KAJIAN YURIDIS ATAS PUTUSAN MAHKAMAH INTERNASIONAL NOMOR 102 TAHUN 2002 MENGENAI SENGKETA ANTARA MALAYSIA DENGAN REPUBLIK INDONESIA ATAS KEPEMILIKAN PULAU SIPADAN DAN PULAU LIGITAN

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2004

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DAFTAR ISI

HALAMAN JUDUL..... i
HALAMAN MOTTO..... iii
HALAMAN PERSEMBAHAN..... iv
HALAMAN PERSETUJUAN..... v
HALAMAN PENGESAHAN..... vi
KATA PENGANTAR..... vii
DAFTAR LAMPIRAN..... xi
ABSTRAKSI..... xii

I. PENDAHULUAN

1.1 Latar Belakang Masalah..... 1
1.2 Ruang Lingkup Masalah..... 4
1.3 Rumusan Masalah..... 4
1.4 Tujuan Penulisan..... 5
1.5 Metode Penulisan..... 5
1.5.1 Pendekatan Masalah..... 6
1.5.2 Sumber Bahan Hukum..... 6
1.5.3 Metode Pengumpulan Bahan Hukum..... 6
1.5.4 Analisis Bahan Hukum..... 7

II. FAKTA, DASAR HUKUM DAN LANDASAN TEORI

2.1 Fakta..... 8
2.1.1 Sejarah Pulau Sipadan dan Pulau Ligitan..... 9
2.1.2 Keputusan Mahkamah Internasional..... 13
2.2 Dasar Hukum..... 15
2.3 Landasan Teori..... 12
2.3.1 Upaya-upaya Penyelesaian Damai Sengketa Internasional Yang Diakui Oleh Hukum Internasional..... 19
2.3.1.1 Upaya Penyelesaian Damai NonYudisial..... 19
2.3.1.2 Upaya Penyelesaian Sengketa Secara Yudisial... 21
2.3.2 Pengertian Perolehan Wilayah..... 24

2.3.3 Cara-Cara Memperoleh Wilayah Yang Diatur Dalam Hukum Internasional..... 25
2.3.3.1 Penyerahan (Cession)..... 25
2.3.3.2 Pendudukan (Occupation)..... 26
2.3.3.3 Penguasaan (Prescription)..... 27
2.3.3.4 Perubahan Alam (Operation of Nature)..... 28
2.3.3.5 Penaklukan (Conquest)..... 28
2.3.3.6 Putusan Pengadilan (Adjudication)..... 29

III. PEMBAHASAN

3.1 Proses Persidangan Yang Dilalui Oleh Kedua Negara Dalam Persidangan Mahkamah Internasional..... 30
3.2 Dasar Pertimbangan Mahkamah Internasional Dalam Mengambil Keputusan Mengenai Sengketa Antara Malaysia Dengan Republik Indonesia Tentang Kepemilikan Pulau Sipadan Dan Pulau Ligitan..... 38
3.3 Langkah Yang Diambil Pemerintah Indonesia Dalam Menjaga Serta Mengelola Wilayah Perbatasan Indoesia..... 48
3.4 Persetujuan Dan Pengakuan Atas Keputusan Mahkamah Internasional ..52
3.5 Argumen Hukum Dan Politik Atas Pengakuan Keputusan Mahkamah Internasional Oleh Republik Indonesia..... 57

IV. KESIMPULAN DAN SARAN

4.1 Kesimpulan..... 59
4.2 Saran..... 60

DAFTAR PUSTAKA

LAMPIRAN-LAMPIRAN

DAFTAR LAMPIRAN

Lampiran 1 : Surat Pengantar Konsultasi

Lampiran 2 : Surat Pemberitahuan Telah Melakukan Penelitian

Lampiran 3 : Peta Pulau Sipadan Dan Pulau Ligitan

Lampiran 4 : Convention Between Her Majesty The Queen Of The Netherlands And His Majesty In Respect Of The United Kingdom Of Respecting The Delimitation Of The Frontier Between The States In Borneo Under Protection And Netherlands Territory In That Islands 1891.

Lampiran 5 : Special Agreement For The Submission To The International Court Of Justice The Disputes Between Indonesia And Malaysia Concerning The Sovereignty Over Pulau Sipadan And Pulau Ligitan.

Lampiran 6 : Keputusan Mahkamah Internasional Tanggal 17 Desember 2002 Nomor 102 Tentang Sengketa Pulau Sipadan Dan Pulau Ligitan Antara Malaysia Dengan Republik Indonesia.

ABSTRAKSI

Sengketa kepemilikan Pulau Sipadan dan Pulau Ligitan berawal sejak tahun 1969. Pada saat itu dilakukan perundingan mengenai batas landas kontinen antara Malaysia dengan Republik Indonesia di Kuala Lumpur. Perundingan tersebut menemui jalan buntu karena Malaysia menolak konsep yang disodorkan pihak Indonesia berdasarkan perjanjian penetapan kekuasaan atas wilayah jajahan yang dibuat oleh Inggris dan Belanda pada tanggal 20 Juni 1891. Akhirnya kedua negara memutuskan untuk menunda perundingan batas landas kontinen sampai waktu yang ditetapkan kemudian dan sepakat kedua pulau tersebut dalam status quo. Sejak saat itu, kedua negara melewati masa-masa yang panjang. Perundingan-perudingan telah diupayakan untuk menyelesaikan masalah kedua pulau tersebut namun tidak juga terwujud. Upaya penyelesaian sengketa yang dilakukan kedua negara hanya mampu untuk meredam konflik antar negara namun tidak mampu menuntaskan masalah pulau tersebut. Sampai akhirnya kedua negara sepakat membawa sengketa ini ke Mahkamah Internasional (International Court of Justice). Dan setelah melewati proses yang cukup panjang, pada tanggal 17 Desember 2002 Mahkamah Internasional memutuskan Pulau Sipadan dan Pulau Ligitan menjadi milik Malaysia.

Keputusan Mahkamah Internasional initentu saja mempunyai pengaruh besar bagi Republik Indonesia dan Malaysia. Dengan keputusan ini, batas landas kontinen antara kedua negara yang selama ini menjadi kerikil tajam dalam hubungan kedua negara telah terselesaikan. Di sisi lain, pengalaman ini menjadi pelajaran tersendiri bagi Indonesia dalam menyelesaikan permasalahan perbatasan yang bersinggungan dengan kepentingan nasional negara lain.

Adapun tujuan penulis dalam skripsi ini adalah untuk membahas mengenai proses persidangan yang dilalui kedau negara yang bersengketa dalam pengadilan Mahkamah Internasional serta pertimbangan Mahkamah dalam memenangkan Malayia atas kepemilikan kedua pulau sengketa.

BAB I
PENDAHULUAN

1.1 Latar Belakang Masalah

Sejak berakhirnya Perang Dunia II yang ditandai dengan munculnya negara-negara baru, banyak terjadi perubahan peta politik dunia. Wilayah-wilayah yang dulunya masih berada dibawah koloni negara lain berubah menjadi negara baru dan berdaulat. Dengan munculnya negara-negara yang baru merdeka tersebut sedikit banyak akan mempengaruhi perkembangan hubungan internasional. Hal ini dapat dilihat dari hubungan yang akan terjadi antara negara-negara yang baru merdeka tersebut dengan negara koloni atau antar negara bekas koloni. Hubungan antar negara tersebut dapat berbentuk kerjasama ataupun pertikaian. Dalam mengadakan kerjasama, mereka akan memperoleh keuntungan bersama baik dalam bentuk materil maupun non materil. Namun ada kalanya diantara negara-negara tersebut sering juga tidak mempunyai tujuan yang sama, bahkan tidak jarang terjadi saling bertentangan antara negara yang satu dengan negara yang lain. Hal ini disebabkan karena terjadi perbedaan persepsi antar negara-negara tersebut mengenai sesuatu hal yang disengketakan.

Salah satu hal yang sering disengketakan adalah mengenai wilayah serta batas-batas wilayah negara. Sebagaimana ditentukan di dalam pasal 1 Konvensi Montevidio 1933 bahwa salah satu unsur yang harus dipenuhi agar suatu kelompok masyarakat dapat disebut negara adalah wilayah. Wilayah merupakan unsur yang mutlak harus dipenuhi. Wilayah adalah suatu ruang dimana orang yang menjadi warga negara atau penduduk negara yang bersangkutan hidup serta menjalankan segala aktivitasnya. Dalam sejarah kehidupan umat manusia maupun negara-negara, sering terjadi konflik yang oersumberkan pada masalah wilayah. Konflik ini bisa disebabkan oleh karena keinginan untuk melakukan ekspansi wilayah maupun karena kurang jelasnya perbatasan wilayah antara negara yang satu dengan negara yang lain. Tetapi dengan meningkatnya penghormatan atas kedaulatan teritorial negara-negara, kini usaha untuk melakukan ekspansi wilayah sudah berkurang. Namun konflik-konflik antar negara karena ketidakjelasan

batas-batas wilayah dipelbagai belahan dunia masih tetap ada dan sering kali muncul menjadi konflik bersenjata.

Masalah ketidakjelasan batas-batas negara dan status wilayah seringkali menjadi sumber persengketaan di antara negara-negara yang berbatasan dan berdekatan. Sengketa perbatasan atau wilayah itu pada hakekatnya dilatarbelakangi oleh suatu motivasi adanya kepentingan tertentu, baik kepentingan politik, ekonomi, sosial, budaya maupun keamanan teritorialnya. Di samping itu perkembangan situasi regional maupun internasional turut pula mempengaruhi tingkah laku negara-negara yang bersengketa dalam hal mempertahankan bahkan memperjuangkan kedaulatan wilayahnya. Persoalan kedaulatan negara atas suatu wilayah tidak hanya berkaitan dengan pengelolaan atas kekayaan suatu pulau tertentu saja, melainkan berkaitan erat dengan batas-batas wilayah negara secara menyeluruh dengan muatan-muatan kedaulatan dan hak berdaulat yang melekat di atasnya.

Demikian pula halnya dengan sengketa perbatasan antara Malaysia dengan Republik Indonesia atas Pulau Sipadan dan Pulau Ligitan yang terletak di lepas pantai Kalimantan. Timbulnya sengketa kepemilikan Pulau Sipadan dan Pulau Ligitan berawal sejak tahun 1969. Pada saat itu dilakukan perundingan antara Indonesia dan Malaysia di Kuala Lumpur mengenai batas landas kontinen. Pada saat perundingan tersebut, Malaysia menolak klaim Indonesia atas kepemilikan Pulau Sipadan dan Pulau Ligitan. Indonesia sendiri tidak memasukkan kedua pulau tersebut ke dalam wilayahnya dalam UU RI No.4 Tahun 1960. Akhirnya perundingan tersebut mengalami jalan buntu dalam menentukan batas wilayah kedua negara di sekitar lepas pantai Kalimantan, dan kedua negara sepakat menunda perundingan batas landas kontinen sampai waktu yang ditetapkan kemudian. Kedua negara juga sepakat menjadikan Pulau Sipadan dan Pulau Ligitan dalam keadaan status quo. Sejak saat itu, kedua negara melakukan upaya penyelesaian sengketa tersebut secara damai. Setelah tahun 1969, usaha penyelesaian secara damai dimulai lagi pada tahun 1991 melalui pembicaraan di tingkat pejabat tinggi dalam Komite Bersama Indonesia Malaysia dan selanjutnya

diikuti pertemuan-pertemuan lain yang dilakukan baik di Jakarta maupun di Kuala Lumpur.

Upaya penyelesaian hukum akhirnya direkomendasikan Wakil Khusus kedua negara pada tahun 1996 setelah mencermati kesulitan mendapatkan solusi politis yang dapat disepakati kedua negara. Pertimbangannya antar lain bahwa mengingat klaim kepemilikan atas Pulau Sipadan dan Pulau Ligitan merupakan masalah hukum dan bahwa isu tersebut sangat sensitif dalam hubungan bilateral kedua negara. Untuk itu disarankan perlunya penyelesaian melalui jalur hukum (*adjudication*) oleh pihak yang dipandang berwibawa dan netral, yakni Mahkamah Internasional. Sebagai tindak lanjut, pada tahun 1997 kedua negara sepakat membawa permasalahan itu ke Mahkamah Internasional melalui *Special Agreement for the Submission to the International Court of Justice the dispute between Indonesia and Malaysia concerning the Sovereignty over Pulau Sipadan and Pulau Ligitan.* Penyelesaian perkara di bawah yurisdiksi Mahkamah Internasional melalui *Special Agreement 1997* ini mengandung arti bahwa penyelesaian sengketa atas kedua pulau tidak lagi berada di dalam domain politik atau diplomatis melainkan sepenuhnya berada dibawah proses hukum yang berjalan mengikuti proses beracara sebagaimana yang telah disepakati bersama. Pada tanggal 17 Desember 2002, Mahkamah Internasional (International Court of Justice) di Den Haag, Belanda, memutuskan bahwa Malaysia memiliki kedaulatan atas Pulau Sipadan dan Pulau Ligitan berdasarkan pertimbangan *effective.*

Permasalahan putusan sengketa Pulau Sipadan dan Pulau Ligitan ini sangat menarik untuk dikaji secara ilmiah berdasarkan aturan-aturan hukum internasional, karena sengketa ini melibatkan dua negara anggota ASEAN yang terkemuka. Sengketa mengenai Pulau Sipadan dan Pulau Ligitan ini juga menjadi kerikil tajam dalam hubungan bilateral kedua negara. Di samping itu, penyelesaian sengketa internasional melalui Mahkamah Internasional adalah yang pertama kali untuk kawasan Asia Tenggara. Hal ini menunjukkan bahwa kedua negara berhasil menyelesaikan pertikaian secara damai dan mampu menyisihkan penggunaan kekerasaan. Keputusan Mahkamah Internasional ini juga menjadi pelajaran tersendiri bagi Republik Indonesia dalam menyelesaikan masalah

perbatasan yang bersinggungan dengan kepentingan nasional negara lain serta perlindungan dan pengelolaan wilayah perbatasan Indonesia. Alasan inilah yang memotivasi penulis mengangkatnya dalam skripsi dengan judul **"KAJIAN YURIDIS ATAS PUTUSAN MAHKAMAH INTERNASIONAL NOMOR 102 TAHUN 2002 MENGENAI SENGKETA ANTARA MALAYSIA DENGAN REPUBLIK INDONESIA TENTANG KEPEMILIKAN PULAU SIPADAN DAN PULAU LIGITAN".**

1.2 Ruang Lingkup Masalah

Dalam hal ini, penulis menitikberatkan ruang lingkup masalah pada alasan putusan Mahkamah Internasional atas sengketa internasional Pulau Sipadan dan Pulau Ligitan serta proses peradilan yang dilalui oleh Indonesia dan Malaysia dalam Mahkamah Internasional tersebut. Begitu juga mengenai dampak dari putusan Mahkamah Internasional tersebut, penulis memfokuskan pada masalah konsep penjagaan dan pengelolaan wilayah terluar Indonesia yang berbatasan dengan negara lain beserta pulau-pulaunya.

1.3 Rumusan Masalah

Berasarkan latar belakang yang telah diuraikan di atas, maka dapat ditarik beberapa permasalahan sebagai berikut :

1. bagaimanakah proses persidangan yang dilalui oleh kedua negara dalam persidangan Mahkamah Internasional?
2. apakah dasar pertimbangan Mahkamah Internasional dalam mengambil keputusan mengenai sengketa antara Malaysia dengan Republik Indonesia tentang kepemilikan Pulau Sipadan dan Pulau Ligitan?
3. apakah langkah yang diambil oleh pemerintah Indonesia dalam menjaga dan mengelola wilayah perbataan wilayah Indonesia?
4. bagaimanakah pengakuan kedua negara atas keputusan Mahkamah Internasional ?
5. apakah argumen hukum dan politik Republik Indonesia atas pengakuan keputusan Mahkamah Internasional?

1.4 Tujuan Penulisan

Setiap tulisan harus mempunyai tujuan, terutama tulisan yang bersifat ilmiah. Begitu juga halnya dengan penulisan skripsi ini yang mempunyai tujuan sebagai berikut

1. untuk mengetahui proses persidangan yang dilalui oleh kedua negara dalam persidangan Mahkamah Internasional;
2. untuk mengetahui dasar pertimbangan Mahkamah Internasional dalam mengambil keputusan mengenai sengketa antara Malaysia dengan Republik Indonesia tentang kepemilikan Pulau Sipadan dan Pulau Ligitan;
3. untuk mengetahui langkah-langkah yang diambil oleh pemerintah Indonesia dalam menjaga serta mengelola daerah perbatasan wilayah Indonesia;
4. untuk mengetahui tentang pengakuan kedua negara atas keputusan Mahkamah Internasional ;
5. untuk mengetahui argumen hukum dan politik Republik Indonesia atas pengakuan keputusan Mahkamah Internasional.

1.5 Metode Penulisan

Metode penulisan merupakan suatu cara untuk merumuskan, menganalisa masalah yang ada dan menguji kebenaran. Metode penulisan yang digunakan adalah analisis deskriptif, yaitu metode yang menggambarkan suatu keadaan secara lengkap dan jelas mengenai keputusan Mahkamah Internasional sehingga pembahasan masalah dapat dikemukakan dengan cermat dan jelas.

1.5.1 Pendekatan Masalah

Sebagai analisa untuk mencapai suatu pembahasan yang sesuai dengan tujuan penulisan, maka penyusun menggunakan metode yuridis normatif, yakni :"Pendekatan yang menggunakan ketentuan perundang-undangan yang berlaku atau metode pendekatan hukum doktrinal yaitu teori-teori hukum dan pendapat para sarjana hukum terutama yang berhubungan dengan permasalahan" (Soemitro, 1988:24). Adapun permasalahan yang dibahas dalam skripsi ini adalah permasalahan hukum yang mempunyai aspek internasional. Askpek internasional

yang dimaksud adalah permasalahan yang melintasi batas-batas n:gara sehingga dalam menyelesaikan masalah tersebut diperlukan hukum yang mempunyai kewenangan internasional sehingga hukum normatif yang digunakan untuk penulisan skripsi ini adalah Hukum Internasional dimana penulis mengkaji permasalahan atau sengketa internasional berdasarkan Hukum Internasional tersebut.

1.5.2 Sumber Bahan Hukum

Sumber data dalam penulisan skripsi ini adalah sumber data sekunder, yaitu sumber data yang berupa tulisan-tulisan yang meliputi literatur-literatur baik dalam bentuk buku-buku yang berkaitan dengan pokok bahasan, majalah, buletin, koran ataupun bahan-bahan lain. Bahan-bahan lain yang dimaksud di sini adalah berupa peraturan-peraturan Internasional berdasarkan Hukum Internasional yang berlaku, seperti Piagam Perserikatan Bangsa Bangsa, Statuta Mahkamah Internasional dan perjanjian-perjanjian yang telah ditandatangani oleh pihak yang bersengketa. Sumber data lainnya adalah bahan-bahan yang memberi penjelasan seperti hasil seminar, makalah dan sebagainya.

1.5.3 Metode Pengumpulan Bahan Hukum

Tehnik pengumpulan data dalam penulisan skripsi ini dilakukan dengan cara menelaah berbagai literatur, kliping-kliping koran dan majalah, dokumen-dokumen, makalah ataupun perundang-undangan yang berkaitan erat dengan permasalahan tersebut. Kemudian penulis mengklasifikasikan data-data yang terkumpul tersebut sehingga dapat digunakan sebagai bahan untuk menganalisis permasalahan yang ada.

