

CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN (INDONESIA *v.* MALAYSIA) (MERITS)

Judgment of 17 December 2002

In its Judgment in the case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), the Court found, by sixteen votes to one, that “sovereignty over Pulau Ligitan and Pulau Sipadan belongs to Malaysia”. Ligitan and Sipadan are two very small islands located in the Celebes Sea, off the north-east coast of the island of Borneo.

The Court was composed as follows: President Guillaume; Vice-President Shi; Judges Oda, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal and Elaraby; Judges ad hoc Weeramantry and Franck; Registrar Couvreur.

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Judge Oda appended a declaration to the Judgment of the Court; Judge ad hoc Franck appended a dissenting opinion to the Judgment of the Court.

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The full text of the operative paragraph of the Judgment reads as follows:

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.”

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History of the proceedings and claims of the Parties
(paras. 1-13)

On 2 November 1998 Indonesia and Malaysia notified to the Registrar of the Court a Special Agreement between the two States, signed at Kuala Lumpur on 31 May 1997 and having entered into force on 14 May 1998. In that Special Agreement they requested the Court 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.

Each of the Parties duly filed a Memorial, Counter-Memorial and Reply within the time limits fixed by the Court.

Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to choose a judge ad hoc to sit in the case: Indonesia chose Mr. Mohamed Shahabuddeen and Malaysia Mr. Christopher Gregory Weeramantry. After Mr. Shahabuddeen had resigned, Indonesia chose Mr. Thomas Franck to replace him.

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.

Public hearings were held from 3 to 12 June 2002.

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.”

Geographical context
(para. 14)

The Court first describes the geographical context of the dispute as follows:

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. 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 coordinates 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 coordinates 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.

Historical background (paras. 15-31)

The Court then gives an overview of the complex historical background of the dispute between the Parties.

Bases of the Parties' claims (paras. 32 and 33)

The Court notes that Indonesia's claim to sovereignty over the islands of Ligitan and Sipadan rests primarily on the Convention which Great Britain and the Netherlands concluded on 20 June 1891 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". Indonesia 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.

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.

The 1891 Convention between Great Britain and the Netherlands (paras. 34-92)

The Court notes that 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 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 Sebatik: 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.

• *Interpretation of the 1891 Convention* (paras. 37-92)

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."

It further recalls that, with respect to Article 31, paragraph 3, it 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))

The Court observes that Indonesia does not dispute that these are the applicable rules.

- *The text of Article IV*
(paras. 39-43)

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. According to Malaysia, the plain and ordinary meaning of the words “across the Island of Sebatik” 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”.

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.

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.

- *The context*
(paras. 44-48)

Having summarized the Parties’ arguments concerning the context of the 1891 Convention, the Court considers that the Dutch Explanatory Memorandum appended to the draft Law submitted to the Netherlands States-General with a view to ratification of the 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. 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.

As regards the map appended to the Explanatory Memorandum, the Court notes that this shows four differently coloured lines, the boundary eventually agreed being represented by a red line. On the map, the red line continues out to the sea along parallel 4°10' N to the south of Mabul Island, such an extension out to sea having not been commented in the Memorandum, nor discussed in the Dutch Parliament. It also notes that this 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. It further notes that there is nothing in the case file either 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 the argument of Indonesia that the red line on the map 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.

Nor does the Court accept Indonesia’s argument regarding the legal value of the map appended to the Explanatory Memorandum. 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. The British Government did not react to this internal transmission. The Court then notes that such a lack of reaction to the line on the map appended to the Memorandum cannot be deemed to constitute acquiescence in this line. The Court concludes 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.

- *The object and purpose of the 1891 Convention*
(paras. 49-51)

Having examined the arguments of Indonesia and Malaysia, 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 Netherlands 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. 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.

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.

- *Supplementary means to seek possible confirmation of Court’s interpretation: “travaux préparatoires” of the 1891 Convention and circumstances of its conclusion* (paras. 53-58)

In view of the foregoing, the Court considers that it is not 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.

The Court observes that following its formation, in May 1882, the British North Borneo Company (BNBC) asserted rights which it believed it had acquired from Alfred Dent and Baron von Overbeck — who themselves acquired them from the Sultan of Sulu — 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.

The Joint Commission met three times and devoted itself almost exclusively to questions relating to the disputed area of the north-east coast of the island of Borneo. 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. 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 the Netherlands agreed with this partition.

During the negotiations, the parties used various sketch-maps to illustrate their proposals and opinions. The Court considers that it is impossible to deduce anything at all from the length of the lines on these sketch-maps.

The Court concludes 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.

Subsequent practice (paras. 59-80)

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 then recalls 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 Netherlands 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 Netherlands possessions in Borneo”. By that 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 a 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.

In view of the foregoing, the Court does not 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.

After examining the title and preamble of the 1915 Agreement and the terms of the joint report of the Commission, the Court concludes that the 1915 Agreement covered a priori the entire boundary "between the Netherlands territory and the State of British North Borneo" and that 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, in addition, considers that an examination of the map annexed to the 1915 Agreement reinforces its interpretation of that Agreement.

