qu'ils ne renoncent à aucun titre sur aucun territoire sur lequel les Philippines avaient un droit historique. Rien dans le contexte diplomatique de la convention de 1930 ne permet de penser que les Etats-Unis étaient prêts à céder quoi que ce soit, et en particulier Ligitan et Sipadan.

78. Comme la correspondance que j'ai présentée le montre, les Etats-Unis avaient pour objectif, en négociant la convention de 1930 avec la Grande-Bretagne, de confirmer leur propre titre sur les îles Turtle et les île Mangsee par un accord de frontière définitif. La BNBC, qui administrait les îles Turtle et qui avait construit un phare sur l'île de Taganak (l'une des îles

Turtle), cherchait à obtenir l'appui du Gouvernement britannique pour persuader les Etats-Unis de céder les îles Turtle à la Grande-Bretagne, ou tout au moins pour permettre à la BNBC de continuer à les administrer pour une durée indéterminée (voir par exemple les annexes 15 et 19 ainsi que les paragraphes 6.59-6.61 de la réplique de l'Indonésie).

79. Le Gouvernement britannique reconnaissait quant à lui que toute cession de la part des Etats-Unis était hors de question. C'est ce qui ressort d'un mémorandum du 6 août 1929 envoyé à Londres par l'ambassade britannique à Washington, dans lequel est exposée la position du Gouvernement britannique (RI, par. 6.62 et annexe 18) :

> «S'agissant des propositions contenues dans le mémorandum [la proposition de cession des îles Turtle à la Grande-Bretagne], les délégués des Etats-Unis, tout en reconnaissant qu'il est plus facile d'administrer les îles depuis Sandakan que depuis Manille, ont estimé que la cession, la vente, voire la location des îles au Nord-Bornéo poserait des difficultés insurmontables en raison de la position du Sénat des Etats-Unis sur ces questions et également, comme nous avons été portés à le croire, de l'opposition de la part du Gouvernement philippin.»

80. La ligne frontière définie par la convention de 1930 apparaît à l'écran en violet. Vous trouverez aussi ce document sous l'onglet n° 48 de votre dossier. Cette ligne traduit la position constante des Etats-Unis depuis la lettre du secrétaire d'Etat du 23 octobre 1903. Les îles Turtle et les îles Mangsee situées à plus de 9 milles de la côte de Bornéo étaient reconnues comme appartenant aux Etats-Unis. Au sud, les possessions américaines comprenaient l'île de Sibutu et ses dépendances, mais aucune autre île au sud de celles-ci. Les Etats-Unis n'ont renoncé à aucun territoire par cette convention et ils n'en ont cédé aucun. Ils n'ont fait valoir de prétentions ni sur Ligitan, ni sur Sipadan, ni sur aucune autre île située au sud-ouest de Sibutu, parce qu'ils n'avaient pas hérité ces îles de l'Espagne. De la même manière, la Grande-Bretagne n'a pas acquis Ligitan et Sipadan auprès des Etats-Unis en vertu de la convention parce qu'il n'appartenait pas aux Etats-Unis de les céder.

81. L'argument final de la Malaisie sur ce sujet est formulé comme une question rhétorique. La Malaisie demande : «si l'Indonésie a raison, quelles conséquences cela a-t-il pour le groupe de cinq îles (Kapalai, Danawan, Si Amil, Ligitan et Sipadan) qui se trouvent au sud de la ligne de la convention de 1930, mais à plus de 9 milles marins de la côte de Bornéo ?» (CMM, par. 3.28.)

82. La réponse à cette question est simple. Comme l'a expliqué sir Arthur Watts, la question de l'appartenance de ces îles, qui n'ont jamais fait partie des possessions du sultan de Sulu, de l'Espagne ou des Etats-Unis, a été réglée par la convention anglo-néerlandaise de 1891. L'article IV de la convention était aussi favorable à la Grande-Bretagne qu'il l'était aux Pays-Bas. Les îles situées au nord de la ligne de 4º 10' de latitude nord, y compris Kapalai, Danawan et Si Amil, étaient attribuées à la Grande-Bretagne précisément selon l'interprétation que fait l'Indonésie de l'article IV de la convention. Quant aux îles situées au sud de cette ligne — à savoir Ligitan et Sipadan — elles étaient attribuées aux Pays-Bas. La convention de 1930 n'a rien changé à cette situation. Elle ne visait ni Ligitan, ni Sipadan et était, pour les Pays-Bas, *res inter alios acta*.

C. Conclusion

83. Monsieur le président, Madame et Messieurs de la Cour, cela m'amène à la fin de mon exposé et à la conclusion de l'Indonésie. Non seulement la Malaisie n'est pas parvenue à prouver que, comme elle le soutient, chacun des maillons de sa chaîne conventionnelle du titre est valable, mais les éléments de preuve font irrésistiblement penser le contraire.

84. Je remercie la Cour de son attention et vous prie, Monsieur le président, de bien vouloir appeler à la barre M. Pellet, qui va poursuivre l'exposé de l'Indonésie.

Le PRESIDENT : Merci beaucoup, Monsieur Bundy. Je donne maintenant la parole à M. Pellet.

The PRESIDENT: Thank you very much, Mr. Bundy. I now give the floor to Professor Alain Pellet.

Mr. PELLET: Thank you very much.

THE ABSENCE OF A MALAYSIAN TITLE BASED ON *EFFECTIVITÉS*

Mr. President, Members of the Court,

1. It is my task this morning to show that, far from establishing the sovereignty of Malaysia over Pulau Ligitan and Pulau Sipadan, the activities conducted on these two islands by the Parties

and their predecessors confirm the title which Indonesia derives from the 1891 Convention. I shall do so in two stages. In my first statement, after some general considerations on the role which *effectivités* can play — not in the abstract, but in the context of the present dispute — I shall show that the *effectivités* relied on by Malaysia certainly do not confer on it the territorial title which it lacks in other respects. Mrs. Loretta Malintoppi will then take the floor in order to establish that the same is true as regards the cartographical material. I shall then return in order to demonstrate briefly that the respective activities of the Parties combine to confirm what is well and truly the title which Indonesia claims.

I. The limited relevance of *"effectivités"* in the present dispute

2. I must however confess my hesitation, Mr. President — for after three and a half years and three rounds of written pleadings, I have still not understood the role which our Malaysian friends seek to attribute to the *effectivités*.

3. The Parties agree that the disputed islands were not *res nullius* at the time of the colonization of Borneo by the Netherlands, and then by the United Kingdom. As Malaysia has stated, "[t]here can be no suggestion that any [of the islands] is, or at any relevant time was, *terra nullius*" (Memorial of Malaysia, p. 10, para. 3.1; see also Memorial of Indonesia, p. 37, para. 4.1 and Counter-Memorial of Indonesia, p. 11, para. 3.2). Without doubt the local peoples had a sophisticated "social and political organization" (cf. *Western Sahara, Advisory Opinion*, 16 October 1975, *I.C.J. Reports 1975*, p. 39, para. 80) and the territorial conceptions of the local sultans as presented by Indonesia in its Memorial that I referred to briefly yesterday (CR 2002/27, pp. 41-42, para. 15) — which went unquestioned — show that they attributed only marginal importance to the uninhabited island lying off the coasts over which they exercised their authority even though they regarded those islands as their own (pp. 38-44, para. 4.3-4.19).

4. It has been said that "[the] connection with the *terra nullius* is pointed to as an important point of distinction between effective occupation and acquisitive prescription" (I. Brownlie, *Principles of International Law*, Clarendon Press, Oxford, 1998, pp. 136-137). If Pulau Ligitan and Pulau Sipadan had been *res nullius*, we would have had a classic case of territorial acquisition by occupation and the Court would have had to weigh up the respective manifestations of effective

authority on the part of the two States or their predecessor(s). But this is not the case: although they disagree about the proprietor of the title, the two Parties agree that a title did exist from the beginning.

5. Now in law *effectivités* — colonial or post-colonial — can have only two functions:

— either they confirm the pre-existing title;

— or they displace it, assuming that to be possible, which is far from being evident.

6. In this respect it suffices to cite once again the *dictum* — justly famous (since it sets forth the alternatives clearly and concisely) — of the Chamber of the Court in the *Burkina Faso/Mali Frontier Dispute*:

> "Where the act corresponds exactly to law, where effective administration is additional to the *uti possidetis juris*, the only role of *effectivité* is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title." (Judgment of 22 December 1986, *I.C.J. Reports 1986*, pp. 586-587, para. 63.)

And the Court fully confirmed this approach in its Judgment of 3 February 1994 in the case concerning the *Territorial Dispute* between Libya and Chad, where it expressed the view that, where a treaty title exists, "the effectiveness of occupation of the relevant areas in the past, and the question whether it was constant, peaceful and acknowledged, are not matters for determination in this case" (*I.C.J. Reports 1994*, p. 38, para. 76).

7. Indonesia's position is clear: under the 1891 Convention it holds a territorial title which, as Sir Arthur Watts has demonstrated, is firmly established (and one which, moreover, confirms the previous situation characterized by Boeloengan's ownership of the disputed islands). Accordingly, *effectivités* can only confirm this title, and the manifestations of authority relied on by Malaysia, as far as they are concerned, can only be dismissed and regarded as usurpations of territorial jurisdiction — easily explicable, what is more, in the light of the characteristics of the area concerned.

8. The Malaysian argument — it would be more appropriate to put this word in the plural — the Malaysian arguments are infinitely more convoluted and, as I said, I am not sure that I have grasped all their ins and outs, particularly since they varied considerably during the various phases

of the written proceedings and to a great extent contradict each other. Let us try and find our bearings, though, by setting forth in succession the different arguments put forward by Malaysia — although in an attempt to simplify things I shall confine myself to the three arguments which emerge from the Reply, to the exclusion of the Memorial and the Counter-Memorial.

9. *Version 1*: Malaysia, it says, succeeded to the original title of the Sultan of Sulu to the disputed islands, whose inhabitants owed him allegiance (Reply of Malaysia, p. 1, para. 1.3 (1)) — *sic*: the islands in question were uninhabited; *sic* again, Malaysia cannot point to the slightest manifestation of authority by Sulu or the BNBC over those islands before 1891; I shall come back to this point. This title, Malaysia says, passed to it via the BNBC and the United States — *sic* yet again: Malaysia acknowledges, however, that the Sultan did not cede his title to the company (Reply of Malaysia, p. 1, para. 1.3 (2)-(4) and p. 2, para. 1.3 (5)). And what about *effectivités* now, Mr. President? They play a very large part, since Malaysia insists that the islands were effectively administered by the BNBC from 1878 onwards. Did they shift the title from Sulu to the BNBC? Certainly not, since, Malaysia admits at the same time that this title only passed to Great Britain by virtue of the Treaty concluded by it with the United States in 1930. If there was any administration, therefore, it was one which lacked title; in fact, it was in opposition to the title, and all these pseudo-*effectivités* are devoid of any legal effect.

10. *Version 2* of the Malaysian argument: in paragraph 1.17 of its Reply, Malaysia asserts: "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." (p. 5.) This is a singular "historical consolidation of title" (whatever one may think of the theory itself): Malaysia, in one and the same breath, concedes (for the purposes of the discussion) that it has no title but that this non-title was nonetheless "consolidated" by the *effectivités* "because [the islands] have been administered by Malaysia and its predecessors for more than a century, and that administration is what matters" (Reply of Malaysia, pp. 5-6, para. 1.18). This is no longer the historical consolidation of a title (non-existent here), it is prescription *contra legem*.

11. *Version 3* (which is intended, it seems, as an explanation of the previous version but differs from it considerably): Malaysia asserts that its demonstration of *effectivités* over the two islands

> "serves a dual function: first, it confirms Malaysia's title which is independently based on a series of valid legal instruments [this would be variant 1]; second, even if — in a manner by no means clear or established — the Netherlands had at one time possessed title to the islands, such title has been displaced by British/Malaysian *effectivités* over the years" (Reply of Malaysia, pp. 89-90, para. 5.62),

which would correspond to version 2, but with a significant shift of emphasis, since this time Malaysia no longer invokes the dubious theory of historical consolidation of title, but the theory — no less dubious in international law — of acquisitive prescription (*ibid.*, pp. 90-91, para. 5.63). At all events this is totally irreconcilable with a position firmly expressed in Malaysia's Memorial, where it was stated that its reliance on continuous peaceful possession of the islands by Malaysia and its predecessors "is not, it must be emphasized, one involving the assertion by Malaysia of a prescriptive title against Indonesia" (Memorial of Malaysia, p. 60, para. 6.3).