1.5.4 Analisis Bahan Hukum

Penulis menganalisis bahan hukum dari hasil penelitian yang sudah terkumpul dengan menggunakan metode deskriptif kualitatif, yaitu menganalisa bahan untuk memperoleh gambaran singkat yang tidak didasarkan pada angka-angka statistik melainkan analisis yang diuji dengan norma-norma dan kaidah-

kaidah hukum yang berkaitan dengan masalah yang dibahas (Soemitro, 1988:108). Analisis hukum yang penulis lakukan dalam pembahasan skripsi ini dilakukan dengan mengumpulkan semua bahan hukum. Selanjutnya data tersebut dikualifikasikan, dibandingkan, diteliti, ditelaah dan dianalisa berdasarkan teori dan ketentuan Hukum Internasional mengenai penyelesaian sengketa Internasional.

BAB II
FAKTA, DASAR HUKUM DAN LANDASAN TEORI

2.1 Fakta

Masalah ketidakjelasan batas-batas negara seringkali menimbulkan klaim atas wilayah secara bersamaan di antara negara-negara yang berdekatan. Sengketa perbatasan dan wilayah ini pada dasarnya dilatarbelakangi adanya kepentingan-kepentingan baik kepentingan politik, sosial, ekonomi maupun keamanan teritorial suatu negara. Tidak jarang sengketa ini menjadi konflik senjata karena persoalan kedaulatan negara atas suatu wilayah tidak hanya berkaitan dengan batas-batas wilayah suatu negara secara menyeluruh dengan muatan-muatan kedaulatan dan hak berdaulat yang melekat di atasnya, melainkan juga tentang harga diri sebuah bangsa.

Demikian halnya dengan sengketa teritorial atas pulau Sipadan dan Pulau Ligitan, yang sama-sama diklaim oleh Indonesia dan Malaysia sebagai wilayahnya. Walau demikian, kedua negara sepakat untuk menyelesaikan sengketa ini dengan damai dan menghindari penyelesaian sengketa dengan kekuatan senjata.

Kedua negara telah melakukan banyak negosiasi sejak sengketa itu muncul pertama kali pada tahun 1969. Serangkaian perundingan dan pertemuan secara intensif telah dilakukan baik di Malaysia maupun di Indonesia yang berupa *Senior Official Meeting*, *Joint Commission Meeting* dan *Joint Working Group*. Namun ternyata negosiasi yang dilakukan tersebut selama ini hanya efektif sebagai '*conflict defuser*' dan belum efektif sebagai '*conflict solver*' untuk menentukan status kepemilikan kedua pulau tersebut. Dikatakan sebagai peredam konflik, karena negosiasi telah berhasil menahan dan mengendalikan emosi kedua negara dimana negara yang bersengketa tidak sampai menggunakan ancaman kekuatan militer untuk memperebutkan kedua pulau tersebut. Di sisi lain, negosiasi ini belum sepenuhnya efektif sebagai pemecah masalah, dan walaupun konflik senjata tidak terjadi namun masalah sengketa kedua pulau tersebut masuh juga tidak jelas dan belum terselesaikan.

Indonesia dan Malaysia akhirnya berkesimpulan bahwa sengketa Pulau Sipadan dan Pulau Ligitan ini sulit untuk diselesaikan dalam kerangka bilateral dan negosiasi. Perlu ada pihak ketiga yang dianggap mampu untuk menyelesaikan sengketa kedua negara dan Indonesia dan Malaysia sepakat membawa sengketa ini ke Mahkamah Internasional. Mahkamah Internasional dianggap alternatif yang paling tepat untuk menyelesaikan sengketa yang telah lama berlangsung di antara kedua negara.

2.1.1 Sejarah Pulau Sipadan Dan Pulau Ligitan

Ligitan adalah pulau yang sangat kecil yang berada 21 mil dari Tanjung Tutop Semenanjung Semporna, daerah terdekat dengan Pulau Borneo (Kalimantan). Titik kordinat dari pulau ini adalah 4° 09' LU dan 118° 53' LS. Pulau Sipadan lebih besar dari Ligitan, titik kordinatnya 4° 06' LU dan 118° 37' LS jauhnya sekitar 15 mil laut dari Tanjung Tutop dan 42 mil dari pantai timur Pulau Sebatik. Sengketa mengenai pulau ini memiliki sejarah panjang dan rumit. Pada abad 16, Kerajaan Spanyol membuka koloninya di Philipina dan menggunakan sektor perdagangan untuk memperluas pengaruhnya ke daerah di sekitar selatan. Pada akhir abad 16, Spanyol memulai memperluas pengaruhnya terhadap Kesultanan Sulu. Pada tanggal 23 September 1836, Spanyol dan Kesultanan Sulu menandatangani perjanjian damai, perlindungan dan perdagangan. Dalam perjanjian tersebut, Spanyol menjanjikan perlindungan kepada Sultan Sulu atas daerah kekuasaannya. Perjanjian itu juga mengatur tentang wilayah atau daerah kekuasaan yang berbunyi :

> " in any of the islands situated within the limits of the Spanish jurisdiction, and which extend from the western point of Mindanao to Borneo and Paragua, with the exception of Sandakan ant the other territories tributary to the Sultan on the island of Borneo " (http://www.ijc-cij.org).

Belanda di lain pihak juga membuka koloninya di Pulau Borneo pada awal abad 16 perusahaan dagang Hindia Belanda (Netherlands East India Company) yang memiliki keinginan besar berdagang di daerah tersebut menggunakan hak publik di Asia Tenggara melalui Piagam yang diberikan oleh

Kerajaan Belanda kepadanya pada tahun 1602. Melalui piagam tersebut, perusahaan itu diijinkan untuk memasukkan wilayah tersebut kedalam wilayah Kerajaan Belanda.

Pada saat perusahaan dagang tersebut berkembang pesat abad 16 dan 18 pengaruh Sultan Banjarmasin juga semakin luas, mencakup daerah utara dan selatan Borneo. Pada daerah pantai timur, wilayah yang dikuasai Banjarmasin termasuk Kerajaan Berou yang terdiri dari 3 kerajaan kecil; Sambaliung, Gunungtabur dan Bulungan.. Sultan Sulu dan Brunai di lain pihak memperluas daerahnya ke arah utara dari Pulau Borneo.

Pada abad 18, perusahaan dagang Belanda bangkrut dan wilayah yang sebelumnya dikuasai dialihkan ke Gubernur Belanda. Selama Perang Napoleon, Inggris mengambil alih penguasaan wilayah yang selama ini dikuasai oleh Belanda. Melalui Konvensi London 13 Agustus 1814, Kerajaan Belanda memperoleh kembali wilayah yang dulu pernah dimilikinya. Pada ranggal 3 Januari 1817, sebuah perjanjian ditandatangani oleh Belanda dengan Sultan Banjarmasin, dimana pasal 5 perjanjian terebut mengatur tentang penyerahan kerajaan Berou serta tanah jajahannya kepada Belanda. Pada tanggal 13 September 1823, sebuah lampiran disetujui untuk mengamandemen pasal 5 Perjanjian 1817 tersebut. Sebuah perjanjian baru ditandatangani lagi pada tanggal 4 Mei 1826, dimana pasal 4-nya kembali mengingatkan tentang penyerahan (*cession*) Kesultanan Berou beserta tanah jajahannya kepada Belanda. Selama waktu tersebut, Kerajaan Berou yang terdiri dari Kesultanan Sambaliung, Gunungtabur dan Bulungan terpecah-pecah. Melalui deklarasi yang dibuat pada tahun 1843, Kesultanan Bulungan segera menundukkan diri kepada kekuasaan Kerajaan Hindia Belanda.

Gambaran geografis wilayah Kesultanan Bulungan untuk pertama kali muncul pada kontrak antara Belanda dengan Kesultanan Bulungan yang dibuat pada tanggal 12 November 1850. Pasal 2 kontrak tersebut menggambarkan tentang batas-batas wilayah yang dimiliki oleh tiap-tiap kerajaan yang berisi :

"The territory of Boeloengan is located within the following boundaries;

- With Goenoeng –Teboer: from the seasore landwards, the Karangtiegau River from its mouth ups to its origin; in addition the Batoe Beokkier and mouth Palpakh;
- With the Sulu possessions; at the sea the cape named Batou Tinagat, as well as the Tawau River.

The following islands shall belong to Boeloengan : Tarakkan, Nenoekkan and Sebatikh, with the small islands belonging thereto.

This delemitation is esthablised provisionally and shall be complited examined and determined again"

Kerajaan Inggris juga memiliki keinginan untuk melakukan aktifitas perdagangan di daerah ini tetapi tidak membuat sebuah perjanjian pun sampai akhir abad 19. Setelah diadakan Anglo-Dutch Convention pada 13 Agustus 1814, klaim dagang dan wilayah di daerah Borneo mulai berbenturan satu dengan yang lain. Pada tanggal 17 Maret 1824, Inggris dan Belanda menandatangani sebuah perjanjian baru untuk mencoba menyelesaikan sengketa dagang dan wilayah. Pada tahun 1877, Sultan Brunai memberikan wilayah yang luas kepada Mr.Alfred Dent dan Baron Von Overbeck di Borneo Utara. Dan akhirnya Sultan Sulu juga memberikan hak dan kekuasaan atas wilayahnya kepada mereka sebagai wakil dari perusahaan Inggris. Sultan Sulu juga menunjuk Baron Von Overbeck sebagai Dato' Bndahara dan Rajah Sandakan yang memiliki kekuasaan penuh atas wilayah yang telah diberikan. Selain pengangkatan ini, Sultan Sulu juga mengajak kerajaan lain untuk menerima Baron Von Overbeck sebagai penguasa tertinggi namun Baron Von Overbeck akhirnya melepaskan semua hak-hak tersebut. Di lain pihak Alfred mempergunakan Royal Charter dari pemerintahan Inggris untuk mengurus dan mengeksploitasi daerah tersebut. Pada bulan Mei 1882, sebuah perusahaan yang bernama British North Borneo Company (BNBC) mengelola daerah tersebut.

Spanyol dan Inggris serta Jerman pada tanggal 11 Maret 1877 menandatangani persetujuan perdagangan bebas dan lintas kapal sebagai suatu cara untuk menyelesaikan sengketa dagang yang selama ini terjadi di antara mereka. Melalui perjanjian ini, Spanyol menjamin dan memastikan kebebasan perdagangan, penangkapan ikan dan pelayaran kapal. Tanggal 7 Maret 1885, Spanyol, Jerman dan Inggris menandatangani sebuah perjanjian baru yang mengatur tentang pengakuan Jerman dan Inggris atas penguasaan efektif atas

Kepulauan Sulu, yang sebelumnya adalah wilayah '*terrae nullius*'. Pada tanggal 12 Mei 1888, Pemerintah Inggris mengikuti perjanjian dengan BNBC untuk membentuk sebuah negara di Borneo Utara, yang menghasilkan sebuah negara Protektorat Inggris dengan nama North Borneo. Tanggal 20 Juni 1891, Inggris menandatangani perjanjian (Konvensi 1891) untuk membagi wilayah di Borneo.

Setelah selesai perang antara Inggris dengan Amerika, Spanyol menyerahkan Kepulauan Philipina kepada Amerika melalui Perjanjian Damai Paris (Treaty of Peace of Paris) tanggal 10 Desember 1898. Pada tanggal 22 April 1903, Sultan Sulu menandatangani penegasan penyerahan dengan Pemerintah Inggris di Borneo Utara (North Borneo), yang mana menetapkan nama-nama pulau yang telah diserahkan kepada Alfred Dent dan Baron Von Overbeck pada tahun 1878. Pada tahun 1903, BNBC mengajukan protes ke kantor Luar Negeri Amerika Serikat sehubungan dengan kunjungan kapal US Navy, USS Quiros dan mengibarkan bendera pada beberapa pulau yang dikuasai BNBC.

Pada tanggal 28 September 1915, Inggris dan Belanda menandatangani persetujuan di mana dalam perjanjian ini kedua negara sepakat untuk menyetujui pasal 5 Konvensi 1891 dan menegaskan laporan dan lampiran peta akan disiapkan oleh komisi bersama untuk menegaskan batas wilayah tersebut. Sebuah perjanjian lain ditandatangani lagi oleh Belanda dan Inggris mengikuti Konvensi 1891 pada tanggal 20 Maret 1928. Inggris dan Amerika pada tanggal 2 Januari 1930 membuat sebuah perjanjian yang mengatur tentang adanya sebuah penarikan garis untuk memisahkan kepemilikan wilayah antara Kepulauan Philipina (Amerika Serikat) dengan Negara Borneo Utara (Inggris). Pada tanggal 26 Juli 1946, BNBC masuk ke dalam perjanjian dengan dengan Pemerintahan Inggris di mana dalam perjanjian tersebut BNBC menyerahkan hak dan kekuasaannya atas wilayah di Borneo Utara. Pada tanggal 9 Juli 1963, Negara Malaysia memasukkan Borneo Utara (North Borneo) menjadi wilayah negara bagian Malaysia dengan nama Sabah.

Setelah kemerdekaan masing masing negara, Indonesia dan Malaysia mulai memberikan lisensi pertambangan minyak di lepas pantai timur Borneo

(Kalimantan). Indonesia memberikan lisensi pertambangan minyaknya pada tanggal 6 Oktober 1960 kepada perusahaan Jepang. Malaysia juga memberikan lisensinya keada Sabah Teiseki Oil Company tahun 1968.

Sengketa berawal pada tahun 1969 sehubungan dengan diskusi mengenai garis batas kontinental di antara Malaysia dengan Indonesia. Pada tangal 27 Oktober 1969, perjanjian bersama antara Malaysia dengan Indonesia disepakati dan berlaku atau disahkan pada tanggal 7 November 1969. Namun Perjanjian ini tidak mencakup mengenai wilayah di timur Borneo khususnya tentang Pulau Sipadan dan Pulau Ligitan. (http://www.icj-cij.org)

2.1.2 Keputusan Mahkamah Internasional

Secara teknis pengambilan keputusan oleh Mahkamah Internasional akan didahului dengan pertemuan awal para hakim. Pada saat itu, Ketua Majelis akan menyampaikan garis besar masalah yang perlu untuk dibahas dan diputus oleh Mahkamah Internasional. Dalam mengambil keputusan mengenai sengketa ini, Mahkamah Internasional meninjau dari sejarah dan latar belakang sengketa kedua pulau tersebut. Klaim Indonesia atas kepemilikan Pulau Sipadan dan Pulau Ligitan secara garis besar adalah berdasarkan Konvensi 1891 antara Inggris dan Belanda. Sedangkan Malaysia beranggapan bahwa Konvensi 1891 bila dilihat secara keseluruhan akan menunjukkan bahwa Konvensi tersebut mengatur tentang perbatasan di daratan Borneo. Setelah meneliti Konvensi 1891, Mahkamah Internasional menyimpulkan bahwa Konvensi 1891 tidak bisa diintepretasikan sebagai peraturan yang mengatur garis batas yang menjorok ke laut ke arah selatan Pulau Sebatik. Mahkamah Internasional juga menemukan bahwa Konvensi 1891 tidak mengatur kepemilikan Indonesia atas Pulau Sipadan dan Pulau Ligitan. Mahkamah Internasional lebih lanjut menjelaskan bahwa bukti-bukti berupa peta yang diajukan kedua belah pihak tidak ada yang membantah kesimpulan Mahkamah Internasional ini. Mahkamah Internasional menolak argumentasi Indonesia tentang kepemilikan Pulau Sipadan dan Pulau Ligitan yang sebelumnya merupakan milik Kesultanan Bulungan. Mahkamah

Internasional juga menolak argumentasi Malaysia yang didasarkan pada pewarisan hak (*chain of title*) dari Inggris.

Mahkamah Internasional akhirnya harus menguji argumentasi kedua belah pihak tentang prinsip '*effective*' yang dilakukan oleh kedua belah pihak. Mahkamah Internasional berpendapat bahwa Inggris sebagai penjajah Malaysia lebih melakukan efektifitas dibanding Belanda ataupun Indonesia. Bukti-bukti yang disampaikan oleh Malaysia tentang adanya efektifitas yang dilakukan Inggris menjadi poin telak penentuan kedaulatan. Dengan mengacu pada putusan Denmark melawan Norwegia dalam kasus Legal Status of Eastern Greenland menentukan dua kriteria yang penting untuk menunjukkan adanya efektifitas. Pertama adalah adanya kehendak dan kemauan (*the intention and will*) untuk bertindak sebagai negara pada wilayah yang disengketakan. Kedua adalah adanya tindakan nyata atau pelaksanaan kewenangan negara (*actual exercise or display of such authority*). Di samping itu, yang juga diperhatikan adalah ada tidaknya klaim yang lebih tinggi (*superior claim*) dari pihak lawan dalam sengketa. Mahkamah Internasional menyimpulkan Malaysia memiliki sejumlah dokumen yang menunjukkan adanya administrasi berkesinambungan yang dilakukan pemerintah kolonial Inggris. Ini dibuktikan dengan beragam manifestasi baik bersifat administratif maupun legislatif sebagaimana terlihat dari pengutipan pajak terhadap kegiatan penangkapan penyu dan pengumpulan telur penyu sejak 1917. penyelesaian kasus-kasus sengketa pengumpulan telur penyu pada tahun 1930-an, penetapan Pulau Sipadan sebagai cagar burung (*bird sanctuaries*) dan pembangunan dan pemeliharaan mercu suar sejak tahun 1962 di Pulau Sipadan dan 1963 di Pulau Ligitan.

Mahkamah Internasional menegaskan bahwa fakta-fakta yang diajukan Malaysia ini meskipun jumlahnya sedikit namun bervariasi dalam karakternya tersebut membuktikan adanya pengelolaan secara damai dan berlanjut atas kedua pulau. Kesemuanya ini melingkupi suatu periode waktu yang memadai dan dinilai memperlihatkan suatu keinginan untuk melaksanakan fungsi-fungsi negara berkaitan dengan kedua pulau dalam rangka pengelolaan yang lebih luas. Sebaliknya, tindakan yang dijadikan sandaran Indonesia untuk membuktikan

efektifitasnya, antara lain kegiatan survei Kapal Macasser di tahun 1903, patroli Lynx pada tahun 1921, patroli TNI-AL serta kegiatan penangkapan ikan tradisional oleh nelayan Indonesia di kawasan pada tahun 1960-an dinilai tidak menunjukkan itikad dan kemuan untuk bertindak sesuai dengan kapasitas negara. Mahkamah Internsional menggarisbawahi baik laporan komandan Kapal Lynx maupun dokumen-dokumen lain yang diajukan Indonesia berhubungan dengan kegiatan survei dan patroli laut tidak memperlihatkan adanya bukti bahwa baik Belanda maupun Indonesia menganggap baik Belanda maupun Indonesia menganggap Pulau Sipadan dan Pulau Ligitan serta laut disekitarnya berada dalam wilayah kedaulatan Belanda ataupun Indonesia. Dalam kaitan pembuktian kegiatan efektif ini, Mahkamah Internasional sama sekali tidak mempertimbangkan tindakan-tindakan yang dilakukan para pihak setelah '*critical date*' (1969) kecuali apabila tindakan yang dimaksud merupakan kelanjutan normal dari tindakan-tindakan sebelumnya dan tidak dimaksudkan untuk memperkuat posisi hukum para kedua pihak.

2.2 Dasar Hukum

Berkaitan dengan kasus ini maka dasar hukum penyelesaian sengketa Pulau Sipadan dan Pulau Ligitan melalui Mahkamah Internasional yang penulis gunakan adalah sebagai berikut:

1. Piagam Perserikatan Bangsa Bangsa (CHARTER OF THE UNITED STATES)
    1. Pasal 1

        The Purpose of the United Nations are :

        1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjusment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determinations of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all with out distinction as to race, sex, language, or religion; and
4. To be an center for harmonizing the actions of nations in the attainment of these common ends.

