CR 2002/35

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2002

Public sitting

held on Wednesday 12 June 2002, at 10 a.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 mercredi 12 juin 2002, à 10 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
		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	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

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

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

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Capt. Fanani Tedjakusuma, Indonesian Armed Forces Headquarters,

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Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte et nous allons entendre le second tour de plaidoiries pour la Malaisie. Je donne immédiatement la parole au professeur Jean-Pierre Cot.

M. COT :

LA CONVENTION DU 20 JUIN 1891

Monsieur le président, Madame et Messieurs de la Cour,

1. Il me revient l'honneur d'ouvrir ce second tour de plaidoiries au nom de la Malaisie. Dans ma plaidoirie, j'examinerai les arguments présentés au nom de l'Indonésie par ses conseils lundi au sujet du traité de 1891. Le professeur Schrijver qui me succèdera reviendra sur les positions du gouvernement de La Haye. Le professeur Crawford abordera les problèmes posés par la succession au titre territorial et les cartes. Sir Eli Lauterpacht examinera pour sa part les effectivités. Enfin Son Excellence Tan Sri Kadir conclura ce second tour. Nous pensons Monsieur le président pouvoir exposer nos thèses en une matinée, répondant ainsi à votre souhait de brièveté et de concision.

2. Monsieur le président, les trois tours de procédure écrite et les deux tours de procédure orale ont permis de décanter cette affaire, sinon de rapprocher les positions des Parties. Nous avons ainsi pu écarter les faux problèmes, rectifier les erreurs, grandes ou petites.

3. Le professeur Soons a bien fait de me reprendre sur l'inexcusable confusion entre Batavia et Surabaya. Je confirme décidément le cliché : les Français ne connaissent pas leur géographie !

4. Plus significatif peut-être, sir Arthur, dans sa talentueuse plaidoirie, a nuancé pour sa part les affirmations de l'Indonésie sur deux points importants : 1) il n'y a jamais eu de proposition britannique de périmètre d'allocation soumise à la partie néerlandaise; 2) la carte du «Mémorandum explicatif n° 3», n'a jamais été communiquée aux autorités britanniques. Ces précisions sont de nature à aider la Cour à trancher le litige qui lui est soumis, je vais tenter de le démontrer.

I. Il n'y a jamais eu de proposition britannique de périmètre d'attribution

5. Le Gouvernement britannique n'a jamais soumis aux Pays-Bas la proposition de tracer une ligne en haute mer jusqu'au méridien 118° 44' 30" de longitude est. Il n'a jamais soumis à son partenaire lors des négociations officielles une carte portant prolongation en haute mer du parallèle 4° 10' ou d'un parallèle quelconque. Dont acte.

6. Mais il faut aller plus loin, j'en conviens volontier. Sir Arthur Watts a expliqué que, fasciné par le tour de magie, je n'avais pas saisi l'essentiel : les négociateurs britanniques avaient bien en tête un périmètre d'attribution, comme le montrent les croquis et notes conservés dans les archives britanniques[1]. Mais Monsieur le président, si cela était si évident, pourquoi ne l'a-t-on pas dit ? Dans le texte ou au cours des longues négociations préalables.

7. Reprenons le texte de l'article IV de la convention de 1891. D'après mon éminent contradicteur, le texte est clair : la ligne du parallèle 4° 10', d'après ces dispositions, continue de courir, «across», donc «beyond» l'île de Sebatik. D'après nous, d'après la Malaisie, le texte est clair : la frontière traverse l'île de Sebatik de part en part, afin — seconde partie de la phrase — de partager l'île entre les deux parties. Et chacun de part et d'autre de la barre, d'invoquer à l'appui de son texte clair les arguments sémantiques et les références linguistiques qui s'imposent.

8. Monsieur le président, supposons un instant — ce n'est pas la thèse de la Malaisie, vous l'avez compris —, supposons un instant, dis-je, que le texte n'est pas clair. Que ces deux interprétations, aussi évidentes l'une que l'autre, indiquent une ambiguïté, une polysémie. Il faut alors poursuivre le processus d'interprétation par recours aux travaux préparatoires.

9. Ah non ! s'exclame mon contradicteur. Impossible, puisque le texte est clair. Et de verrouiller ainsi le processus d'interprétation en posant le préalable de l'irrecevabilité du recours aux travaux préparatoires[2].

10. Sir Arthur précise que, si les parties ont clairement formulé leur volonté, il ne faut pas détricoter le résultat par un recours imprudent aux travaux préparatoires[3]. La Partie indonésienne, Madame et Messieurs de la Cour, cherche ainsi à enfermer la Cour dans la pétition de principe.

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[1] CR 2002/33, p. 18, par. 31 (Watts).

[2] CR 2002/33, p. 18, par. 29-30 (Watts).

[3] CR 2002/33, p. 18, par. 29 (Watts).

Pourquoi ? Parce que nos adversaires savent pertinemment que rien, dans les travaux préparatoires, ne confirme en quoi que ce soit leurs dires. Rien.

11. Pour notre part, Monsieur le président, nous croyons légitime dans le cas présent le recours aux travaux préparatoires. Voyons s'ils confirment la thèse du texte clair avancé par l'une ou par l'autre Partie. Vous le rappeliez dans l'affaire du *Différend territorial (Jamahiriya arabe Libyenne/Tchad)* :

> «La Cour ne considère pas nécessaire de recourir aux travaux préparatoires pour élucider le contenu du traité de 1955; toutefois, comme dans d'autres affaires, elle estime pouvoir, en se référant à ces travaux, confirmer la lecture qu'elle fait du texte du traité…»[4]

12. Ce recours aux travaux préparatoires me paraît d'autant plus s'imposer ici qu'il s'agit ou non de déterminer un périmètre d'attribution. Or mon éminent contradicteur a admis que la plupart des périmètres d'attribution sont explicitement définis, même si le langage peut varier. Il n'a pas trouvé d'exemple contraire de périmètre implicite. Il a sans doute ajouté que la convention de 1891 constituait un exemple de *«variation»*, une exception pour tout dire[5]. Peut-être. C'est possible. Encore faut-il alors prouver que les parties ont entendu déroger à la pratique commune en matière de périmètres d'attribution.

13. Car Monsieur le président, on en revient toujours à la même question. Si les Parties ont entendu tracer un périmètre d'attribution, pourquoi ne l'ont-elles pas dit ? Pourquoi une formule ambiguë ? Pourquoi ce silence de la correspondance diplomatique ? Pourquoi ce mutisme des commissaires tant britanniques que néerlandais lors des trois réunions de la commission jointe ? Cette question là fondamentale à mes yeux, sir Arthur Watts s'est bien gardé d'y répondre. Parce qu'il n'a pas la réponse.

II. La carte du «Mémorandum explicatif n° 3» n'a pas été communiquée au Gouvernement britannique

14. Mon contradicteur qui réfute le recours aux travaux préparatoires, nous venons de le voir, ne peut s'opposer de la même manière à l'examen de la procédure de ratification de la convention de 1891 par les états généraux, parce qu'il a désespérément besoin de la carte annexée au

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[4] *C.I.J. Recueil 1994*, p. 27, par. 55.

[5] CR 2002/33, p. 23, par. 48 (Watts).

«Mémorandum explicatif n° 3». Or les travaux approfondis des états généraux sont tout aussi silencieux sur un hypothétique périmètre d'attribution. Nous l'avons constaté vendredi dernier; je n'y reviens pas[6].

15. Venons-en maintenant directement à la carte. *«The map was not officially communicated»*, sir Arthur ne peut pas le contester[7]. Mais c'est pour ajouter aussitôt que j'élève le pédantisme et le formalisme à un niveau absurde. Permettez-moi, Monsieur le président, de faire ici l'éloge, sinon du pédantisme, du moins d'un minimum de formalisme. Je sais bien que le droit international n'attache pas aux formes la même importance que le droit interne. Mais à trop méconnaître les formes, c'est la sécurité des transactions juridiques que l'on menace. Il vous appartient, Madame et Messieurs de la Cour, dans la présente affaire, d'établir le juste équilibre entre l'absence de formalisme et la sécurité juridique qui doit permettre de s'assurer de la réalité du consentement de l'Etat. Et plus précisément, en l'instance présente, la vérification du consentement britannique à l'établissement d'un périmètre d'attribution. La Cour l'a rappelé dans l'affaire du *Temple de Préah Vihéar* : «le droit international insiste particulièrement sur les intentions des parties, lorsque la loi ne prescrit pas de forme particulière, les parties sont libres de choisir celle qui leur plait, pourvu que leur intention en ressorte clairement»[8].

16. Si la carte avait été officiellement communiquée aux autorités britanniques, elle aurait sans doute provoqué une obligation de réaction. Mais tel n'a pas été le cas. Dès lors, nous entrons dans la zone plus imprécise de l'acquiescement, voire de l'*estoppel*.

17. Comme le notait Paul Reuter à cette même barre et dans la même affaire du *Temple de Préah Vihéar* :

> «Sans avoir à entrer ici dans toutes les finesses, qui sont grandes, de l'analyse juridique anglo-saxonne, il faut simplement relever que dans les relations internationales la doctrine fait de l'*estoppel* un mécanisme répondant au principe général de la bonne foi et au besoin de sécurité qui régit les sociétés humaines.»[9]

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[6] CR 2002/31, p. 31-34, par. 80-90 (Cot).

[7] CR 2002/33, p. 27, par. 71 (Watts). Voir cependant Loretta Malintoppi pour qui la carte annexée fut «communiquée à leurs interlocuteurs britanniques qui ne l'ont nullement contestée» (CR 2002/34, p. 14).

[8] *C.I.J. Recueil 1961*, p. 31.

[9] Cité par Jennings, «The Acquisition of Territory in International Law», p. 41, note 3.

Ce sont en effet le principe général de la bonne foi et le besoin de sécurité qui éclairent votre jurisprudence en la matière. Et qui conduisent notamment à ne pas conclure hâtivement à l'existence d'un *estoppel* ou d'un acquiescement là où il n'y en a pas.

18. Or je ne relève dans notre affaire aucune trace d'acquiescement, aucun indice du consentement du Gouvernement britannique à la carte annexée au «Mémorandum explicatif n° 3». Je relève encore moins d'acquiescement plus précis à la prolongation de la ligne rouge en haute mer. Le Gouvernement britannique n'a jamais indiqué, par un mot, par un geste, par un comportement, son acquiescement à un tel tracé. Dans ces conditions, admettre la carte comme une expression des vues du Gouvernement néerlandais, soit. L'admettre comme preuve du consentement britannique, non. Nous le savons, une signature sur un coin de table par une personne habilitée à engager l'Etat sur le plan international suffit sans doute. Mais là, il n'y a même pas signature, communiqué, déclaration, acte juridique, acte matériel. La règle de base en la matière reste le consentement, quelle qu'en soit la forme. C'est ce consentement qui fait défaut.

19. J'ajoute qu'il n'y a pas eu, par la suite, la moindre utilisation de la carte, la moindre occasion de réagir, le moindre comportement de nature à créer une pratique ultérieure dans l'application du traité à ce propos. S'agissant d'une affaire aussi sérieuse qu'une délimitation territoriale, Monsieur le président, la diplomatie des arrière-pensées ou des froncements de sourcils ne suffit pas.

20. Enfin, les conditions de l'*estoppel* ne sont évidemment pas réunies. On ne voit pas où se trouve le changement de position d'une partie et moins encore le préjudice subi par l'autre. Au demeurant, substituer à l'exigence d'un consentement clair une attitude ou un silence lors d'une négociation ou d'un échange diplomatique est hasardeux pour le moins.

21. La Cour a eu l'occasion de le relever dans l'affaire *Elletronica Sicula S.p.A.* :

> «[B]ien qu'on ne puisse exclure qu'un *estoppel* puisse, dans certaines circonstances, découler d'un silence, lorsqu'il aurait fallu dire quelque chose, il est évidemment difficile de déduire l'existence d'un *estoppel* du simple fait de n'avoir pas mentionné une question à un moment donné au cours d'échanges diplomatiques assez intermittents.»[10]

[10] *C.I.J. Recueil 1989*, p. 44.

22. Ici, nous sommes très en deçà de l'hypothèse envisagée par la Cour dans l'affaire *ELSI*, puisque la carte annexée au «Mémorandum explicatif n° 3» ne s'intégrait même pas à des «échanges diplomatiques intermittents». Déduire l'expression d'un consentement, qu'on l'appelle acquiescement ou *estoppel*, du silence britannique face à la production d'une carte dans un débat parlementaire interne me paraît constituer une extrapolation de l'expression de la volonté au-delà de toute raison.

23. En somme la carte annexée au «Mémorandum explicatif n° 3» me paraît appelée au même destin que le rapport Eason dans l'affaire de l'*Ile de Kasikili/Sedudu*. Dans son arrêt, la Cour :

> «relève en effet que ledit rapport semble n'avoir jamais été communiqué à l'Allemagne et avoir toujours conservé un caractère interne. Par ailleurs, la Cour observe que le Gouvernement britannique lui-même n'a jamais donné de suite à ce rapport, ni après son établissement … ni ultérieurement…»[11]

24. Comme le rapport Eason, la carte du «Mémorandum explicatif n° 3» a toujours conservé un caractère interne. Le Gouvernement néerlandais ne lui a jamais donné suite, ni après son établissement, ni ultérieurement.