12. But let us pause for a moment to consider this question of acquisitive prescription, which academic writers continue to find so absorbing, although as far as I know it has never found a place in the jurisprudence, as Professor Marcel Kohen observed in the conclusion to an exhaustive study (*Possession contestée et souveraineté territoriale* [Disputed possession and territorial sovereignty], PUF, Paris, 1997, p. 68; see also pp. 473-480).

13. Mr. President, I shall resist the temptation to discuss at length the question whether or not this notion is accepted in international law. Let us say that at the very least this is doubtful (see Counter-Memorial of Indonesia, p. 122, para. 7.5). In any case, even if international law did have a place for acquisitive prescription, it would only be upon strict conditions and "[n]either practice nor the jurisprudence . . . are a basis for asserting that mere evidence of the effective nature of possession constitutes an adequate means of acquiring sovereignty over a given territory" (M. Kohen, *op. cit.*, p. 70), contrary to what appears to be the view of Malaysia, which backs away from any discussion of this point (see Reply of Malaysia, p. 91, para. 5.64, note).

14. The Court has never determined what those conditions might be. However, in the *Kasikili/Sedudu Island* case, although expressed no opinion on the possibility of acquisitive prescription existing in international law (cf. Judgment of 13 December 1999, *I.C.J. Reports 1999*, p. 1105, para. 97; see also the dissenting opinion of Judge Fleischauer, p. 1206, who expanded on the Court's Judgment in this respect), it did consider the question whether the conditions on which the two Parties agreed were fulfilled in that case (*ibid.*, p. 1103-1106, paras. 94-99). I shall do the

same, Mr. President, although I would point out that Indonesia, for its part, continues to have serious doubts about the applicability of prescription where territory is concerned and adheres to the second of the alternatives which I mentioned just now: that possession cannot displace a title — in the present instance, it cannot confer on Malaysia the sovereignty over Ligitan and Sipadan which vests in Indonesia under the 1891 Convention and which, on a subsidiary basis, it inherited from the Sultan of Boeloengan.

15. On an even more subsidiary level, therefore, may I ask whether the *effectivités* relied on by Malaysia fulfil the conditions set out by Namibia in the *Kasikili/Sedudu Island* case, conditions whose validity Botswana did not contest. The conditions were as follows — stated in the indicative but I put them into the conditional because, I repeat, Indonesia for its part does not agree that acquisitive prescription has an established place in international law; but, if such were the case,

> "four conditions [would have to] be fulfilled to enable possession by a State to mature into a prescriptive title:
>
> 1. The possession of the . . . State [would have to] be exercised *à titre de souverain*.
>
> 2. The possession [would have to] be peaceful and uninterrupted.
>
> 3. The possession [would have to] be public.
>
> 4. The possession [would have to] endure for a certain length of time." (*I.C.J. Reports 1999*, p. 1103, para. 94.)

These conditions correspond moreover with those given in the ninth edition of *Oppenheim's* treatise, a work on which Malaysia (rightly) lays considerable stress (cf. Reply of Malaysia, p. 90, n. 117 (iii) and pp. 91-92, para. 5.65), even though its authors, too, are careful not to take a categorical position on the acceptance of the notion in international law (Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law*, Longman, London, 1992, Vol. I, pp. 705-708).

16. Let us therefore, Mr. President, compare the *effectivités* invoked by Malaysia with the above conditions. This shows us clearly that:

II. The *effectivités* relied on by Malaysia could neither have created nor displaced a territorial title

17. I shall say virtually nothing about the last condition, namely that the possession should endure for "a certain length of time" — it is vague and obviously depends on the circumstances involved. I do not in fact deny that *if* (I repeat, "if") Malaysia or its predecessors had, *à titre de souverain*, publicly, peacefully and uninterruptedly conducted activities on the two islands from the middle of the nineteenth century onwards that condition would be fulfilled. But that is not the case and at all events, Mr. President, none of the other three conditions are fulfilled.

(a) *A deceptive list of* effectivités

18. Out of curiosity we have prepared a list of the pre-colonial, colonial and post-colonial *effectivités* relied on by Malaysia. This list is at tab 49 in the judges' folders.

19. It strikes the eye immediately that although Malaysia has set great store by its *effectivités* — increasingly so as the written pleadings progressed — they boil down to very little. The list is long but only in appearances; when looked at more closely, it is all too obvious that, on the most favourable construction for Malaysia, there are only three episodes, which even taken together, are far from sufficient to create and *a fortiori* displace a territorial title.

20. Let us begin by eliminating everything which is irrelevant. There is much to do, Mr. President! (All the documents which are clearly irrelevant, even prima facie, are in bold characters in the list.)

21. First, whatever is subsequent to the critical date for the purposes of the present dispute, namely the year 1969, can be regarded as irrelevant. I shall come back to this after the break. This disposes of the Malaysian assertions represented by Nos. 43-46 in the list. The same holds good for all the alleged "acts" and all the documents which do not concern, or do not mention, at least one or other of the two islands. And those documents are legion.

22. All the documents relied on by Malaysia in regard to fisheries or navigation and relating to the pre-colonial period are of that nature (List Nos. 1-8). Let us, for example, take Annex 40 to the Malaysian Memorial (No. 5); this is an extract from the answer of the Dutch Minister of the Colonies to enquiries made by the Budget Committee of the Second Chamber of Parliament; all it does is to state a fact already mentioned by Malaysia (Memorial of Malaysia, p. 35, para. 5.8 *(b)*),

namely that portions of the island of Borneo were not part of the Dutch possessions, but it says nothing about the extent of those portions and even less about the two islands we are concerned with. Another example, Annex 76 to the Memorial of Malaysia (List No. 1), is no more relevant; this is a statement by a person who is described as the Sultan of Sulu's agent on the east coast of Borneo; it says that the Bajau of Omadar (Omadal) took possession of a boat at Sibutee. Now not only is Omadal situated to the south of Darwel Bay (the southernmost outpost of the reasonable claims of Sulu) and Sibutee to the north-east of that point but also, as Indonesia has clearly established with the support of detailed argument in its Counter-Memorial (pp. 19-37, paras. 3.23-3.73), it is impossible to equate "Bajau Laut" with "Sulu" as Malaysia rather off-handedly ventures to do. The facts are set out in documents Nos. 2, 6 and 7.

23. Moreover, a number of these documents tend clearly to contradict what Malaysia is seeking to prove. I mention, but purely for the record, the refusal of the people of Sandakan to hoist the Spanish flag (List Nos. 3 and 4): in any case we are far removed here from the disputed frontiers, even if this refusal shows just how little these so called "Sandakan Sulus" felt themselves to be "Sulu". Document No. 8 is more interesting: although it mentions neither Ligitan nor Sipadan, on reading it one has the very clear impression that Semporna, an adventitious foundation, represented the southernmost outpost of the BNBC, and in any case the document confirms that the territory which the latter administered did not go beyond Batoe Tinagat.

24. The picture remains the same after 1891. Thus the punitive expedition of the *Petrel* (in 1891) (List No. 9) was directed against Bajau Laut people of Dinawan and had nothing to do with Ligitan and Sipadan; the same is true of the 1892 expedition, in this case against the Bajau of Omadal (No. 10); and the southernmost island mentioned in documents Nos. 11, 12, 16, 17, 39 and 42, which relate to the Semporna and Dinawan areas, is Si Amil, to the "north of the Ligitan Group" as document No. 11 states. The 1901 Boats and Fisheries Proclamation (List No. 13) is extremely interesting, but not in the least, as Malaysia would wish us believe, because it concerns our two islands — of which there is no mention in the Proclamation — but for a completely different reason. What in fact does this Proclamation say? Among other things, that all British North Borneo fishing boats must be registered and that the fishing licences must indicate the districts to which the licence applies; so one would have thought that Malaysia would have

inundated us — inundated yourselves — with licences mentioning Sipadan or Ligitan (particularly since those licences had to be renewed annually); but not at all! It has produced none whatsoever.

25. Instead of this (which would have constituted evidence of an *effectivité*, certainly not a decisive one, but relevant), all we have received is a few affidavits (Nos. 45-49) which are worth what they are worth — that is to say, very little; they state that the inhabitants of Si-Amil fished or collected turtle eggs around or on Ligitan or Sipadan; this is also true of fishermen from the Indonesian coast (see Memorial of Indonesia, para. 6.9, p. 104 and Vol. 5, Anns. I, J, K, L and M and Counter-Memorial of Indonesia, Ann. 31) and even from the Philippines (cf. the affidavit of Panglima Nujum bin Panglima Abu Sari, No. 47, Memorial of Malaysia, Vol. 4, Ann. 118, p. 96, para. 5); these documents are never specific about the date of the events which they recount and some of them also tend to embellish the situation — I am thinking, for example, of the nice little story told by Tilaran Haji Abdul Majid about Sipadan, which got its name from the fact that someone called Paran was found dead there! (No. 46, Memorial of Malaysia, Vol. 4, Ann. 117, p. 93, para. 11); or the explanation of the development of Semporna given by Datuk Panglima Abdullah Bin Panglima Uddang (No. 49, Memorial of Malaysia, Vol. 4, Ann. 120, p. 100, para. 3) which differs totally from the real history of the foundation of the town of Semporna by the British.

26. In addition to the documents which I have just cited, other documents relied on by Malaysia as evidence of its *"effectivités"* must be dismissed by virtue of the fact that they mention neither Pulau Ligitan nor Pulau Sipadan. This is the case, for example, with the 1914 Proclamation on Trade (List No. 20) or the Ordinance of 28 June 1963 on the proclamation of a bird sanctuary (No. 40), which are very general in nature and make no mention of our two islands. Likewise, Malaysia gives a list of the indigenous leaders of the east coast of North Borneo from 1878 to 1909 (No. 17); there is no name in this list of anyone who is a native of Ligitan or Sipadan — and for good reason! — and this document proves absolutely nothing in regard to the territorial sovereignty of our two islands.

27. The file of Malaysian *effectivités* is being whittled down, Mr. President: there remain only three episodes concerning respectively (1) the collection of turtle eggs, (2) the creation of a bird sanctuary and (3) the construction of light towers on the two islands — because that is what they come down to, the *effectivités* from which Malaysia would wish you, Members of the Court,

to conclude that it has a title to Ligitan and Sipadan. I will leave aside the *Quiros* episode (List Nos. 14 and 15) since my colleague and friend Rodman Bundy has shown its irrelevance as support for Malaysia's claims. A few words now on the remainder.

(b) ***The collection of turtle eggs on Sipadan***

28. Malaysia relies on 22 documents in this respect, but I leave aside the affidavits, which I have already spoken about. The remaining 17 documents are enumerated in a list at tab 50 in the judges' folders, which is an extract from the previous list. I cannot deal with them individually, but in any case it will probably suffice if I bring out the salient points.

