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YEAR 2002

Public sitting

held on Friday 7 June 2002, at 3 p.m., at the Peace Palace,

President Guillaume presiding,

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

VERBATIM RECORD

ANNÉE 2002

Audience publique

tenue le vendredi 7 juin 2002, à 15 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

The Government of the Republic of Indonesia is represented by:

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

as Agent;

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

as Co-Agent;

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

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

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

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

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

as Counsel and Advocates;

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

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

as Counsel;

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

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

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

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

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

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

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

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

comme agent;

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

comme coagent;

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

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

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

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

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

comme conseils et avocats;

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

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

comme conseils;

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

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

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

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

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

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

Mr. Suwarno, Director for Boundary Affairs, Department of Internal Affairs,
Mr. Subyianto, Director for Exploration & Exploitation, Department of Energy & Mining,
Mr. A. B. Lopian, 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 Haviied Achmad, Head of District, East Kalimantan Province,
Mr. Adam Mulawarman T., Department of Foreign Affairs,
Mr. Ibnu Wahyutomo, Department of Foreign Affairs,
Capt. Wahyudi, Indonesian Armed Forces Headquarters,
Capt. Fanani Tedjakusuma, Indonesian Armed Forces Headquarters,
Group Capt. Arief Budiman, Survey & Mapping, Indonesian Armed Forces Headquarters,
Mr. Abdulkadir Jaelani, Second Secretary, Embassy of the Republic of Indonesia, The Hague,
Mr. Daniel T. Simandjuntak, Third Secretary, Embassy of the Republic of Indonesia, The Hague,
Mr. Soleman B. Ponto, Military Attaché, Embassy of the Republic of Indonesia, The Hague
Mr. Ishak Latuconsina, Member of the House of Representatives of the Republic of Indonesia,
Mr. Amris Hasan, Member of the House of Representatives of the Republic of Indonesia,

as Advisers;

Mr. Martin Pratt, International Boundaries Research Unit, University of Durham,
Mr. Robert C. Rizzutti, Senior Mapping Specialist, International Mapping Associates,
Mr. Thomas Frogh, Cartographer, International Mapping Associates

as Technical Advisers.

The Government of Malaysia is represented by:

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

as Agent;

- M. Suwarno, directeur des affaires frontalières, ministère de l'intérieur,
- M. Subiyanto, directeur de l'exploration et de l'exploitation, ministère de l'énergie et des mines,
- M. A. B. Lapian, expert sur l'histoire de Bornéo,
- M. Kria Fahmi Pasaribu, ministre conseiller à l'ambassade d'Indonésie à La Haye,
- M. Moenir Ari Soenanda, ministre conseiller à l'ambassade d'Indonésie à Paris,
- M. Rachmat Budiman, ministère des affaires étrangères,
- M. Abdul Havied Achmad, chef de district, province de Kalimantan est,
- M. Adam Mulawarman T., ministère des affaires étrangères,
- M. Ibnu Wahyutomo, ministère des affaires étrangères,
- Le capitaine Wahyudi, quartier général des forces armées indonésiennes,
- Le capitaine Fanani Tedjakusuma, quartier général des forces armées indonésiennes,
- Le colonel Arief Budiman, département de la topographie et de la cartographie, quartier général des forces armées indonésiennes,
- M. Abdulkadir Jaelani, deuxième secrétaire à l'ambassade d'Indonésie à La Haye,
- M. Daniel T. Simandjuntak, troisième secrétaire à l'ambassade d'Indonésie à La Haye,
- M. Soleman B. Ponto, attaché militaire à l'ambassade d'Indonésie à la Haye,
- M. Ishak Latuconsina, Membre de la Chambre des Représentants de la République d'Indonésie,
- M. Amris Hasan, Membre de la Chambre des Représentants de la République d'Indonésie,
- comme conseillers;*
- M. Martin Pratt, unité de recherche sur les frontières internationales de l'Université de Duhram,
- M. Robert C. Rizzutti, cartographe principal, *International Mapping Associates*,
- M. Thomas Frogh, cartographe, *International Mapping Associates*,
- comme conseillers techniques.*
- Le Gouvernement de la Malaisie est représenté par :***
- S. Exc. M. Tan Sri Abdul Kadir Mohamad, ambassadeur en mission extraordinaire, ministère des affaires étrangères,

comme agent;

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

as Co-Agent;

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

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

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

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

as Counsel and Advocates;

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

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

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

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

as Counsel;

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

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

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

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

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

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

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

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

as Advisers;

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

comme coagent;

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

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

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

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

comme conseils et avocats;

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

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

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

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

comme conseils;

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

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

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

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

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

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

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

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

comme conseillers;

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

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

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

as Technical Advisers.

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

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

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

comme conseillers techniques.

Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte et je donne la parole, au nom de la Malaisie, au professeur Sir Elihu Lauterpacht.

Sir Elihu LAUTERPACHT:

EFFECTIVITÉS

1. Mr. President and Members of the Court, it falls to me to respond specifically to the points that Indonesia has made in its opening on the subject of *effectivités*. I shall only touch incidentally on Indonesia's presentation of its own conduct — or lack of conduct. That has been examined by Professor Schrijver. Nor will I be discussing Indonesia's treatment of the oil concessions. They will be considered, together with the maps, by Professor Crawford. My task is to respond to the Indonesian commentary on the conduct of Malaysia and its predecessors. But the fact that the question of the nature and effect of the conduct of the Parties is thus being divided between counsel should not be allowed to suggest that there is any real comparability between the *effectivités* of the two sides. The Malaysian case is a positive one. I will recall the specific and cogent evidence of conduct on the British and Malaysian sides representing the assertion and reflection of their sovereignty. The Indonesian case, by contrast, is essentially a negative one. There is virtually nothing that Indonesia can present in the way of conduct in support of its claim to title. Nothing could demonstrate this difference, nor in the positions of the Parties, more compellingly than the manner in which the subject of *effectivités* was tackled by Indonesia in its opening round of argument. Take the speech of Professor Soons on 3 June. First, under the heading of "Dutch exercises of State functions: the activities of the Royal Netherlands Navy" he spoke of a list of Dutch warships which, as he claimed, "shows that the Dutch Government cared about the security of this part of its possessions"¹. But when we look at the Annex to the Indonesian Counter-Memorial that he cites in support of this assertion², what do we find? A list of names of 30 Dutch warships said to have been "present off the coast of north-east Borneo during the period 1895-1928". Leaving aside the initial four-year period of neglect from 1891-1895, one may well ask, what happened to the period from 1928 onwards to the date of Indonesian independence in

¹CR 2002/28, p. 33, para. 12 (Professor Soons).

²Counter-Memorial of Indonesia, Vol. 2, Ann. 32.

1949; and from the date of Indonesian independence to 1969? Did the Dutch and Indonesians lose interest in the area? And how did this presence off the coast of north-east Borneo manifest itself in relation to Ligitan and Sipadan? And in what way so as to reflect Netherlands sovereignty? No evidence has been presented on these points.

2. This sorry list is then supplemented by a reference to the presence in the area of the Netherlands navy ship *Koetei* in 1910 — said to have been “not surveying but patrolling”³. Even if this were so, it would not amount to an exercise of territorial jurisdiction. And even if it did, which is scarcely possible, it is not much of a contribution to the Indonesian position.

3. Then we come to the surveying activities of the *Macasser* in 1903, said to demonstrate “that the Dutch had interests there”⁴. But demonstrating an interest by carrying out a survey does not evidence sovereignty. If such could be the case is there any country in the world that could not be subject to a claim of sovereignty by Britain or the United States by reason of their worldwide surveying activities?

4. So, Mr. President, we come to what Professor Soons called “the most striking example of Dutch acts of sovereignty”, namely, the visit to the area of the *Lynx* in 1921⁵. Of course, this is “the *most* striking example”, because it is, apart from the scanty items already mentioned, the *only* example. And so it was presented in detail, for six pages of transcript. Well let us assume, without for a moment conceding, that the interpretation placed by Professor Soons upon this singular — and by singular I mean sole, as well as extraordinary — voyage is correct. What does it prove? Only that one commander of one Dutch naval vessel is said on one voyage to have treated Si Amil as British, and by implication, Sipadan as not being British. And even so, we must recall, he was careful to keep in touch with the British Resident at Tawau. Could it have been because the *Lynx* commander thought that as he might be sailing in British waters it would be prudent to establish with the local authorities that he was engaged in no more than a patrol seeking pirates?