2. Pasal 11 ayat 2

The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Members of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question in which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.

3. Pasal 12

1. While the Security Council is exercising in respect of any disputes or situation the function assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so request,
2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the Genera; Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.

4. Pasal 14

Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjusment of any situation, regardless of origin, which it deemns likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

5. Pasal 33

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of theis own choice.
2. The Security Council shall, when it deems necessary, call upon the parties to settle theis dispute by such means.

6. Pasal 35 ayat 1 dan 2

1. Any Member of the United Nations may bring any dispute, or any situation of the nature reffered to in Article 34, to the attention of the Security Council or of the General Assembly.
2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the disputes, the obligations of pacific settlement provided in the present Charter.

2. Statuta Mahkamah International (STATUTE OF THE INTERNATIONAL COURT OF JUSTICE)

1. Pasal 34

1. Only states may be parties in cases before the Court
2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before

4. Pasal 14

   Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjusment of any situation, regardless of origin, which it deemns likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

5. Pasal 33

   1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of theis own choice.
   2. The Security Council shall, when it deems necessary, call upon the parties to settle theis dispute by such means.

6. Pasal 35 ayat 1 dan 2

   1. Any Member of the United Nations may bring any dispute, or any situation of the nature reffered to in Article 34, to the attention of the Security Council or of the General Assembly.
   2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the disputes, the obligations of pacific settlement provided in the present Charter.

2. Statuta Mahkamah International (STATUTE OF THE INTERNATIONAL COURT OF JUSTICE)

   1. Pasal 34

      1. Only states may be parties in cases before the Court
      2. The Court, subject to and in conformity with its Rules, may reque t of public international organizations information relevant to cases before

it, and shall receive such information presented by such organizations on their own initiative.

3. Whenever the construction of the constituent insrument of a public intenational organization or of an international convention adopted thereunder is in question in a case before the Court, the Registar shall so notify the public internatio:al organization concerned and shall communicate to it copies of all the written proceedings.

2. Pasal 36 ayat 1, ayat 3 dan ayat 6

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for :n the Charter of the United Nation or in treaties and conventions in force.

3. The declarations refered to above may be be made unconditionally or on condition of reciprocity on the part several or certain states, or for a certain time.

6. In the event of a disputes as to wheter the Court has jurisdiction, the matter shall be settled by the decision of the Court.

3. Pasal 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply :

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of ageneral practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the rovisions of Article 59, judicial decisions and teachings of the most highly qualified publicist of the various nations, as subsidiary means for the determanation of rule of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

4. Pasal 63
    1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.
    2. Every state so notified has the right to intervene in the proceedings; but if it uses right, the construction given by the judgment will be equally binding upon it.
3. Convention Between Her Majesty The Queen Of The Netherlands And His Majesty In Respect Of The United Kingdom Of Respecting The Delimitation Of The Frontier Between The States In Borneo Under British Protection And Netherlands Territory In That Islands 1891.
4. Special Agreement For The Submission To The International Court Of Justice The Dispute Between Indonesia And Malaysia Concerning The Sovereignty Over Pulau Sipadan And Pulau Ligitan 1997.
5. Keputusan Mahkamah Internasional tanggal 17 Desember 2002 General List No:102 tentang sengketa Pulau Sipadan dan Pulau Ligitan antara Indonesia dan Malaysia.

2.3 Landasan Teori

2.3.1 Upaya-Upaya Penyelesaian Damai Sengketa Internasional Yang Diakui Oleh Hukum Interasional

Penyelesaian sengketa internasional adalah salah satu sisi dari persoalan besar dalam pemeliharaan perdamaian dunia. Dalam Piagam PBB, penggunaan kekerasan dari salah satu negara untuk menyelesaikan sengketa internasional tidak diijinkan. Penyelesaian sengketa secara damai adalah satu-satunya cara yang disarankan.

2.3.1.1 Upaya Penyelesaian Damai Non Judicial

Upaya penyelesaian sengketa secara damai *non judicial* dapat ditempuh para pihak melalui :

1. Jasa-jasa baik (Good Offices)

Good offices atau Jasa Jasa Baik merupakan metode penyelesaian sengketa internasional tradisional yang tidak tercantum dalam ketentuan pasal 33 Piagam Perserikatan Bangsa Bangsa akan tetapi merupakan suatu metode yang sering digunakan oleh Perserikatan Bangsa Bangsa. Pada *good offices* ini, campur tangan pihak ke tiga bukan menjatuhkan putusan untuk pihak-pihak yang berselisih melainkan mengajak pihak yang bersengketa untuk memutuskan perkara untuk mereka.

Jasa-jasa baik adalah tindakan pihak ketiga yang membawa ke arah negoisasi dengan tanpa berperan serta dalam diskusi mengenai substansi atau pokok sengketa yang disengketakan (Burhan Tsani, 1990:112).

Secara prinsip, negara yang menawarkan jasa-jasa baiknya tidak ikut secara langsung dalam perundingan-perundingan, tetapi hanya menyiapkan dan mengambil langkah-langkah yang perlu agar negara-negara yang bersengketa bertemu satu sama lain dan merundingkan sengketanya. (Mauna, 2003:191).

Apabila pihak ketiga telah mempertemukan pihak-pihak yang bersengketa maka tugas dari pihak ke tiga itu pun selesai, seperti yang dikemukakan oleh Michael Akehurst :

> " A state is said to offer its goods offices when it tries to persuade states to enter in to negotiation; when the negotiation starts, its function are at an end" (1970:290).

2. Mediasi (Mediation)

Penyelesaian sengketa melalui mediasi sedikit berbeda dibandingkan dengan upaya *good offices*, dimana dalam mediasi, seorang mediator turut ambil bagian dalam perundingan dan juga mengusulkan cara-cara penyelesaian bagi pihak yang bersengketa. Menurut Burhan Tsani:

"Mediasi adalah tindakan negara ke tiga atau individu yang tidak berkepentingan dalam suatu sengketa internasional, yang bertujuan membawa ke arah negoisasi atau memberi fasilitas ke arah negoisasi dan sekaligus berperan serta dalam negoisasi pihak sengketa tersebut" (1990:110).

Tugas dan peranan dari mediator hanya mendamaikan tuntutan yang berlainan diantara para pihak yang bersengketa dan mencegah memburuknya sengketa. Dalam mediasi ini, para pihak yang bersengketa menunjuk individu ataupun pemerintahan suatu negara yang dianggap mampu bertindak adil dan tidak memihak. Sering kali negara mediator mempergunakan pengaruhnya agar negara yang bersengket memberikan konsensi timbal balik demi terciptanya suatu penyelesaian. Namun demikian, saran-saran yang diberikan mediator dalam negoisasi tidak mempunyai daya mengikat sehingga perlu keluwesan agar proses mediasi berhasil di samping adanya kemauan para pihak dan penerimaan serta implementasi penyelesaian yang disarankan.

3. Penyelidikan (Enquiry)

Tujuan dari suatu penyelidikan adalah untuk menetapkan fakta yang mungkin diselesaikan dan dengan cara demikian memperlancar suatu penyelesaian yang dirundingkan. Dalam hubungan internasional telah ditunjukkan hampir selama setengah abad bahwa sengketa diselesaikan bukan berdasarkan pada hukum internasional yang memang masih memiliki banyak kekurangan namun berdasarkan pada fakta-fakta dari sengketa yang ada.

Sering terjadi dalam kasus sengketa internasional diangkat suatu komisi untuk menyelidiki fakta historis dan geografis yang menjadi pokok permasalahan dan dengan hal itu menjelaskan masalah-masalah sengketa. Cara ini juga sering dilakukan oleh Perserikatan Bangsa Bangsa dengan membentuk komisi penyelidik, yang berfungsi menentukan fakta-fakta yang menyinggung adanya persengketan, misalnya dengan mendengarkan para saksi atau mengunjungi daerah di mana pelanggaran atas hukum internasional yang dikatakan telah terjadi (Wallace, 1986:277).

4. Konsiliasi (Conciliation)

Konsiliasi adalah suatu cara penyelesaian secara damai sengketa internasional oleh suatu organ yang telah dibentuk sebelumnya atau dibentuk kemudian atas kesepakatan pihak-pihak yang bersengketa setelah lahirnya

masalah yang dipersengketakan (Mauna, 2003:203) . Konsiliasi merupakan bentuk kombinasi dari mediasi dan penyelidikan. Konsiliator adalah pihak yang ditunjuk oleh pihak yang bersengketa melalui sebuah perjanjian. Dalam konsiliasi ini, konsiliator akan menyelidiki sengketa. Namun konsiliasi mempunyai sifat lebih formal dan tidak fleksibel seperti mediasi. Jika saran dari mediator tidak diterima oleh para pihak, maka konsiliator bisa membuat rumusan baru untuk menyelesaikan sengketa. Namun tidak demikian dengan konsiliasi dimana konsiliator hanya akan melaporkan hasli penyelidikannya dan memberikan satu saran kepada para pihak. Para pihak yang bersengketa juga tidak diwajibkan untuk menerima saran dari konsiliator. Konsiliasi ini sering menyerupai arbitrase.

2.3.1.2 Upaya Penyelesaian Sengketa Secara Yudisial

Penyelesaian sengketa secara damai melalui hukum merupakan suatu proses penyelesaian sengketa yang didasarkan pada prinsip-prinsip hukum internasional yang dapat dilakukan melalui :

1. Perwasitan (Arbitrase)

Arbitase adalah suatu institusi yang cukup tua yang digunakan untuk menyelesaikan perselisihan yang tidak dapat diselesaikan melalui perudingan. Arbitarase menunjukkan prosedur yang persis sama sebagaimana dalam hukum nasional, yaitu menyerahkan sengketa kepada orang-orang tertentu (*arbitrator*) yang dipilih secara bebas oleh para pihak, mereka itulah yang memutuskan penyelesaian sengketa.

Komisi Hukum Internasional mendefinisikan arbitrase sebagai suatu prosedur untuk menyelesaikan perselisihan-perselisihan di antara negara-negara dengan ketentuan-ketentuan yang mengikat atas dasar hukum dan sebagai hasil penerimaan yang dilaksanakan secara suka rela (Wallace, 1993:87)

Konferensi The Hague 1899 menjadi cikal bakal pembentukan Permanent Court of Arbitration. Pada tahun 1900 Permanent Court of Arbitration berdiri dan mulai berfungsi pada tahun 1902 sampai saat ini. Prosedur pengajuan penyelesaian sengketa melalui arbitrase dimulai dan diawali dari penunjukan dua orang *arbitrator* oleh setiap negara yang salah seorang diantara *arbitrator* tersebut

boleh berkewarganegaraan negara yang bersangkutan ataupun orang-orang yang dinominasikan oleh negara-negara tersebut. Para *arbitrator* yang dipilih kemudian memilih seorang wasit yang bertindak sebagai ketua anggota dari pengadilan arbitrase. Putusan yang diambil melalui pengumpulan suara terbanyak. Prosedur ini dijalankan oleh pengadilan arbitrase sesuai dengan *compromise* khusus atau perjanjian arbitrase, yang menentukan secara rinci pokok masalah dari sengketa itu dan waktu untuk mengangkat anggota-anggota pengadilan dan menentukan yurisdiksi pengadilan. Prosedur tersebut harus ditaati dan kaidah serta prinsip-prinsip hukum harus dilaksanakan. Arbitrase tergantung kepada kemauan negara-negara yang bersengketa untuk mengajukan sengketa itu kepada pengadilan dan hasrat negara yang bersengketa untuk mencapai suatu penyelesaian (Starke, 1984:648). Keputusan arbitrase mengikat negara-negara yang bersengketa, hal ini biasanya dinyatakan dalam kompromis arbitrase ataupun karena keputusan tersebut didasarkan pada ketentuan-ketentuan hukum positif yaitu pasal 81 Konvensi Den Haag 1907 (Mauna, 2003:236).

2. Mahkamah Internasional (International Court of Justice)

Pembentukan Mahkamah Internasional sejalan dengan tujuan Perserikatan Bangsa Bangsa yaitu dalam rangka penyelesaian sengketa secara damai dalam bentuk lembaga atau badan peradilan yang diberi wewenang untuk menyelesaikan sengketa antar negara. Mahkamah Internasional adalah satu-satunya badan peradilan yang dibentuk oleh Perserikatan Banga Bangsa dan berdasarkan pada Piagam PBB yang berkedudukan sebagai organ utama (The Principal Organ) yang sejajar dengan organ lainnya seperti Majelis Umum dan Dewan Keamanan. Mahkamah Internasional adalah lembaga pengganti The Permanent Court of International Justice (PCIJ). Lembaga PCIJ ini akhirnya dibubarkan karena adanya pandangan PCIJ tidak efektif dalam menjalankan tugasnya dan tidak masuknya PCIJ ke dalam struktur Perserikatan Bangsa Bangsa dianggap menjadi kelemahan organisasi tersebut dalam menjalankan tugas dan wewenangnya.

Abdul Rasjid (1985:19) mengemukakan bahwa Mahkamah Internasional mempunyai wewenang penuh untuk mengadili perkara-perkara yang diajukan kepadanya tanpa campur tangan organ-organ lain . Namun demikian, Mahkamah

Internasional harus bersikap pasif, artinya Mahkamah Internasional baru mengadakan reaksi atau langkah-langkah apabila ada pengajuan perkara oleh para pihak dan tidak dapat melakukan inisiatif sendiri untuk memulai suatu perkara. Sifat penyelesaian perkara ke Mahkamah Internasional ini adalah fakultatif, para pihak atau dalam hal ini negara dapat memilih cara penyelesaian sengketa lain. Walaupun Mahkamah Internasional dibentuk oleh Perserikatan Bangsa Bangsa, tidak ada kewajiban bagi negara-negara untuk selalu menyelesaikan sengketa melalui Mahkamah Internasional. Kewenangan Mahkamah Internasional untuk memeriksa dan menyelidiki perkara yang diajukan kepadanya tergantung pada kemauan para pihakyang bersengketa.

Mahkamah Internasional tidak mempunyai yurisdiksi yang bersifat memaksa terhadap negara-negara, seperti layaknya sistem peradilan nasional dimana yurisdiksi badan peradilannya bersifat memaksa terhadap warga negaranya. Mahkamah Internasional memiliki yurisdiksi untuk menyeleaikan perkara apabila telah ada persetujuan terlebih dahulu dalam bentuk *special agreement* yang menyatakan bahwa negara-negara yang bersangkutan telah menerima atau mengakui yurisdiksi Mahkamah Internasional. Masalah yurisdiksi inilah yang menjadi titik kelemahan dari Mahkamah Internasional, dimana banyak negara tidak dapat digugat ke Mahkamah Internasional karena negara yang bersangkutan tidak berkemauan untuk menerima yurisdiksi Mahkamah Internasioal tersebut.

Dalam hal pelaksanaan keputusan diserahkan kepada itikad baik masing-masing pihak yang bersengketa yang lebih bersifat tanggung jawab moral, ataupun karena adanya saling menghormati di antara para pihak. Tidak adanya upaya pemaksa disebabkan para pihak yang berperkara adalah negara yang berdaulat, yang tidak dapat dipaksa oleh pihak luar. Walaupun menurut Piagam PBB Dewan Keamanan dapat diminta untuk membuat rekomendasi atau saran ataupun untuk menentukan dan mengambil tindakan-tindakan agar dipenuhinya putusan, namun tidak ada ketentuan tindakan seperti apa yang dapat diambil untuk memaksa pihak-pihak yang tidak mau menerima isi putusan Mahkamah Internasional tersebut.

2.3.2 Pengertian Perolehan Wilayah

Para sarjana hukum internasional tidak memberikan pengertian peolehan wilayah secara jelas. Mereka hanya mengemukakan tentang cara-cara perolehan wilayah dan kedaulatan atas suatu wilayah yang memang berhubungan erat dengan perolehan suatu wilayah. Dalam hukum internasional, perolehan suatu wilayah ataupun penambahan wilayah mirip seperti yang dikenal dalam hukum perdata yang dipergaruhi oleh Hukum Romawi.

Micchael Akehurst mengemukakan bahwa perolehan wilayah adalah suatu cara singkat untuk menggambarkan perolehan kedaulatan atas suatu wilayah. Negara memperoleh suatu wilayah apabila negara tersebut menunjukkan kedaulatan atas wilayah yang diperolehnya (1970 : 182).

2.3.3 Cara-cara Memperoleh Wilayah Yang Diatur Dalam Hukum Internasional

Max Huber, *arbitrator* dalam sengketa Islands of Palmas Arbitration mengatakan:

> "Kedaulatan dalam hubungan antara menandakan kemerdekaan. Kemerdekaan berkenaan dengan suatu bagian dari muka bumi ini adalah hak untuk melaksanakan di dalamnya, tanpa campur tangan negara-negara lain, fungsi-fungsi suatu negara"(Kaligis, 2003:167)

Konsep dari fungsi-fungsi negara ditunjukkan melalui adanya aktifitas negara dalam skala yang memadai, yang menunjukkan secara meyakinkan pelaksanaan wewenang dalam kedaulatan territorial dari negara tersebut.

Karena demikian pentingnya suatu wilayah membuat sering terjadi sengketa mengenai perebutan wilayah antara negara. Tidak jarang suatu negara melakukan perang terhada negara lain karena usaha untuk memperluas wilayahnya atau pun adanya klaim yang bersamaan atas suatu wilayah seperti halnya sengketa Pulau Sipadan dan Pulau Ligitan antara Malaysia dengan Republik Indonesia.

2.3.3.1 Penyerahan (Cession)

Penyerahan (*Cession*) adalah penguasaan wilayah yang biasanya dilakukan dengan suatu perjanjian dari satu negara ke negara lain. Perjanjian ini juga memberikan ijin negara penerima untuk menyerahkan wilayah tersebut kepada pihak yang lainnya. Prinsip ini mempunyai suatu syarat bahwa satu pihak menerima kedaulatan dan pihak yang lain melepaskannya. Penyerahan wilayah ini dapat bersifat sukarela ataupun dengan paksaan sebagai akibat perang yang dilakukan negara lain.

Cara ini bersandarkan pada prinsip bahwa hak mengalihkan teritorialnya adalah sifat fundamental dari kedaulatan suatu negara (Starke, 1984:151). Dalam penyerahan wilayah yang dilakukan juga akan disertai dengan penyerahan hak-hak kedaulatan berkenaan dengan wilayah yang diserahkan. Dan negara yang menyerahkan tidak dapat mengalihkan lebih dari pada wilayah dan kedaulatan yang dimilikinya (*nemo dat quod non habet*). Negara penerima itu juga harus tunduk pada batas-batas kedaulatan yang sebelumnya mengikat negara yang menyerahkan tersebut dengan negara lain.

2.3.3.2 Pendudukan (Occupation)

Pendudukan adalah penegakan kedaulatan atas wilayah yang bukan di bawah wewenang negara lain yang baru ditemukan ataupun ditinggalkan oleh negara yang sebelumnya (Starke, 1984:146). Pendudukan sangat berhubungan erat dengan *terrae nullius*, yang membedakannya dengan *prescription*. Syarat penguasaan yang efektif telah berkembang luas dalam hukum internasional sejalan dengan semakin sedikitnya wilayah yang belum dikuasai oleh negara-negara lain di dunia. Pendudukan dimulai dengan penemuan, yang pada hakekatnya tidak mengukuhkan hak penguasaan negara penemu wilayah tersebut. Publikasi mengenai penemuan suatu dapat memperkenalkan kepada masyarakat internasional mengenai suatu kepentingan yang ada lebih dahulu dari negara lain. Suatu wilayah mengalami suatu pendudukan apabila menerapkan penguasaan yang efektif. Pendudukan yang efektif ini ditunjukkan dengan bukti konkret tentang pemilikan atau penguasaan atau ditunjukkan dengan suatu tindakan yang jelas atau simbolis.