29. According to Malaysia, these documents prove that "[b]oth 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" (Reply of Malaysia, p. 14, para. 2.17). This is reading a lot into them — more, certainly, than they actually say:

1. None of them mentions the name Ligitan.
2. The tortuous conclusion I have just quoted is revealing moreover: it is probably true that Sipadan was used by certain inhabitants of Dinawan to collect turtle eggs and that this activity caused disputes but:
   - — they were not the only ones there (for example, in his account of the voyage of the *Quiros* in 1903, Lt. Boughter relates that Bajau from other localities have been "poaching" there and Indonesia has produced evidence establishing that some of them came from the Indonesian island of Derawan for instance (No. 56));
   - — Malaysia seeks to turn to advantage the fact that the author of this affidavit explains that he spent two months on the island at the request of a Badjau living in Semporna (Reply of Indonesia, p. 14, n. 41); this is true — and proves only one thing: that the collection of turtle eggs is a traditional matter involving ethnic and family ties, but is in no way a question of sovereignty;
   - — in any event, the intermittent presence on the island of peoples from Dinawan is certainly not such as to establish the territorial claims of the British authorities, any more than the presence of members of the Masubia tribe on the island of Kasikili/Sedudu proved

Namibia's sovereignty over it (cf. *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment of 13 December 1999, *I.C.J. Reports 1999*, pp. 1094-1095, para. 74, and pp. 1105-1106, paras. 98-99); in this connection, Malaysia must "show more than the use of the disputed territory . . . for their private ends" (*ibid.*, p. 1103, para. 94);

— in fact, according to Malaysia itself (see Memorial of Malaysia, p. 65, para. 6.9; see also Reply of Malaysia, p. 70, para. 5.14), this was Bajau Laut (Nos. 18, 21, 22, 23, 25, 32 and 45), whose links with the Sultanate of Sulu (as, moreover, with the Sultanates of Boeloengan and Berou) and with the colonial powers do not warrant any definite conclusion on the *territorial* appurtenance of the areas where they operated as, I repeat, Indonesia has shown in its Counter-Memorial (pp. 19-37, paras. 3.23-3.73), without being contradicted.

3. Above all, and with the exception of the Turtle Ordinance of 1917 (issued at a time when the BNBC certainly had no title to Sipadan), these are exclusively documents settling disputes between residents of Dinawan regarding the collection of eggs or granting them the right to engage in this activity (Nos. 18 to 23, 25, 29 to 33, 38 and 51); here is the proof of the *personal* jurisdiction exercised by the Company over the population of Dinawan, but certainly not of its *territorial* jurisdiction over Sipadan; in the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*, Namibia was unable to convince the Court that the intermittent presence of the Masubia "according to the seasons and their needs, for exclusively agricultural purposes" constituted a manifestation of authority *à titre de souverain* (*I.C.J. Reports 1999*, pp. 1105-1106, para. 98), whereas their establishment in the island was proven; the same applies *a fortiori* to the occasional collecting of eggs referred to by Malaysia.

4. Further, documents on which Malaysia bases itself have clearly not been published and cannot therefore serve as *public* evidence of the possession of the island by the BNBC, which, however, would be indispensable to establishing acquisition of a title by prescription. Now, it must be reiterated that, on Malaysia's own admission, the BNBC had no title over Sipadan until 1930 (cf. Memorial of Malaysia, p. 37, para. 5.12; Counter-Memorial of Malaysia, p. 54, para. 3.6, and p. 69, para. 3.29; Reply of Malaysia, p. 1, para. 1.3 (2)) always assuming it had acquired one on this date, which is not the case.

30. However, two of the documents relied on by Malaysia are public — just two, Mr. President; these are the *Turtle Ordinance* of 1917 (No. 24 in the list) and a document presented by Malaysia as an official publication of the BNBC (see Reply of Malaysia, p. 14, para. 2.15, and p. 72, para. 5.19) dating from 1922 and which mentions the production of turtle eggs in Sipadan (No. 26). But if there were any publications it is highly unlikely that, especially in 1917 in the middle of the First World War, they came to the attention of the Dutch administrators of the region, who were the only ones who could have been alerted to the ensuing violation of the rights of the Netherlands.

31. Members of the Court, can it reasonably be deduced, solely from the Turtle Ordinance — the only document of any importance made public and adopted in the middle of a world war —, that the BNBC could have acquired a title, whereas the Parties are agreed in considering that it did not have one, albeit for different reasons (Malaysia because, contrary to all reason, the title was allegedly retained by Sulu; Indonesia because this title was granted to the Netherlands by the 1891 Convention)? Can the title claimed by Malaysia be inferred from a document which confines itself to protecting the natural resources of the region by the creation, moreover, of a native reserve — which has more to do with local customs than with the colonial territorial division? The reply to this question is patently, clearly, categorically: no. Perhaps it is an *effectivité* — although there may be some doubt about the fact that the BNBC acted *"à titre de souverain"*, and that it was much more a matter of the preservation of commercial interests. But in any case, it is not enough to displace a pre-existing title; nor even to establish it *de novo* — but this second question does not arise: Malaysia agrees, we are not here dealing with a *terra nullius*.

32. But there is something else: the only two public documents relied on in the Malaysian written pleadings as *effectivités* date respectively from 1917 and 1922; once again at a time when Malaysia recognizes that the BNBC had no title over the two islands — because the BNBC had apparently (still according to Malaysia) been acquired from the United States by Great Britain in 1930; further, in 1921, the Dutch had clearly reaffirmed their title to the two islands, as shown by the important incident of the *Lynx*, of which Professor Soons has spoken. Moreover, it is significant that the Sultan of Sulu who, according to Malaysia, still held the territorial title to the two islands, did not protest more. Also, on that occasion, the Dutch had actually set foot on

Sipadan, whereas, for their part, the British had clearly never had the least effective presence there on the ground; and, it should be stressed, Malaysia does not provide the least proof that the Turtle Ordinance of 1917 even so much as began to be implemented on Sipadan.

(c) ***The proclamation of a bird sanctuary on Sipadan***

33. The establishment of a bird sanctuary, or more precisely, a sanctuary for shore birds (megapodes), on Sipadan leads to the same type of assertions. Three documents are concerned here (Nos. 27, 28 and 40) listed under tab No. 51 in the judges' folders, none of which, once again, mentions Ligitan.

34. The first two date respectively from 19 December 1932 and 1 February 1933. The upshot was that, following a proposal by the conservator of forests of Sandakan (No. 27), Sipadan was "reserved for the purpose of bird sanctuaries" (No. 28). As for the 1963 Ordinance, consolidating and amending the "law for the protection and conservation of certain species of wild animals and birds" (No. 40), on the one hand it refers to a "law", though there is nothing to say that this is the Ordinance of 1913 (to which the two documents I have just quoted refer) and, on the other hand, as Malaysia does not provide the complete text of this Ordinance, it is impossible to verify that it does not give an exhaustive list of the areas and islands to which it applies — but what is certain is that this Ordinance does not mention Sipadan.

35. Yet this is not the most important point: Malaysia, which has nevertheless visibly "combed" carefully through all the relevant archives, does not instance the slightest hint of concrete implementation. In its Reply, it is indignant that Indonesia questioned the fact that the 1932 decision revealed an intention to act *"à titre de souverain"* (Reply of Indonesia, p. 74, para. 5.22); yet this was indeed the case: the decision was not implemented on the ground; it had no territorial effect; it is not "practice"; it remained, at best, a "virtual *effectivité*".

36. Further, the map of Semporna district, annexed to the Malaysian Memorial, a reproduction of which, Members of the Court, you will find in your folders under tab 52 and which is being projected behind me, establishes that the British were aware that Ligitan and Sipadan did not fall within their jurisdiction, the boundaries of which are clearly shown on the map. Malaysia seeks to minimize the importance of this map (Reply of Malaysia, p. 73, para. 5.21) on the pretext

that other islands, which Indonesia does not regard as its own, are shown there outside the administrative boundaries of Semporna district; this is true, but in no way detracts from the fact that Sipadan, although mentioned as a "Bird Sanctuary", is "outside British administration"; the 1933 decision therefore has the air of a kind of extraterritorial regulation; while this certainly means that tribute should be paid to the far-sightedness of the British authorities, who were endeavouring to protect the environment for the common good at a time when this was not a normal concern, it certainly does not mean that this regulation should be regarded as an action *"à titre de souverain"*. Indeed, as I have said, there is not the slightest trace of action.

(d) ***The construction and maintenance of the light towers***

37. Lastly, Malaysia relies on the construction of lighthouses on the two islands — lighthouses is perhaps rather a grand word: reference to the photographs provided by Malaysia (Memorial of Malaysia, pp. 22 and 25) shows that these are light metallic structures, with a lantern on the top. Having said this, it is true that they were built by the British in 1962 and 1963 respectively and attracted a certain amount of publicity, as shown by the five documents produced by Malaysia (Nos. 34 to 37, and 41 in the list); furthermore, the Indonesians have never claimed to be unaware of their existence (as shown by documents Nos. 43, 54 and 55; see also Memorial of Indonesia, Vol. 4, Ann. 142, p. 245). The list of relevant documents is found this time under tab 53 in the judges' folders. These would appear to be the only true *effectivités* on which Malaysia can rely. Yet they are of extremely limited scope.

38. In fact, it has been established by many legal decisions that the construction and maintenance of lighthouses do not, in themselves, constitute proof of the desire to act *"à titre de souverain"*. Malaysia does not dispute this, but asserts that the precedents quoted in the Indonesian Counter-Memorial (pp. 134-135, paras. 7.40-7.43) are explained solely by the particular circumstances of this case (Reply of Malaysia, pp. 74-75, paras. 5.25-5.26). This is not the view of the Arbitral Tribunal, which settled the *Eritrea/Yemen* case and which held, in general (and not, as Malaysia claims, in relation to the circumstances of the case), that "[t]he operation or maintenance of lighthouses and navigational aids is normally connected to the preservation of safe navigation, and not normally taken as a test of sovereignty" (First Stage, Award of 9 October 1998, p. 87,

para. 328); furthermore, the detailed history of the construction and maintenance of the lighthouses in the Red Sea, related in Chapter VI of the *Eritrea/Yemen* Award (pp. 57-65, paras. 200-238), shows that the question of sovereignty over the islands concerned was always dissociated, voluntarily or *de facto* in the *Eritrea/Yemen* case, from the establishment and maintenance of the lighthouses. Similarly, in the *Minquiers and Ecrehos* case, the Court found that the fact that the French Government had "assumed the sole charge of the lighting and buoying of the Minquiers for more than 75 years, without having encountered any objection from the United Kingdom Government" did not prove that "France has a valid title to the Minquiers" and cannot be considered "as involving a manifestation of State authority in respect of the islets" (Judgment of 17 November 1953, *I.C.J. Reports 1953*, pp. 70-71).

39. One of the reasons for this position lies in the fact that France had acted "to aid navigation to and from French ports and protect shipping against the dangerous reefs of the Minquiers" (*ibid.*, p. 70). Precisely as in the case which concerns us, the British proceeded to construct the "lights" at Ligitan and Sipadan in order "to assist navigation of vessels between Tawau and Sandakan using the Alice Channel route between Tawau and Sandakan, [or] secondary routes on the inshore channel for the Tawau/Semporna route" (document No. 34 in the list) — these maritime routes exclusively entailed internal coastal navigation in the colony of North Borneo and now Malaysia.

40. This being so, there is no reason to be surprised that Indonesia did not protest against the establishment of the two light towers on the uninhabited islands of no importance for local Indonesians or international traffic. They were also constructed when Indonesia was experiencing a difficult political situation. Moreover, I would add that, not only did Indonesia not protest, but it expressly gave its consent to the maintenance of the two lighthouses (the one on Sipadan at any rate) by Malaysia, as shown by the Note Verbale of 7 May 1988, by which the Indonesian Ministry of Foreign Affairs strongly protested against the tourist invasion of Sipadan organized by Malaysia, noting that, at the close of the 1969 negotiations,

> "the two sides agreed to temporarily set aside the question [of ownership or title of the islands of Sipadan and Ligitan] and to maintain the status quo on the islands (no activities *except for maintaining a lighthouse at the easternmost part of Sipadan*)" (Memorial of Indonesia, Vol. 4, Ann. 142, p. 245; emphasis added).

41. This situation is not unlike that of the lighthouse on the island of Taganak in the Turtle Islands group referred to a moment ago by Mr. Bundy. This lighthouse was built by the BNBC "as an aid to navigation" (Reply of Indonesia, Vol. 2, Ann. 16, p. 196; see also Ann. 18, pp. 236 and 182) at the beginning of the twentieth century, at a time when the British had no territorial sovereignty over the island, as expressly acknowledged by them subsequently (cf. Reply of Indonesia, Vol. 2, Ann. 13 or 16). As this precedent shows, building a lighthouse solely as an aid to local navigation does not in any way, of itself, prejudge sovereignty; at the most it may give rise to compensation inasmuch as it is a sort of international public service (cf. the Exchange of Notes appended to the Convention of 2 January 1930, Memorial of Indonesia, Vol. 4, Ann. 126, p. 87).

