BAB III

PENUTUP

A. KESIMPULAN

Kesimpulan dari penelitian ini adalah bahwa pengaruh Putusan Mahkamah Internasional terhadap kasus Sipadan dan Ligitan antara Indonesia dengan Malaysia bagi pembentukan hukum nasional mengenai batas wilayah negara yaitu harus disesuaikannya peraturan terhadap keberadaan pulau-pulau yang menjadi titik terluar sekaligus menjadi titik dasar dalam menetapkan penarikan garis pangkal terutama disekitar pulau Sipadan dan Ligitan. Hanya saja putusan ini tidak merubah garis batas landas kontinen kedua Negara.

B. SARAN

Pemerintah Indonesia harus segera menetapkan secara jelas mengenai batas-batas wilayah negaranya baik batas wilayah di darat maupun laut dan segera membentuk suatu produk hukum yang mengatur secara khusus mengenai perbatasan negara. Supaya tidak terulang lagi kasus terlepasnya Pulau Sipadan dan Ligitan.

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LAMPIRAN

PUTUSAN MAHKAMAH INTERNASIONAL TERHADAP KASUS SIPADAN DAN LIGITAN

INTERNATIONAL COURT OF JUSTICE

YEAR 2002

2002
17 December
General List
No. 102

17 December 2002

CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN

(INDONESIA/MALAYSIA)

Geographical context — Historical background — Bases on which the Parties found their claims to the islands of Ligitan and Sipadan.

* *

Conventional title asserted by Indonesia (1891 Convention between Great Britain and the Netherlands).

Indonesia's argument that the 1891 Convention established the 4° 10' north parallel of latitude as the dividing line between the respective possessions of Great Britain and the Netherlands in the area of the disputed islands and that those islands therefore belong to it as successor to the Netherlands.

Disagreement of the Parties on the interpretation to be given to Article IV of the 1891 Convention — Articles 31 and 32 of the Vienna Convention on the Law of Treaties reflect international customary law on the subject.

Text of Article IV of the 1891 Convention — Clause providing "From 4° 10' north latitude on the east coast the boundary-line shall be continued eastward along that parallel, across the Island of Sebittik . . ." — Ambiguity of the terms "shall be continued" and "across" — Ambiguity which could have been avoided had the Convention expressly stipulated that the 4° 10' north parallel constituted the line separating the islands under British sovereignty from those under Dutch sovereignty — Ordinary meaning of the term "boundary".

Context of the 1891 Convention — Explanatory Memorandum appended to the draft Law submitted to the Netherlands States-General with a view to ratification of the Convention — Map appended to the Memorandum shows a red line continuing out to sea along the 4° 10' north parallel — Line cannot be considered to have been extended in order to settle any dispute in the waters beyond Sebatik — Explanatory Memorandum and map never transmitted by the Dutch Government to the British Government but simply forwarded to the latter by its diplomatic agent in The Hague — Lack of reaction by the British Government to the line cannot be deemed to constitute acquiescence.

Object and purpose of the Convention — Delimitation solely of the parties' possessions within the island of Borneo.

Article IV of the Convention, when read in context and in the light of the Convention's object and purpose, cannot be interpreted as establishing an allocation line determining sovereignty over the islands out to sea, to the east of Sebatik.

Recourse to supplementary means of interpretation in order to seek a possible confirmation of the Court's interpretation of the text of the Convention — Neither travaux préparatoires *of the Convention nor circumstances of its conclusion support the position of Indonesia.*

Subsequent practice of the parties — 1915 Agreement between Great Britain and the Netherlands concerning the boundary between the State of North Borneo and the Dutch possessions on Borneo reinforces the Court's interpretation of the 1891 Convention — Court cannot draw any conclusion from the other documents cited.

Maps produced by the Parties — With the exception of the map annexed to the 1915 Agreement, cartographic material inconclusive in respect of the interpretation of Article IV.

Court ultimately comes to the conclusion that Article IV determines the boundary between the two Parties up to the eastern extremity of Sebatik Island and does not establish any allocation line further eastwards.

* *

Question whether Indonesia or Malaysia obtained title to Ligitan and Sipadan by succession.

Indonesia's argument that it was successor to the Sultan of Bulungan, the original title-holder to the disputed islands, through contracts which stated that the Sultanate as described in the contracts formed part of the Netherlands Indies — Indonesia's contention cannot be accepted.

Disputed islands not mentioned by name in any of the international legal instruments cited — Islands not included in the 1878 grant by which the Sultan of Sulu ceded all his rights and powers over his possessions in Borneo to Alfred Dent and Baron von Overbeck — Court observes that, while the Parties both maintain that Ligitan and Sipadan were not terrae nullius *during the period in question in the present case, they do so on the basis of diametrically opposed reasoning, each of them claiming to hold title to those islands.*

Malaysia's argument that it was successor to the Sultan of Sulu, the original title-holder to the disputed islands, further to a series of alleged transfers of that title to Spain, the United States, Great Britain on behalf of the State of North Borneo, the United Kingdom, and Malaysia cannot be upheld.

* *

Consideration of the effectivités *relied on by the Parties.*

Effectivités *generally scarce in the case of very small islands which are uninhabited or not permanently inhabited, like Ligitan and Sipadan — Court primarily to analyse the* effectivités *which date from the period before 1969, the year in which the Parties asserted conflicting claims to Ligitan and Sipadan — Nature of the activities to be taken into account by the Court in the present case.*

Effectivités *relied on by Indonesia — Activities which do not constitute acts* à titre de souverain *reflecting the intention and will to act in that capacity.*

Effectivités *relied on by Malaysia — Activities modest in number but diverse in character, covering a considerable period of time and revealing an intention to exercise State functions in respect of the two islands — Neither the Netherlands nor Indonesia ever expressed its disagreement or protest at the time when these activities were carried out — Malaysia has title to Ligitan and Sipadan on the basis of the* effectivités *thus mentioned.*

JUDGMENT

Present: *President* GUILLAUME; *Vice-President* SHI; *Judges* ODA, RANJEVA, HERCZEGH, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL, ELARABY; *Judges* ad hoc WEERAMANTRY, FRANCK; *Registrar* COUVREUR.

In the case concerning sovereignty over Pulau Ligitan and Pulau Sipadan,

between

the Republic of Indonesia,

represented by

H. E. Mr. Hassan Wirajuda, Minister for Foreign Affairs,

as Agent;

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

as Co-Agent;

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

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

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

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

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

as Counsel and Advocates;

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

Mr. Mathias Forteau, Lecturer and Researcher at the University of Paris X-Nanterre, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris X-Nanterre,

as Counsel;

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

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

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

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

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

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

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

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

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

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

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

Mr. Rachmat Budiman, Department of Foreign Affairs,

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

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

Mr. Ibnu Wahyutomo, Department of Foreign Affairs,

Capt. Wahyudi, Indonesian Armed Forces Headquarters,

Capt. Fanani Tedjakusuma, Indonesian Armed Forces Headquarters,

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

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

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

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

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

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

as Advisers;

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

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

Mr. Thomas Frogh, Cartographer, International Mapping Associates,

as Technical Advisers,

and

Malaysia

represented by

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

as Agent;

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

as Co-Agent;

Sir Elihu Lauterpacht, Q.C., C.B.E., Honorary Professor of International Law, University of Cambridge, member of the Institute of International Law,

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

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

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

as Counsel and Advocates;

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

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

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

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

as Counsel;

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

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

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

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

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

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

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

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

as Advisers;

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

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

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

as Technical Advisers,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. By joint letter dated 30 September 1998, filed in the Registry of the Court on 2 November 1998, the Ministers for Foreign Affairs of the Republic of Indonesia (hereinafter "Indonesia") and of Malaysia notified to the Registrar a Special Agreement between the two States, signed at Kuala Lumpur on 31 May 1997 and having entered into force on 14 May 1998, the date of the exchange of instruments of ratification.

2. The text of the Special Agreement reads as follows:

"The Government of the Republic of Indonesia and the Government of Malaysia, hereinafter referred to as 'the Parties';

Considering that a dispute has arisen between them regarding sovereignty over Pulau Ligitan and Pulau Sipadan;

Desiring that this dispute should be settled in the spirit of friendly relations existing between the Parties as enunciated in the 1976 Treaty of Amity and Co-operation in Southeast Asia; and

Desiring further, that this dispute should be settled by the International Court of Justice (the Court),

Have agreed as follows:

Article 1

Submission of Dispute

The Parties agree to submit the dispute to the Court under the terms of Article 36, paragraph 1, of its Statute.

Article 2

Subject of the Litigation

The Court is requested to determine on the basis of the treaties, agreements and any other evidence furnished by the Parties, whether sovereignty over Pulau Ligitan and Pulau Sipadan belongs to the Republic of Indonesia or to Malaysia.

Article 3

Procedure

1. Subject to the time-limits referred to in paragraph 2 of this Article, the proceedings shall consist of written pleadings and oral hearings in accordance with Article 43 of the Statute of the Court.

2. Without prejudice to any question as to the burden of proof and having regard to Article 46 of the Rules of Court, the written pleadings should consist of:

(a) a Memorial presented simultaneously by each of the Parties not later than 12 months after the notification of this Special Agreement to the Registry of the Court;

(b) a Counter-Memorial presented by each of the Parties not later than 4 months after the date on which each has received the certified copy of the Memorial of the other Party;

(c) a Reply presented by each of the Parties not later than 4 months after the date on which each has received the certified copy of the Counter-Memorial of the other Party; and

(d) a Rejoinder, if the Parties so agree or if the Court decides ex officio or at the request of one of the Parties that this part of the proceedings is necessary and the Court authorizes or prescribes the presentation of a Rejoinder.

3. The above-mentioned written pleadings and their annexes presented to the Registrar will not be transmitted to the other Party until the Registrar has received the part of the written pleadings corresponding to the said Party.

4. The question of the order of speaking at the oral hearings shall be decided by mutual agreement between the Parties or, in the absence of that agreement, by the Court. In all cases, however, the order of speaking adopted shall be without prejudice to any question regarding the burden of proof.

Article 4

Applicable Law

The principles and rules of international law applicable to the dispute shall be those recognized in the provisions of Article 38 of the Statute of the Court.

Article 5

Judgment of the Court

The Parties agree to accept the Judgment of the Court given pursuant to this Special Agreement as final and binding upon them.

Article 6

Entry into Force

1. This Agreement shall enter into force upon the exchange of instruments of ratification. The date of exchange of the said instruments shall be determined through diplomatic channels.

2. This Agreement shall be registered with the Secretariat of the United Nations pursuant to Article 102 of the Charter of the United Nations, jointly or by either of the Parties.

Article 7

Notification

In accordance with Article 40 of the Statute of the Court, this Special Agreement shall be notified to the Registrar of the Court by a joint letter from the Parties as soon as possible after it has entered into force.

In witness whereof the undersigned, being duly authorized thereto by their respective Governments, have signed the present Agreement."

3. Pursuant to Article 40, paragraph 3, of the Statute of the Court, copies of the joint notification and of the Special Agreement were transmitted by the Registrar to the Secretary-General of the United Nations, the Members of the United Nations and other States entitled to appear before the Court.

4. By an Order dated 10 November 1998, the Court, having regard to the provisions of the Special Agreement concerning the written pleadings, fixed 2 November 1999 and 2 March 2000 as the respective time-limits for the filing by each of the Parties of a Memorial and then a Counter-Memorial. The Memorials were filed within the prescribed time-limit. By joint letter of 18 August 1999, the Parties asked the Court to extend to 2 July 2000 the time-limit for the filing of their Counter-Memorials. By an Order dated 14 September 1999, the Court agreed to that request. By joint letter of 8 May 2000, the Parties asked the Court for a further extension of one month to the time-limit for the filing of their Counter-Memorials. By Order of 11 May 2000, the President of the Court also agreed to that request. The Parties' Counter-Memorials were filed within the time-limit as thus extended.

5. Under the terms of the Special Agreement, the two Parties were to file a Reply not later than four months after the date on which each had received the certified copy of the Counter-Memorial of the other Party. By joint letter dated 14 October 2000, the Parties asked the Court to extend this time-limit by three months. By an Order dated 19 October 2000, the President of the Court fixed 2 March 2001 as the time-limit for the filing by each of the Parties of a Reply. The Replies were filed within the prescribed time-limit. In view of the fact that the Special Agreement provided for the possible filing of a fourth pleading by each of the Parties, the latter informed the Court by joint letter of 28 March 2001 that they did not wish to produce any further pleadings. Nor did the Court itself ask for such pleadings.

6. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case: Indonesia chose Mr. Mohamed Shahabuddeen and Malaysia Mr. Christopher Gregory Weeramantry.

7. Mr. Shahabuddeen, judge *ad hoc*, having resigned from that function on 20 March 2001, Indonesia informed the Court, by letter received in the Registry on 17 May 2001, that its Government had chosen Mr. Thomas Franck to replace him.

8. On 13 March 2001, the Republic of the Philippines filed in the Registry of the Court an Application for permission to intervene in the case, invoking Article 62 of the Statute of the Court. By a Judgment rendered on 23 October 2001, the Court found that the Application of the Philippines could not be granted.

9. During a meeting which the President of the Court held on 6 March 2002 with the Agents of the Parties, in accordance with Article 31 of the Rules of Court, the Agents made known the views of their Governments with regard to various aspects relating to the organization of the oral

proceedings. In particular, they stated that the Parties had agreed to suggest to the Court that Indonesia should present its oral arguments first, it being understood that this in no way implied that Indonesia could be considered the applicant State or Malaysia the respondent State, nor would it have any effect on questions concerning the burden of proof.

Further to this meeting, the Court, taking account of the views of the Parties, fixed Monday 3 June 2002, at 10 a.m., as the date for the opening of the hearings, and set a timetable for them. By letters dated 7 March 2002, the Registrar informed the Agents of the Parties accordingly.

10. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

11. Public hearings were held from 3 to 12 June 2002, at which the Court heard the oral arguments and replies of:

For Indonesia: H.E. Mr. Hassan Wirajuda,
Sir Arthur Watts,
Mr. Alfred H. A. Soons,
Mr. Alain Pellet,
Mr. Rodman R. Bundy,
Ms Loretta Malintoppi.

For Malaysia: H.E. Mr. Tan Sri Abdul Kadir Mohamad,
H.E. Dato' Noor Farida Ariffin,
Sir Elihu Lauterpacht,
Mr. Nico Schrijver,
Mr. James Crawford,
Mr. Jean-Pierre Cot.

*

12. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Indonesia,

in the Memorial, Counter-Memorial and Reply:

> "On the basis of the considerations set out in this [Reply], the Government of the Republic of Indonesia requests the Court to adjudge and declare that:
>
> *(a)* sovereignty over Pulau Ligitan belongs to the Republic of Indonesia; and
>
> *(b)* sovereignty over Pulau Sipadan belongs to the Republic of Indonesia."

On behalf of the Government of Malaysia,

in the Memorial, Counter-Memorial and Reply:

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

13. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Indonesia,

> "On the basis of the facts and legal considerations presented in Indonesia's written pleadings and in its oral presentation, the Government of the Republic of Indonesia respectfully requests the Court to adjudge and declare that:
>
> (i) sovereignty over Pulau Ligitan belongs to the Republic of Indonesia; and
>
> (ii) sovereignty over Pulau Sipadan belongs to the Republic of Indonesia."

On behalf of the Government of Malaysia,

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

*

* *

14. The islands of Ligitan and Sipadan (Pulau Ligitan and Pulau Sipadan) are both located in the Celebes Sea, off the north-east coast of the island of Borneo, and lie approximately 15.5 nautical miles apart (see below, pp. 13 and 14, sketch-maps Nos. 1 and 2).