³CR 2002/28, p. 33, para. 12 (Professor Soons).

⁴CR 2000/28, p. 34.

⁵*Ibid.*

5. Professor Soons was in due course followed on the subject by Professor Pellet⁶. He began with a disquisition on what he called “the limited pertinence of *effectivités* in the present case”. That he should do so is understandable, but the length at which he did so does not establish the correctness of his position, though it does recognize the difficulty that the British *effectivités* pose for Indonesia. In this respect he really did no more than repeat the position of Indonesia already set out in its Counter-Memorial⁷ and in its Reply⁸. Malaysia, for its part, has already dealt with these legal considerations in its Memorial⁹, and more fully in its Reply¹⁰. And the fact that it has done so succinctly does not detract from the strength of its position. The Court would not, I am sure, thank me for repeating these arguments now.

6. Nonetheless, a few sentences to recall what Malaysia understands by *effectivités* and their significance in this case may not be out of place at this point.

7. *Effectivités* consists of conduct attributable to a State which evidences its authority in, or in relation to, the disputed territory. The greater the number of *effectivités*, the longer the period over which they extend and the wider the range of governmental behaviour that they reflect, the more significant is their role. Conversely, the less there is of them, the less supportive they will be as evidence of sovereignty.

8. There are two ways in which *effectivités* matter in the present case.

9. First, by their indication of the manner, extent and period in which Malaysia and its predecessors asserted authority over the disputed islands, they support Malaysia’s rejection of the Indonesian interpretation of the 1891 Convention.

10. Second, even if, contrary to Malaysia’s contention, the 1891 Convention accorded title to Indonesia, the fact that throughout the ensuing 78 years until 1969, and even afterwards, Malaysia and its predecessors actually exercised authority over the islands, and Indonesia did not, means that whatever title Indonesia might conceivably have acquired in 1891 has by now been replaced by Malaysia’s title based on the presence and conduct *à titre de souverain* of Britain.

⁶CR 2002/29, pp. 17 *et seq.*

⁷Counter-Memorial of Indonesia, Vol. I, Chap. VII, Sec. 1.

⁸Reply of Indonesia, Vol. I, Chap. VII, Sec. 2.

⁹Memorial of Malaysia, Vol. 1, paras. 61-69.

¹⁰Reply of Malaysia, paras. 5.54-5.64.

11. I venture to recall the reference that I made yesterday, towards the close of my opening speech, to the views expressed by Judge Huber in the *Island of Palmas* case — which I restated in the following brief proposition: “A title based on a peaceful and continuous display of State authority would in international law prevail over a title of acquisition of sovereignty not followed by actual display of State authority.”¹¹ And, always assuming, though in no way admitting, that somehow the Netherlands acquired title to the islands in 1891, that is exactly what has happened in the ensuing 78 years. I need not repeat that there has been no actual display of State authority by the Netherlands or Indonesia. I need focus only on the peaceful and continuous display of State authority by Britain and Malaysia.

12. And how may I best do that in short compass and without undue or lengthy repetition of what has already been amply demonstrated in the written pleadings? The answer has been provided by Professor Pellet in the lists of *effectivités* that he has produced as Exhibits 49, 50, 51, 52 and 53 in the judges’ folders presented by Indonesia on 4 June. Subject to some qualification, they form a convenient and helpful starting point to the present necessary, albeit summary, review of the conduct of Britain and Malaysia. I am grateful to Professor Pellet for his contribution.

13. The first comment on his lists is that they are somewhat inflated. Seemingly, Professor Pellet intends, by loading the lists with items of either no or limited relevance, to diminish the significance of those that are important. If I may demonstrate the limitations of my qualifications in the French language, this is not a case of “*reculer pour mieux sauter*” but of “*sauter pour mieux reculer*”. By exaggeration or rejection, an attempt is made to reduce the significance of what remains.

14. I will not take issue with all those items in the General List relating to the period before 1891. So items 1 to 8 may be discarded. So may items 9 to 13, as being marginal to the issues. But not so items 14 and 15 — the American documents. Although marked by Professor Pellet as lacking all legal relevance, as Professor Crawford has shown, they demonstrate that the islands were never thought of as being Dutch. But they do more than that. Item 15 is the 1903 report on the islands under the sovereignty of the United States lying off the coasts of British North Borneo

¹¹CR 2002/30, para. 22.

prepared by Lt. Boughter, the Commanding Officer of the U.S. *Quiros*. It concludes with the following paragraph, under the final heading of “Islands of Danawan and Si Amil”, which is in any respect supportive of the facts that have been stated by Malaysia:

“I am informed that the island of Sipadan lying to the southward and westward of Danawan has always been understood by the natives as being an appanage of the latter named island whose inhabitants by native custom have enjoyed the monopoly of collecting the turtle eggs deposited there.”

So I emphasize the first point, namely that Sipadan was always regarded by those around as being an appanage of Danawan and Si Amil. And then he went on: “Recently Bajaus from other localities have been poaching and complaint has been lodged with the Resident at Lahat Datu.” — I emphasize the last words: “complaint has been lodged with the Resident at Lahat Datu”. Lt. Boughter was thus noting that the authority to hear a complaint about poaching was the British — the *British* — Resident, an important item of evidence confirming the existence and exercise of British jurisdiction in relation to Sipadan in 1903. Thus, when linked together with the Exchange of Notes between Britain and the United States allowing the British North Borneo Company to continue to administer the islands, these documents form part of the picture of British authority in the islands and cannot properly be classified as having no legal pertinence.

15. Items 18 and 19 are of the same order of significance. They show clearly that in 1910 the British North Borneo Company authorities — the Assistant District Officer of Semporna and the Resident of the East Coast — considered that the resolution of disputes over the collection of turtle eggs on Sipadan was a matter for their concern. The same is equally true of item 21 — the 1916 letter from the Acting Resident of the East Coast at Lahad Datu relating to the grant of a monopoly to collect turtle eggs on Sipadan, the last paragraph of which, with its reference to Ordinance XXX of 1914, shows the relevance of item 20 — an Ordinance or Proclamation of the Governor of North Borneo which was clearly understood to apply to Sipadan¹² but was nonetheless dismissed by Professor Pellet. Equally pertinent are items 22 and 23 which evidence the operation of the licensing system in relation to Sipadan. The applicability to Sipadan of item 24 (the 1917 Turtle Preservation Ordinance) is evident on its face.

¹²Memorial of Malaysia, Vol. 4, Ann. 93

16. I could continue to recall the role of these and later documents relating to the collection of turtle eggs which demonstrate the applicability and application of British legislation to Sipadan and the corresponding exercise of British jurisdiction. But that would not by itself meet Professor Pellet's detailed use of his scalpel. I should look at some of his specific comments.

17. There is, he says, no mention of Ligitan. True. But that does not diminish the value of the evidence relating to Sipadan. And if Sipadan was British, so was Ligitan. For one thing, Ligitan appears on the Dutch 1891 Explanatory Memorandum map as lying north of the 4° 10' line. But more important, as I said yesterday, Sipadan and Ligitan are each of them and together part of a group of islands, a social and economic unity. If Sipadan was British and not Dutch, it follows that Ligitan was British and not Dutch.

18. Professor Pellet next observed that the inhabitants of Danawan were not alone in collecting turtle eggs from Sipadan. He said that Bajau from other localities poached the eggs. There is no evidence that the scale of such poaching was significant. In any case what can the fact of theft have to do with the title of the local sovereign? And as we have just seen, poaching was dealt with by the British Resident at Lahad Datu.

19. We are told next that the collection of turtle eggs was a matter of tradition. So it may well be. But that cannot contradict the evidence of the concern of the British authorities with the subject and of the existence and application of British legislation. The tradition was recognized and enforced by those authorities, and disputes concerning it were settled by them. These are classic governmental activities, appropriate to the nature of the situation and the territory.

