CR 2002/30

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2002

Public sitting

held on Thursday 6 June 2002, at 3 p.m., at the Peace Palace,

President Guillaume presiding,

***in the case concerning* Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)**

VERBATIM RECORD

ANNÉE 2002

Audience publique

tenue le jeudi 6 juin 2002, à 15 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président,

***en l'affaire relative à la* Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)**

COMPTE RENDU

Present:	President	Guillaume
	Vice-President	Shi
	Judges	Oda
		Ranjeva
		Herczegh
		Fleischhauer
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
	Judges *ad hoc*	Weeramantry
		Franck
	Registrar	Couvreur

Présents : M. Guillaume, président
M. Shi, vice-président
MM. Oda
Ranjeva
Herczegh
Fleischhauer
Koroma
Vereshchetin
Mme Higgins
MM. Parra-Aranguren
Kooijmans
Rezek
Al-Khasawneh
Buergenthal
Elaraby, juges
MM. Weeramantry
Franck, juges *ad hoc*

M. Couvreur, greffier

The Government of the Republic of Indonesia is represented by:

H. E. Dr. N. Hassan Wirajuda, Minister for Foreign Affairs,

as Agent;

H. E. Mr. Abdul Irsan, Ambassador of Indonesia to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the International Law Commission,

Mr. Alfred H. A. Soons, Professor of Public International Law, Utrecht University,

Sir Arthur Watts, K.C.M.G., Q.C., Member of the English Bar, Member of the Institute of International Law,

Mr. Rodman R. Bundy, *avocat à la Cour d'appel de Paris*, Member of the New York Bar, Frere Cholmeley/Eversheds, Paris,

Ms Loretta Malintoppi, *avocat à la Cour d'appel de Paris*, Member of the Rome Bar, Frere Cholmeley/Eversheds, Paris

as Counsel and Advocates;

Mr. Charles Claypoole, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley/Eversheds, Paris,

Mr. Mathias Forteau, Lecturer and Researcher at the University of Paris X-Nanterre, Researcher at CEDIN — Paris X (Nanterre)

as Counsel;

Mr. Hasyim Saleh, Deputy Chief of Mission, Embassy of the Republic of Indonesia, The Hague,

Dr. Rachmat Soedibyo, Director General for Oil & Natural Resources, Department of Energy & Mining,

Major General S. N. Suwisma, Territorial Assistance to Chief of Staff for General Affairs, Indonesian Armed Forces Headquarters,

Mr. Donnilo Anwar, Director for International Treaties for Politics, Security & Territorial Affairs, Department of Foreign Affairs,

Mr. Eddy Pratomo, Director for International Treaties for Economic, Social & Cultural Affairs, Department of Foreign Affairs,

Mr. Bey M. Rana, Director for Territorial Defence, Department of Defence,

Le Gouvernement de la République d'Indonésie est représenté par :

S. Exc. M. Hassan Wirajuda, ministre des affaires étrangères,

comme agent;

S. Exc. M. Abdul Irsan, ambassadeur d'Indonésie aux Pays-Bas,

comme coagent;

M. Alain Pellet, professeur à l'Université de Paris X-Nanterre, membre et ancien président de la Commission du droit international,

M. Alfred H. A. Soons, professeur de droit international public à l'Université d'Utrecht,

Sir Arthur Watts, K.C.M.G., Q.C., membre du barreau anglais, membre de l'Institut de droit international,

M. Rodman R. Bundy, avocat à la cour d'appel de Paris, membre du barreau de New York, cabinet Frere Cholmeley/Eversheds, Paris,

Mme Loretta Malintoppi, avocat à la cour d'appel de Paris, membre du barreau de Rome, cabinet Frere Cholmeley/Eversheds, Paris,

comme conseils et avocats;

M. Charles Claypoole, *Solicitor* à la Cour suprême d'Angleterre et du Pays de Galles, cabinet Frere Cholmeley/Eversheds, Paris,

M. Mathias Forteau, chargé de cours et chercheur à l'Université de Paris X-Nanterre, chercheur au au Centre de droit international de l'Université de Paris X-Nanterre (CEDIN),

comme conseils;

M. Hasyim Saleh, chef de mission adjoint à l'ambassade d'Indonésie à La Haye,

M. Rachmat Soedibyo, directeur général pour les ressources pétrolières et naturelles, ministère de l'énergie et des mines,

Le général de division S. N. Suwisma, assistant pour les questions territoriales auprès du chef d'état-major pour les affaires générales, quartier général des forces armées indonésiennes,

M. Donnilo Anwar, directeur des traités internationaux pour les questions de politique, de sécurité et de territoire au ministère des affaires étrangères,

M. Eddy Pratomo, directeur des traités internationaux pour les questions économiques, sociales et culturelles au ministère des affaires étrangères,

M. Bey M. Rana, directeur de la défense territoriale, ministère de la défense,

Mr. Suwarno, Director for Boundary Affairs, Department of Internal Affairs,

Mr. Subyianto, Director for Exploration & Exploitation, Department of Energy & Mining,

Mr. A. B. Lapian, Expert on Borneo History,

Mr. Kria Fahmi Pasaribu, Minister Counsellor, Embassy of the Republic of Indonesia, The Hague,

Mr. Moenir Ari Soenanda, Minister Counsellor, Embassy of the Republic of Indonesia, Paris,

Mr. Rachmat Budiman, Department of Foreign Affairs,

Mr. Abdul Havied Achmad, Head of District, East Kalimantan Province,

Mr. Adam Mulawarman T., Department of Foreign Affairs,

Mr. Ibnu Wahyutomo, Department of Foreign Affairs,

Capt. Wahyudi, Indonesian Armed Forces Headquarters,

Capt. Fanani Tedjakusuma, Indonesian Armed Forces Headquarters,

Group Capt. Arief Budiman, Survey & Mapping, Indonesian Armed Forces Headquarters,

Mr. Abdulkadir Jaelani, Second Secretary, Embassy of the Republic of Indonesia, The Hague,

Mr. Daniel T. Simandjuntak, Third Secretary, Embassy of the Republic of Indonesia, The Hague,

Mr. Soleman B. Ponto, Military Attaché, Embassy of the Republic of Indonesia, The Hague

Mr. Ishak Latuconsina, Member of the House of Representatives of the Republic of Indonesia,

Mr. Amris Hasan, Member of the House of Representatives of the Republic of Indonesia,

as Advisers;

Mr. Martin Pratt, International Boundaries Research Unit, University of Durham,

Mr. Robert C. Rizzutti, Senior Mapping Specialist, International Mapping Associates,

Mr. Thomas Frogh, Cartographer, International Mapping Associates

as Technical Advisers.

The Government of Malaysia is represented by:

H. E. Tan Sri Abdul Kadir Mohamad, Ambassador-at-Large, Ministry of Foreign Affairs

as Agent;

M. Suwarno, directeur des affaires frontalières, ministère de l'intérieur,

M. Subiyanto, directeur de l'exploration et de l'exploitation, ministère de l'énergie et des mines,

M. A. B. Lapian, expert sur l'histoire de Bornéo,

M. Kria Fahmi Pasaribu, ministre conseiller à l'ambassade d'Indonésie à La Haye,

M. Moenir Ari Soenanda, ministre conseiller à l'ambassade d'Indonésie à Paris,

M. Rachmat Budiman, ministère des affaires étrangères,

M. Abdul Havied Achmad, chef de district, province de Kalimantan est,

M. Adam Mulawarman T., ministère des affaires étrangères,

M. Ibnu Wahyutomo, ministère des affaires étrangères,

Le capitaine Wahyudi, quartier général des forces armées indonésiennes,

Le capitaine Fanani Tedjakusuma, quartier général des forces armées indonésiennes,

Le colonel Arief Budiman, département de la topographie et de la cartographie, quartier général des forces armées indonésiennes,

M. Abdulkadir Jaelani, deuxième secrétaire à l'ambassade d'Indonésie à La Haye,

M. Daniel T. Simandjuntak, troisième secrétaire à l'ambassade d'Indonésie à La Haye,

M. Soleman B. Ponto, attaché militaire à l'ambassade d'Indonésie à la Haye,

M. Ishak Latuconsina, Membre de la Chambre des Représentants de la République d'Indonésie,

M. Amris Hasan, Membre de la Chambre des Représentants de la République d'Indonésie,

comme conseillers;

M. Martin Pratt, unité de recherche sur les frontières internationales de l'Université de Duhram,

M. Robert C. Rizzutti, cartographe principal, *International Mapping Associates*,

M. Thomas Frogh, cartographe, *International Mapping Associates*,

comme conseillers techniques.

Le Gouvernement de la Malaisie est représenté par :

S. Exc. M. Tan Sri Abdul Kadir Mohamad, ambassadeur en mission extraordinaire, ministère des affaires étrangères,

comme agent;

H. E. Dato' Noor Farida Ariffin, Ambassador of Malaysia to the Kingdom of the Netherlands

as Co-Agent;

Sir Elihu Lauterpacht, Q.C., C.B.E., Honorary Professor of International Law, University of Cambridge, Member of the *Institut de Droit International*,

Mr. Jean-Pierre Cot, Emeritus Professor, University of Paris-I (Panthéon-Sorbonne), Former Minister,

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, Member of the English and Australian Bars, Member of the Institute of International Law,

Mr. Nico Schrijver, Professor of International Law, Free University, Amsterdam and Institute of Social Studies, The Hague; Member of the Permanent Court of Arbitration

as Counsel and Advocates;

Dato' Zaitun Zawiyah Puteh, Solicitor-General of Malaysia,

Mrs. Halima Hj. Nawab Khan, Senior Legal Officer, Sabah State Attorney-General's Chambers,

Mr. Athmat Hassan, Legal Officer, Sabah State Attorney-General's Chambers,

Mrs. Farahana Rabidin, Federal Counsel, Attorney-General's Chambers

as Counsel;

Datuk Dr. Nik Mohd. Zain Hj. Nik Yusof, Secretary General, Ministry of Land and Co-operative Development,

Datuk Jaafar Ismail, Director-General, National Security Division, Prime Minister's Department,

H. E. Ambassador Hussin Nayan, Under-Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Ab. Rahim Hussin, Director, Maritime Security Policy, National Security Division, Prime Minister's Department,

Mr. Raja Aznam Nazrin, Principal Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Zulkifli Adnan, Counsellor of the Embassy of Malaysia in the Netherlands,

Ms Haznah Md. Hashim, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Azfar Mohamad Mustafar, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs

as Advisers;

S. Exc. Mme Dato' Noor Farida Ariffin, ambassadeur de la Malaisie auprès du Royaume des Pays-Bas,

comme coagent;

Sir Elihu Lauterpacht, Q.C., C.B.E., professeur honoraire de droit international à l'Université de Cambridge, membre de l'Institut de droit international,

M. Jean-Pierre Cot, professeur émérite à l'Université de Paris 1 (Panthéon-Sorbonne), ancien ministre,

M. James Crawford, S.C., F.B.A., professeur de droit international à l'Université de Cambridge, titulaire de la chaire Whewell, membre des barreaux anglais et australien, membre de l'Institut de droit international,

M. Nico Schrijver, professeur de droit international à l'Université libre d'Amsterdam et à l'Institut d'études sociales de La Haye, membre de la Cour permanente d'arbitrage,

comme conseils et avocats;

Mme Dato' Zaitun Zawiyah Puteh, *Solicitor General* de la Malaisie,

Mme Halima Hj. Nawab Khan, juriste principale au cabinet de l'*Attorney-General* de l'Etat du Sabah,

M. Athmat Hassan, juriste au cabinet de l'*Attorney-General* de l'Etat du Sabah,

Mme Farahana Rabidin, conseil fédéral au cabinet de l'*Attorney-General*,

comme conseils;

M. Datuk Dr. Nik Mohd. Zain Hj. Nik Yusof, secrétaire général du ministère de l'aménagement du territoire et du développement coopératif,

M. Datuk Jaafar Ismail, directeur général du département de la sécurité nationale, services du premier ministre,

S. Exc. M. Hussin Nayan, ambassadeur, sous-secrétaire au département des affaires territoriales et maritimes du ministère des affaires étrangères,

M. Ab. Rahim Hussin, directeur de la politique de sécurité maritime, département de la sécurité nationale, cabinet du premier ministre,

M. Raja Aznam Nazrin, secrétaire adjoint principal au département des affaires territoriales et maritimes du ministère des affaires étrangères,

M. Zulkifli Adnan, conseiller de l'ambassade de la Malaisie aux Pays-Bas,

Mme Haznah Md. Hashim, secrétaire adjointe au département des affaires territoriales et maritimes du ministère des affaires étrangères,

M. Azfar Mohamad Mustafar, secrétaire adjoint au département des affaires territoriales et maritimes du ministère des affaires étrangères,

comme conseillers;

Mr. Hasan Jamil, Director of Survey, Geodetic Survey Division, Department of Survey and Mapping,

Mr. Tan Ah Bah, Principal Assistant Director of Survey, Boundary Affairs, Department of Survey and Mapping,

Mr. Hasnan Hussin, Senior Technical Assistant, Boundary Affairs, Department of Survey and Mapping

as Technical Advisers.

M. Hasan Jamil, directeur de la topographie, service des levés géodésiques, département de la topographie et de la cartographie,

M. Tan Ah Bah, sous-directeur principal de la topographie, service des frontières, département de la topographie et de la cartographie,

M. Hasnan Hussin, assistant technique principal du service des frontières, département de la topographie et de la cartographie,

comme conseillers techniques.

Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte. Avant de donner la parole à l'agent de la République de Malaisie et à ses conseils, je voudrais très brièvement rendre hommage à deux des Membres de la Cour qui sont récemment décédés.