Ligitan is a very small island lying at the southern extremity of a large star-shaped reef extending southwards from the islands of Danawan and Si Amil. Its co-ordinates are 4° 09' latitude north and 118° 53' longitude east. The island is situated some 21 nautical miles from Tanjung Tutop, on the Semporna Peninsula, the nearest area on Borneo. Permanently above sea level and mostly sand, Ligitan is an island with low-lying vegetation and some trees. It is not permanently inhabited.

Although bigger than Ligitan, Sipadan is also a small island, having an area of approximately 0.13 sq. km. Its co-ordinates are 4° 06' latitude north and 118° 37' longitude east. It is situated some 15 nautical miles from Tanjung Tutop, and 42 nautical miles from the east coast of the island of Sebatik. Sipadan is a densely wooded island of volcanic origin and the top of a

submarine mountain some 600 to 700 m in height, around which a coral atoll has formed. It was not inhabited on a permanent basis until the 1980s, when it was developed into a tourist resort for scuba-diving.

*

15. The dispute between the Parties has a complex historical background, of which an overview will now be given by the Court.

In the sixteenth century Spain established itself in the Philippines and sought to extend its influence to the islands lying further to the south. Towards the end of the sixteenth century it began to exercise its influence over the Sultanate of Sulu.

On 23 September 1836 Spain concluded Capitulations of peace, protection and commerce with the Sultan of Sulu. In these Capitulations, Spain guaranteed its protection to the Sultan

> "in any of the islands situated within the limits of the Spanish jurisdiction, and which extend from the western point of Mindanao (Magindanao) to Borneo and Paragua (Palawan), with the exception of Sandakan and the other territories tributary to the Sultan on the island of Borneo".

On 19 April 1851, Spain and the Sultan of Sulu concluded an "Act of Re-Submission" whereby the island of Sulu and its dependencies were annexed by the Spanish Crown. That Act was confirmed on 22 July 1878 by a Protocol whereby the Sultan recognized "as beyond discussion the sovereignty of Spain over all the Archipelago of Sulu and the dependencies thereof".

16. For its part, the Netherlands established itself on the island of Borneo at the beginning of the seventeenth century. The Netherlands East India Company, which possessed considerable commercial interests in the region, exercised public rights in South-East Asia under a charter granted to it in 1602 by the Netherlands United Provinces. Under the Charter, the Company was authorized to "conclude conventions with Princes and Powers" of the region in the name of the States-General of the Netherlands. Those conventions mainly involved trade issues, but they also provided for the acceptance of the Company's suzerainty or even the cession to it by local sovereigns of all or part of their territories.

When the Netherlands East India Company established itself on Borneo in the seventeenth and eighteenth centuries, the influence of the Sultan of Banjermasin extended over large portions of southern and eastern Borneo. On the east coast, the territory under the control of Banjermasin included the "Kingdom of Berou", composed of three "States": Sambaliung, Gunungtabur and Bulungan. The Sultans of Brunei and Sulu exercised their influence over the northern part of Borneo.

Upon the demise of the Netherlands East India Company at the end of the eighteenth century, all of its territorial possessions were transferred to the Netherlands United Provinces. During the Napoleonic wars, Great Britain took control of the Dutch possessions in Asia. Pursuant to the London Convention of 13 August 1814, the newly formed Kingdom of the Netherlands recovered most of the former Dutch possessions.

17. A Contract was concluded by the Netherlands with the Sultan of Banjermasin on 3 January 1817. Article 5 of this Contract provided for *inter alia* the cession to the Netherlands of Berou ("Barrau") and of all its dependencies. On 13 September 1823, an addendum was concluded, amending Article 5 of the 1817 Contract.

On 4 May 1826 a new Contract was concluded. Article 4 thereof reconfirmed the cession to the Netherlands of Berou ("Barou") and of its dependencies.

Over the following years, the three territories that formed the Kingdom of Berou, Sambaliung, Gunungtabur and Bulungan, were separated. By a Declaration of 27 September 1834, the Sultan of Bulungan submitted directly to the authority of the Netherlands East Indies Government. In 1844 the three territories were each recognized by the Government of the Netherlands as separate Kingdoms. Their chiefs were officially accorded the title of Sultan.

18. In 1850 the Government of the Netherlands East Indies concluded with the sultans of the three kingdoms "contracts of vassalage", under which the territory of their respective kingdoms was granted to them as a fief. The Contract concluded with the Sultan of Bulungan is dated 12 November 1850.

A description of the geographical area constituting the Sultanate of Bulungan appeared for the first time in the Contract of 12 November 1850. Article 2 of that Contract described the territory of Bulungan as follows:

> "The territory of Boeloengan is located within the following boundaries:
>
> — with Goenoeng-Teboer: from the seashore landwards, the Karangtiegau River from its mouth up to its origin; in addition, the Batoe Beokkier and Mount Palpakh;
>
> — with the Sulu possessions: at sea the cape named Batoe Tinagat, as well as the Tawau River.
>
> The following islands shall belong to Boeloengan: Terakkan, Nenoekkan and Sebittikh, with the small islands belonging thereto.
>
> This delimitation is established provisionally, and shall be completely examined and determined again."

A new Contract of Vassalage was concluded on 2 June 1878. It was approved and ratified by the Governor-General of the Netherlands East Indies on 18 October 1878.

Article 2 of the 1878 Contract of Vassalage described the territory of Bulungan as follows: "The territory of the realm of Boeloengan is deemed to be constituted by the lands and islands as described in the statement annexed to this contract." The text of the statement annexed to the contract is virtually identical to that of Article 2 of the 1850 Contract.

This statement was amended in 1893 to bring it into line with the 1891 Convention between Great Britain and the Netherlands (see paragraph 23 below). The new statement provided that:

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

19. Great Britain, for its part, possessed commercial interests in the area but had no established settlements on Borneo until the nineteenth century. After the Anglo-Dutch Convention of 13 August 1814, the commercial and territorial claims of Great Britain and the Netherlands on Borneo began to overlap.

On 17 March 1824 Great Britain and the Netherlands signed a new Treaty in an attempt to settle their commercial and territorial disputes in the region.

20. In 1877, the Sultan of Brunei made three separate instruments in which he "granted" Mr. Alfred Dent and Baron von Overbeck a large area of North Borneo. Since these grants included a portion of territory along the north coast of Borneo which was also claimed by the Sultan of Sulu, Alfred Dent and Baron von Overbeck decided to enter into an agreement with the latter Sultan.

On 22 January 1878 the Sultan of Sulu agreed to "grant and cede" to Alfred Dent and Baron von Overbeck, as representatives of a British company, all his rights and powers over:

> "all the territories and lands being tributary to [him] on the mainland of the Island of Borneo, commencing from the Pandassan River on the west coast to Maludu Bay, and extending along the whole east coast as far as the Sibuco River in the south, comprising all the provinces bordering on Maludu Bay, also the States of Pietan, Sugut, Bangaya, Labuk, Sandakan, Kinabatangan, Mamiang, and all the other territories and states to the southward thereof bordering on Darvel Bay and as far as the Sibuco River, with all the islands belonging thereto within three marine leagues [9 nautical miles] of the coast".

On the same day, the Sultan of Sulu signed a commission whereby he appointed Baron von Overbeck "Dato' Bndahara and Rajah of Sandakan" with "the fullest power of life and death" over all the inhabitants of the territories which had been granted to him and made him master of "all matters . . . and [of] the revenues or 'products'" belonging to the Sultan in those territories. The Sultan of Sulu asked the "foreign nations" with which he had concluded "friendly treaties and alliances" to accept "the said Dato' Bndahara as supreme ruler over the said dominions".

Baron von Overbeck subsequently relinquished all his rights and interests in the British company referred to above. Alfred Dent later applied for a Royal Charter from the British Government to administer the territory and exploit its resources. This Charter was granted in November 1881. In May 1882 a chartered company was officially incorporated under the name of the "British North Borneo Company" (hereinafter the "BNBC").

The BNBC began at that time to extend its administration to certain islands situated beyond the 3-marine-league limit referred to in the 1878 grant.

21. On 11 March 1877 Spain, Germany and Great Britain concluded a Protocol establishing free commerce and navigation in the Sulu (Joló) Sea with a view to settling a commercial dispute which had arisen between them. Under this Protocol, Spain undertook to guarantee and ensure the liberty of commerce, of fishing and of navigation for ships and subjects of Great Britain, Germany and the other Powers in "the Archipelago of Sulu (Joló) and in all parts there[of]", without prejudice to the rights recognized to Spain in the Protocol.

On 7 March 1885 Spain, Germany and Great Britain concluded a new Protocol of which the first three articles read as follows:

> "*Article 1*
>
> The Governments of Germany and Great Britain recognize the sovereignty of Spain over the places effectively occupied, as well as over those places not yet so occupied, of the archipelago of Sulu (Joló), of which the boundaries are determined in Article 2.
>
> *Article 2*
>
> The Archipelago of Sulu (Joló), conformably to the definition contained in Article 1 of the Treaty signed the 23rd of September 1836, between the Spanish Government and the Sultan of Sulu (Joló), comprises all the islands which are found between the western extremity of the island of Mindanao, on the one side, and the continent of Borneo and the island of Paragua, on the other side, with the exception of those which are indicated in Article 3.
>
> It is understood that the islands of Balabac and of Cagayan-Joló form part of the Archipelago.
>
> *Article 3*
>
> The Spanish Government relinquishes as far as regards the British Government, all claim of sovereignty over the territories of the continent of Borneo which belong, or which have belonged in the past, to the Sultan of Sulu (Joló), including therein the neighboring islands of Balambangan, Banguey and Malawali, as well as all those islands lying within a zone of three marine leagues along the coasts and which form part of the territories administered by the Company styled the 'British North Borneo Company'."

22. On 12 May 1888 the British Government entered into an Agreement with the BNBC for the creation of the State of North Borneo. This Agreement made North Borneo a British Protectorate, with the British Government assuming responsibility for its foreign relations.

23. On 20 June 1891 the Netherlands and Great Britain concluded a Convention (hereinafter the "1891 Convention") for the purpose of "defining the boundaries between the Netherland possessions in the Island of Borneo and the States in that island which [were] under British protection" (see paragraph 36 below).

24. At the end of the Spanish-American War, Spain ceded the Philippine Archipelago (see paragraph 115 below) to the United States of America (hereinafter the "United States") through the Treaty of Peace of Paris of 10 December 1898 (hereinafter the "1898 Treaty of Peace"). Article III of the Treaty defined the Archipelago by means of certain lines. Under the Treaty of 7 November 1900 (hereinafter the "1900 Treaty"), Spain ceded to the United States "all islands belonging to the Philippine Archipelago, lying outside the lines described in Article III" of the 1898 Treaty of Peace (see paragraph 115 below).

25. On 22 April 1903 the Sultan of Sulu concluded a "Confirmation of Cession" with the Government of British North Borneo, in which were specified the names of a certain number of islands which were to be treated as having been included in the original cession granted to Alfred Dent and Baron von Overbeck in 1878. The islands mentioned were as follows: Muliangin, Muliangin Kechil, Malawali, Tegabu, Bilian, Tegaypil, Lang Kayen, Boan, Lehiman, Bakungan, Bakungan Kechil, Libaran, Taganack, Beguan, Mantanbuan, Gaya, Omadal, Si Amil, Mabol, Kepalai and Dinawan. The instrument further provided that "other islands near, or round, or lying between the said islands named above" were included in the cession of 1878. All those islands were situated beyond the 3-marine-league limit.

26. Following a visit in 1903 by the US Navy vessel USS *Quiros* to the area of the islands disputed in the present proceedings, the BNBC lodged protests with the Foreign Office, on the ground that some of the islands visited, on which the US Navy had placed flags and tablets, were, according to the BNBC, under its authority. The question was dealt with in particular in a memorandum dated 23 June 1906 from Sir H. M. Durand, British Ambassador to the United States, to the United States Secretary of State, with which a map showing "the limits within which the [BNBC] desire[d] to carry on the administration" was enclosed. Under an Exchange of Notes dated 3 and 10 July 1907, the United States temporarily waived the right of administration in respect of "all the islands to the westward and southwestward of the line traced on the map which accompanied Sir H. M. Durand's memorandum".

27. On 28 September 1915 Great Britain and the Netherlands, acting pursuant to Article V of the 1891 Convention, signed an Agreement relating to "the Boundary Between the State of North Borneo and the Netherland Possessions in Borneo" (hereinafter the "1915 Agreement"), whereby the two States confirmed a report and accompanying map prepared by a mixed commission set up for the purpose (see paragraphs 70, 71 and 72 below).

On 26 March 1928 Great Britain and the Netherlands signed another agreement (hereinafter the "1928 Agreement") pursuant to Article V of the 1891 Convention, for the purpose of "further delimiting part of the frontier established in article III of the Convention signed at London on the 20th June, 1891" ("between the summits of the Gunong Api and of the Gunong Raya"); a map was attached to that agreement (see paragraph 73 below).

28. On 2 January 1930 the United States and Great Britain concluded a Convention (hereinafter the "1930 Convention") "delimiting . . . the boundary between the Philippine Archipelago . . . and the State of North Borneo" (see paragraph 119 below). This Convention contained five articles, of which the first and third are the most relevant for the purposes of the present case. Article I defined the line separating the islands which belonged to the Philippine Archipelago and those which belonged to the State of North Borneo; Article III stipulated as follows: "All islands to the north and east of the said line and all islands and rocks traversed by the said line, should there be any such, shall belong to the Philippine Archipelago and all islands to the south and west of the said line shall belong to the State of North Borneo."

29. On 26 June 1946 the BNBC entered into an agreement with the British Government whereby the Company transferred its interests, powers and rights in respect of the State of North Borneo to the British Crown. The State of North Borneo then became a British colony.

30. On 9 July 1963 the Federation of Malaya, the United Kingdom of Great Britain and Northern Ireland, North Borneo, Sarawak and Singapore concluded an Agreement relating to Malaysia. Under Article I of this Agreement, which entered into force on 16 September 1963, the colony of North Borneo was to be "federated with the existing States of the Federation of Malaya as the [State] of Sabah".

31. After their independence, Indonesia and Malaysia began to grant oil prospecting licences in waters off the east coast of Borneo during the 1960s. The first oil licence granted by Indonesia to a foreign company in the relevant area took the form of a production sharing agreement concluded on 6 October 1966 between the Indonesian State-owned company P. N. Pertambangan Minjak Nasional ("Permina") and the Japan Petroleum Exploration Company Limited ("Japex"). The northern boundary of one of the areas covered by the agreement ran eastwards in a straight line from the east coast of Sebatik Island, following the parallel 4° 09' 30" latitude north for some 27 nautical miles out to sea. In 1968 Malaysia in turn granted various oil prospecting licences to Sabah Teiseki Oil Company ("Teiseki"). The southern boundary of the maritime concession granted to Teiseki was located at 4° 10' 30" latitude north.

The present dispute crystallized in 1969 in the context of discussions concerning the delimitation of the respective continental shelves of the two States. Following those negotiations a delimitation agreement was reached on 27 October 1969. It entered into force on 7 November 1969. However, it did not cover the area lying to the east of Borneo.

In October 1991 the two Parties set up a joint working group to study the situation of the islands of Ligitan and Sipadan. They did not however reach any agreement and the issue was entrusted to special emissaries of the two Parties who, in June 1996, recommended by mutual agreement that the dispute should be referred to the International Court of Justice. The Special Agreement was signed on 31 May 1997.

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* *

32. Indonesia's claim to sovereignty over the islands of Ligitan and Sipadan rests primarily on the 1891 Convention between Great Britain and the Netherlands. It also relies on a series of *effectivités*, both Dutch and Indonesian, which it claims confirm its conventional title. At the oral proceedings Indonesia further contended, by way of alternative argument, that if the Court were to reject its title based on the 1891 Convention, it could still claim sovereignty over the disputed islands as successor to the Sultan of Bulungan, because he had possessed authority over the islands.