(e) *Provisional conclusion on the* effectivités

42. In short, Mr. President, the possession relied on by Malaysia has not been exercised *"à titre de souverain"*, or uninterruptedly, or publicly.

43. It has not been public. As explained by David Johnson in an authoritative article on acquisitive prescription in international law, of which he is an advocate, "[p]ublicity is essential because acquiescence is essential" ("Acquisitive Prescription in International Law", *BYBIL* 1950, p. 347; see also Ian Brownlie, *Principles of International Law*, Clarendon Press, Oxford, 1998, p. 155). In other words, the effective presence of the State which relies on it must be sufficiently overtly public for the States invoking a competing title to be able to protest. This is not the case of any of the few *"effectivités"* relied on by Malaysia. And Indonesia had no reason to protest against traditional fishing or egg collecting activities any more than against the construction of light towers as an aid to Malaysian navigation in the region.

44. The possession Malaysia relies on has not been *"à titre de souverain"* either. The Turtle Ordinance of 1917 and the "arbitrations" by the BNBC as between the contradictory claims of the Bajau from Dinawan fall within the category of commercial and private activities and, at any event, take place at a time when Malaysia itself does not dispute that the BNBC had no sovereignty over Ligitan and Sipadan; it cannot therefore have acted *"à titre de souverain"*. The same applies to the inclusion of Sipadan in a bird sanctuary for shore birds, a decision not followed up by any

concrete manifestation of authority on that island, or by the construction and maintenance of light towers which, as such, do not constitute manifestations of sovereign authority.

45. And this claimed Malaysian possession — which did not therefore take the form of any effective presence on the islands until the end of the 1980s, after the birth of the present dispute — has not been uninterrupted either. Even supposing the few *effectivités* put forward with such insistence by Malaysia are relevant, which none of them really is, as I think I have shown, they are remarkably few and far between, as shown by document No. 49 in the judges' folder.

46. Let me point out in this connection, Members of the Court, that we have included in that list *all* the so-called proofs of *effectivités* relied on by Malaysia in all three volumes of its written pleadings. And what do we find?

— that none of the documents prior to 1903 mentions the two islands; as for the documents of 1903 (Nos. 14 and 15), they relate to the voyage of the *Quiros* and are based on an error subsequently acknowledged by the American authorities, as Mr. Bundy showed yesterday;

— we also find that Malaysia relies on a number of internal disputes relating to the collection of turtle eggs between 1910 and 1917, the date of the Turtle Ordinance (Nos. 18 to 24 in the list); two documents then relate to the years 1918 and 1922 (Nos. 25 and 26); and then

— nothing further until 1931-1933, the date of the two documents relating to the bird sanctuary (Nos. 27 and 28); and

— once again a gap of over 20 years when, in 1954, there are again a few manifestations of pseudo-*effectivités* between 1954 and 1963 (Nos. 29 to 42).

In other words, on Malaysia's own admission, there is no manifestation of *effectivité* until 1910; nothing new for some ten years between 1922 and 1931; and nothing again for over 20 years between 1933 and 1954. Is it reasonable to speak of "continuous possession"?

47. More significant still: during the colonial period, from 1963 to 1969, Malaysia is not in a position to rely on *any effectivité* until 1988 — in other words, some 20 years after the dispute had broken out publicly. From that point, on the other hand, it endeavours to concoct a possession — but it is, legally speaking, too late, as I shall show presently when I contrast the Indonesian *effectivités* with the absence of serious Malaysian *effectivités*.

48. Mr. President, as far as I understand them, the Malaysian arguments, which are not without a certain resemblance, *mutatis mutandis*, to those which Namibia sought to assert before the Court in the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)* (cf. Judgment of 13 December 1999, *I.C.J. Reports 1999*, p. 1092, para. 71), are very largely — and in the case of one of them, the main one apparently — exclusively based on the *effectivités* on which Malaysia relies. To understand their potential effects, it is helpful to refer again to what Malaysia, in its Reply, presents as the two "strands" of its case (Reply of Malaysia, p. 66).

49. According to the first strand, the Sultan of Sulu had retained "sovereignty" over Pulau Ligitan and Pulau Sipadan, which did not pass to Great Britain until the Anglo-American Treaty of 1930. For the Malaysian claim to be convincing, two conditions — cumulative (not alternative) — must be met: on the one hand, Sulu's "sovereignty" over the islands would have to be established and, on the other hand, the 1930 Treaty would have to relate to the islands claimed by Malaysia. We showed yesterday that neither of these hypotheses was valid. Consequently, the claimed *effectivités* on which Malaysia relies do not have any legal significance unless they had displaced the treaty title belonging to Indonesia by virtue of an acquisitive prescription which, assuming it was accepted in international law — which, I repeat, we do not think it would be — supposes manifestations of effective authority *"à titre de souverain"* which are much more convincing that those relied on by Malaysia.

50. Our opponents encounter yet another difficulty, at least during the period prior to 1930, since the claimed BNBC *effectivités* run counter to the so-called territorial title belonging to the Sultan of Sulu. We would therefore be dealing with *effectivités contra legem*, which, on Malaysia's own admission (cf. Reply of Malaysia, p. 20, para. 2.26), did not displace the Sulu title. The only two *effectivités* on which Malaysia relies during this period — the collection of turtle eggs on Sipadan by Bajau from Dinawan (an activity over which they had no monopoly moreover) and the Turtle Ordinance of 1917 — are therefore legally discredited.

51. So all that remains is the decision to include Sipadan in the bird sanctuary for shore birds created by the 1930 Ordinance (which was never implemented in practice) and the construction of the two light towers, which is certainly not enough to displace Indonesia's title under the 1891 Convention, or to establish a title by occupation — which corresponds to the second "strand"

of the Malaysian case (Reply of Malaysia, p. 68, para. 5.6), which, anyway, is not compatible with the conviction, shared by the Parties, that the two islands were not *terrae nullius*.

Mr. President, I propose to speak presently, with your permission, about the *effectivités* and the mutual conduct of the Parties which confirm the Indonesian title. Before that, Mrs. Loretta Malintoppi will, if you would be so kind as to give her the floor, consider the maps relied on by the two Parties and their legal significance. I think she is ready to begin now, or after the break, as you will.

The PRESIDENT: Thank you, Professor Pellet. The sitting is suspended for ten minutes.

The Court adjourned from 11.25 a.m. to 11.35 a.m.

The PRESIDENT: Please be seated. The sitting is open again and I give the floor to Mrs. Loretta Malintoppi.

Mrs. MALINTOPPI: Thank you, Mr. President.

THE IMPORTANCE OF THE CARTOGRAPHY IN THE INDONESIA/MALAYSIA CASE

I. Introduction

1. Mr. President, Members of the Court, it is a great honour for me to appear before you today on behalf of the Government of the Republic of Indonesia.

2. The purpose of my statement is to examine the elements of cartographic evidence produced by the two Parties in their written pleadings and to assess their importance in the legal context of the present case. I shall be assisted in this task by Mr. Robert Rizzutti and Mr. Charles Claypoole and I thank them for their services.

3. Before proceeding to a detailed description of the maps, I should like to draw attention to a point on which there is no disagreement between the Parties: the fact that the cartography cannot in itself constitute a territorial title. Maps, though, are undoubtedly one of the means whereby the parties express their conviction as to the extent of a territorial title. To that extent they can help to clarify the legal situation.

4. In the present case, Indonesia takes the view that the maps can confirm the territorial title established by the 1891 Convention between Great Britain and Indonesia's predecessor in title, the

Netherlands. In the case in point the maps represent an aspect of the conduct of the Parties which can, to borrow the words of the Chamber of the Court in the *Frontier Dispute* case, endorse "a conclusion at which a court has arrived by other means" (*Frontier Dispute, I.C.J. Reports 1986*, p. 583, para. 56).

5. From this point of view, the relevant cartography in this case is useful in several respect. *First*, certain maps placed on the file by the Parties testify to the state of knowledge regarding the limits of the sovereignty of the predecessor States in the area. According to those maps, the islands which are the object of the present dispute formed part of the territorial possessions of the Netherlands. *Second*, the cartographical elements in this case furnish evidence of the intentions of the Parties regarding the line established by the 1891 Convention. *Third*, the cartography subsequent to the signing of that Convention can serve as an element of proof of the subsequent practice of the parties.

6. *Finally*, a very large number of official maps published by Malaysia after its independence show a line which does not stop at the island of Sebatik, but extends out to sea from that island in contradiction to Malaysia's present position. These Malaysian maps constitute so many proofs of the interpretation which Malaysia placed on the line defined by the 1891 Convention. They therefore represent a whole series of assertions going against our opponents' interests — admissions against interest, that is — whereby Malaysia has acquiesced in the Indonesian position.

7. Doubtless that is why Malaysia treats the cartography somewhat disdainfully. It maintains that the maps — despite according them importance when, by an extraordinary chance, they can be interpreted as supporting its argument — are not decisive in the present case. Malaysia contends that its claims are based on a "chain of title" — a series of successive titles —, on the colonial *effectivités* and on the fact that the islands were under Malaysian administration. It considers that its claims are not based on cartographic elements of evidence, because, it says, these do not always show the prolongation of the line beyond the island of Sebatik and — in any event, according to Malaysia — they do not support the conclusion that the islands fall under the sovereignty of Indonesia (Counter-Memorial of Malaysia, pp. 120-121, paras. 5.37-5.38).

8. Yet, Mr. President, the importance of the cartography in the present case is undeniable: a characteristic of the case is the presence, on a very large number of official maps from different sources, of a line crossing the island of Sebatik and continuing eastwards out into the Celebes Sea.

9. The same line occurs from map to map from 1891 onwards, the date of the signing of the Anglo-Dutch Convention. The recurrence of this line is one element in this case which Malaysia is incapable of explaining. The only explanation it has ventured to give is that the line represents a territorial sea boundary (Counter-Memorial of Malaysia, Vol. 1, p. 102, para. 5.12). This is a particularly surprising assertion given that Malaysia does not take the trouble to justify it in any way whatsoever.

10. Mr. President, we need not look very far in order to understand the origin of this line which appears and reappears over the years — and on the Malaysian maps even. It can only have one source, and that is the 1891 Convention.

11. After this brief introduction I shall undertake a review of the maps. I do not of course, Mr. President, intend to subject you again to the entire cartographic material which is appended to the Parties' written pleadings. I shall confine myself to commenting on the most significant maps which confirm the territorial title inherited by Indonesia to the isles of Sipadan and Ligitan. In regard to the maps which will not be discussed in this statement, may I ask the Court to be good enough to refer to our written pleadings (Memorial of Indonesia, Atlas, maps 1, 2, 3, 4, 6, 7, 8, 9, 15, 21, 22, 23, 24; Counter-Memorial of Indonesia, maps 4-9).

12. I should like first to examine the relevant cartographic material chronologically, while retaining the various headings under which Indonesia classes this material. I shall then briefly consider the maps produced by Malaysia and I shall conclude with a few general remarks on the Malaysian claims in regard to the cartography.

II. The maps which reflect the opinion of the signatories regarding the interpretation of the 1891 Convention

(a) *The maps prior to the 1891 Convention*

13. Mr. President, Members of the Court, the genesis of the present case has already been put to you. Thus we have seen how, in the negotiations which resulted in the conclusion of the

1891 Convention, the Netherlands and Great Britain agreed that the dividing line between their respective possessions should follow the parallel of latitude 4° 10' N and should continue along that parallel eastwards beyond the island of Sebatik.

14. Professor Pellet has drawn attention to the importance of the maps exchanged by the parties during the negotiations. His statement bears eloquent testimony to the value which should be attributed to this cartographic material legally and I shall add very little to that. May I simply point out that these maps served to illustrate the respective positions of the States parties in concluding the Convention. They therefore remove all doubt as to their intentions, namely that the line of allocation of territory between them was to cross the island of Sebatik and continue beyond it out to sea.