The Court is further of the view that a debate, referred to by Indonesia, 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, 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.

The Court finally is of the opinion that it cannot draw any conclusion for purposes of interpreting Article IV of the 1891 Convention from the practice of the Parties in awarding oil concessions.

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.

- *Maps*
(paras. 81-91)

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.

It notes that 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 paras. 47, 48 and 72 above).

Having examined the other maps produced by the Parties, the Court finds that, in sum, with the exception of the map annexed to the 1915 Agreement (see above), the cartographic material submitted by the Parties is inconclusive in respect of the interpretation of Article IV of the 1891 Convention.

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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.

Title by succession
(paras. 93-125)

The Court then turns to the question whether Indonesia or Malaysia obtained title to Ligitan and Sipadan by succession. The Court recalls that 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. Malaysia contends that Ligitan and Sipadan never belonged to the possessions of the Sultan of Bulungan.

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. It recalls that in the 1878 Contract the island possessions of the Sultan were described as "Terekkon [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.

The Court then recalls that 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.

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. It 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.

The Court first deals with the question whether Ligitan and Sipadan were part of the possessions of the Sultan of Sulu. In all relevant documents, the Sultanate is invariably described as "the Archipelago of Sulu and the dependencies thereof" or "the Island of Sooloo with all its dependencies". These documents, however, 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. The Court further refers to Malaysia's allegation of the existence of ties of allegiance 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.

Turning 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. But the Court concludes that there is no evidence that Spain considered Ligitan and Sipadan as covered by that Protocol. The Court observes, however, that it cannot be disputed, 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. 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.

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. 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. Subsequent events show that the United States itself was uncertain to which islands it had acquired title under the 1900 Treaty. 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.

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. 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. 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.

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.

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.

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.

"Effectivités"
(paras. 126-149)

The Court then considers 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 observes that 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 indicates that, having found that neither of the Parties has a treaty-based title to Ligitan and Sipadan, it will consider these *effectivités* as an independent and separate issue.

It notes that, in support of its arguments relating to *effectivités*, Indonesia cites patrols in the area by vessels of the Dutch Royal Navy, activities of the Indonesian Navy, as well as activities of Indonesian fishermen. It notes further that, 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, although it argues that this cannot be interpreted as demonstrating that Indonesia regarded the islands as not belonging to its territory.

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, allegedly the most important economic activity on Sipadan for many years. 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.

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)

The Court points out that 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.

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. The Court therefore, primarily, analyses the *effectivités* which date from the period before 1969, the year in which the Parties asserted conflicting claims to Ligitan and Sipadan.

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.

Turning then to the *effectivités* relied on by Indonesia, the Court begins by pointing out that none of them is of a legislative or regulatory character. It finds, moreover, that it 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.

With regard to a continuous presence of the Dutch and Indonesian navies in the waters around Ligitan and Sipadan, as cited by Indonesia, it cannot, in the opinion of the Court, be deduced either from the report of the commanding officer of the Dutch destroyer *Lynx* — which patrolled the area in 1921 — 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.

The Court finally observes that activities by private persons such as Indonesian fishermen, cannot be seen as *effectivités* if they do not take place on the basis of official regulations or under governmental authority. 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.

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.

Both the measures taken to regulate and control the collecting of turtle eggs and the establishment of a bird reserve, as cited by Malaysia as evidence of such effective administration over the islands, must, in the view of the Court, be seen as regulatory and administrative assertions of authority over territory which is specified by name.

The Court observes that the construction and operation of lighthouses and navigational aids are not normally considered manifestations of State authority. It recalls, however, 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.

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. 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.

Declaration of Judge Oda

Judge Oda considers the present case a "weak" one in that neither Party made a strong showing in support of its claim to title to the islands on any basis. Judge Oda notes that the Court was requested to choose between the two Parties in adjudging sovereignty, and he considers that given that choice, the Court reached a reasonable decision.

In Judge Oda's view, a full understanding of the present case requires an awareness of the underlying facts and circumstances. He notes that the existence of the islands of Ligitan and Sipadan has been known since the nineteenth century, but that neither Indonesia nor Malaysia claimed sovereignty over them until the late 1960s. Prior to that time, there was no dispute between the two States concerning sovereignty over the islands. Any dispute that may have arisen at that time concerned only the delimitation of the continental shelf between the two States, which had

become of interest because of submarine oil reserves, but *not* sovereignty over the islands.

In the mid-1960s agreements between neighbouring States to delimit the continental shelf were entered into in all parts of the world. Indonesia and Malaysia succeeded in concluding an agreement on the delimitation of the continental shelf in the Malacca Straits and the South China Sea. However, negotiations on the area to the east of Borneo became deadlocked in September 1969 and the Parties agreed to suspend them. The Parties considered this date to be the “critical date” in respect of their dispute concerning sovereignty. Prior to these negotiations, Indonesia and Malaysia had also granted Japanese oil companies oil exploration and exploitation concessions in this area. The concession zones did not overlap and neither Indonesia nor Malaysia claimed that its zone had been violated by the other Party.