Le juge Herman Mosler, qui nous a quittés en décembre 2001, était né en 1912 près de Bonn. Docteur en droit en 1937, il avait alors pris des fonctions de recherche à l'Institut pour le droit international de l'empereur Guillaume. Après la guerre, M. Mosler était devenu professeur à l'Université de Francfort et, en 1951, le chef du département juridique du ministère des affaires étrangères de la République fédérale d'Allemagne. Puis, en 1954, membre de la Cour permanente d'arbitrage. A la même époque, il fut nommé professeur à l'Université de Heidelberg et directeur de l'Institut pour le droit international Max Planck, position qu'il a conservée jusqu'à son élection à la Cour en 1976. C'est sous sa direction que cet institut est devenu internationalement renommé pour les études et les recherches de droit international et qu'il l'est encore aujourd'hui. En 1959, il avait été élu juge à la Cour européenne des droits de l'homme à Strasbourg et, compte tenu de la faible activité de la Cour internationale de Justice à cette époque, il avait conservé ce poste jusqu'en 1981, époque à laquelle il était déjà juge à la Cour depuis quelques années. Il dut l'abandonner parce que la charge de travail avait augmenté et qu'il était donc dans l'obligation de se consacrer exclusivement à la Cour. Il a été membre de celle-ci de 1976 à 1985. Le juge Mosler était un homme qui était profondément imprégné de l'idée que le droit avait un rôle éthique et social dans les sociétés humaines et son cours général à l'Académie de droit international en 1974 le montre bien, puisqu'il avait choisi pour titre «La communauté internationale comme société de droit».

Le juge José Sette-Camara, quant à lui, était né à Minas Gerais en 1920, au Brésil, et avait fait ses études à l'Université McGill à Montréal en préparant un texte devenu classique sur la ratification des traités. Diplomate précoce, il était à 39 ans ambassadeur du Brésil; puis homme d'Etat, il fut le dernier gouverneur de Rio de Janeiro, alors capitale du Brésil, avant de devenir maire de Brasilia. Puis, il fut journaliste au journal *Do Bresil* entre 1968 et 1972, période difficile dans l'histoire de ce pays où il sut montrer une grande indépendance. Juge à la Cour internationale de Justice de 1979 à 1988, il en fut vice-président pendant trois années et ce fut lui aussi un

magistrat épris de l'idée que le droit a la primauté sur le pouvoir dans la construction de la société internationale. Il est décédé récemment après une longue maladie dans sa maison de Rio de Janeiro.

Cet hommage étant rendu à nos deux anciens collègues, nous allons maintenant commencer l'audience d'aujourd'hui et je vais immédiatement donner la parole à l'agent de la République fédérale de Malaisie, Son Excellence M. Tan Sri Abdul Kadir Mohamad, *Ambassador-at-Large*. Monsieur l'agent, vous avez la parole.

Mr. MOHAMAD:

1. Mr. President and distinguished Members of the Court, it is a great honour to appear before you, and to take this opportunity to explain why sovereignty over the islands of Ligitan and Sipadan belongs to Malaysia.

2. Malaysia and Indonesia are two neighbouring countries in south-east Asia, which have mutually agreed to appear before this honourable Court to settle a dispute over the sovereignty of Sipadan and Ligitan, the general location of which may be viewed on the map that is now being displayed before the Court. You may also see it in tab No. 1 of your folders. [Show graphic 1 — Malaysian and Indonesian territory including islands]

The islands of Ligitan and Sipadan form part of the State of Sabah in Malaysia

3. The islands of Ligitan and Sipadan form part of the State of Sabah in the eastern part of Malaysia, which was known, during a certain period in history, as the State of North Borneo.

4. Malaysia and Indonesia have lived in peace and harmony for over 40 years, sharing not only land but also maritime boundaries. In the seas around it, Malaysia has 561 islands: Indonesia has 17,508. The fact that we have, between us, a dispute over only two islands — that is, Ligitan and Sipadan — is a measure of the generally friendly relations that exist between Malaysia and Indonesia. [End graphic 1]

The dispute over the islands affects important interests of Malaysia

5. [Show graphic 2 — the east coast of Sabah (Malaysia) and Kalimantan (Indonesia)] Nonetheless there *is* a dispute over these two islands. Indonesia first challenged Malaysia's right to

the islands in 1969, in the context of negotiations to agree upon the respective continental shelf boundaries of the two countries off the east coast of Borneo. The dispute has prevented the Parties from reaching any agreement on those boundaries, which is itself a concern. But the importance of the two islands is not limited to their importance in terms of maritime delimitation. They have for a long time been part of the social and political system of Sabah, formerly North Borneo. The two islands of Ligitan and Sipadan cannot be considered in isolation. They form part of a group of islands, traditionally called the Ligitan Group, which are relatively close together and form an economic and social unit. The people of the surrounding islands, especially Danawan and Si Amil, have always used the two islands for fishing, turtle egg collection and other purposes. You may see these islands shown on the map now on the screen and in tab No. 2 of your folders. Sipadan itself is a major tourist resort, listed in diving manuals as one of the great diving places in the world. There are important conservation interests associated with the islands, especially Sipadan, which is a major breeding ground for green turtles. [End graphic 2]

6. Mr. President, distinguished Members of the Court, the Parties tried for four years — between 1992 and 1996 — to find an amicable bilateral settlement to this dispute. We did not succeed. Thus, the decision to bring this matter for adjudication and settlement in this Court became the best way forward for both our countries. Indeed we have come to the ICJ on friendly terms, by way of a Special Agreement. In fact, when the present hearings commenced on Monday here in The Hague, the Deputy Prime Minister of Malaysia arrived in Jakarta for a three-day official visit to Indonesia.

Malaysia's case is clear and finds strong support in the evidence

7. Mr. President, Indonesia has inferred that Malaysia's case consists of "complex and artificial arguments". Let me say immediately that the Malaysian arguments are neither complex nor artificial.

8. In the written pleadings, Malaysia has established its case through clear and cogent argument, fully supported by documentary evidence.

First, Malaysia has shown that it acquired title to the islands of Ligitan and Sipadan by grant of the previous sovereign. Sovereignty over the Ligitan Group was acquired as a result of treaties

between Great Britain and the United States in 1907 and 1930. An earlier treaty, the Madrid Protocol with Spain in 1885, was essential background to these two treaties.

Second, Malaysia has shown that these two islands are, and for many years have been, in the possession and subject to the administration of Malaysia and of its predecessors in title. These predecessors in title were, from 1878, the British North Borneo Company which came under the protection of Great Britain in 1888. In 1946, the status of the State of North Borneo changed from a protectorate to a colony of Great Britain. In 1963 it became the Malaysian State of Sabah. Throughout, the two islands were administered as part of North Borneo or Sabah. That remains the case to this day.

9. Senior counsel for Malaysia, Sir Elihu Lauterpacht, will elaborate on these arguments later this afternoon when he presents the overview of Malaysia's case.

The facts concerning Malaysia's title

10. In particular, Malaysia has provided, in the written pleadings, evidence on six historical facts and their validity under the international law in force at the time of those transactions. These six facts are as follows:

(1) Like other islands off the east coast of Borneo, the Ligitan group, including Ligitan and Sipadan, were part of the dominions of the Sultanate of Sulu in the nineteenth century, something expressly recognized by the Dutch.

(2) When the people of these islands transferred their allegiance from the Sultan of Sulu to the British North Borneo Company, or BNBC, the company administered the two islands along with the rest of the Ligitan Group.

(3) The BNBC's administration of the offshore islands was not challenged by Spain or by the Netherlands.

(4) The BNBC's administration was recognized as a fact by the United States.

(5) The BNBC's right of administration was converted into a full right of British sovereignty as a result of the Treaty of 1930 between the United States and Great Britain.

(6) In 1963, Malaysia succeeded to British sovereignty over the islands, and its sovereignty continues uninterrupted to the present day.

Indonesia has failed to provide evidence to substantiate its case

11. By contrast, Indonesia has failed to provide evidence to substantiate its case. Here, three points stand out.

(1) There is no evidence that Ligitan and Sipadan were ever part of the territory of Bulungan.

(2) There is no evidence that Ligitan and Sipadan were allocated to the Netherlands in 1891. The British-Dutch Convention of 1891 was a land boundary treaty. It concerned possessions "in Borneo". It did not apportion maritime areas. Although Indonesia rests its whole case on the Convention, and thus makes the Convention relevant to this dispute, the fact remains that the Convention is irrelevant to the two islands.

(3) There is no evidence that the islands of Ligitan and Sipadan were ever administered or claimed by the Netherlands or by Indonesia, before Indonesia raised this subject as a matter of dispute between Indonesia and Malaysia in 1969.

12. Later this afternoon, Professor Nico Schrijver will give details about the extent of Dutch claims in the area prior to 1891, and Professor Crawford will show that the offshore islands were considered both by the British and the Dutch as belonging to Sulu and then to Spain.

13. Tomorrow morning, Professor Jean-Pierre Cot will spell out in more detail the many reasons why the 1891 Convention cannot and does not support Indonesia's case.

14. Apart from its actual language, let me just mention one reason. The 1891 Convention could not have given the two islands to Indonesia because at the time they did not belong to British North Borneo, any more than they belonged to Dutch Borneo. They were not included in the 1878 grant. As this Court pointed out in its intervention Judgment last year, "the grant of 1878 is not in issue as between Indonesia and Malaysia in this case, both agreeing that Pulau Ligitan and Pulau Sipadan were not included in its reach"[1]. That was the Judgment. But if the two islands were not part of North Borneo in 1891, how can there have been any intention to give them to the Netherlands? They were simply not part of the picture.

[1]Judgment of 23 October 2001, para. 66.

The so-called "Standstill Agreement" and the issue of oil practice

15. Mr. President, distinguished Members of the Court, I feel compelled to discuss something which seems to have taken on great significance in Indonesia's case, that is the so-called "Standstill Agreement" of 1969. Indonesia accuses Malaysia of repeated breaches of that Agreement, and through its counsel, prided itself with its own restraint and compliance with it. It also relies on the Standstill Agreement to exclude the continuous evidence of Malaysian administration of the islands since 1969.

16. [Show graphic 3 — Memorial of Malaysia, Ann. 74.] The Court will have noted that although the Standstill Agreement was referred to repeatedly by the Agent for Indonesia and by several of its counsel, not one of them took care to quote its actual language. You can see it on the screen now, and it is tab No. 3 in your folders. Let me quote it in full:

> "With reference to our negotiation and the Agreement concerning the delimitation of the continental shelf boundaries between our two countries, initialled today by us on behalf of our respective Governments, I have the honour to state our understanding that both the negotiation and the Agreement are purely and wholly of a technical nature."[2]

17. Now this exchange of letters is completely general and vague in its terms. It reflects an understanding "that both the negotiation and the Agreement are purely and wholly of a technical nature". It says nothing about any territorial dispute. The Agreement itself does not even cover the east coast of Borneo. The Court will be aware of standstill agreements concluded during boundary negotiations: they characteristically refer to the issue in dispute, they say that the parties will do nothing to exacerbate the dispute, they make it clear that anything either party does is without prejudice to the position of the other, they provide for confidentiality and any other agreed provisions. This particular exchange of letters does absolutely nothing of the sort. All it says is that the Agreement and the negotiation were of a technical nature. That is true: they dealt with the technical issue of maritime boundaries, and they did not address, for example various political issues which had soured relations between our two countries in the early 1960s. They make no reference to the disputed islands, they are not "without prejudice" agreement and they have no relevance to the present case.

---

[2]Memorial of Malaysia, Ann. 74.

18. Accordingly there can be no question that anything done by Malaysia since 1969 in relation to the islands was, or could have been, a breach of the exchange of letters. There is nothing in the exchange of letters by which Malaysia undertook not to develop the two islands (which are not mentioned). This is a purely unilateral and retrospective interpretation by Indonesia of the language of the exchange of letters, an interpretation which bears no relationship to its text. [End graphic 3.]

19. May I add, however, that Malaysia is fully aware of its obligations, under the Statute of the Court and the principle of good faith, not to prejudice the case in any manner or to allow the destruction of evidence. But it would not serve the interests of the people — whatever the decision of the Court on these two islands — if we did not take the necessary conservation measures or ensure a sustainable development of tourism, which, I might add, is an entirely different thing from a tourist invasion as suggested by counsel for Indonesia.

20. It was also suggested that the standstill agreement was the reason why the Parties have not developed their oil licensing practice east of Sebatik. Again, there is no truth in this at all. Any agreement by the Parties not to develop an area or issue licences pending resolution of a dispute would be express: again, there are examples of which the Court will be aware. The reason the Parties did not issue further licences was, first of all, the dispute itself, and secondly the indications from seismic studies that the area was not prospective. In his speech tomorrow dealing with the mapping issues, Professor Crawford will discuss further the question of the Parties offshore oil practice, such as it is.

The issue before the Court

21. Mr. President, distinguished Members of the Court, as it did in the opening of its written pleadings, Malaysia today maintains that the issue before the Court remains the same: that is, (1) to confirm Malaysia's sovereignty over the two islands based upon treaties with the other interested States and on long and effective possession and administration; and (2) to reject Indonesia's claim based upon its interpretation of the 1891 Boundary Convention.

22. In this context it is important to recall that Asia is replete with territorial disputes of one kind or another. This case is only the first case in 40 years where the Court has had to decide a

territorial dispute between two Asian countries. The role this Court has performed so often in the rest of the world is thus once more extended to Asia. Malaysia trusts that the Court will follow the same approach, the same judicial policy as in previous boundary cases, that of favouring stability. Malaysia and its predecessors have administered these islands without interruption, peacefully under a claim of title. That peaceful and established possession and title should not be interrupted and subverted by a claim based upon a totally new interpretation of a treaty — an interpretation which neither State which concluded the treaty ever proposed or considered.

23. For the reasons which I have outlined and other reasons which counsel for Malaysia will develop, we are confident that Malaysia's title to Pulau Ligitan and Pulau Sipadan is unshakeable, clear and incontrovertible.

24. Mr. President, I wish to conclude here, and invite you to call upon my colleague the Co-Agent, Ambassador Noor Farida Ariffin, to present to you the geographical and social context of Ligitan and Sipadan in relation to the State of Sabah in particular, and to Malaysia in general.

Mr. President, distinguished Members of the Court, I thank you.