15. It is in fact obvious that, in the negotiations on the 1891 Convention, the British negotiators envisaged a territorial dividing line extending beyond the mainland and well beyond the island of Sebatik.

16. On their side, the Dutch negotiators had also prepared sketch-maps which expressed the same notion of territorial division. These maps too confirm that the parties to the 1891 Convention had obviously envisaged that the territorial allocation should extend beyond the island of Sebatik. Thus, contrary to Malaysia's contention, there is nothing "imaginary" about this idea — it is precisely what the parties agreed on in Article IV of the 1891 Convention and, as Sir Arthur Watts demonstrated yesterday, precisely what was represented on the map attached to the Dutch "Explanatory Memorandum".

(b) ***The map attached to the Dutch "Explanatory Memorandum"***

17. This map, now on the screen and at tab 8 in the judges' folders (Memorial of Indonesia, Atlas, map 5), is of particular importance for this case. It reflects clearly the shared intention of the parties and the existence of a consensus between the two States concerned in regard to the course of the line established by the 1891 Convention.

18. Like the map in the *Livre Jaune* in the *Libya/Chad* case, the map attached to the "Explanatory Memorandum" testifies to the official, public and contemporary interpretation by the Dutch authorities of the line established by the Convention.

19. This brings to mind the well known passage in the Award in the *Beagle Channel* case where the Court of Arbitration observed:

> "Thus maps or charts in existence previous to the conclusion of the Treaty in 1881 might be relevant if, in the circumstances, they could (for instance) throw light on the intentions of the Parties, or give graphic expression to a situation of fact generally known at the time or within the actual, or to be presumed, knowledge of the negotiators. Equally, maps published after the conclusion of the Treaty can throw light on what the intentions of the Parties in respect of it were, and, in general, on how it should be interpreted." (*Beagle Channel, ILR*, Vol. 52, 1979, p. 202.)

20. The map attached to the "Explanatory Memorandum" therefore fits perfectly with the reasoning followed by the Court of Arbitration in the *Beagle Channel* case, particularly because it testifies — as the Award put it — to "the view which the one or the other Party took at the time . . . concerning the settlement resulting from the Treaty".

(c) ***The official maps published after the conclusion of the 1891 Convention***

21. With regard to the maps published after the conclusion of the 1891 Convention — and in particular those of the British North Borneo Company's official cartographer, Stanford — they confirm that the course of the line resulting from the Convention crosses the island of Sebatik and, following parallel of latitude 4° 10' N, continues out to sea from the east coast of Sebatik, whereas the two disputed islands lie to the south of that parallel.

22. Professor Soons has made the point that the maps drawn up by Stanford in 1894, 1903 and 1904 show a dividing line between the Dutch and the British possessions; and that the line in question crossed the island of Sebatik and continued seawards from the latter for several miles to the east of the islands of Sipadan and Ligitan.

23. These maps show quite clearly that Stanford had taken account of the territorial delimitation resulting from the conclusion of the Convention. They represent the point of view of the administering entity on the extent of its territorial powers. The maps published by Stanford contain no disclaimer suggesting that their publisher did not accept responsibility for the boundary line. It is therefore clear that Stanford — and therefore the BNBC — considered that, according to the 1891 Convention, the line represented by the 4° 10' N parallel marked the limit of the territorial possessions of the BNBC on the island of Borneo and in the Celebes Sea.

24. Mr. President, I should like now to mention very rapidly three other maps of British origin, all post-1891, which cannot be reconciled with Malaysia's present position. The first is a "Top Secret" map of North Borneo issued by the Geographical Section of the British General Staff during the Second World War in 1944 (Counter-Memorial of Indonesia, map A.2). It is on the screen and at tab 54 in the judges' folders. Great Britain obviously considered that the course of the boundary pursuant to the Convention did not stop at Sebatik. In that respect, the British point of view, represented on this 1944 map, does not differ from that of Indonesia today.

25. It should also be noted that the line which appears on the top secret map of 1944 is far from unique. For example, the map now on the screen — and at tab 55 in your folders — contains the same graphic representation of the 1891 Convention line. This map was issued by the British Ministry of Defence in 1973 under the title "Tactical Pilotage Chart" (Memorial of Indonesia, Atlas, map 19).

26. As the Court can see, the line traced by the 1891 Convention crosses the island of Sebatik and continues eastwards beyond the east coast of that island. This raises a number of questions: where does this line come from? What does it mean? Why, if we follow the Malaysian argument, does the line not stop at the east coast of Sebatik?

27. Malaysia is struck dumb on these points. In truth, there is only one explanation: the line appearing on these maps confirms that the Indonesian interpretation of the 1891 line is the only possible and only plausible interpretation, that it is — in effect — the only one which corresponds to the truth.

28. The third British map which I should like to show you contains aspects which are interesting from a different standpoint. It was drawn up by the Survey Department of the Colony of North Borneo in 1953 (Memorial of Indonesia, Atlas, map 10). It is now on the screen and at tab 56 in your folders. This map shows in yellow the territory of the British Colony of North Borneo, both the mainland and the islands. The boundaries of the various provinces making up the colony are marked by black lines of alternating dots and dashes. One of these lines stops at the east coast of the island of Sebatik and another runs southward from a place called Kiraz and stops just north of the islands of Sipadan and Ligitan at a latitude which can only correspond to parallel 4° 10' N. Even though the line crossing the island of Sebatik does not continue beyond the latter,

the map leaves no doubt about the fact that the British administration of North Borneo did not extend to the territories situated to the south of the line drawn in 1891.

29. Before I finish with this map, I should like to make one comment: it is surprising, to say the least, to see — if one follows our opponents' argument — that the islands of Sipadan and Ligitan simply do not appear on this map. They are not represented on it at all, unlike a number of other islands, small or large, as being part of the Colony of North Borneo.

A third group of maps, all of Malaysian origin remains to be considered. These are:

III. The maps published by independent Malaysia which contradict its present position

30. After its independence in 1963, and even after 1969, the date on which the dispute arose, Malaysia produced a large number of official maps showing a line which extends off the east coast of the island of Sebatik. These maps date from the years 1964 to 1974. They reflect a consistent practice which represents the point of view of the Malaysian Government as regards the line established by the 1891 Convention.

31. This large-scale and consistent production of official maps emanating from the Malaysian Government inevitably generates legal consequences.

32. The decision of the Boundary Commission in the *Eritrea/Ethiopia* case on 13 April last discusses the question of official maps published by one of the parties to a boundary dispute. A particular conclusion ensuing from the decision is that significant legal consequences are attributable to a map produced by an official government agency of a party, and that the latter party must suffer the adverse effects of the map if it has not disclaimed it (Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia, p. 26, para. 3.21).

33. What is more, this Arbitral Award is not an isolated one. International judicial decisions affirm that maps produced by one of the parties to a case are opposable to it as admissions against interest where they contradict the position taken by that party during the dispute. It will suffice to mention here the *Minquiers and Ecrehos* and *Burkina Faso/Republic of Mali* cases, as well as the *Island of Palmas, Labrador Frontier, Laguna del Desierto* and *Eritrea/Yemen* arbitrations. The conduct of Malaysia, as we have seen, furnishes proof of the existence of an agreement between the

Parties within the meaning of Article 31, paragraph 3 *(b)* of the Vienna Convention on the Law of Treaties as regards the scope of the 1891 Convention and in particular the location of the line established by Article IV of the Convention.

34. What does Malaysia say in regard to these maps? Its argument is somewhat weak; it contends that these maps are "generalized" or lacking in detail and that they contain "disclaimers". Although it is true that in some cases the maps contain disclaimers in regard to exact boundary lines, it is also true that numerous maps contain no such qualification at all. Moreover, in any case it is indisputable that the existence of such disclaimers would have no effect on the probative force of these maps in support of the Malaysian position as regards the course of the line in a "non-suspect" period, that is to say during the period which preceded the dispute.

35. The Boundary Commission in the *Eritrea/Ethiopia* case had occasion to comment on the disclaimers in maps where certain features are unfavourable to the State having published them. Here is what the Commission said in its decision on this subject:

> "As regards the State adversely affected by the map, a disclaimer cannot be assumed to relieve it of the need that might otherwise exist for it to protest against the representation of the feature in question. The need for reaction will depend upon the character of the map and the significance of the feature represented. The map still stands as a statement of geographical fact, especially when the State adversely affected itself produced and disseminated it, even against its own interest. The disclaimers may influence the decision about the weight to be assigned to the map, but they do not exclude its admissibility." (Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia, p. 28, para. 3.27.)

36. Also, and this seems to us the most important aspect here, Malaysia does not offer any explanation for the presence on all these maps (covering a number of years) of a quite remarkable common feature: the line which crosses the island of Sebatik extends well beyond this island following parallel 4° 10' of latitude.

37. For the time being, it is perhaps best to let the maps speak for themselves. The first (No. 57 in your folders; Memorial of Indonesia, Atlas, map 11) was prepared in 1964 by the Survey Department of the British Ministry of Defence for the Malaysian Directorate of National Mapping — which is a Malaysian Government body. The map is called "Pulau Sebatik". The course of the 1891 line is here represented in the normal way, in other words, crossing the island of Sebatik and continuing east along parallel 4° 10' of latitude north. It should be noted that this map

contains a disclaimer regarding the boundaries indicated on it. However, it remains important showing as it does the interpretation given by the Malaysian Government in 1964 of the object of the 1891 Convention, in other words, that the course of the line delimited the respective possessions of the parties on land and at sea.

38. The map now being shown on the screen, and which is No. 58 in the judges' folders, is entitled "Tawau" and was also prepared by the British Ministry of Defence for the Malaysian Directorate of National Mapping (Memorial of Indonesia, Atlas, map 13). Its date is 1965. Once again, we find the line established by the Convention, running along parallel 4° 10' of latitude north, east of the island of Sebatik and into Saint Lucia Bay. Although this map contains a note cautioning that it is not to be regarded as authoritative where the international boundaries are concerned, it is nevertheless significant that, at the foot of the map, there is a sketch representing a "boundary diagram", which reproduces the course of the 1891 line.

39. Here is another example. This time it is from a map of the following year, 1966, also published by the Malaysian Directorate of National Mapping. It is entitled "Malaysia, Singapurak, Brunei; pemerentahan" (in French: *Carte politique de la Malaisie, Singapour et Brunéi*) and is No. 59 in your folders (Counter-Memorial of Indonesia, map A.1). There is no disclaimer on this map. Again, the boundary line is the same: the line is extended east of Sebatik and continues until, off Celebes, it meets the line of the 1930 Convention between Great Britain and the United States.

40. I should now like to move on to a map which is of vital importance for the present case. It is an official map prepared by the Malaysian Ministry of Lands and Mines and published in 1968 — in other words, a year before the date on which the dispute between the Parties crystallized (Memorial of Indonesia, Atlas, map 16). This map is No. 60 in your folders. It was prepared by a Malaysian government body in the context of a geological study of the region of North Borneo conducted in 1967. At the time, Malaysia was starting to manifest keen interest in prospecting for oil and gas in the region, which led the Malaysian Government to focus particular attention on the area adjacent to the islands of Sipadan and Ligitan.

41. The map, which does not contain any disclaimer, represents the boundaries of Sabah by a dotted line, underlined by a superimposed continuous red line. The line established by the 1891 Convention is represented as extending east of Sebatik. It joins the extension southwards of

the line of the 1930 Convention between Great Britain and the United States. As you will be able to check on the enlargement being shown on the screen, there is no mistake: as the international boundary, the legend on the map indicates the dotted line reproducing the customary line of the 1891 Convention.

42. Professor Pellet will shortly discuss this map in greater detail and also the history of the oil concessions in the region. For my part, I shall not dwell on it any further. Moreover, this map, which represents the oil concessions of 1968, is only one of many examples. For there are many official Malaysian maps which reproduce the characteristic course of the 1891 line. These maps reveal the existence of an agreement between the Parties on the scope and significance of the 1891 Convention.