25. Monsieur le président, sir Arthur Watts a repris l'analogie entre la carte du «Mémorandum explicatif n° 3» et la carte du *Livre jaune*, qui avait été analysée par la Cour dans l'affaire du *Différend territorial (Jamahiriya arabe libyenne/Tchad)* certains s'en souviendront. Je crois que ce rapport commet un contre-sens. Il analyse en effet la carte du *Livre jaune* comme une interprétation authentique de l'accord conclu entre la France et la Grande-Bretagne le 21 mars 1899.

26. Mais la Cour ne s'est jamais prononcée sur ce point, car ce n'était pas la question qui lui était posée. La question lui était soumise était de savoir à quelle carte la France et l'Italie — l'Italie, non la Grande-Bretagne — faisaient référence dans l'échange de lettres des 1er et 2 novembre 1902 lorsque les parties précisaient :

> «Il a été expliqué à cette occasion que, par la limite de l'expansion française en Afrique septentrionale … on entend bien la frontière de la Tripolitaine indiquée par la carte annexée à la déclaration du 21 mars 1899, additionnelle à la convention franco-anglaise du 14 juin 1898.»[12]

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[11] *C.I.J. Recueil 1999*, p. 1078, par. 55.

[12] Mémoire du Tchad, livre I, p. 174-175 et livre II, annexes 78-80.

27. Dans son arrêt, la Cour constate que : «La carte ainsi mentionnée ne pouvait être que celle du *Livre jaune* sur laquelle figurait une ligne en pointillé indiquant la frontière de la Tripolitaine»[13].

28. En d'autres termes, et dans cette affaire, il s'agissait pour la Cour d'*identifier* la carte intégrée dans le règlement conventionnel de 1902 entre la France et l'Italie, non pas d'*apprécier la portée juridique* entre la France et la Grande-Bretagne, de la carte publiée par la France dans le *Livre jaune* au lendemain de la conclusion de l'accord de 1899. Dans la présente affaire, la carte du «Mémorandum explicatif n° 3» n'a jamais été, que je sache, intégrée à un règlement conventionnel ultérieur. J'ajoute que l'Italie s'est prévalue de la carte du *Livre jaune* dans des négociations ultérieures[14] à propos de l'affaire *Libye/Tchad*. Tandis qu'ici, ni la Grande-Bretagne, ni les Pays-Bas, n'ont fait la moindre référence à la carte du «Mémorandum explicatif» par la suite. La carte du «Mémorandum explicatif n° 3» est ainsi restée enterrée dans les archives parlementaires néerlandaises et, pour information, dans les archives du Foreign Office.

29. J'en viens à l'accord de Tawao et à l'accord de 1915 qui lui a conféré valeur conventionnelle. Mon contradicteur propose en effet une lecture nouvelle, innovante, révolutionnaire de l'accord[15]. Il s'agit en l'espèce, ni plus ni moins, de supprimer l'alinéa 1), celui qui déclare : *«(1) Traversing the island of Sebitik, the frontier line follows the parallel of 4° 10' north latitude, as already fixed by the Boundary Treaty and marked on the east and west coasts by boundary pillars.»*

30. Je comprends que cet alinéa 1) embarrasse la partie indonésienne. Dans le rapport la frontière est décrite d'est en ouest. L'alinéa 1) précise d'où vient la frontière. Elle vient de la côte orientale de l'île de Sebatik, pas de plus loin. Pour nos amis indonésiens -- et c'est toute la virtuosité de ce rapport qui a été ainsi mis a contribution -- il vaut donc mieux ignorer la disposition, la réputer non-écrite. Notons, cette manie curieuse qu'a l'Indonésie d'élaguer les textes. L'Indonésie avait déjà proposé, vous vous en souvenez, de supprimer le second alinéa de

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[13] Arrêt du 3 février 1994, *C.I.J. Recueil 1994*, p. 33, par. 61.

[14] Réplique du Tchad, livre I, p. 54.

[15] CR 2002/33, p. 30-32, par. 84-94 (Watts). Les écrits de l'Indonésie et la première intervention de sir Arthur étaient plus classiques. Cf. mémoire de l'Indonésie, vol. 1, p. 97, par. 5.65; contre-mémoire, vol. 1, p. 100-104, par. 5.104-5.113; réplique, vol. 1, p. 48-52, par. 2.42-2.47.

l'article IV de la convention de 1891. Cela devient comme un réflexe, comme une manie, un peu comme ces jardiniers français qui se croient obligés d'élaguer systématiquement les arbres pour les mettre en conformité avec la perspective souhaitée : l'école de Le Nôtre de Versailles. Je préfère pour ma part, Monsieur le président, les jardins à l'anglaise, surtout en matière d'interprétation des traités.

31. Notons le préambule de l'article 3 du rapport :

> «We have determined the boundary between the Netherland territory and the State of British North Borneo, as described in the Boundary Treaty supplemented by the interpretation of Article 2 of the Treaty mutually accepted by the Netherland and British Governments in 1905, as taking the following course.»

32. Nulle restriction dans tout cela. Nulle volonté des commissaires de limiter leurs travaux à une stricte opération de démarcation terrestre. Je vous engage à jeter un coup d'œil sur cet accord, que nous avons inclus pour votre commodité dans votre dossier sous la cote 76. On y retrouve cette perspective d'une délimitation ou d'une détermination de la frontière — les deux termes sont employés, à l'exclusion de celui de «démarcation» — dans le préambule de l'accord, proprement dit, signé par le secrétaire au Foreign Office et l'ambassadeur des Pays-Bas.

33. Revenons au texte de l'accord : *«Taking the following course»*, la frontière traverse l'île de Sebatik d'est en ouest en suivant le parallèle 4° 10', puis, à partir de la borne posée sur la rive occidentale de l'île, elle suit le parallèle vers l'occident jusqu'au milieu du chenal… Et la carte, nous l'avons vu la semaine dernière, confirme cette interprétation. La frontière commence bien à l'East Corner de Sebatik. Elle ne vient pas du grand large. C'est ce que nous vous demandons de dire et juger.

34. Au terme de cette plaidoirie, Monsieur le président, je prends congé de la Cour. Monsieur le président, Madame, Messieurs de la Cour, je vous remercie pour votre attention. Monsieur le Président, je vous prie maintenant de donner la parole à mon collègue, le professeur Nico Schrijver.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. Je donne maintenant la parole au professeur Nico Schrijver.

Mr. SCHRIJVER: Thank you.

DUTCH CLAIMS AND PRACTICE WITH RESPECT TO NORTH-EAST BORNEO AND THE ISLANDS IN DISPUTE

Introduction

1. Mr. President, Members of the Court. I shall briefly respond to issues raised by counsel of Indonesia with respect to, firstly, the Sultanate of Bulungan; secondly, Dutch claims of sovereignty east of Batu Tinagat and to the islands of Ligitan and Sipadan; and, thirdly, the internal Dutch deliberations during the 1920s on the absence of a maritime boundary.

I. The Sultanate of Bulungan did not hold any title to the islands

2. As regards the Sultanate of Bulungan, Malaysia still finds difficulty in grasping what in fact the position of Indonesia is. In the written pleadings we could note a waning interest in Bulungan as a basis of Indonesia's claim to the two islands, to the extent that Indonesia in its Reply stated that the pre-1891 history was "an irrelevance"[16]. In our first round we noted that Sir Arthur Watts advised the Court that there was no need for it to consider the rival claims of the Sultan of Bulungan and the Sultan of Sulu[17]. Indonesia plainly admitted that too many uncertainties and ambiguities existed. However, in the second round of these hearings Professor Soons steadfastly maintained, despite all the evidence to the contrary, that "through contracts with the Sultan of Boeloengan, the Netherlands acquired title to Sipidan and Ligitan"[18]. In a similar vein, Professor Pellet summarized, that should the Court not accept Indonesia's title to the islands based on the 1891 Boundary Convention, its sovereignty could alternatively still be vested on its succession to the title of the Sultan of Bulungan[19].

3. However, it is a clear matter of reading black and white that the 1850 and the 1878 contracts between the Sultan and the Netherlands as well as the 1893 updated official "Description of the Territory of Boeloengan and List of Islands Belonging Thereto" show this simply was *not* the case. The 1878 and 1893 documents state that the islands belonging to Bulungan are Sebatik,

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

[17]CR 2002/30, p. 38, para. 4 (Mr. Schrijver).

[18]CR 2002/33, p. 33, para. 2.

[19]CR 2002/34, p. 37, para 3.

Nunukan and Tarakan as well as the small islands belonging thereto[20]. Apart from the literal meaning of this text, any reasonable interpretation cannot bring islands some dozens of miles from the coast within the scope of the phrase "islets belonging thereto". Indonesia chose to ignore these facts — for obvious reasons.

4. Furthermore, the Ligitan group of islands did not fall within the area disputed by the Dutch and British during the 1880s, between the Sibuku River and Batu Tinagat. This consisted of a part of the mainland of East Borneo and the islands on the coast, most notably Sebatik and Nunukan, as can even be noted from the Dutch internal map attached to the Explanatory Memorandum.

5. Professor Soons discussed some of the features of the Sultanate of Bulungan. Let me make clear for the record that Malaysia never did assert that Bulungan was a "*purely* land-based Sultanate", as Professor Soons claimed on Monday[21]. Here I just would like to refer the Court to the expert report by Professor Houben, identifying Bulungan as "a small coastal Sultanate with limited territorial reach"[22]. By contrast, Sulu was of course a typical maritime Sultanate.

6. [Project ethnographic map, insert 3, MR] Professor Soons also referred to the fact that the coastal population, particularly Bugis, participated in fishing and maritime trading. Malaysia already recorded this in its Memorial and its Reply[23]. Reportedly, during the nineteenth century they bartered forestry products for slaves from the Sulu region. Yet, the Bugis in Bulungan were small in number[24]. This can also be demonstrated — and please excuse me if I allow myself to be carried away for a moment — in the beautifully produced and probably first ethnographic map of Borneo, made in 1917, now on the screen and included in your folders under tab 78, from the archives of the Royal Tropical Institute in Amsterdam[25]. As you can see from the pink coloured areas, the Bugis, originating in South Sulawesi, lived mainly along the coast in south-eastern and western Borneo rather than in north-eastern Borneo.

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[20]See Memorial of Malaysia, Vol. 2, Ann. 11, p. 41 and Vol. 3, Ann. 54.

[21]CR 2002/33, p. 33, para. 5.

[22]See Ann. to Counter-Memorial of Malaysia, p. 15.

[23]Counter-Memorial of Malaysia, p. 25, para. 3.4; Reply of Malaysia, p. 25, para. 3.4.

[24]See literature referred to in written pleadings, particularly the articles by Von Dewall (1855) and Gallois (1856) and the books by Lindblad (1988), Sather (1997) and Warren (1981).

[25]See Reply of Malaysia, insert 3, p. 26.

7. Mr. President, by the end of this case we will all have become specialists on Bulungan. [End of graphic] And there is no evidence that the Sultan of that Bulungan ever exercised the slightest authority over islands far off the coast; as a matter of fact, all the evidence is to the contrary.

II. Supposed Dutch claims to east of Batu Tinagat and the islands

8. I would now like to turn to the supposed Dutch claims to the islands. The Dutch colonial administration over the area spanned nearly a century. There can be little doubt that this particular area of Borneo was really on the fringes of the Dutch colonial area, as was repeatedly admitted by the Dutch Ministers of Colonies and Foreign Affairs in their discussions with Parliament.

9. Furthermore, as we noted in the first round, the period from 1830 until approximately 1890 is viewed within recent Dutch historiography as being marked by self-restraint and a policy of "abstention" towards the outer islands. Indonesia did not respond to this observation in its second round.

10. Nevertheless, Indonesia saw fit to argue that in the pre-1891 period the Dutch claims extended to various islands of the Ligitan Group, including even Mabul. These claims were never recorded or reported in any diplomatic contacts, diplomatic correspondence or parliamentary proceedings. All that Professor Soons mentions with respect to evidence of these supposed Dutch claims, are two incidents concerning a native boat on Mabul, incidents which indeed raised concern among BNBC officials in 1883[26]. In the relevant document which Malaysia has also included in the judges' folders under tab 79, there is an explicit reference to the fact that "the Dutch men-of-war are cruising in our [namely British] waters, north of the boundary they themselves claim"[27].

11. Furthermore, the document of W. H. Treacher, the first Governor of British North Borneo, makes once again perfectly clear that the Dutch and British were co-operating in combating piracy and slavery. As Governor Treacher put it in his letter: "I should be the last to underrate the good work done by the Dutch cruisers in suppressing piracy and slavery on their east

[26]CR 2002/33, p. 34, paras. 6 and 9.

[27]See Reply of Indonesia, Vol. 2, Ann. 2.

coast; but the people I refer to are not pirates or slave-dealers, and the boat in question was seized in North Borneo and not in Dutch waters."[28]

12. Apart from suppressing piracy and the slave trade in co-operation with the British, some Dutch ships were also involved in surveying. As we can read from the relevant logbooks these surveying activities included British North Borneo, including the coastline of, and islands and reefs off the coast of British North Borneo. Yet, this is not to say that such activities and the publication of nautical charts are to be interpreted as evidence of sovereignty and the exclusive right to display the activities of a State, as determined by Judge Huber in the *Island of Palmas* case[29]. The activities of Dutch ships *cannot* be interpreted as meeting the classical criteria of displaying exclusive authority. They were simply not exercises of defence of territory, let alone of territorial jurisdiction.