The PRESIDENT: Je vous remercie beaucoup, Monsieur l'ambassadeur. Je donne maintenant la parole, pour la Malaisie, à Son Excellence l'ambassadeur Noor Farida Ariffin.

Mrs. ARIFFIN:

1. Merci M. le Président. Mr. President, Members of the Court, it is indeed a great honour and privilege for me to appear before this Court and to represent Malaysia as its Co-Agent in this case. My colleague, Tan Sri Abdul Kadir Mohamad, the Agent for Malaysia, has given you the introduction to our case.

2. I wish now briefly to present to the Court the geographical and social context of the dispute. I will show that the islands of Ligitan and Sipadan, as well as many of the surrounding islands, are part of a group of islands in the Semporna area. Their relation to the mainland will be examined. I will also endeavour to give a brief history of the islands and their economy.

3. As a first step I would like to show the Court a video of the islands of Ligitan and Sipadan.

VIDEO: The islands of Sipadan and Ligitan are part of the State of Sabah in the east of Malaysia. This video introduces the general geographical setting of the islands and shows some of their special features such as their natural beauty and their function as a resource space for the local people. We start from the island of Sabate. In line with the 1891 Boundary Convention, the island of Sabate is divided into two along the 4º 10' N parallel. In June 1891, a joint mission of British and Dutch ships, consisting of HMS *Raddler*, HMS *Igiria* and the Dutch ship HNLMS *Banda*, calculated the exact position of this parallel. A boundary mark was first placed on the west coast of Sabate shown here. Subsequently, the ships placed a beacon on the east coast of the island of Sabate. The distance from Sabate to the island of Sipadan is about 42 nautical miles.

Sipadan is an oceanic island; it is the peak of a mount which rises abruptly for about 600 m under sea level. It may be compared to a mushroom. The stem stands on the sea-bed, many of its features are under water while only a few metres of the cap appear above the sea surface. The distance from Tanjum Tutob, the nearest point on the Sabah mainland to Sipadan is only 14.8 nautical miles. Coconut trees on Sipadan Island were first planted almost 130 years ago by turtle egg collectors from the island of Danawan. The green turtles that make Sipadan their nesting ground, have provided the Bajau ruling community of Danawan a lucrative income for centuries. However, as early as 1914, Britain took steps to regulate the collection of turtle eggs on Sipadan and Ligitan. In 1919, Sipadan was declared a native reserve for the collection of turtle eggs. Turtle egg collection is currently prohibited under Malaysian law. Individuals with the hereditary right to collect turtle eggs on Sipadan, have been compensated. To prevent extinction of the turtles, the eggs are now collected by officers from the Wildlife Department. Turtles visiting Sipadan are tagged and registered. Their eggs are collected and transferred to a hatchery on the other side of the island. Upon hatching, the turtles are released into the sea.

Sipadan was declared a bird sanctuary from 1933 and was indicated as such on the 1935 map of the district. Sipadan Island is still a bird sanctuary today. Visitors to the island are immediately informed of this upon arrival. In 1997, Sipadan and Ligitan became protected areas. The lighthouse on Sipadan Island was constructed in 1962 by the British Government and is currently administered by the Sabah Marine Department. The lighthouse is regularly maintained to ensure the safety of navigation. Access to Sipadan is exclusively via Malaysia. Visitors need official

approval to visit the island. The majority of visitors are experienced scuba divers who come to explore the underwater beauty of Sipadan. The diving companies are incorporated in Malaysia. The island of Ligitan lies about 55 nautical miles east of Sebatik and approximately 15.5 nautical miles from Sipadan. Ligitan lies only 21.5 nautical miles to the south-east from the foothill of Hoothill, the nearest point on Sempurna, on the mainland of Sabah. As we approach the island of Ligitan its fringing coral reef is clearly visible. The surrounding waters of Ligitan island are a good fishing ground. For fishermen who regularly fish here, spending a night on Ligitan is very common. Despite the presence of sea snakes on the island, the Pulau or sea gypsies have made the waters around the island their home. A flotilla of boats can be seen present in the area during the day. Furthermore, on the island of Ligitan Bajau Laut and Pulau dry fish and squid. The lighthouse automatically begins to operate as dust falls in Ligitan. The lighthouse has been blinking signals to navigators since 1963. The islands of Danawan, Si Amil, Ligitan, Sipadan, Kapalai, Mabu and Omadal constitute a cluster of islands of which the principal island is Danawan. There is a constant movement of people between them all. Danawan is mainly populated by the Bajau Laut the head man of Dinawan has for the last 100 years come from the descendants of the indigenous leader, Panglima or Chief Abusari. The islands of Danawan and Omadau have their own cemeteries. Sipadan itself is often described as an appendage of Danawan whereby the rights to collect turtle eggs on Sipadan were initially granted by the Sultan of Sulu to the ruling Bajau of Danawan. The group of islands forms an integrated geographic, cultural and social whole and is part of one marine economy. [End of video]

4. Mr. President, Members of the Court, as you have seen, the video has shown both the disputed islands. It would be useful, however, to explain to the Court the macro- as well as the micro-geographical setting of this dispute.

5. The territories of Malaysia fall into two main geographical areas: the Malay Peninsula and the northern part of the island of Borneo, extending from the west to the east coast. Numerous offshore islands are found off the coasts of both Peninsular and East Malaysia. So far as the east coast of Borneo is concerned, all these islands are well known, have names and are described in authoritative sailing guides and pilots. They are also shown on maps of the eighteenth and

nineteenth centuries, with names which are for the most part the same or similar to the names they have today.

The PRESIDENT: Excuse me, may I ask you to speak a little more slowly for the interpreters. Thank you very much.

Mrs. ARIFFIN: I apologize.

Even those islands which were not permanently inhabited were visited by fishermen and others and their resources harvested throughout the period for which records exist. They have long been subject to administrative control by Malaysia and its predecessors in title. There can be no suggestion that any one of them is, or at any time was, *terra nullius*, and indeed Indonesia does not suggest otherwise.

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

7. All boundaries between the two Parties are maritime boundaries, with the exception of the boundary on the main island of Borneo and the adjacent island of Sebatik. Here the boundary was laid down by their respective predecessors in title, Britain and the Netherlands, in the 1891 Boundary Convention. The boundary was formally demarcated when necessary and in particular, by a further treaty of 1915, to which a map was annexed.

8. [Show Memorial of Malaysia insert 3, Borneo Coast, Sulu Archipelago] As you can see from the map on the screen, which has also been included in the judges' folders at tab 4, to the north and east of the large island of Borneo are many small islands stretching in the direction of the Philippines across the Sulu Sea and the Celebes Sea. A particular feature of the region to the east is the chain of islands still known as the Sulu Archipelago. Its main town of Jolo was the seat of the Sultan of Sulu who held sway over these islands and many others in the surrounding seas, including the north-east coast of Borneo itself. [End insert 3]

9. Mr. President, Members of the Court, having explained the macro-geographical setting, I shall now turn to the micro-geographical setting.

10. [Show Memorial of Malaysia insert 13, Semporna Region] The map on the screen, which you will find in your folders at tab 5, shows the north-east coast of Borneo which consists of a series of bays and indentations interspersed with peninsulas, with associated offshore islands. These bays and indentations include Teluk Lahad Datu (Darvel Bay), and, south of the Semporna Peninsula, Sibuko Bay, a large bay formerly known as St. Lucia Bay. To the south of Sibuko Bay is the Celebes Sea. Within Sibuko Bay and north of the island of Sebatik is Teluk Tawau (Cowie Bay). The north shoreline of Cowie Bay is the site of Tawau, the local administrative centre, and slightly to the east of it, Batu Tinagat. Sailing east from the island of Sebatik itself, there is nothing but open sea with some shoals until, 30 nautical miles away, is encountered Terumbu Ligitan or Ligitan Reefs in English. As you can see from the map, Ligitan Reefs and Pulau Ligitan are separate features and it is Pulau Ligitan which is the subject of the present dispute. Ligitan and Sipadan are respectively 19.5 nautical miles and 8.2 nautical miles further to the south-east of Terumbu Ligitan or Ligitan Reefs. [End insert 13]

11. In the nineteenth and twentieth centuries, the islands and reefs along the north-east coast of Borneo have been mainly inhabited and used by the Bajaus, otherwise known as Bajau Laut or sea gypsies. They live mostly in boats or in settlements of stilt houses above water. There is a large settlement in Trusan Treacher, near Semporna, the result of the resettlement efforts of the British North Borneo Company after 1906. The Bajaus have their own language called Sama or Samal. Their occupation, at times relevant to the present case, was mostly fishing and the collection of forest products. They were a key part of the procurement system operated from Sulu until the 1880s, whereby goods such as edible birds' nests, *trepang* or *bêche-de-mer*, rattan, etc., were collected by them and traded through the port of Jolo especially with China. The role of Jolo was largely taken over by the trading centre of Semporna after its establishment by the company in 1887. The local leaders, who were often Sulu, were appointed by the Sultan of Sulu, and given such titles as Panglima, Datu or Temenggong. The company assumed that prerogative after 1878 and confirmed in office or subsequently appointed a number of local leaders who had previously held office under the Sultan.

12. In 1903 the *British North Borneo Herald* published an interesting account of the Bajau cemetery on Omadal, referring also to the Bajau settlements of Silam, Danawan and Semporna.

Bajaus from Danawan have long held the licence to collect turtle eggs on Sipadan, granted initially by the Sultan of Sulu and subsequently recognized by the Government of North Borneo. The licence was reissued by the Government of North Borneo under the Turtle Preservation Ordinance of 1917.

13. [Show MM insert 5, islands around Semporna, Sabah, Malaysia] Mr. President, Members of the Court, with respect to the island of Ligitan, which lies at latitude 4º 09' 48" N and longitude 118º 53' 04" E, it is the southern extremity of an extensive star-shaped reef that extends southward from Danawan and Si Amil islands, which are respectively 8.6 nautical miles and 8.9 nautical miles north of the island of Ligitan. The Ligitan Group includes Sipadan. The islands in this group are shown on the satellite image on the screen and at tab 6 in your folders. Bajaus living on Danawan and Si Amil made use of the whole reef for fishing, and of Ligitan itself for drying fish and other purposes, as you have seen from the video. As shown in the video, Ligitan Island lies about 21.5 nautical miles south-east of the nearest point on the coast which is the foothill of Hood Hill, and is about 15.5 nautical miles east of Sipadan. Most of the reef is submerged, though it shows dry patches in irregular shapes of between 0.3 m and 1.2 m in height. The island is not permanently inhabited but until very recently, there were a number of huts on stilts which were intermittently occupied.

14. At the northern tip of the reef, Danawan lies approximately 15.5 nautical miles south-east of Semporna Peninsula. Nearby, about 0.5 nautical miles to the north-east of Danawan, there is a separate island, Si Amil, on which there is a lighthouse operated by Malaysia. There is also a lighthouse — not just a lantern — operated by Malaysia on Ligitan itself, which you have seen in the video. Ligitan is covered in rocks, wild grass and trees called *bilang-bilang*.

15. Mr. President, Members of the Court, as to the island of Sipadan, it lies at latitude 4º 06' 39" N and longitude 118º 37' 56" E. It is 14.8 nautical miles from the nearest point on the coast. The general direction of the closest mainland coastline in Sibuko Bay is eastwards along the Semporna Peninsula, terminating at Pantau at the eastern end of Bum Bum Island. [End graphic insert 5] As was shown in the video, Sipadan is 42 nautical miles from the island of Sebatik. The nearest exclusively Indonesian island, Pulau Ahus, is 51.2 nautical miles away. Sipadan is neither geographically, ethnographically nor economically associated with any part of Indonesia.

16. Sipadan was originally covered with thick jungle until the time Panglima Abu Sari planted some coconut trees and some maize. It was not what one would describe as an uninhabited island. Although there were no permanent dwellings on the island apart from the semi-permanent wooden hut built by the licensed turtle egg collectors, Panglima Johan and Panglima Nujum, it was visited every night during the turtle egg harvesting season by these turtle egg collectors. A well was dug on the island to provide fresh water on the occasions that the turtle egg collectors spent nights on the islands.

17. Sipadan is part of the administrative district of Semporna in Malaysia: earlier it was part of the district of Lahad Datu. Neither the Netherlands nor Indonesia has ever exercised any authority over it.

18. Because of its unusual structure and unspoiled coral, Sipadan is a very popular tourist centre, especially for scuba divers. This diving activity led to the development on the island of a number of diving establishments and chalets. At its height there were 191 regular residents on the island, none of whom were Indonesian; the number has now been substantially reduced to protect the island from over-exploitation. The chalets and diving companies are registered with the Registrar of Companies, Sabah, with the exception of the Pulau Bajau Resort which is registered with the Semporna District Council. About 100 visitors are present on the island on any given day. Over the past 17 years, 134,631 tourists, mostly foreign, have visited the island. It is hardly the "small privately operated tourist facility" as was so erroneously described by counsel for Indonesia. However, the conservation aspect of the island is given equal importance. For example, the status of Sipadan as a bird sanctuary, derived from the North Borneo Land Ordinance of 1930, is still preserved. Both this Ordinance and the Turtle Conservation Ordinance of 1917 are vigorously enforced by the Sabah Wildlife Department.

19. The nearest inhabited island is Mabul, some 8 nautical miles to the north of Sipadan. Like Sipadan, Mabul is a tourist resort. In addition to the resort employees, there is a settlement of about a thousand people. Some are of Sulu and Philippine origin. There are also about 40 Bajaus who live mainly in boats moored within a few metres of the shore and whose livelihood is fishing.

20. Mr. President, Members of the Court, as was mentioned in the video, Ligitan and Sipadan form part of a group of small islands comprising Mabul, Omadal, Kapalai, Danawan,

Si Amil, Ligitan and Sipadan. In the first edition of the *Eastern Archipelago Pilot*, published in 1890, Sipadan is described as "the southernmost of the group", immediately following a description of Si Amil, Danawan and Ligitan and before the brief mention of Mabul. The geographical closeness of these islands forming the Ligitan group has led to a constant movement of people between them all. I would like to emphasize that the group of islands forms an integrated geographic, cultural and social whole and is part of one marine economy.