43. Here is yet another example.

44. The Agent of Indonesia noted that, in 1969, during the delimitation of the continental shelf in the Malacca Strait and the South China Sea, Malaysia for the first time made claims on the islands of Sipadan and Ligitan. The map now being shown on the screen (Memorial of Indonesia, Atlas, map 17) — and which is No. 61 in your folders — had been appended to the Agreement in which the negotiations culminated. On this map there appears a dotted line extending east of Sebatik. Malaysia obviously could not be unaware of the existence of this line at the time.

45. But the list of the official Malaysian maps showing the line established by the Convention does not let matters rest there. On the contrary, the production of these maps continues, even after the critical date.

46. Let us therefore take a look at this map, which is No. 64 in the judges' folders. Prepared by the Department of Lands and Surveys of the region of Sabah in 1964, this map was published by the Malaysian Directorate of National Mapping in 1972. Its title is "Malaysia, Timor, Sabah" (Memorial of Indonesia, Atlas, map 18). The line representing the course of the 1891 line coincides with the boundary represented on the previous map. Hence, as the Court will note, Malaysia's point of view had still not changed in 1972. The location of the boundary was the same in the 1966 and 1967 editions (Memorial of Indonesia, Atlas, maps 12 and 14) of the same map published by the same Malaysian Directorate of Mapping (which are Nos. 62 and 63 in your folders).

47. It should be emphasized that the 1972 map is all the more important for having been published by the Malaysian government body responsible for the production of maps three years after the 1969 negotiations and after the first formulation by Malaysia of its claims to the disputed islands.

48. In 1974, the Malaysian Department of Statistics published a map entitled "Negeri Sabah, Population and Housing Census. Map Showing Distribution of Population" (Memorial of Indonesia, Atlas, map 20; judges' folders, No. 65). This map is accompanied by a disclaimer on the boundaries but again contains a line extending beyond the island of Sebatik, in accordance with the 1891 Convention.

49. Mr. President, Members of the Court, Professor Pellet will shortly explain how Malaysia's whole conduct reveals how its view coincides with Indonesia's on the 1891 line. For my part, I would point out that this map merits particular attention by the Court, constituting as it does an element of proof of Malaysia's subsequent practice with respect to the 1891 Convention.

50. In the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*, the Court referred to the subsequent practice of the States. Among other things, it instanced the commentary by the International Law Commission on the draft Article 31, paragraph 3 *(b)*, of the Vienna Convention on the Law of Treaties. On this topic the Commission observed:

> "The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty. Recourse to it as a means of interpretation is well-established in the jurisprudence of international tribunals." (*Yearbook of the International Law Commission 1966*, Vol. II, pp. 221-222, para. 15.)

51. In this case, the fact that, on a very large number of official Malaysian maps, there is a line crossing the island of Sebatik and continuing beyond it must have a raison d'être. This line cannot have been reproduced there by chance, on one official map after the other. It can but be an illustration of Malaysia's agreement to the line resulting from the 1891 Convention. In any case, the Malaysian maps produced after independence provide valuable pointers to the determination of the boundary between the two States as viewed by Malaysia.

A final category of maps must also be carefully examined. These are:

IV. The maps submitted to the Court by Malaysia

52. I cannot examine one by one all the maps produced by Malaysia in its voluminous "Memorial Atlas" and its Counter-Memorial. I shall confine myself to a few examples and a few general observations on these maps as a whole.

53. Certain maps produced by Malaysia are of Dutch and British origin and date from the beginning of the last century, particularly the nautical maps and the maps prepared by the Netherlands East Indies Topographical Office. They show only the boundaries on the island of Borneo itself. As already noted in our written pleadings (Counter-Memorial, Vol. 1, Map Annex, paras. A.4 and A.5 and Reply, Vol. 1, Map Annex, paras. 4 and 5), the purpose of these maps is to provide technical information and they cannot be reliable sources for possible pointers regarding territorial appurtenance. No attribution of sovereignty is indicated on them and, furthermore, we have no way of knowing in what circumstances they were prepared. They are therefore not of any great help in settling the question put to the Court.

54. Also, most of the maps produced by Malaysia cannot be used to support its territorial claim to the islands which are the object of this dispute. Indeed, in no way do they prove that the islands of Sipadan and Ligitan were subject to the sovereignty of Malaysia's predecessor, Great Britain. The most that is shown on these maps is a line which stops at the eastern coast of the island of Sebatik. However, this does not seem to worry our opponents. In certain cases, the mere indication of the disputed islands on a map is enough for Malaysia to characterize them as British or Malaysian (Memorial of Malaysia, Vol. 5, maps 13 and 18). To accept this Malaysian position would be a remarkable act of faith, but an act of faith is not proof.

55. Let us have a look, for example, at a map of British origin published in 1941 and entitled "The State of North Borneo" (Memorial of Malaysia, Atlas, map 14). This map is now being projected on the screen and is No. 67 in the judges' folders. According to Malaysia, this map is interesting as demonstrating "a clear understanding that Sipadan was part of the State of North Borneo . . . and a deliberate intention to include it, since the island appears just beyond the bottom line of the framework of the map" (Memorial of Malaysia, p. 110, para. 10.11).

56. Once again, there is nothing to warrant the assurance with which our opponents assert that the disputed islands are here considered as forming part of the State of North Borneo. While

they appear — and then only just — on either side of the framework of the map, part of the southern section of the island of Sebatik, as well as the adjacent territory of the island of Borneo, is also included on it. Surely Malaysia does not mean to suggest that these territories — indisputably Dutch at the time — fell under the sovereignty of the State of North Borneo?

57. It should also be noted that this map contradicts the arguments based by Malaysia on the presumption of successive titles or "chain of title" passing via Spain and the United States. Indeed, the islands are clearly situated there south of a boundary line termed the "Boundary between the Philippine Archipelago and the State of North Borneo", in other words a boundary between the Philippine Archipelago and the State of North Borneo.

58. The same argument applies to the following map, which is also a representation of the colony of North Borneo, published by the Survey Department at Jesselton 11 years later, in 1952 (Memorial of Malaysia, Atlas, map 17). This map is No. 68 in the judges' folders. Again, the line delimiting the possessions of North Borneo and the Philippine Archipelago lies well to the north of the islands of Sipadan and Ligitan.

59. As regards the other cartographic elements introduced into these proceedings by the opposing Party, Malaysia itself admits that the maps contradict one another. On the one hand, there are the maps on which the line stops at Sebatik, which is the case of the example being shown on the screen and which is also in your folders as No. 69. This map, entitled "Tawau", was published in 1964 by the Malaysian Directorate of National Mapping (Memorial of Malaysia, Atlas, map 15). As you can see, Members of the Court, the line represented on the map of Tawau stops at the east coast of the island of Sebatik. For Malaysia, this is very significant. For Indonesia, the fact that certain maps do not show any continuation beyond the island of Sebatik does not mean much. What is significant is not the absence of this line; it is its presence.

60. On the other hand, there are also maps introduced into the case by Malaysia still showing the characteristic line of the 1891 Treaty. Thus, for example, two Indonesian maps of 1965 and 1968, both entitled "Kalimantan Utara" (Counter-Memorial of Malaysia, Vol. 2, maps 8 and 9), which are No. 70 in your folders and two enlargements of which showing the 1891 line are going to be projected on the screen in succession. On the screen now is a map of British origin published in 1978 under the title "Operational Navigation Chart L-11"(Memorial of Malaysia, Atlas,

map 22). This map is No. 71 in your folders. And again, a map of the island of Sebatik from 1987, which is being shown on the screen and which is No. 72 in your folders (Counter-Memorial of Malaysia, Vol. 2, map 11). Lastly, a map of Kalimantan published by PT Pembina in 1992 (Counter-Memorial of Malaysia, Vol. 2, map 12), an enlargement of which is being shown on the screen and is No. 73 in your folders. All these maps have one point in common: the boundary line between Indonesia and Malaysia extends eastwards beyond the island of Sebatik.

61. For Malaysia, this line does not mean anything. What does it matter if it appears on a large number of maps? On others it does not appear. Furthermore, it is explained to us, cartographic proofs are often contradictory and in general not very decisive in territorial disputes, unless they form part of an international treaty (Counter-Memorial of Malaysia, p. 117, para. 5.32). Perhaps so, but from where does the extension of the boundary line come which in this case appears on the vast majority of the maps of the region? Why is it there? What is it for?

62. Confronted with these maps, Malaysia has been quite incapable of providing any credible explanation. This is why it has to resort to maps which do not show any extension of the line beyond Sebatik, so that it can oppose them to the multitude of maps, where the line crosses the island of Sebatik and continues beyond it. It is this line that Malaysia does not wish to explain and whose importance it seeks to diminish as much as it can.

63. In reality, the only possible explanation, Mr. President, is that the line which follows parallel 4° 10' of latitude north off the island of Sebatik reproduces the line which is shown on the map annexed to the Dutch "Explanatory Memorandum" and that it therefore represents the boundary drawn by the 1891 Convention, in other words a line dividing territories, including islands, as between Indonesia and Malaysia. This explanation — of course — does not particularly appeal to our eminent opponents, as it patently confirms Indonesian sovereignty over the islands claimed by Malaysia.

64. Mr. President, Members of the Court, I have now reached the end of my oral argument. I thank you for your kind and patient attention and would ask you to give the floor to my friend and colleague, Professor Pellet.

The PRESIDENT: Thank you, Maître. I now give the floor to Professor Alain Pellet.

Confirmation of the Indonesian title by the conduct of the Parties

Mr. PELLET: Mr. President, Members of the Court,

1. I showed a few moments ago that the *effectivités* on which Malaysia relies were not such as to establish any territorial title of that Party to Pulau Ligitan and Pulau Sipadan; in particular, it seems that the collection of turtle eggs on Sipadan, by the Bajau Laut from Danawan among others, had no particular bearing on the island's appurtenance to one Party or the other. For his part, Professor Soons established, yesterday afternoon, that, during the colonial period, the Netherlands unequivocally manifested their conviction that the two islands belonged to the Dutch part of Borneo. As Mrs. Loretta Malintoppi has just shown, the maps confirm the existence of the Indonesian title based on the 1891 Convention. An examination of the conduct of the Parties leads to the same conclusions: subject to the "tourist invasion" of Sipadan organized by Malaysia from the end of the 1980s, the conduct of the two States confirms that they have held and continue to hold parallel 4° 10" N as the limit of their respective possessions.

2. This results, among other things, from the petroleum concessions they granted, from the navigational aids and naval patrols in the region. However, before coming to these three points, I will show that two elements of which Malaysia makes such an issue are without relevance (I) and, in any case, are not likely to weaken the conclusions resulting from a study of the mutual conduct of the Parties (II).

I. The conduct relied on by Malaysia is without relevance

3. Malaysia relies on two arguments which, according to it, might establish its desire to act *à titre de souverain* on Sipadan or, conversely, Indonesia's recognition of its lack of title. These are the control of tourist activity on Pulau Sipadan *(a)* and the fact that Indonesia allegedly did not take the disputed islands into consideration when, in 1960, it drew the boundary of its archipelagic waters *(b)*. Although established, these two facts certainly do not have the legal significance attached to them by Malaysia.

(a) ***The tourist invasion of Sipadan by Malaysia***

4. In its Reply, Malaysia relies on the "regulation of tourism", which allegedly establishes its administration of the two islands (cf. p. 22, para. 2.31). The only proof of this it offers is the

adoption, in 1997, of an Order, apparently not published, declaring the two islands protected areas (Protected Areas Order — Memorial of Malaysia, Vol. 4, Ann. 123). As such, this instrument is hardly convincing: it is a regulation which has no more probative force than the proclamation by the colonial authorities of a "Bird Sanctuary", a matter I discussed a little while ago. However, in the present case, it must be acknowledged that this proclamation corresponds to a reality on the ground, which was not the case of the Megapode Preserve. As I said, from the end of the 1980s, Malaysia methodically set in motion a veritable tourist invasion of the island of Sipadan.