13. Mr. President, the Parties have debated the availability of reports in archives and in other sources. Of course, we assume that Indonesia is the best-informed authority on what is, and what is no longer available in Indonesia, and, if available, where the archives are now located. All Malaysia wanted to emphasize is that the Public Record Office in London and the General State Archives in The Hague still contain a wealth of relevant materials, including lists of movements of Dutch ships in the area, an uninterrupted chronological survey of destinations of naval vessels and reports of surveying activities in the Netherlands East Indies for the period 1894-1956, as well as a considerable number of logbooks. But both Parties have not been able to find any relevant reports, above the few reported in the pleadings.

14. Regarding archives on regional administrative centres: Malaysia also regrets that those of the local Dutch administration in Tarakan are no longer available. But, with due respect, these would not have been very important for our case. *Highly* relevant to our case are the archives of the Residency of the Southern and Eastern Division of Borneo, most notably the Memoranda of Transfer of the Residents and the mail reports on the region. Fortunately, nearly all of them are available in large quantity and can be found on microfiche in the General State Archives in The Hague. And these mail reports — these Memoranda of Transfer —provide us with an accurate

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[28] *Ibidem.*

[29] *Island of Palmas* (*The Netherlands* v. *the United States*), 2 *RIAA* (1928), p. 829.

picture of Dutch presence in, and administration of, the region of Bulungan. Hence, it is very significant that *none* of these Memoranda of Transfer and mail reports refer to the islands of Ligitan and Sipadan. Nor do the Dutch Annual Reports on the Colonies and parliamentary proceedings .

III. Internal Dutch deliberations in the 1920s on the absence of a maritime boundary

15. Mr. President, Members of the Court, I would now like to proceed to my next and last item: the internal Dutch deliberations in the 1920s. First of all, we have some difference of opinion with Indonesia as to what triggered this discussion on the absence of a maritime boundary east of Sebatik. There can be little doubt that it all started as a result of uncertainty with regard to the line to be adopted as the border between the Dutch and British and maritime areas near the island of Sebatik for the purpose of anti-piracy control.

16. As the Vice-Admiral stated in his letter dated 4 January 1922, which you find in its original form and in English translation under tab 80: "In the Agreement . . . concerning the boundary line between the Netherlands and the British protectorate in Borneo, no boundary line is set forth which separates the territorial seas of the Netherlands and the protectorate in question."[30] Obviously, the Vice-Admiral makes reference to the 1915 Agreement, with the accompanying treaty map, which was made public by official decree in the Netherlands East Indies in 1916, which you find under tab 81 of your folders[31].

17. Second, we have some difference of opinion with respect to the relevance of the fact that the Commander of the Naval Forces of the Netherlands East Indies initially opted for a boundary line perpendicular to the coast out of the three options under discussion — and not two as Professor Soons mistakenly said (para. 41). While we know from the Awards by the Tribunals in the *Guinea/Guinea-Bissau* case and *Eritrea/Yemen* case, as discussed by Professor Cot last Friday[32], that a maritime boundary line does not necessarily correspond with an allocation line, Malaysia continues to find it highly significant that during the extensive deliberations, none of the

[30]Reply of Malaysia, Ann. 4.

[31]Reply of Malaysia, Ann. 5.

[32]CR 2002/31, pp. 19-20.

officers involved in the Netherlands East Indies or The Hague ever referred to the existence of a maritime boundary or an allocation line east of Sebatik along the 4° 10' N parallel.

18. Thirdly, in response to my question why the Resident of the Southern and Eastern Division of Borneo repeatedly stated that in this particular area "there are no islands; only the open sea", Indonesia has nothing more to offer than that the Resident was stationed 900 km away and that he was not well informed[33]. By implication, this also applies to the Assistant Resident stationed much closer in Samarinda in Koetei. However, both of them should have known had the Dutch any claims to the islands of Ligitan and Sipadan, let alone had they been exercising actual sovereignty there .

19. Lastly, I would like to refer the Court to the Memorandum of the Legal Department of the Netherlands Ministry of Foreign Affairs, dated 8 August 1923. This Memorandum, included under tab 82 of your folders, is an extensive paper, well documented and with references to various handbooks on international law and the law of the sea, which show the tools of an Office of Legal Affairs at the time[34]. Whereas the Navy preferred a line perpendicular to the coast, the Legal Adviser advised the Ministers to maintain the continuation of the land boundary. His main reason for adopting the parallel of 4° 10' N is shown in his quotation from the 1891 Explanatory Memorandum to Parliament:

> "By this division of the island both the Netherlands and British North-Borneo will have that area of the island in possession which forms the shore of the waterway along which each has to reach the coastal area allocated to them; this is fair and rational."[35]

It confirms once more that the main concern was the access to their respective areas of the mainland of Borneo west and north-west of Sebatik.

20. Obviously, the various Dutch authorities did not regard the 4° 10' N line as an established maritime boundary. After receiving the report of the *Lynx* cruise, they would have certainly not jeopardized a claim to Sipadan and Ligitan by pressing for a boundary line perpendicular to the coast of Sebatik Island if they had thought Dutch sovereignty over the islands

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[33]CR 2002/33, p. 43, para. 43.

[34]Counter-Memorial of Malaysia, Vol. 2, Ann. 5, pp. 27-43. See also Reply of Malaysia, para. 4.13.

[35]Memorial of Malaysia, Vol. 3, Ann. 51.

to the east of the coast of Sebatik was at stake. But the issue was just not considered during these lengthy and well documented internal Dutch deliberations spanning a period of five years.

21. Finally, Mr. President, there was a conspicuous silence on the part of Indonesia in response to Professor Crawford's list of 15 maps which showed conclusively that the islands of Sipadan and Ligitan were not considered to belong to the Sultanate of Bulungan or the Netherlands East Indies. In conclusion, the Sultan of Bulungan did not hold title to the islands in dispute, and neither did the Dutch in law or in practice. The internal Dutch deliberations in the 1920s provide evidence on the absence of a maritime boundary east of Sebatik.

22. Mr. President, distinguished Members of the Court, this concludes my intervention on the Dutch position with respect to the Sultanate of Bulungan and the islands. May I now invite you to call on Professor Crawford who will deal with Malaysia's title to the islands in dispute. Thank you, Mr. President, Members of the Court.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. Je donne maintenant la parole au professeur Crawford.

Mr. CRAWFORD:

Malaysia's title to the islands in dispute

Introduction

1. Mr. President, Members of the Court, Professors Cot and Schrijver have shown, respectively, that the 1891 Convention does not sustain Indonesia's case, and that neither the Netherlands nor Indonesia (before 1969) ever made any claim to the two islands. That is, as it were, the case *against* Indonesia. I turn to deal with those aspects of the case *for* Malaysia which I discussed on Monday. As far as they concern, first, the legal basis of title itself, and secondly and secondarily, the map evidence. In short I will deal first with the legal case and then with the geographical or map case, in so far as this is necessary to respond to what Indonesia has said in its second round. Sir Elihu Lauterpacht will follow me and deal, on the same basis, with the aspect of the case for Malaysia which concerns administration.

A. Malaysia's title to the islands

2. I turn then to the documents and transactions which establish Malaysia's title to the islands. I need to address four topics.

(1) The 1885 Protocol and the *nemo dat* argument

3. On Monday both Sir Arthur Watts and Mr. Bundy dealt with the issues surrounding the 1885 Protocol, which I discussed in the first round. Mr. Bundy sought to show that neither the Convention nor any other evidence established Sulu or Spanish title to the islands[36]; Sir Arthur sought to refute the *nemo dat* argument[37]. Let me deal with them in that order.

4. As to the 1885 Protocol, Mr. Bundy complained that I had not taken you to its Article I[38]. You can see it on the screen, and the whole text of the Protocol is in your folders at tab 83. Article I says quite simply:

> "The Governments of Great Britain and of Germany recognise the sovereignty of Spain over the places effectively occupied, as well as over those places not yet occupied, of the Archipelago of Sulu (Jolo), of which the limits are laid down in Article II."

Thus — unlike the situation with the previous Protocol of 1877[39] between the same three States — Spanish sovereignty is now recognized over all places, whether or not they are actually occupied. The only exception is the areas covered by the Sulu grant of 1877, including islands within 9 nautical miles, and that is set out in Article III. This is all perfectly clear, and it has nothing to do with any requirement of Spanish notification. Sovereignty is vested by Articles I to III without any requirement, either of notification or of occupation. And in both respects you can contrast this with the Protocol of 1877. That was the basis for the legal advice of both the United States[40] and Great Britain[41] after 1900. Both items of legal advice were based upon the 1885 Protocol, unfortunately Mr. Bundy failed to discuss that legal advice on Monday. I commend those legal opinions to you again, both for their clear analysis of the situation, and for the evident absence of the slightest

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[36]CR 2002/33, p. 45, para. 4, p. 46, paras. 8-11 (Mr. Bundy).

[37]CR 2002/33, pp. 24-26, paras. 51-60 (Sir Arthur Watts).

[38]CR 2002/33, p. 47, para. 9 (Mr. Bundy).

[39]Memorial of Malaysia, Vol. 2, Ann. 5.

[40]Memorial of Malaysia, Vol. 3, Ann. 55.

[41]Memorial of Indonesia, Vol. 3, Ann. 109.

inkling that the Dutch might entertain claims to two of the islands. In this respect the facts underpinning the documents are as significant as the legal analysis they contain.

5. Mr. Bundy sought to discredit the evidence of Sulu control over the islands off the coast of North Borneo in the latter part of the nineteenth century[42], but he failed to heed Professor Pellet's newly adopted slogan, "some facts are better than no facts". Perhaps most striking was Mr. Bundy's dismissal of the — what he described as — private map, taken from the second edition of the *General Atlas of the Netherlands Indies*. As you will recall, this map of 1870 clearly showed the two islands, by name, as part of the dominions of Sulu[43]. Mr. Bundy complained that the two responsible Dutch officials who produced that map got their geography distorted[44]. This, he seemed to conclude, was evidence of *Dutch* control over the islands through Bulungan. It was as if, because these Dutch officials could not accurately depict the region, north-east of Sebatik, therefore the Dutch controlled the region. The logic was not easy to follow; but in any event there is no doubt that the map depicts the two islands as lying beyond the proclaimed horizon of Dutch interest and activity and as part of the dominions of Sulu off the north-east coast of Borneo.

6. Of course, from a forensic point of view, Mr. Bundy had to try to trash — if I can use an unattractive modern word — all the pre-1878 evidence of Sulu control, just as Professor Pellet had to do for the BNBC period. For Indonesia now argues, subsidiarily and in the alternative[45], that the two islands actually belonged to the Sultan of Bulungan, who has to that limited extent come back to life after his earlier disappearance — it is a sort of existence in the alternative. The sequel to Agatha Christie's "The Strange Case of the Disappearing Sultan" is, we find, "The Sudden Return of the Sultan". But Inspector Schrijver, aided by his expert witness Professor Houben, has definitively excluded the possibility of a sequel. Some facts are better than no facts, and there are no facts supporting Bulungan's title to the islands.

7. Mr. Bundy also asserted once more that if Malaysia failed to demonstrate Sulu authority over the offshore islands, our case fails. But that, of course, is not true. What the 1885 Convention

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[42]CR 2002/33, pp. 44-46, paras. 3-5 (Mr. Bundy).

[43]Memorial of Malaysia, Vol. 5, map 3.

[44]CR 2002/33, p. 45, para. 4 (4) (Mr. Bundy).

[45]CR 2002/34, 10 June 2002, p. 37, para. 3 (Professor Pellet).

shows perfectly clearly is that the British claim to North Borneo went no further that 9 nautical miles from the coast and that it did not include these islands. Indeed, from this point of view, it doesn't really matter so much whether the islands were Sulu or not. They were not British and therefore Britain could not, and could not have intended, silently to confer on the Dutch a treaty title to them.

8. Mr. President, Malaysia made the *nemo dat* argument in each round of our written pleadings[46], and last week[47]. Now for the first time Indonesia through Sir Arthur Watts has attempted to reply to it[48]. I am grateful to him.

9. What he said, on Monday, was that title to the two islands was uncertain, and that the Treaty produced certainty. But of course that does not work. Two things were certain about the position in 1890: (1) that the Sulu grant extended out to only 9 nautical miles (and thus did not include the islands), (2) that the Dutch did not claim areas or islands east of Batu Tinagat. Those things were certain, and they add up to an *incapacity* on the part of Britain to give the Dutch a treaty title or to recognize in the Dutch actual authority over the islands. It also demonstrates the absence of intention to do either of those things. It is true, there was great uncertainty inland, but there was no uncertainty in this respect as to the offshore islands beyond 9 nautical miles. It is clear from the Sulu Grant itself of 1878[49], from the Royal Charter of 1881[50], from the Protocol of 1885[51] and from the Protectorate Agreement of 1888[52].