Mr. President, Members of the Court, I would like to thank you for the attention that you have given to my speech, and I would be grateful if you would call upon Sir Elihu Lauterpacht to continue Malaysia's presentation. Thank you.

Le PRESIDENT : Je vous remercie, Madame l'ambassadeur. I now give the floor to Sir Elihu Lauterpacht.

Sir Elihu LAUTERPACHT: Thank you, Mr. President.

1. Mr. President and Members of the Court, I am privileged to have been entrusted with the task of outlining the substantive part of Malaysia's response in more detail than was possible in Ambassador Kadir's opening statement. I will focus on the case as it now appears in the light of Indonesia's most recent statement of its position. The principal elements of Malaysia's response will then be developed in greater detail by my distinguished colleagues Professors Cot, Crawford and Schrijver, and in one respect by myself.

2. There are just a few preliminary points that can be quickly disposed of. First, we will be mindful of the Court's Practice Direction VI requiring parties to comply fully with the terms of Article 60, paragraph 1, of the Court's Rules and thus to avoid unnecessary repetition of what has already been set out at length in the written pleadings. Therefore, wherever possible, my colleagues and I will do no more than indicate the main features of the contention and will provide in the footnotes to our arguments references to the places in the written pleadings where they are more fully elaborated. Of course, we will not read those references, but they will be included in the transcripts of the day's proceedings.

3. Second, the Court will recall that in the arguments of the two sides, references are made to two different sequences of rulers: on the Indonesian side, to the Rulers of Bulungan, to the

Netherlands and, most recently, to Indonesia; on the Malaysian side, to the Rulers of Sulu, to the British North Borneo Company, to Spain, to the United States, to Britain and, most recently, to Malaysia. In order to avoid unnecessary repetition, it will be convenient on some occasions to attribute past actions simply to "Indonesia" or "Malaysia" respectively, despite the fact that the conduct in question was that of one of their predecessors in title.

4. Third, and more important, something must be said about the critical date to which both Sir Arthur Watts and Professor Pellet have referred. Sir Arthur said that "the dispute now before the Court crystallized in 1969". In so far as this was meant to suggest that there was something in the nature of a dispute before 1969, which solidified, so to speak, in that year there is no basis for it whatsoever. Before the maritime delimitation discussions in 1969 neither Indonesia nor its predecessors had given any indication of an interest in or claim to the islands. More likely, however, Sir Arthur meant only what he then said next: "For the purpose of admitting and assessing evidence of the exercise of State sovereignty, any conduct after that date is to be disregarded."[3] And this was also the argument of Professor Pellet. The contention is, with respect, unsustainable. The proposition is now well established in international law that it is not concerned with the admissibility of evidence but with the weight to be given to it. There is no automatic cut-off date for the admissibility of evidence. All the evidence may be looked at. If, to use Sir Arthur's words, it is "self-serving, designed to strengthen, or even establish, that State's claim to sovereignty" its weight will be correspondingly reduced. But that is not the case here. If Malaysia had, by the development of tourist activity on Sipadan, intended thereby to strengthen its case for sovereignty over that island, is it not strange that it waited nearly 20 years before promoting the tourism that generated the first Indonesian protest of May 1988[4]? The truth of the matter lies in two propositions. The first is one of law and is to be found in the award in the *Palena* arbitration over which Lord McNair presided. It is to the effect quite simply that there is no objection to a tribunal taking into account post-critical date activity if it evidences the continuation of a course of conduct openly pursued before the critical date.

---

[3]CR 2002/27, p. 23.

[4]Memorial of Indonesia, Vol. I, para. 8.71.

5. The second proposition is one of fact. In this case the facts of Malaysian activity on and in relation to Sipadan are a natural outgrowth of the character of the island. Scuba-diving is a sport that only become popular in the 1980s. Malaysia did not invent the remarkable physical features of Sipadan with a view to tempting scuba divers to rally to the support of Malaysian sovereignty. Quite to the contrary. Malaysia accepted the responsibilities of sovereignty to ensure the protection of the island's environment as well as the basic needs of the visitors. The most recent official manifestation of that responsibility is the Protected Areas Order 1997 by which Sipadan and Ligitan were declared to be protected areas[5]. The Government was thus empowered to regulate more closely the number of people visiting the islands with a view to protecting their environments.

6. The point that really requires emphasis now is that, without at all diminishing the significance of the continuity of Malaysian presence in the islands over the last 33 years, the fact is that 78 years elapsed from 1891 to 1969 without any sign from Indonesia and its predecessors that it questioned the presence of Malaysia and its predecessors in the islands or the legitimacy of their presence there. This is the point that Malaysia will be repeatedly stressing — for 78 years Indonesia remained totally silent and inactive regarding title to the islands.

7. Moreover, we must bear in mind that this is not a situation in which the presence of the British North Borneo Company of Britain and of Malaysia is any way dependent upon a grant, lease or licence made by Bulungan or the Netherlands. Sipadan and Ligitan have at all times, until most recently, been outside any area claimed by Indonesia or falling under its authority. Britain and Malaysia have not been the licensees of the Netherlands or Indonesia.

8. The Court has just heard from Ambassador Ariffin an illuminating description of the geographical and social context of the present dispute. It is worth emphasizing one consideration to be drawn from what she has said.

9. This case is not about title to two isolated islands set in a far distant ocean from any neighbouring land. Ligitan and Sipadan are in no way similar to, say, Clipperton Island, which was 800 miles from any significant coast and which fell to be examined without reference to its position relative to any other land. As the maps in the video just shown to the Court and insert 5 in the

[5]Memorial of Malaysia, Vol. IV, Ann. 123.

Malaysian Memorial so strikingly demonstrate, Ligitan and Sipadan are an integral part of an island unity, comprised of the islands of Omadal, Danawan, Si Amil, and Kapalai closely linked to the adjoining Semporna Peninsula. [Show map.] These islands form more than a geographical unit. They are a social and economic unit. They are used by the local people based in these islands, in the exploitation of the adjacent fisheries and, as regards Sipadan, with a major interest in its turtles and their eggs. When Sir Arthur, in his opening, said that "both islands were occasionally used by seasonal fishermen and turtle egg collectors"[6] he was understating the nature of the use of the islands. True, as he said, "neither island sustained a permanent resident population" — that is prior to the development of tourist facilities — but both were permanent and habitual adjuncts of the populations of the neighbouring islands. The collection of turtle eggs was not occasional but was regular and regulated. The fishermen used Ligitan continuously to dry their fish and nets, and to stay for a period of time.

10. Of course, there have been some changes in recent years. In particular, the economic interest of the people of Semporna, Danawan and Si Amil in turtle eggs as such was replaced by their financial interest in the payments contracted to be made to them by the companies operating the scuba-diving centres on Sipadan. No longer would the owners of the traditional rights to collect turtle eggs continue to exercise those rights. Instead, the scuba-diving companies undertook to purchase all the turtle eggs laid on Sipadan with a view to leaving them there to hatch naturally. None were to be removed save in accordance with the instructions of the Department of Wildlife of Sabah — note, of *Sabah*, not of Indonesia. That position still prevails. The Indonesian authorities have never shown any interest in this significant environmental feature[7]. Their attempt to separate Ligitan and Sipadan from their natural neighbours is marked by the highest degree of artificiality. Not only are these islands a group — they lie in relatively close proximity to the mainland of, initially, Sulu, then of British North Borneo and now of Sabah. Sipadan, the most distant from the coastline to the north, is still no more than 14.8 nautical miles away from the Semporna coast. Ligitan is 21.5 miles distant. But measured from the nearest point on the Indonesian coast, the coast of Sebatik, Sipadan is 42 nautical miles away and Ligitan is 55 nautical miles. Now we know

[6]CR 2002/27, p. 20.

[7]Sale and Purchase Agreement, 1993, M/R, Ann. 8.

that in these matters mere proximity or contiguity is not the controlling factor. Judge Huber said so expressly in the *Island of Palmas* case. The Court heard argument to the same effect in the *Qatar* v. *Bahrain* case. But when proximity is coupled with administration, then proximity may properly be given weight. It really hardly needs saying again. When one looks at the map, the cluster of islands of which Ligitan and Sipadan form a part are manifestly separate from the area of Indonesian authority. There is a measure of unreality, of absurdity even, in trying to throw a kind of legalistic bridge over the waters lying between Sebatik and the islands in question.

11. Permit me, Mr. President, now to turn to the essentials of the case. It is striking in the simplicity of its central issues. It is one in which Indonesia claims on the sole basis of a treaty now more than 110 years old title to two islands of which it has never had possession and over which it has never exercised any authority whatsoever. Malaysia contests Indonesia's interpretation of the treaty. That question is at the forefront of the case. The resolution of that question in Malaysia's favour would dispose of the whole case. I will come back to it in a moment.

12. But first I must stress again a basic and inescapable historical fact. These islands are now in the possession of Malaysia, subject to its control and administration, and they have been so at all material times for more than a century and a half. There is not a glimmer of actual display of Indonesian State authority on the islands. Indonesia is effectively a claimant attempting to oust the State in possession from its long-possessed territory. But now, let me return to first things first: the 1891 Treaty.

13. The Court has heard extended argument from Indonesia on this matter. Expressed in its simplest terms, the Indonesian argument is that the words that the boundary line of 4º 10' N shall run eastwards — and now come the crucial words — "across the island of Sebatik", mean not only that the boundary crosses that island but also that it extends into the sea for an indefinite distance.

14. My distinguished colleague, Professor Jean-Pierre Cot will respond to this argument in systematic detail. In the meantime, I will respectfully invite the Court to reflect on a number of questions that identify some significant weaknesses in Indonesia's arguments relating to the interpretation of the 1891 Convention.

15. On Monday, Sir Arthur Watts pointed to the Preamble of the Convention as defining its object and purpose. The words he relied on were: "being desirous of defining the boundaries

between the Netherlands possessions in the Island of Borneo and the States in that Island which are under British protection". Sir Arthur said that nothing limited those boundaries to the land in the island.

Question 1: Why should the definition of the boundaries between the possessions of the Parties "in the Island" extend into the sea more than 50 miles to the east, south of the Semporna Peninsula, when, according to Indonesia's own illustrative map — which is tab No. 6 in their judges' folder of 3 June — the areas of their respective claims to possession were limited to an area of the island of Borneo nowhere near the maritime region and islands in question?

Question 2: In the same order of enquiry, how does a boundary described as running from the east coast of Borneo across that island from east to west come to extend eastwards across the sea more than 55 nautical miles? How is that extension or continuation to be established? Is it achieved only by the use of the words "across the island of Sebatik"? Why after providing that the boundary should continue across the island of Sebatik, was the whole of the rest of that Article, Article (4), concerned only to allocate that portion of the island to the north of that parallel unreservedly to the company and the portion south of that parallel to the Netherlands? If the intention had also been to divide territories lying in the sea, why did the Article not say also, and I invent a quotation: "and those islands situated to the north of that parallel shall belong to the BNBC and those to the south shall belong to the Netherlands"? That would have been the complete and logical way of expressing the objective which Indonesia now says that the Article was intended to achieve.

Question 3: Or, if a shorter form of words would have been preferred, why were the words "across the island of Sebatik" included at all when the meaning for which Indonesia argues could have been achieved simply by saying "from the east coast the boundary line shall be continued eastward along that parallel"? Do not the words "across the island of Sebatik" act as words of limitation, restricting the line to the breadth of that island? And what about the ordinary meaning of the word "across" which means "across", and not "across and beyond"? If you mean a line to stretch "across and beyond" an area, you need to state its ultimate destination in that way — and again I invent a quotation: "across the island of Sebatik to somewhere specific beyond it". It is not enough to leave the line as indefinite but yet not endless.

16. Let us turn from the words of the Treaty. If they are not by themselves sufficient to support Malaysia's case, what then of the additional elements introduced into the argument by Indonesia?

Question 4: Indonesia places dominant emphasis on the Explanatory Memorandum map presented to the Netherlands Parliament in 1891. On what basis can recourse to this map be justified as of varying the meaning of the text? Why, if the 1891 Explanatory Memorandum map is so important an element in the interpretation of the 1891 Convention, was it not annexed to the Convention and made to form part of it? Is one party to a treaty entitled to put its own interpretation on the treaty by means of a unilaterally prepared map which it then contends 78 years later, notwithstanding the conduct of the other party to the contrary, that the other side has accepted? It should be borne in mind that in the *Temple* case, the map that formed the basis of the acquiescence was formally handed by one party to the other in a meeting. That was not the case here. Sir Arthur twice repeated that the map was "officially known" to the British Government[8]. But what does "officially known" mean other than that it reached the Foreign Office and was suitably filed? How many in British circles would have known of the map? And would they have focused on the length of the red line the extension of which could not have been seen as having any relevance? More to the point, what would Indonesia have been able to say now if the British Ambassador in The Hague had simply disregarded or overlooked the map and had not sent it home? The Netherlands did not know how Britain had dealt with the map. Nor did it care. Only in connection with this case was the history of the map resurrected. The map was never officially communicated to Britain and the Netherlands never acted in reliance upon British possession of the map.

Question 5: Why, if the line was intended to be a specific line of allocation, is there no consistency between the various later maps on which it appears — particularly on a map which bears the signatures of Dutch representatives, the map of 1915[9]?

Question 6: By what stretch of interpretation can a line that is spoken of in the Indonesian pleadings as a "boundary" line when drawn across land, and even across the water between the

---

[8]CR 2002/28, pp. 22 and 23.

[9]Memorial of Malaysia, Atlas, No. 23.

main island of Borneo and Sebatik, suddenly without a variation of wording change its character to a line of allocation in the sea east of Sebatik? It must be recalled, this was at a time — the 1890s — when the concept of an allocation line was clearly understood. Yet the Indonesian Reply contends that an allocation line may be extracted from the language of the 1891 Treaty. In the case of the land delimitation, (to use the words of Indonesia) "the Convention resulted in a boundary line". In the case of the line at sea "it resulted in an allocation of islands on either side of the line". One expression; two different meanings! That is a strange result, to say the least.