Judge Oda finds that, contrary to the assertion in the Special Agreement, the only dispute which existed in or around 1969 was one concerning the delimitation of the continental shelf and that such delimitation dispute would have been referred more properly to the Court by joint agreement. Judge Oda further notes that the Application by the Philippines in 2001 for permission to intervene did *not* concern either Party’s title to the two islands but the delimitation of the continental shelf between the Parties.

In the 1960s, the prevailing rule concerning the delimitation of the continental shelf was the one set out in Article 6, paragraph 1, of the 1958 Convention on the Continental Shelf. This provision is extremely ambiguous because it neither makes clear the baselines from which the median line should be measured nor does it explain the “special circumstances” which justify departing from a median line in connection with certain islands. Judge Oda suspects that the main concern of both Parties in their negotiations on the delimitation of their respective continental shelves related to the definition of the baselines and the role in terms of the “special circumstances” test to be played by the two islands. In fact, the Parties (particularly Indonesia) might have concluded that sovereignty over the islands would entitle them to a much wider continental shelf. In Judge Oda’s view, the issue of sovereignty arose only as a result of the Parties’ manoeuvring for better bargaining positions in the continental shelf delimitation. This resulted from a misconception on the part of the Parties, who failed to understand that, in accordance with the “special circumstances” rule, a delimitation line could have also been drawn disregarding these two islands.

Though Malaysia has now been awarded sovereignty over the islands, the impact of the Court’s Judgment on the delimitation of the continental shelf should be considered from a different angle. The rule concerning the delimitation of the continental shelf is set out in Article 83 of the 1982 United Nations Convention on the Law of the Sea calling for “an equitable solution”. The question remains how “equitable” considerations apply to these islands. Judge Oda concludes that the present Judgment does not necessarily

have a direct bearing on the delimitation of the continental shelf.

Dissenting opinion of Judge Franck

Judge Franck agrees with the Court’s finding and reasoning in rejecting Malaysia’s contention that it has inherited sovereignty over Pulau Ligitan and Pulau Sipadan by virtue of a “chain of title” that stretches from the Sultan of Sulu to Spain to the United States to Britain to Malaysia.

As for the *effectivités*, acts undertaken by the Parties in their sovereign capacity with regard to the two islands, these are so inconsequential that, weighing them against each other resembles trying to guess the respective weight of a handful of cut grass and a handful of feathers. Malaysia set up navigational lights which, in other cases, this Court has considered not to be acts demonstrating a claim to sovereignty. The establishment by Malaysia of a deep-sea diving resort occurred after the critical date on which the Parties agreed to a “stand-still” that excludes evidence of this sort of subsequent activity. The Dutch, by their efforts by sea and air to control piracy in the area demonstrated an active interest of at least equal vigour to that of the British. The assessment of these and other such lightweight activities cannot but lead to inconclusive results.

Moreover, the Court should not even have embarked on this unsatisfying task because such *effectivités* are irrelevant when title to territory has been established by treaty. In this instance, Judge Franck maintains, the Anglo-Dutch Convention of 1891, in delimiting the entire frontier between the colonial predecessors on Borneo of Malaysia and Indonesia, has established a line intended to resolve potentially conflicting territorial claims of the two empires. The object and purpose was to bring peace to a vast area of overlapping ambitions and, in accordance with the Vienna Convention on Treaties, that objective should have been honoured by this Court.

In particular, Article IV of the 1891 Convention, in establishing the 4°10’ line to allocate territory beyond Borneo’s east coast and “across the Island of Sebitik” should have been presumed to extend so far as necessary to allocate the two islands — which clearly lie south of the line — and thereby to resolve any future source of dispute. It ought to have been presumed that a treaty intended to resolve all outstanding issues in the area could not have intended to leave the disposition of Ligitan and Sipadan up to turtle egg collection and piracy patrolling.

Indeed there is ample evidence to validate this logical, if rebuttable but unrebutted, presumption. The Dutch Government’s map accompanying the Explanatory Memorandum by which the ratification of the 1891 Convention was urged upon the States-General shows the 4°10’ line extending out to sea eastward of Sebitik. This map was well known to the British Government, which had been alerted to it by its Minister in The Hague. There was no objection from London. In more recent times, Indonesian and Malaysian oil exploration concessions were also careful to respect the extension of this line well east of Sebitik.

These facts duly support the inference that the 4°10' line was not intended to end on the east coast of Sebatik.

Moreover, the legal presumption — recognized in this Court's jurisprudence — that treaties establishing borders, boundaries and lines of allocation between States are intended to effect closure has an important role to play in

establishing the legal régime that underpins world peace. Such treaties should be interpreted broadly, not narrowly as if they were contracts for the sale of barley. In this light, the 4°10' line in the 1891 Convention should have been recognized as dispositive in this dispute.