Wayan Parthiana mengemukakan unsur-unsur yang harus dipenuhi untuk sahnya suatu pendudukan adalah:

1. Unsur subjektif, yang meliputi unsur niat atau maksud dan unsur tindakan-tindakan nyata yang satu dengan yang lainnya saling berkaitan. Oleh karena niat untuk menguasai itu haruslah diwujudkan dalam dalam tindakan nyata dan sebaliknya dari tindakan-tindakan nyata itulah dapat disimpulkan adanya niat tersebut.
2. Unsur objektif, yaitu wilayah yang diduduki atau dikuasai itu hendaknya merupakan wilayah yang tidak bertuan atau *terrae nullius* (1987:39).

Prinsip efektif seringkali dipakai dalam menentukan dan menyelesaikan sengketa kepemilikan wilayah antar negara. Dalam kasus Pulau Miangas atau Island of Palmas Case antara Belanda dan Amerika Serikat tahun 1928, Max Huber sebagai *arbitrator* tunggal memenangkan Belanda atas pulau tersebut karena telah melaksanakan dan menunjukkan penguasaan yang efektif atas pulau yang bersangkutan. Demikian pula dengan kasus Eastern Greenland antara Norwegia dan Denmark, PCIJ memenangkan Denmark karena mampu membuktikan keaaar-keadaan yang memerlihatkan adanya unsur *effecivities*.

2.3.3.3 Penguasaan (Prescription)

Penguasaan atau *prescription* merupakan perolehan alas hak oleh kontrol publik yang damai dan kontinyu atas wilayah. Namun ada perbedaan dengan prinsip pendudukan di mana *preskripsi* dapat dilakukan atas wilayah manapun. Seperti yang dikemukakan oleh Michael Akehurst:

"Prescription is the acquisition of territory which belonged to another state. Whereas occupation is acquisition of *terra nullius*" (1970:186).

Penguasaan sebagai salah satu cara memperoleh wilayah diterima oleh banyak, walau demikian banyak ahli-ahli hukum internasional yang menolak bahwa pengasaan merupakan salah satu institusi hukum internasional.

Penguasaan menurut Starke adalah hasil pelaksanan kedaulatan secara de facto secara damai untuk jangka waktu yang sangat lama atas wilayah yang tunduk pada kedaulatan negara yang satu lagi (1984:152).

Mengenai panjangnya waktu yang diperlukan dalam pelaksanaan kedaulatan sebelum penguasaan akan memberi hak yang baik, tidak ada periode

yang diterima dan tergantung pada keadaan masing-masing. Namun dalam hukum Inggris, ada pengaturan di mana penghuni liar memperoleh hak terhadap suatu wilayah setelah 12 tahun, seperti yang dikemukakan Akehurst;

> "...there is no fixed period in internatinal law, but the time needed almost certainly much more than twelve years"(1970:186).

Tetapi sanggahan dari negara lain yang biasanya sangat gencar akan menghambat pengukuhan hak suatu dengan *prescription*. Ketika dihadapkan pada klaim yang bersamaan, pengadilan internasional biasanya akan merumuskan atau menunjuk negara yang dapat membuktikan tingkat penguasan yang lebih tinggi terhadap suatu wilayah yang dipersengketakan.

2.3.3.4 Perubahan Alam (Operation of Nature)

Perolehan wilayah melalui *operation of nature* ini menunjuk pada proses perkembangan dalam aturan hukum internasional. Hak ini terjadi apabila suatu negara bertambah wilayahnya khususnya melalui sebab-sebab alamiah, yang mungkin oleh kegiatan sungai atau yang lain ke wilayah yang telah berada di bawah kedaulatan negara yang memperoleh itu. Penambahan wilayah secara berangsur-angsur dan tidak kelihatan adalah sah sejauh proses tersebut memperlihatkan perluasan wilayah yang telah dikuasai secara efektif, seperti yang dikemukakan oleh Brownlie:

> " Accretion, the gradual and imperceptible addition of substance, is only valid in s far as the process gives rises to an extension to areas already under effective occupation on the basis of principle of contiguity and certainly"(1979:156).

Pertambahan wilayah secara geografis ini juga mempengaruhi batas-batas wilayah internasional di mana batas wilayah negara akan turut berubah mengikuti perubahan bentuk alam yang terjadi.

Walau jarang terjadi, prinsip penambahan wilayah secara geografis ini tidak mungkin dihindari meski masih ada keraguan apakah prinsip ini termasuk salah satu cara perolehan wilayah.

2.3.3.5 Penaklukan (Conquest)

Conquest adalah suatu metode memperoleh wilayah kedaulatan teritorial dengan cara menaklukkan negara dalam perang. Negara yang kalah akan menyerahkan wilayah kepada penakluk berdasarkan perjanjian atau bila tidak ada perjanjian, wilayah mana dapat dikuasai jika permusuhan antara pihak-pihak yang berperang telah berhenti. Pada abad 20 telah terjadi perkembangan sejalan dengan Piagam PBB, yang melarang suatu negara untuk melakukan perang dan melarang penggunaan kekuatan senjata kecuali untuk pembelaan diri. Perkembangan ini juga mempengaruhi metode memperoleh wilayah secara *conquest* di mana penaklukan tidak lagi merupakan suatu cara yang sah untuk memperoleh wilayah.

Hak suatu negara atas suatu wilayah melalui penaklukan akan penuh bila melalui pengakuan secara hukum oleh negara lain seperti yang dikemukakan oleh Akehurst:

> " an aggressor's title is invalid, simply because it is based on aggression, but its defects are cured when it is recognized (or, at any rate, when it recognized *de jure*) by other states (1970:188).

2.3.3.6 Putusan Pengadilan (Adjudication)

Terkadang *adjudication* (Putusan Pengadilan) dimasukkan ke dalam cara-cara memperoleh wilayah namun cara ini masih diragukan. Dalam teori, pengadilan internasional mempunyai tugas untuk menentukan negara mana yang memiliki kedaulatan atas suatu wilayah, namun bukan untuk memberikan hak wilayah baru kepada negara (Akehurst,1970:187). Pengadilan internasional tidak akan memberikan hak kepada negara dimana suatu wilayah tersebut tidak pernah dimiliki oleh negara tersebut.

Cara ini sering juga terjadi dimana negara-negara membentuk sebuah komisi untuk menentukan batas wilayah, dimana komisi ini memiliki kekuasaan dari perjanjian yang dibuat oleh negara-negara tersebut. Komisi ini bisa saja memperluas dan m,empersempit garis batas suatu begara. Pengalihan kedaulatan wilayah dalam *adjudication* ini sering dianggap sebagai bentuk *cession* (penyerahan).

BAB III
PEMBAHASAN

3.1 Proses Persidangan Yang Dilalui Oleh Kedua Negara Negara Dalam Persidangan Mahkamah Internasional

Penyelesaian sengketa Pulau Sipadan dan Pulau Ligitan secara damai melalui Mahkamah Internasional (International Court of Justice) disepakati kedua negara pada tanggal 7 Oktober 1996. Kesepakatan ini ditindaklanjuti dengan penandatanganan *special agreement* antara Menteri Luar Negeri Republik Indonesia Ali Alatas dengan Menteri Luar Negeri Malaysia Datuk Abdullah Ahmad Badawi pada tanggal 31 Mei 1997. Republik Indonesia melalui Ali Alatas meratifikasi *special agreement* tersebut pada tanggal 4 Mei 1998 dan Malaysia meratifikasinya pada tanggal 24 April 1998. Melalui *special agreement* tersebut penyelesaian sengketa Pulau Sipadan dan Pulau Ligitan sepenuhnya menjadi wewenang Mahkamah Internasional.

Mahkamah Internasional merupakan lembaga peradilan yang didirikan Perserikatan Bangsa Bangsa yang bertugas menyelesaikan sengketa antara negara-negara melalui badan peradilan. Tugas Mahkamah Internasional sebagai badan peradilan sejalan dengan tujuan Perserikatan Bangsa Bangsa yaitu untuk mempertahankan perdamaian dan keamanan serta mencegah tindakan-tindakan yang mengancam perdamaian dunia dengan cara-cara damai (Abdul Rasjid, 1985:41). Namun demikian, tidak ada kewajiban bagi negara-negara untuk menyelesaikan sengketanya melalui Mahkamah Internasional. Maksudnya di sini adalah penyelesaian sengketa melalui Mahkamah Internasional bersifat sukarela, sepanjang hal itu dikehendaki oleh para pihak dan Mahkamah Internasional hanya mempunyai wewenang untuk menyelesaikan sengketa antara negara-negara apabila ada kemauan atau kehendak oleh pihak-pihak yang bersengketa yang dinyatakan dalam *special agreement*.

Special agreement yang disepakati oleh Malaysia dan Republik Indonesia mengatur mengenai keputusan Mahkamah Internasional yang bersifat final dan mengikat kedua belah pihak. Artinya bahwa apapun keputusan yang diambil

Mahkamah Imternasional akan dihormati oleh Republik Indonesia dan Malaysia sebagai wujud dari upaya pemeliharaan damai di dunia khususnya di kawasan Asia Tenggara.

Pengajuan perkara ke Mahkamah Internasional dapat dilakukan dengan dua cara, pertama, bila antara pihak-pihak yang bersengketa telah ada perjanjian khusus (*special agreement*) maka perkara dapat dimasukkan dengan pemberitahuan (*notification*) melalui Panitera Mahkamah. Kedua, perkara dapat pula diajukan secara sepihak (dalam hal tidak ada persetujuan antara pihak-pihak yang bersengketa) dengan permohonan secara tertulis yang dialamatkan kepada Panitera Mahkamah (Abdul Rasjid, 1985:78).

Proses persidangan dalam sengketa ini juga. Dalam *special agreement* antara Malaysia dengan Republik Indonesia pasal 4 diatur mengenai proses persidangan yang terbagi dalam dua bagian utama, yaitu sesi Argumentasi Tertulis (*Written Pleadings*) dan Argumentasi Lisan (*Oral Pleadings*). Argumentasi Tertulis terbagi menjadi tiga tahapan, yaitu dimulai dengan penyampaian dasar klaim yang disebut sebagai *Memorial*. Atas *Memorial* yang disampaikan, masing-masing pihak diberi kesempatan untuk menjawab dalam bentuk *Counter Memorial*. *Counter Memorial* yang disampaikan oleh masing-masing negara kemudian akan dijawab kembali dalam bentuk Reply. Pasal 42 ayat 1 *Rules of Court* menyatakan bahwa, *"a memorial shall contain a statement of the relevant facts, a statement of law and the submission"*. Jadi Memorial pada hakekatnya adalah pernyataan pihak penggugat yang mengandung penyebutan tentang fakta-fakta yang menjadi dasar gugatan, penyebutan alasan hukumnya serta apa yang dimohonkan (*petitum*) kepada Mahkamah Internasional.

Republik Indonesia menyampaikan *Memorial* pada tanggal 2 November 1999. Selanjutnya kedua negara menyampaikan *Counter Memorial* pada bulan Agustus 2000. Atas *Counter Memorial* yang disampaikan, masing-masing negara telah menanggapinya dalam *Reply* yang disampaikan ke Mahkamah Internasional pada tanggal 2 Maret 2001. Pada bulan Juni 2002, para pihak diberi kesempatan untuk menyampaikan Argumentasi Lisan (*Oral Pleadings*) mereka. Dari pihak Republik Indonesia hadir dan mengawali Argumentasi Lisan adalah Menteri Luar

Negeri Hasan Wirajuda. Sementara dari pihak Malaysia diketuai oleh Duta Besar Keliling Kementrial Luar Negeri Malaysia Tan Sri Abdul Kadir Mohamad.

Guna menangani kasus ini, kedua belah pihak telah membentuk suatu tim yang beranggotakan penasihat hukum dan kuasa hukum. Tim yang dibentuk Republik Indonesia dalam sidang Mahkamah Internasional diwakili oleh Menteri Luar Negeri Republik Indonesia Hasan Wirajuda sebagai *Agent* dan Abdul Irsan, Duta Besar Indonesia untuk Belanda sebagai *Co-Agent*. Sedangkan yang bertindak sebagai *Counsel and Advocates* yaitu:

1. Allain Pellet, Guru Besar Universitas X-Nanterre di Paris, anggota dan mantan Kepala Komisi Hukum Internasional
2. Alfred. H. A Soons, Guru Besar Hukum Publik Internasional di Universitas Utrecht
3. Sir Arthur Watts, K.C.M.G., Q.C., anggota pengacara Inggris (*English Bar*), anggota Institut Hukum Internasional
4. Rodman R. Bundy, anggota pengacara New York
5. Loretta Malintoppi, anggota pengacara Roma (http://www.deplu.go.id)

Sebagai penasihat tehnik adalah Martin Pratt, Unit Peneliti Perbatasan Internasional, Universitas Durham, Robert C. Rizzutti, Spesialis Senior Pemetaan Asosiasi Pemetaan Internasional dan Thomas Frogh, Kartografer Asosiasi Pemetaan Internasional.

Sedangkan dari pihak Malaysia, tim yang dibentuk untuk sidang Mahkamah Internasional diwakili oleh Duta Besar Keliling Kementrian Luar Negeri Malaysia Tan Sri Abdul Kadir Mohamad sebagai *Agent*, dan Dato' Noor Farida Arifin sebagai *Co-Agent*. Malaysia juga membawa penasihat hukum dan pengacara terkenal yaitu:

1. Sir Elihu Lauterpacht, Q.C., C.B.E., Guru Besar Hukum Internasional Universitas Cambridge, anggota Institut Hukum Internasional
2. Jean-Pierre Cot, Profesor Emeritus Universitas Paris
3. James Crawford, S.C., F.B.A., Profesor Hukum Internasional Universitas Cambridge, anggota pengacara Inggris dan Australia, anggota Institut Hukum Internasional

Bulungan. Tidak ada keraguan perihal batas kepemilikan antara belanda dan Inggris di Borneo Utara mengingat Konvensi 1891 merupakan instrumen hukum yang menyelesaikan ketidakjelasan di antara kedua negara mengenai kepemilikan wilayah darat Borneo dan wilayah laut yang terletak si sebelah timur Borneo yang dibatasi oleh *allocation line* garis 4°10'LU. Hal ini diatur dalam pasal 4 Konvensi 1891 yang menyebutkan:

> " *From 4°10' north latitude on the east coast the boundary line shall be continued eastward along that parallel, across the islands 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* "

Pulau Sipadan dan Ligitan secara faktual terletak di sebelah selatan garis tersebut. Sebaliknya, kedua pulau ini juga tidak pernah menjadi bagian dari Kesultanan Sulu. Klaim Malaysia yang didasarkan rantai kepemilikan mengandung cacat hukum mengingat Pulau Sipadan dan Pulau Ligitan tidak pernah menjadi bagian dari Kesultanan Sulu atau Spanyol atau Amerika maupun Inggris sehingga kedua pulau tersebut tidak mungkin dapat dialihkan ke Malaysia.

Kesepakatan mengenai Konvensi 1891 ini ditegaskan melalui peta lampiran penjelasan (*Memorie Van Toelichting*) untuk keperluan ratifikasi Konvensi oleh Belanda. Praktek penertiban peta oleh Amerika Serikat, Inggris, Belanda pada periode berikut dan bahkan Malaysia hingga tahun1970-an juga konsisten dengan penafsiran Indonesia bahwa batas 4o10' LU berlanjut terus ke laut memotong Pulau Sebatik. Indonesia berkeyakinan bahwa amandemen pada tahun 1893 mengindikasikan adanya interpretasi Konvensi 1891, dimana pada amandemen tersebut dikatakan bahwa Pulau Tarakan dan Nunukan dan bagian-bagian lain dari Pulau Sebatik yang terletak di selatan dan garis batas adalah milik Sultan Bulungan beserta pulau-pulau kecil lainnya sejauh pulau-pulau tersebut masih berada di selatan garis batas. Indonesia juga menambahkan bahwa Inggris menerima interpretasi ini, dimana pada pertemuan resmi yang diadakan antara Inggris dan Belanda, pihak Inggris tidak memberikan reaksi ataupun protes kepada Belanda. Indonesia dengan ini menolak klaim kepemilikan Malaysia atas Pulau Sipadan dan Pulau Ligitan yang didasarkan pada faktor kedekatan jarak secara geografis mengingat secara yuridis *in proximity* tidak secara otomatis dapat

menimbulkan kedaulatan (*title*) kewilayahan sebagaimana diputuskan Mahkamah Internasional dalam beberapa kasus. Secara geomorfologis kedua pulau tersebut juga berbeda dan terpisah dari pulau-pulau terdekat serta daratan Malaysia maupun menjadi bagian gugusan Kepulauan Ligitan. Mengenai hal ini disampaikan Republik Indonesia dalam *Memorial*-nya di depan pengadilan Mahkamah Internasional (http://www.deplu.go.id)

Untuk mendukung klaim Indonesia atas Pulau Sipadan dan Pulau Ligitan, Indonesia mengikutsertakan prinsip efektif yang dilakukan terhadap kedua pulau tersebut. Indonesia menyebutkan tentang patroli dan pengamanan terhadap bajak laut di sekitar perairan keduan pulau yang dilakukan oleh Belanda pada tahun 1921. Demikian pula dengan Angkatan Laut Indonesia yang juga pernah mengunjungi perairan Sipadan antara tahun 1965 dan 1968. Bahkan Indonesia menyebutkan tentang pemberian lisensi pada perusahaan minyak Jepang, Japan Petroleum Exploration Co., Ltd.

Indonesia lebih lanjut menolak klaim kepemilikan Malaysia yang berlandaskan teori penguasaan efektif. Hal ini disampaikan Negara Indonesia dalam *Reply*. Terdapat bukti bahwa secara aktual Belanda hadir dan melaksanakan kedaulatannya terhadap kedua pulau sengketa antara lain dengan melakukan patroli dan pengumpulan data di kawasan tersebut dalam rangka tanggung jawab Belanda untuk memelihara kehandalan peta-peta kartografis kawasan yang terletak di sebelah selatan 4°10' LU. Indonesia juga menegaskan bahwa tindakan-tindakan pasca perundingan penetapan batas maritim 1969 tidak dapat mengubah situasi hukum yang telah ada sebelumnya. Ketiadaan bukti tertulis tidak dapat diartikan bahwa para pihak dapat melakukan tindakan atas objek persengketaan. Sebaliknya, tindakan yang dilakukan secara sepihak ini hanya akan mempersulit pemecahan masalah. Hal ini disampaikan Indonesia dalam menanggapi tindakan Malaysia yang tetap melakukan aktivitas terhadap kedua pulau walaupun telah ada kesepakatan diantara kedua negara menetapkan kedua pulau sengketa tersebut dalam keadaan status quo (http://www.deplu.go.id)

Dalam *Closing Speech* yang disampaikan pada sesi terakhir giliran Indonesia pada tanggal 10 Juni 2000, Menteri Luar Negeri Hasan Wirajuda

kembali mengingatkan Mahkamah Internasional bahwa praktek kedua negara selama ini senantiasa menghormati batas 4°10' LU sesuai Konvensi 1891. Menteri Luar Negeri Hasan Wirajuda juga menyampaikan penegasan sikap dan posisi Indonesia untuk *private rights* yang telah ada dikedua pulau sengketa dan dilaksanakan sesuai hukum nasional sekiranya Mahkamah Internasional memutuskan status Pulau Sipadan dan Pulau Ligitan sebagai milik Indonesia. Sebaliknya, Pemerintah Indonesia juga siap untuk melanjutkan perundingan perihal delimitasi batas laut di kawasan Pulau Sipadan dan Pulau Ligitan guna melengkapi perjanjian 1969 dengan mempertimbangkan keputusan Mahkamah Internasioanl. Hasan Wirajuda sebagai Agen Republik Indonesia sesuai dengan prosedur Mahkamah Internasional juga telah menyampaikan *submission* yang berisi permintaan agar Mahkamah Internasional memutuskan bahwa Pulau Sipadan dan Pulau Ligitan menjadi milik Indonesia (http://www.deplu.go.id)

Sementara itu Malaysia mendasarkan klaimnya terhadap kedua pulau sengketa berdasarkan beberapa transaksi (*series of transaction*) dari Sultan Sulu hingga Inggris dan terakhir Malaysia. Kemudian Malaysia mengklaim bahwa Inggris kemudian Malaysia telah melakukan penguasaan secara damai dan berkesinambungan (*continuous peaceful possession*) sejak tahun 1878, bahkan Belanda kemudian Indonesia telah lama menelantarkan (*inactivity*) kedua pulau tersebut. Selanjutnya Malaysia mengargumentasikan bahwa Konvensi 1891 tidak mendukung klaim Indonesia atas Pulau Sipadan dan Pulau Ligitan. Hal ini dikarenakan Konvensi 1891 mengatur mengenai batas daratan di wilayah Borneo dan tidak termasuk kepulauan yang lepas dari Pulau Borneo.