20. As to the Turtle Ordinance of 1917, Professor Pellet invokes the existence of the First World War as a possible explanation of why the Netherlands administration might have been unaware of it. If at all true, it might explain why they may not have become aware of the Ordinance in 1917. But it does not explain why they did not become aware of it in 1918, 1919, 1920 and each subsequent year of its existence and application. The real explanation of the absence of Netherlands reaction is that the Dutch were not concerned with what happened in Sipadan and Ligitan any more than they were concerned with other developments in British North Borneo.

21. Professor Pellet asks whether one can infer title to Sipadan from the legislative activity reflected in the Turtle Preservation Ordinance. Why not? The enactment of legislation is one of the most obvious and accepted displays of sovereign authority. Surely it is every bit as cogent as, and indeed infinitely more cogent than, the solitary voyage of the *Lynx*.

22. At this point in his speech, Professor Pellet passed to the material relating to the establishment of the Megapode Reserve in 1932. In so doing he omitted to mention item 26 in his list, the 1922 Report on Commercial Sea Products from the Government of British North Borneo¹³. However, this item should not be so lightly discarded. It states, particularly at page 47, that “the sandy shores of our islands, notably Taganak . . . Turtle Island . . . and Sipadan Island in Sibuko Bay, abound with turtle eggs”: “our islands”. If, therefore, the ignorance of the Netherlands authorities of the existence of the Turtle Preservation Ordinance had persisted for the whole of the period since 1917, the appearance of this report in 1932 would have put them on notice that Sipadan was regarded by the British as one of “our islands”. Or were the Dutch authorities also unaware of this report?

23. Nor, while on the subject of turtle eggs, did distinguished counsel for Indonesia refer to other items reflecting official British activity in relation thereto, although he very properly included the items in his list¹⁴.

24. So I return now to the next item in Professor Pellet’s argument: the question of the megapode reserves or bird sanctuaries¹⁵. As to this, Professor Pellet can find nothing more to say than that there is no evidence of any concrete measure of implementation. It is difficult to understand this criticism. What more is needed in the way of implementation than the notice in Annex 101 that the named islands, including Sipadan, are reserved for the purpose of bird sanctuaries? This was an official Government notice, published in an *Official Gazette*. As for the repetition of Indonesia’s comments on the 1935 map showing Sipadan as a bird sanctuary, all that

¹³Memorial of Malaysia, Vol. 4, Ann. 99.

¹⁴See Memorial of Malaysia, 1, p. 67.

¹⁵CR 2002/29, p. 29.

needs to be said in response has already been said in the Malaysian Reply¹⁶ and need not be repeated here. And I respectfully commend that Reply once more to your attention.

25. However, since we are speaking of evidential maps here, it is appropriate to draw attention to one map that appears to have escaped Professor Pellet's net. It is the 1958 map of the Lahad Datu Police District prepared by S. M. Ross¹⁷. This shows both Sipadan and Ligitan as falling within that district. Indeed, the district boundary line is also clearly shown on the map as running south-east from Kalampang and extending into the sea to the south of Sipadan. It hardly needs saying that the inclusion of the two islands in the Police District is a further clear indication that Britain considered that it had jurisdiction in both places, as already shown in Lt. Boughter's report 55 years earlier.

26. We come next to Indonesia's comments on the construction and maintenance of what Professor Pellet has chosen to downgrade to "*lanternes lumineuses*" since, in his view, they are not "*phares*" or lighthouses. Nonetheless, he concedes that they are "true *effectivités*", his words: "*véritables effectivités*", but contends that their significance is very limited. The basis for this contention is a legal argument that the construction of a lighthouse does not prove a wish to act *à titre de souverain*. This may well be so, at any rate when the construction of a light is an act taken by itself, without being accompanied by other evidence of State activity. But here the establishment of the lights at Ligitan and Sipadan are not isolated acts. They are part of a pattern of exercise of State authority appropriate in kind and degree to the character of the places involved; a standard expressed by the Permanent Court in the *Eastern Greenland* case. They cannot be dismissed as legally irrelevant. Their construction was sufficiently significant to merit a mention in a section on the "Development and Maintenance of Navigational Aids" in the Annual Report of 1961 of the Colony of North Borneo¹⁸. Nor can their relevance be dismissed by an *ex post facto* grant of so called "agreement" to their maintenance some 26 years later, or by saying yet again that earlier Indonesian silence reflected "a difficult political situation", comparable presumably to Netherlands silence regarding the Turtle Ordinance in 1917 due to the First World War.

¹⁶Reply of Malaysia, pp. 73-74, paras. 5.21-5.22.

¹⁷Memorial of Malaysia, Atlas, No. 18.

¹⁸Memorial of Malaysia, 4, Ann. 110.

27. And so, Mr. President and Members of the Court, we move towards the conclusion of this section. You will observe that I am saying nothing about the post-1969 *effectivités*. That does not reflect any acceptance by Malaysia of Indonesia's contention that such material is not admissible. I have already made my submissions in this connection and will not repeat them. But the point that matters is that Malaysia's position is sufficiently established by the pre-1969 material. Britain had a good title to the islands which Malaysia inherited. Malaysia has maintained that position. Indonesia has presented no evidence to undermine that title. There is, therefore, no point in taking the Court's time to go over material which has already been sufficiently developed in the written pleadings.

28. I pass therefore to the conclusions offered by Professor Pellet. He argued that the possession of Malaysia did not satisfy three requirements: it was not public; it was not *à titre de souverain*; and it was not continuous. I will not contest the requirements because Malaysia has satisfied them all. Permit me to recall how.

29. As to *publicity*. British presence in the islands or part of the island group, and as administered from the Semporna Peninsula, has always been open and has never been opposed. It does not need to be publicized in every particular. The governmental structure was a matter of public knowledge. It was acknowledged by the fact that the Commander of the *Lynx* on its famous patrol in 1921 thought it appropriate to communicate his intentions to the District Officer at Tawau. Particular legislation was public: Proclamation XXX of 1914; the Turtle Preservation Ordinance of 1917; the Government Notification of 1933; the Notices to Mariners; the North Borneo Fauna Conservation Ordinance (1963). All these were public: so was the 1922 report on commercial sea products from the Government of British North Borneo. This was sufficient publicity — if it had been taken notice of — to make Malaysia's position clear.

30. Was the conduct *à titre de souverain*? Professor Pellet questions the sovereign position of the BNBC in the area. This is really so feeble a point that it deserves no reply. What else could the governmental activity of the company in the area have been, until eventually it ceded its rights to the British Government? And the fact that some of the illustrations of BNBC authority relate to the settlement of private disputes does not alter the sovereign character of the jurisdiction that it exercised during that period.

31. What then about the *continuity* of the exercise of Malaysian authority? The fact that the evidence does not cover every day in every way does not alter the underlying continuity of the administration. Indonesia has produced no evidence to contradict the historical and legal continuity underlying, and implicit in, the specific terms adduced by Malaysia.

32. There is, Mr. President and Members of the Court, a serious measure of absurdity, an inversion of reality, in this attempt by Indonesia to put Malaysia in the position of having to prove its title by reference to a standard of conduct that Indonesia's own behaviour does not remotely approach. If the Netherlands acquired a title to the islands in 1891, it was up to it to maintain it. And to do so by conduct comparable to that which it now demands of Malaysia. But what does the Court get? A close scrutiny of the details of British and Malaysian conduct which cannot conceal the true governmental position. And what does the Court get as regards the conduct of Indonesia? The *Lynx*, the *Lynx* and yet again the *Lynx*.

33. Mr. President and Members of the Court, I respectfully submit that the evidence of British and Malaysian activity — even if taken only for the period to 1969 — is more than adequate to support both Malaysia's interpretation of the 1891 Treaty by reference to the subsequent conduct of the Parties and Malaysia's title on a basis of historical consolidation. It also shows that the Netherlands and Indonesia have done nothing in relation to the islands to maintain their claimed title.

34. I thank you, Mr. President and Members of the Court, for having allowed me once again the honour of addressing you, and I now respectfully request you to call upon Professor Crawford.

Le PRESIDENT : Je vous remercie, sir Elihu. Je donne maintenant la parole au professeur James Crawford.

Mr. CRAWFORD: Mr. President, my speech will last just slightly less than an hour and I will leave it to you to indicate if you would like to take the coffee break during that period or struggle through to the bitter end!

Le PRESIDENT : Je vous en prie. Commencez, nous verrons plus tard.