Question 7: Sir Arthur has sought to lend force to his argument by comparing the language of Articles III and IV of the Convention. He points to the express statement in Article III that the boundary runs "from the summit of the range of mountains mentioned in Article II, to Tandjong-Datoe on the west coast of Borneo"[10]. So, Sir Arthur continues, "it is evident that when the Parties intended the boundary to terminate at a point on the coast, they found no difficulty in saying so". And this he contrasts with the language of Article IV. So we come to the next question — which I seem to have forgotten to number, let us say it is question 7 *(a)*: Is it true that Article III described the western terminus of the boundary by saying that it ran to the coast? The answer is that it did not. The boundary ran to a named place, Tandjoeng Dato, which happened to be on the west coast. It reached that town by following the watershed between two identified sets of rivers, those reaching the sea north of Tandjoeng Dato and those reaching the sea south of it. There is no way in which the boundary across Sebatik could have been described in a similar way because there was no named town or place on the eastern coast of that island which could have been identified as its eastern terminus. In any case, in that eastern sector the boundary was formed by a latitudinal line, not by a watershed. The comparison is totally misleading.

Question 8: What explanation can there be of the terms of the joint British-Dutch delimitation "on the spot" — as it was called — in February 1913 of the frontier between British and Dutch territory? This started with the words: "Traversing the island of Sibetik, the frontier line follows the parallel of 4° 10' north latitude as already fixed by Article 4 of the boundary treaty and marked on the east and west coasts by boundary pillars."[11] There is no word of reference,

[10]CR 2002/28, p. 15, para. 31.

[11]Memorial of Malaysia, 2, p. 95.

expressed or implied, to the extension of the boundary eastwards of the pillar on the east coast. And the same question can be asked of the record of the demarcation on Sebatik jointly carried out in May 1914[12]. And yet again the same can be asked of the virtually identical language of the Anglo-Dutch Agreement of 1915 completing the 1913 demarcation[13]. I have already referred to the signed map which accompanies this Agreement.

Question 9: Why, if, as Indonesia contends, the boundary line in the sea is so clear, did the Dutch Government find it necessary to give such detailed consideration in 1920 as to where to draw the lines of the territorial sea between the Netherlands and British parts of Sebatik? Surely, if the basic Indonesian contention is correct, the 1891 line would have achieved the necessary delimitation.

17. Permit me to turn briefly to the Indonesian treatment now of Malaysia's title. Malaysia points to this as fully supportive of its assertion of the legal consequences of its long administration of the islands and of its denial of the effect alleged by Indonesia of the terms of the 1891 Convention. This will be developed more fully by my learned friend, Professor Crawford. In the meantime I need say only the following.

18. In 1885 Britain recognized the sovereignty of Spain over the places occupied, as well as over those places not yet occupied, of the Sulu Archipelago. Spain recognized the retention of sovereignty by Britain over islands within 3 marine leagues down to the Sibuko River — both Ligitan and Sipadan were outside these lines. As a result of the loss by Spain of its title when it was defeated by the United States in the Spanish-American War, the US inherited the underlying title to the offshore islands beyond 9 nautical miles, Sipadan and Ligitan, but agreed to permit the British North Borneo Company to administer the islands. This was the effect of the 1907 Exchange of Notes[14], in which the US Government temporarily waived the right of administration to all the islands westward and southward of the so-called Durand Line of 1906. In 1930 the United States and the United Kingdom agreed on a final settlement, as a result of which some of the islands covered by the 1907 Exchange of Notes, in particular the Turtle Islands, were returned

---

[12]*Ibid*., p. 102.

[13]*Ibid*., p. 104.

[14]Memorial of Malaysia, 2, p. 93.

to the United States while others, in particular the five islands south of Semporna including the two in dispute here, remained with British North Borneo[15].

19. *Question 10*: What act of authority by the Sultan of Bulungan or by the Dutch Netherlands Indies Government can Indonesia show over the islands? And after 1891, if the Netherlands had claimed any of the islands, why did it never say so? In particular why did it remain silent in 1907, when Britain and the United States made a public agreement concerning those offshore islands?

20. At this point, I may return to the second main element in the Malaysian case, the first having been Malaysia's interpretation of the Treaty. And this is the legal significance of two related facts: the first is that Malaysia and its predecessors in title have possessed and administered the islands for more than a century and a half. The second fact is the obverse of the first, namely, that in all that time Indonesia and its predecessors in title have never possessed or administered the islands.

21. It is well to recall at the very beginning two sentences in the much cited and respected Award of Judge Huber in the *Island of Palmas* case[16]. These are, I may say, not the same sentences that were the subject of so much discussion before this Court in the *Qatar* v. *Bahrain* case. Those were the sentences relating to contiguity. The ones now referred to are, rather, some of the sentences which follow in a later part of the Award: and they are highly pertinent here:

> "The Netherlands, on the contrary [that is, contrary to the United States argument based on discovery, recognition by treaty and contiguity] found their claim to sovereignty essentially in the title of peaceful and continuous display of State authority over the island [the opposite, I may observe *en passant*, of what Indonesia is now arguing]. Since this title would in international law prevail over a title of acquisition of sovereignty not followed by actual display of State authority, it is necessary to ascertain in the first place whether the contention of the Netherlands is sufficiently established by evidence, and, if so, for what period of time."[17]

22. Now, allow me please to restate the proposition in Judge Huber's observation in positive terms — and this is how it goes: "A title based on a peaceful and continuous display of State authority would in international law prevail over a title of acquisition of sovereignty not followed

---

[15] *Ibid*., p. 116.

[16] 1928, II *UNRIAA* 829.

[17] *Ibid*., p. 867.

by actual display of State authority." Expressed in terms of the present case, even if, as Indonesia claims and Malaysia disputes, the 1891 Convention could have given title to Indonesia, that would not prevail over the title of Malaysia developed and hardened on the basis of its continuous presence in, and administration of, the islands since before 1891.

23. Malaysia possesses the islands and has done so since before the 1891 Convention. Indonesia has never occupied or possessed them. Indonesia's claim thus suffers from two fundamental defects. First, Indonesia's interpretation of the 1891 Convention, on which — and on which alone — the whole of its case rests, is quite unsustainable. Second, Indonesia is trying to oust the State that has, with its predecessors, been in effective possession since the nineteenth century. If the concept of stability of frontiers, which this Court has endorsed on several occasions, has any real meaning, this case is without doubt one in which it applies with self-evident force. The fundamental defect in what the Court has heard so far from Indonesia is its failure to show how the title to which Indonesia pretends on the basis of its interpretation of the 1891 Convention survived the intervening 78 years of British and Malaysian possession until 1969 within the meaning of the principle enunciated by Judge Huber — a principle never challenged.

24. It is simply a matter of comparing what the Netherlands did in relation to the islands with what Britain did. These points will be elaborated in due course by Professor Schrijver, in respect of the limits of Dutch action, and by myself in respect of British conduct. But again, in the meantime, there are a number of further questions which the Court will no doubt wish to consider.

Question 11: Where is the evidence of a single item of Dutch administration, legislation or assertion of title in respect of the islands? Do the occasional tangential passages near the islands of the *Macasser*, 1903; the *Koetei*, 1910; and the *Lynx*, 1921 — three items in a period of 80 years —really amount to "administration"?

Question 12: Where is the evidence of any regular presence of persons on the islands, whether resident or not, who regarded themselves as under the authority of the Dutch? Not a single instance is offered by Indonesia.

Question 13: How does Indonesia displace the significance of the open and undisputed inclusion of the islands within the administrative districts of the British Semporna Peninsula?

Question 14: Regrettably the last: where is the evidence of any economic activity in the islands, especially the collection of turtle eggs, by the inhabitants of Dutch territory living south of the 4º 10' line?

25. I shall return to the significance of these last four questions when later I address the Court on the subject of *effectivités*. It is Malaysia's contention that there are no answers to any of these questions that can support Indonesia's position. In consequence, Malaysia submits that the Court should find that sovereignty over Ligitan and Sipadan belongs to Malaysia. This submission will now be developed in greater detail by my colleagues.

Mr. President, unless you find it convenient to take a break at this point, may I ask you now to call upon my colleague, Professor Schrijver, to address you.

The PRESIDENT: Thank you very much. I think it would be convenient to have the break at this stage. La séance est suspendue pour une dizaine de minutes.

L'audience est suspendue de 16 h 30 à 16 h 40.

Le PRESIDENT : Veuillez vous asseoir. La séance est reprise. Je donne maintenant la parole, au nom de la Malaisie, au professeur Schrijver.

Mr. SCHRIJVER: Merci.

DUTCH CLAIMS TO BORNEO'S EAST COAST AND ISLANDS BEFORE 1891

Introduction

1. Mr. President, Members of the Court. Since this is the first time that I have the honour of addressing you in this courtroom, I would like at the outset to express my deep respect for your distinguished Court and to record my pleasure at participating in these proceedings on behalf of the Government of Malaysia.

2. My task today is to examine the issue of supposed Dutch claims to East Borneo in the period leading up to the 1891 Boundary Convention between Great Britain and the Netherlands.

3. In its Memorial, Indonesia dealt extensively with the issue of the Dutch relationship with the Sultanate of Bulungan and its geographical extent. The major part of Chapter III as well as the

entire Chapter IV, entitled "The pre-1891 situation", were devoted to it[18]. The Counter-Memorial also addressed the pre-1891 situation, but took the view that ambiguities may have existed and that the ownership of islands in the area on either side was uncertain[19]. Subsequently, we learnt from Indonesia's Reply that it had shifted to the view that the pre-1891 history and the existence of valid claims in that period were "an irrelevance"[20].

4. Hence, over time Indonesia appears to have completely dropped Bulungan as a basis for its claim to the islands of Ligitan and Sipadan. It now appears to base its claim to the islands entirely on the interpretation that the 1891 Boundary Convention represented a compromise between the Dutch and the British, not only with respect to the mainland, but also with respect to island possessions. As Sir Arthur Watts in his speech overviewing the case pointed out: "there is . . . no need for this Court to consider the merits of the rival claims of the Sultans"[21], the Sultan of Bulungan and the Sultan of Sulu.

5. Nevertheless, my distinguished colleague Professor Soons took time to survey the whole history of north-east Borneo prior to the 1891 Boundary Convention[22]. Indonesia appears to hobble back and forth between two views when it returns from time to time to the Dutch contracts with Bulungan.

6. Malaysia is of the view that for a proper understanding of the case, history and practice before 1891 do matter. They provide the background of the diplomatic rivalry between Great Britain and the Netherlands in nineteenth century Borneo. Furthermore, they show decisively what the 1891 Convention was about.

7. Hence, Mr. President, Members of the Court, I will first briefly give an overview of Dutch colonization of the island of Borneo — a colonization which started late and was desultory. Secondly, I will review the features of the Sultanate of Bulungan on which Indonesia initially put so much reliance as a basis for its claims to sovereignty over the islands in dispute. In reality,

---

[18]Memorial of Indonesia, pp. 9-27 and pp. 37-60.

[19]See Counter-Memorial of Indonesia, Vol. 1, p. 41, para. 3. 86 and p. 86, para. 5.61.

[20]See Reply of Indonesia, p. 9, para. 1.5, and p. 101, para. 5.40 *(f)*.

[21]CR 2002/27, p. 25, para. 35 (ii).

[22]CR 2002/27, pp. 26 *et seq.*

Bulungan was a mainly land-based Sultanate, whose sway in any case — and that is my next issue — did not pertain to islands of the Ligitan Group, also known as the Sulu islands.

8. Fourthly, I shall demonstrate that, in practice, Dutch sovereignty was never exercised or even claimed east of Batu Tinagat. Fifthly and finally, I shall make clear that the sporadic Dutch naval activities in the area before 1891 cannot be viewed as exercises of territorial jurisdiction over the Ligitan Group.

I. Dutch colonization of Borneo started late and was desultory

9. I would like first to look at the Dutch colonization of Borneo. Mr. President, we are dealing with two small islands, which are part of the complex of islands off the coast of North Borneo. Despite Borneo's huge size, the island was largely unknown to Europeans for a considerable period of time. It was not until the mid-eighteenth century that the Dutch managed to gain actual footholds in the south-eastern part of Borneo[23].

10. The Dutch were able to maintain their dominant position in western and southern Borneo for a short period only. Fierce competition to the Dutch soon emerged, from the trading ships of other nations, including the Chinese and the British East India Company. While the Dutch exerted influence mainly in the western and southern parts of Borneo, the British established themselves in the north and north-east. The truth is that the Dutch took little interest in East Borneo as it was on the outskirts of its colonial empire that was already over-extended at that time.

11. Moreover, as Professor Fasseur of Leiden University observed, after 1830 the Netherlands embarked on a policy of self-restraint: it concentrated on the economic exploitation of Java and merely maintained the status quo in the outer islands. This policy of *abstention* was also practised with respect to Borneo[24].

12. Such claims as the Dutch made with respect to north-east Borneo were essentially reactive in nature. These claims arose in response to events such as the arrival of James Brooke in Sarawak in the early 1840s, the grant of North Borneo by the Sultan of Sulu to Von Overbeck and Dent in 1878, the according of a royal charter by the British Government to the newly-established

---

[23]See Memorial of Indonesia, pp. 55-56 and Counter-Memorial of Malaysia, App. I, Houben study, p. 4.

[24]See Counter-Memorial of Malaysia, App. I, Houben study, pp. 2-5.

British North Borneo Company in 1881 and the establishment of a British protectorate over Sarawak, Brunei and British North Borneo in 1888.

13. Each time these events gave rise to some diplomatic activity reflecting rivalry in the area, although overall Anglo-Dutch relations were very cordial during the second part of the nineteenth century. On various occasions such events also triggered a decision by the Dutch Government — sometimes spurred by parliament — to undertake efforts to strengthen Dutch presence in and administration of parts of Borneo.