10. Then there was a more subtle argument, which was at least hinted at by several of Indonesia's counsel[53]. It seems to run as follows: even if British North Borneo did not include the islands in 1891, it was open to Britain to promise that if in future it would acquire the islands, these would be passed on to the Dutch. In effect, Britain would become a sort of clearing agent for the

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[46]Memorial of Malaysia, para. 8.22; Counter-Memorial of Malaysia, para. 3.29; Reply of Malaysia, paras. 1.8 (4), 1.14.

[47]CR 2002/30, p. 16, para. 14 (Tan Sri Abdul Kadir Mohamed); pp. 49-50, paras. 11-12, 59, paras. 33 (6), 34; p. 35, para. 45, p. 40, para. 63 (2) (Professor Crawford).

[48]CR 2002/33, pp. 24-26, paras. 51-60 (Sir Arthur Watts).

[49]Memorial of Malaysia, Vol. 2, Ann. 9.

[50]Memorial of Malaysia, Vol. 2, Ann. 13.

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

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

[53]See, e.g., CR 2002/33, p. 26, para. 59 (Sir Arthur Watts).

islands, pursuant to the 1891 Convention. Britain, it is said, could have promised in 1891 that any future acquisitions of territory south of 4° 10' would be handed over to Dutch Borneo. On that basis there would have been no *nemo dat* problem. After all, someone *can* promise to give what they will get in the future to another, even if they do not have it now.

11. But the Court will immediately see that this alternative argument — if it was made and it was only hinted at — is absolutely hopeless. Although in theory a State could promise to hand over future-acquired territory to another State, it is obvious that such a promise would have to be explicit and would have to be discussed, and that it cannot be inferred from a boundary agreement which deals with existing territory, existing territorial claims and a boundary immediately created and effective immediately upon ratification. There is not a trace of a suggestion in the written record of any such promise as to the future. Moreover, such an interpretation would contradict the object and purpose of the 1891 Convention, which was, we agree, finally to settle the dispute concerning the area of overlapping claims. It was not the purpose of the Convention to create the possibility of later claims to still further, after-acquired islands, beyond that area and further to the east.

12. I should make one final point. Assume, for the sake of argument, not only that Malaysia is wrong about Sulu titles but that the Ligitan islands belonged in 1891 exclusively to the indigenous inhabitants and not to any State or Sultan. That is what you held to be the case for the *Western Sahara* prior to Spanish colonization[54]. On that assumption, no doubt, the Ligitan islands were not *terra nullius*. But they would not have been the subject of any State's sovereignty, not Spain, not the Netherlands, not the State of North Borneo under British protection. I note that the convergent legal analyses of the situation made in 1903 by Secretary of State Hay[55] and in 1905 by the British Foreign Office[56] both implicitly reject that possibility. Let us however assume that they were wrong to do so and that the islands were never Spanish. It would follow that the islands in the Ligitan Group were excluded from the scope of the 1907 Exchange of Notes and the 1930 Treaty. But they would still now be part of British North Borneo, that is to say, of Malaysia, because the

[54]*I.C.J. Reports 1975*, p. 16.

[55]Memorial of Malaysia, Vol. 3, Ann. 55.

[56]Memorial of Malaysia, Vol. 3, Ann. 66.

indigenous inhabitants of the Ligitan Group came to owe their allegiance to the BNBC and its successors in title, and to this day they owe it to Malaysia. They clearly have never owed any allegiance to Indonesia. The well-attested social facts associated with the islands — which Indonesia does not deny; not even Professor Pellet, with all his capacity for denial, denies those social facts — would have combined with BNBC, British and Malaysian *effectivités* to give the islands to Malaysia.

13. For these reasons, Mr. President, Members of the Court, Sir Arthur's attempt to deal with the *nemo dat* argument is, with respect, wholly unconvincing. In fact I do not think it convinced Professor Pellet. Why else would he have attempted the heroic and hopeless task of trying to prove that Indonesian *effectivités* over these islands were greater than Malaysian? On the theory of the case adopted by Indonesia and by Professor Pellet in the first round, there was no need to do so. Instead counsel for Indonesia could and did rely on the rules concerning prescription, with their very high standard of proof on the State seeking to displace a pre-existing title. You heard Professor Pellet discuss it at length last week. By contrast I do not think that counsel for Indonesia used the word "prescription" on Monday. It has disappeared from the Indonesian vocabulary. Its disappearance is a tacit acknowledgment of the force of the two words *"nemo dat"*. Instead you had, from Professor Pellet: "some facts are better than no facts . . .". Mr. President, that is not a rule relevant to prescription.

(2) The 1900 Convention

14. Mr. President, Members of the Court, I turn to my second point, the 1900 Convention. I can be much briefer in relation to that Convention. Mr. Bundy accused me of trying to hide from it and of being embarrassed by it. In fact what there was to say about it we said. The 1900 Convention between Spain and the United States covered "any and all" Spanish islands beyond the 1898 Treaty of Paris lines. It was not limited to the islands of Cagayan Sulú and Sibutú which were particularly mentioned. If it had been so limited, it would not have covered the Turtle Islands and the Mangsee Islands, yet it is clear — and we agree — that it did cover them. The Court may recall my argument about liking cheeses, particularly camembert and gorgonzola — but I apologize, Mr. President, my liking for cheeses is causing me to repeat myself.

15. In any event, Secretary Hay's legal opinion of 1903 is quite clear on the point. I am sorry Mr. Bundy could not discuss it on Monday.

(3) The events of 1900-1907

16. I turn equally briefly to the events of 1903 to 1907. There are only two points that need clarification. Apart from these I leave the Court to read through the documents chronologically listed in tab 35 of our judges' folders for last week.

17. The first question of fact is this. Did the parties consider that only islands to the north of Sibutu were affected by the 1907 Exchange of Notes? The BNBC clearly did not think so; their memorandum and their map covered all the islands visited by the *Quiros* including Danawan — and they knew that Danawan was visited by the *Quiros*. So did the Durand map, which became the map annexed to the 1907 Exchange of Notes. The Sultan's Confirmation of 1903 — even though it was plainly invalid as a matter of law — also covered islands to the south-east of Sibutu, including all the inhabited islands in the Ligitan Group. All the facts point the same way.

18. The second question of fact is this. Did the United States spontaneously change its position as reflected in the 1903 Hydrographic Office map, which expressed a claim to all the islands of the Ligitan Group; or did they change their position — or rather stay their hand — because of British concerns, prompted by the BNBC? Mr. Bundy suggested on Monday that the decision was spontaneous and internal. Secretary Hay realized, perhaps in the middle of the night, that he had made a legal mistake. He had blundered and he spontaneously went back on his previous, apparently considered view, disowning the poor Lt. Boughter in the process. Probably not much turns on it, but as I read the record — admittedly not complete — it seems to me that the United States position changed because of discussions to be held with the British. If you refer back to the chronological list of documents, which is our tab 35, you will see that the crucial date is 23 October 1903, when instructions were given not to mark the boundary line on the map "until a mutual agreement has been arrived at between the United States and British governments"[57]. All subsequent internal correspondence presents the British negotiations as the reason for putting the

[57]See Memorial of Malaysia, Vol. 3, Ann. 63; Memorial of Indonesia, Vol. 3, Ann. 104.

issue on hold. There is no suggestion that the United States change of position — if that is what it was — was due to the Dutch, no suggestion at all.

19. I emphasize these facts because, quite apart from their legal significance, which I will not repeat, the whole transaction is a vivid testimony as to the factual situation in relation to precisely these islands. Mr. Bundy seemed to think that because the first edition of the Hydrographic Office map was put on hold, therefore nothing Lt. Boughter saw or said or reported can be relevant. But that is obviously not the case, and Sir Elihu will return to it shortly.

(4) The 1930 Convention

20. [Tab 84 — tab 39 of Malaysia's first round] Fourthly and finally I should say something about the 1930 Convention. Mr. Bundy repeated the trick of asserting there was no evidence for a proposition, while ignoring the evidence Malaysia had tendered. In this case Mr. Bundy's proposition was that the 1930 Convention did not affect the islands. He said that we had produced no evidence that the 1930 Convention affected the islands[58]. In fact, as you will recall, we did produce such evidence. It was of two kinds.

21. The first is the logical connection between the 1907 Exchange of Notes, the temporary arrangement for the administration of the offshore islands, and the 1930 Convention. Because the 1930 Convention made permanent, with certain important variations, what had previously been regulated by the 1907 Exchange of Notes and its annexed map, by definition, therefore, the scope of the two treaties was connected. The temporary arrangement became permanent, but with variations. All the islands, administered under the 1907 Exchange of Notes, all the islands — the phrase comes from the Exchange of Notes — which were not resumed by the United States in 1930 became permanently and for all purposes part of British North Borneo. Thus the annexed map of 1907, the Durand map, with its line down to 4° N, was by definition part of the 1930 arrangements, since it defined the basis upon which the 1930 Convention operated. Mr. Bundy virtually ignored that clear logical connection on Monday.

22. The second kind of evidence we produced was documentary: it is the evidence that the British Admiralty, at least, gave clear and close consideration to the scope of the 1930 Convention

[58]CR 2002/33, p. 54, para. 42 (Mr. Bundy).

prior to its conclusion, and that British officials considered unequivocally that it affected the offshore islands south of Semporna. The map on your screen —tab 84 in your folders — is our re-showing of the lines that were attached to the first of the two Admiralty memoranda of 1927, annexed to your folders in the first round[59]. That map, and the original which is also annexed, is clear evidence of the fact — the two Admiralty memoranda themselves are equally clear evidence of it. Mr. Bundy made no reference to them whatsoever. Let me, if I can interpolate a repetition, recall the conclusion, reached by the Admiralty in 1927, that under the proposed Treaty: "*British North Borneo* [this is under the 1930 Treaty] would receive Buaning, Lankayan, Mantatuan, Mataking and the Ligitan Islands, to none of which she has any valid claim."[60] Indonesia has chosen not to respond to this evidence.

23. It does not matter for this purpose whether the 1930 Convention is interpreted as a treaty of cession, or as a mere relinquishment of a claim to small islands which the United States never actually administered. What is clear from the record is that the BNBC had administered them and was continuing to do so, and that the issues were of concern exclusively to the United States and Great Britain. Whether the transaction is analysed as a relinquishment or a cession does not matter, its legal effect is precisely the same.

24. Mr. President, Members of the Court, to summarize briefly, the islands south of Semporna were Sulu islands. Those beyond 9 nautical miles from the coast were not granted to the BNBC by the Sultan in 1878, but the BNBC for practical reasons gradually extended its control over them, without any protest or action on behalf of Spain or the Netherlands. Nonetheless, their Spanish character was expressly acknowledged by the British in 1885, and they passed to the United States in 1900, as both the United States and Great Britain agreed. They were administered by the BNBC under the 1907 Exchange of Notes until 1932, when the 1930 Convention came into force. At that point, sovereignty over the islands lying to the west and south of the line on the 1930 Convention map firmly and finally vested in British North Borneo under British protection, in the absence of any claim or action by any interested third party. The Dutch never having claimed

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[59]CR 2002/31, 7 June 2002, pp. 50-53, citing Memorial of Indonesia, Vol. 4, Ann. 123; Counter-Memorial of Malaysia, Vol. 2, Ann. 3.

[60]Counter-Memorial of Malaysia, Vol. 2, Ann. 3, p. 18.

the islands, Indonesia lacks any trace of title over them. But even if the islands had not been Sulu, even if they had not been Spanish, even if they had not been American, they would now be Malaysian because Malaysia's predecessors claimed and administered them and no one else did.

Mr. President, that would be a convenient moment for a break.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. La séance de la Court est suspendue pour une dizaine de minutes.

L'audience est suspendue de 11 h 25 à 11 h 35.

Le PRESIDENT : Veuillez vous asseoir. La séance est reprise et je donne la parole au professeur Crawford.

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

B. The map evidence

25. I turn now to deal with the map evidence. Let me start with two preliminary points concerning the geography and the maps.

(1) The "Ligitan Group" is not a concocted potion

26. This preliminary point concerns what Professor Pellet was pleased to describe as our invented reference to the "Ligitan Group": he called it *"soi-disant"*, a concocted potion uniquely invented for the purposes of the case[61]. So worried was Sir Arthur Watts about this concocted potion that he spent a quarter of his speech, which should have been on the 1891 Convention, talking about the Ligitan Group instead[62]. So let me show you that it was not a concocted potion but part of the original recipe and the original reality.

27. [Show MC-M, map 7, detail] I attach, at tab 85 in your folders, a list of maps in the record which use the phrase "Ligitan Group". You will see there are 14 maps that do so, ranging from 1881 to 1997. In the time available since Monday we have not been able to find all of the

[61]CR 2002/34, p. 31, para. 33 (Professor Pellet).

[62]CR 2002/33, pp. 12-17, paras. 2-24 (Sir Arthur Watts).

references in the documentary annexes to the Ligitan Group, but there are certainly some. Let me mention two items, one map and one document.

28. The first item is the map which is tab 86 in your folders and is on the screen: you have seen it before. It is the map published in Batavia in 1941[63], which I showed you last Friday. It shows the words "Ligitan Group" between the star-shaped reef and Sipadan Island. In case you were wondering, the number "(51)" in brackets next to Sipadan is a reference to the height of the top of the trees on Sipadan, and is there to aid mariners. Incidentally, we know the name of the BNBC subject who planted trees on Sipadan. Indonesia has not told us the name of any Dutch or Indonesian person who spent more than half an hour on the island at any time before 1969, let alone someone who planted trees.