5. Legally speaking, the important point is that the tourist invasion did not begin at the end of the 1980s, in other words, as Indonesia explained in its Memorial, well after the critical date (Memorial of Indonesia, pp. 152-160, paras. 8.5-8.28 and pp. 171-182, paras. 8.70-8.97). According to the definition given by the recent *Dictionnaire de droit international public*, published under Professor Jean Salmon, the critical date is the:

> "date or relevant period for establishing the content of a legal situation, which must be adopted for assessing the respective rights (usually territorial titles) of the parties and with effect from which the unilateral actions of the parties are no longer able to modify their respective rights" (Bruylant/AUF, Brussels, 2001, p. 293).

6. In this case, the two Parties agree that this date should be fixed at 18 September 1969, the day they recognized the existence of the dispute relating to sovereignty over the two islands (cf. Counter-Memorial of Indonesia, p. 9, para. 2.18). Nothing they have done since has altered the existing legal situation. Here, two elements are added to the "natural" effects which, as a rule, are associated with the critical date, namely:

— first, the two States agree not to prejudice the status quo pending the settlement of the dispute; and

— second, Indonesia has constantly protested against the violations of its rights.

7. The Agent of Indonesia yesterday reminded us of the circumstances in which the status quo agreement was concluded (CR2002/27, pp. 16-18, paras. 15-20; see also Memorial of Indonesia, pp. 156-158, paras. 8.18-8.20); Malaysia did not dispute this point in the written pleadings. The conclusion is that, by modifying the very substance of Sipidan, by making this uninhabited island into a tourist factory — Malaysia prides itself that over 115,000 tourists have visited it over the last 15 years (Memorial of Malaysia, p. 18, para. 3.19) — by building all kinds of

tourist facilities there, Malaysia has violated the agreement of the two Parties agreeing to preserve the status quo until the dispute is definitively settled, an agreement which, for its part, Indonesia has scrupulously respected.

8. On the other hand, anxious as it is not to allow Malaysia to encroach upon its rights, Indonesia has made a point of protesting against the various phases of this massive Malaysian intrusion. This is a phenomenon which only manifested itself from 1988 onwards. On 7 May of that year, the Indonesian Ministry of Foreign Affairs, in a Note Verbale which I quoted in part during my first statement this morning, denounced the planting of about a hundred coconut trees, the construction of a berth and the beginning of organized tourist activities:

> "Such activities are clearly contrary to the understanding reached during the negotiation on the delimitation of the continental shelf boundaries between Indonesia and Malaysia, held in Kuala Lumpur in 1969. It was then clearly understood by the Malaysian and the Indonesian delegations that, since no agreement could yet be reached on the question of ownership or title of the islands of Sipadan and Ligitan the two sides agreed to temporarily set aside the question and to maintain the status quo on the islands (no activities except for maintaining a lighthouse at the easternmost part of Sipadan) until a mutually acceptable solution could be reached and to postpone the negotiation on the delimitation in the area." (Memorial of Indonesia, Vol. 4, Ann. 142, p. 245.)

Further protests of this kind were made on 15 April 1992 following the construction of some 40 bungalows and various hotel facilities (Memorial of Indonesia, Vol. 4, Ann. 147), on 17 June 1993 (*ibid.*, Ann. 164), on 6 September 1994 (*ibid.*, Ann. 176) and on 17 April 1995 (*ibid.*, Ann. 180); or again on 22 November 1993 concerning a brochure distributed by the Malaysian Ministry for Culture, Arts and Tourism, presenting Sipadan as "one of the scuba-diving resorts in Malaysia" (*ibid.*, Anns. 170 and 178).

9. Malaysia has only one comment on this: the Indonesian protests referring specifically to Malaysia's tourist activities on Sipadan only started in 1988 and ended in 1994 (Reply of Malaysia, pp. 75-76, paras. 5.27-5.28). Quite true! But for rather obvious reasons, Mr. President: the exploitation of the island for tourism only started at the end of the 1980s; and it would not have been very sensible to lodge repeated protests with Malaysia against an occupation which still continued — especially as, in 1992, the Parties began high-level talks aimed at a definitive settlement of the dispute and also as the head of the Malaysian delegation at the second session of the Joint Working Group promised, in January 1994, that his country would henceforth refrain

from stepping up its activities on Ligitan and Sipadan, a belated reiteration of the principle of the status quo (cf. Memorial of Indonesia, Vol. 4, Ann. 176, p. 424).

10. But the fact remains: notwithstanding the status quo agreement of 1969, thus confirmed in 1994, Malaysia organized the exploitation of Pulau Sipadan for tourism and Indonesia protested against this development, which, in any case, did not begin until after the critical date and cannot therefore strengthen Malaysia's case in any way whatever. The same applies to another recurrent argument in Malaysia's written pleadings, which concerns:

(b) ***The 1960 boundary line of Indonesia's archipelagic waters***

11. The course of this boundary was effected by Act No. 4 of 18 February 1960 (Memorial of Indonesia, Vol. 4, Ann. 128). Malaysia rightly points out that it does not take account of Sipadan and Ligitan for establishing the archipelagic baselines then adopted (cf. Memorial of Malaysia, pp. 84-85, paras. 7.20-7.21); but this fact does not have the legal implications it seeks to draw from it.

12. In order to appreciate its scope, one must first refer to the contemporary context: in a largely hostile environment, Indonesia was campaigning for recognition of the concept of archipelagic waters. On the eve of the Second United Nations Conference on the Law of the Sea, due to be held from 17 March to 26 April 1960, there was an urgent need to create a precedent, one ideally not constituting such a radical break with the law of the sea then in force that it would have acted as a deterrent to it. These two factors are more than adequate to explain why Sipadan and Ligitan are not taken into consideration in the determination in Indonesia's archipelagic waters:

— regardless of what Malaysia writes (Reply of Malaysia, pp. 79-81, para. 5.41), the 1960 Act was prepared in some haste, with the opening of the Second Conference of the Law of the Sea on the horizon;

— furthermore, Indonesia, anxious to obtain recognition of the notion of archipelagic waters, sought, for the rest, to diverge as little as possible from the existing law of the sea.

13. One of the credos of that law, enunciated in 1951 by the International Court of Justice in the *Fisheries (United Kingdom* v. *Norway)* case was that "the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast" (*I.C.J. Reports 1951*, p. 133), a

principle enunciated in the same terms by Article 4, paragraph 2, of the Geneva Convention on the Territorial Sea and the Contiguous Zone. Further, "the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters". Moreover, this is the principle enshrined by Article 47, paragraph 3, of the Montego Bay Convention, under which the drawing of the archipelagic baselines "shall not depart to any appreciable extent from the general configuration of the archipelago".

14. Now this would have been the case if Indonesia had taken the two islands into consideration in order to fix the line of its archipelagic waters, as shown by the sketch-map being projected behind me, which is No. 74 in the judges' folders. The vast seaward advance constituted by the triangle running from point 36 to point 37 via Ligitan would certainly have departed appreciably from the general direction of the Indonesian coast and, bearing in mind the effects resulting from the archipelagic baselines, would have led to a substantial encroachment on maritime areas on which the United Kingdom could have asserted claims.

15. Malaysia accuses Indonesia of not having respected Article 47, paragraph 1, of the Convention on the Law of the Sea, which authorizes archipelagic States to "draw straight archipelagic baselines joining the outermost points of the outermost islands . . . (cf. Reply of Malaysia, pp. 78-79, para. 5.38). This objection is a curious one:

— It is anachronistic because the Indonesian Act dates from 1960, and the Montego Bay Convention, which enshrines the notion of archipelagic waters thanks to the efforts of a handful of States, among which Indonesia was particularly active, dates from 1982;

— Article 47 *authorizes* archipelagic States to include the outermost islands on certain conditions (which will not definitely be fulfilled in this case) but does not in any way *oblige* them to do so; in this respect, the contrast with the main islands is striking; indeed, paragraph 1 of this provision continues by stipulating that this possibility is only open "*provided* that within such baselines are included the main islands . . ." and it would take a great deal of imagination to characterize Ligitan and Sipadan as "main islands";

— furthermore, as I pointed out, paragraph 3 of this Article lays down that the drawing of the baselines must "not depart to any appreciable extent from the general configuration of the archipelago", which would be the case if the two islands were taken into account.

16. Moreover, the case of Ligitan and Sipadan is anything but isolated: many other islands within Indonesian sovereignty (and recognized as such by Malaysia in the 1969 negotiations) remained outside Indonesia's archipelagic waters. This is the case, for example, of a number of islands or islets situated in the Malacca Strait or the China Sea, mentioned in the affidavit of one of the principal Indonesian negotiators, Admiral Adi Sumardiman (Memorial of Malaysia, Vol. 5, Ann. B; see also Memorial of Malaysia, p. 154, para. 8.12).

17. Further, it is very bad form of Malaysia to put forward such an argument: it itself refrained from taking Ligitan and Sipadan into account when determining its territorial sea in 1969, the very year when, for the first time, it claimed the two islands: three years later, the Malaysian National Directorate of Mapping, which had played a decisive role in the failure of the negotiations, again published the usual map leaving the two islands outside Malaysian jurisdiction, as my friend Loretta Malintoppi so excellently explained a few moments ago (see map No. 64 in the judges' folders).

18. The conclusion, Mr. President, is: neither the tourist invasion of Sipadan organized by Malaysia from the 1980s onwards, nor the exclusion of these two outlying islands from Indonesia's archipelagic waters constitute relevant arguments in support of Malaysia's case. Indonesia, on the other hand, is able to rely on the very marked coincidence between the practices of the two countries with respect to the navigational aids and oil concessions, to which may be added the regularity of Indonesian naval patrols in the region.

II. The coincidence between the conduct of the Parties along parallel 4º 10' N

(a) *The Indonesian naval patrols*

19. Let us begin with the latter.

20. Malaysia asserts that Indonesia does not refer to any manifestation of effective authority in the disputed islands during the key period between independence and the critical date (cf. Reply of Malaysia, p. 82, para. 5.44). This is as true of Malaysia, which only began to put in an appearance on Pulau Ligitan and Pulau Sipadan, or in their vicinity, from the 1980s onwards, somewhat frenetically — but not inconsistently, if only in the context of the maps, as Mrs. Malintoppi has shown — as it is inaccurate with respect to Indonesia.

21. Professor Soons pointed out yesterday that the Dutch have constantly exercised maritime police powers in these remote confines of the colonial empire. After independence, Indonesia stepped up its naval presence in the region. As shown by a consistent series of detailed testimonies from sailors having taken part in these operations, not only did the Indonesian Navy regularly patrol the waters surrounding these two islands, but also, whenever necessary, conducted police operations *on* the two islands. I would remind you that I am now speaking of after independence and before the critical date. We have proof of this as regards, for example:

— a patrol by a warship, the *Kri Ular Sanca* at Sipadan and in the surrounding waters in 1965 (Memorial of Indonesia, Vol. 5, Ann. F, p. 25);

— another patrol in May 1967 off Sipadan (Memorial of Indonesia, Vol. 5, Ann. G, p. 31);

— the action taken in December 1967 in response to a complaint by Nanoekhan fishermen who had reported that inhabitants of Semporna had been fishing illegally around the two islands (Memorial of Indonesia, Vol. 5, Ann. D, p. 17); and

— a naval inspection at the end of 1968 (Memorial of Indonesia, Vol. 5, Ann. H, p. 37).

22. Nothing on the other hand, throughout this period, on the Malaysian side. Nor any protest against these routine operations, which in particular showed that Sipadan was uninhabited and that the light tower was poorly maintained and rusty (cf. Memorial of Indonesia, Vol. 5, Ann. D, p. 17).

23. Indonesia did of course maintain its presence in the sea area concerned after 1969, while Malaysia attempted to establish its own presence there. The result was a war of Notes Verbales devoid of legal significance except in so far as they establish what each Party considered to be its rights — with an important exception however: the Indonesian actions are the continuation of those I have just described, whereas Malaysia's clearly appear to result from its sudden discovery of alleged rights over the disputed islands, which it thought it opportune to seek to establish *ex post facto* (here again, only from the end of the 1980s) in order to make up for its previous lack of action.