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

THE MAPS

Introduction

1. In this final presentation in Malaysia's first round, it is my task to take you briefly through the map evidence, and to deal in that context with the oil licences, before briefly summarizing Malaysia's case. I will show that overall the map evidence provides clear support for Malaysia's claim to the islands — and no specific support for Indonesia. To assist the Court you will find in tab 51 in your folders, a list, in chronological order, of all the maps of the area which are reproduced in the pleadings of both Parties, with references. And, again, the chronological order is helpful. There are 77 maps in total, excluding maps produced specifically for the purposes of the case.

2. I must acknowledge the assistance of members of the Malaysian Department of Survey and Mapping, under their Director of Survey, Mr. Hasan Jamil, for the enormous amount of work they have done in the preparation of the maps. In particular I should like to thank Mr. Tan Ah Bah and Mr. Hasnan Hussin.

3. As the Court will be aware, all maps are not equal. Shakespeare wrote that some men are born great, some achieve greatness and some have greatness thrust upon them¹⁹. Now whether this is true for men, it is certainly true for maps. Some maps are born great — in particular, those annexed to treaties. These are the category 1 maps, legally the great maps. Then there are maps that achieve greatness, because they are endorsed and put forward by States in the context of international relations as reflecting a boundary, and maybe they are accepted by other States as well, as the Annex 1 map was in the *Temple* case. The Annex 1 map achieved greatness²⁰. These are the category 2 maps.

4. And then there are category 3 maps, the miscellaneous maps, the maps that are none of the above, the maps that have no international endorsement at all. These maps have no international status. They are more or less reliable or more or less unreliable depictions, on some scale or

¹⁹W. Shakespeare, *Twelfth Night*, Act 2, scene 5.

²⁰*I.C.J. Reports 1962*, pp. 33-35.

another, of something or another. They may be privately published; they may be internal maps which have never been published at all. Thus category 3 maps cover a very wide range. Indeed it is impossible to work much with maps in the context of international boundaries, with maps in this third category, without being impressed — and one might say depressed — at their variability, inconsistency and imprecision on points of detail. This is why, as you have repeatedly said — most recently in the *Namibia/Botswana* case²¹ — such maps are never in themselves dispositive, unlike maps in the first two categories, which are or may be. In *Namibia/Botswana*, you quoted with approval a passage of the Chamber in *Burkina Faso/Mali*, where it said that these 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 . . . a document endorsed by international law with intrinsic legal force for the purpose of establishing territorial rights [can do] . . .”.

There speaks a Chamber with a lot of experience of looking at maps. The contrast is clear: category 3 maps consists of maps which are, at best, “only extrinsic evidence”. They are to be thrown into the pot “along with other evidence of a circumstantial kind”²². They have no special status at all. So let me look at the maps under these three categories.

Category 1. The annexed maps

5. I turn to the first and most important category, category 1, the maps annexed to a treaty and endorsed by the treaty as an accurate description of the boundary. As we have shown, the Dutch internal map is not in this category. But of the 77 maps in the record, five are treaty maps: of these three show treaty lines which are, in some way or another, relevant to the dispute.

6. [Tab 52: 1907 map] The first is the map annexed to the 1907 Exchange of Notes between Britain and the United States, which is tab 52 in your folders²³. I have already described the Exchange of Notes, it provided that the map was an integral part of the agreement. You can see that the red line on the annexed map goes down to 4° N, well to the south of the islands, the location of which was by 1907 securely known as a result of the survey voyages of the *Egeria* and other vessels. All the islands to the south and west of the red line but beyond 9 nautical miles from

²¹*I.C.J. Reports 1999*, p. 1045 at pp. 1098-1100 (paras. 84-87), citing the Chamber in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, *I.C.J. Reports 1986*, p. 582, paras. 54, 56.

²²*I.C.J. Reports 1986*, p. 582.

²³Memorial of Malaysia, Vol. 2, Anns. 23-24, and for the map see Memorial of Malaysia, Vol. 5, map No. 6.

the coast were acknowledged to be administered by the BNBC and to belong to the United States.
[End 1907 map]

7. [Tab 53: 1915 map] The second of the annexed maps is that annexed to the 1915 Anglo-Dutch Agreement: it is tab 53 in your folders. Professor Cot has already discussed it. It is inconsistent with Indonesia's position. The red line showing the boundary stops at the east coast of Sebatik. There is no indication on the map, in the agreement, in the *travaux* of anywhere else that the 1915 map was not a complete depiction of the boundary prescribed by Article IV of the 1891 Boundary Convention. The map was carefully prepared, based on a joint report, the Tawao Report, of 1913. If you had asked the authors of the Tawao Report whether their line was a complete and accurate description of the 1891 Convention's provisions — specifically Article IV — they would have said “of course it is, that's what we were sent here to do”. And indeed they did say that in paragraph 3 of their Report: “We have determined the boundary between the Netherland territory and the State of British North Borneo as described in the Boundary Treaty . . . as taking the following course . . .” And the course of the boundary was “[t]ravelling the island of Sibetik” and it is described from east to west²⁴. Not a description consistent with Indonesia's position. [End 1915 map]

8. [Tab 54: 1930 map, “Philippine Islands Southwestern Part”] The third annexed map is that attached to the 1930 Anglo-American Treaty, which is tab 54²⁵. As I noted this morning, there were two annexed maps: this is the relevant one. The line shown on the map is not very easy to see, so we have highlighted it in red. According to the Treaty, all the islands to the north and east of the line were part of the Philippines, all those to the south and west were part of British North Borneo. [End 1930 map]

9. [Tab 55: composite map showing combined effect of 3 lines on annexed maps] It is instructive to look at the combined effect of the three annexed treaty maps, the three category 1 maps that are relevant, and you can see this in tab 55. First, the 1915 map, which confirms that the effect of the 1891 Convention is a line stopping at the east coast of Sebatik. Then the 1907 Durand line: all the islands to the west and south of that line and beyond 9 miles from the coast are

²⁴Memorial of Malaysia, Vol. 2, Ann. 25, pp. 95-96.

²⁵Memorial of Malaysia, Vol. 5, map No. 25.

administered by the BNBC pursuant to the 1907 Exchange of Notes. Then the position is finally regularized by the 1930 Treaty, which takes back to the Philippines some islands further north, in particular the Turtle Islands group — which are in that indentation marked “1930 Treaty” — but definitively leaves the Ligitan Group to North Borneo. This is the legal effect of the internationally agreed maps, the category 1 maps in this case. [End composite]

10. Finally I should mention the map annexed to the 1969 Agreement on Continental Shelf Delimitation²⁶. The Parties agree that this map did not delimit any maritime areas off the east coast of Borneo. The reason it did not is that Indonesia had just made its claim to the two islands. Malaysia of course rejected that claim, and the Parties proceeded only to delimit the maritime boundary elsewhere. Evidently the 1969 map does not establish anything for the east coast of Borneo. It was concluded under an express reservation of the competing claims to the islands. Nonetheless, Indonesia attempts to argue that the innominate lines and dots on that map amount to a concession by Malaysia as to the correctness of Indonesia’s claim²⁷. This is of course absurd: a State does not at the same time vigorously reject a new territorial claim made by another State and immediately sign a map which concedes the claim. Malaysia certainly did not do so.

Category 2. Maps embodying international claims by the originating State

11. Mr. President, I move from the five treaty maps to the second class of maps, the category 2 maps. These are those which, although not agreed between the States concerned or annexed to treaties, are put forward and endorsed *in the context of interstate relations* in such a way as to give them intrinsic legal significance. For example, a map may be used in negotiations by one State to specify a claim against the other State involved in the negotiations, in which case it reflects the limits of the former State’s territorial claims.

12. In the present case there are five category 2 maps, and it is significant that they are prepared one by each of the five principal actors reflecting their territorial claims or holdings in the region. Let me take you briefly through them.

²⁶Memorial of Malaysia, Vol. 2, Ann. 32, and for the map itself, Memorial of Indonesia, Map Atlas, map No. 17.

²⁷Transcript.