14. [Project map of Dutch Borneo, Southern and Eastern Division, book Irwin.] In this context, the Government of the Netherlands East Indies concluded or renewed contracts with local rulers, including the Sultans of Pasir, Koetei, Sambalioeng, Goenoeng Taboer and Bulungan. The location of these Sultanates is shown on the map on the screen, which is taken from the book *Nineteenth-Century Borneo* by Irwin and which is in the judges' folders under tab 10. These areas came under the administration of the Dutch Resident in Bandjermasin, head of the Southern and Eastern Division of Borneo and as such, the chief colonial officer in the area *(Zuider- en Oosterafdeeling)*. These contracts included the right of the Dutch to establish themselves in the region, to exploit the natural resources in the area and to conduct trade, to the exclusion of other foreign powers.

II. Bulungan was a mainland-based Sultanate in eastern Borneo

15. Of particular relevance, and that is my second item today, is the series of contracts with Bulungan in the eastern part of Borneo, which emerged from the Sultanate of Berou as a separate sultanate in the early nineteenth century. The northern part was called the Tidung lands, which had first been conquered by Bulungan and later officially became part of Bulungan through various royal marriages. [stop projecting map] Here I would also like to refer to the informative study by Professor Houben, a specialist in the field of south-east Asian history, which appeared as an Appendix to Malaysia's Counter-Memorial. In its Reply Indonesia seeks to downplay Professor Houben's study by calling it "a note" and "a short study"[25], but as a matter of fact Indonesia has made no attempt to provide an equivalent expert study.

[25]See Reply of Indonesia, Chap. 5.

16. On 2 June 1878, the Dutch renewed the Contract with the Sultan of Bulungan which is under tab 11 of your folders. In this Contract the northern boundary of Bulungan was determined as being contingent with: "the Sulu possessions: at sea the cape called Batu Tinagat, as well as the Tawau River".

17. This is not to say that the Sultan of Bulungan, or for that matter the Dutch, could exercise control in these northern territories. As the Dutch Government plainly admitted to Parliament in 1879[26]: "The north-east and north-west part of Borneo have never been under our dominion. We have never disputed the authority of Spain over the dependencies of Sulu in the north-east portion of the island."

18. The 1878 grant by the Sultan of Sulu provided that the southern border of the area under the control of Dent and Von Overbeck would be the Sibuku River, thus overlapping the territory of the Sultan of Bulungan under Dutch influence. This territory was claimed to extend to Batu Tinagat. Both the British and the Dutch agreed that the area in dispute lay between the Sibuku River and Batu Tinagat. A sketch-map is now being shown and is also included under tab 12 of the judges' folders.

19. There can be little doubt concerning the location of the river Sibuku in the northern part of the Tidung lands, despite the confusion which may arise from what Professor Pellet said with respect to the river Subakun in Darvel Bay on Monday[27]. The Sibuku River is shown in essentially the correct place in contemporary Dutch atlases, as can be seen for example in the enlargement of the 1881 Atlas by *De Sturler*, reproduced as map 1 in the Indonesian Map Atlas, and also as can be seen from the authoritative 1870 Versteeg *General Atlas of the Netherlands Indies*, reproduced as map 3 in Malaysia's Map Atlas. Extracts of both maps are included in the judges' folders under tab 13. While Professor Pellet may not yet be willing to drop the point, the Dutch did so nearly straightaway in the 1880s.

20. During the 1870s and 1880s several incidents occurred between the Netherlands and the British North Borneo Company which highlighted the necessity of resolving this territorial dispute.

---

[26]In Dutch: *"zijn aan ons gezag te alle tijde vreemd geweest"*. See Memorial of Malaysia, p. 75, and Memorial of Malaysia, Vol. 2, Ann. 40, p. 24.

[27]CR 2002/27, pp. 44-46, paras. 26-28.

Professor Soons also referred to these in his presentation[28], and there is hence no need for me to repeat what we have already stated in our written pleadings. Great Britain filed various protests against the border at 4° 20' N claimed by the Dutch. A lengthy but inconclusive diplomatic exchange followed, especially during the period 1879-1882. The correspondence is remarkably well documented in the General State Archives here in The Hague and the Public Record Office in London. What matters is that in the hundreds of pages of these documents there is not one single reference to any island of the Ligitan Group. [Stop projecting map]

21. Mr. President, the diplomatic contacts resulted in the Joint British-Dutch Commission. The relevant negotiations took place during the period 1889-1891. Both Indonesia and Malaysia have extensively reviewed these interesting negotiations for the 1891 Boundary Convention[29]. Tomorrow, my colleague Professor Cot will address these *travaux préparatoires* in some detail.

III. The Dutch contracts with Bulungan did not pertain to the Ligitan group of islands

22. I now proceed to the question whether the Dutch contracts with Bulungan pertained to the Ligitan group of islands. As already repeatedly mentioned in the pleadings of both Indonesia and Malaysia, the various contracts between the Netherlands and the Sultan of Bulungan identified specific islands as belonging to Bulungan. The relevant part of the 1878 Description of the Boundaries and Statement of the Islands belonging to it is now on the screen and can also be found under tab 14 in your folders[30] [project relevant part of 1878 Contract]:

> "Description of the Boundaries of the Kingdom of Boeloengan and Statement of the Islands Belonging to it:
>
> . . . . . .
>
> The following islands belong to Boeloengan, viz.:-
>
> Terekkan, Nanoekan, and Sebittikh, with the islets belonging thereto."

Terakkan, Nanoekan, and Sebittikh, with the islets belonging thereto.

23. The phrase "islets belonging thereto" *("met toebehoorende eilandjes")*, referring to the islets appertaining to the islands Terakkan, Nenoekkan and Sebatik, is to be understood to mean the

---

[28]CR 2002/27, p. 34, para. 33.

[29]See Memorial of Malaysia, pp. 91-94, Memorial of Indonesia, pp. 26-27 and pp. 74-78.

[30]Full text in Memorial of Malaysia, Vol. 2, Ann. 11, p. 41.

series of small islands in the immediate neighbourhood of, and most notably between, the islands of Sebatik, Nanukan and Tarakan. [Stop projecting text and now show map with the small islets]

24. The phrase "islets belonging thereto" of course evidently refers only to the configuration of small islands in the vicinity of the named islands, most notably those now on the screen and under tab 15 of the judges' folders. They are found mostly between the islands of Sebatik and Nunukan and the island of Tarakan. Most of these islets carry a name and include Tina Basan, Bukat, Ahus, Baru, Tibu and Bunju.

25. The Sulu islands, including Sipadan and Ligitan, have never been referred to in these contracts or in any related document. They are simply not in the immediate vicinity of Sebatik, Nunukan and Tarakan. Mr. President, could any reasonable interpretation give rise to the assumption that Pulau Sipidan, at 42 nautical miles from Sebatik, and Pulau Ligitan, at 55 nautical miles, come within the scope of the phrase "islets belonging thereto" *("toebehoorende eilandjes")*? [Stop projecting map]

26. When the contract of 2 June 1878 was reported to the Dutch Parliament, there was certainly no reference to any claim by the Netherlands to islands in the Ligitan Group, islands not in the vicinity of Bulungan but offshore islands at a considerable distance in the Sulu Sea. Neither was there such a reference in the extensive debates in the Second and First Chambers of the Dutch Parliament in response to alleged incursions by the British into Dutch territory[31].

IV. No Dutch sovereignty was ever claimed east of Batu Tinagat

27. As admitted by Indonesia in its written pleadings, there was never, at any time, an attempt by the Dutch negotiators to claim any territory east of Batoe Tinagat or islands east of Sebatik. Let me quote here what has been so aptly described by Indonesia itself in its Memorial, at page 74[32]: [project text]

> "throughout the second half of the 19th century the history of the north-eastern area of Borneo saw a steady increase in the territorial extent of British authority at the expense of the Dutch: in effect the Dutch were on the retreat . . .".

[31]Memorial of Malaysia, Anns. 40 and 42.

[32]Memorial of Indonesia, p. 74.

28. As pointed out, and documented in Malaysia's Reply, there is ample evidence of the Dutch considering Batu Tinagat as "the point of demarcation" and of the recognition by the Dutch authorities of territory being under British influence east of Batu Tinagat. Mr. President, there is no need here to repeat these arguments, apart from recalling what was frankly admitted by the Dutch Ministers of Colonies and Foreign Affairs when tabling the draft law to approve the ratification of the 1891 Boundary Convention[33]: [project text]

> "The Dutch Government has never paid much attention to her territory at the Eastern coast of Borneo which was unknown to her and moreover totally uninhabited; that the rights of the Sultan of Boeloengan on the disputed area cannot be called totally indisputable . . ."

29. By the phrase "disputed area" in the text I just quoted, the Ministers meant the area between the Sibuku River and Batu Tinagat to which I referred earlier. Moreover, it is a known fact that, and I now quote from what was reported in the same Explanatory Memorandum[34]: [project text],

> "The Bajaus who live on the islands located at the North-Eastern coast of Borneo, which belong to the Sultanate of Solok, still continuously collect forest products in the disputed area and show no concern whatsoever for the Sultan of Bulungan."

30. In a similar vein, in 1888 Count de Bylandt had dismissed the proposal to grant the Dutch Batu Tinagat in the form of an enclave[35].

31. During the ratification debate in 1892, the Dutch Minister for Foreign Affairs even considered that the claims of Bulungan to Batu Tinagat could not be proved and "were in reality imaginary"[36]. "Imaginary", Mr. President.

32. While this week we have seen all kinds of maps, not one single map includes islands of the Ligitan Group as being part of the Sultanate of Bulungan.

V. There was no exercise of jurisdiction over the islands

33. Mr. President, distinguished Members of the Court, I would now like to proceed to my fifth issue: was there any Dutch exercise of territorial jurisdiction over the islands in the period

---

[33]Memorial of Malaysia, p. 100, full text in Memorial of Malaysia, Vol. 4, Ann. 51, p. 93.

[34]Memorial of Malaysia, Vol. 3, Ann. 51, p. 91.

[35]Memorial of Malaysia, p. 78.

[36]Counter-Memorial of Malaysia, p. 28 and Memorial of Indonesia, Ann. 84, Vol. 3, p. 266.

leading up to the conclusion of the 1891 Boundary Convention. After extensive research on both sides, neither Indonesia nor Malaysia has found any evidence of the Netherlands exercising territorial jurisdiction over the islands prior to 1891. This is not surprising, since no relevant power in the region, including the Netherlands itself, considered this part of the Sulu region to be within the realm of the Sultan of Bulungan or the Netherlands East Indies.

34. There is, however, some difference of opinion with Indonesia as regards the relevance of the movements in the area of the Dutch navy vessel *Admiraal van Kinsbergen* in 1878 when it took soundings and anchored off the coast. A landing took place on Mabul, but not on Sipadan. In its Counter-Memorial Indonesia goes so far as to argue that "this shows that at the time the Dutch considered that the island [they refer to Mabul] belonged to the Sultan of Boeloengan"[37]. The island of Mabul lies only 7.5 nautical miles away from Sipadan. Mr. President, if the Dutch would have claimed Mabul and surrounding islands, *why* did they not mention this at all in the 1889-1891 negotiations? It would have been an extra card in a poor hand!

35. Moreover, with respect to this *van Kinsbergen* voyage my distinguished counterpart, Professor Soons, claimed that "the Dutch naval presence *throughout this period* proves the position of the Dutch Government that their sovereignty, through the Sultan of Boeloengan, extended at least up to this area"[38]. Throughout the period, Mr. President, up to 1891. However, both Indonesia and Malaysia have failed to find any evidence of this in the archives or elsewhere[39].

36. Obviously, isolated cases of Dutch ships steaming through the area and reportedly sighting Sipadan cannot be regarded as a serious indication that Bulungan's title extended that far off the coast, and it is certainly not evidence for Professor Soons', frankly rather wild, assertion of a Dutch presence "throughout the period".

VI. Conclusion

37. Mr. President, kindly allow me to wind up by drawing three conclusions.

38. Firstly, as regards pre-1891 Dutch claims to Borneo's east coast and islands, Malaysia has not found a single sentence, a phrase or a word which directly or indirectly contains, or could

---

[37]Counter-Memorial of Indonesia, Vol. 1, p. 34, para. 3.63.

[38]CR 2002/27, p. 33, para. 30; emphasis added.

[39]Reply of Malaysia, p. 36.

be interpreted to contain, any claim on the part of the Sultan of Bulungan or the Dutch authorities to territory east of Batu Tinagat.

39. Secondly, the same applies to offshore islands and the maritime area to the east and north-east of the islands specifically mentioned in the contracts and supplementary agreements between the Sultan of Bulungan and the Netherlands, such as the islands of Tarakan, Nunukan and Sebatik. Nor is anything reported in this regard in the Dutch Annual Reports on the Colonies, in other official colonial documents such as the mail reports or memoranda of transfer by local Residents, in parliamentary proceedings or in travel accounts.

40. Accordingly, Mr. President, and this is my last conclusion for today, we can fully share the Indonesian view, albeit on quite different grounds, that as there were no pre-1891 Dutch claims to these islands, the nineteenth century history of Bulungan is indeed "an irrelevance".

41. Mr. President, this concludes my intervention at this stage. May I now invite you to call upon my colleague Professor James Crawford. Thank you, Mr. President, distinguished Members of the Court, for your very kind attention.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. I now give the floor to Professor James Crawford.

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

THE EXTENT OF BRITISH NORTH BORNEO IN 1891 AND ITS IMPLICATIONS FOR INDONESIA'S CLAIM

Introduction and overview

1. My task is to show how Malaysia acquired title to the two disputed islands, Ligitan and Sipadan, and indeed to the Ligitan group of islands as a whole, by virtue of transfer from, or relinquishment by, its predecessor in title, the United States. I am going to do that in two stages. Today, I will show the position as it was prior to the Convention of 1891. Tomorrow I will deal with the transactions with the United States.

2. Let me first, however, place these issues within the context of the case as a whole. For you do not actually need to decide how Malaysia acquired title to the islands, if you reject Indonesia's argument based on the 1891 Convention.