33. For its part, Malaysia contends that it acquired sovereignty over the islands of Ligitan and Sipadan following a series of alleged transmissions of the title originally held by the former sovereign, the Sultan of Sulu. Malaysia claims that the title subsequently passed, in succession, to Spain, to the United States, to Great Britain on behalf of the State of North Borneo, to the United Kingdom of Great Britain and Northern Ireland, and finally to Malaysia itself. It argues that its title, based on this series of legal instruments, is confirmed by a certain number of British and Malaysian *effectivités* over the islands. It argues in the alternative that, if the Court were to conclude that the disputed islands had originally belonged to the Netherlands, its *effectivités* would in any event have displaced any such Netherlands title.

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* *

34. As the Court has just noted, Indonesia's main claim is that sovereignty over the islands of Ligitan and Sipadan belongs to it by virtue of the 1891 Convention. Indonesia maintains that "[t]he Convention, by its terms, its context, and its object and purpose, established the 4° 10' N parallel of latitude as the dividing line between the Parties' respective possessions in the area now in question". It states in this connection that its position is not that "the 1891 Convention line was from the outset intended also to be, or in effect was, a maritime boundary . . . east of Sebatik

island" but that "the line must be considered an allocation line: land areas, including islands located to the north of 4° 10' N latitude were . . . considered to be British, and those lying to the south were Dutch". As the disputed islands lie to the south of that parallel, "[i]t therefore follows that under the Convention title to those islands vested in The Netherlands, and now vests in Indonesia".

Indonesia contends that the two States parties to the 1891 Convention clearly assumed that they were the only actors in the area. It adds in this regard that Spain had no title to the islands in dispute and had shown no interest in what was going on to the south of the Sulu Archipelago.

In Indonesia's view, the Convention did not involve territorial cessions; rather, each party's intention was to recognize the other party's title to territories on Borneo and islands lying "on that party's side" of the line, and to relinquish any claim in respect of them. According to Indonesia, "both parties no doubt considered that [the] territories . . . on their side of the agreed line were *already* theirs, rather than that they had *become* theirs by virtue of a treaty cession". It maintains that in any case, whatever may have been the position before 1891, the Convention between the two colonial Powers is an indisputable title which takes precedence over any other pre-existing title.

35. For its part, Malaysia considers that Indonesia's claim to Ligitan and Sipadan finds no support in either the text of the 1891 Convention or in its *travaux préparatoires*, or in any other document that may be used to interpret the Convention. Malaysia points out that the 1891 Convention, when seen as a whole, clearly shows that the parties sought to clarify the boundary between their respective land possessions on the islands of Borneo and Sebatik, since the line of delimitation stops at the easternmost point of the latter island. It contends that "the ordinary and natural interpretation of the Treaty, and relevant rules of law, plainly refute" Indonesia's argument and adds that the ratification of the 1891 Convention and its implementation, notably through the 1915 Agreement, do not support Indonesia's position.

Malaysia additionally argues that, even if the 1891 Convention were construed so as to allocate possessions to the east of Sebatik, that allocation could not have any consequence in respect of islands which belonged to Spain at the time. In Malaysia's view, Great Britain could not have envisioned ceding to the Netherlands islands which lay beyond the 3-marine-league line referred to in the 1878 grant, a line said to have been expressly recognized by Great Britain and Spain in the Protocol of 1885.

* *

36. On 20 June 1891, the Netherlands and Great Britain signed a Convention for the purpose of "defining the boundaries between the Netherland possessions in the Island of Borneo and the States in that island which [were] under British protection". The Convention was drawn up in Dutch and in English, the two texts being equally authentic. It consists of eight articles. Article I

stipulates that "[t]he boundary between the Netherland possessions in Borneo and those of the British-protected States in the same island, shall start from 4° 10' north latitude on the east coast of Borneo". Article II, after stipulating "[t]he boundary-line shall be continued westward", then describes the course of the first part of that line. Article III describes the further westward course of the boundary line from the point where Article II stops and as far as Tandjong-Datoe, on the west coast of Borneo. Article V provides that "[t]he exact positions of the boundary-line, as described in the four preceding Articles, shall be determined hereafter by mutual agreement, at such times as the Netherland and the British Governments may think fit". Article VI guarantees the parties free navigation on all rivers flowing into the sea between Batoe-Tinagat and the River Siboekoe. Article VII grants certain rights to the population of the Sultanate of Bulungan to the north of the boundary. Lastly, Article VIII stipulates the conditions in which the Convention would come into force.

Indonesia relies essentially on Article IV of the 1891 Convention in support of its claim to the islands of Ligitan and Sipadan. That provision reads as follows:

> "From 4° 10' north latitude on the east coast the boundary-line shall be continued eastward along that parallel, across the Island of Sebittik: that portion of the island situated to the north of that parallel shall belong unreservedly to the British North Borneo Company, and the portion south of that parallel to the Netherlands."

The Parties disagree over the interpretation to be given to that provision.

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37. The Court notes that Indonesia is not a party to the Vienna Convention of 23 May 1969 on the Law of Treaties; the Court would nevertheless recall that, in accordance with customary international law, reflected in Articles 31 and 32 of that Convention:

> "a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion." (*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 21-22, para. 41; see also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 18, para. 33; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 812, para. 23; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1059, para. 18.)

Moreover, with respect to Article 31, paragraph 3, the Court has had occasion to state that this provision also reflects customary law, stipulating that there shall be taken into account, together with the context, the subsequent conduct of the parties to the treaty, i.e., "any subsequent agreement" (subpara. *(a)*) and "any subsequent practice" (subpara. *(b)*) (see in particular *Legality of*

the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I), p. 75, para. 19; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1075, para. 48).

Indonesia does not dispute that these are the applicable rules. Nor is the applicability of the rule contained in Article 31, paragraph 2, contested by the Parties.

38. The Court will now proceed to the interpretation of Article IV of the 1891 Convention in the light of these rules.

* *

39. With respect to the terms of Article IV, Indonesia maintains that this Article contains nothing to suggest that the line stops at the east coast of Sebatik Island. On the contrary, it contends that "the stipulation that the line was to be 'continued' eastward along the prescribed parallel [, across the island of Sebatik,] requires a prolongation of the line so far as was necessary to achieve the Convention's purposes". In this respect, Indonesia points out that had the parties to the Convention intended not to draw an allocation line out to sea to the east of Sebatik (see paragraph 34 above) but to end the line at a point on the coast, they would have stipulated this expressly, as was the case in Article III.

Moreover, Indonesia notes a difference in punctuation between the Dutch and English texts of Article IV of the Convention, both texts being authentic (see paragraph 36 above), and bases itself on the English text, which reads as follows:

> "From 4° 10' north latitude on the east coast the boundary-line shall be continued eastward along that parallel, across the Island of Sebittik: that portion of the island situated to the north of that parallel shall belong unreservedly to the British North Borneo Company, and the portion south of that parallel to the Netherlands."

Indonesia emphasizes the colon in the English text, claiming that it is used to separate two provisions of which the second develops or illustrates the first. It thus contends that the second part of the sentence, preceded by the colon, "is essentially a subsidiary part of the sentence, filling out part of its meaning, but not distorting the clear sense of the main clause, which takes the line out to sea along the 4° 10' N parallel".

40. Malaysia, for its part, contends that when Article IV of the 1891 Convention provides that the boundary line continues eastward along the parallel of 4° 10' north, this simply means "that the extension starts from the east coast of Borneo and runs eastward across Sebatik, in contrast with the main part of the boundary line, which starts at the same point, but runs westwards". According to Malaysia, the plain and ordinary meaning of the words "across the Island of Sebittik" is to describe, "in English and in Dutch, a line that crosses Sebatik from the west coast to the east coast and goes no further". Malaysia moreover rejects the idea that the parties to the 1891 Convention

intended to establish an "allocation perimeter", that is to say a "theoretical line drawn in the high seas under a convention which enables sovereignty over the islands lying within the area in question to be apportioned between the parties". Malaysia adds that "allocation perimeters" cannot be presumed where the text of a treaty remains silent in such respect, as in the case of the 1891 Convention, which contains no such indication.

In regard to the difference in punctuation between the Dutch and English texts of Article IV of the Convention, Malaysia, for its part, relies on the Dutch text, which reads as follows:

> "Van 4° 10' noorder breedte ter oostkust zal de grenslijn oostwaarts vervolgd worden langs die parallel over het eiland Sebittik; het gedeelte van dat eiland dat gelegen is ten noorden van die parallel zal onvoorwaardelijk toebehooren aan de Brittsche Noord Borneo Maatschappij, en het gedeelte ten zuiden van die parallel aan Nederland".

Malaysia contends that the drafting of this provision as "a single sentence divided into two parts only by a semi-colon indicates the close grammatical and functional connection between the two parts". Thus, in Malaysia's view, the second clause of the sentence, which relates exclusively to the division of the island of Sebatik, confirms that the words "across the Island of Sebittik" refer solely to that island.

41. The Court notes that the Parties differ as to how the preposition "across" (in the English) or *"over"* (in the Dutch) in the first sentence of Article IV of the 1891 Convention should be interpreted. It acknowledges that the word is not devoid of ambiguity and is capable of bearing either of the meanings given to it by the Parties. A line established by treaty may indeed pass "across" an island and terminate on the shores of such island or continue beyond it.

The Parties also disagree on the interpretation of the part of the same sentence which reads "the boundary-line shall be continued eastward along that parallel [4° 10' north]". In the Court's view, the phrase "shall be continued" is also not devoid of ambiguity. Article I of the Convention defines the starting point of the boundary between the two States, whilst Articles II and III describe how that boundary continues from one part to the next. Therefore, when Article IV provides that "the boundary-line shall be continued" again from the east coast of Borneo along the 4° 10' N parallel and across the island of Sebatik, this does not, contrary to Indonesia's contention, necessarily mean that the line continues as an allocation line beyond Sebatik.

The Court moreover considers that the difference in punctuation in the two versions of Article IV of the 1891 Convention does not as such help elucidate the meaning of the text with respect to a possible extension of the line out to sea, to the east of Sebatik Island (see also paragraph 56 below).

42. The Court observes that any ambiguity could have been avoided had the Convention expressly stipulated that the 4° 10' N parallel constituted, beyond the east coast of Sebatik, the line separating the islands under British sovereignty from those under Dutch sovereignty. In these circumstances, the silence in the text cannot be ignored. It supports the position of Malaysia.

43. It should moreover be observed that a "boundary", in the ordinary meaning of the term, does not have the function that Indonesia attributes to the allocation line that was supposedly established by Article IV out to sea beyond the island of Sebatik, that is to say allocating to the parties sovereignty over the islands in the area. The Court considers that, in the absence of an express provision to this effect in the text of a treaty, it is difficult to envisage that the States parties could seek to attribute an additional function to a boundary line.

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44. Indonesia asserts that the context of the 1891 Convention supports its interpretation of Article IV of that instrument. In this regard, Indonesia refers to the "interaction" between the British Government and the Dutch Government concerning the map accompanying the Explanatory Memorandum annexed by the latter to the draft Law submitted to the States-General of the Netherlands with a view to the ratification of the 1891 Convention and the "purpose of [which] was to explain to the States-General the significance of a proposed treaty, and why its conclusion was in the interests of The Netherlands". Indonesia contends that this map, showing the prolongation out to sea to the east of Sebatik of the line drawn on land along the 4° 10' north parallel, was forwarded to the British Government by its own diplomatic agent and that it was known to that Government. In support of this Indonesia points out that "Sir Horace Rumbold, the British Minister at The Hague, sent an official despatch back to the Foreign Office on 26 January 1892 with which he sent two copies of the map: and he drew specific attention to it". According to Indonesia, this official transmission did not elicit any reaction from the Foreign Office. Indonesia accordingly concludes that this implies Great Britain's "irrefutable acquiescence in the depiction of the Convention line", and thereby its acceptance that the 1891 Convention divided up the islands to the east of Borneo between Great Britain and the Netherlands. In this respect, Indonesia first maintains that this "interaction", in terms of Article 31, paragraph 2 *(a)*, of the Vienna Convention on the Law of Treaties, "establishes an agreement between the two governments regarding the seaward course of the Anglo-Dutch boundary east of Sebatik". It also considers that this "interaction" shows that the map in question was, within the meaning of Article 31, paragraph 2 *(b)*, of the Vienna Convention, an instrument made by the Dutch Government in connection with the conclusion of the 1891 Convention, particularly its Articles IV and VIII, and was accepted by the British Government as an instrument related to the treaty. In support of this twofold argument, Indonesia states *inter alia* that "[the map] was officially prepared by the Dutch Government immediately after the conclusion of the 1891 Convention and in connection with its approval by the Netherlands States-General as specifically required by Article VIII of the Convention", that "it was publicly and officially available at the time", and that "the British Government, in the face of its official knowledge of the map, remained silent".

45. For its part, Malaysia contends that the map attached to the Dutch Government's Explanatory Memorandum cannot be regarded as an element of the context of the 1891 Convention. In Malaysia's view, that map was prepared exclusively for internal purposes.

Malaysia notes in this respect that the map was never promulgated by the Dutch authorities and that neither the Government nor the Parliament of the Netherlands sought to incorporate it into the Convention; the Dutch act of ratification says nothing to such effect.

Malaysia moreover argues that the map in question was never the subject of negotiations between the two Governments and was never officially communicated by the Dutch Government to the British Government. Malaysia adds that, even if the British Government had been made aware of this map through the intermediary of its Minister in The Hague, the circumstances "did not call for any particular reaction, as the map had not been mentioned in the parliamentary debate and no one had noted the extension of the boundary-line out to sea". Malaysia concludes from this that the map in question was not "an Agreement or an Instrument 'accepted by the other party and related to the treaty'".

46. The Court considers that the Explanatory Memorandum appended to the draft Law submitted to the Netherlands States-General with a view to ratification of the 1891 Convention, the only document relating to the Convention to have been published during the period when the latter was concluded, provides useful information on a certain number of points.

First, the Memorandum refers to the fact that, in the course of the prior negotiations, the British delegation had proposed that the boundary line should run eastwards from the east coast of North Borneo, passing between the islands of Sebatik and East Nanukan. It further indicates that the Sultan of Bulungan, to whom, according to the Netherlands, the mainland areas of Borneo then in issue between Great Britain and the Netherlands belonged, had been consulted by the latter before the Convention was concluded. Following this consultation, the Sultan had asked for his people to be given the right to gather jungle produce free of tax within the area of the island to be attributed to the State of North Borneo; such right was accorded for a 15-year period by Article VII of the Convention. As regards Sebatik, the Memorandum explains that the island's partition had been agreed following a proposal by the Dutch Government and was considered necessary in order to provide access to the coastal regions allocated to each party. The Memorandum contains no reference to the disposition of other islands lying further to the east, and in particular there is no mention of Ligitan or Sipadan.

47. As regards the map appended to the Explanatory Memorandum, the Court notes that this shows four differently coloured lines. The blue line represents the boundary initially claimed by the Netherlands, the yellow line the boundary initially claimed by the BNBC, the green line the boundary proposed by the British Government and the red line the boundary eventually agreed. The blue and yellow lines stop at the coast; the green line continues for a short distance out to sea, whilst the red line continues out to sea along parallel 4° 10' N to the south of Mabul Island. In the Explanatory Memorandum there is no comment whatever on this extension of the red line out to sea; nor was it discussed in the Dutch Parliament.