13. [Tab 56: CMI, Vol. 2 Ann. 22] The first is the map of 1888, which is tab 56. It was sent as an attachment by Count von Bylandt, to his Ambassador in London on 28 July 1889, and it was communicated during the negotiations to the British side²⁸. Both the Dutch and the British accepted that the red line drawn on the map reflected the “Northern Boundary of Dutch possessions” in Borneo. There is no question of any claim to island or land territory to the east of Batu Tinagat. All the depictions of the Dutch claim on the east coast, whether emanating from the Dutch or the British, are consistent in showing that the Dutch claims went no further than Batu Tinagat. The documentary record is also entirely consistent with this. [End CMI, Vol. 2 Ann. 22]

14. [Tab 57: United States Hydrographic Office Map 1903] The second of these maps has become controversial, and I suppose we may say that it is on the fringes of category 2. It is the United States Hydrographic Office map of 1903, which is tab 57. It shows the Ligitan Group, including Sipadan, as “islands . . . under the sovereignty of the United States of America”²⁹. This of course was issued at the same time, though by an independent process, as the voyage of the *Quiros* — the voyage during which both Sipadan and Ligitan were claimed by the United States. Indonesia argues that this map was not formally disseminated by the United States but was in effect withdrawn³⁰. I dealt with that argument already, it is only half true: the dissemination of the map was halted, but the United States never retreated from the legal basis on which the map was prepared, as I demonstrated this morning. Moreover the reason the line on this map was put on hold “for the moment” had nothing whatever to do with the Netherlands and everything to do with the BNBC claim to the islands³¹. In the event the British, mindful of the position it had taken in 1885, agreed that the islands formally belonged to the United States³². It may be noted that this episode was more explicit than Thailand’s concession of French sovereignty by reference to the Annex 1 map in the *Temple* case. There is a further important difference between the two cases. The United States analysis of the situation arising from the transactions subsequent to 1878 was not

²⁸Memorial of Malaysia, Vol. 3, Ann. 47, p. 66.

²⁹Memorial of Malaysia, Vol. 5, map No. 5.

³⁰Reply of Indonesia, paras. 6.33-6.34.

³¹Memorial of Malaysia, paras. 5.27-5.37 and documents there referred to.

³²Memorial of Malaysia, Vol. 3, Ann. 66.

merely cartographically clear — as the Annex 1 map was cartographically clear. It was legally correct, as the Annex 1 map was not. [End US map]

15. [Tab 58: Durand map] At any event, there is no indication that the United States resiled from the position shown on this map prior to the conclusion of the relevant treaties. That position is confirmed from the BNBC side in the Durand map of 1903, which was annexed, or rather the line on the Durand map was annexed to the 1907 Exchange of Notes which is tab 58. Unfortunately, despite vigorous searching, we have not been able to find the original map which was attached to the BNBC despatch of 13 July 1903 from the company to the British Foreign Office³³; we have the despatch, but not the map. But all the documentary evidence supports the conclusion that the line shown on the screen is in truth what it says that it is, the “Red line referred to in paragraph 24 of despatch dated 13 July 1903 to Foreign Office”; that was the despatch of the BNBC Governor Martin immediately following the voyage of the *Quiros*. The line depicts the islands actually administered by the BNBC; it also of course depicted their claim. It plainly includes both Ligitan and Sipadan. [End Durand map]

16. I turn now to two more recent maps which the Parties to this dispute, Indonesia and Malaysia, have produced and published in order to depict their maritime claims. Maritime boundaries depend on land boundaries, as you have recently been told, and these maps thus reflect, in the context of inter-State claims, the views of the Parties. Moreover not only are they official maps, they were carefully prepared because the question of maritime boundaries was of huge potential significance to the Parties. They are not just occasional productions.

17. [Tab 59: Indonesian continental shelf map; enlarge North Borneo segment] The first of these is the map annexed to Indonesian Act No. 4 of 18 February 1960, depicting the new Indonesian archipelagic baselines claim³⁴. The map is on a scale of 1:14 million, but it is a summary of a process of careful preparation and study, and the proclamation of Act No. 4 was rightly treated by Indonesia as marking an important moment. You can see there are a large number of identified turning points, each one of which of course was separately calculated. It was the product of a careful process of preparation.

³³Memorial of Malaysia, Vol. 3, Ann. 59.

³⁴Memorial of Malaysia, Vol. 4, Ann. 107; Memorial of Malaysia, Vol. 5, Map No. 7.

18. Now as we know from Professor Pellet, on the east coast of Borneo, the baselines shown are inconsistent with any territorial claim to islands such as Sipadan and Ligitan. If those islands had been claimed, the baselines would have been quite different: [add red line] there would have been red lines as now shown, superimposed on the map, drawn from Turning Point 37 sharply north-eastwards up to the islands. The point at the end, presumably on Ligitan, would have been Turning Point 36³⁵, whereas Turning Point 36, in fact, is on Sebatik.

19. Professor Pellet sought to excuse Indonesia for its failure to draw that line. He argued that that a line would not follow the general direction of the coast and would therefore violate the law of the sea³⁶. But there is absolutely no indication that that was the reason for Indonesia's not using Ligitan and Sipadan in 1960. Indonesia will have in its archives the information about the decisions as to the turning points; it has produced nothing to support Professor Pellet's assertion. And just a quick look at the baselines indicates that the assertion is, well, the sort of thing an advocate would say when in difficulty. [End tab 59]

20. [Tab 60: Show selected aspect of 1960 map] You can see on the screen, and in tab 60, another segment of the 1960 baselines. It covers an area further to the east in the region of Turning Points 70 to 73. You can see there is no indication of restraint here, and we could have chosen a number of other examples. In short, we may presume that the reason Indonesia did not draw its baselines to Ligitan was not restraint, but that it did not claim the two islands in 1960. [End Indonesian map]

21. [Tab 61: Malaysian continental shelf map 1979] Finally we have the 1979 map, "Territorial Waters and Continental Shelf Boundaries of Malaysia", which is tab 61³⁷. It shows territorial sea and continental shelf boundaries in general terms including, of course, those drawn around Sipadan and Ligitan. Again it is unequivocal. By contrast, Indonesia has never, at any stage, with or without disclaimer, produced a single map showing the two islands as Indonesian. Nor did the Dutch ever do so, as I will demonstrate in a moment. [End Malaysian continental shelf map 1979]

³⁵See Memorial of Malaysia, p. 81, Insert 10.

³⁶CR 2002/29, pp. 54-55, paras. 12-17.

³⁷Memorial of Malaysia, Vol. 5, map No. 19.

22. Mr. President, Members of the Court, I have taken you through five maps in category 2, reflecting the claims or holdings of the Parties. The 1888 Dutch map, reflecting the eastern limit of its claim. The United States map of 1903, reflecting the legal claims made during the voyage of the *Quiros*, even though they were put on hold pending negotiations with the British. The Durand line, reflecting the view of the BNBC's administration. And the modern, considered maritime claim lines of Indonesia in 1960 and Malaysia in 1979. So there are eight relevant maps in the first two categories of maps. Each one of them reflects the Malaysian position in this case. Not one of them reflects the Indonesian position.

The category 3 maps

23. Mr. President, Members of the Court, that leaves another 67 maps in the record and we have approximately two hours. The maps fall into the residual category, category 3. They are simply indications of a general kind. The vast majority of them show the islands as Malaysian, or do not show the islands at all. A few are equivocal. One, the British map shown by Ms Malintoppi on Tuesday³⁸, appears to show Sipadan as Indonesian and Ligitan as Malaysian. It contains a disclaimer. It is completely out of line with the other maps and with the positions of both Parties in the case, and there is nothing more to be said about it.

24. [Tab 62: Internal Dutch map (1891) extract] Much more important for Indonesia in this case, of course, is the internal Dutch map of 1891. Indeed it has been singled out by Indonesia as the linchpin, the centrepiece, the focal point of its case. Indonesia has certainly attempted to thrust greatness upon this map!

25. You can see the relevant part of that map yet again on the screen, in tab 62 in your folders. It actually has not been carefully analysed. There are three points to be made about it, geographical, legal, historical.

26. First, the *geographical* point. You can see that the line out to sea stops just after "P. Maboel", that is Maboel Island, which the map attributes to North Borneo. No island is shown south of the line, or south of the extension of the line that would be if the line was extended further east, except of course for the southern portion of Sebatik itself. The map does not show Sipadan.

³⁸CR 2002/29, p. 49, para. 60.