3. That proposition — I don't say it's a confession of irrelevance — rests on an elementary proposition of law and on two elementary facts: one of the facts is agreed, one of them cannot reasonably be disputed.

4. The elementary proposition of law is as follows. You only have to decide this case between Malaysia and Indonesia. Indeed you *can* only do so. In judicial proceedings, title is relative, as Judge Huber said in the *Island of Palmas* case[40]. In order to succeed, one claimant only has to show that it has a better claim than the other. It does not have to show a title good against the world. When it comes to title, some facts are better than no facts, and many facts are better than a few facts.

5. And there are two elementary facts in this case. First, the Dutch had no title to the Ligitan Group before 1891. It can hardly be disputed that the claims of Bulungan did not extend so far. To say that the Ligitan Group was part of the Tidoeng lands is frankly fantastic, and my friends have not been able to find or have not attempted to find a Dutch historian of Borneo who would dare to say that. In its Memorial, Indonesia relied heavily on the connection between Bulungan and the Ligitan Group. But as the pleadings have proceeded — and you have heard — this claim has receded into the background: "the Disappearing Sultan", Agatha Christie would have called it. In its Reply Indonesia is reduced to saying that the question was "uncertain"[41], and that the Court did not actually need to resolve the question. It said so again this week: the word "uncertainty", which occurred 14 times in the Reply, sprang to the lips of Sir Arthur Watts any time he referred to anything before 1891[42]. Indeed the Court will wonder at the alchemy by which *uncertainty* in 1891 was transformed into *certainty* and a treaty title in 1892. But in 12 years of negotiations — well, rather in the negotiations that spanned 12 years in two stages from 1879 to 1891 — the Dutch never on any occasion asserted any title to the islands at all, as Professor Schrijver has just shown you. So that is the first fact.

6. The second fact is this. After 1891, neither the Netherlands nor Indonesia exercised actual authority over the islands. By contrast the BNBC, Britain and Malaysia did exercise at least some

---

[40]*Island of Palmas* case, *RIAA*, Vol. II (1928), pp. 838-839, 868.

[41]Reply of Indonesia, Introduction, paras. 3-4; see also paras. 5.38, 5.40 *(a)*.

[42]CR 2002/27, pp. 21 (Sir Arthur Watts), 56 (Sir Arthur Watts) (3 times), 50-51 (Prof. Pellet), 57 (Sir Arthur Watts), 58 (Sir Arthur Watts) (3 times); CR 2002/28, p. 26 (Sir Arthur Watts).

such authority. It is true that Indonesia tries to point to cases where Dutch ships went ashore at Sipadan. The captain of the *Lynx* may not have read and indeed could not have read the *Western Sahara* case: if there was no one there, he might have thought he was entitled to go ashore. You heard from Professor Soons Indonesia's case on *effectivités* between 1891 and 1969. It was effectively a one-card trick, the card being the *Lynx*: a solitary animal, the lynx. In fact Professor Soons probably spent longer talking about the *Lynx* on Monday than the *Lynx*'s boarding party spent on Sipadan on 26 November 1921[43]. Then Professor Pellet had the nerve to suggest that this was continuous administration[44]. Even if the *Lynx* was exercising territorial jurisdiction during that brief half an hour — and came back empty-handed — in November 1921 (and Professor Schrijver will tell you tomorrow that it was not), that single incident is nothing as compared with the record of BNBC, British and Malaysian administration over the years. So this much is clear, and it is the second elementary fact: there is a great deal more by way of actual administration of the islands by Malaysia and its predecessors than there is by Indonesia and its predecessors. That is the second fact.

7. These two facts being established, the Indonesian claim fails if its case on the treaty fails. Without the treaty, no one could even begin to say that it had a better title to the islands than Malaysia. All you have to do is to decide on the treaty, and everything else is an unnecessary complication.

8. So, you might ask, why am I presenting the issue of title to the Ligitan Group, including Sipadan and Ligitan, when all Malaysia has to do is show that it is right on the interpretation of the treaty?

9. Well, the first and the simplest reason for doing so is that it is the truth. It corresponds to what happened. It reflects the historical record — I am afraid I was trained in history as well as in the law. Indonesia's claim was presented for the very first time, as a matter of historical fact, in 1969. By contrast, Malaysia's claim corresponds with the actual transactions, with what the politicians, diplomats and administrators thought and did at the relevant times. It is Indonesia's case which is artificially constructed, not Malaysia's.

---

[43]Memorial of Indonesia, Vol. 4, Ann. 120, p. 4.

[44]CR 2002/27, pp. 56-57 (Prof. Pellet).

10. The second reason for doing so — the first reason for my dealing with this issue is that it reflects the historical truth — is that we can actually show the process by which Malaysia came to have title to the islands clearly enough through the documents. It is true that it did not happen in a single transaction but through a series of transactions, in the period from 1885 to 1930. But fortunately we have good records for each of the transactions concerned. They were the Tripartite Protocol between Britain, Germany and Spain of 1885[45] — sometimes referred to as the Madrid Protocol —, the Anglo-American Exchange of Notes of 1907[46] and the Anglo-American Boundary Convention of 1930[47]. We know what issues the parties to those treaties had to face; we know how they resolved them. We also know from the record that these treaties dealt with quite different issues from those discussed between Great Britain and the Netherlands which led to the 1891 Boundary Convention. There was simply no overlap between the negotiations.

11. And the third reason for dealing with the issue of title is this. It is an independent basis for establishing Malaysia's sovereignty over the islands. In order to succeed in this case, Indonesia has to show a whole series of things. It is not enough for Indonesia to show that the 1891 Convention somehow allocated the two islands to Dutch Borneo. Even if that were true, it would not get Indonesia home. Because Great Britain could not have allocated the two islands to Dutch Borneo, even if it had wanted to. The Ligitan group of islands was not part of the British protectorate of North Borneo at the time of the 1891 Convention, and the Parties *agree* that it was not. *Nemo dat quod non habet*. The British could not give to the Dutch in 1891 title to islands which, on any view of things, were not part of North Borneo. And the subsequent history, especially the transactions of 1903 to 1907 involving the United States, *shows* that this was so. It shows that the Indonesian claim has no purchase at all in the historical record.

12. [Tab 14. Sulu grant and the territorial dispute with the Philippines.] In three rounds of written pleadings, and now in its first oral round, Indonesia has never faced up to this difficulty. It continues to argue as if all it needs to show is that the 1891 Convention allocated the two islands to the Dutch. This gives it, as it said in its Reply and again this week, a "clear treaty title" to the

---

[45]Memorial of Malaysia, Vol. 2, Ann. 15.

[46]Memorial of Malaysia, Vol. 2, Anns. 23-24, together with the annexed map (the Durand map), Memorial of Malaysia, Vol. 5, Map 6.

[47]Memorial of Malaysia, Vol. 2, Ann. 29.

islands[48]. And all that Professor Pellet said about prescription was predicated upon a clear treaty title. But let us accept — for the sake of argument only — that Indonesia might be right about the interpretation of the 1891 Convention. Even on that basis, Indonesia would not have a treaty title. And the reason is that in 1891 the two islands were not part of North Borneo. They were not British to give. As you can see from the graphic on the screen (tab 14 in your folders), the islands were not included in the Sulu grant of 1878 — indeed you have already said so. Nothing happened between 1878 and 1891 to change that situation. The situation was expressly reaffirmed in 1885, when Great Britain and Germany finally recognized Spanish claims to all the areas of Sulu not contained in the 1878 grant, and Spain, in return, recognized British rights to North Borneo and the islands within nine miles, that is, the islands covered by the Sultan's grant of 1878.

13. Thus in 1891, Great Britain was bound by a public act, the Protocol of 1885, to recognize as Spanish all the Sulu islands beyond 9 miles from the coast of Borneo down to the Sibuko River. Moreover Britain knew at the time that the Dutch laid no claim to the islands south of Darvel Bay. It had been repeatedly told in correspondence and in the negotiations that the Dutch claims extended no further east than Batu Tinagat. If the Protocol of 1885 had affected Dutch claims, why did the Dutch not protest? The answer is clear. As Dutch maps showed, the area including the two islands was accepted by the Dutch as belonging to Sulu; they were Sulu possessions beyond the seashore, we might say.

14. So how on earth, even if it is right on the interpretation of the 1891 Convention, can Indonesia succeed? It has never bothered to tell us. Its claim completely lacks coherence. It has never administered the islands. It relies on an alleged allocation of them by a treaty with Britain at a time when they did not belong to Britain. So where can this clear Indonesian treaty title come from? An allocation line in a treaty can only allocate islands that belong to the parties to the treaty. Indonesia ignores this difficulty. All we have is silence. An allocation line in a treaty can only allocate islands that belong to the parties to the treaty. [End tab 14]

15. Mr. President, Members of the Court, I apologize for the repetition, but the dust ably thrown up by our opponents makes it necessary to be crystal clear. If you reject Indonesia's

[48]Reply of Indonesia, Introduction, paras. 2, 13.

argument on the interpretation of the 1891 Convention, the case is over: it is the very foundation stone of their case. But even if, hypothetically, you were to accept Indonesia's argument on the Convention, you would have to go further. You would have to decide how it is that the Netherlands could have acquired the islands when neither the Netherlands nor the BNBC had title to them in 1891. Even if, improbably, Indonesia is right on the 1891 Convention, you still have to decide what happened to title to the islands, based on events after 1891. Malaysia presents its argument on that point, and supports it with historical and legal documents. From Indonesia what does the Court have? No theory at all, and, above all, no facts.

16. Indonesia has made much about the contradiction between Malaysia's case on title and its case on administration — the word "contradiction" occurs to the lips almost as much as "uncertainty". But Malaysia's story is internally consistent and not at all contradictory, as I will show. On the other hand, there is a contradiction at the heart of Indonesia's case. Indonesia claims a treaty title over two islands by virtue of a treaty with a State which, it says, did not have title to the islands when the treaty was made, and never has had it since. Now *that* is a contradiction.

Transactions affecting North Borneo and the islands before 1891

17. Mr. President, Members of the Court, I turn then to the transactions affecting North Borneo before 1891. In doing so I want to make an essential preliminary point. Indonesia consistently talks about the two islands as if they were isolated uninhabited islands in the middle of the ocean. But as we have shown, Ligitan is not isolated at all: it is physically part of a single reef structure with Danawan and Si Amil. Sipadan, it is true, is an oceanic island, which is why the scuba divers like it. It is some miles away, but it has always been considered to be part of the Ligitan group of islands. Read the 1890 British Sailing Directory[49], and also the second edition of 1902 which Indonesia put in its Reply[50]. Both treat Sipadan as part of something called the Ligitan Group, and that phrase appears on contemporary charts.

18. And the point is this. Before 1889, no one spoke about the 4° 10' parallel. It was chosen late in the negotiations for the 1891 Convention because it happens to be the longitude of

[49]Counter-Memorial of Malaysia, Vol. 2, Ann. 1.

[50]Reply of Indonesia, Vol. 2, Ann. 4.

Broershoek, and for no other reason. In the Sulu period, no one would have contemplated having title to these two tiny islands: it would have had to be to the whole group of islands. To talk about Bulungan in 1878 having title to Sipadan and Ligitan would have been completely baffling: just because they were below 4° 10', would have been a complete *non sequitur*, a complete anachronism. But that makes the absence of any mention of the Ligitan group of islands even more incredible, if they were claimed by the Netherlands. It would have been giving up larger islands in the group in order to keep smaller ones. That would have called for discussion, if it had been intended. But of course it was not.

19. Indonesia rather feebly says that it would be wrong "to give the impression that the Netherlands had given up all claims and all presence east of Batu Tinagat"[51]. There is no evidence of any such claims or any such presence, as Professor Schrijver has demonstrated. They were never expressed in a formal document, they were never the subject of the slightest protest or action on behalf of the Dutch. They were not shown as Dutch on any map. There is no documentary evidence. There is no single name of a Bulungan official associated with the islands — or for that matter a Dutch official, during the whole of the period prior to the 1891 Convention. Any Dutch claim to the islands is completely inconsistent with the negotiating history of the Convention.

The extent of the Sultanate of Sulu before 1878 and the scope of the 1878 Grant

20. So if the Ligitan group of islands was not part of Bulungan, was it part of Sulu? According to Indonesia, the position of the islands in 1891 was completely unclear. Mr. Bundy said that Malaysia had provided *"absolutely no evidence"* of Sulu control[52].

21. [Tab 15: 1870 Dutch map] In fact the position before 1878 so far as concerns the islands off north-eastern Borneo is sufficiently clear from the historical record and doesn't square with Mr. Bundy's proclamation. In particular, the documents before the Court show the following:

(1) In his account of Sulu possessions on Borneo in 1837, Hunt specifically identified Sipadan, with its "abundance of green turtle", as belonging to Sulu[53].

---

[51]Reply of Indonesia, para. 5.23.

[52]CR 2002/28, p. 45 (Mr. Bundy).

[53]Memorial of Malaysia, Vol. 3, Ann. 34, as quoted in Memorial of Malaysia, para. 5.4.

(2) In his "Notes on Borneo" of 1855, the Dutch official von Dewall expressly admits that the local chiefs on the north-east coast "can only be considered as tributary to Sulu". They have Sulu titles, whereas the people of the Dutch territories "do not venture upon the sea"[54]. He was right about that: the Sultan of Bulungan had no navy. How could he have exercised authority over the islands without any ships? You can't swim that far, and there is no evidence that he could swim at all.

(3) By contrast agents of the Sultan, whose names we know, exercised authority over the islands on the east coast, including Omadal[55]. Indonesia concedes that the Sultan of Sulu appointed headmen on Danawan[56], which is part of the Ligitan Group, and is closely associated with Sipadan.