Dalam *Counter Memorial* dan *Reply*-nya, Malaysia menolak interpretasi Indonesia atas Konvensi 1891 dan terhadap relevansinya dengan klaim Indonesia atas Pulau Sipadan dan Pulau Ligitan mengingat Konvensi 1891 hanya mengatur perbatasan darat kedua negara di Borneo. Malaysia menyebutkan bahwa Indonesia tidak bisa mengklaim Pulau Sipadan dan Pulau Ligitan atas dasar *treaty title* mengingat pada saat Konvensi 1891 dibuat, kedua pulau sengketa bukan merupakan bagian dari wilayah British Protectorate of North Borneo dan Inggris tidak mungkin dapat memberi kedua pulau tersebut kepada Belanda pada tahun

1891. Pada intinya argumentasi pihak Malaysia mendasarkan klaim kepemilikan atas Pulau Sipadan dan Pulau Ligitan pada serangkaian transaksi pengelolaan yang dilakukan oleh British North Borneo Company -perusahaan yang menjadi cikal bakal kehadiran Inggris di wilayah koloni- yang diperoleh melalui transfer kedaulatan dari Spanyol dan Amerika. Kedua pulau sengketa semula merupakan bagian dari wilayah Kesultanan Sulu dan beralih menjadi milik Malaysia berdasarkan *chain of title*. Di samping itu, Malaysia juga mendalilkan adanya penguasaan efektif yang tidak terputus atas kedua pulau dengan mengajukan dua fakta. Pertama, bahwa sebelum tahun 1891 Belanda tidak memiliki hak atas Pulau Sipadan dan Pulau Ligitan mengingat klaim Kesultanan Bulungan tidak mencakup kedua pulau yang dimaksud. Kedua, setelah tahun 1891 baik Belanda maupun kemudian Indonesia tidak pernah melaksanakan hak otoritas atas Pulau Sipadan dan Pulau Ligitan. Sebaliknya, British North Borneo Company, Inggris dan Malaysia secara nyata melaksanakan hak tersebut antara lain dengan ordonansi perlindungan satwa burung, pemungutan pajak terhadap pengumpulan telur penyu dan pengoperasian mercu suar. Fakta-fakta tersebut menunjukkan bahwa Malaysia dan pendahulunya memiliki lebih banyak bukti nyata tentang tindakan administrasi atas Pulau Sipadan dan Pulau Ligitan. Malaysia juga menggunakan faktor *geographical setting* kedua pulau tersebut secara komparatif serta faktor kedekatan jarak yang dianggap selaras dengan kenyataan bahwa kegiatan penduduk di kelompok pulau tersebut merupakan suatu kesatuan sosial dan ekonomis. Malaysia juga menolak argumentasi Indonesia tentang *critical date* 1969 di mana sengketa itu muncul sehingga bukti dan bahwa kegiatan setelah itu harus diabaikan karena tidak memiliki relevansi hukum. Kemudian Malaysia menolak interpretasi Indonesia atas adanya *standstill agreement* tahun 1969 mengingat pertukaran nota yang ada hanya merupakan persetujuan yang bersifat teknis serta tidak mencakup kawasan sebelah timur Borneo. Pada sesi terakhir, Malaysia menyampaikan *Closing Speech* yang berisi permintaan agar Mahkamah Internasional memutuskan kepemilikan Malaysia atas Pulau Sipadan dan Pulau Ligitan (http://www.deplu.go.id)

3.2 Dasar Pertimbangan Mahkamah Internasional Dalam Mengambil Keputusan Mengenai Sengketa Antara Malaysia Dengan Republik Indonesia Tentang Kepemilikan Pulau Sipadan Dan Pulau Ligitan

Untuk memutuskan sengketa internasional mengenai Pulau Sipadan dan Pulau Ligitan, maka Mahkamah Internasional meninjau dan memeriksa dasar-dasar klaim yang diajukan oleh masing-masing pihak. Ada tiga dasar klaim pokok yang diajukan oleh masing-masing pihak kepada Mahkamah Internasional yaitu;

1. Konvensi 1891 antara Inggris dan Belanda

   Klaim berdasarkan konvensi ini diajukan oleh Indonesia.
2. Suksesi negara.

   Indonesia dan Malaysia mengajukan dasar suksesi atas klaim mereka.
3. Prinsip efektif

   Kedua negara mengajukan prinsip efektif yang telah dilakukan atas kedua pulau yang disengketakan.

Mahkamah Internasional akan meneliti satu per satu dasar klaim yang diajukan oleh masing-masing pihak. Melalui penelitian dan pertimbangan atas masing-masing dasar klaim yang diajukan tiap-tiap negara, Mahkamah Internasional dapat memutuskan siapa yang berhak atas kedua pulau yang disengketakan.

Klaim Indonesia atas Pulau Sipadan dan Pulau Ligitan terutama didasarkan pada Konvensi 1891 antara Inggris dan Belanda. Indonesia menyatakan bahwa konteks dan tujuan serta objek dari Konvensi 1891 adalam membuat garis batas 4°10'LU menjadi antara Inggris dan Belanda di Pulau Borneo. Wilayah yang berada di sebelah utara garis 4°10'LU menjadi milik Inggris sedangkan yang di sebelah selatan menjadi milik Belanda. Pulau Sipadan dan Pulau Ligitan terletak di sebelah Selatan garis 4°10'LU, yang berarti adalah milik Belanda dan kini menjadi milik Indonesia.

Di lain pihak, Malaysia menolak klaim Indonesia yang berdasarkan pada Konvensi 1891 tersebut. Malaysia berpendapat bahwa apabila Konvensi 1891 dilihat secara menyeluruh akan menunjukkan secara jelas bahwa Belanda dan Inggris bermaksud untuk mempertegas garis batas wilayah mereka pada Pulau

Borneo dan Pulau Sebatik. Garis batas yang diatur dalam Konvensi 1891 tidak mengatur mengenai wilayah atau pulau-pulau yang berada di arah timur dari garis 4°10' tersebut.

Untuk membuktikan dasar klaim Indonesia tersebut, Mahkamah Internasional memeriksa dan menganalisa Konvensi 1891 yang menjadi dasar klaim Indonesia tersebut. Pada tanggal 20 Juni 1891, Inggris dan belanda menandatangani sebuah konvensi yang bertujuan untuk mengatur garis batas-batas antara wilayah Inggris dan Belanda di Pulau Borneo. Konvensi 1891 tersebut terdiri dari 8 pasal. Pasal 1 mengatur tentang batas kepemilikan wilayah Belanda dan Inggris berawal dari garis 4°10' LU di timur pantai Pulau Borneo. Pasal 2 mengatur tentang penarikan batas garis batas tersebut menuju ke arah barat. Pasal 3 menjelaskan bahwa penarikan garis batas ke arah barat berhenti sampai Tanjung Tutop, di pantai barat Borneo. Pasal 4 mengatur tentang penarikan garis batas 4°10 LU dilanjutkan ke arah timur, melewati Pulau Sebatik. Pulau-pulau yang beradadi sebelah utara garis paralel tersebut menjadi milik Inggris dan di sebelah Selatan menjadi milik Belanda. Pasal 5 menyatakan bahwa pengaturan posisi yang lebih jelas tentang garis batas tersebut akan ditentukan lebih lanjut di antara kedua negara. Pasal 6 mengatur tentang pemberian jaminan kebebasan berlayar di seluruh sungai yang berada antara Batoe-Tinegat dan di Sungai Siboekoe. Pasal 7 mengatur tentang pemberian hak kepada rakyat Kesultanan Bulungan atas bagian utara batas wilayah. Pasal 8 mengartur tentang waktu berlakunya Konvensi tersebut.

Mahkamah Internasional mencatat adanya perbedaan interpretasi kedua negara (antara Indonesia dan Malaysia) atas Konvensi 1891 dimana Malaysia tida : setuju dengan pendapat Indonesia tentang Pasal 4 Konvensi 1891. Dalam hal ini, Mahkamah Internasional berpendapat bahwa pasal 1 Konvensi 1891 mengatur tentang titik awal penarikan garis batas wilayah antara Belanda dan Inggris. Pasal 2 dan 3 mengatur tentang bagaimana garis batas tersebut berlanjut dari satu titik ke titik lain. pasal 4 menjelaskan tentang garis batas yang harus dilanjutkan ke arah timur pantai Borneo dan garis batas tersebut memotong dan berakhir pada Pulau Sebatik. Hal ini berbeda dengan penafsiran Indonesia yang beranggapan

garis batas tersebut bukan hanya memotong Pulau Sebatik tetapi dilanjutkan menuju arah laut di mana Pulau Sipadan dan Ligitan berada.

Untuk memperkuat penafsiran Indonesia atas Konvensi 1891, Indonesia menyertakan *Explanatory Memorandum* yang merupakan bagian penjelasan dari Konvensi 1891. Pada peta yang menyertai Explanatory Memorandum tersebut digambarkan perpanjangan garis batas 4°10' LU menuju ke arah timur Pulau Sebatik. Mahkamah Internasional berpendapat bahwa Explanatory Memorandum menjelaskan tentang penarikan garis batas paralel menuju ke arah timur dari pantai timur Borneo Utara (North Borneo). Mahkamah Internasional juga menemukan adanya 4 perbedaan warna garis yang terdapat pada peta yang ada pada *Explanatory Memorandum* tersebut. Garis biru menandakan pada peta batas wilayah yang menjadi milik Belanda, garis kuning menunjukkan wilayah milik BNBC. Garis hijau adalah untuk menunjukkan wilayah yang menjadi Inggris dan garis merah adalah garis batas yang disetujui masing-masing pihak. Garis biru dan kuning berhenti di pada pantai, garis hijau sedikit mengarah ke luar menuju laut, sedangkan garis merah bersambung ke laut sejajar dengan garis paralel 4°10' LU menuju arah selatan Pulau Mabul. Mahkamah Internasional tidak menemukan adanya pengaturan pada *Explanatory Memorandum* termasuk juga pada rapat parlemen Belanda mengenai penarikan garis batas berwarnah merah tersebut ke luar menuju laut. Mahkamah Internasional menyatakan bahwa peta yang terdapat Explanatory Memorandum hanya menunjukkan beberapa pulau terletak pada sebelah utara garis paralel 4°10' LU dan tidak ada pulau yang ditunjukkan pada sebelah selatan garis tersebut. Lebih lanjut Mahkamah Internasional menyatakan bahwa anggota Parlemen Belanda juga tidak menyadari tentang keberadaan dua pulau kecil yang terletak di sebelah selatan garis batas terebut. Selain itu, Mahkamah Internasional juga tidak menemukan data-data lain yang dapat menunjukkan Pulau Sipadan dan Pulau Ligitan menjadi objek sengketa antara Belanda dan Inggris pada saat Konvensi 1891 dibuat.. Setelah melakukan pemeriksaan lebih jauh, Mahkamah Internasional menyatakan bahwa *Explanatory Memorandum* beserta peta yang disertakan oleh Pemerintah Indonesia sebagai bukti untuk memperkuat klaimnya tidak dapat diterima sebagai sebuah perjanjian

mengikat yang mengikuti Konvensi 1891. Mahkamah Internasional menemukan bahwa Pemerintah Belanda tidak pernah mengirimkan *Explanatory Memorandum* dan peta tersebut secara resmi kepada Pemerintah Inggris. Mahkamah Internasional berkesimpulan bahwa Konvensi 1891 bertujuan hanya untuk pembatasan wilayah antara Belanda dan Inggris pada Pulau Borneo, hal ini dijelaskan dalam Pembukaan Konvensi 1891. Mengenai kepemilikan Pulau Sebatik, Mahkamah Internasional tidak menemukan adanya pasal-pasal atau aturan-aturan lain pada Konvensi 1891 yang mengatur kepemilikan pulau-pulau lain selain Pulau Borneo dan Sebatik.

Mahkamah Internasional juga harus memeriksa perjanjian-perjanjian lain yang diserahkan Indonesia sebagai bukti untuk memperkuat interpretasinya atas pasal 4 Konvensi 1891.Perjanjian pertama yang dibuat antara Inggris dan Belanda mengenai batas wilayah di Pulau Borneo dilakukan pada tanggal 25 September 1915. Mahkamah Internasional menemukan bahwa Perjanjian 1915 yang dibuat tersebut tidak sepenuhnya berhubungan dengan Konvensi 1891 terutama mengenai pembatasan wilayah. Dalam pandangannya lebih jauh, Mahkamah Internasional menolak pendapat Indonesia yang menyatakan Perjanjian 1915 menunjukkan Ingris dan Belanda menyetujui garis batas 4°10' LU ditarik ke arah laut di sebelah timur Pulau Sebatik.

Perjanjian lain yang diserahkan Indonesia adalah perjanjian yang dibuat pada tahun 1928 antara Inggris dan Belanda. Dalam pandangannya terhadap perjanjian ini, Mahkamah Internasional berpendapat bahwa Perjanjian 1928 hanya mengatur mengenai batas wilayah kedua negara di daerah pedalaman Pulau Sebatik. Mahkamah Internasional tidak menemukan satu pun konklusi yang mengatur mengenai perluasan wilayah yang memanjang ke arah laut di timur Pulau Sebatik. Mahkamah Internasional berkesimpulan bahwa tidak ada perjanjian-perjanjian lain antara Inggris dan Belanda yang berhubungan dengan garis batas yang diatur dalam Konvensi 1891, yang artinya Indonesia menurut Mahkamah Internasional tidak dapat membuktikan klaim kepemilikan Pulau Sipadan dan Ligitan berdasarkan Konvensi 1891.

Baik Indonesia maupun Malaysia secara bersamaan mendasarkan klaim kepemilikan Pulau Sipadan dan Pulau Ligitan pada suksesi negara. Indonesia berpendapat bahwa Pulau Sipadan dan Pulau Ligitan sebelum menjadi objek sengketa pada Konvensi 1891 adalah milik Sultan Bulungan, kemudian Sultan Bulungan menyerahkan pulau tersebut kepada Belanda yang akhirnya menjadi milik Indonesia sebagai negara suksesor. Mahkamah Internasional tidak dapat menerima argumentasi Indonesia ini. Dalam pemeriksaan yang dilakukan Mahkamah Internasional terhadap perjanjian-perjanjian antara Sultan Bulungan dengan Belanda, Mahkamah Internasional tidak menemukan adanya perjanjian yang menyatakan Pulau Sipadan dan Pulau Ligitan adalah milik Sultan Bulungan. Pada tahun 1878, Sultan Bulungan dan Belanda membuat sebuah kontrak perjanjian yang mengatur mengenai pulau-pulau yang dimiliki oleh Sultan Bulungan yang terdiri dari Tarakan, Nunukan dan Sebatik beserta pulau-pulau kecil lainnya yang berada di dekat ketiga pulau tersebut. Namun Mahkamah Internasional berpendapat Pulau Sipadan dan Pulau Ligitan tidak dapat dimasukkan sebagai pulau-pulau kecil dalam Kontrak 1878 karena Pulau Sipadan dan Pulau Ligitan tersebut berada lebih dari 40 mil laut dari ketiga pulau milik Sultan Bulungan tersebut. Dan akhirnya Mahkamah Internasional tidak dapat menerima klaim Indonesia yang didasarkan pada suksesi negara.

Malaysia juga menggunakan prinsip suksesi negara sebagai dasar klaim kepemilikan Pulau Sipadan dan Pulau Ligitan. Malaysia menyatakan bahwa kepemilikan atas pulau Sipadan dan Pulau Ligitan berdasarkan transfer kedaulatan yang berawal dari Sultan Sulu, yang beralih ke Spanyol, kemudian ke pihak Amerika Serikat, lalu ke North Borneo dan setelah itu beralih ke Inggris dan akhirnya ke pihak Malaysia.

Mahkamah Internasional pertama sekali memeriksa kebenaran kepemilikan Sultan Sulu atas Pulau Sipadan dan Pulau Ligitan. Menurut Protokol yang dibuat antara Spanyol, Jerman dan Inggris tahun 1885, luas wilayah Kesultanan Sulu digambarkan secara samar terdiri dari seluruh pulau yang berada diantara ujung barat Pulau Mindanao dan Pulau Borneo serta Pulau Paragua. Namun dalam Protokol 1885 dan perjanjian-perjanjian lain tidak ada yang

mengatur mengenai keberadaan Pulau Sipadan dan Pulau Ligitan. sehubungan dengan wilayah yang dimiliki Kesultanan Sulu. Mengenai transfer kedaulatan ke pihak Spanyol pada tanggal 22 Juli 1878, Mahkamah Internasional menyatakan Spanyol tidak menaruh perhatian terhadap Pulau Sipadan dan Pulau Ligitan atau pun pulau-pulau lainnya yang berdekatan dan Spanyol juga tidak pernah menunjukkan otoritas kedaulatannya terhadap pulau-pulau tersebut. Mahkamah Internasional juga menambahkan bahwa Spanyol tidak pernah melakukan pendudukan terhadap pulau-pulau tersebut seperti yang diatur dalam pasal 2 Protokol 1885. Bahkan setelah tahun 1878, BNBC memperluas wilayah administrasinya ke pulau-pulau tersebut melebihi balas laut 3 mil dan juga akhirnya mengklaim kepemilikan pulau-pulau tersebut tanpa adanya protes dari pihak Spanyol. Mahkamah Internasional tidak menemukan adanya bukti tentang Pulau Sipadan dan Pulau Ligitan diatur dalam Protokol 1878 antara Spanyol dan Sultan Sulu ataupun Protocol 1885 antara Spanyol, Jerman dan Inggris. Lebih lanjut Mahkamah Internasional menjelaskan bahwa Spanyol adalah satu-satunya negara yang seharusnya dapat mengklaim kepemilikan atas Pulau Sipadan dan Pulau Ligitan. Namun tidak ada dokumen yang menjelaskan Spanyol pernah melakukan klaim tersebut. Inggris, North Borneo dan Belanda baik secara implisit maupun eksplisit juga tidak pernah melakukan klaim atas Pulau Sipadan dan Pulau Ligitan.