The Court notes that the map shows only a number of islands situated to the north of parallel 4° 10'; apart from a few reefs, no island is shown to the south of that line. The Court accordingly concludes that the Members of the Dutch Parliament were almost certainly unaware that two tiny islands lay to the south of the parallel and that the red line might be taken for an allocation line. In

this regard, the Court notes that there is nothing in the case file to suggest that Ligitan and Sipadan, or other islands such as Mabul, were territories disputed between Great Britain and the Netherlands at the time when the Convention was concluded. The Court cannot therefore accept that the red line was extended in order to settle any dispute in the waters beyond Sebatik, with the consequence that Ligitan and Sipadan were attributed to the Netherlands.

48. Nor can the Court accept Indonesia's argument regarding the legal value of the map appended to the Explanatory Memorandum of the Dutch Government.

The Court observes that the Explanatory Memorandum and map were never transmitted by the Dutch Government to the British Government, but were simply forwarded to the latter by its diplomatic agent in The Hague, Sir Horace Rumbold. This agent specified that the map had been published in the Official Journal of The Netherlands and formed part of a Report presented to the Second Chamber of the States-General. He added that "the map seems to be the only interesting feature of a document which does not otherwise call for special comment". However, Sir Horace Rumbold did not draw the attention of his authorities to the red line drawn on the map among other lines. The British Government did not react to this internal transmission. In these circumstances, such a lack of reaction to this line on the map appended to the Memorandum cannot be deemed to constitute acquiescence in this line.

It follows from the foregoing that the map cannot be considered either an "agreement relating to [a] treaty which was made between all the parties in connection with the conclusion of the treaty", within the meaning of Article 31, paragraph 2 *(a)*, of the Vienna Convention, or an "instrument which was made by [a] part[y] in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to that treaty", within the meaning of Article 31, paragraph 2 *(b)*, of the Vienna Convention.

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49. Turning to the object and purpose of the 1891 Convention, Indonesia argues that the parties' intention was to draw an allocation line between their island possessions in the north-eastern region of Borneo, including the islands out at sea.

It stresses that the main aim of the Convention was "to resolve the uncertainties once and for all so as to avoid future disputes". In this respect, Indonesia invokes the case law of the Court and that of its predecessor, the Permanent Court of International Justice. According to Indonesia, the finality and completeness of boundary settlements were relied on by both Courts, on several occasions, as a criterion for the interpretation of treaty provisions. In particular, Indonesia cites the Advisory Opinion of the Permanent Court on the *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne* (1925), which states: "It is . . . natural that any article designed to fix a frontier should, if possible, be so interpreted that the result of the application of its provisions in their entirety should be the establishment of a precise, complete and definitive frontier." (*Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925, P.C.I.J., Series B, No. 12*, p. 20.)

Indonesia puts forward a number of other arguments to justify its interpretation of the Convention's object and purpose. It points out that "in the preamble to the 1891 Convention the parties stated that they were 'desirous of defining the boundaries' (in the plural) between the Dutch and British possessions in Borneo" and argues that this must be taken to mean not only the island of Borneo itself but also other island territories. Indonesia thus contends that the line established by Article IV of the Convention concerned not only the islands which are the subject of the dispute now before the Court but also other islands in the area. Moreover, Indonesia notes that, while Article IV did not establish an endpoint for the line — providing for the line to extend eastward of the island of Sebatik —, that does not mean that the line extends indefinitely eastward. In Indonesia's opinion, the limit to its eastward extent was determined by the purpose of the Convention, "the settlement, once and for all, of possible Anglo-Dutch territorial differences in the region".

50. Malaysia, on the other hand, maintains that the object and purpose of the 1891 Convention, as shown by its preamble, were to "defin[e] the boundaries between the Netherlands possessions in the island of Borneo and the States in that island which are under British protection". Referring to the provisions concerning the island of Sebatik, Malaysia moreover adds that one of the concerns of the negotiators of the Convention was also to ensure access to the rivers — the only possible means at the time of penetrating the interior of Borneo — and freedom of navigation. Malaysia thus concludes that the 1891 Convention, when read as a whole, reveals unambiguously that "it was intended to be a land boundary treaty", as nothing in it suggests that it was intended to divide sea areas or to allocate distant offshore islands.

51. The Court considers that the object and purpose of the 1891 Convention was the delimitation of boundaries between the parties' possessions within the island of Borneo itself, as shown by the preamble to the Convention, which provides that the parties were "desirous of defining the boundaries between the Netherland possessions *in* the Island of Borneo and the States *in that island* which are under British protection" (emphasis added by the Court). This interpretation is, in the Court's view, supported by the very scheme of the 1891 Convention. Article I expressly provides that "*[t]he boundary . . . shall start* from 4° 10' north latitude on the east coast of Borneo" (emphasis added by the Court). Articles II and III then continue the description of the boundary line westward, with its endpoint on the west coast being fixed by Article III. Since difficulties had been encountered concerning the status of the island of Sebatik, which was located directly opposite the starting point of the boundary line and controlled access to the rivers, the parties incorporated an additional provision to settle this issue. The Court does not find anything in the Convention to suggest that the parties intended to delimit the boundary between their possessions to the east of the islands of Borneo and Sebatik or to attribute sovereignty over any other islands. As far as the islands of Ligitan and Sipadan are concerned, the Court also observes that the terms of the preamble to the 1891 Convention are difficult to apply to these islands as they were little known at the time, as both Indonesia and Malaysia have acknowledged, and were not the subject of any dispute between Great Britain and the Netherlands.

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52. The Court accordingly concludes that the text of Article IV of the 1891 Convention, when read in context and in the light of the Convention's object and purpose, cannot be interpreted as establishing an allocation line determining sovereignty over the islands out to sea, to the east of the island of Sebatik.

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53. In view of the foregoing, the Court does not consider it necessary to resort to supplementary means of interpretation, such as the *travaux préparatoires* of the 1891 Convention and the circumstances of its conclusion, to determine the meaning of that Convention; however, as in other cases, it considers that it can have recourse to such supplementary means in order to seek a possible confirmation of its interpretation of the text of the Convention (see for example *Territorial Dispute (Libyan Arab Jamahiriya/Chad), I.C.J. Reports 1994*, p. 27, para. 55; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 21, para. 40).

54. Indonesia begins by recalling that prior to the conclusion of the 1891 Convention the Sultan of Bulungan had

> "clear claims . . . to inland areas north of the Tawau coast and well to the north of 4° 10' N, which were acknowledged by Great Britain in agreeing, in Article VII of the 1891 Convention, to the Sultan having certain continuing transitional rights to jungle produce".

It adds that the Netherlands engaged in "activity in the area evidencing Dutch claims to sovereignty extending to the north of the eventual 4° 10' N line". It further notes "the prevailing uncertainty at the time as to the precise extent of the territories belonging to the two parties" and mentions "the occurrence of occasional Anglo-Dutch confrontations as a result of these uncertainties".

Indonesia moreover maintains that the *travaux préparatoires* of the 1891 Convention, though containing no express indication as to whether Ligitan and Sipadan were British or Dutch, confirm its interpretation of Article IV.

In Indonesia's view, there can be no doubt that during the negotiations leading up to the signature of the Convention the two parties, and in particular Great Britain, envisaged a line continuing out to sea to the east of the island of Borneo. In support of this argument, Indonesia submits several maps used by the parties' delegations during the negotiations. It considers that these maps "show a consistent pattern of the line of proposed settlement, wherever it might finally run, being extended out to sea along a relevant parallel of latitude".

55. Malaysia rejects Indonesia's analysis of the *travaux préparatoires*. In its view, "the consideration of the boundary on the coast never extended to cover the islands east of Batu Tinagat". Malaysia further considers that the *travaux préparatoires* of the 1891 Convention make clear that the line proposed to divide Sebatik Island "was a boundary line, not an allocation line", that the line "was adopted as a compromise only *after* the 4° 10' N line was agreed as a boundary line for the mainland of Borneo", and that the line in question "related only to the island of Sebatik and not to other islands well to the east". Malaysia points out that in any event this could not have been a matter of drawing a "boundary line" in the open seas because at the time in question maritime delimitation could not extend beyond territorial waters.

56. The Court observes that following its formation, the BNBC asserted rights which it believed it had acquired from Alfred Dent and Baron von Overbeck to territories situated on the north-eastern coast of the island of Borneo (in the State of Tidoeng "as far south as the Sibuco River"); confrontations then occurred between the Company and the Netherlands, the latter asserting its rights to the Sultan of Bulungan's possessions, "with inclusion of the Tidoeng *territories*" (emphasis in the original). These were the circumstances in which Great Britain and the Netherlands set up a Joint Commission in 1889 to discuss the bases for an agreement to settle the dispute. Specifically, the Commission was appointed "to take into consideration the question of the disputed boundary between the Netherland Indian possessions on the *north-east coast* of the Island of Borneo and the territory belonging to the British North Borneo Company" (emphasis added by the Court). It was moreover provided that "in the event of a satisfactory understanding", the two governments would define the "*inland boundary-lines* which separate the Netherland possessions in Borneo from the territories belonging to the States of Sarawak, Brunei, and the British North Borneo Company respectively" (emphasis added by the Court). The Joint Commission's task was thus confined to the area in dispute, on the north-eastern coast of Borneo. Accordingly, it was agreed that, once *this* dispute had been settled, the inland boundary could be determined completely, as there was clearly no other point of disagreement between the parties.

The Joint Commission met three times and devoted itself almost exclusively to questions relating to the disputed area of the north-east coast. It was only at the last meeting, held on 27 July 1889, that the British delegation proposed that the boundary should pass between the islands of Sebatik and East Nanukan. This was the first proposal of any prolongation of the inland boundary out to sea. The Court however notes from the diplomatic correspondence exchanged after the Commission was dissolved that it follows that the Netherlands had rejected the British proposal. The specific idea of Sebatik Island being divided along the 4° 10' N parallel was only introduced later. In a letter of 2 February 1891 to the British Secretary for Foreign Affairs from the Dutch Minister in London, the latter stated that the Netherlands agreed with this partition. The Secretary for Foreign Affairs, in his reply dated 11 February 1891, acknowledged this understanding and enclosed a draft agreement. Article 4 of the draft is practically identical in its wording to Article IV of the 1891 Convention. In the draft agreement (proposed by Great Britain) the two sentences of Article 4 are separated by a semicolon. In the final English text, the semicolon was replaced by a colon without the *travaux préparatoires* shedding any light on the reasons for this change. Consequently, no firm inference can be drawn from the change. There were no further difficulties and the Convention was signed on 20 June 1891.

57. During the negotiations, the parties used various sketch-maps to illustrate their proposals and opinions. Some of these sketch-maps showed lines drawn in pencil along certain parallels and continuing as far as the margin. Since the reports accompanying the sketch-maps do not provide any further explanation, the Court considers that it is impossible to deduce anything at all from the length of these lines.

There is however one exception. In an internal Foreign Office memorandum, drafted in preparation for the meeting of the Joint Commission, the following suggestion was made:

> "Starting eastward from a point A on the coast near Broers Hoek on parallel 4° 10' of North Latitude, the line should follow that parallel until it is intersected by . . . the Meridian 117° 50' East Longitude, opposite the Southernmost point of the Island of Sebattik at the point marked C. The line would continue thence in an Easterly direction along the 4th parallel, until it should meet the point of intersection of the Meridian of 118° 44' 30" marked D."

This suggestion was illustrated on a map that is reproduced as map No. 4 of Indonesia's map atlas. Sipadan is to the west of point D and Ligitan to the east of this point. Neither of the two islands appears on the map. The Court observes that there is nothing in the case file to prove that the suggestion was ever brought to the attention of the Dutch Government or that the line between points C and D had ever been the subject of discussion between the parties. Although put forward in one of the many British internal documents drawn up during the negotiations, the suggestion was never actually adopted. Once the parties arrived at an agreement on the partition of Sebatik, they were only interested in the boundary on the island of Borneo itself and exchanged no views on an allocation of the islands in the open seas to the east of Sebatik.

58. The Court concludes from the foregoing that neither the *travaux préparatoires* of the Convention nor the circumstances of its conclusion can be regarded as supporting the position of Indonesia when it contends that the parties to the Convention agreed not only on the course of the land boundary but also on an allocation line beyond the east coast of Sebatik.

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59. Concerning the subsequent practice of the parties to the 1891 Convention, Indonesia refers once again to the Dutch Government's Explanatory Memorandum map accompanying the draft of the Law authorizing the ratification of the Convention (see paragraphs 47 and 48 above). Indonesia considers that this map can also be seen as "a subsequent agreement or as subsequent practice for the purposes of Article 31.3 *(a)* and *(b)* of the Vienna Convention" on the Law of Treaties.

60. Malaysia points out that the Explanatory Memorandum map submitted by the Dutch Government to the two Chambers of the States-General, on which Indonesia bases its argument, was not annexed to the 1891 Convention, which made no mention of it. Malaysia concludes that this is not a map to which the parties to the Convention agreed. It further notes that "[t]he internal Dutch map attached to the Explanatory Memorandum was the object of no specific comment during the [parliamentary] debate and did not call for any particular reaction". Thus, according to Malaysia, this map cannot be seen as "a subsequent agreement or as subsequent practice for the purposes of Article 31.3 *(a)* and *(b)* of the Vienna Convention" on the Law of Treaties.

61. The Court has already given consideration (see paragraph 48 above) to the legal force of the map annexed to the Dutch Government's Explanatory Memorandum accompanying the draft Law submitted by it for the ratification of the 1891 Convention. For the same reasons as those on which it based its previous findings, the Court considers that this map cannot be seen as "a subsequent agreement or as subsequent practice for the purposes of Article 31.3 *(a)* and *(b)* of the Vienna Convention".

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62. In Indonesia's view, the 1893 amendment to the 1850 and 1878 Contracts of Vassalage with the Sultan of Bulungan provides a further indication of the interpretation given by the Netherlands Government to the 1891 Convention. It asserts that the aim of the amendment was to redefine the territorial extent of the Sultanate of Bulungan to take into account the provisions of the 1891 Convention. According to the new definition of 1893, "[t]he Islands of Tarakan and Nanoekan and that portion of the Island of Sebitik, situated to the south of the above boundary-line . . . belong to Boeloengan, as well as the small islands belonging to the above islands, so far as they are situated to the south of the boundary-line . . ." According to Indonesia, this text indicates that the Netherlands Government considered in 1893 that the purpose of the 1891 Convention was to establish, in relation to islands, a line of territorial attribution extending out to sea. Indonesia adds that the British Government showed acquiescence in this interpretation, because the text of the 1893 amendment was officially communicated to the British Government on 26 February 1895 without meeting with any reaction.

63. Malaysia observes that the small islands referred to in the 1893 amendment are those which "belong" to the three expressly designated islands, namely Tarakan, Nanukan and Sebatik, and which are situated to the south of the boundary thus determined. Malaysia stresses that it would be fanciful "to see this as establishing an allocation perimeter projected 50 miles out to sea".

64. The Court observes that the relations between the Netherlands and the Sultanate of Bulungan were governed by a series of contracts entered into between them. The Contracts of 12 November 1850 and 2 June 1878 laid down the limits of the Sultanate. These limits extended to

the north of the land boundary that was finally agreed in 1891 between the Netherlands and Great Britain. For this reason the Netherlands had consulted the Sultan before concluding the Convention with Great Britain and was moreover obliged in 1893 to amend the 1878 Contract in order to take into account the delimitation of 1891. The new text stipulated that the islands of Tarakan and Nanukan, and that portion of the island of Sebatik situated to the south of the boundary line, belonged to Bulungan, together with "the small islands belonging to the above islands, so far as they are situated to the south of the boundary-line". The Court observes that these three islands are surrounded by many smaller islands that could be said to "belong" to them geographically. The Court, however, considers that this cannot apply to Ligitan and Sipadan, which are situated more than 40 nautical miles away from the three islands in question. The Court observes that in any event this instrument, whatever its true scope may have been, was *res inter alios acta* for Great Britain and therefore it could not be invoked by the Netherlands in its treaty relations with Great Britain.