But it does show a small unnamed island with a fringing reef well to the east and slightly to the north, it is ringed on the map now. This is Ligitan, with part of the star-shaped reef. It is exactly where the 1890 British Sailing Directory put it, at “latitude 4° 12 ½’N, longitude 118° 54’ E”³⁹. The Sailing Directory, which is in the Malaysian Counter-Memorial, is by far the best contemporary evidence of what was generally available knowledge as to the location of the islands. The *Egeria* did not reach Ligitan and conduct a detailed survey until the following year. The Sailing Directory incidentally does not give the co-ordinates of Sipadan. Someone who had the internal Dutch map and the Sailing Directory would think that the two islands belonged to North Borneo; one of them is north of 4° 10’, the other one, there are no co-ordinates. Someone armed only with the internal map would think that no island was attributed to Dutch Borneo by the line, and that the unnamed island was attributed to North Borneo. As I have said, the unnamed island is Ligitan.

27. Thus the internal Dutch map locates one of the disputed islands to the north of 4° 10’ and does not show the other one. The line on the internal Dutch map *does not attribute any islands to Dutch Borneo*. It is only in hindsight that we know that both islands are south of 4° 10’. The negotiators gave no indication of knowing that. In 1891, as I have said, the British surveys, which accurately located the islands, had not yet been carried out. So that is the geographical point. [End internal map]

28. [Tab 63: show first draft of the internal Dutch map] The *legal* point my colleagues have already made. Both in its first draft and in its final draft, this is an internal map. It was prepared after the conclusion of the Treaty by someone on the Dutch side. We have the first draft of the map⁴⁰, which shows an even shorter line, stopping much further west. You can see that on the screen and in tab 63. Of course the internal Dutch map is not part of the *travaux préparatoires*. The best a later, well-informed Dutch official could say was that it was “not impossible” that it was known to the British⁴¹. “Not impossible”: it is a stark contrast with “officially known”. In fact the British had picked up a copy, as we know. But it was not officially communicated and there was

³⁹See Counter-Memorial of Malaysia, para. 1.3.

⁴⁰Memorial of Malaysia, Vol. 1, insert 15.

⁴¹Counter-Memorial of Malaysia, Vol. 2, Ann. 5, pp. 27-28.

no obligation whatever on Britain to react to it. But there was nothing to react to. The internal Dutch map did not attribute any islands to Dutch Borneo. [End first draft]

29. And the *historical* point is this: after its brief appearance in the Dutch parliamentary record, the map disappeared even as an internal map, until the 1920s and the discussion over the territorial sea, when it resurfaced. It was at no stage part of the debate, even a Dutch debate — the line out to sea is not mentioned in the Dutch parliamentary proceedings. Still less was it mentioned in any subsequent diplomatic discussions prior to 1969. There was simply no Dutch claim out to sea, which the internal map might or might not support. Thus even if the internal Dutch map graphically supported the Indonesian case — which it does not —, it is as lacking in historical significance as it is lacking in geographical pertinence or legal weight. That map truly has had greatness thrust upon it, but unfortunately for Indonesia it is too slender a thread to bear the weight.

30. Mr. President, Members of the Court, getting rid of those two maps reduces the number in category 3 down to 65. It would be tedious to take the Court through all these 65 maps, and I will not do so. I want only to make three general points.

(a) *The absence of any Dutch or Indonesian map claiming the islands on the basis of the 1891 Convention*

31. The first point is to ask whether the Dutch and Indonesian maps produced since the ratification of the 1891 Convention support Indonesia's case. You will find, at tab 64, a list of all the post-1891 Dutch and Indonesian maps, with references, in chronological order. They cover virtually a century, from 1894 to 1992. There are 15 Dutch maps on that list and seven Indonesian maps, a total of 22.

32. I will let you look at them for yourself, but not one of these 22 Dutch and Indonesian maps shows the two islands as belonging to Dutch Borneo or Indonesia — not one. Some do not show the islands at all. Those that do show the islands, overwhelmingly show them as belonging to North Borneo (Sabah).

33. I am just going to take three examples, two from the Dutch period, one from the Indonesian.

34. [Tab 65: 1913 Dutch map: MM, insert 2] The first is the "Sketch-map of the Southern and Eastern Divisions of Borneo", published by the Netherlands Indies Topographical Office in

Batavia in 1913⁴², which is tab 65 in your folders. It shows the 1891 boundary stopping at the east coast of Sebatik. Well to the east it shows the Ligitan Group. They are evidently part of the Government of British North Borneo, along with the other maps, though of course by this stage, pursuant to the 1907 Exchange of Notes. [End 1913 Dutch map]

35. [Tab 66: 1941 Dutch map: CMM, map 7] The second of the Dutch maps I want to show you is the last Dutch map in the record. It dates from 1941, and again was published in Batavia. You can see an extract on the screen, and it is tab 66 in your folders. It shows accurately both the 1891 Anglo-Dutch boundary and the 1930 Anglo-American boundary. In between the two boundaries it shows the Ligitan Group. The whole complex of islands off Semporna is evidently part of British North Borneo. And you can tell this from a nice point of detail. Note that in this Dutch map the Dutch islands have the abbreviation "P." for *pulau*, for example P. Oost Noenoekan. Then look at the islands around Semporna. The abbreviation for them is "I.", for island, thus Sipadan Island. Whoever drew that map in 1941 wanted to distinguish between the Dutch islands with *pulau* and the British islands with the abbreviation "I." and did so in the clearest typographical way, on a map which clearly and correctly represented the boundary situation in the region. This is the Dutch heritage. [End 1941 map]

36. [Tab 67: 1976 Indonesian map: CMM, map 10, detail] Then let me take you to one of the six Indonesian maps in the record, which is the map entitled "Bandar Seri Begawan", published in Jakarta in 1976, after the dispute had arisen. It is tab 67. It does not contain a disclaimer. You can see the 1891 boundary across Sebatik, stopping at the east coast — although it is not terribly visible here, I can assure you that it is there as a line of crosses. You can see the 1930 Anglo-American boundary, which is now the boundary between the Philippines and Sabah. You can see the cluster of islands forming the Ligitan Group. Would anyone looking at this map have thought that two of these islands were part of Indonesia? Of course not. [End tab 67]

37. Mr. President, Members of the Court, the conclusion to be drawn from the 22 Dutch and Indonesian maps in the record is that the two islands were never thought of or claimed to be part of

⁴²Memorial of Malaysia, Map Atlas, map 1.

Dutch Borneo or, after 1945, Indonesia. That is entirely clear, and it is entirely consistent with the position taken by the Dutch and by Indonesia up to 1969.

38. This needs some emphasis. Indonesia does not claim that anything that has happened since 1945 actually changed the legal situation. It has done its best to argue that nothing could have changed the legal situation. If the Dutch did not own the islands in 1945, Indonesia does not suggest that any event or transaction since then could have changed the situation. Nor was there any event or transaction capable of doing so. But the map evidence confirms that the Dutch did not claim the islands as part of Dutch Borneo before 1945. Indonesia succeeded to the islands and territories of the Dutch East Indies on independence. Those territories did not include the two islands. Indonesia could not succeed to a territorial claim the Dutch never made. It did not have entitlements which the Dutch at no point ever asserted. It succeeded to the Dutch territorial position positively and negatively. It acquired whatever the Dutch had acquired. It failed to acquire whatever they had failed to acquire — and *a fortiori*, it failed to acquire what they had never claimed. It is as simple as that.

Mr. President, it will take me about another half an hour. I am in your hands.

Le PRESIDENT : Continuez, je vous prie.

Mr. CRAWFORD:

(b) *The oil practice of the Parties*

39. The second point I want to make concerns the oil practice of the Parties since independence. Indonesia seeks to use the oil practice to show that it did, and/or Malaysia did not, claim the islands. But the documentary record — which is very slight — does not begin to establish this. In fact there seems to be very little oil hereabouts which is the reason why there is very little documentary record.

40. [Tab 68: MI, map 6.2] There is only one original map in the record dealing with oil concession activity, apart from the continental shelf claim maps that I showed you. That one map is a Malaysian map of 1968, depicting the oil prospecting licences and leases granted on and

offshore of Sabah as a whole⁴³. You can see it on the screen. This map does not show any islands at all south of Semporna, and is of a generic character. It is obviously not intended to reflect the territorial position of particular islands which are not depicted.