Berdasarkan Perjanjian 1900 antara Spanyol dan Amerika Serikat, Spanyol menyerahkan seluruh kedaulatan wilayahnya kepada Philipina. Perjanjian ini adalah lanjutan dari Perjanjian Damai 1898 yang mengatur tentang penyerahan pulau-pulau yang tidak disebutkan dalam Perjanjian Damai 1898 tersebut. Namun tidak ada disebutkan pulau-pulau lain yang letaknya berdekatan dengan pantai North Borneo. Pulau yang dimaksudkan dalam Perjanjian 1900 hanyalah Pulau Cagayan Sulu dan Pulau Sebatik. Mahkamah Internasional mencatat bahwa Pulau Sipadan dan Pulau Ligitan tidak termasuk dalam Perjanjian 1898 ataupun Perjanjian 1900 dan Spanyol tidak pernah menyerahkan klaimnya atas Pulau Sipadan dan Pulau Ligitan ataupun atas pulau lain yang berada lebih dari 3 mil laut dari pantai North Borneo kepada Amerika Serikat. Di lain pihak, Amerika

Serikat tidak mengetahui secara jelas pulau-pulau yang diterimanya melalui perjanjian 1900. Hubungan korespondensi yang dilakukan antara Sekretaris Negara Amerika Serikat dengan Sekretaris Perang dan Angkatan Laut Amerika Serikat mengenai akibat dari pelayaran kapal perang Amerika Serikat *Quiros* dan pembuatan peta oleh Kantor Pemetaan Amerika Serikat yan membuat membuat garis batas wilayah antara Amerika Serikat dan Inggris dimana disebutkan Pulau Sipadan dan Pulau Ligitan menjadi milik Amerika Serikat menggambarkan adanya ketidakjelasan wilayah teritorial dan maritim yang dimiliki oleh Filipina dimana wilayah terebut diserahkan oleh Spanyol. Mahkamah Internasional mencatat bahwa Sekretaris Negara Amerika Serikat tidak tahu menahu tentang Pulau Sipadan dan Pulau Ligitan beserta pulau-pulau lainnya yang berupa pulau-pulau karang adalah milik Spanyol ataupun Kesultanan Sulu.

Persetujuan lain dibuat oleh Inggris dan Amerika Serikat pada tahun 1907. Persetujuan ini menetapkan tentang kelanjutan administrasi BNBC pada pulau-pulau yang berada lebih dari 3 mil laut dari pantai North Borneo. Namun mengenai Pulau Sipadan dan Pulau Ligitan dan kepemilikannya masih tidak jelas. Tidak ada indikasi yang menunjukkan kepemilikan atas Pulau Sipadan dan Pulau Ligitan antara BNBC dan Amerika Serikat. Kemudian pada tahun 1930, sebuah Konvensi disetujui oleh Inggris dan Amerika Serikat yang mengatur mengenai penarikan batas wilayah yang dimiliki oleh Filipina dan North Borneo. Pasal 3 Konvensi 1930 tersebut mengatur tentang kepemilikan North Borneo atas pulau-pulau yang berda di sebelah selatan dan barat garis batas tersebut. Konvensi ini tidak menyebutkan adanya pulau-pulau lain selain Pulau Penyu dan Pulau Mangsee yang menjadi milik Amerika Serikat. Melalui Konvensi 1930, Amerika Serikat menyerahkan haknya atas pulau-pulau yang dimilikinya kepada Inggris. Namun Mahkamah Internasional berpendapat bahwa Amerika Serikat tidak pernah melakukan penguasaan atas Pulau Sipadan dan Pulau Ligitan dan hal ini dikuatkan dengan tidak adanya bukti-bukti dokumentasi yang keluar dari Pemerintahan Amerika Serikat atas penguasaan pulau-pulau tersebut. Dengan demikian tidak dapat dikatakan Amerika Serikat menyerahkan kekuasaan atas Pulau Sipadan dan Pulau Ligitan kepada Inggris berdasarkan Konvensi 1930

seperti yang dinyatakan oleh Malaysia. Selain itu, Mahkamah Internasional menambahkan bahwa Inggris menerima kedaulatan atas seluruh pulau yang berada di luar zona 3 mil laut yang dimiliki BNBC. Menurut Mahkamah Internasional, Inggris hanya menerima kedaulatan atas Pulau Penyu dan Pulau Mangsee menurut Konvensi 1930. Dalam pandangannya lebih jauh, Mahkamah Internasional menolak argumentasi Malaysia yang menyatakan Malaysia mendapatkan hak kedaulatan atas Pulau Sipadan dan Pulau Ligitan berdasarkan pada transfer kedaulatan yang tidak dapat diganggu gugat dari Sultan Sulu ke pihak Malaysia sekarang. Mahkamah Internasional menyatakan tidak ada bukti kepemilikan Sultan Sulu atas Pulau Sipadan dan Pulau Ligitan dan berkesimpulan bahwa Malaysia tidak dapat memperoleh kekuasaan atas Pulau Sipadan dan Pulau Ligitan berdasarkan prinsip suksesi negara.

Mahkamah Internasional menetapkan prinsip *effectifities* yang diajukan oleh Indonesia maupun Malaysia adalah masalah yang bebas dan terpisah dari klaim yang lainnya. Dalam memeriksa sengketa Pulau Sipadan dan Pulau Ligitan ini, Mahkamah Internasional lebih menekankan pada penguasaan efektif (*Effectife Occupation*) dari sebuah kedaulatan. Kedaulatan yang dimaksudkan disini adalah tindakan nyata dari sebuah negara atas wilayahnya dan tidak ada klaim yang lebih tinggi tingkatannya atas wilayah tersebut. Mahkamah Internasional dalam hal ini merujuk pada putusan kasus Legal Status of Eastern Greenland antara Denmark dan Norwegia tahun 1933 yang dihasilkan oleh Permanent Court of International Justice (PCIJ) yaitu :

" 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 elemets 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 no to adjudication upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power.

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" (http://www.icj-cij.org).

Mahkamah Internasional juga menegaskan bahwa pada kasus sengketa pulau yang sangat kecil dan tidak dihuni secara menetap seperti halnya pada Pulau Sipadan dan Pulau Ligitan, prinsip efektif yang dilakukan terhadapnya pada umumnya sangat jarang ditemukan. Lebih lanjut Mahkamah Internasional mengemukakan bahwa prinsip efektif yang akan diperiksa oleh Mahkamah Internasional adalah hal-hal yang dilakukan kedua belah pihak yaitu antara Malaysia dan Indonesia sebelum sengketa ini timbul diantara kedua negara (*critical date*) pada tahun 1969. Hal-hal yang dilakukan oleh masing-masing pihak baik Indonesia maupun Malaysia setelah tahun 1969 tidak akan mendapatkan pertimbangan dari Mahkamah Internasional kecuali apabila aktifitas yang dilakukan adalah merupakan kelanjutan secara normal dari tindakan yang dilakukan oleh pihak-pihak sebelum *critical date* dengan tanpa tujuan untuk memperkuat posisi dari masing-masing pihak.

Menyangkut mengenai prinsip *effectivities* yang dilakukan oleh Indonesia, Mahkamah Internasional menilai bahwa tidak ada satu pun perundang-undangan yang mengatur mengenai Pulau Sipadan dan Pulau Ligitan. Mahkamah Internasional juga tidak dapat mengabaikan fakta bahwa Undang Undang No. 4 Tahun 1960 yang mengatur mengenai penarikan garis pangkal wilayah laut Indonesia tidak memasukkan Pulau Sipadan dan Pulau Ligitan sebagai titik-titik garis pangkal.

Menurut opini Mahkamah Internasional, tidak dapat ditarik kesimpulan dari laporan komandan kapal patroli Belanda Lynx atau dari dokumen lain yang disajikan oleh Indonesia dalam kaitannya dengan patroli laut Indonesia atau Belanda bahwa otoritas kedaulatan terkait meliputi Pulau Sipadan dan Pulau Ligitan dan perairan di sekitarnya di bawah kedaulatan Belanda ataupun Indonesia. Indonesia menyatakan bahwa perairan di sekitar Pulau Sipadan dan Pulau Ligitan digunakan oleh nelayan tradisional Indonesia sebagai lahan menangkap ikan. Namun hal ini tidak diterima oleh Mahkamah Internasional dengan alasan bahwa aktivitas yang dilakukan perseorangan tidak dapat dikatakan sebagai *effectivities* jika tidak didasarkan pada peraturan resmi atau

wewenang pemerintah yang sah. Mahkamah Internasional menganggap bahwa tindakan yang dilakukan oleh Indonesia bukanlah merupakan tindakan *a titre de souverein* yang mencerminkan kehendak dan keinginan untuk bertindak dalam kapasitasnya sebagai sebuah negara.

Berkenaan dengan prinsip efektif yang disandarkan Malaysia, Mahkamah Internasional pertama sekali mengamati bahwa sesuai dengan Konvensi 1930, Amerika Serikat menyerahkan kedaulatan atas Pulau Sipadan dan Pulau Ligitan dan tidak ada negara lain yang mengemukakan kedaulatannya atas kedua pulau tersebut pada waktu itu atau merasa keberatan dengan pemerintahan berkelanjutan yang dilakukan oleh State of North Borneo. Mahkamah Internasional beranggapan bahwa BNBC mempunyai hak untuk memerintah kedua pulau tersebut dan hal ini juga diakui oleh Amerika Serikat secara formal setelah tahun 1907, maka kegiatan-kegiatan administratif ini tidak dapat diabaikan begitu saja.

Selanjutnya Mahkamah Internasional berpendapat bahwa aktivitas yang dilakukan oleh State of North Borneo sebelum dibuatnya Konvensi 1930 tidak dapat dianggap sebaai tindakan *a titre de souverain* karena Inggris Raya pada saat itu tidak mengajukan klaim kedaulatan atas nama State of North Borneo atas pulau-pulau di luar batas 3 mil landas kontinen.

Sebagai bukti administratif terhadap kedua pulau sengketa, Malaysia menyatakan bahwa ukuran yang diambil oleh Otoritas North Borneo untuk mengatur dan mengendalikan tindakan pengumpulan telur penyu di Pulau Sipadan dan Pulau Ligitan merupakan sebuah aktivitas ekonomi yang nyata di daerah tersebut pada saat itu. Hal ini merujuk pada Turtle Preservation Ordonance 1917, yang bertujuan untuk menciptakan *native reserve* untuk pengumpulan telur penyu. Pulau Sipadan termasuk di antara pulau-pulau yang masuk dalam *native reserve* tersebut.

Mahkamah Internasional berpendapat bahwa kegiatan yang dilakukan oleh Malaysia baik itu atas namanya sendiri atau sebagai suksesor Inggris memang sedikit jumlahnya tetapi hal ini sangat beragam dalam karakternya, termasuk dalam tindakan-tindakan legislatif, administratif dan quasi peradilan. Hal-hal tersebut meliputi periode waktu yang panjang dan menunjukkan pola penampakan

kehendak untuk melaksanakan fungsi kenegaraan yang berkaitan dengan kedua pulau tersebut dalam konteks administrasi dalam lingkup yang lebih luas.

Selanjutnya Mahkamah Internasional tidak dapat mengabaikan fakta bahwa pada saat itu kegiatan-kegiatan tersebut dilaksanakan, baik Indonesia maupun pendahulunya Belanda tidak pernah melakukan pertentangan atau protes. Dalam hal ini, Mahkamah Internasional memberikan catatan bahwa pada tahun 1902 dan 1962 Belanda tidak pernah mengingatkan Otoritas Koloni North Borneo atau Malaysia setelah kemerdekaannya bahwa pembangunan mercu suar pada masa itu dilakukan di wilayah yang mereka anggap sebagai milik Belanda ataupun Indonesia.

Berdasarkan fakta-fakta yang diberikan oleh kedua belah pihak, Mahkamah Internasional menyimpulkan bahwa Malaysia memiliki hak terhadap Pulau Sipadan dan Pulau Ligitan berdasarkan prinsip *effectivities* yang dilakukan oleh Malaysia ataupun Inggris pendahulunya.

3.3 Langkah Yang Diambil Oleh Pemerintah Indonesia Dalam Menjaga Serta Mengelola Wilayah Perbatasan Wilayah Indonesia

Sebagai negara kepulauan terbesar di dunia, Indonesia merupakan perlintasan strategis bagi navigasi internasional karena menghubungkan sekaligus dua samudera. Karakteristik geografis yang demikian membuat masalah perbatasan dan pengelolaan wilayah perbatasan laut menjadi sangat penting artinya. Bagaimana potensi dan kendala dalam pengelolaan wilayah perbatasan ini setidaknya tercermin dari letak geografis Indonesia yang dikelilingi 10 negara tetangga sekaligus yaitu India, Thailand, Malaysia, Singapura, Vietnam, Filipina, Palau, Papua Nugini, Australia dan Timor Leste.

Penetapan batas wilayah negara meskipun diakui sebagai tindakan internal yang mencerminkan hak berdaulat suatu negara namun senantiasa memiliki dimensi eksternal. Kaitannya di sini adalah penghormatan terhadap kepentingan negara lain yang wilayahnya berbatasan dengan langsung Indonesia. Karena itu penetapan batas wilayah tidak dapat ditafsirkan sebagai tindakan sepihak sebab dengan demikian tidak akan mempunyai kekuatan mengikat bagi negara lain.

Idealnya persetujuan-persetujuan batas wilayah negara diselesaikan melalui negosiasi dan diikuti dengan undang-undang batas wilayah negara.

Perhatian pemerintah terhadap batas negara secara fisik mengalami pasang surut dan penanganannya masih secara ad hoc, dimulai sejak Deklarasi Juanda 13 Desember 1957 yang menetapkan wilayah perairan Indonesia dengan menggunakan konsep negara kepulauan atau juga dikenal dengan Wawasan Nusanatra., menggantikan Ordonansi Belanda tahun 1939. Deklarasi Juanda tersebut walaupun terkesan disiapkan secara ad hoc menjelang dilaksanakannya Konvensi Perserikatan Bangsa Bangsa mengenai Hukum Laut di Genewa Februari 1958, namun atas kegigihan para perunding Republik Indonesia pada waktu itu, maka harus diakui bahwa Indonesia telah berhasil meyakinkan konsep negara kepulauan (Archipelago State) kepada masyarakat dunia. Sebagai tindak lanjut Deklarasi Juanda, Pemerintah Indonesia mengeluarkan Perpu No.4 Tahun 1960 tentang perairan Indonesia sebagai dasar hukum untuk menetapkan titik dasar guna mengukur lebar laut teritorial 12 mil dimana Pulau Sipadan dan Pulau Ligitan belum diperhitungkan sebagai pulau pulau terluar untuk menarik titik dasar lebar laut territorial 12 mil. Pada tahun 1982, Perserikatan Bangsa Bangsa memberlakukan United Nations Convention On The Law Of The Sea (UNCLOS 1982) yang kemudian diratifikasi dengan Undang-Undang No. 17 Tahun 1985 yang mengharuskan Indonesia melakukan berbagai penentuan dan pengaturan serta penataan batas laut negara.

Sebagai implementasi UNCLOS 1982, Indonesia menerbitkan Undang-Undang No. 6 tahun 1996 tentang perairan Indonesia dan Peraturan Pemerintan No. 61 Tahun 1998 tentang perubahan titik dasar dan garis dasar di sekitar kepulauan Natuna. Dan terakhir Indonesia mengeluarkan Peraturan Pemerintah No. 38 Tahun 2002 tentang daftar oordinat geografis titik-titik pangkal kepulauan Indonesia. Arti penting dari Peraturan Pemerintah ini adalah menegaskan status hukum pulau-pulau terluar Indonesia sehingga dari garis yang menghubungkan titik-titik tersebut dapat ditarik klaim wilayah laut sesuai dengan ketentuan hukum internasional yang berlaku. Namun perlu diingat bahwa perlu adanya revisi tentang Peraturan Pemerintah tersebut setelah adanya keputusan dari Mahkamah

Internasional tentang Pulau Sipadan dan Pulau Ligitan sebelum Peraturan Pemerintah tersebut diajukan ke Perserikatan Bangsa Bangsa.

Berbeda dengan delimitasi batas landas kontinen, hingga saat ini belum satu pun perbatasan Zona Ekonomi Eksklusif di sekeliling Indonesia ditetapkan dalam suatu perjanjian. Satau-satunya rujukan yang digunakan adalah garis batas perikanan sementara yang disepakati Indonesia dengan Australia tahun 1981 dalam bentuk Nota Kesepahaman tentang *Provisional Enforcement Fisheries And Surveilance Lines*. Upaya penyelesaian garis batas Zona Ekonomi Eksklusif tidak mudah dilakukan mengingat kadang kala prioritas dan kepentingan para pihak berbeda dalam melihat persoalan. Di samping itu rejim Zona Ekonomi Eksklusif itu sendiri merupakan suatu hal yang baru dan secara efektif menjadi kaidah hukum internasional sejak berlakunya UNCLOS 1982 (http://www.deplu.go.id).

Keputusan Mahkamah Internasional mengenai sengketa Pulau Sipadan dan Pulau Ligitan merupaka pelajaran tersendiri dan sangat berharga bagi bangsa Indonesia. Dari keputusan Mahkamah Internasional atas sengketa Pulau Sipadan dan Ligitan beserta sengketa-sengketa sejenis lainnya, tampak jelas bahwa kepedulian terhadap suatu wilayah merupakan instrumen penting dalam penjagaan wilayah dan pengelolaan daerah perbatasan beserta pulau-pulau terluar sangat diperlukan sekali dalam menunjukkan kedaulatan suatu negara terhadap wilayahnya.

Kepala Staf TNI Angkatan Laut Bernard Kent Sondakh menyatakan sebagai negara kepulauan terbesar di dunia, hak maritim Indonesia meliputi 17.000 lebih pulau dengan panjang garis pantai yang mencapai 81.000 km serta luas wilayah perairan yang mencapai 7,9 juta km² (Kaligis, 2003:65). Di antara ribuan pulau tersebut terdapat pulau-pulau kecil baik yang berpenghuni maupun tidak yang merupakan titik-titik terluar batas wilayah negara. Sampai saat ini memang belum ada satu negara pun yang mengklaim kepemilikan pulau-pulau terluar tersebut. Namun demikian masalah kepemilikan atau keberadaan pulau-pulau terluar tersebut khususnya yang berbatasan dengan negara lain perlu segera ditangani karena mengandung potensi konflik dengan negara lain.

Hingga saat ini terdapat beberapa permasalahan perbatasan antara Indonesia dengan negara tetangga yang masih belum diselesaikan secara tuntas. Indonesia dengan Malaysia memiliki masalah perbedaan pemahaman rezim laut dimana Malaysia ternyata juga menyatakan diri sebagai negara kepulauan (*Archipelago State*) disamping itu juga masalah batas wilayah di perairan sebelah timur Pulau Sebatik yang harus dirundinglan. Sampai saat ini juga belum terjadi konflik perbatasan, namun bila dibiarkan maka bukan tidak mungkin di masa yang akan datang Indonesia akan menghadapi masalah hilangnya pulau-pulau Indonesia dari pengawasan yang akhirnya menimbulkan ketidakjelasan perbatasan wilayah Indonesia.