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65. Indonesia also cites the Agreement concluded between Great Britain and the Netherlands on 28 September 1915, pursuant to Article V of the 1891 Convention, concerning the boundary between the State of North Borneo and the Dutch possessions on Borneo. It stresses that this was a demarcation agreement which, by definition, could only concern the inland part of the boundary. According to Indonesia, the fact that this Agreement does not mention the boundary eastward of the island of Sebatik does not imply that the 1891 Convention did not establish an eastward boundary out to sea. It states that, unlike in the case of the islands of Borneo and Sebatik, where demarcation was physically possible, such an operation was not possible in the sea east of Sebatik.

Finally, Indonesia asserts that the fact that the Commissioners' work started at the east coast of Sebatik does not mean that the 1891 Convention line began there, any more than the fact that their work ended after covering some 20 per cent of the boundary can be interpreted to mean that the boundary did not continue any further. It states that, contrary to what Malaysia suggests, the Commissioners' report did not say that the boundary started on the east coast of Sebatik but indicated only that "[t]raversing the island of Sibetik, the frontier line follows the parallel of 4° 10' north latitude . . .".

66. Indonesia contends that the same applies to the 1928 Agreement, whereby the parties to the 1891 Convention agreed on a more precise delimitation of the boundary, as defined in Article III of the Convention, between the summits of the Gunong Api and of the Gunong Raya.

67. With respect to the maps attached to the 1915 and 1928 Agreements, Indonesia acknowledges that they showed no seaward extension of the line along the 4° 10' N parallel referred to in Article IV of the 1891 Convention. It further recognizes that these maps formed an integral

part of the agreements and that as such they therefore had the same binding legal force as those agreements for the parties. Indonesia nevertheless stresses that the maps attached to the 1915 and 1928 Agreements should in no sense be considered as prevailing over the Dutch Explanatory Memorandum map of 1891 in relation to stretches of the 1891 Convention line which were beyond the reach of the 1915 and 1928 Agreements.

68. Malaysia does not share Indonesia's interpretation of the 1915 and 1928 Agreements between Great Britain and the Netherlands. On the contrary, it considers that these Agreements contradict Indonesia's interpretation of Article IV of the 1891 Convention.

With respect to the 1915 Agreement, Malaysia points out that the Agreement "starts by stating that the frontier line traverses the island of Sebatik following the parallel of 4° 10' N latitude marked on the east and west coasts by boundary pillars, then follows the parallel westward". In Malaysia's view, this wording "is exclusive of any prolongation of the line eastward". Further, Malaysia maintains that the map referred to in the preamble to the Agreement and annexed to it confirms that the boundary line started on the east coast of Sebatik Island and did not concern Ligitan or Sipadan. In this respect, it observes that on this map the eastern extremity of the boundary line is situated on the east coast of Sebatik and that the map shows no sign of the line being extended out to sea. Malaysia points out, however, that from the western endpoint of the boundary the map shows the beginning of a continuation due south. Malaysia concludes from this that "[i]f the Commissioners had thought the [1891 Convention] provided for an extension of the boundary line eastwards by an allocation line, they would have likewise indicated the beginning of such a line" as they had done at the other end of the boundary. Malaysia stresses that the Commissioners not only chose not to extend the line on the map but they even indicated the end of the boundary line on the map by a red cross. Malaysia adds that the evidentiary value of the map annexed to the 1915 Agreement is all the greater because it is "the only official map agreed by the Parties".

At the hearings, Malaysia further contended that the 1915 Agreement could not be considered exclusively as a demarcation agreement. It explained that the Commissioners did not perform an exercise of demarcation *stricto sensu*, as they took liberties with the text of the 1891 Convention at a number of points on the land boundary, and these liberties were subsequently endorsed by the signatories of the 1915 Agreement. As an example, Malaysia referred to the change made by the Commissioners to the boundary line in the channel between the west coast of Sebatik and mainland Borneo, for the purpose of reaching the middle of the mouth of the River Troesan Tamboe.

69. With respect to the 1928 Agreement, which pertains to an inland sector of the boundary between the summits of the Gunong Api and the Gunong Raya, Malaysia considers that this instrument confirms the 1915 Agreement, since the Netherlands Government could have taken the opportunity to correct the 1915 map and Agreement if it had so wished.

70. The Court will recall that the 1891 Convention included a clause providing that the parties would in the future be able to define the course of the boundary line more exactly. Thus, Article V of the Convention states: "The exact positions of the boundary-line, as described in the four preceding Articles, shall be determined hereafter by mutual agreement, at such times as the Netherland and the British Governments may think fit."

The first such agreement was the one signed at London by Great Britain and the Netherlands on 28 September 1915 relating to "the boundary between the State of North Borneo and the Netherland possessions in Borneo". As explained in an exchange of letters of 16 March and 3 October 1905 between Baron Gericke, Netherlands Minister in London, and the Marquess of Lansdowne, British Foreign Secretary, and in a communication dated 19 November 1910 from the Netherlands Chargé d'affaires, the origin of that agreement was a difference of opinion between the Netherlands and Great Britain in respect of the course of the boundary line. The difference concerned the manner in which Article II of the 1891 Convention should be interpreted. That provision was, by way of the 1905 exchange of letters, given an interpretation agreed by the two Governments. In 1910, the Netherlands Minister for the Colonies made known to the Foreign Office, by way of the above-mentioned communication from the Netherlands Chargé d'affaires, his view that "the time [had] come to open the negotiations with the British Government mentioned in the [Convention] of June 20, 1891, concerning the indication of the frontier between British North Borneo and the Netherland Territory". He stated in particular that the uncertainty as to the actual course of the boundary made itself felt "along the whole" boundary. For that purpose, he proposed that "a mixed Commission . . . be appointed to indicate the frontier on the ground, to describe it and to prepare a map of same". As the proposal was accepted, a mixed Commission carried out the prescribed task between 8 June 1912 and 30 January 1913.

71. By the 1915 Agreement, the two States approved and confirmed a joint report, incorporated into that Agreement, and the map annexed thereto, which had been drawn up by the mixed Commission. The Commissioners started their work on the east coast of Sebatik and, from east to west, undertook to "delimitate on the spot the frontier" agreed in 1891, as indicated in the preamble to the Agreement. In the Court's view, the Commissioners' assignment was not simply a demarcation exercise, the task of the parties being to clarify the course of a line which could only be imprecise in view of the somewhat general wording of the 1891 Convention and the line's considerable length. The Court finds that the intention of the parties to clarify the 1891 delimitation and the complementary nature of the demarcation operations become very clear when the text of the Agreement is examined carefully. Thus the Agreement indicates that "[w]here physical features did not present natural boundaries conformable with the provisions of the Boundary Treaty of the 20th June, 1891, [the Commissioners] erected the following pillars".

Moreover, the Court observes that the course of the boundary line finally adopted in the 1915 Agreement does not totally correspond to that of the 1891 Convention. Thus, as Malaysia points out, whereas the sector of the boundary between Sebatik Island and Borneo under Article IV of the 1891 Convention was to follow a straight line along the parallel of 4° 10' latitude north (see paragraph 36 above), the 1915 Agreement stipulates that:

> "(2) Starting from the boundary pillar on the west coast of the island of Sibetik, the boundary follows the parallel of 4° 10' north latitude westward until it reaches the middle of the channel, thence keeping a mid-channel course until it reaches the middle of the mouth of Troesan Tamboe.

(3) From the mouth of Troesan Tamboe the boundary line is continued up the middle of this Troesan until it is intersected by a similar line running through the middle of Troesan Sikapal; it then follows this line through Troesan Sikapal as far as the point where the latter meets the watershed between the Simengaris and Seroedong Rivers (Sikapal hill), and is connected finally with this watershed by a line taken perpendicular to the centre line of Troesan Sikapal".

In view of the foregoing, the Court cannot accept Indonesia's argument that the 1915 Agreement was purely a demarcation agreement; nor can it accept the conclusion drawn therefrom by Indonesia that the very nature of this Agreement shows that the parties were not required to concern themselves therein with the course of the line out to sea to the east of Sebatik Island.

72. In connection with this agreement, the Court further notes a number of elements which, when taken as a whole, suggest that the line established in 1891 terminated at the east coast of Sebatik.

It first observes that the title of the 1915 Agreement is very general in nature ("Agreement between the United Kingdom and the Netherlands relating to the Boundary between the State of North Borneo and the Netherland Possessions in Borneo"), as is its wording. Thus, the preamble to the Agreement refers to the joint report incorporated into the Agreement and to the map accompanying it as "relating to the boundary between the State of North Borneo and the Netherland possessions in the island", without any further indication. Similarly, paragraphs 1 and 3 of the joint report state that the Commissioners had "travelled in the neighbourhood of the frontier from the 8th June, 1912, to the 30th January, 1913" and had

"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*" (emphasis added by the Court).

For their part, the Commissioners, far from confining their examination to the specific problem which had arisen in connection with the interpretation of Article II of the 1891 Convention (see paragraph 70 above), also considered the situation in respect of the boundary from Sebatik westward. Thus, they began their task at the point where the 4° 10' latitude north parallel crosses the east coast of Sebatik; they then simply proceeded from east to west.

Moreover, subparagraph (1) of paragraph 3 of the joint report describes the boundary line fixed by Article IV of the 1891 Convention as follows: "Traversing the island of Sibetik, the frontier line follows the parallel of 4° 10' north latitude, *as already fixed by Article 4 of the Boundary Treaty and marked on the east and west coasts by boundary pillars*" (emphasis added by the Court).

In sum, the 1915 Agreement covered *a priori* the entire boundary "between the Netherland territory and the State of British North Borneo" and the Commissioners performed their task beginning at the eastern end of Sebatik. In the opinion of the Court, if the boundary had continued in any way to the east of Sebatik, at the very least some mention of that could have been expected in the Agreement.

The Court considers that an examination of the map annexed to the 1915 Agreement reinforces the Court's interpretation of that Agreement. The Court observes that the map, together with the map annexed to the 1928 Agreement, is the only one which was agreed between the parties to the 1891 Convention. The Court notes on this map that an initial southward extension of the line indicating the boundary between the Netherlands possessions and the other States under British protection is shown beyond the western endpoint of the boundary defined in 1915, while a similar extension does not appear beyond the point situated on the east coast of Sebatik; that latter point was, in all probability, meant to indicate the spot where the boundary ended.

73. A new agreement was concluded by the parties to the 1891 Convention on 26 March 1928. Although also bearing a title worded in general terms ("Convention between Great Britain and Northern Ireland and the Netherlands respecting the Further Delimitation of the Frontier between the States in Borneo under British Protection and the Netherlands Territory in that Island"), that agreement had a much more limited object than the 1915 Agreement, as its Article 1 indicates:

> "The boundary as defined in article III of the Convention signed at London on the 20th June, 1891, is further delimited between the summits of the Gunong Api and of the Gunong Raya as described in the following article and as shown on the map attached to this Convention."

The Court considers this too to be an agreement providing for both a more exact delimitation of the boundary in the sector in question and its demarcation, not solely a demarcation treaty. However, the Court finds that in 1928 it was a matter of carrying out the detailed delimitation and demarcation of only a limited inland boundary sector. Accordingly, the Court cannot draw any conclusions, for the purpose of interpreting Article IV of the 1891 Convention, from the fact that the 1928 Agreement fails to make any reference to the question of the boundary line being extended, as an allocation line, out to sea east of Sebatik.

74. The Court lastly observes that no other agreement was concluded subsequently by Great Britain and the Netherlands with respect to the course of the line established by the 1891 Convention.

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75. However, Indonesia refers to a debate that took place within the Dutch Government between 1922 and 1926 over whether the issue of the delimitation of the territorial waters off the east coast of the island of Sebatik should be raised with the British Government. Indonesia sets out the various options that had been envisaged in this respect: one of these options consisted in considering that the 1891 Convention also established a boundary for the territorial sea at 3 nautical miles from the coast. The other option consisted in drawing a line perpendicular to the coast at the terminus of the land boundary, as recommended by the rules of general international law that were applicable at the time. Indonesia adds that the final view expressed in September 1926 by the Minister for Foreign Affairs of the Netherlands, who had opted for the perpendicular line, was that

it was not opportune to raise the matter with the British Government. According to Indonesia, this internal debate shows that the Dutch authorities took the same position as Indonesia in the present case and saw the 1891 line as an allocation line rather than a maritime boundary. Indonesia further points out that the internal Dutch discussions were entirely restricted to the delimitation of the territorial waters off Sebatik Island and did not involve the islands of Ligitan and Sipadan.

76. Malaysia considers the proposal by certain Dutch authorities to delimit the territorial waters by a line perpendicular to the coast from the endpoint of the land boundary as particularly significant as this would have made it more difficult for the Dutch Government to make any subsequent claim to sovereignty over distant islands situated to the south of an allocation line along the 4° 10' N parallel. Malaysia accordingly asserts that, in view of this debate, it is difficult to argue that in 1926 the Dutch authorities considered that any delimitation of territorial waters or the course of an allocation line had been provided for by an agreement between Great Britain and the Netherlands in 1891 or later. It further concludes from this debate that the Dutch authorities were clearly of the view that no rule of international law called for the prolongation, beyond the east coast of Sebatik, of the 4° 10' N land boundary, and that in any event the authorities did not favour such a solution, considering it to be contrary to Dutch interests.

77. The Court notes that this internal debate sheds light on the views of various Dutch authorities at the time as to the legal situation of the territories to the east of Sebatik Island.

In a letter of 10 December 1922 to the Minister for the Colonies, the Governor-General of the Dutch East Indies proposed certain solutions for the delimitation of the territorial waters off the coast of Sebatik. One of these solutions was to draw "a line which is an extension of the land border". The Ministry of Foreign Affairs was also consulted. In a Memorandum of 8 August 1923, it also mentioned the "extension of the land boundary" dividing Sebatik Island as the possible boundary between Dutch territorial waters and the territorial waters of the State of North Borneo. In support of this solution, the Ministry of Foreign Affairs invoked the map annexed to the Explanatory Memorandum, "on which the border between the areas under Dutch and British jurisdiction on land and sea is extended along the parallel 4° 10' N". The Ministry however added that "this map [did] not result from actual consultation" between the parties, although it was probably known to the British Government. Nevertheless, in his letter of 27 September 1926 to the Minister for the Colonies, the Minister for Foreign Affairs, whilst not considering it desirable to raise the question with the British Government, put forward the perpendicular line as being the best solution. In the end this issue was not pursued and the Dutch Government never drew it to the attention of the British Government.

In the Court's view, the above-mentioned correspondence suggests that, in the 1920s, the best informed Dutch authorities did not consider that there had been agreement in 1891 on the extension out to sea of the line drawn on land along the 4° 10' north parallel.

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78. Finally, Indonesia maintains that, in granting oil concessions in the area, both Parties always respected the 4° 10' North latitude as forming the limit of their respective jurisdiction. Accordingly, in Indonesia's view, its grant of a licence to Japex/Total demonstrates that it considered that its jurisdictional rights extended up to the 4° 10' N line. Indonesia goes on to indicate that Malaysia acted in similar fashion in 1968 when it granted an oil concession to Teiseki, pointing out that the southern limit of this concession virtually coincides with that parallel. Thus, according to Indonesia, the Parties recognized and respected the 4° 10' N parallel as a separation line between Indonesia's and Malaysia's respective zones.

For its part, Malaysia notes that the oil concessions in the 1960s did not concern territorial delimitation and that the islands of Ligitan and Sipadan were never included in the concession perimeters. It adds that "[n]o activity pursuant to the Indonesian concessions had any relation to the islands".