29. The second document is the 1890 *British Sailing Directory* for "Borneo: North-East Coast", which you will find in your folders as tab 87[64]. The entry for the Ligitan islands cover Si Amil, Danawan, a small unnamed islet — which is actually Ligitan —, Sipadan and Mabul; the *Directory* then moves on to Sibuko Bay. This chapter covers everything down to the Sibuko River, the end of the 1878 Grant, and then it stops.

30. Indonesia argues that the second edition of the *Sailing Directory* does not list Sipadan as part of the Ligitan Islands[65]. It is true that there are significant changes between the 1890 and the 1904 editions of the *Sailing Directory*, no doubt as a result of new information arising from such voyages as that of the *Egeria*. Under the entry for Ligitan Islands, in the second edition, are covered everything from Si Amil to Mabul Islands; Ligitan islet is now mentioned by name, as is Kapalai; then Ligitan Channel to the north and Sipadan to the south of Mabul — it is only 8 nautical miles away. It is unclear from the text whether the Ligitan Islands entry include Sipadan but it is perfectly clear that Sipadan is still treated as part of "Borneo; North-East Coast". Later the *Directory* discusses Sebatik and it mentions the boundary pillars now placed there. There is no suggestion that any of the islands discussed under Ligitan Islands are not part of British North Borneo. [End MC-M, map 7, detail.]

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[63]Counter-Memorial of Malaysia, Vol. 2, map 8.

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

[65]For the second edition (1904) see Reply of Indonesia, Ann. 4.

31. These references entirely dispose of Professor Pellet's notion that the Ligitan Islands or the Ligitan Group are some sort of invented potion or poison pill being foisted on Indonesia. The term has been current for a long time. Of course, Sipadan is not physically part of the star-shaped reef; it is principally now serviced from Mabul, but historically its connection was, as we know, with Danawan.

(2) The classification of map evidence

32. My second preliminary point concerns the classification of the map evidence which I presented last week. You will remember category 1, the treaty maps — the great maps; category 2, the maps put forward as reflecting claims or even informal agreements or understandings at the inter-State level; and then the residual category 3. Ms Malintoppi suggested that this classification is too rigid, but a map is either annexed to a treaty or it is not. The internal Dutch map *was not so* annexed, and all attempts by Indonesia to turn it into a category 2 map have failed, as Professor Cot has shown you. In the result, Indonesia did not deny that all the maps I listed as category 1 or category 2 maps support Malaysia. None of them support Indonesia. In this context it is significant that there was no discussion from Indonesia on Monday of the 1888 Dutch map, or of the very many related statements made by the Dutch that they did not claim any territory east of Batu Tinagat, nor of the map annexed to the 1907 Exchange of Notes.

(3) Ms Malintoppi's 24 maps

33. With these preliminaries out of the way, let me turn to the maps alleged to support Indonesia's case. On Monday, Ms Malintoppi helpfully gave us — their tab 12, which was a list of 24 maps which, she said, support Indonesia's claims to the islands[66]. We have re-presented that list of 24 maps as tab 88 in our folder, with annotations. Ms Malintoppi is responsible for the identification of the maps, I am responsible for the annotations. The annotations show, first, whether the two disputed islands appear on the map, and secondly, if they do, how they are shown relative to any line on the map. I will take you to a few of the maps shortly, but let us look at the overall picture.

[66]CR 2002/34, pp. 19-21, paras. 33-36 (Ms Malintoppi).

34. [Show Malaysia Timor Sabah; no need to put in folders] First, the island of Sipadan does not appear on 15 of her 24 maps. It is not shown. Those maps accordingly can say nothing precise or specific as to its status.

35. Of the nine maps on the list on which the island of Sipadan appears, the island is shown to the south of a line drawn on the map in some, but not others. On five maps Sipadan is shown to the south of a line. Now, three of these are the early Stanford maps — they are Nos. 2, 5 and 6 on the list, which is tab 88. The Stanford maps show what appears to be a BNBC administrative boundary. On each of these maps Sipadan is shown to the south of the boundary and Ligitan to the north. At this time, as we know, neither island was actually part of British North Borneo, although by 1903 there is independent evidence that the BNBC was resolving disputes over turtle egg collection on Sipadan, an activity which continued and was later reinforced by legislation specifically applied to the island. These three administrative boundary maps do not actually attribute Sipadan to British North Borneo, but neither do they attribute it to the Netherlands, it is simply to the south of an administrative boundary. I should say that those maps were later replaced by administrative maps which showed a closed administrative boundary of Tawau, where there were no islands further to the east. That closed administrative boundary stopped well short of the islands, and then there was an open administrative district of Semporna which obviously includes the islands. Three of those maps showing the open administrative district of Semporna, Nos. 13, 14 and 19, are on Ms Malintoppi's list: and one of them you can see now on the screen. It seems to me obvious that these maps do not support Indonesia's case. But, of course, it is for you to decide.

36. I turn now to Ligitan. The island of Ligitan appears on 12 of the 24 maps listed by Ms Malintoppi. So its strike rate is higher, it is 50 percent, though quite often it is not named. But there is not a single map in the record which shows Ligitan, named or unnamed, south of any line on the map. You can check that for yourselves by looking at the 24 maps. Not a single one shows Ligitan to the south of the line. Not even the Explanatory Memorandum map, as I showed last week[67] and as Indonesia does not dispute. Of course the Explanatory Memorandum map did not have a line extending as far east as Ligitan. But if that line had been extended, it would have

[67]CR 2002/32, pp. 29-30, paras. 26-27.

shown Ligitan to the north of the line. And the fact is, whenever a map shows a line extending so far east, and shows Ligitan, it shows Ligitan to the north of the line, without exception.

37. So of Ms Malintoppi's maps, the number of maps which directly support a claim to Ligitan is zero; the number which can be read as supporting a claim to Sipadan is five, if you count the early Stanford maps; two, if you do not. I remind you that there are 77 maps of the region in the record. We could have multiplied editions of maps showing the line stopping at Sebatik, but maps are not to be unnecessarily multiplied, as William of Occam, the medieval philosopher, might have said if he'd been a lawyer.

38. Of course, Ms Malintoppi seeks to put the point in another way. She argues that maps showing lines in the sea south of Sebatik are evidence of the existence of an allocation line along the parallel of 4° 10' N pursuant to the 1891 Convention, even if the lines on the maps stop short of the islands (as most of them do), and even if they are not expressed to be allocation lines or international boundaries (almost all of them are not so expressed)[68]. In other words, she does not appear to argue that the maps are evidence of Indonesian sovereignty as such. Rather they are evidence of a cartographic practice which supports Indonesia's treaty claim.

39. [Tab 89 -- *Century Atlas* map] This argument calls for three comments. First, it disqualifies altogether those among her 24 maps which do not show a line along the parallel of 4° 10' N but show some other line. Let me give one example which Indonesia stressed on Monday, the *Century Atlas* map of 1897, a commercial map which you can see on the screen once more: it is No. 4 on Ms Malintoppi's list[69]. It shows something called a "Boundary of Dutch Possessions", but at no stage does it follow the 4° 10' N line, as you can see on the screen. Rather, it swings somewhat north so as to attribute Karakelong Island and other islands to the Netherlands. Moreover, if you look at it in detail, as now on the screen, you will see that the islands to the south of the line (none of which are in the right place to be the islands in dispute and none of which are named) are actually coloured red: they are British, they are not orange or Dutch. There seems to be a discontinuity between the very large lines showing so-called boundaries and the specific situation of the islands off Borneo, and that discontinuity is a feature of certain other maps in the

[68]CR 2002/34, pp. 16-17, paras. 20-21 (Ms Malintoppi).

[69]See Memorial of Indonesia Map Atlas, map 7 with enlargement.

record. But in any event, if the map record is inconsistent (which it is), this commercial map achieves the singular distinction of being inconsistent with itself!

40. Thus the *Century Atlas* map does not actually support Ms Malintoppi's main argument — because it manifestly does not show a 4° 10' line, and because it pictures islands to the south of the line as British. Nonetheless, Mr. Bundy, making a welcome return, sought to reinforce its status by emphasizing that it had been exhibited by the United States in the *Island of Palmas* arbitration[70]. Well, there were about 50 maps in that arbitration — the only complete set of maps appears to be in your library —, the *Century Atlas* map was one. Mr. Bundy did not bother to tell us what Arbitrator Huber said about that map. The Arbitrator noted that several maps, in particular the *Century Atlas* map, showed an island, Mata Island, which almost certainly did not exist. He noted that Mata Island was not shown on the only large-scale map "directly based on researches on the spot", which was one of the British Admiralty charts. He concluded that "only with the greatest caution use can be made of maps as indications of the existence of sovereignty over Palmas"[71]. In other words, he dismissed the *Century Atlas* map, which showed the Island of Palmas and specifically showed it to be American, not Dutch. The *Century Atlas* map was better evidence of United States sovereignty over Palmas than any Dutch or Indonesian map in the record of this case in respect of Sipadan and Ligitan, and yet it was dismissed, and of course the United States lost the case. So much for the authority of the *Century Atlas* map.

41. The second comment on Ms Malintoppi's argument is that, if she wishes to extend the 4° 10' line east, beyond that shown on maps, she has to explain why it stops short of Karakelong Island. The *Century Atlas* map line, on which she relies, goes well past it. On Friday I showed you that the 4° 10' line cuts through Karakelong Island[72]. We project a line along the 4° 10' parallel, giving land areas to the north to the British and to the south to the Dutch, then the British get the northern half of Karakelong Island, just as they got the northern half of Sebatik. Ms Malintoppi on Monday did not bother to say why the line should stop east of Ligitan and west of Karakelong Island. More importantly, perhaps, neither she nor other counsel for Indonesia have managed to

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[70]CR 2002/33, pp. 49-50, paras. 20-22 (Mr. Bundy).

[71](1928) 2 *UNRIAA* at p. 853.

[72]CR 2002/32, p. 39, para. 61.

explain why, if the parties in 1891 thought they were drawing an allocation line, they never discussed its length, its extent or its legal effect. [End tab 89]

42. And the third comment on Ms Malintoppi's argument, is that subsequent mapping practice could only be very, very secondary evidence of the interpretation of a treaty and, if so, the practice would have to be consistent on both sides. Here it is completely inconsistent. In particular, there is not a single Dutch or Indonesian map which shows an allocation line of the same character or length as the Dutch internal map does. Ms Malintoppi made no comment on the list of 22 Dutch and Indonesian maps I gave you last Friday[73]. To summarize, as support for an argument based on the interpretation of the 1891 Convention, the maps are feeble evidence indeed.

43. While I am on the *Island of Palmas* case, I should add that that particular dispute has nothing to do with our case. It concerned an island which was covered by the 1898 Treaty of Paris, not the Additional Convention of 1900, as Mr. Bundy appeared to imply[74]. That is not to say, however, that the Award is not useful as an example of method. It is very useful — in its distrust of what I have called category 3 maps[75], in its disdain for inchoate or merely theoretical titles[76], and in its robust support for possessory titles based on actual allegiance and contact with the indigenous people of a disputed island[77]. In these three respects, it provides something of a model, and also Mr. President, in respect of its brevity. In particular, I note Judge Huber's statement that:

> "If the Arbitrator is satisfied as to the existence of legally relevant facts which contradict the statements of cartographers whose sources of information are not known, he can attach no weight to the maps, however numerous and generally appreciated they may be."[78]

A fortiori he can attach no weight to the maps if there are hardly any of them that support the claim.

44. Now, of the 24 maps on Ms Malintoppi's list, only two remain to be mentioned: these are Nos. 15 and 22 on her list. One is Malaysian and one is British. I will not be like Mr. Pellet and pretend that there is no evidence against my side, as it were: these two maps are problematic.

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[73]CR 2002/32, p. 31, para. 31; Malaysian judges' folders, tab 64.

[74]CR 2002/33, p. 49, para. 21 (Mr. Bundy), p. 50, para. 24 (Mr. Bundy).

[75](1928) 2 *UNRIAA* at p. 852.

[76]*Ibid.*, pp. 846, 869.

[77]*Ibid.*, pp. 851, 858, 862-866.

[78]*Ibid.*, p. 853.

Both have disclaimers. Both are contained in Malaysia's Map Atlas, in its Memorial and are discussed in the pleadings. Curiously, neither has of them has actually been discussed by Indonesia in the hearings, although Ms Malintoppi quickly showed both of them to you on Monday[79]. For the sake of completeness, let me deal with them.