(4) The islands were shown as part of Sulu on Dutch maps. The map shown on the screen, and in tab 15 in your folders, comes from the *General Atlas of the Netherlands Indies*, in the second edition of 1870[57]. You see the relevant part now, in closer detail, as tab 16. Sipadan and Ligitan — it is Siparan here and you know why, because of the history of the name — are clearly shown as within the dominions of Sulu, or Solok as it is on the map, in a publication produced eight years before the Sulu grant. The editors of the Atlas, incidentally, were two well-informed officials of the Dutch Netherlands Government. They were not remote cartographers of world hand atlases.

(5) Immediately after the 1878 grant, the Dutch Government in response to questions in Parliament affirmed that it had "never disputed the authority of Spain over the dependencies of Sulu in the north-east portion" of Borneo[58]. This was subject to an express reservation of Dutch title along the coast to Batu Tinagat but no further. In 1879, for example, the Dutch Colonial Minister specified "Batoo Tinagat Rock" as the border[59]. The area in dispute was clearly shown on maps which made no reference to the proposed allocation line to the east,

---

[54]Reply of Indonesia, Vol. 2, Ann. 1.

[55]See, e.g., Memorial of Malaysia, Vol. 4, Ann. 76, discussed in Memorial of Malaysia, para. 5.7. For a list of names see Memorial of Malaysia, Vol. 4, Ann. 90.

[56]Counter-Memorial of Indonesia, para. 3.53.

[57]Memorial of Malaysia, Vol. 5, Map 3.

[58]Memorial of Malaysia, Vol. 3, Ann. 51, as cited in Memorial of Malaysia, para. 5.8.

[59]Memorial of Malaysia, Vol. 3, Ann. 40, p. 24.

and of course no reference to the 4° 10' parallel, which made its first entry into the negotiations in 1889, ten years later. In 1888, the Dutch Government said that Batu Tinagat was "*le point extrême à l'est*", "the extreme point at the east" of its claims[60]. And far from Bulungan retreating southwards down the coast, all the evidence is that it leapt forward to Batu Tinagat in 1879 as a pre-emptive move against the Sultan's grant. [End tab 16]

22. Mr. President, Members of the Court, this week Sir Arthur Watts expressly accepted that the evidence required for title to territory depends on the nature of the territory and its location, and that relatively slender evidence might be sufficient, if no claimant State could present any better evidence[61]. That is of course correct. But unfortunately when Indonesia's counsel came to consider the evidence of Sulu title they did not apply Sir Arthur's well-established rule. Naturally, to show that two small islands among dozens surrounding the Semporna Peninsula belonged in 1870 to a native Sultanate presents certain difficulties. But in fact we have produced a considerable body of contemporary evidence to that effect, and it is specific evidence, not just general assertion. I refer for example to Panglima Abu Sari — Panglima was a title awarded by a ruler — Panglima Abu Sari was appointed headman of Danawan in 1899 by the company. He was involved in disputes about turtle egg collection on Sipadan which the BNBC settled. He actually went to jail because he still held allegiance to the Sultan of Sulu; he was briefly jailed for that by the BNBC[62]. That shows the continuance of these links of allegiance well after the Sultan of Sulu had disappeared from the international scene. This evidence has to be compared, above all, with what Indonesia produces, which is nothing. The Dutch claims were co-extensive with the territory of Bulungan as set out in the contracts of 1850 and 1878. Indeed, as Indonesia actually says in its Reply, "The Netherlands admitted that the territory of Boelongan did not extend beyond the cape of Batu Tinagat."[63] No wonder Indonesia can produce no evidence of sovereignty over the islands. There is no evidence in the record that the Sultan of Bulungan exercised any control even over the island of Sebatik itself: the Dutch evidence, such as it is, tends to the contrary. The Dutch claim

---

[60]Memorial of Indonesia, Vol. 2, Ann. 37, p. 329, and see Reply of Malaysia, para. 3.21.

[61]CR 2002/27, p. 24 (Sir Arthur Watts),

[62]See Reply of Indonesia, para. 2.7, footnote 11 and references.

[63]Reply of Indonesia, para. 5.14.

over Batu Tinagat was itself an ambit claim, it was the furthest they thought they could go up along the coast, and it was eventually withdrawn. The Dutch withdrew in a south-westerly direction after 1891 from Batu Tinagat to Broershoek: they did not advance 50 miles to the east towards Sulu!

23. Incidentally, I would note that Mr. Bundy's only attempt to show the absence of Sulu authority was by reference to a Note from the Philippines to Indonesia dated 5 April 2001[64]. It might be thought to be a late piece of evidence. The Court will remember the Philippines new, egg-shaped territorial claim, of which that letter was the precursor. It will recall Judge Kooijmans' blunt remark that the Philippines claim did not rise to the level of "plausibility"[65]. I hope next week Mr. Bundy will have the decency to refer to contemporary documents, that is to documents of the period in question, the nineteenth century. His only evidence dates from the twenty-first century, and is correspondingly implausible.

24. Thus when in 1878 the Sultan made his grant to the promoters of the British company, the position was clear enough. The Dutch accepted that the islands lying between Borneo and the Philippines were historically part of Sulu. The only exception to that were the inshore islands of Sebatik, Tarakan and Nanukan, and the small islets belonging thereto, which were claimed as part of Bulungan under the contracts of 1850 and 1878. All the rest was Sulu. And this reflected the social and political situation. The Sultan of Bulungan held no sway over the Sulu rulers and their Bajau subjects who inhabited and used the islands. The turtle egg collectors on Sipadan apparently owed their right to collect the eggs to a Sulu grant. What order there was in the region came from local officials such as Panglima Abu Sari, appointed by the Sultan of Sulu.

25. Counsel for Indonesia sought to minimize the significance of Sulu, treating it as nothing more than a petty sultanate, not capable of exercising authority over other islands[66]. Again that illustrates a lack of understanding of the history of the region. Sulu sustained opposition to Spain for many decades; it succumbed only in late 1878 after a determined Spanish effort. There is a

---

[64]CR 2002/27, p. 46 (Mr. Bundy).

[65]Judgment of 23 October 2001, declaration of Judge Kooijmans, paras. 9, 16.

[66]CR 2002/27, pp. 40-43 (Professor Pellet).

substantial literature on Sulu in the eighteenth and nineteenth centuries, which is referred to in Malaysia's pleadings[67].

26. [Tab 17: Territorial extent of sultan's grant] Moreover, whatever uncertainties there may have been as to the extent of the 1878 grant, its effect on the offshore islands is quite clear. It covered the mainland down to the Sibuko River and the offshore islands within 9 nautical miles of that coast. It did not cover Kapalai, or the Ligitan group of islands — Danawan, Si Amil, Ligitan and Sipadan. All of these were beyond 9 nautical miles from the coast, as you can see from the graphic which is tab 17 in your folders.

The establishment of the BNBC

27. Mr. President, Members of the Court, I turn briefly to the establishment of the BNBC. The 1878 grant was made to the promoters of the BNBC, Overbeck and Dent. The reason was that they were setting up a British company which was constituted by a Royal Charter, issued by Queen Victoria in 1881[68]. The Charter incorporated the territorial extent of the 1878 grant. It gave rise to a Dutch protest[69], which as Professor Soons told you was based, not on any particular administration by the Dutch, but on a quite general and unfounded argument concerning the effect of the 1824 Treaty[70]: it had nothing to do with the offshore islands. The very fact of that protest demonstrates that the Dutch Government was aware of the extent of the Sulu grant. The consistent expression of the Dutch claim as extending no further east than Batu Tinagat has to be read in that context. There are no offshore islands within 9 nautical miles of Batu Tinagat, except the island of Sebatik. [End tab 17]

The Protocol of 1885

28. I turn next to the Madrid Protocol of 1885. Spain, as you know, did not accept the validity of the 1878 grant. The reason was it claimed to have conquered Sulu at the latest in 1851. The Netherlands recognized the Spanish claim, the Germans and the British did not. The

---

[67]See Memorial of Malaysia, Vol. 1, p. 8, note 7 and works there cited.

[68]Memorial of Malaysia, Vol. 2, Ann. 14.

[69]Memorial of Malaysia, Vol. 3, Ann. 41.

[70]CR 2002/27, p. 36 (Professor Soons).

disagreement was resolved in the Protocol of 1885, by which Great Britain and Germany recognized the Sultanate of Sulu as part of the Spanish Philippines, and Spain recognized the territory covered by the Sulu grant as part of British North Borneo[71]. Thus under the 1885 Protocol, Great Britain recognized as Spanish all islands which were part of the Sulu territory and which were beyond 9 nautical miles from the coast of Borneo. This included all the islands in the Ligitan group.

29. Indonesia has sought to minimize the impact of the 1885 Protocol, arguing that it only concerned the Sulu Archipelago in some narrow sense and not the islands off North Borneo. Although it has to be said that that argument hardly surfaced this week. In fact, the terms of the 1885 Protocol are explicit: you will find them as tab 20 in your folders.

30. Article II provided that the Archipelago included

> "all [I stress, *all*] the islands which are found between the western extremity of the island of Mindanao on the one side, and the continent of Borneo . . . on the other side, with the exception of those which are indicated in Article III [the continent of Borneo]".

Then Article III provided that:

> "The Spanish Government renounces, as far as regards the British Government [not as far as regards any other government] all claims of sovereignty over the territories of the continent of Borneo, which belong, or which have belonged in the past [that was there because they could not agree on the status of Sulu] to the Sultan of Sulu (Jolo), and which comprise the neighbouring islands of Balambangan, Banguey, and Malawali, as well as all those comprised within a zone of three maritime leagues from the coast, and which form part of the territories administered by the company styled the 'British North Borneo Company'."

Thus while Spain did not accept the *validity* of the 1878 grant in 1885, it clearly recognized its *extent*. The reference to the 3-marine league zone of islands in Article III, combined with the reference in Article II, shows that the parties to the 1885 Protocol envisaged all the islands off the North Borneo coast down to the Sibuko River, and recognized that all the islands beyond 3 marine leagues continued to belong to Spain. That was precisely the conclusion drawn by the United States and Great Britain when they confronted the issue after 1903, as we will see tomorrow.

---

[71] Memorial of Malaysia, Vol. 2, Ann. 15.

There is no suggestion in the documentary record that the Dutch negotiators had any other view of the matter. The Netherlands never protested the 1885 Protocol or its confirmation in 1897[72].

The establishment of the British Protectorate

31. One other relevant event occurred before negotiations began between the Netherlands and Great Britain over their disputed claims "in Borneo". This was the formal proclamation by Britain of a protectorate over British North Borneo in 1888[73].

32. Only two points need to be made about the Protectorate Agreement and its associated Proclamation. First, it is clear that the extent of British North Borneo was the same under the Agreement and Proclamation as it was under the 1878 Grant and the 1885 Protocol. Secondly, the Protectorate was initially protested by the Netherlands, but then it was recognized in 1891. Again the protest shows that the Dutch Government was well aware of the situation. British North Borneo only extended to the islands within 9 miles of the coast. Thus the Dutch had notice four times of the situation and of that limitation: in the 1878 Grant, which caused them to occupy Batu Tinagat; in the Royal Charter, which they protested; in the 1885 Protocol, which was published; and in the 1888 Protectorate Agreement, which they protested. How could — this may be the fifteenth question — the 1891 Convention with Britain have allocated islands to the Netherlands, when there were no islands within 9 nautical miles of North Borneo which could have been affected by the allocation line, if one had existed?

Conclusion

33. Let me summarize the position as it stood at the time of the negotiations and conclusion of the 1891 agreement. I will do it in six points.

(1) The State of North Borneo under British protection claimed all the territory down to the Sibuko River and all islands within 9 nautical miles of the coast.

(2) That claim was expressly recognized by Spain in 1885.

[72]Memorial of Malaysia, Vol. 2, Ann. 18.

[73]Memorial of Malaysia, Vol. 2, Ann. 16.

(3) The claim was also recognized by the Netherlands in the 1891 Convention, *except* for the disputed area lying between the Sibuko River and Batu Tinagat. It was this disputed area which was divided by the 1891 Convention.

(4) The Ligitan group of islands fell outside the scope of the 1878 grant and the islands were clearly recognized by Britain in the 1885 Protocol as belonging to Spain.

(5) The Dutch Government was well aware of the limited scope offshore of the Sulu grant. It never claimed any islands to the east of Sebatik. It showed no interest in the Ligitan group whatever.

(6) Finally, even if — hypothetically — the 1891 Convention had drawn an allocation line 50 or 100 miles to the east of Sebatik, that line could not have affected the two islands because they did not belong to, and were not then claimed by, Great Britain as belonging to North Borneo.

34. Mr. President, Members of the Court, if these conclusions are correct — we have heard nothing to refute them —, they have a drastic effect on Indonesia's case. As I have shown, Indonesia's case stands and falls, in the first place, on the meaning of the 1891 Convention. But even if the 1891 Convention had the *meaning* attributed to it by Indonesia, it could not have had that legal *effect*. *Nemo dat quod non habet*. The islands were not Britain's to give in 1891. The Netherlands *could not have had* a treaty title to the islands arising from the 1891 Convention. And that in turn, as I have said, makes irrelevant everything Professor Pellet had to say on Tuesday about prescription. In fact, the evidence here would, if necessary, support a claim of prescription in favour of Great Britain against the Netherlands, given the absence of any expression of interest by the Netherlands in the islands after 1891, and their continued administration by the BNBC and its successors. But issues of prescription do not arise, because even Indonesia admits that the prior Dutch claim through Bulungan was uncertain, and because for the reasons I have explained there was no question of the Dutch acquiring a treaty title in 1891. Therefore the Dutch were no better placed after 1891 than they were before. Any claim they made had to be expressly made and sustained. It was neither made nor sustained, and the fact that it was not is fatal to Indonesia's case, irrespective of the 1891 Convention. What I have said is true even if — *quod non* — Indonesia's arguments about the 1891 Convention had any validity.

35. But, Mr. President, Members of the Court, tomorrow morning, Professor Cot will show you that they do not. Thank you, Mr. President.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. Ceci met un terme à la séance d'aujourd'hui. La Cour reprendra l'examen de cette affaire demain à 10 heures du matin. La séance est levée.

L'audience est levée à 18 heures.

_____