79. The Court notes that the limits of the oil concessions granted by the Parties in the area to the east of Borneo did not encompass the islands of Ligitan and Sipadan. Further, the northern limit of the exploration concession granted in 1966 by Indonesia and the southern limit of that granted in 1968 by Malaysia did not coincide with the 4° 10' north parallel but were fixed at 30" to either side of that parallel. These limits may have been simply the manifestation of the caution exercised by the Parties in granting their concessions. This caution was all the more natural in the present case because negotiations were to commence soon afterwards between Indonesia and Malaysia with a view to delimiting the continental shelf.

The Court cannot therefore draw any conclusion for purposes of interpreting Article IV of the 1891 Convention from the practice of the Parties in awarding oil concessions.

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80. In view of all the foregoing, the Court considers that an examination of the subsequent practice of the parties to the 1891 Convention confirms the conclusions at which the Court has arrived in paragraph 52 above as to the interpretation of Article IV of that Convention.

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81. Lastly, both Parties have produced a series of maps of various natures and origins in support of their respective interpretations of Article IV of the 1891 Convention.

82. Indonesia produces maps of "Dutch" or "Indonesian" origin, such as the map annexed to the Dutch Explanatory Memorandum of 1891 and a map of Borneo taken from an Indonesian atlas of 1953. Secondly, it produces "British" or "Malaysian" maps, such as three maps published by

Stanford in 1894, 1903 and 1904 respectively, a map of Tawau "produced by Great Britain in 1965", two "maps of Malaysia of 1966 of Malaysian origin", a "Malaysian map of Semporna published in 1967", the "official Malaysian map of the 1968 oil concessions showing the international boundary", another map of Malaysia "published by the Malaysian Directorate of National Mapping in 1972", etc. Thirdly, Indonesia relies on a map from an American atlas of 1897 annexed by the United States to its Memorial in the *Island of Palmas* Arbitration.

83. Indonesia contends that the maps it has produced "are consistent in depicting the boundary line as extending offshore to the north of the known locations of the islands of Ligitan and Sipadan, thus leaving them on what is now the Indonesian side of the line". Indonesia stresses that "[i]t was only in 1979, well after the dispute had arisen, that Malaysia's maps began to change in a self-serving fashion".

As regards the legal value of the maps it has produced, Indonesia considers that a number of these maps fall into the category of the "physical expressions of the will of the State or the States concerned" and that, while "these maps do not constitute a territorial title by themselves, they command significant weight in the light of their consistent depiction of the 1891 Treaty line as separating the territorial possessions, including the islands, of the Parties".

84. In regard to the evidentiary value of the maps presented by Indonesia, Malaysia states that "Indonesia has produced not a single Dutch or Indonesian map, on any scale, which shows the islands and attributes them to Indonesia". In Malaysia's view, contrary to what Indonesia contends, the Dutch maps of 1897-1904 and of 1914 clearly show the boundary terminating at the east coast of Sebatik. Malaysia emphasizes, moreover, that the Indonesian official archipelagic claim map of 1960 clearly does not treat the islands as Indonesian. Malaysia asserts that even Indonesian maps published since 1969 do not show the islands as Indonesian. It does, however, recognize that some modern maps might be interpreted in a contrary sense, but it contends that these are relatively few in number and that their legal force is reduced by the fact that each of them contains a disclaimer in regard to the accuracy of the boundaries. Malaysia moreover argues that on the majority of these latter maps the islands of Ligitan and Sipadan are not shown at all, are in the wrong place, or are not shown as belonging to Malaysia or to Indonesia.

85. In support of its interpretation of Article IV of the 1891 Convention, Malaysia relies in particular on the map annexed to the 1915 Agreement between the British and Netherlands Governments relating to the boundary between the State of North Borneo and the Netherland possessions in Borneo: according to Malaysia, this is the only official map agreed by the parties. Malaysia also relies on a series of other maps of various origins. It first presents a certain number of Dutch maps, including *inter alia* the map entitled "East coast of Borneo: Island of Tarakan up to Dutch-English boundary" dated 1905, two maps of 1913 showing the "administrative structure of the Southern and Eastern Borneo Residence", the map made in 1917 "by the Dutch official, Kaltofen", which, according to Malaysia, "is a hand-drawn ethnographic map of Borneo", a map of

"Dutch East Borneo" dated 1935, and the 1941 map of "North Borneo". Secondly, it relies on certain maps of British origin, that is to say the map published in 1952 by the "Colony of North Borneo", the "schematic map" of administrative districts of the colony of North Borneo dated 1953, and the map of "the Semporna police district of 1958, by S. M. Ross". Thirdly, it cites an Indonesian map: "Indonesia's continental shelf map of 1960". Lastly, it also relies on a 1976 map of Malaysian origin, entitled "Bandar Seri Begawan".

86. Malaysia considers that all of these maps clearly show that the boundary line between the Dutch and British possessions in the area did not extend into the sea east of Sebatik and that Ligitan and Sipadan were both regarded, depending on the period, as being British or Malaysian islands.

87. In regard to the evidentiary value of the maps produced by Malaysia, Indonesia contends, first, that virtually none of them actually shows Ligitan and Sipadan as Malaysian possessions. It points out that the only map which depicts the disputed islands as Malaysian possessions "is a map prepared in 1979 to illustrate Malaysia's claim to the area". Indonesia argues in this respect that this map, having been published ten years after the dispute over the islands crystallized in 1969, is without legal relevance in the case. Secondly, Indonesia points out that the maps relied on by Malaysia, which do not depict the 1891 line as extending out to sea, "are entirely neutral with respect to the territorial attribution of the islands of Sipadan and Ligitan". As regards in particular the map attached to the 1915 Agreement, Indonesia considers it logical that this map should not show the line extending eastward of the island of Sebatik along the 4° 10' N parallel, since it was concerned only with the territorial situation on the island of Borneo. Finally, with reference to the maps produced by Malaysia in its Memorial under the head of "Other Maps", Indonesia asserts that none of these supports Malaysia's contentions as to sovereignty over the two islands.

88. The Court would begin by recalling, as regards the legal value of maps, that it has already had occasion to state the following:

> "maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their cartographic character. It is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or

unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts." (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 582, para. 54; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1098, para. 84).

In the present case, the Court observes that no map reflecting the agreed views of the parties was appended to the 1891 Convention, which would have officially expressed the will of Great Britain and the Netherlands as to the prolongation of the boundary line, as an allocation line, out to sea to the east of Sebatik Island.

89. In the course of the proceedings, the Parties made particular reference to two maps: the map annexed to the Explanatory Memorandum appended by the Netherlands Government to the draft Law submitted to the States-General for the ratification of the 1891 Convention, and the map annexed to the 1915 Agreement. The Court has already set out its findings as to the legal value of these maps (see paragraphs 47, 48 and 72 above).

90. Turning now to the other maps produced by the Parties, the Court observes that Indonesia has submitted a certain number of maps published after the 1891 Convention showing a line continuing out to sea off the eastern coast of Sebatik Island, along the parallel of 4° 10' latitude north. These maps include, for example, those of Borneo made by Stanford in 1894, in 1903 and in 1904, and that of 1968 published by the Malaysian Ministry of Lands and Mines to illustrate oil-prospecting licences.

The Court notes that the manner in which these maps represent the continuation out to sea of the line forming the land boundary varies from one map to another. Moreover, the length of the line extending out to sea varies considerably: on some maps it continues for several miles before stopping approximately halfway to the meridians of Ligitan and Sipadan, whilst on others it extends almost to the boundary between the Philippines and Malaysia.

For its part, Malaysia has produced various maps on which the boundary line between the British and Dutch possessions in the region stops at the eastern coast of Sebatik Island. These maps include the map of British North Borneo annexed to the 1907 Exchange of Notes between Great Britain and the United States, the Dutch map of 1913 representing the Administrative Structure of the Southern and Eastern Borneo Residence, and the map showing the 1915 boundary line published in the Official Gazette of the Dutch Colonies in 1916.

The Court however considers that each of these maps was produced for specific purposes and it is therefore unable to draw from those maps any clear and final conclusion as to whether or not the line defined in Article IV of the 1891 Convention extended to the east of Sebatik Island. Moreover, Malaysia was not always able to justify its criticism of the maps submitted by Indonesia. For example, the Stanford maps of 1894, 1903 and 1904, extending out to sea along the parallel of 4° 10' latitude north, corresponded to an administrative boundary of North Borneo, but could not cite any basis other than the 1891 Convention as support for the continuation of that State's administrative boundary along the parallel in question.

91. In sum, with the exception of the map annexed to the 1915 Agreement (see paragraph 72 above), the cartographic material submitted by the Parties is inconclusive in respect of the interpretation of Article IV of the 1891 Convention.

* *

92. The Court ultimately comes to the conclusion that Article IV, interpreted in its context and in the light of the object and purpose of the Convention, determines the boundary between the two Parties up to the eastern extremity of Sebatik Island and does not establish any allocation line further eastwards. That conclusion is confirmed both by the *travaux préparatoires* and by the subsequent conduct of the parties to the 1891 Convention.

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* *

93. The Court will now turn to the question whether Indonesia or Malaysia obtained title to Ligitan and Sipadan by succession.

* *

94. Indonesia contended during the second round of the oral proceedings that, if the Court were to dismiss its claim to the islands in dispute on the basis of the 1891 Convention, it would nevertheless have title as successor to the Netherlands, which in turn acquired its title through contracts with the Sultan of Bulungan, the original title-holder.

95. Malaysia contends that Ligitan and Sipadan never belonged to the possessions of the Sultan of Bulungan.

96. The Court observes that it has already dealt with the various contracts of vassalage concluded between the Netherlands and the Sultan of Bulungan when it considered the 1891 Convention (see paragraphs 18 and 64 above). It recalls that in the 1878 Contract the island possessions of the Sultan were described as "Terekkan [Tarakan], Nanoekan [Nanukan] and

Sebittikh [Sebatik], with the islets belonging thereto". As amended in 1893, this list refers to the three islands and surrounding islets in similar terms while taking into account the division of Sebatik on the basis of the 1891 Convention. The Court further recalls that it stated above that the words "the islets belonging thereto" can only be interpreted as referring to the small islands lying in the immediate vicinity of the three islands which are mentioned by name, and not to islands which are located at a distance of more than 40 nautical miles. The Court therefore cannot accept Indonesia's contention that it inherited title to the disputed islands from the Netherlands through these contracts, which stated that the Sultanate of Bulungan as described in the contracts formed part of the Netherlands Indies.

97. For its part, Malaysia maintains that it acquired sovereignty over the islands of Ligitan and Sipadan further to a series of alleged transfers of the title originally held by the former sovereign, the Sultan of Sulu, that title having allegedly passed in turn to Spain, the United States, Great Britain on behalf of the State of North Borneo, the United Kingdom of Great Britain and Northern Ireland and finally to Malaysia.

It is this "chain of title" which, according to Malaysia, provides it with a treaty-based title to Ligitan and Sipadan.

98. Malaysia asserts, in respect of the original title, that "[i]n the eighteenth and throughout the nineteenth century until 1878, the coastal territory of north-east Borneo and its adjacent islands was a dependency of the Sultanate of Sulu".

It states that "[t]his control resulted from the allegiance of the local people and the appointment of their local chiefs by the Sultan", but that his authority over the area in question was also recognized by other States, notably Spain and the Netherlands.

Malaysia further states that during the nineteenth and twentieth centuries, the islands and reefs along the north-east coast of Borneo were inhabited and used by the Bajau Laut, or Sea Gypsies, people who live mostly on boats or in settlements of stilt houses above water and devote themselves in particular to fishing, collecting forest products and trade. In respect specifically of Ligitan and Sipadan, Malaysia notes that, even though these islands were not permanently inhabited at the time of the main decisive events in respect of sovereignty over them, that is, the latter part of the nineteenth century and the twentieth century, they were nevertheless frequently visited and were an integral part of the marine economy of the Bajau Laut.

99. Indonesia observes in the first place that if the title to the islands in dispute of only one of the entities mentioned in the chain of alleged title-holders cannot be proven to have been "demonstrably valid", the legal foundation of Malaysia's "chain of title" argument disappears.

In this respect, Indonesia states that the disputed islands cannot be regarded as falling at the time in question within the area controlled by the Sultan of Sulu, as he was never present south of Darvel Bay except through some commercial influence which in any event was receding when the 1891 Convention between Great Britain and the Netherlands was concluded. Indonesia admits that

there may have been alliances between the Sultan of Sulu and some Bajau Laut groups, but argues that those ties were personal in nature and are not sufficient in any event to establish territorial sovereignty over the disputed islands.

100. Concerning the transfer of sovereignty over the islands of Ligitan and Sipadan by the Sultan of Sulu to Spain, Malaysia asserts that "Article I of the Protocol [confirming the Bases of Peace and Capitulation] of 22 July 1878 declared 'as beyond discussion the sovereignty of Spain over all the Archipelago of Sulu and the dependencies thereof'". Malaysia further holds that, pursuant to the Protocol concluded on 7 March 1885 between Spain, Germany and Great Britain, the latter two Powers recognized Spain's sovereignty over the entire Sulu Archipelago as defined in Article 2 of that instrument. According to that provision, the Archipelago included "all the islands which are found between the western extremity of the island of Mindanao, on the one side, and the continent of Borneo and the island of Paragua, on the other side, with the exception of those which are indicated in Article 3". Malaysia points out that this definition of the Archipelago is in conformity with that set out in Article I of the Treaty signed on 23 September 1836 between the Spanish Government and the Sultan of Sulu. It adds that "[w]hatever the position may have been in 1878, the sovereignty of Spain over the Sulu Archipelago [and the dependencies thereof] was clearly established in 1885".

101. Indonesia responds that there is no evidence to show that Ligitan and Sipadan were ever Spanish possessions. In support of this assertion, Indonesia maintains that the disputed islands were not identified in any of the agreements concluded between Spain and the Sultan. It further cites the 1885 Protocol concluded by Spain, Germany and Great Britain, Article 1 of which provided: "The Governments of Germany and Great Britain recognize the sovereignty of Spain over the places effectively occupied, as well as over those places not yet so occupied, of the archipelago of Sulu (Joló)". In Indonesia's view, this reflected the spirit of the 1877 Protocol concluded by those same States, which required Spain to give Germany and Great Britain notice of any further occupation of the islands of the Sulu Archipelago before being entitled to extend to those new territories the agreed régime for the territories already occupied by it. This provision was repeated in Article 4 of the 1885 Protocol. According to Indonesia, Spain however never actually occupied the islands of Ligitan and Sipadan after the conclusion of the 1885 Protocol and, accordingly, was never in a position to give such notice to the other contracting parties.

102. Concerning the transfer by Spain to the United States of Ligitan and Sipadan, Malaysia maintains that it was generally recognized that those islands were not covered by the allocation lines laid down in the 1898 Treaty of Peace; Malaysia claims that the Sultan of Sulu nevertheless expressly recognized United States sovereignty over the whole Sulu Archipelago and its dependencies by an Agreement dated 20 August 1899. According to Malaysia, that omission from the 1898 Treaty of Peace was remedied by the 1900 Treaty between Spain and the United States ceding to the latter "any and all islands belonging to the Philippine Archipelago . . . *and particularly* . . . the islands of Cagayan Sulú and Sibutú and their dependencies". In Malaysia's view, the intent of the parties to the 1900 Treaty was to bring within the scope of application of the Treaty all Spanish islands in the region which were not within the lines laid down in the 1898 Treaty of Peace.