45. [Tab 90 — Semporna (1967)] The first is the map which you can now see on the screen, and is tab 90 in your folders[80]. It is a Malaysian Ministry of National Mapping map of 1967, entitled simply "Semporna". It shows the 1930 Treaty line — to the right of the map — as a treaty line between the Philippines and Indonesia, despite the fact that the Treaty was between Britain and the United States. It shows Pulau Ligitan apparently above the dashed line entitled "Malaysia (Sabah)/Republic of Indonesia", which if that line represents the 4° 10' N parallel is wrong: it should be beneath the line. So there are a number of errors on the map. The map shows Sipadan as below that line. Overall it is wrong and misleading. It may even have misled Indonesia, since it was not long after the publication of that map in 1967 that Indonesia first made its claim to the islands. Helen's face is alleged to have started a war: it may be this map started a case. On the other hand, Malaysia was not misled for long. As soon as Malaysia learned of the Indonesian claim it rejected that claim and it has done so consistently since. This map has never been repeated by Malaysia nor adopted cartographically by Indonesia. [End map]

46. Ms Malintoppi argued in effect that this map is an admission against interest on the part of Malaysia, but there are three obvious answers to that. The first is that the map contains a disclaimer and is therefore, quite simply, not an admission. If I make a statement and at the same time say that my statement cannot be relied on, I have made no admission; if I tell you the time that suggests my clock may be wrong, I have not told you the accurate time, you are not entitled to rely on it. That is perfectly simple. Secondly, as the Court has made clear on several occasions, even official maps are not admissions against interest; they are simply evidence to be taken into account. The common law rules of admission against interest — part of the common law of evidence — are not to be imported into the international law of territorial title, any more than you allowed it to be imported into the law of maritime delimitation in respect of the Hoffman letter in

[79]CR 2002/34, p. 20, para. 34 (Ms Malintoppi).

[80]Memorial of Malaysia, Vol. 5, map 20.

the *Gulf of Maine* case. No doubt deliberate admissions by foreign ministers may be binding, but they do not carry disclaimers; and, anyway, cartographers are not foreign ministers. Cartographers are not immune from making mistakes, whatever immunities foreign ministers may have!

47. This map was produced by the central mapping authority only a few years after Sabah joined Malaysia. The mistake has not been repeated.

48. [Tab 91: operational navigational chart (1978)] I turn to the second map, a British map of 1978, which is tab 91 in your folders. It shows an allocation line proceeding east, then turning south-east — you can see it shown on the screen — leaving Ligitan clearly to Malaysia and Sipidan apparently to Indonesia. The map contains a disclaimer. It was produced after the critical date. It was obviously not relied on at any stage by Indonesia, which by 1978 was fully aware of Malaysia's claim to both islands. Nor is it opposable to Malaysia, which had nothing to do with its production. It is completely lacking in any legal or cartographic basis. It is completely isolated among the 77 maps of the disputed area which are in this case. Moreover it does not reflect the view or the legal position taken in this case by either Party. After five rounds of written pleadings in this case, both parties agree that *either* the two islands both belong to Malaysia, *or* that the two island belong to Indonesia. There is no middle position: *either* the 1891 Convention as interpreted in light of the internal map and the subsequent practice of the parties contained an allocation line along the 4° 10' parallel, *or* it did not. No other map or document has ever suggested that such a line, if it existed, could suddenly bend, or why it should do so at any particular point. Lacking any articulated rationale and any foundation in the legal positions taken repeatedly and deliberately by both Parties before the Court, this British map can, simply and safely, be ignored.

49. Mr. President, Members of the Court:, at the end of her speech on Monday, Ms Malintoppi showed you a series of 15 maps which, she said, supported Indonesia's claim. You may have been struck, as you watched them, by the diversity of the maps: some showed lines extending a few miles to the east of Sebatik, some further; some showed the islands, or at least one of them, many showed neither; some showed islands in the wrong place, and so on. Overall they were an extraordinary mixture, and only by a deliberate, I might say wilful, act of the imagination could they all be represented to show the same thing.

50. You may consider the following sample of 15 different maps as being rather clearer and more consistent, both with each other and with the historical and legal record. You will find these maps successively under tab 92 of your folders.

51. [Tab 92: Succession of 15 maps] First, we have the Dutch map, "East Coast of Borneo: Island of Tarakan up to Dutch-English Boundary" dated 1905, with the 4° 10' N line stopping at the east coast of Sebatik[81].

52. Then we have — by now you will be familiar with it — the map of British North Borneo (a Stanfords map, incidentally: a category A map), annexed to the 1907 Exchange of Notes. It shows the 4° 10' N line stopping at the east coast of Sebatik[82]. It was published officially.

53. Then, the 1913 Dutch map showing the administrative structure of the Southern and Eastern Borneo Residence. Sebatik, Nanukan, Tarakan and the small islands belonging thereto are shown. But not Sipadan and Ligitan. The 4° 10' N line stops at the east coast of Sebatik[83].

54. Then we have another Dutch map of the same year, showing the Southern and Eastern Division of Borneo in 1913, with the 4° 10' N line stopping at the east coast of Sebatik. This time the two islands in dispute are shown and named, but there is no indication of their being Dutch[84].

55. Then we have the map accompanying the 1915 Boundary Agreement — another category A map — with the 4° 10' N line stopping at the east coast of Sebatik[85].

56. Now we have the portrayal of the 1915 boundary line in the 1916 Dutch *Colonial Gazette*, showing of course exactly the same thing though in more polished and attractive form[86].

57. This map by the Dutch official, Kaltofen, is a hard-drawn ethnographic map of Borneo, dated 1917[87]. It has been suggested that the First World War prevented the Dutch from focusing on what was going on, that they had a sort of four-year period of collective amnesia, and that they failed to observe the administration of the peoples of British North Borneo. But this Dutch official

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[81]Counter-Memorial of Malaysia, Vol. 2, map 2.

[82]Memorial of Malaysia, Vol. 5, map 6.

[83]Counter-Memorial of Malaysia, Vol. 1, insert 11.

[84]Memorial of Malaysia, Vol. 5, map 1.

[85]Memorial of Malaysia, Vol. 5, map 23.

[86]Reply of Malaysia, insert 9.

[87]Reply of Malaysia, insert 3.

certainly seems to have been rather observant. And he did not think that any line went out in the sea east of Sebatik, or that any of the people of the east were Dutch.

58. Now a 1935 map of East Borneo, in which, as you can see, the northern areas of Dutch East Borneo are actually projected above the margin of the map in order to get them to fit[88]. Whoever made this beautiful map evidently did not think there were tiny bits of Dutch East Borneo off the map in an east-north-easterly direction.

59. And here we have the cartographer of the prestigious *Atlas of the Tropical Netherlands* in 1938 who stopped the 4° 10' line at the east coast of Sebatik, and then superimposed on the Ligitan islands a town map of the southerly town of Balikpapan. It did not show the islands at all[89]. How careless of him!

60. And once again the 1941 map sheet North Borneo, which reflects the legal position at the time with complete accuracy and honesty[90]. Sipadan Island — you notice the abbreviation "I" — belongs to North Borneo. So does Ligitan Island — you have seen the words *Ligitan Group* already. The 4° 10' line stops at the east coast.

61. In 1952, turning from Dutch to British maps, what is now the Colony of North Borneo produces this map. You will see that Sipadan — if we go back to the full map, please — is actually shown below the map border. The island of Sipadan is located below the border and a specific attempt is made to show it. You will see also that the boundary stops at the east coast of Sebatik. The only reason for depicting Sipadan in that way must have been that it was considered to be part of British North Borneo[91].

62. The next year the colony shows its administrative districts, in a schematic map with no offshore islands. There is no line east of Sebatik. You can see that the administrative boundary of the Semporna district is open[92]. That there was an administrative boundary in precisely this

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[88]Counter-Memorial of Malaysia, Vol. 2, map 5.

[89]Counter-Memorial of Malaysia, Vol. 1, Insert 12.

[90]Counter-Memorial of Malaysia, Vol. 2, map 7.

[91]Memorial of Malaysia, Vol. 5, map 17.

[92]Memorial of Indonesia, Map Atlas, map 10.

location is also shown on the map of the Semporna police district of 1958, by S. M. Ross, which you have already been shown[93].

63. Contrast Indonesia's continental shelf map of 1960 — a category B map — disclaiming any interest in the two islands[94].

64. And now the British Admiralty chart "Tawau to Tarakan" of 1960: no line east of Sebatik[95].

65. And finally the Malaysian map, "Bandar Seri Begawan" of 1976, which seems entirely clear in its portrayal of Malaysia's sovereignty over the Ligitan Group[96].

Conclusion

66. Mr. President, Members of the Court, summarizing variable and inconsistent maps falling within category 3 is not easy. That is what Ms Malintoppi had to do with her 15 maps, and I am sure she will agree that it was a thankless task. By contrast the maps I have just shown you are come in all three categories: Category A, treaty maps, category B, maps put forward as expressing the international claim of a State, as well as some category C maps. They include all of those three; they are completely consistent. I could have shown others, but I will not try your patience more.

67. Mr. President, Members of the Court, thank you for your careful attention throughout. May I ask you, Mr. President, to call on Sir Elihu Lauterpacht who will address Malaysia's *effectivités*.

The PRESIDENT: Thank you, Professor Crawford. J'appelle maintenant à la barre sir Elihu Lauterpacht.

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[93]Memorial of Malaysia, Vol. 5, map 18.

[94]Memorial of Malaysia, Vol. 5, map 7.

[95]Memorial of Malaysia, Vol. 5, map 11.

[96]Counter-Memorial of Malaysia, Vol. 2, map 10.

Sir Elihu LAUTERPACHT: Mr. President and Members of the Court.

EFFECTIVITÉS

1. My task is to reply on the question of *effectivités* as dealt with by counsel for Indonesia in their second-round speeches.

2. There are some preliminary points to be made.

3. The first relates to the critical date. The position of Indonesia appears to have undergone some significant change. In his first speech, Sir Arthur Watts was absolutely clear on this subject: "the dispute now before the Court crystallized in 1969. For the purpose of admitting and assessing evidence of . . . State sovereignty, any conduct occurring after that date is to be disregarded"[97]. This limitation was imposed by Indonesia for the purpose principally of excluding evidence of the development since 1969 of the tourist facilities on Sipadan and especially the continuous presence there of scuba-diving facilities. All these activities have evidently been carried on with the authority, and under the sovereign control of Malaysia. Indonesia has not manifested its presence or supported its claim to status in any way. And so it is understandable that Indonesia has been concerned to exclude these post-1969 activities from consideration by the Court.

4. Professor Pellet, on the other hand, was not slow to introduce into his speech references to facts occurring after 1969. Thus he spoke of the Indonesian Note Verbale of 7 May 1988 as "the first of the long series of Notes protesting against the establishment of tourist equipment at Sipadan". He adhered also to Indonesia's reliance upon the *ex post facto* agreement in May 1988 to the construction of the light towers on Sipadan and Ligitan, a mere 26 years of after they had been built and had begun operations[98].

5. Now, Malaysia is not troubled by this change of position by Indonesia. Malaysia merely points to a following fact: so starved is Indonesia of examples of its own *effectivités* in respect of the islands prior to 1969 that it has been forced to have recourse to diplomatic assertions subsequent to that date, *not* as part of the diplomatic history of the dispute but as denial of the

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[97]CR 2002/27, p. 23, para. 28.

[98]CR 2002/34, p. 24, para. 11 (Mr. Pellet): *"Il tient à ce que l'Indonésie a formellement donné son accord à l'entretien des deux lanternes. Il résulte en effet d'une note verbale indonésienne du 7 mai 1988."*

relevance of the continuity of Malaysian conduct during the past three decades. Anyway, for its part, Malaysia still adheres to its position that its title was fully established before 1969.

6. My second preliminary observation relates to the character of conduct that can properly be taken into account as *effectivités*. Professor Pellet took exception to one phrase in the definition of *effectivités* that I offered. I had spoken of *effectivités* as consisting of "conduct attributable to a State which evidences its authority in, *or in relation to*, the disputed territory"[99]. In using the expression "in relation to" the disputed territory I was doing no more than echoing the words used by this Court in the *Minquiers and Ecrehos* case when the Court said: "The Court further finds that the British authorities during the greater part of the nineteenth century and in the twentieth century have exercised State functions *in respect of* the group [that is the Ecrehos group]."[100] "In respect of," not *on*. That was the concept and the expression that I reflected in the use of the phrase "in relation to". The conduct does not have to occur *physically* on the territory in question, but it must evidently relate to it — as do the principal *effectivités* that I shall presently recall.

7. Because some of these principal pertinent *effectivités* took the form of legislation, my learned friend, Professor Pellet, was understandably anxious to diminish their significance. So he introduced a reference to the decision of the Permanent Court of International Justice in the *Lotus* case[101] in support of his suggestion, echoing the words of the *Lotus*, that "nothing in the world prohibited the BNBC or the British administration from extending its laws and jurisdiction to persons, things or acts outside its territory" *[Translation by Malaysia]*[102]. Professor Pellet's objective was clear. It was to suggest that the fact that a State might legislatively seek to regulate certain matters did not mean that the area within which those matters occurred lay within its territory. His argument appears to have been: because a State may legislate extraterritorially, the fact that the BNBC legislated for Sipadan did not mean that Sipadan was part of the territory of the BNBC. But the example that he gave quite undermined the argument that he was seeking to promote:

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[99]CR 2002/34, p. 22, para. 2 (Mr. Pellet).

[100]*I.C.J. Reports 1953*, p. 67; emphasis added.

[101]*P.C.I.J., Series A, No. 10*, p. 19.

[102]CR 2002/34, p. 26, para. 19.