Kepala Staf TNI Angkatan Laut Bernard Kent Sondakh dalam Seminar Sengketa Sipadan Ligitan di Universitas Indonesia menyatakan pada dasarnya terdapat 4 kriteria sebuah pulau dinyatakan hilang, yaitu ;

1. Hilang secara fisik, biasanya sebagai dampak dari proses geologis seperti abrasi atau karena rekayasa manusia yang dapat menenggelamkan atau menghilangkan pulau. Walaupun abrasi merupakan sesuatu yang bersifat alami, tetapi kegiatan manusia dapat mempercepat proses tersebut. Salah satu contoh adalah Pulau Nipah di Selat Singapura, kegiatan penambangan pasir laut yang berlebihan di perairan Riau merupakan penyebab utama hampir tenggelamnya pulau tersebut.
2. Hilang secara kepemilikan adalah dikaernakan perubahan status kepemilikan. Perubahan status kepemilikan ini dapat tejadi karena pemaksaan atau kekuatan militer maupun melalui proses hukum.
3. Hilang secara pengawasan. Dengan jumlah yang mencapai 17.000 lebih pulau, sebuah pulau dapat saja luput dari kontrol atau pengawasan pemerintah terlebih apabila posisi pulau tersebut lebih dekat ke negara lain dibanding ke Indonesia.. Tanpa pengawasan, pulau-pulau terluar dapat saja dimanfaatkan oleh masyarakat atau bahkan pemerintah negara yang berbatasan untuk berbagai kegiatan misalnya parawisata, perikanan bahkan pembangunan fisik.
4. Hilang secara sosial ekonomi. Hal ini biasanya diawali oleh praktek ekonomi masyarakat di pulau tersebut yang diikuti dengan interaksi sosial dari generasi ke generasi sehingga terjadilah perubahan struktur ekonomi maupun struktur populasi penduduk di pulau tersebut (Kaligis, 2003:67)

Isu penegakan hukum merupakan salah satu perwujudan kedaulatan Negara Kesatuan Republik Indonesia di daerah perbatasan dengan negara lain. Penegakan hukum di laut secara umum sebagai suatu kegiatan pentaatan hukum oleh aparat negara berdasarkan peraturan hukum nasional dan internasional terhadap kegiatan pemanfaatan lingkungan laut dalam batas-batas wilayah

yurisdiksi nasional. Penegakan hukum diarahkan guna menjamin ketertiban dan kepastian hukum di laut atas berbagai aspek eksploitasi ekonomis sumber daya alam serta dalam rangka pemeliharaan lingkungan laut. Politik luar negeri Republik Indonesia di bidang kelautan dalam hal ini diarahkan guna mendorong partisipasi universal terhadap rezim hukum laut internasional sebagaimana terdapat di dalam UNCLOS 1982 sehingga dapat menjamin kepastian hukum bagi pengelolaan potensi sumber daya alam laut nasional.

Upaya lainnya seperti yang dikemukakan oleh Menter Luar Negeri Hasan Wirajuda adalah dengan cara merundingkan garis batas wilayah internasional Indonesia dengan negara tetangga berdasarkan ketentuan hukum internasional yang berlaku (http://www.deplu.go.id). Pengakuan internasional atas konsepsi Wawasan Nusantara sebagaimana ditegaskan dalam Konvensi 1982 membawa tanggung jawab besar bagi Indonesia untuk mengamankan kepentingan nasional di bidang kelautan dan wilayah perbatasan. Kedaulatan laut dan wilayah perbatasan diwujudkan melalui tindakan pengelolaan nyata oleh aparatur penyelenggara administrasi negara di dalam batas-batas wilayah nasional Indonesia. Tindakan pengelolaan ini juga pada hakekatnya merupakan perwujudan kepedulian untuk memberikan sentuhan pembangunan ekonomi yang nyata.

3.4 Persetujuan dan Pengakuan Atas Keputusan Mahkamah Internasional.

Bila diperhatikan dan ditinjau dari segi jumlah, Mahkamah Internasional tidak begitu banyak memeriksa perkara . Dalam perkembangannya tercatat bahwa yang sering diajukan ke pengadilan Mahkamah Internasional adalah masalah-masalah kecil. Demikian pula dengan masalah-masalah yang diajukan untuk memperoleh nasehat (*advisory opinion*) hanya menyangkut masalah interpretasi piagam atau anggaran dasar organisasi internasional. Boer Mauna menyatakan bahwa ada semacam kekurangpercayaan yang bersifat umum terhadap hakim-hakim Mahkamah Internasional. Sifat kurang percaya ini berasal dari hampir seluruh kelompok negara yang tentunya dengan alasan yang berbeda (2003:260).

Sikap politik kelompok negara tertentu terhadap Mahkamah Internasional sedikit banyak akibat dari sengketa ideologi Timur dan Barat. Rusia (dulu bernama Uni Sovyet) yang termasuk negara pendiri Perserikatan Bangsa Bangsa tetap menunjukkan keengganannya untuk menggunakanan Mahkamah Internasional dalam upaya penyelesaian sengketa dengan negara lain. Mahkamah Internasional sendiri selalu menolak untuk memeriksa perkara sengketa negara bila yang digugat adalah negara-negara Blok Timur karena negara-negara tersebut tidak pernah menyatakan menerima yurisdiksi Mahkamah Internasional.

Dalam upaya penyelesaian sengketa Pulau Sipadan dan Pulau Ligitan, Indonesia dan Malaysia sepakat untuk menerima dan mengakui yurisdiksi Mahkamah Internasional. Oleh para pihak, Mahkamah Internasional diberi hak untuk memeriksa dan memberikan keputusan sesuai dengan aturan yang terdapat dalam Statuta Mahkamah Internasional status kepemilikan Pulau Sipadan dan Pulau Ligitan. Malaysia dan Indonesia juga sepakat akan menerima keputusan tersebut yang mengikat diantara kedua belah pihak.

Dalam beberapa kasus yang diajukan ke hadapan Mahkamah Internasional, penemuan fakta menjadi suatu tugas utama dalam pengadilan. Mahkamah Internasional memerlukan data yang objektif penyebab terjadinya suatu sengketa. Data-data ini bisa diperoleh langsung dari negara-negara yang bersangkutan namun tentu saja akan memiliki versi yang berbeda. Hal ini dapat dijelaskan dalam sengketa wilayah di mana bukti adanya tindakan pendudukan (*occupation*) merupakan dasar penegakan hak .

Pada kasus sengketa Pulau Sipadan dan Pulau Ligitan, kedua pulau adalah wilayah *terrae nullius* (wilayah yang tidak berada dibawah penguasaan negara manapun) karena tidak ada perjanjian yang jelas mengatur kepemilikan pulau-pulau tersebut. Bahkan Spanyol yang dianggap negara yang paling mungkin untuk mengklaim Pulau Sipadan dan Pulau Ligitan berdasarkan Protokol 1878 tidak menyadari keberadaan pulau tersebut dan tidak mengklaim kedaua pulau itu.

Dalam pemeriksaan perkara ini, Mahkamah Internasional menemukan bahwa perjanjian-perjanjian yang dibuat oleh para pihak di wilayah Borneo pada masa kolonialisasi tidak mencantumkan atau mengatur secara rinci mengenai

Pulau Sipadan dan Pulau Ligitan. Peta-peta yang ditunjukkan oleh Indonesia dan Malaysia sebagai bukti argumen tidak satu pun yang dapat meyakinkan Mahkamah Internasional. Ketidakjelasan bukti tentang pulau tersebut dalam peta-peta yang diajukan baik oleh Malaysia maupun Indonesia mungkin saja terjadi mengingat kecilnya wilayah pulau tersebut. Bahkan Pulau Ligitan hanya berupa sebuah pulau karang kecil yang tenggelam bila air laut pasang (Tempo, 22 Desember 2002).

Di sisi lain, Mahkamah Internasional mencermati tentang kegiatan yang dilakukan oleh kedua negara ataupun negara pendahulunya (Inggris dan Belanda) atas kedua pulau sengketa. Fakta bahwa Malaysia ataupun Inggris yang melakukan tindakan pendudukan efektif (*effective occupation*) menjadi poin kemenangan Malaysia atas sengketa ini. Malaysia menemukan fakta bahwa Malaysia dan atau Inggris menaruh perhatian besar terhadap pulau kecil tersebut. Perhatian atas kedua pulau yang diberikan oleh Malaysia menurut Mahkamah Internasional merupakan suatu tindakan yang menunjukkan kedaulatan dari sebuah negara.

Indonesia dan Malaysia mempercayakan Mahkamah Internasional untuk membuat suatu keputusan yang mengikat mengenai sengketa Pulau Sipadan dan Pulau Ligitan. Melalui pasal 2 *Special Agreement* 1997 antara Malaysia dan Indonesia, Mahkamah Internasional diminta untuk memeriksa sengketa ini dan menentukan status kepemilikan Pulau Sipadan dan Pulau Ligitan. Dari berbagai perjanjian dan bukti-bukti yang disampaikan oleh Indonesia dan Malaysia, Mahkamah Internasional akhirnya mempergunakan prinsip efektif sebagai dasar untuk menyelesaikan sengketa tersebut.

Prinsip efektif (*effeectivities*) seringkali dipakai dalam menentukan dan menyelesaikan sengketa kepemilikan wilayah antar negara. Dalam kasus Pulau Miangas (Island of Palmas Case) antara Belanda dan Amerika Serikat, Max Huber sebagai arbitrator tunggal memenangkan Belanda karena telah melaksanakan dan menunjukkan penguasaan efektif atas pulau yang disengketakan (Kaligis, 2003:46). Demikian pula dengan kasus *Eastern Greenland* antara Norwegia dan Denmark, PCIJ memenangkan Denmark karena mampu membuktikan keadaan-

keadaan yang memperlihatkan adanya unsur penguasaan efektif (http://www.icj-cij.org).

Adijaya Jusuf mengemukakan suatu asumsi fisik dari kedaulatan dapat ditunjukkan dengan :

1. suatu tindakan yang jelas atau simbolis atau dengan langkah-langkah legislatif dan eksekutif yang berlaku pada wilayah yang diklaim
2. atau melalui berbagai perjanian dengan negara lain yang mengakui kedaulatan negara yang mengajukan klaim tersebut
3. atau dengan penetapan batas-batas wilayah (Kaligis, 2002:78).

Perkembangan hukum internasional yang marak pada abad 18 menuntut bahwa penguasaan yang seharusnya efektif akan tidak dianggap sebagai suatu penguasan efektif jika efektifitas tersebut hanya dilakukan pada saat tindakan pengambilalihan namun tidak pada saat pemeliharaan daerah tersebut. Perwujudan dari kedaulatan wilayah mengasumsikan bentuk-bentuk yang berbeda berdasarkan kondisi waktu dan tempat. Meskipun secara prinsipil kedaulatan tersebut dilakukan secara terus menerus, namun pada kenyataannya kedaulatan tidak dapat dilaksanakan pada setiap saat di setiap titik wilayah yang bersangkutan. Max Huber dalam putusannya atas *Island of Palmas Case* seperti yang dikutip oleh Ian Brownlie menyatakan:

" Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas (1979:145).

Dalam menyelesaikan sengketa Pulau Sipadan dan Pulau Ligitan, Mahkamah Internasional mempergunakan putusan-putusan sengketa internasional yang sejenis sebagai dasar hukum menentukan status kepemilikan pulau yan disengketakan. Dalam hal ini, Mahkamah Internasional prinsip efektif unutk memenangkan Malaysia atas kepemilikan Pulau Sipadan dan Pulau Ligitan.

Di samping itu Mahkamah Internasional adalah salah satu badan internasional yang dapat menafsirkan perjanjian atau traktat. Hal ini juga diatur pada pasal 36 ayat 1 Statuta Mahkamah Internasional. Dalam upaya penyelesaian

sengketa Pulau Sipadan dan Pulau Ligitan, Mahkamah Internasional memeriksa Konvensi 1891. Mahkamah Internasional menemukan adanya perbedaan persepsi diantara Malaysia dan Indonesia atas Konvensi 1891 khususnya pasal 4. Indonesia menafsirkan garis batas yang diatur dalam pasal 4 Konvensi 1891 tersebut ditarik ke luar menuju ke laut dari Pulau Sebatik. Sedangkan Malaysia berpendapat bahwa garis batas tersebut hanya memotong Pulau Sebatik dan sekaligus berhenti pada Pulau tersebut dan tidak menuju ke arah laut seperti yang dinyatakan pihak Indonesia.

Mahkmah Internasional menemukan adanya perbedaan pengertian atas kalimat yang terdapat dalam paal Konvensi 1891. Pasal 33 Konvensi Wina menentukan :

1. bahwa apabila suatu traktat disahkan dalam beberapa bahasa, maka naskah tersebut sama sahihnya dalam setiap bahasa kecuali traktat tersebut menentukan dan disepakati para peserta bahwa hanya suatu naskah tertentu yang harus berlaku dalam hal timbulnya silang pendapat.
2. bahwa istilah-istilah dari traktat harus dianggap memiliki arti yang sama dalam setiap naskah.
3. bahwa suatu penafsiran yang diberikan harus yang paling sesuai dengan naskah-naskah berkenaan dengan maksud dan tujuan dari traktat tersebut.

Dalam kesimpulannya atas Konvensi 1891, Mahkamah Internasional menyatakan bahwa garis batas yang diatur dalam pasal 4 hanya memotong Pulau Sebatik dan tidak dilanjutkan ke arah laut seperti yang ditafsirkan oleh Indonesia. Di samping itu Mahkamah Internasional menyatakan bahwa Konvensi 1891 dan perjanjian lain tidak digunakan sebagai dasar pertimbangan kepemilikan Pulau Sipadan dan Pulau Ligitan karena dalam Pembukaan Konvensi 1891 dinyatakan bahwa maksud dan tujuan dari Konvensi 1891 tersebut hanyalah mengatur mengenai pembatasan wilayah di Borneo antara Inggris dan Belanda.

Selain menafsirkan Konvensi 1891, Mahkamah Internasional juga menafsirkan perjanjian yang diajukan Malaysia sebagai dasar pertimbangan kepemilikan Pulau Sipadan dan Pulau Ligitan. Malaysia berpendapat bahwa perjanjian-perjanjian yang diajukan adalah sebagai bukti adanya suksesi negara

atas kedua pulau yang disengketakan. Mahkamah Internasional menemukan adanya ketidakjelasan atas keberadaan Pulau Sipadan dan Pulau Ligitan pada perjanjian-perjanjian yang ditunjukkan oleh Malaysia. Dan Mahkamah Internasional tidak menemukan bukti adanya pihak yang mengklaim kepemilikan atas pulau tersebut dan aturan yang secara jelas menyebutkan pihak yang memiliki pulau tersebut.

3.5 Argumen Hukum Dan Politik Atas Pengakuan Keputusan Mahkamah Internasional Oleh Republik Indonesia

Kekalahan Indonesia dalam kasus sengketa Pulau Sipadan dan Pulau Ligitan melalui Mahkamah Internasional menjadi suatu pelajaran yang sangat berharga bagi Indonesia. Untuk kawasan Asia Tenggara, penyelesaian sengketa wilayah melalui Mahkamah Internasional merupakan pengalaman pertama. Di satu sisi, keputusan Mahkamah Internasional ini menunjukkan keberhasilan kedua negara untuk menyisihkan cara kekerasan dalam upaya penyelesaian sengketa. Menteri Luar Negeri Hasan Wirajuda mengatakan bahwa meskipun kalah dalam persidangan Mahkamah Internasional, Indonesia mampu menunjukkan suatu cara yang beradab dalam menyelesaikan sengketa internasional (Kaligis, 2003:5). Namun di sisi lain, kekalahan ini mencoreng nama Indonesia di dunia internasinal terlebih setelah lepasnya Timor Timur dari pangkuan Indonesia yang menguatkan anggapan ketidakperhatian Indonesia atas wilayahnya.

Dalam memperjuangkan sengketa ini, Indonesia telah banyak memberikan argumentasi yang bertujuan untuk membuktikan Pulau Sipadan dan Pulau Ligitan adalah milik Indonesia. Bukti dan argumen Indonesia tersebut telah diutarakan baik dalam upaya penyelesaian tingkat bilateral maupun dalam Mahkamah Internasional. Keyakinan Indonesia atas kepemilikan Pulau Sipadan dan Ligitan tersebut dapat ditunjukkan dengan adanya hasil pemotretan dengan satelit Landsat-7 dari badan Pengkajian dan Penerapan Teknologi yang menunjukkan Pulau Sipadan dan Pulau Ligitan berada dalam wilayah Indoensia (Tempo,22 Desember 2002). Bahkan ahli waris tahta Kesultanan Bulungan Datu Ma'Mun bin Muhammad Djalaludin sangat menyayangkan apabila Pulau Sipadan dan

Ligitan jatuh ke tangan Malaysia karena kedua pulau tersebut adalah milik Kesultanan Bulungan. Pada tanggal 1964, Istana Bulungan di Tanjung Palas dibakar dan dirusak total Komandan Distrik Militer Bulungan. Seluruh harta kerajaan dan arsip penting kerajaan musnah termasuk arsip mengenai Pulau Sipadan dan Ligitan. Hal ini menjadi kelemahan Indonesia dalam membuktikan Pulau Sipadan dan Pulau Ligitan adalah milik Kesultanan Bulungan. Selain itu, mayoritas pengusaha yang membuka usaha resort di Pulau Sipadan lebih menginginkan Indonesia memenangkan sengketa pulau tersebut (Tempo, 22 Desember 2002).

Ada ketidakpuasan yang timbul dari keputusan Mahkamah Internasional tersebut karena sebelum keputusa tersebut keluar, Pemerintah Indonesia dan tim yang ikut dalam persidangan yakin akan kans yang sama besar dengan posisi Malaysia. Namun pada pemungutan suara, Indonesia hanya mendapatkan 1 suara dan 16 suara lainnya mendukung Malaysia. Kekalahan telak ini cukup mengejutkan pihak Indonesia yang juga yakin Mahkamah Internasional akan membagi kedua pulau tersebut di antara kedua negara. Namun demikian, Keputusan Mahkamah Internasional yang memenangkan Malaysia atas kepemilikan Pulau Sipadan dan Pulau Ligitan tetap dihormati oleh Indonesia. Berdasarkan pasal 5 Special Agreement, Indonesia menghormati keputusan Mahkamah Internasional tersebut dan tidak ada upaya banding lain yang dapat ditempuh yang diatur oleh keuda negara. Di samping itu, posisi Indonesia dalam kancah pergaulan internasional yang sedang dalam sorotan dan terpuruknya perekonomian negara tidak memberikan kekuatan politik untuk menentang keputusan Mahkamah Internasional ataupun mempengaruhi keputusan Mahkamah Internasional selama berjalannya proses persidangan. Belanda seharusnya ikut ambil bagian dalam proses penyelesaian sengketa ini karena sengketa ini menyangkut kepemilikan wilayah pada jaman kolonial namun hal itu tidak dilakukan.

BAB IV
KESIMPULAN DAN SARAN

4.1 Kesimpulan

Berdasarkan uraian pembahasan di atas yang merupakan jawaban dari permasalahan yang ada, maka dapat ditarik kesimpulan sebagai berikut :

1. Proses persidangan dalam peradilan Mahkamah Internasional yang dilalui oleh Malaysia dan Indonesia terbagi atas :
   1. Sesi argumentasi tertulis (*Written Pleadings*) yang terbagi lagi dalam 3 tahapan :
      a. Memorial
      b. Counter Memorial
      c. Reply
   2. Sesi argumentasi lisan (*Oral Pleadings*)
2. Pertimbangan Mahkamah Internasional dalam memenangkan pihak Malaysia dalam sengketa Pulau Sipadan dan Pulau Ligitan adalah karena Malaysia berhasil membuktikan adanya penguasaan efektif atas kedua pulau sengketa. Mahkamah Internasional merujuk pada putusan dalam kasus sengketa yang serupa yaitu kasus Legas Status of Eastern Greenland antara Norwegia dan Denmark. Dalam kasus sengketa ini kriteria okupasi yang dipergunakan untuk membuktikan prinsip keefektifan . Mahkamah Internasional memandang pihak Malaysia memenuhi 2 unsur yaitu :
   1. Adanya suatu kehendak atau keinginan untuk bertindak sebagai negara yang berdaulat atas pulau yang disengketakan.
   2. Adanya pelaksanaan kedaulatan tersebut dengan pantas.
3. Dalam upaya menjaga wilayah perbatasan, pemerintah Indonesia telah banyak merundingkan penetapan batas wilayah dengan negara tetangga yang saling bersebelahan. Di samping itu, pemerintah Indonesia telah berupaya untuk melakukan pengidentifikasian dan pengamanan pulau-pulau terluar serta memaksimalkan pengelolaan wilayah perbatasan khususnya pada perbatasan laut beserta pulau-pulau terluarnya.