In support of its interpretation of the 1900 Treaty, Malaysia notes that in 1903, after a visit of the USS *Quiros* to the region, the United States Hydrographic Office published a chart of the "Northern Shore of Sibuko Bay", showing the disputed islands on the American side of a line separating British territory from United States territory. Malaysia concludes from this that the 1903 chart represented a public assertion by the United States of its sovereignty over the additional islands ceded to it under the 1900 Treaty, adding that this assertion of sovereignty occasioned no reaction from the Netherlands.

103. Malaysia also observes that after the voyage of the *Quiros* the Chairman of the BNBC sent a letter of protest to the British Foreign Office, stating that the Company had been peacefully administering the islands off North Borneo beyond the line of 3 marine leagues without any opposition from Spain. According to Malaysia, the BNBC at the same time took steps to obtain confirmation from the Sultan of Sulu of its authority over the islands lying beyond 3 marine leagues. The Sultan provided that confirmation by a certificate signed on 22 April 1903. Malaysia states that the Foreign Office nevertheless had doubts about the international legal effect of the Sultan of Sulu's 1903 certificate and, faced with the United States claims to the islands under the 1900 Treaty, the British Government "rather sought an arrangement with the United States that would ensure the continuity of the Company's administration".

Malaysia considers that the United States and Great Britain attempted to settle the questions concerning sovereignty over the islands and their administration by an Exchange of Notes of 3 and 10 July 1907. Great Britain is said to have recognized the continuing sovereignty of the United States, as successor to Spain, over the islands beyond the 3-marine-league limit; for its part, the United States is said to have accepted that these islands had in fact been administered by the BNBC and to have agreed to allow that situation to continue, subject to a right on both parts to terminate the agreement on 12 months' notice. Malaysia asserts that all relevant documents clearly show that the islands covered by the 1907 Exchange of Notes included all those adjacent to the North Borneo coast beyond the 3-marine-league line and that Ligitan and Sipadan were among those islands. Malaysia relies in particular on the 1907 Exchange of Notes and the map to which it referred and which depicts Ligitan and Sipadan as lying on the British side of the line which separates the islands under British and American administration. It further points out that the 1907 Exchange of Notes was published at the time by the United States and by Great Britain and that it attracted no protest on the part of the Netherlands Government.

104. Indonesia responds that the 1900 Treaty only concerned those islands belonging to the Philippine Archipelago lying outside the line agreed to in the 1898 Treaty of Peace and that the 1900 Treaty provided that in particular the islands of Cagayan Sulu, Sibutu and their dependencies were amongst the territories ceded by Spain to the United States. However, according to Indonesia, Ligitan and Sipadan cannot be considered part of the Philippine Archipelago, nor can they be viewed as dependencies of Cagayan Sulu and Sibutu, which lie far to the north. Thus, the disputed islands could not have figured among the territories which Spain allegedly ceded to the United States under the 1898 and 1900 Treaties.

Indonesia adds that its position is supported by subsequent events. According to it, the United States was uncertain as to the precise extent of the possessions it had obtained from Spain.

To illustrate the uncertainties felt by the United States, Indonesia observes that in October 1903 the United States Navy Department had recommended, after consultation with the State Department, that the boundary line shown on certain United States charts be omitted. According to Indonesia, it is significant that this recommendation concerned in particular the chart of the "Northern Shore of Sibuko Bay" issued by the United States Hydrographic Office in June 1903, after the voyage of the *Quiros*. In Indonesia's view it is thus "clear that the 1903 Hydrographic Office Chart, far from being a 'public assertion' of US sovereignty, as suggested by Malaysia, was a tentative internal position which was subsequently withdrawn after more careful consideration"; the 1903 chart can therefore not be seen as an official document, and nothing can be made of the fact that it provoked no reaction from the Netherlands.

As regards the United States-British Exchange of Notes of 1907, Indonesia considers that this consisted only of a temporary arrangement whereby the United States waived in favour of the BNBC the administration of certain islands located "to the westward and southwestward of the line traced on the [accompanying] map . . . [This], however, was without prejudice to the issue of sovereignty" over the islands in question.

105. As regards the transfer of sovereignty over Ligitan and Sipadan from the United States to Great Britain on behalf of North Borneo, Malaysia argues that the 1907 Exchange of Notes had not totally settled the issue of sovereignty over the islands situated beyond the line of three marine leagues, laid down in the 1878 Dent-von Overbeck grant. It states that the question was finally settled by the Convention of 2 January 1930, which entered into force on 13 December 1932. Under that Convention, it was agreed that the islands belonging to the Philippine Archipelago and those belonging to the State of North Borneo were to be separated by a line running through ten specific points. Malaysia points out that under the 1930 Convention "all islands to the north and east of the line were to belong to the Philippine Archipelago and all islands to the south and west were to belong to the State of Borneo". In Malaysia's view, since Ligitan and Sipadan clearly lie to the south and west of the 1930 line, it follows that they were formally transferred to North Borneo under British protection.

Malaysia makes the further point that the 1930 Convention was published both by the United States and by Great Britain and also in the League of Nations *Treaty Series*, and that it evoked "no reaction from the Netherlands, though one might have been expected if the islands disposed of by it were claimed by the Netherlands".

Finally, Malaysia observes that, by an agreement concluded on 26 June 1946 between the British Government and the BNBC, "the latter ceded to the Crown all its sovereign rights and its assets in North Borneo". According to Malaysia, the disappearance of the State of North Borneo and its replacement by the British Colony of North Borneo had no effect on the extent of the territory belonging to North Borneo.

106. For its part, Indonesia claims that the documents relating to the negotiation of the 1930 Convention show clearly that the United States deemed that it had title to islands lying more than 3 marine leagues from the North Borneo coast only in areas lying to the north of Sibutu and its immediate dependencies. Hence, Indonesia contends that the negotiations leading up to the

conclusion of the 1930 Convention focused solely on the status of the Turtle Islands and the Mangsee Islands. It observes that, in any event, the southern limits of the boundary fixed by the 1930 Convention lay well to the north of latitude 4° 10' north and thus well to the north of Ligitan and Sipadan.

107. As regards transmission of the United Kingdom's title to Malaysia, the latter states that, by the Agreement of 9 July 1963 between the Governments of the Federation of Malaya, the United Kingdom of Great Britain and Northern Ireland, North Borneo, Sarawak and Singapore, which came into effect on 16 September 1963, North Borneo became a State within Malaysia under the name of Sabah.

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108. The Court notes at the outset that the islands in dispute are not mentioned by name in any of the international legal instruments presented by Malaysia to prove the alleged consecutive transfers of title.

The Court further notes that the two islands were not included in the grant by which the Sultan of Sulu ceded all his rights and powers over his possessions in Borneo, including the islands within a limit of 3 marine leagues, to Alfred Dent and Baron von Overbeck on 22 January 1878, a fact not contested by the Parties.

Finally, the Court observes that, while the Parties both maintain that the islands of Ligitan and Sipadan were not *terrae nullius* during the period in question in the present case, they do so on the basis of diametrically opposed reasoning, each of them claiming to hold title to those islands.

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109. The Court will first deal with the question whether Ligitan and Sipadan were part of the possessions of the Sultan of Sulu. It is not contested by the Parties that geographically these islands do not belong to the Sulu Archipelago proper. In all relevant documents, however, the Sultanate is invariably described as "the Archipelago of Sulu and the dependencies thereof" or "the Island of Sooloo with all its dependencies". In a number of these documents its territorial extent is rather vaguely defined as "compris[ing] all the islands which are found between the western extremity of the island of Mindanao, on the one side, and the continent of Borneo and the island of Paragua, on the other side" (Protocol between Spain, Germany and Great Britain, 7 March 1885; see also the Capitulations concluded between Spain and the Sultan of Sulu, 23 September 1836). These documents, therefore, provide no answer to the question whether Ligitan and Sipadan, which are located at a considerable distance from the main island of Sulu, were part of the Sultanate's dependencies.

110. Malaysia relies on the ties of allegiance which allegedly existed between the Sultan of Sulu and the Bajau Laut who inhabited the islands off the coast of North Borneo and who from time to time may have made use of the two uninhabited islands. The Court is of the opinion that such ties may well have existed but that they are in themselves not sufficient to provide evidence that the Sultan of Sulu claimed territorial title to these two small islands or considered them part of his possessions. Nor is there any evidence that the Sultan actually exercised authority over Ligitan and Sipadan.

111. Turning now to the alleged transfer of title over Ligitan and Sipadan to Spain, the Court notes that in the Protocol between Spain and Sulu Confirming the Bases of Peace and Capitulation of 22 July 1878 the Sultan of Sulu definitively ceded the "Archipelago of Sulu and the dependencies thereof" to Spain. In the Protocol of 7 March 1885 concluded between Spain, Germany and Great Britain, the Spanish Government relinquished, as far as regarded the British Government, all claims of sovereignty over the territory of North Borneo and the neighbouring islands within a zone of 3 marine leagues, mentioned in the 1878 Dent-von Overbeck grant, whereas Great Britain and Germany recognized Spanish sovereignty over "the places effectively occupied, as well over those places not yet so occupied, of the Archipelago of Sulu (Joló), of which the boundaries are determined in Article 2". Article 2 contains the rather vague definition mentioned in paragraph 109 above.

112. It is not contested between the Parties that Spain at no time showed an interest in the islands in dispute or the neighbouring islands and that it did not extend its authority to these islands. Nor is there any indication in the case file that Spain gave notice of its occupation of these islands, in accordance with the procedure provided for in Article 4 of the 1885 Protocol. Nor is it contested that, in the years after 1878, the BNBC gradually extended its administration to islands lying beyond the 3-marine-league limit without, however, claiming title to them and without protest from Spain.

113. The Court therefore cannot but conclude that there is no evidence that Spain considered Ligitan and Sipadan as covered by the 1878 Protocol between Spain and the Sultan of Sulu or that Germany and Great Britain recognized Spanish sovereignty over them in the 1885 Protocol.

It cannot be disputed, however, that the Sultan of Sulu relinquished the sovereign rights over all his possessions in favour of Spain, thus losing any title he may have had over islands located beyond the 3-marine-league limit from the coast of North Borneo. He was therefore not in a position to declare in 1903 that such islands had been included in the 1878 grant to Alfred Dent and Baron von Overbeck.

114. The Court, therefore, is of the opinion that Spain was the only State which could have laid claim to Ligitan and Sipadan by virtue of the relevant instruments but that there is no evidence that it actually did so. It further observes that at the time neither Great Britain, on behalf of the State of North Borneo, nor the Netherlands explicitly or implicitly laid claim to Ligitan and Sipadan.

115. The next link in the chain of transfers of title is the Treaty of 7 November 1900 between the United States and Spain, by which Spain "relinquish[ed] to the United States all title and claim of title . . . to any and all islands belonging to the Philippine Archipelago" which had not been covered by the Treaty of Peace of 10 December 1898. Mention was made in particular of the islands of Cagayan Sulu and Sibutu, but no other islands which were situated closer to the coast of North Borneo were mentioned by name.

116. The Court first notes that, although it is undisputed that Ligitan and Sipadan were not within the scope of the 1898 Treaty of Peace, the 1900 Treaty does not specify islands, apart from Cagayan Sulu and Sibutu and their dependencies, that Spain ceded to the United States. Spain nevertheless relinquished by that Treaty any claim it may have had to Ligitan and Sipadan or other islands beyond the 3-marine-league limit from the coast of North Borneo.

117. Subsequent events show that the United States itself was uncertain to which islands it had acquired title under the 1900 Treaty. The correspondence between the United States Secretary of State and the United States Secretaries of War and of the Navy in the aftermath of the voyage of the USS *Quiros* and the re-edition of a map of the United States Hydrographic Office, the first version of which had contained a line of separation between United States and British possessions attributing Ligitan and Sipadan to the United States, demonstrate that the State Department had no clear idea of the territorial and maritime extent of the Philippine Archipelago, title to which it had obtained from Spain. In this respect the Court notes that the United States Secretary of State in his letter of 23 October 1903 to the Acting Secretary of War wrote that a bilateral arrangement with Great Britain was necessary "to trace the line demarking [their] respective jurisdictions", whereas with regard to Sipadan he explicitly stated that he was not in a position to determine whether "Sipadan and the included keys and rocks had been recognized as lying within the dominions of Sulu".

118. A temporary arrangement between Great Britain and the United States was made in 1907 by an Exchange of Notes. This Exchange of Notes, which did not involve a transfer of territorial sovereignty, provided for a continuation of the administration by the BNBC of the islands situated more than 3 marine leagues from the coast of North Borneo but left unresolved the issue to which of the parties these islands belonged. There was no indication to which of the islands administered by the BNBC the United States claimed title and the question of sovereignty was therefore left in abeyance. No conclusion therefore can be drawn from the 1907 Exchange of Notes as regards sovereignty over Ligitan and Sipadan.

119. This temporary arrangement lasted until 2 January 1930, when a Convention was concluded between Great Britain and the United States in which a line was drawn separating the islands belonging to the Philippine Archipelago on the one hand and the islands belonging to the State of North Borneo on the other hand. Article III of that Convention stated that all islands to the south and west of the line should belong to the State of North Borneo. From a point well to the

north-east of Ligitan and Sipadan, the line extended to the north and to the east. The Convention did not mention any island by name apart from the Turtle and Mangsee Islands, which were declared to be under United States sovereignty.

120. By concluding the 1930 Convention, the United States relinquished any claim it might have had to Ligitan and Sipadan and to the neighbouring islands. But the Court cannot conclude either from the 1907 Exchange of Notes or from the 1930 Convention or from any document emanating from the United States Administration in the intervening period that the United States did claim sovereignty over these islands. It can, therefore, not be said with any degree of certainty that by the 1930 Convention the United States transferred title to Ligitan and Sipadan to Great Britain, as Malaysia asserts.

121. On the other hand, the Court cannot let go unnoticed that Great Britain was of the opinion that as a result of the 1930 Convention it acquired, on behalf of the BNBC, title to all the islands beyond the 3-marine-league zone which had been administered by the Company, with the exception of the Turtle and the Mangsee Islands. To none of the islands lying beyond the 3-marine-league zone had it ever before laid a formal claim. Whether such title in the case of Ligitan and Sipadan and the neighbouring islands was indeed acquired as a result of the 1930 Convention is less relevant than the fact that Great Britain's position on the effect of this Convention was not contested by any other State.

122. The State of North Borneo was transformed into a colony in 1946. Subsequently, by virtue of Article IV of the Agreement of 9 July 1963, the Government of the United Kingdom agreed to take "such steps as [might] be appropriate and available to them to secure the enactment by the Parliament of the United Kingdom of an Act providing for the relinquishment . . . of Her Britannic Majesty's sovereignty and jurisdiction in respect of North Borneo, Sarawak and Singapore" in favour of Malaysia.

123. In 1969 Indonesia challenged Malaysia's title to Ligitan and Sipadan and claimed to have title to the two islands on the basis of the 1891 Convention.

124. In view of the foregoing, the Court concludes that it cannot accept Malaysia's contention that there is an uninterrupted series of transfers of title from the alleged original title-holder, the Sultan of Sulu, to Malaysia as the present one. It has not been established with certainty that Ligitan and Sipadan belonged to the possessions of the Sultan of Sulu nor that any of the alleged subsequent title-holders had a treaty-based title to these two islands. The Court can therefore not find that Malaysia has inherited a treaty-based title from its predecessor, the United Kingdom of Great Britain and Northern Ireland.

125. The Court has already found that the 1891 Convention does not provide Indonesia with a treaty-based title and that title to the islands did not pass to Indonesia as successor to the Netherlands and the Sultan of Bulungan (see paragraphs 94 and 96 above).