41. For its part, Indonesia has never issued any exploration licence covering the area of the two disputed islands or anywhere close to them, as Indonesia itself admits and as they portrayed on Tuesday through Professor Pellet⁴⁴. Nor has there been any actual oil activity by either Party in the vicinity of the islands, so far as the record shows. In these circumstances, the position is that neither Party has any relevant oil practice. Since Malaysia has always administered the islands, and Indonesia never has, that leaves the administrative record pretty well where it was, or almost.

42. But you will recall that, whereas the Indonesian licence area stops not so far east of Sabatik and is nowhere near the two islands and implies no claim to them, the Malaysian licence area cuts right through the territorial sea of Ligitan. Of the two concessions, it is Malaysia's and not Indonesia's which implies a territorial claim to at least one of the islands in dispute. [End map 6.2]

43. But I do not suggest that anything very much turns on this. These were large exploration licences delimited by long straight lines; they do not appear to have had regard to local issues, any more than Yemen's oil practice in the *Eritrea/Yemen* case⁴⁵. What can certainly be said, however, is that Indonesia's licence does not imply any claim to the two islands.

(c) *Maps showing lines in the sea*

44. Mr. President, Members of the Court, I turn briefly to my third general point, which may be called the "lines in the sea" argument. It was made by Ms Malintoppi last Tuesday with great elegance — it is a pleasure to respond to what she said. She pointed out that there are a number of maps showing lines in the sea to the east of Sebatik, and she sought to use these lines to support Indonesia's claim.

45. Before I descend to detail, the first point to note is that Indonesia does not suggest that any of these maps is in itself sufficient to establish its title, and indeed Ms Malintoppi began by

⁴³Memorial of Indonesia, map 6.2, opposite p. 106.

⁴⁴See Memorial of Indonesia, map 6.3, opposite p. 108.

⁴⁵(1998) 114 *ILR* 1 at pp. 108-109 (paras. 416-417).

saying so expressly⁴⁶. She did not suggest that, if the Dutch did not own the islands as the result of the 1891 Boundary Convention, these later maps gave it title. So their significance, if any, is secondary; they are intended to support a title which, as Malaysia has already shown, cannot possibly exist. The reason it cannot possibly exist is that the Dutch did not claim the islands before 1891 or after: the British did not own them before 1930. The 1891 Convention did not give to the Netherlands, and could not have given to the Netherlands, islands the Dutch did not previously claim and Britain did not own.

46. But let me look at the maps showing lines in the sea on their own terms, subsidiary and subordinate as the Indonesian argument appears to be.

47. [Tab 69: map 1] In doing so I will ignore a few early maps that do not focus on the east coast of Borneo. For example, in its written pleadings Indonesia placed some emphasis on this splendid map, which comes from the pleadings in the *Island of Palmas* case. It is tab 69 in your folders. We call this the jumbo jet map, because it reflects a region from Burma down to the north-east coast of Australia — and I can tell you from bitter experience that takes about seven hours to fly in a jumbo jet. The so-called boundary lines east of Borneo, depicted as curved coloured lines on that map of 1881 — they tell us nothing whatever about small islands off the east coast of Borneo. [End map.]

48. Focusing, then, on the maps which themselves focus on the east coast, the first point to make is that, without exception, all the treaty maps and all the formal claim maps which I have analysed, which show a line across Sebatik, stop the line at the east coast. All the category 1 maps, all the category 2 maps.

49. Of the category 3 maps which show a boundary line across Sebatik, it is true that a number show the line continuing out to sea. The problem for Indonesia is that none of the maps actually establishes its case, and this quite apart from the point that, inherently, a category 3 map cannot do so anyway. Let us look at these maps a little more closely.

⁴⁶CR 2002/29, p. 36, para. 3.

50. First of all, of course, there is the internal Dutch map and the first draft of that map, which show lines in the sea east of Sebatik, of different lengths. I have already dealt with these and need say no more about them. Even as maps, they do not establish Indonesia's case.

51. Then there is a group of maps showing lines extending a few miles east of Sebatik. Perhaps the authors of these maps thought that one drew the territorial sea by extending the line of the land boundary, though when the Dutch thought about it in the 1920s they came to the contrary conclusion.

52. Let me take two examples of this group; we will call them the short-line maps. I will take one Dutch one and one Indonesian one to illustrate the point.

53. [Tab 70; Ann. 28] The first, which you can see on the screen, is a Dutch administrative map of 1939 showing the administrative district of Tarakan. You will remember the Dutch contracts with Bulungan of 1850, 1878 and 1893, referring to Sebatik, Nunukan, Tarakan and the small islands belonging thereto. Well, here these small islands are, shown clearly on the Dutch administrative map of 1939. The map line goes east, along the 1891 boundary, out to sea for a short distance, about 3 miles, and then turns south and it then follows the curvature of the coast and immediate offshore islands⁴⁷. It is a beautiful, classical depiction of a territorial sea. It depicts the extent of Dutch sovereignty, just before the Second World War broke out. [End Ann. 28]

54. [Tab 71: show CMM, Vol. 2, map 11] And in its turn, Mr. President, Members of the Court, Indonesia took no different position prior to 1969. Indeed, it took no different position in any of its maps at any time. You can see this from the Indonesian map dated 1987, entitled "Land Systems and Land Suitability", which is tab 71. It actually reflects a joint British-Indonesian land survey. You can see that the 4° 10' line crosses Sebatik, goes out a short distance, it is about 3 nautical miles, and then stops. Of course the map does not show any detail to the north or the east; the land survey concerned Indonesian Borneo, not Sabah. There was no survey of Ligitan for land suitability, or of the land systems on Sipadan. The map is inconsistent with the view that Indonesia includes the islands. But, I must admit, it contains a disclaimer. [End map]

⁴⁷See Reply of Indonesia, Vol. 12, Ann. 28.

55. [Tab 72: MI, Atlas, map 12 (detail)] I turn to the Malaysian maps which Ms Malintoppi sought to rely on. In particular she relied on some maps which show innominate lines east of Sebatik. Mostly they show what is apparently an internal provincial boundary of one or more of the districts of North Borneo. Some of these maps show the provincial boundary stopping in the open sea before going very far, for example, representing the administrative district of Tawao. Others show it continuing further east. All of them appear to show Ligitan north of the line, whatever line it may be. You can see on the screen one of those maps, published by the Directorate of National Mapping in 1966, called “Malaysia Timor. Sabah”. It is tab 72. It contains a disclaimer. For some reason it does not show Sipadan at all. But, disclaimer or no disclaimer, the map does not attribute either of the two islands to Indonesia. In fact it treats Ligitan clearly as part of the Semporna district.

56. In this context I should say a brief word about Stanfords, the map publisher in London. They were, and still are, a commercial company. Just because they published maps for the BNBC did not make them official publishers. And anyway, the maps they published for the BNBC which show lines in the sea depict not international but internal administrative boundaries. At worst they are equivocal as to the islands outside those boundaries. [End map]

57. Counsel for Indonesia sought to give additional weight to its map case by two strategies. The first of these was to ignore any evidence contrary to their position, the second was to extend short lines into long lines.

58. As to the first strategy, Ms Malintoppi said that maps which showed no line to the east were to be ignored because they were boundary lines which stopped at the east coast⁴⁸. Whereas those maps that did show lines extending some distance offshore were evidence of an allocation line proceeding to the east, and supported Indonesia’s case. It was on this basis — and only on this basis — that she was able to say that the vast majority of maps supported Indonesia⁴⁹. This is a splendid attempt to have it both ways: if we ignore all the evidence against a disputed proposition, it is not surprising that the evidence in its favour looks overwhelming. But this case is about a boundary line which is said somehow to turn into an allocation line beyond the territorial sea, and

⁴⁸CR 2002/29, p. 47, paras. 53-54.

⁴⁹CR 2002/29, p. 42, paras. 30-31.

the majority of maps that show the boundary stopping at the coast or proceeding only a few miles as it may be a territorial sea boundary, like the Tarakan map I just showed you, are evidence against there being any allocation line. Such maps, the majority, cannot simply be ignored.