4. Indonesia dan Malaysia sepakat menerima yurisdiksi Mahkamah Internasional dalam upaya menyelesaikan sengketa Sipadan dan Ligitan. Dalam memeriksa perkara mengambil keputusan, Mahkamah Internasional menemukan bukti-bukti yang ada dalam sengketa tersebut (*fact finding*) dan menafsirkan perjanjian-perjanjian yang disertakan kedua belah pihak dalam membuktikan klaim kepemilikan Pulau Sipadan dan Pulau Ligitan. Di samping itu, Mahkamah Internasional juga mencari dasar hukum sebagai sandaran untuk memutuskan sengketa Pulau Sipadan dan Pulau Ligitan.
5. Indonesia menerima dan menghormati keputusan Mahkamah Internasional. Walaupun ada ketidakpuasan dari pihak Indonesia, namun tidak ada upaya lain yang dapat ditempuh untuk merubah keputusan tersebut baik itu upaya hukum maupun politis.

4.2 Saran

Saran-saran yang dapat dikemukakan penulis sehubungan dengan permasalahan yang tersebut diatas adalah :

1. Indonesia berbatasan dengan 10 negara sekaligus sehingga perlu mendapat perhatian terhadap wilayah perbatasan. Penetapan batas-batas wilayah mutlak diperlukan untuk kepentingan kepastian hukum tingkat nasional dan internasional. Penetapan batas wilayah yang dituang dalam bentuk perundang-undangan akan menjamin kepastian hukum atas wilayah Indonesia khususnya di daerah perbatasan dan pulau-pulau terluar.
2. Agar kasus sengketa Pulau Sipadan dan Pulau Ligitan tidak terulang kembali, Pemerintah Indonesia perlu mengelola dan menunjukkan tindakan tindakan nyata atas wilayah dan pulau-pulau terluar Indonesia. Kealpaan untuk mewujudkan tindakan kedaulatan yang nyata dapat dijadikan dalil hukum untuk menggugurkan status kepemilikan negara atas suatu wilayah tertentu.

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Sehubungan dengan hal tersebut diatas kami mohon bantuan secukupnya.
Karena hasil dari konsultasi ini digunakan untuk melengkapi bahan penyusunan skrepsi.
Atas bantuan dan kerjasama yang baik kami ucapkan terimakasih.

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" ***KAJIAN YURIDIS ATAS PUTUSAN MAHKAMAH INTERNASIONAL NO: 102 MENGENAI SENGKETA ANTARA MALAYSIA DENGAN REPUBLIK INDONESIA TENTANG KEPEMILIKAN PULAU SIPADAN DAN LIGITAN*** "

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Atas perhatian Saudara diucapkan terima kasih.

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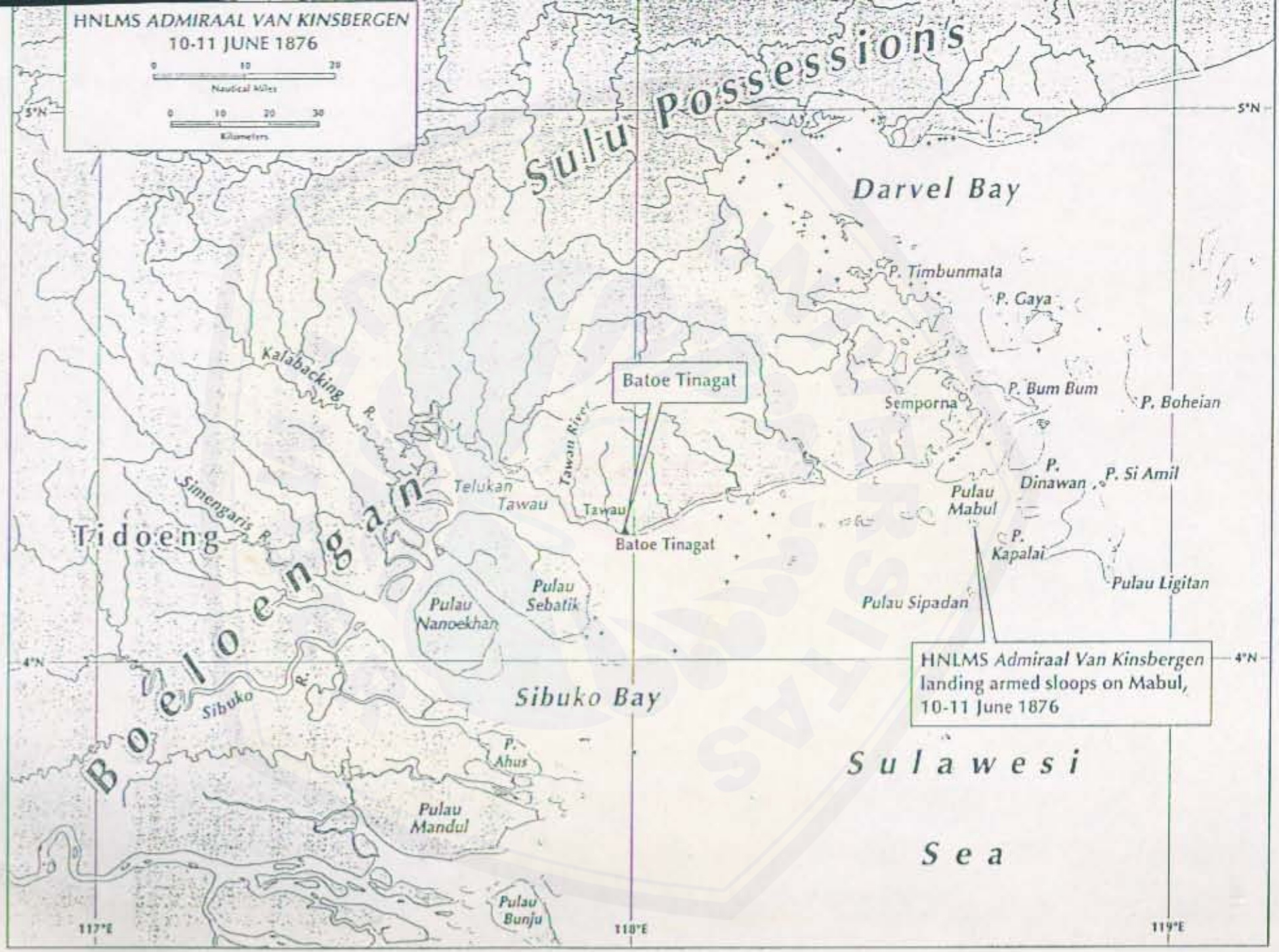

INTERNATIONAL COURT OF JUSTICE

SPECIAL AGREEMENT

FOR SUBMISSION TO THE INTERNATIONAL COURT OF JUSTICE OF THE DISPUTE BETWEEN INDONESIA AND MALAYSIA CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN

jointly notified to the Court on 2 November 1998

1998
General List
No. 102

JOINT NOTIFICATION, DATED 30 SEPTEMBER 1998, ADDRESSED TO THE REGISTRAR OF THE COURT

New York, 30 September 1998.

On behalf of the Government of the Republic of Indonesia and the Government of Malaysia, and in accordance with Article 40, paragraph 1, of the Statute of the International Court of Justice, we have the honour to transmit to you:

(1) a certified true copy of the Special Agreement for Submission to the International Court of Justice of the Dispute between the Republic of Indonesia and Malaysia concerning Sovereignty over Pulau Ligitan and Pulau Sipadan, signed at Kuala Lumpur on 31 May 1997;

(2) a certified true copy of the Procès-Verbal of the Exchange of Instruments of Ratification between the Republic of Indonesia and Malaysia, signed at Jakarta on 14 May 1998.

The aforesaid Special Agreement entered into force, pursuant to its Article 6, paragraph 1, on the date of exchange of instruments of ratification, i.e., on 14 May 1998.

In accordance with Article 35 of the Rules of Court, both Governments (the Government of the Republic of Indonesia and the Government of Malaysia) hereby notify the Court of their intention to exercise the power conferred by Article 31 of the Statute of the Court to choose a judge *ad hoc* in these proceedings.

We further have the honour to inform you, in accordance with Article 40 of the Rules of Court, that:

(1) H.E. Mr. Nugroho Wisnumurti, Director-General for Political Affairs, Department of Foreign Affairs of the Republic of Indonesia, and the Ambassador Extraordinary and Plenipotentiary of the Republic of Indonesia to the Kingdom of the Netherlands (whose name will be communicated later to the Court) have been appointed as Agent and Co-Agent for the Republic of Indonesia for the purpose of the present case, and their address for service at the seat of the Court shall be: H.E. Mr. Nugroho Wisnumurti, Agent of the Republic of Indonesia, and the Indonesian Ambassador to the Kingdom of the Netherlands, Co-Agent of the Republic of Indonesia, before the International Court of Justice, Embassy of the Republic of Indonesia to the Kingdom of the Netherlands, Tobias Asserlaan 8, 2517 KC The Hague.

(2) H.E. Datuk Abdul Kadir Mohamad, Secretary-General of the Ministry of Foreign Affairs, Malaysia, and H.E. Mr. A. Ganapathy, Ambassador Extraordinary and Plenipotentiary of Malaysia to the Kingdom of the Netherlands, have been appointed as Agent and Co-Agent for Malaysia for the purpose of the present case and their address for service at the seat ofthe Court shall be: H.E. Datuk Abdul Kadir Mohamad, Agent of Malaysia, and H.E. Mr. A. Ganapathy, Co-Agent of Malaysia, before the International Court of Justice, Embassy of Malaysia to the Kingdom of the Netherlands, Rustenburgweg 2, 2517 KE The Hague.

(Signed) ALI ALATAS

Minister for Foreign Affairs
of the Republic of Indonesia

(Signed) DATO' SERI ABDULLAH HAJI AHMAD BADAWI

Minister for Foreign Affairs
of Malaysia

---

1. SPECIAL AGREEMENT

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

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

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

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

Have agreed as follows:

Article 1
Submission of Dispute

The Parties agree to submit the dispute to the Court under the terms of

Article 36, paragraph 1, of its Statute.

Article 2
Subject of the Litigation

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

Article 3
Procedure

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

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

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

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

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

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

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

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

Article 4
Applicable Law

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

Article 5
Judgment of the Court

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

Article 6
Entry into Force

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

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

Article 7
Notification

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

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

Done in four originals in the English language at Kuala Lumpur on the thirty-first day of May 1997.

For the Government of
the Republic of Indonesia,

For the Government of
Malaysia,

(Signed) ALI ALATAS,
Minister for Foreign Affairs.

(Signed) DATUK ABDULLAH AHMAD BADAWI,
Minister for Foreign Affairs.

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2. PROCÈS-VERBAL OF EXCHANGE OF INSTRUMENTS OF RATIFICATION

The undersigned have met today for the purpose of exchanging the Instruments of Ratification of the Special Agreement for Submission to the International Court of Justice of the Dispute between Indonesia and Malaysia concerning Sovereignty over Pulau Ligitan and Pulau Sipadan signed at Kuala Lumpur, Malaysia, on the 31st of May, 1997.

These Instruments, having been examined and found to be in due form, have been exchanged today.

In witness whereof, the undersigned have signed the present Procès-Verbal.

Done at Jakarta, this fourteenth day of May, in the year one thousand nine hundred and ninety-eight, in duplicate.

For the Government of
the Republic of Indonesia,
(Signed) NUGROHO
WISNUMURTI,

Director-General for Political Affairs,
Department of Foreign Affairs of the
Republic of Indonesia.

For the Government
of Malaysia,

(Signed) DATO' ZAINAL ABIDIN
BIN ALIAS,

Ambassador of Malaysia
to the Republic of Indonesia.

Annex 1

INSTRUMENT OF RATIFICATION OF INDONESIA

CONVENTION BETWEEN HER MAJESTY THE QUEEN OF THE NETHERLANDS AND HIS MAJESTY IN RESPECT OF THE UNITED KINGDOM OF RESPECTING THE DELIMITATION OF THE FRONTIER BETWEEN THE STATES IN BORNEO UNDER BRITISH PROTECTION AND NETHERLANDS TERRITORY IN THAT ISLAND

London, June 20th, 1891

Her majesty the Queen Dowager, regent of the Netherlands, in the name of her Majesty WILHELMINA, Queen of the Netherlands, and her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Empress of India, being desirous of defining the boundaries between the Netherlands possessions in the Islands of Borneo and the States in that Islands which are under British protection, have resolved to conclude a Convention to that effect, and have appointed as their Plenipotentiaries for that purpose, that is to say :

Her Majesty the Queen Dowager, Regent of the Netherlands, Count CHARLES MALCOLM ERNEST GEORGES DE BYLANDT, Knight Grand Cross of the Order of the Netherlands Lion, Her Majesty's Envoy Extraordinary and Minister Plenipotentiary at the Court of St James; and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Empress of India, the Right Honourable ROBERT ARTHUR TALBOT GASCOYNE CECIL, Marquis as SALIBURY, Earl of Salibury, Viscount Crasborne, Baron cecil, peer of the United Kingdom, Knight of the Most Noble Order of the Garter, Member of her Majesty's Most Honourable Privy Council, Her Majesty's Principal Secretary of State for Foreign Affairs, Ec : who, having produced their full Powers, found in good and due form, have agreed upon the following Articles :

Article I

The boundary between the Netherland possessions in Borneo and those of the British protected states in the same island, shall start from 4° 10′ north latitude on the east coast of Borneo.

Article II

The boundary line shall be continued wardward from 4°10′ north latitude and follow in a west north, a west direction, between the Rivers Simengaris and Sodoeng, up to the point where the meridian 117°, east longitude crosses the parallel 4° 20′ north latitude, with the view of including the Simengaris River within Dutch territory.

The boundary line shall than follow westward the parallel 4° 20′ north latitude until it reaches the summit of the range of mountains which form on that parallel watershed between the rivers running to the north west coast and those running to the east coast Borneo, it being understood that, in the event of the Simengaris River or any other river flowing in the sea below 4° 10′, being found on survey to cross the proposed boundary line within a radius of 5 geographical miles, the line shall be diverted so as to include such small portion or bends of rivers within Dutch territory; a similiar concession being made by the Netherlands Government with regard to any river debouching above 4° 10′ on the territory of the British North Borneo Company, but turning southwards.

Articles III

From the summit of the range of mountains mentioned in article II, to Tandjong Datoe on the west coast of

Borneo, the boundary line shall follow the watershed of the rivers running to the north west and west coast south of Tandjong Datoe the south coast and the east coast south of 4°10' north latitude.

Article IV

From 4° 10' north latitude on the east coast the boundary line shall be continued eastward along that parallel, across the islands 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.

Article V

The exact position of the boundary line, as describe in the four preceding articles, shall be determined here after by mutual agreement, at such times as the Netherlands and the British Governments may think fit.

Article VI

The navigation of all rivers into the sea between Batoe-Tinagad and the River Sibakoe shall be free, exept for the transport of war material and no transport duties shall be leaved on other goods passing up those rivers.

Article VI

The population of Boeloegan shall be allowed to collect jungle produce in the territory between the Simengaris and Tawao Rivers for fifteen years from the date

of the signature of the present Convention, free from any tax or duty.

Article VII

The present convention shall be ratified, and it shall come into force three months after the exchange of the ratifications, with shall take place at London one month, or sooner if possible, after the said convention shall received the approval of the Netherlands States-Generals.

In withness where oh the Undersigned have signed the present convention, and have there to their seals.

Done at London, in duplicate, this 20th day of June, 1891.

(L. S,) (get) c. VAN BYLANDT

(L. S,) (.) SALISBURY

INTERNATIONAL COURT OF JUSTICE

YEAR 2002

2002
17 December
General List
No. 102

17 December 2002

CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN

(INDONESIA/MALAYSIA)

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

* *

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

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

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

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

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

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

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

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

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

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

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

* *

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

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

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

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

* *

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

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

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

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

JUDGMENT

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

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

between

the Republic of Indonesia,

represented by

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

as Agent;

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

as Co-Agent;

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

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

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

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

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

as Counsel and Advocates;

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

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

as Counsel;

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

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

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

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

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

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

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

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

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

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

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

Mr. Rachmat Budiman, Department of Foreign Affairs,

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

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

Mr. Ibnu Wahyutomo, Department of Foreign Affairs,

Capt. Wahyudi, Indonesian Armed Forces Headquarters,

Capt. Fanani Tedjakusuma, Indonesian Armed Forces Headquarters,

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

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

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

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

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

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

as Advisers;

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

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

Mr. Thomas Frogh, Cartographer, International Mapping Associates,

as Technical Advisers,

and

Malaysia

represented by

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

as Agent;

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

as Co-Agent;

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

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

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

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

as Counsel and Advocates;

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

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

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

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

as Counsel;

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

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

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

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

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

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

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

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

as Advisers;

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

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

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

as Technical Advisers,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

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

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

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

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

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

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

Have agreed as follows:

Article 1

Submission of Dispute

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

Article 2

Subject of the Litigation

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

Article 3

Procedure

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

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

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

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

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

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

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

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

Article 4

Applicable Law

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

Article 5

Judgment of the Court

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

Article 6

Entry into Force

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

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

Article 7

Notification

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*

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

On behalf of the Government of Indonesia,

in the Memorial, Counter-Memorial and Reply:

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

On behalf of the Government of Malaysia,

in the Memorial, Counter-Memorial and Reply:

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

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

On behalf of the Government of Indonesia,

"On the basis of the facts and legal considerations presented in Indonesia's written pleadings and in its oral presentation, the Government of the Republic of Indonesia respectfully requests the Court to adjudge and declare that:

(i) sovereignty over Pulau Ligitan belongs to the Republic of Indonesia; and

(ii) sovereignty over Pulau Sipadan belongs to the Republic of Indonesia."

On behalf of the Government of Malaysia,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"*Article 1*

The Governments of Germany and Great Britain recognize the sovereignty of Spain over the places effectively occupied, as well as over those places not yet so occupied, of the archipelago of Sulu (Joló), of which the boundaries are determined in Article 2.

Article 2

The Archipelago of Sulu (Joló), conformably to the definition contained in Article I of the Treaty signed the 23rd of September 1836, between the Spanish Government and the Sultan of Sulu (Joló), comprises all the islands which are found between the western extremity of the island of Mindanao, on the one side, and the continent of Borneo and the island of Paragua, on the other side, with the exception of those which are indicated in Article 3.

It is understood that the islands of Balabac and of Cagayan-Joló form part of the Archipelago.

Article 3

The Spanish Government relinquishes as far as regards the British Government, all claim of sovereignty over the territories of the continent of Borneo which belong, or which have belonged in the past, to the Sultan of Sulu (Joló), including therein the neighboring islands of Balambangan, Banguey and Malawali, as well as all those islands lying within a zone of three marine leagues along the coasts and which form part of the territories administered by the Company styled the 'British North Borneo Company'."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "determined the boundary between the Netherland territory and the State of British North Borneo, *as described in the Boundary Treaty supplemented by the interpretation of Article 2 of the Treaty mutually accepted by the Netherland and British Governments in 1905*" (emphasis added by the Court).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Permanent Court continued:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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150. For these reasons,

THE COURT,

By sixteen votes to one,

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

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

AGAINST: *Judge* ad hoc Franck.

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

(Signed) Gilbert GUILLAUME,
President.

(Signed) Philippe COUVREUR,
Registrar.

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

(Initialled) G. G.

(Initialled) Ph. C.