126. The Court will therefore now consider whether evidence furnished by the Parties with respect to *"effectivités"* relied upon by them provides the basis for a decision — as requested in the Special Agreement — on the question to whom sovereignty over Ligitan and Sipadan belongs. The

Court recalls that it has already ruled in a number of cases on the legal relationship between *"effectivités"* and title. The relevant passage for the present case can be found in the Judgment in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, where the Chamber of the Court stated after having said that "a distinction must be drawn among several eventualities": "[i]n the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration" (*I.C.J. Reports 1986*, p. 587, para. 63; see also *Territorial Dispute (Libyan Arab Jamahiriya/Chad), I.C.J. Reports 1994*, p. 38, paras. 75-76; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, Merits, I.C.J. Reports 2002*, para. 68).

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127. Both Parties claim that the *effectivités* on which they rely merely confirm a treaty-based title. On an alternative basis, Malaysia claims that it acquired title to Ligitan and Sipadan by virtue of continuous peaceful possession and administration, without objection from Indonesia or its predecessors in title.

The Court, having found that neither of the Parties has a treaty-based title to Ligitan and Sipadan (see paragraphs 92 and 124 above), will consider these *effectivités* as an independent and separate issue.

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128. Indonesia points out that, during the 1969 negotiations on the delimitation of the respective continental shelves of the two States, Malaysia raised a claim to sovereignty over Ligitan and Sipadan Islands. According to Indonesia, it was thus at that time that the "critical date" arose in the present dispute. It contends that the two Parties undertook, in an exchange of letters of 22 September 1969, to refrain from any action which might alter the status quo in respect of the disputed islands. It asserts that from 1969 the respective claims of the Parties therefore find themselves "legally neutralized", and that, for this reason, their subsequent statements or actions are not relevant to the present proceedings.

Indonesia adds that Malaysia, from 1979 onwards, nevertheless took a series of unilateral measures that were fundamentally incompatible with the undertaking thus given to respect the situation as it existed in 1969. By way of example Indonesia mentions the publication of maps by Malaysia showing, unlike earlier maps, the disputed islands as Malaysian and the establishment of a number of tourist facilities on Sipadan. Indonesia adds that it always protested whenever Malaysia took such unilateral steps.

129. With respect to the critical date, Malaysia begins by asserting that prior to the 1969 discussions on the delimitation of the continental shelves of the Parties, neither Indonesia nor its predecessors had expressed any interest in or claim to these islands. It however emphasizes the importance of the critical date, not so much in relation to the admissibility of evidence but rather to "the weight to be given to it". Malaysia therefore asserts that a tribunal may always take into account post-critical date activity if the party submitting it shows that the activity in question started at a time prior to the critical date and simply continued thereafter. As for scuba-diving activities on Sipadan, Malaysia observes that the tourist trade, generated by this sport, emerged from the time when it became popular, and that it had itself accepted the responsibilities of sovereignty to ensure the protection of the island's environment as well as to meet the basic needs of the visitors.

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130. In support of its arguments relating to *effectivités*, Indonesia cites patrols in the area by vessels of the Dutch Royal Navy. It refers to a list of Dutch ships present in the area between 1895 and 1928, prepared on the basis of the reports on the colonies presented each year to Parliament by the Dutch Government *("Koloniale Verslagen")*, and relies in particular on the presence in the area of the Dutch destroyer *Lynx* in November and December 1921. Indonesia refers to the fact that a patrol team of the *Lynx* went ashore on Sipadan and that the plane carried aboard the *Lynx* traversed the air space of Ligitan and its waters, whereas the 3-mile zones of Si Amil and other islands under British authority were respected. Indonesia considers that the report submitted by the commander of the *Lynx* to the Commander Naval Forces Netherlands Indies after the voyage shows that the Dutch authorities regarded Ligitan and Sipadan Islands as being under Dutch sovereignty, whereas other islands situated to the north of the 1891 line were considered to be British. Indonesia also mentions the hydrographic surveys carried out by the Dutch, in particular the surveying activities of the vessel *Macasser* throughout the region, including the area around Ligitan and Sipadan, in October and November 1903.

As regards its own activities, Indonesia notes that "[p]rior to the emergence of the dispute in 1969, the Indonesian Navy was also active in the area, visiting Sipadan on several occasions".

As regards fishing activities, Indonesia states that Indonesian fishermen have traditionally plied their trade around the islands of Ligitan and Sipadan. It has submitted a series of affidavits which provide a record of occasional visits to the islands dating back to the 1950s and early 1960s, and even to the early 1970s, after the dispute between the Parties had emerged.

Finally, in regard to its Act No. 4 concerning Indonesian Waters, promulgated on 18 February 1960, in which its archipelagic baselines are defined, Indonesia recognizes that it did not at that time include Ligitan or Sipadan as base points for the purpose of drawing baselines and defining its archipelagic waters and territorial sea. But it argues that this cannot be interpreted as demonstrating that Indonesia regarded the islands as not belonging to its territory. It points out in this connection that the Act of 1960 was prepared in some haste, which can be explained by the

need to create a precedent for the recognition of the concept of archipelagic waters just before the Second United Nations Conference on the Law of the Sea, which was due to be held from 17 March to 26 April 1960. Indonesia adds that it moreover sought to diverge as little as possible from the existing law of the sea, one of the principles of which was that the drawing of baselines could not depart to any appreciable extent from the general direction of the coast.

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131. Malaysia argues that the alleged Dutch and Indonesian naval activities are very limited in number. Malaysia contends that these activities cannot be regarded as evidence of the continuous exercise of governmental activity in and in relation to Ligitan and Sipadan that may be indicative of any claim of title to the islands.

As regards post-colonial practice, Malaysia observes that, for the first 25 years of its independence, Indonesia showed no interest in Ligitan and Sipadan. Malaysia claims that Indonesia "did not manifest any presence in the area, did not try to administer the islands, enacted no legislation and made no ordinances or regulations concerning the two islands or their surrounding waters".

Malaysia further observes that Indonesian Act No. 4 of 18 February 1960, to which a map was attached, defined the outer limits of the Indonesian national waters by a list of baseline co-ordinates. However, Indonesia did not use the disputed islands as reference points for the baselines. Malaysia argues that, in light of the said Act and of the map attached thereto, Ligitan and Sipadan Islands cannot be regarded as belonging to Indonesia. Malaysia admits that it has still not published a detailed map of its own baselines. It points out that it did, however, publish its continental shelf boundaries in 1979, in a way which takes full account of the two islands in question.

132. As regards its *effectivités* on the islands of Ligitan and Sipadan, Malaysia mentions control over the taking of turtles and the collection of turtle eggs; it states that collecting turtle eggs was the most important economic activity on Sipadan for many years. As early as 1914, Great Britain took steps to regulate and control the collection of turtle eggs on Ligitan and Sipadan. Malaysia stresses the fact that it was to British North Borneo officials that the resolution of disputes concerning the collection of turtle eggs was referred. It notes that a licensing system was established for boats used to fish the waters around the islands. Malaysia also relies on the establishment in 1933 of a bird sanctuary on Sipadan. Malaysia further points out that the British North Borneo colonial authorities constructed lighthouses on Ligitan and Sipadan Islands in the early 1960s and that these exist to this day and are maintained by the Malaysian authorities. Finally, Malaysia cites Malaysian Government regulation of tourism on Sipadan and the fact that, from 25 September 1997, Ligitan and Sipadan became protected areas under Malaysia's Protected Areas Order of that year.

133. Indonesia denies that the acts relied upon by Malaysia, whether considered in isolation or taken as a whole, are sufficient to establish the existence of a continuous peaceful possession and administration of the islands capable of creating a territorial title in the latter's favour.

As regards the collection of turtle eggs, Indonesia does not contest the facts as stated by Malaysia but argues that the regulations issued by the British and the rules established for the resolution of disputes between the inhabitants of the area were evidence of the exercise of personal rather than territorial jurisdiction. Indonesia also contests the evidentiary value of the establishment of a bird sanctuary by the British authorities as an act *à titre de souverain* in relation to Sipadan. Similarly, in Indonesia's view, Malaysia's construction and maintenance of lighthouses do not constitute proof of acts *à titre de souverain*. It observes in any event that it did not object to these activities by Malaysia because they were of general interest for navigation.

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134. The Court first recalls the statement by the Permanent Court of International Justice in the *Legal Status of Eastern Greenland (Denmark* v. *Norway)* case:

> "a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.
>
> Another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power."

The Permanent Court continued:

> "It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries." (*P.C.I.J., Series A/B, No. 53*, pp. 45-46.)

In particular in the case of very small islands which are uninhabited or not permanently inhabited — like Ligitan and Sipadan, which have been of little economic importance (at least until recently) — *effectivités* will indeed generally be scarce.

135. The Court further observes that it cannot take into consideration acts having taken place after the date on which the dispute between the Parties crystallized unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them (see the Arbitral Award in the *Palena* case, 38 International Law Reports *(ILR)*, pp. 79-80). The Court will, therefore, primarily, analyse the *effectivités* which date from the period before 1969, the year in which the Parties asserted conflicting claims to Ligitan and Sipadan.

136. The Court finally observes that it can only consider those acts as constituting a relevant display of authority which leave no doubt as to their specific reference to the islands in dispute as such. Regulations or administrative acts of a general nature can therefore be taken as *effectivités* with regard to Ligitan and Sipadan only if it is clear from their terms or their effects that they pertained to these two islands.

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137. Turning now to the *effectivités* relied on by Indonesia, the Court will begin by pointing out that none of them is of a legislative or regulatory character. Moreover, the Court cannot ignore the fact that Indonesian Act No. 4 of 8 February 1960, which draws Indonesia's archipelagic baselines, and its accompanying map do not mention or indicate Ligitan and Sipadan as relevant base points or turning points.

138. Indonesia cites in the first place a continuous presence of the Dutch and Indonesian navies in the waters around Ligitan and Sipadan. It relies in particular on the voyage of the Dutch destroyer *Lynx* in November 1921. This voyage was part of a joint action of the British and Dutch navies to combat piracy in the waters east of Borneo. According to the report by the commander of the *Lynx*, an armed sloop was despatched to Sipadan to gather information about pirate activities and a seaplane flew a reconnaissance flight through the island's airspace and subsequently flew over Ligitan. Indonesia concludes from this operation that the Netherlands considered the airspace, and thus also the islands, as Dutch territory.

139. In the opinion of the Court, it cannot be deduced either from the report of the commanding officer of the *Lynx* or from any other document presented by Indonesia in connection with Dutch or Indonesian naval surveillance and patrol activities that the naval authorities concerned considered Ligitan and Sipadan and the surrounding waters to be under the sovereignty of the Netherlands or Indonesia.

140. Finally, Indonesia states that the waters around Ligitan and Sipadan have traditionally been used by Indonesian fishermen. The Court observes, however, that activities by private persons cannot be seen as *effectivités* if they do not take place on the basis of official regulations or under governmental authority.

141. The Court concludes that the activities relied upon by Indonesia do not constitute acts *à titre de souverain* reflecting the intention and will to act in that capacity.

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142. With regard to the *effectivités* relied upon by Malaysia, the Court first observes that pursuant to the 1930 Convention, the United States relinquished any claim it might have had to Ligitan and Sipadan and that no other State asserted its sovereignty over those islands at that time or objected to their continued administration by the State of North Borneo. The Court further observes that those activities which took place before the conclusion of that Convention cannot be seen as acts *"à titre de souverain"*, as Great Britain did not at that time claim sovereignty on behalf of the State of North Borneo over the islands beyond the 3-marine-league limit. Since it, however, took the position that the BNBC was entitled to administer the islands, a position which after 1907 was formally recognized by the United States, these administrative activities cannot be ignored either.

143. As evidence of such effective administration over the islands, Malaysia cites the measures taken by the North Borneo authorities to regulate and control the collecting of turtle eggs on Ligitan and Sipadan, an activity of some economic significance in the area at the time. It refers in particular to the Turtle Preservation Ordinance of 1917, the purpose of which was to limit the capture of turtles and the collection of turtle eggs "within the State [of North Borneo] or the territorial waters thereof". The Court notes that the Ordinance provided in this respect for a licensing system and for the creation of native reserves for the collection of turtle eggs and listed Sipadan among the islands included in one of those reserves.

Malaysia adduces several documents showing that the 1917 Turtle Preservation Ordinance was applied until the 1950s at least. In this regard, it cites, for example, the licence issued on 28 April 1954 by the District Officer of Tawau permitting the capture of turtles pursuant to Section 2 of the Ordinance. The Court observes that this licence covered an area including "the islands of Sipadan, Ligitan, Kapalat, Mabul, Dinawan and Si-Amil".

Further, Malaysia mentions certain cases both before and after 1930 in which it has been shown that administrative authorities settled disputes about the collection of turtle eggs on Sipadan.

144. Malaysia also refers to the fact that in 1933 Sipadan, under Section 28 of the Land Ordinance, 1930, was declared to be "a reserve for the purpose of bird sanctuaries".

145. The Court is of the opinion that both the measures taken to regulate and control the collecting of turtle eggs and the establishment of a bird reserve must be seen as regulatory and administrative assertions of authority over territory which is specified by name.

146. Malaysia further invokes the fact that the authorities of the colony of North Borneo constructed a lighthouse on Sipadan in 1962 and another on Ligitan in 1963, that those lighthouses exist to this day and that they have been maintained by Malaysian authorities since its independence. It contends that the construction and maintenance of such lighthouses is "part of a pattern of exercise of State authority appropriate in kind and degree to the character of the places involved".

147. The Court observes that the construction and operation of lighthouses and navigational aids are not normally considered manifestations of State authority (*Minquiers and Ecrehos, Judgment, I.C.J. Reports 1953*, p. 71). The Court, however, recalls that in its Judgment in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)* it stated as follows:

> "Certain types of activities invoked by Bahrain such as the drilling of artesian wells would, taken by themselves, be considered controversial as acts performed *à titre de souverain*. The construction of navigational aids, on the other hand, can be legally relevant in the case of very small islands. In the present case, taking into account the size of Qit'at Jaradah, the activities carried out by Bahrain on that island must be considered sufficient to support Bahrain's claim that it has sovereignty over it." (*Judgment, Merits, I.C.J. Reports 2001*, para. 197.)

The Court is of the view that the same considerations apply in the present case.

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148. The Court notes that the activities relied upon by Malaysia, both in its own name and as successor State of Great Britain, are modest in number but that they are diverse in character and include legislative, administrative and quasi-judicial acts. They cover a considerable period of time and show a pattern revealing an intention to exercise State functions in respect of the two islands in the context of the administration of a wider range of islands.

The Court moreover cannot disregard the fact that at the time when these activities were carried out, neither Indonesia nor its predecessor, the Netherlands, ever expressed its disagreement or protest. In this regard, the Court notes that in 1962 and 1963 the Indonesian authorities did not even remind the authorities of the colony of North Borneo, or Malaysia after its independence, that the construction of the lighthouses at those times had taken place on territory which they considered Indonesian; even if they regarded these lighthouses as merely destined for safe navigation in an area which was of particular importance for navigation in the waters off North Borneo, such behaviour is unusual.

149. Given the circumstances of the case, and in particular in view of the evidence furnished by the Parties, the Court concludes that Malaysia has title to Ligitan and Sipadan on the basis of the *effectivités* referred to above.

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150. For these reasons,

THE COURT,

By sixteen votes to one,

Finds that sovereignty over Pulau Ligitan and Pulau Sipadan belongs to Malaysia.

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Oda, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby; *Judge* ad hoc Weeramantry;

AGAINST: *Judge* ad hoc Franck.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this seventeenth day of December, two thousand and two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Indonesia and the Government of Malaysia, respectively.

(Signed) Gilbert GUILLAUME,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge ODA appends a declaration to the Judgment of the Court; Judge *ad hoc* FRANCK appends a dissenting opinion to the Judgment of the Court.

(Initialled) G. G.

(Initialled) Ph. C.