> "All countries do it [that is, legislate to regulate matters outside their territory]. France does not permit its nationals to bring back in their baggage rare or protected specimens captured in Amazonian forests or in a reserve in Sierra Leone or on the high plateau of Madagascar — and without doubt likewise turtle eggs from Sipadan . . . it does not follow that these parts of Brazil, of Sierra Leone or of Madagascar — not even of Sipadan — are French or are claimed by the Republic." *[Translation by Malaysia.]*

8. What Professor Pellet appears to have overlooked is that the kind of legislation he is describing is quite different from the legislative acts of the BNBC that are pertinent here. For one thing, the legislation here in question was clearly intended to be territorial in its operation — to apply within the State of Borneo — the legislation actually said so, as we shall see; for another thing, the French legislation about which Professor Pellet theorizes is manifestly *not* extraterritorial in its operation. Note, please, the manner in which the legislation was described. It prohibits French nationals from bringing the protected specimens back in their baggage: that is the way that Professor Pellet described it. Thus the connecting link between the legislation and the prohibited conduct is, first, via French nationals, a nationality (as he put it, "*ses nationaux*") and second, through the fact that the prohibited conduct takes place in French territory. The prohibited conduct is not the collection of the protected species aboard, that is a matter for the law of the country concerned. The conduct prohibited by French law is bringing it back into France in the collector's baggage. It is quite clear from the manner in which Professor Pellet described the French legislation that it did not take effect upon French nationals in Brazil, Sierra Leone or Madagascar, but only when they returned to France[103]. This citation of the "*Lotus*" principle is quite out of place in the present context. The question of extraterritorial legislation has nothing to do with the case now before this Court.

9. Turning to another aspect of Professor Pellet's argument. I do not dispute his observation that an essential element in *effectivités* is "the intention and the wish to act in the capacity of sovereign". I did not omit reference to this element out of any desire to conceal it, but only because my concern in that part of my argument was to speak of actual conduct. Of course, the intention to act *à titre de souverain* is an essential ingredient of *effectivités*, but a statement of such intention does not have to appear in every act of the State constituting *effectivités*. It is enough that the act in question is clearly an exercise of sovereign authority related to the territory in question

[103]CR 2002/34, p. 26, para. 19.

and carried out in pursuance of that sovereign authority. Legislation which refers to the territory in question, whether specifically or by implication, clearly falls into that category. To this I shall return in a moment.

10. In the same vein, counsel for Indonesia has tried to drive a wedge in respect of conduct on the islands between, on the one hand, actual presence and behaviour of private persons, whether the Bajau turtle egg collectors or fishermen, and, on the other hand, the sovereign authority and conduct of the State, whether the Sultan of Sulu, the BNBC, Britain or Malaysia. To this end Indonesia has, for example, asserted that the BNBC should be regarded as a private company engaged in commercial activity, whose conduct and administration could therefore not be regarded as of a public or sovereign nature. The falsity of this assertion is readily shown by recalling the terms of the Agreement of 1946 between the Company and the British Crown for the transfer to the Crown of what were there described as the *sovereign rights* of the Company over and to the territory of the State of North Borneo[104]. From 1881 to 1946, the Company was in law and in fact the Government of North Borneo, exercising therein normal powers of government. It was a rather unusual position for a company. But it was the position. It was not a unique position, for similar powers were exercised by other great overseas trading companies, in various parts of the world from the seventeenth century onwards.

11. What is more, when one speaks of *"effectivités"* in relation to the islands one is speaking of effective control and authority by this governmental entity. We are not speaking of the conduct of the Bajau Laut as such, the people who were subject to the authority of the Company. Indonesia has repeatedly referred to the *Kasikili* case in an attempt to liken the position of the Bajau Laut to that of the Masubia people who made use of Kasikili Island for agricultural purposes and whose conduct this Court found not to be *à titre de souverain*. But there is a major and significant difference between the two situations. In the *Kasikili* case there was no supportive legislation of the Mandatory Authority expressly referring to Kasikili as if it were part of South West Africa. Here, as I shall presently respectfully remind the Court, the position has been quite different.

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[104]Memorial of Malaysia, Vol. 2, Ann. 30.

12. There is one other brief preliminary observation to be made, before I turn to the *effectivités* themselves. This relates to the unity of the island group of which Ligitan and Sipadan form a part. Evidently, counsel for Indonesia are troubled by this aspect of the case. They realize, no doubt, that if Ligitan and Sipadan are closely linked to their neighbouring islands which are unquestionably Malaysian, this strengthens the inference that Ligitan and Sipadan share the same national character as those other islands. Proximity and appurtenance, when associated with conduct on the ground, are major factors in identifying or establishing national sovereignty.

13. It may be helpful to mention here the passage in the Judgment of the Chamber of this Court in the *El Salvador/Honduras* case in 1992[105]. There, mention is made of the characteristics of Meanguerita as a "dependency" of Meanguera. The Chamber also referred to the *Minquiers and Ecrehos* case which acknowledged the position of the Minquiers group as a dependency of the Channel Islands[106].

14. Sir Arthur Watts argued at some length in his reply speech that there is no geological or geographical unity between Ligitan, Sipadan and their neighbours. What goes on under the waters is, I suggest, irrelevant for this case: What matters is what goes on above the surface. It is to be noted that Sir Arthur's contention that the islands do not form a geological or geographical unity did not extend in the case of Sipadan to a denial of their social or economic unity with the others in the group. As to Ligitan, he said only that the visits of fishermen from the neighbouring islands "do not make separate territories a 'unity'"[107]. He even observed in passing that "the Court has been supplied with no detailed statistical evidence as to their social or economic significance". Now, with all respect, it hardly lies in the mouth of Indonesia to regret a lack of "detailed statistical evidence" when its own pleadings are replete with unsubstantiated assertions of fishing and of the collection of turtle eggs by unnamed persons from Indonesia at unspecified times. It can reasonably be submitted on behalf of Malaysia that the video shown in the course of Ambassador Ariffin's speech provides cogent testimony of the presence and activity on Ligitan of the local Bajau fishermen. However, they did not in that film look like people who would be

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[105] *I.C.J. Reports 1992*, p. 570.

[106] *I.C.J. Reports 1953*, p. 71.

[107] CR 2002/23, p. 16, para. 23.

zealously compiling statistics of their daily catch to satisfy Indonesia's demands for more specific evidence of their presence. It is an inescapable fact that the islands in question are linked economically and socially to those islands over which Malaysian title is not disputed. Indonesia has not denied that the right to collect turtle eggs was vested in the people of Danawan and that the economic interest in the value of those eggs is still vested in them. Moreover, if the accommodation available in Sipadan itself for the visiting tourist is deemed to be too simple, there is a fine and picturesque hotel at Mabul, indisputably Malaysian, which survives largely by providing accommodation to visitors to Sipadan.

15. In contrast with this, Indonesia neither claims nor provides any evidence of any physical presence of its own on the islands. Such evidence as it has produced of conduct "in relation to" the islands, I shall come back to later.

16. With your permission, Mr. President and Members of the Court, I shall now focus more closely on four of the specific *effectivités* adduced by Malaysia in support of its position. The criterion for my selection of these four items is that they are undoubted acts of governmental authority by Malaysia that specifically refer to Ligitan and Sipadan and have a continuing operation. I am, I must say, too old-fashioned to make liberal use of excerpts on the screen behind me. I venture, therefore, generally in this connection, instead, respectfully to commend to your special perusal Volume 4 of the Malaysian Memorial. This contains the documentary evidence of BNBC, British and Malaysian administration of the islands. It is very difficult, indeed impossible, as one turns the 111 pages of this volume, to escape the impact of the image provided by these documents of Malaysian presence in, and with respect to, the islands from 1878 to the present day. After that, turn, if you will, to the Indonesian pleadings. Where is there anything comparable? The answer, as I shall presently elaborate, is: nowhere. The Court will no doubt bear this in mind when recalling Professor Pellet's truly remarkable assertion on Monday that while Indonesia can invoke *some effectivités*, Malaysia can invoke *none*[108]! The manifest extravagance of such a contention can only cast doubt upon the credibility of all else that comes from that same source.

[108]CR 2002/34, p. 21, para. 1.

17. Let us look first at Proclamation XXX of 1914, made by the Governor of the State of North Borneo[109]. It is called "The Monopolies Proclamation". It authorizes the grant by licence of exclusive rights for any purpose. Admittedly, the Ordinance does not on its face state that it applies to Sipadan or Ligitan. It does, however, refer to monopolies "in the State" — that is, the State of North Borneo. Its territorial application — to Sipadan and Ligitan — is confirmed beyond doubt when, in 1916, the Acting Resident of the East Coast of British North Borneo sought the Governor's approval for a grant of the monopoly of collecting turtle eggs from Sipadan Island. The Acting Resident expressly referred to Ordinance XXX, enclosing in typed form a licence under Schedule II of the Ordinance. In fact, the Governor did not authorize the issue of the licence under the Ordinance because the right in question was, he considered, one "under customary native tenure and they have been allowed to exercise it for many years". Note, *allowed to exercise it*, words which clearly imply that the power existed also *not* to allow it. So, no licence was required under the Monopolies Ordinance. The Acting Resident was directed to issue a document, to be registered in the Magistrate's Office, in which the Government acknowledges the claims to the sole right to collect turtle eggs on Sipadan. At the bottom of the Governor's letter is an endorsement: "The necessary document is being issued."[110] The next Annex[111] contains a copy of the document, called a "Surat". Now, I make the point again: this is not just an isolated act that has to be treated as an *effectivité* of 1914. It is an event that is part of the continuing operation of the act, so that it extends over time. The act is merely the starting point of that particular *effectivité*.

18. We come then to the Turtle Preservation Ordinance of 1917[112]. This is an important document because it deals with the principal economic activity in Sipadan. It thus has the same kind of local significance that a petroleum law would have in an oil-producing country. This Ordinance expressly states, in Section 2, that no person shall without a licence take turtles or collect turtle eggs "within the State or the territorial waters thereof". The specific link with Sipadan comes in Section 3. This provides that areas specified in Schedule C shall be deemed to

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[109]Memorial of Malaysia, Vol. 4, Ann. 93.

[110]Memorial of Malaysia, Vol. 4, Ann. 95, p. 35.

[111]No. 98.

[112]Memorial of Malaysia, Vol. 4, Ann. 97.

be "native reserves" and the Ordinance is not to apply to the collection of turtle eggs by natives therein. There then follows a proviso: "provided that natives collecting turtle eggs in such areas shall be subject to any rules declared hereunder for the protection of the industry". Schedule C names three native reserves. One of them is Sipadan Island.

19. Malaysia has previously had occasion to explain that the identification of a native reserve does not evidence the exclusion of the reserve from the Borneo territory. Indeed, it is clear from the proviso that I have just read, regarding the applicability of "any rules declared hereunder", that it was foreseen that Borneo legislation could apply to the native reserves, including Sipadan.

20. Annex 102 in the same volume contains a licence granted in 1954 under the same Ordinance to the Cocos Islander Headman of Balung Estate, a company in Tawau, to take turtles "within the following limits; that is to say Cowie Harbour and adjacent coastal waters north of the territorial boundary to a line drawn due east from Tanjong Nagos". There then follows a statement of particular relevance here: "this area includes the islands of Sipadan, Ligitan, Kapalai, Mabul, Dinawan and Si Amil". So we have here three indications of importance: the first is that the Ordinance applies to both Sipadan and Ligitan; the second is that they were regarded as north of the territorial boundary; and the third is that they form part of a group of islands, the names of which I have just read. This licence is, moreover, a document which bears the heading "Colony of North Borneo", as well as the subheading "Turtle Preservation Ordinance, 1917" and is signed by the District Officer, Tawau. The fact that the Balung Estate was subject to the authority of the District Officer at Tawau is further evidenced by Annex 103 in the same volume, which is a letter from the District Officer at Lahad Datu conveying a complaint that the Cocos islanders were catching turtles in the vicinity of Sipadan. The follow-up to this can be seen in Annex 104.

21. I turn next to another clear illustration of legislative activity applicable to Sipadan, namely, the establishment of the Megapode Preserves. This was done pursuant to the North Borneo Land Ordinance of 1930. In 1933 a Notice made under Section 28 of the Ordinance was published in the *Official Gazette* of North Borneo[113]. "The islands in Lahad Datu District described in the schedule hereto are reserved for the purposes of bird sanctuaries." Sipadan Island and one

[113]Memorial of Malaysia, Vol. 4, Ann. 101.

other are then described. Also the acreage of Sipadan is specifically mentioned: 7.68 acres. Now the establishment of so precise a figure must surely be an indication that the island had been surveyed. Therefore, it must have been visited by a surveyor. Who could he have been, other than a North Borneo government official, for no one else in the area — certainly not the Bajau Laut — would have had the necessary surveying skills or a reason to carry out such a survey? So there we have another item of *effectivités* on the ground.

22. Now a word about the light towers. There is no need to enter into a semantic dispute about the correct description of structures that are undoubtedly in place and perform a nightly function of helping passing mariners. Lighthouse, light tower, lantern, meccano structure: it matters not. What does matter is that lights were constructed by Malaysia on both Sipadan and Ligitan and have been maintained continuously by Malaysia. Mention was made of the Sipadan light in the Colony of North Borneo Annual Report for 1960[114]. The Sipadan light was the subject of an official public and widely available notice to mariners in 1962. It was described as being "exhibited on a steel lattice tower 72 feet high painted white". A similar notice in 1963 announced the establishment of the Ligitan light[115].