24. One last remark on this point, however, Mr. President: despite the increasing tension between the two countries, Indonesia, for its part, was always extremely careful not to encroach on the 4º 10' N parallel and not to exacerbate the situation. This is evident, for example, from the

instructions given in 1990 by the Chief of the Armed Forces to the Commander of East Fleet ordering him to strengthen the Indonesian naval presence in the area claimed by Malaysia but requiring him "to avoid actions of a hostile character or that may worsen the situation" (Memorial of Indonesia, Vol. 4, Ann. 144, p. 253). This concern is mentioned in an official note of 17 January 1992 which states that the limit for patrol activities is 4º 10' N latitude (*ibid.*, Ann. 145, p. 257).

(b) ***Navigational aids***

25. Apart from the question of the light towers which I talked about earlier this morning, and which I would remind you are maintained by Malaysia with the agreement of Indonesia, the activities of the Parties in regard to navigational aids also bear witness to their agreement to respect the 4º 10' N line.

26. Although Indonesia has referred to this subject on several occasions in its written pleadings, it is interesting that Malaysia maintains an obstinate and embarrassed silence on this aspect of the case. Nothing, not even a line, in this respect in the Malaysian written pleadings. The mutual conduct of the Parties is nevertheless revealing; however, since our opponents have not come up with any arguments, I shall confine myself to summarizing what we have written on this point and would ask you, Members of the Court, to be good enough to refer to it (cf. Memorial of Indonesia, pp. 163-164, paras. 8.41-8.45; Counter-Memorial of Indonesia, p. 140, para. 7.58; and Reply of Indonesia, pp. 64-65, paras. 3.19-3.24).

27. Several elements are in fact relevant:

— the waters situated on either side of the 4º 10' line off the coasts of Kalimantan and Sabah are a danger to navigation owing to the existence of numerous reefs and shallows; in particular, the narrow passage between the "Alert Patches" or "Alert Reef" — a significant name — just south of that parallel and Roach Reefs just to the north, which is used by local coastwise shipping — principally Malaysian — and is a difficult channel; the map on the screen and at tab 75 in the judges' folders illustrates this situation;

— from 10 February to 12 March 1994 an Indonesian warship undertook surveys around Alert Reef and, in conjunction with another Indonesian naval vessel, erected a buoy there (see Memorial of Indonesia, Vol. 4, Ann. 181, p. 459);

— this operation took place with the knowledge and in the presence of no less than three Malaysian warships *(ibid.)* which took no action, nor did the operation evoke any official reaction despite the war of Notes Verbales which was raging at the time;

— this electrical battery buoy has been constantly and openly maintained and kept supplied by the Indonesian Navy (cf. Memorial of Indonesia, Vol. 4, Ann. 179, pp. 443-452) without there being any protest against that activity either; and, in particular,

— Malaysia did the same that year on its side on the Roach Reefs.

28. As First Admiral Nicolas Ello, the person responsible for the operation on the Indonesian side, observed, this could only imply that Malaysia had no doubt about the nature of the 4º 10' line: "It could be assumed that Malaysia respects the 04º 10' 00 N line" (Memorial of Indonesia, Vol. 4, Ann. 181, p. 459). The oil concessions granted by the two Parties lead to the same conclusion.

(c) ***The oil concessions***

29. On this topic, Malaysia proves somewhat more loquacious but, in truth, equally embarrassed. The fact is that here again the way in which the activities of the Parties coincide is highly indicative of their conviction, before the critical date, that the 4° 10' N line marked the limit of their respective jurisdictions.

30. As Indonesia has explained in its Memorial (pp. 106-109, paras. 6.17-6.29), in the 1960s both countries granted oil concessions, partly offshore, whose common feature is that they follow almost exactly the 4° 10' parallel:

— In the case of Indonesia, the concession was the "Permina/Japex" concession of 6 October 1966 (cf. Memorial of Indonesia, Vol. 4, Ann. 129 and Memorial of Malaysia, Vol. 4, Ann. 114), whose northern limit followed the parallel of 4° 9' 30" N — there is no need, however, to dwell on this slight difference (amounting to less than 1 km), which represents an habitual practice in the petroleum extraction industry, designed to avoid any encroachment on the fields of a neighbouring country (see other examples in the Counter-Memorial of Indonesia,

p. 139, n. 73); the relevant line is indicated by black dashes on map No. 75 in the judges' folders.

— In the case of Malaysia, the red line represents the southern limit of the concession granted in 1968 to the Teiseki Company (cf. Memorial of Indonesia, Vol. 4, Ann. 131). This too coincides with the 4° 10' N line — with a difference of 30", and for the same reasons. The way in which each Party's conduct matches and complements the other's is quite remarkable.

31. The map now on the screen, No. 60 in the judges' folders, which Mrs. Malintoppi also displayed just now, is highly revealing as to Malaysia's beliefs about the limits of its maritime jurisdiction. It comes from the Malaysian Ministry of Lands and Mines and was published as an annex to the Annual Report of the Geographical Survey, Borneo Region (cf. Memorial of Indonesia, Vol. 4, Ann. 130). Figure 14 corresponds to the offshore portion of the Teiseki concession and the red line to its outer limits. Bearing in mind the very small scale of the map, the red line coincides with the "international boundary" which, as expressly indicated in the legend, unaccompanied by a disclaimer, is represented by a broken line. To the east, at parallel 4° 23' N, it meets the Convention line between Great Britain and the United States and follows this in a very precise fashion; to the south it follows the 1891 line, that is to say parallel 4° 10' N, to the south of which lie Ligitan and Sipadan.

32. In an attempt to limit the scope of these oil concessions, which are particularly significant for having been granted just before the critical date and even so coincide very precisely, Malaysia puts forward a number of remarkably spineless arguments:

— First, the concessions, it says, were accorded "in the exercise of" the rights of the Parties as they perceived them and not in relation to the dispute over the two islands (Counter-Memorial of Malaysia, p. 89, para. 4.38) — but that is precisely what gives them their substantial probative force: they testify to the perception which the two Parties had of the extent of their maritime jurisdiction (on the basis of the 1891 line) before Malaysia fabricated an artificial claim to the two islands. It is significant in this respect to note that the Teiseki concession was signed by the Minister of Natural Resources of the State of Sabah himself (Memorial of Indonesia, Vol. 4, Ann. 131, p. 171).

— Second, Malaysia asserts that these are "paper claims" (I have been unable to find a French translation for this), insignificant legally because they were not followed up by acts and effects (Counter-Memorial of Malaysia, pp. 89-90, para. 4.39). I confess my ignorance of what the situation was on the Malaysian side; as regards the Indonesian concession to Permina and Japex (subsequently shared with other companies), however, it is precisely because prospection in the region of the 4° 10' N line proved unproductive that subsequent concessions related to areas situated further south (cf. Memorial of Indonesia, p. 105, para. 6.16); contrary, therefore, to what Malaysia maintains, oil prospection activities — unrewarding as they were — did actually take place, at all events on the Indonesian side. Moreover, it is absurd to talk of "paper claims" in this case; not only were there regular formalized concessions, carrying a financial consideration, but also, for any discussion of "paper claims" to be possible, the claims of the two Parties would in any case have had to have been contradictory; the line they adopted for their respective concessions shows that, quite on the contrary, their claims fully coincided.

— Third and last, Malaysia does its best to deny any significance to the Permina/Japex concession on the pretext that it did not expressly include the two islands (Memorial of Malaysia, p. 85, para. 7.21 and Counter-Memorial of Malaysia, pp. 90-92, paras. 4.40-4.42). This is true, but in no way does it detract from the probative force of the facts: these demonstrate that the two Parties, on the eve of the emergence of the dispute, considered the 1891 treaty line to be the limit of their respective jurisdictions. Moreover, the Teiseki concession which, I repeat, stops at the 4° 10' N line, does not include Ligitan and Sipadan either — and in any case it would have been quite remarkable for it to have stopped at that line if Malaysia had believed that it could exercise its jurisdiction further south. Limits of this kind are not fixed lightly.

33. I should like to point out, Mr. President, that this observation in no way contradicts the hesitations of the Netherlands in regard to the boundary of their territorial sea off Sebatik at the beginning of the 1920s. As Professor Soons showed very clearly yesterday afternoon:

— the Dutch authorities hesitated about the line of the boundary and the 4° 10' parallel was one of the possibilities envisaged;

— the Dutch took a formal decision not to raise the matter with the British; and,

— above all, the only issue capable of arising then (during the 1920s) concerned the territorial sea; it would not have crossed anybody's mind to talk about the continental shelf at that period.

34. At the beginning of the 1960s, however, the law of the sea had changed and the practice of the Parties had changed with it. They could by then claim sovereign rights over the entire maritime area with which we are concerned and the fact that the oil concessions granted by the two countries coincided shows that thenceforth they considered that the 4º 10' N line had *de facto* become the limit of their respective maritime jurisdictions.

35. The oil practice of the Parties in the relevant area is particularly significant legally:

— it constitutes an essential element of the subsequent practice of the successors to the parties to the 1891 Convention and establishes the agreement of Indonesia and Malaysia in regard to its interpretation as envisaged in Article 31, paragraph 3 *(b)* of the Vienna Convention on the Law of Treaties (cf. *Kasikili/Sedudu Island, I.C.J. Reports 1999*, pp. 1075-1076, paras. 49-50 and the numerous references cited); and

— it testifies to their position as regards the extent of their respective jurisdictions immediately before the critical date.

36. This, Mr. President, concludes the first round of Indonesia's oral pleadings. May I nevertheless, if you will permit, sum up in broad outline the position of Indonesia. It is simple and in fact amounts to just a few words — which seems to us in marked contrast to Malaysia's argument:

(1) the Convention of 20 June 1891 settled, fully and definitively, the dispute between Great Britain and the Netherlands in regard to the limits of their respective possessions in North Borneo;

(2) the choice of the parallel of 4º 10' N represented a compromise solution which to some extent disposed of the earlier disputes regarding the precise limit of the respective possessions of the Sultans of Boeloengan and Sulu in the area concerned, even though the title of the former (Boeloengan) seems markedly stronger than that claimed by the latter (Sulu);

(3) the wording of Article 4 of the 1891 treaty leaves no doubt about the parties' intention to put an end to any uncertainty, not only in the "continental" portion, if I may call it that, of Borneo,

but also at sea: "From 4º 10' north inwards latitude on the east coast the boundary-line *shall be continued eastward along* that parallel, *across* the Island of Sebittik" (emphasis added);

(4) this is confirmed by the famous — and indeed extremely important — "Elucidation Map" drawn up and published by the Dutch Government in connection with the parliamentary debates on the ratification, a map which had been communicated to Great Britain and evoked no protest on the latter's part;

(5) likewise the two islands, which had certainly not been ceded by the Sultan of Sulu to Great Britain (and could not be ceded for a number of reasons), are not concerned by the 1930 Convention between the latter and the United States, which relates to an area situated considerably further north;

(6) the Parties' predecessors showed no great practical interest in the two islands in the colonial period; however, although all that Malaysia can rely on is a number of regulations, regarding which there is nothing to prove that they were actually implemented (paper claims), the Netherlands consistently demonstrated its effective presence in the area;

(7) the same is true of Indonesia in the period from its independence to the critical date; and various important acts, beginning with the oil concessions that they granted in the 1960s, bear witness to the Parties' agreement as regards the parallel of 4º 10'N being the limit of their respective possessions;

(8) in conclusion, the relevant cartographic material (which includes British and Malaysian official maps) speak exclusively in favour of the Indonesian argument.

Mr. President, Members of the Court, on behalf of our entire team I thank you very warmly for your attention.

The PRESIDENT: Thank you, Professor. This brings an end to this morning's session and the first round of oral pleadings of the Republic of Indonesia. The next sitting of the Court in the present case will take place on Thursday 6 June at 3 p.m. and Malaysia will then begin its first round of oral pleadings.

The Court rose at 1 p.m.