59. [Tab 73: 1968 Kalimantan map] The second strategy was more pervasive. Indonesia treats every line on a map which extends east of Sebatik as supporting its case, irrespective of the length of the line or the character of the boundary shown. Let me take the issue of length. Those maps that do show lines east of Sebatik often show rather short lines, as I have said, and they are evidence of nothing as to the areas much further east. Indonesia has to take those lines, extend them to the east, and stop them after they reach Ligitan. In other words it has to reconstruct the lines in order to suit its claim. Take for example the 1968 Indonesian map of “Kalimantan Utara”, which is tab 73 in your folders. You can see that there is a line extending a few miles to the east of Sebatik. Indonesia wants to treat the existence of that line as significant, but not its length. Again, it cannot have it both ways. The cartographer had a reason for drawing the line to the east, we assume — perhaps to depict a presumed territorial sea boundary — and a reason for stopping the line where it stopped — perhaps an awareness that the territorial sea does not go out very far. On this map the line is about 6 nautical miles from the coast. It is quite illegitimate to count such a map as supporting an allocation line reaching 50 miles further east. The map is the more significant in that it was produced just before the dispute arose. It does not support the Indonesian position. [End Kalimantan map]

60. [Show internal Dutch map] Actually there is a similar problem with the internal Dutch map itself. You will recall that Indonesia portrayed the line as a red line with an arrow. The line on the internal Dutch map does not have an arrow — another touch of “Harry Potter”, perhaps! Indonesia portrayed the line as extending beyond Ligitan. The line on the internal Dutch map fell far short of Ligitan. Even that map, which is Indonesia’s crucial piece of evidence, has to be subjected to plastic surgery in order to support its case.

61. [Tab 74: show extension of Indonesia’s arrow as far as Karakelong Island] But then, one must ask, if the line is to be extended eastwards, why should it stop after it gets to Ligitan? Why should it not keep going? This is Indonesia’s map from the Memorial, with the line drawn across the map. Why should it stop just after Ligitan? Ligitan was not mentioned before 1891.

You can see on the map what happens if the line keeps going: it cuts through an island called Karakelong Island, which is part of Sulawesi and is — or at least has been considered up to now to be — part of Indonesian territory. According to Sir Arthur Watts, Malaysia gets the advantages of the allocation line as well as the disadvantages. So why does Malaysia not get the northern part of Karakelong Island to go along with the northern part of Sebatik? Why must the line stop after Ligitan and not extend as far as the territories owned by the Parties? After all, it has an arrow on it and an arrow can travel quite a long way across a map. No doubt Indonesia will say — indeed Sir Arthur Watts actually said, he may have had Karakelong island in his mind — the line has to stop somewhere. In which case, why not stop it where it stops on the map⁵⁰? And if you do that, virtually none of the 67 category C maps supports Indonesia's case. [End map]

CONCLUSION

62. Mr. President, Members of the Court, let me turn from the rather arid topic of inconsistent maps to the more interesting topic of inconsistent cases. Here, it is *Indonesia's* case which is inconsistent, and multiply inconsistent. Let me take six inconsistencies, having regard to the time of afternoon.

- (1) Indonesia is inconsistent in being unable to decide whether Bulungan matters or not. Their Memorial says it does; their Reply says it doesn't. This week Sir Arthur said it didn't, and Professor Soons said it did. Perhaps they will make up their minds next week.
- (2) Indonesia is inconsistent in claiming a treaty title deriving from Britain at a time when, it accepts that Britain did not own the islands.
- (3) Indonesia is inconsistent in its treatment of *effectivités*. A half hour of the *Lynx* boarding party in Sipadan is considered as evidence of open and continuous administration "throughout the period". On the other hand, substantial evidence going back to 1903 of the regulation of turtle egg collection on Sipadan is treated as private and sporadic.
- (4) Indonesia is inconsistent in its treatment of the critical date. It seeks to exclude evidence of Malaysia's regulation of tourism on the islands, but not their own evidence of an occasional incursion by a so-called Boy Scout troop.

⁵⁰CR 2002/28, p. 16, para. 34 (Sir Arthur Watts).

- (5) Indonesia is inconsistent in its treatment of navigational lights. The erection after the critical date of lights on reefs far to the west (Alert Patches and Roach Reef) is treated as significant. On the other hand, Malaysia's erection of lighthouses on the islands themselves before the critical date is treated as virtually irrelevant.
- (6) Indonesia is inconsistent in its treatment of maps, whether these are produced by governments or private companies. The internal Dutch map does not show any islands south of the line and is not accompanied by any legal reasoning whatever. Yet it is treated as decisive. The United States Hydrographic Office map of 1903, which does show the islands surrounded by a line — it is unequivocal as to what it shows — is treated as irrelevant, even though it *was* accompanied by legal reasoning and even though Britain expressly accepted the legal reasoning. As to private maps, those which show lines in the sea are treated as decisive, however short the line; those which do not show lines in the sea are treated as irrelevant. And, it may be observed, this when the real question is whether a land boundary line somehow became something else. I could go on, but I won't.

63. Indeed it would be wrong to end on a negative note. Let me summarize, affirmatively, Malaysia's case. There are six propositions.

- (1) The Ligitan Group was never part of the Sultanate of Bulungan. The islands were, and were acknowledged by both Britain and the Netherlands to be, Sulu Islands.
- (2) The islands were not part of British North Borneo in 1891, and therefore no treaty title could arise from the 1891 Convention, and this, however Article IV of the Convention might be interpreted.
- (3) Most important of all, the 1891 Convention cannot bear the meaning Indonesia seeks to give it. Read in the context of the negotiations, Article IV is quite clear in being limited to land boundaries and in relation to Sebatik to being limited to the island of Sebatik. The internal Dutch map is not part of the *travaux préparatoires* and is inadmissible in the interpretation of the Treaty. By contrast the 1915 Demarcation Agreement is a related agreement within the meaning of Article 32, paragraph (3) (a), of the Vienna Convention on the Law of Treaties; the annexed demarcation map is both admissible and decisive as to the interpretation of Article IV, if the language of Article IV did not already achieve that result.

- (4) Dutch conduct after the conclusion of the 1891 Convention is wholly inconsistent with Indonesia's position. At no stage did the Dutch claim the islands, whether by further agreements with the Sultan of Bulungan, by maps or by any other conduct. Nor did they ever protest the public acts of Britain or the United States which should have raised questions about control over the islands for any State which claimed them.
- (5) The issue of the possession and eventual title to the islands was publicly resolved between Britain and the United States after 1903, without any suggestion that any third State was involved.
- (6) Neither the Netherlands nor Indonesia exercised any effective control over the islands at any stage. By contrast Malaysia and its predecessors did. The evidence of *effectivités* overwhelmingly favours Malaysia. Since Indonesia cannot claim a treaty title, the relevant test is that of the *Island of Palmas* and *Eastern Greenland* cases: which State can show the better claim based on administration? The answer is, without doubt, Malaysia. But even if the Dutch had a treaty title in theory, their failure to assert it after 1891, combined with actual administration and control over the islands by the BNBC and Britain, must have put an end to that theoretical claim well before 1945.

64. Mr. President, Members of the Court, that concludes Malaysia's first round presentation. On behalf of the Malaysian team may I thank the Court for its patient attention. Thank you, Mr. President.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. C'est par cet exposé que prend fin l'audience de ce jour. Je tiens à remercier chacune des Parties pour la qualité des exposés qui nous ont été présentés. La Cour se réunira à nouveau à partir du lundi 10 juin, à 10 heures, pour entendre le second tour de plaidoiries de la République d'Indonésie qui disposera à cet effet de deux séances, l'une de trois heures, lundi matin, et l'autre de une heure et demi maximum, lundi après-midi. Le second tour de plaidoiries de la Malaisie est prévu dans les mêmes conditions pour le mercredi 12 juin. Je rappellerai toutefois que, conformément au paragraphe 1 de l'article 60 du Règlement de la Cour, les présentations orales doivent être aussi succinctes que possible. J'ajouterai que le second tour de plaidoiries a pour seul objet de permettre à chacune des Parties de

répondre aux arguments avancés oralement par l'autre Partie. Le second tour ne doit donc pas constituer une répétition des présentations déjà faites par les Parties qui, au demeurant, ne sont pas tenues d'utiliser l'intégralité du temps qui leur est alloué. Je vous remercie. La séance est levée.

L'audience est levée à 16 h 35.