23. Professor Pellet mocked these lights saying "after their construction they were hardly the object of attention on the part of an independent Malaysia". And for his information he relied on one of the several Indonesia's litigation-generated affidavits all sworn in 1999. The particular affidavit was by Sergeant Major Ilyas. He surmised that the faded paint of the "lighthouse" — Indonesia's word, not mine! — was "due to lack of maintenance". But a moment's thought might have led Sergeant Major Ilyas to have realized that it is not paint that demonstrates the maintenance of a lighthouse, but fuel. The lights were built at a period before the emergence of solar powered batteries. Who did the Sergeant Major think regularly replenished the source of power for the lights? Certainly, it was not the Indonesians, otherwise they would no doubt have told us. The answer is in a letter dated 2 August 1973 from Mr. Walls of something called Pengarah Laut —which is the Director of Marine —, to the Director of Land and Surveys at Kota Kinabalu: "These are unwatched Light Towers . . . serviced at six monthly intervals — April/October

[114]Memorial of Malaysia, Vol. 4, Ann. 111.

[115]Memorial of Malaysia, Vol. 4, Ann. 113, p. 76.

yearly — and in continuous operation for coastal navigation."[116] Unwatched, means unmanned, not unmonitored. The lights continue to work — as we saw in the video last Thursday. Is this not evidence not merely of official Malaysian activity in relation to the islands but also of official Malaysian activity *on* the islands? Activity regularly carried out?

24. Finally, on the subject of evidence of Malaysian administration, a very brief word is called for about a much earlier episode, the evidence derived from the visit of the USS *Quiros* in 1903. I mention here Lt. Boughter's report, not in relation to the question of the chain of title — this matter has been dealt with by Professor Crawford. Rather, Lt. Boughter's report regarding the administration of the islands by the BNBC is pertinent as evidence of the fact of British administration. It is an objective acknowledgement of the factual situation at that time in 1903, coming not from either party but from a third party with an interest in accurate observation. As such, its value must be recognized.

25. Enough has been said, I suggest, to meet the principal points of criticism by Indonesia of Malaysia's *effectivités*. If I do not go over all the other aspects of that activity, it is only out of respect for your admonition, Mr. President, to be restrained in this second round. But I am bound to affirm that Malaysia adheres to all that it has said on *effectivités* in its written pleadings and in the first round of these hearings.

26. I come, lastly, to contrast with the evidence of Malaysian activities the paltry evidence of Indonesian activity. I shall be brief because there is now so little left still to be said about so little. I have no intention of reminding the Court in any detail of the greatness that Indonesia has thrust upon the *Lynx* and its seaplane of sometimes unpredictable performance. The paucity of Indonesian evidence speaks for itself. But one feature of Netherlands and Indonesian activity (or inactivity) may properly be recalled in the form of two brief citations from the Judgment of the Chamber of this Court in the *El Salvador/Honduras* case. Both relate to the importance of protest and the significance of silence in relation to *effectivités*. The quotations appear in the part of the Judgment dealing with title to the island of Meanguera which was in the possession of El Salvador but to which Honduras laid claim.

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[116]Memorial of Malaysia, Vol. 4, Ann. 115.

27. The first quotation is this:

> "Throughout the whole period covered by the documentation produced by El Salvador concerning Meanguera, there is no record of any protest made by Honduras to El Salvador, with the exception of one recent event, to which reference is made below."[117]

The second quotation relates to the recent event that the Chamber had in mind — a protest made by Honduras on 23 January 1991:

> "The Chamber considers that this protest of Honduras, coming after a long history of acts of sovereignty by El Salvador in Meanguera, was made too late to affect the presumption of acquiescence on the part of Honduras. The conduct of Honduras vis-à-vis earlier *effectivités* reveals an admission, recognition, acquiescence or other form of tacit consent to the situation. Furthermore, Honduras has laid before the Chamber a bulky and impressive list of material relied on to show Honduran *effectivités* relating to the whole of the area in litigation, but fails in that material to advance any proof of its presence on the island of Meanguera."[118]

28. Is that not an almost exact description of the situation here? Indonesia has produced a lot of paper — see, for example, Volume 4 of its Counter-Memorial. But it has not produced one protest during the important, pre-critical date period, from 1891 to 1969, and not one proof of its presence on the islands. Is that not, to use the words of the Chamber, "an admission, recognition, acquiescence or other form of tacit consent to the situation"?

29. So, Mr. President and Members of the Court, I come to my last question — a mercifully short one. The question is simply this: need I say anymore? I provide you with an immediate answer. I shall conclude my argument forthwith.

But before I resume my seat, there is one point of a personal nature that requires to be made. Not personal to me, but to my eminent friend, Professor Jean-Pierre Cot. He has been elected a judge of the International Tribunal on the Law of the Sea and will soon take his place there. This means that he will no longer be able to appear in this Court. His departure will be a grave loss to international advocacy. He is too modest to have brought this event to your notice, but I venture to do so and to express our collective congratulations and good wishes to him on his elevation to the judicial ranks.

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[117] *I.C.J. Reports 1992*, p. 574, para. 361.

[118] *I.C.J. Reports 1992*, p. 577, para. 364.

May I ask you now, Mr. President, notwithstanding the fact that we are so close to one o'clock, kindly to call upon the distinguished Agent of Malaysia, Tan Sri Kadir, to make his final and relatively brief submission. Thank you very much, Mr. President.

Le PRESIDENT : Je vous remercie, sir Elihu. Je donne maintenant la parole à S. Exc. M. l'agent de la Malaisie.

Mr. MOHAMAD:

1. Mr. President and distinguished Members of the Court, the delegation of Malaysia values greatly the opportunity it has had in these two weeks to explain to you Malaysia's stand that sovereignty over Pulau Ligitan and Pulau Sipadan belongs to Malaysia.

2. Malaysia is looking forward to the Court's decision on this case, which will settle the dispute over the two islands, because it will be a peaceful and friendly settlement of the question.

3. It will be a matter of pride and satisfaction for us that in one episode in the diplomatic history of relations between Malaysia and Indonesia, the International Court of Justice has an important part to play. We hope that the Court's role in this matter will contribute to the maintenance of peace and stability in south-east Asia, both in the particular decision you give and in its example for the future settlement of boundary and territorial disputes.

4. Mr. President, Members of the Court, let me summarize the issues Malaysia has sought to show. First, that it has, and for many years has had, a good title over Ligitan and Sipadan while Indonesia has none. Second, and at the same time, that Ligitan and Sipadan have been in the possession and subject to the actual administration of Malaysia and its predecessors in title, while it was impossible for Indonesia to assert the same. Third, that the claim that the 1891 Convention created an allocation line east of Sebatik, and thereby silently gave these two small islands to the Netherlands, has no foundation in law or fact. In its written pleadings and during the course of these hearings, Malaysia has demonstrated each of these three things.

5. Indonesia has maintained primarily that it acquired a clear treaty title from the 1891 Boundary Convention, that this was its basis of claim. On this point, Malaysia has conclusively shown that the Convention had no relevance to the islands of Ligitan and Sipadan. It has shown that the language of the Convention did not have the meaning attributed to it by Indonesia; that the

internal Dutch map does not have the effect Indonesia asserts, and that anyway the 1891 Convention could not have produced any effect because the two islands certainly did not belong to British North Borneo at that time.

6. Then, on the final day of its pleadings we heard our opponents state in the alternative and as a subsidiary argument that, if the Court were to find the 1891 Boundary Convention incapable of conferring sovereignty over Ligitan and Sipadan to the Netherlands, their sovereignty over the two islands could equally be established as successor in title from the Sultan of Bulungan[119]. But, as you have seen, there is no evidence whatever of Bulungan having any authority over the Ligitan Group. Malaysia produced expert evidence on the point which Indonesia did not reply to and which it has not been able to refute. The Dutch Government before 1891 was quite clear as to the extent of its claims, which did not extend to the islands. The various contracts between the Netherlands and the Sultan identified specific islands as belonging to Bulungan. These never included Ligitan and Sipadan which were, respectively, some 42 and 55 nautical miles away from the land-based Sultanate of Bulungan. The same was true of the supplementary contract of 1891, which replaced the 1878 definition of the boundaries of Bulungan and the islands belonging to it.

7. Although the different Malaysian arguments all point the same way, I do particularly wish to emphasize the element of long and uninterrupted possession, going back to the years after the grant of 1878. Indonesia's Agent emphasized that, no doubt unintentionally, when he said in his final remarks on Monday that Indonesia, if it won this case, would respect any rights over the islands duly acquired under Indonesian law[120]. But that is precisely the point: no rights have ever been acquired over the islands under Indonesian law, which has never mentioned the islands and has never been applied there. The rights which people have over the islands have been acquired under Malaysian law, not Indonesian law. The Court has always respected the principles of stability and continuity in territorial administration, and I respectfully call on you now to do so. If an Asian State can come along, 80 years after a boundary treaty was concluded, and claim islands in the peaceful possession of another Asian State on the basis of an argument about the

[119]CR 2002/34, p. 37, para. 3 (Professor Pellet).

[120]CR 2002/34, p. 40, para. 5 (Mr. Wirajuda).

interpretation of the Treaty which has never before been made, then I fear that this case will be a source of serious instability, with implications reaching far beyond these two islands.

8. Accordingly, since Malaysia has administered Ligitan and Sipadan and Indonesia has not, the position in 1969, and now, is that Malaysia has sovereignty over the islands and Indonesia has not. The events between Great Britain and the United States after 1903 show clearly what the status quo was on the islands, and they show the Dutch had no interest in them. They further show how the United States eventually relinquished its earlier claim to the islands by reason of the 1907 Exchange of Notes and the 1930 Convention.

9. Mr. President, that leaves me with one final point to deal with. At the end of its pleadings, Indonesia alluded again to the so-called understanding of 1969. In order to refrain from repeating the explanation I have already given in my opening remarks last week, let me just say that the text of the 1969 Exchange of Letters made no reference to the disputed islands, that it is not a "standstill" agreement and that it has no relevance to the present case[121]. Indonesia made reference to an affidavit of Professor Mochtar Kusumaatmadja made in 1999, some 30 years after the 1969 negotiations between Indonesia and Malaysia and *well* after the present case came before the Court. May I just point out that whatever Professor Mochtar said in the affidavit was entirely his own recollections only. There is no record which can confirm what he said, and his recollections do not coincide with those on the Malaysian side. Of course the two States were obliged to settle their disputes peacefully, but there was no agreement that Malaysia would not maintain and extend its authority over the islands, and Indonesia's claims in that regard are entirely without foundation.

10. Mr. President, distinguished Members of the Court, on behalf of the Government of Malaysia, counsel for Malaysia, the Co-Agent and myself as Agent, I would like to thank the Court for the patience with which it has heard Malaysia's presentation of its case. I would also like to thank the members of the Indonesian delegation for the courtesy they have shown to us during the course of the pleadings. We also thank the staff of the Registry and the Court interpreters.

11. Mr. President, may I respectfully request the Court to confirm Malaysia's sovereignty over Ligitan and Sipadan, and second, to reject Indonesia's claim based upon its interpretation of

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[121]CR 2002/30, p. 17, paras. 15-19 (Mr. Mohamad).

the 1891 Boundary Convention between the Dutch and the British, or its subsidiary and alternative claim as successor-in-title from the Sultan of Bulungan. On that basis I reaffirm Malaysia's submissions as set out in its written pleadings, as follows:

The Government of Malaysia respectfully requests the Court to adjudge and declare that sovereignty over Pulau Ligitan and Pulau Sipadan belongs to Malaysia.

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

Le PRESIDENT : Je vous remercie, Monsieur l'agent de la Malaisie. La Cour prend acte des conclusions finales dont vous avez donné lecture au nom de la Malaisie, comme elle l'a fait le 10 juin pour les conclusions finales présentées par M. l'agent de la République d'Indonésie.

Ceci nous amène à la fin de cette semaine et demie d'audiences.

Je tiens à adresser mes remerciements, pour leurs interventions, aux agents, conseils et avocats des deux Parties pour la qualité de leurs plaidoiries et pour la courtoisie qui a régné pendant ces audiences.

Conformément à la pratique, je prierai les agents de rester à la disposition de la Cour pour tous renseignements complémentaires dont elle pourrait avoir besoin. Sous cette réserve, je déclare close la procédure orale en l'affaire relative à la *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie).*

La Cour va maintenant se retirer pour délibérer. Les agents des Parties seront avisés en temps utile de la date à laquelle la Cour rendra son arrêt.

La Cour n'est saisie d'aucune autre question aujourd'hui et ceci met donc un terme à l'audience de ce jour. Je rappellerai simplement que des audiences se tiendront demain, à 10 heures, en l'affaire des *Activités armées sur le territoire du Congo (nouvelle requête : 2002) (République démocratique du Congo c. Rwanda),* aux fins d'entendre les observations des Parties au sujet de la demande en indication de mesures conservatoires présentée par la République démocratique du Congo le 28 mai dernier.

L'audience est levée à 13 h 20.

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