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International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 2002

Public sitting

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

President Guillaume presiding,

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

VERBATIM RECORD

ANNÉE 2002

Audience publique

tenue le lundi 3 juin 2002, à 15 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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Le PRÉSIDENT : Veuillez vous asseoir. La séance est ouverte et je donne à nouveau la parole à sir Arthur Watts.

Sir Arthur WATTS: Thank you, Mr. President. Before lunch I had explained that, in short, the allocation of title to islands was an integral part of the 1891 Convention's main purpose, which was to settle all territorial disputes in the area. With that in mind, let me now turn to look at the substantive provisions of the Convention giving effect to that purpose as defined. The full text of the Convention is at tab 1 in the judges' folders. The first three articles can be disposed of, for our present purposes fairly quickly.

(b) Article I

15. Article I establishes that the boundary between the Dutch and British possessions "shall start from 4° 10' north latitude on the east coast of Borneo". This was, the Court will recall, the compromise starting point agreed during the negotiations, representing the location of Broershoek on the mainland coast. That provision merely established the starting point for the boundary. From there it went both ways, westwards and eastwards.

(c) Articles II and III

16. The westward boundary, going inland across the mainland of Borneo, is delimited in Articles II and III. Those Articles are not directly relevant, and for the moment may be left on one side — although, for purposes of comparison, it will be helpful to refer to them later.

(d) Article IV

17. The boundary running eastward from its agreed starting point is of central importance for the present case. Its delimitation is set out in Article IV of the Convention. It is on the screen now, and, as I said, it is in the text of the Convention which is at tab 1 in the judges' folders. It 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.”

18. Indonesia's contention as to the meaning of that Article has been briefly set out earlier. It is that Article IV established the 4° 10' N parallel latitude as a line of division between all British and Dutch possessions in the area. Moreover, given the starting point at Broershoek on the coast, the line is to be "continued eastward" — the words used in Article IV — so far as necessary, including out to sea, to achieve that basic task of settling all disputes and dividing all territories.

19. The reasons which lead Indonesia to that view will be set out in full in a few moments. First, it is necessary just to note that in attributing meaning to Article IV, the rules for the interpretation of treaties are to be applied. Those rules are set out in Article 31 of the Vienna Convention on the Law of Treaties, and that provision, as the Court has affirmed (recently in the case concerning *Kasikili/Sedudu Island*¹), reflects customary international law. That case concerned a treaty concluded in 1890, just a year earlier than the Anglo-Dutch Convention presently in issue, and there is no doubt that the same conclusion applies to it.

20. Article 31 is well known. It requires a treaty to "be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

21. It is thus not just the "ordinary meaning" of the terms of the 1891 Convention which governs their interpretation, but that meaning in the context in which those terms are used, and in the light of the Convention's object and purpose.

22. The context of a treaty for the purpose of its interpretation can be clarified in a number of respects. Article 31 of the Vienna Convention itself indicates in this connection that the text of the treaty and its preamble and annexes are part of its context, as are certain agreements or instruments made by the parties in connection with the conclusion of the treaty. As the International Law Commission explained in its Commentary to the draft Articles on the Law of Treaties, the context of a term of a treaty "is not merely the article or section of the treaty in which the term occurs, but the treaty as a whole"². Moreover, following several judgments of the Court cited in Indonesia's Counter-Memorial³, account must also be taken of the general context of the treaty's conclusions.

¹*I.C.J. Reports 1999*, Judgment of 13 December 1999, para. 18.

²Commentary to draft Art. 27, para. 12.

³Counter-Memorial of Indonesia, para. 5.29.

23. In applying these rules of interpretation to Article IV of the 1891 Convention, a number of points stand out.

24. First, it is necessary to recall that the underlying object and purpose of the Convention was to settle which State had sovereignty over which possessions, so that all future disputes, such as those of which there had already been signs, would be avoided.

25. The Convention refers to delimiting boundaries between “possessions”. So far as boundaries on land are concerned, there is no particular problem of principle which arises. But as regards maritime possessions, there is a potential problem: any attempt to attribute by name a myriad small islands to one party or the other is inherently unsafe where, as off the Borneo coast at the end of the nineteenth century, there could be no assurance that *all* islands had been identified. Hence it was the common practice in such circumstances to identify sovereignty over small islands by adopting a straight line across maritime areas, and distribute sovereignty according to whichever side of the line an island might lie. This, manifestly, is what Article IV of the 1891 Convention did — fully in line with prevailing practice, and the geographical circumstances: it was the *only* way to be sure that the underlying objective of avoiding future disputes would be realized.

26. That that was the intention behind Article IV is evident from its very language. It refers to the line, which started at 4° 10' N on the coast, as being “continued eastward along that parallel”. The whole notion of linear “continuation”, particularly when reinforced by the word “along”, does not embrace a line of only limited extent with a nearby terminal point, but signifies rather a line of indeterminate length.

27. Such a reading of the Convention — i.e., one which attributes sovereignty over islands — is the only way in which its purpose — dispute avoidance — could be achieved. The territorial limits of the possessions of the two parties were, as Indonesia has shown, uncertain. Both sides wanted to settle potential disputes once and for all. Giving Article IV a meaning which would leave undecided and still uncertain the attribution of small offshore islands must be rejected as inconsistent with that purpose. Coverage of potentially disputed islands was not some “optional extra” in the Convention, but an integral part of its main purpose.

28. And here it must be emphasized that Article IV is not just about the two Indonesian islands of Sipidan and Ligitan. It establishes a rule that benefited both parties to the Convention —

and still benefits both Parties to this present dispute. It is Article IV's maritime extent in the waters to the east of Borneo which confirmed Britain's — and now Malaysia's — title to those islands which lie to the north of the agreed parallel. If Article IV is deprived of maritime significance, then title to all those other offshore islands could again become an issue — the very thing which the parties wanted to avoid, in reaching a settlement of these territorial problems once and for all.

29. Moreover, it is clear that the parties to the Convention, in their negotiations, were well aware that the line they were negotiating would be a line which would extend out to sea. As Professor Pellet has shown, and as now shown on the screen (and it is at tab 23 in the judges' folders), the initial British proposal was for a line running eastwards from Broershoek, on the coast at 4° 10' N, and then south-eastwards through the channel between the islands of Sebatik and Nanoekan: this British line then turned east along the 4° parallel of latitude and continued for over 50 miles out to the open sea. While that particular proposed line was not in the end the line on which the parties agreed, the fact that that line was proposed, by Great Britain (Malaysia's predecessor in title), shows that a maritime line separating island possessions was in the parties' minds at the time.

30. Malaysia has argued that Article IV only takes the boundary as far east as the east coast of the island of Sebatik mentioned in it. But this is to read into Article IV a terminal boundary point which is not there in the text.

31. To see that this is so, one has only to compare the terms of Article IV with the language specifying the terminal point of the land boundary running westwards from its starting point on the east coast of Borneo. Article II described in some detail the course of the westward-running boundary, and then the relevant part of Article III stated that the boundary runs “[f]rom the summit of the range of mountains mentioned in Article II, to Tandjong-Datoe on the west coast of Borneo”. Here, it is evident that, where the parties intended the boundary to terminate at a point on the coast, they found no difficulty in saying so. “Continues to” a specified point is very different from “continues along” a specified line. By saying, in relation to the eastern end of the line, that it “continues along” the specified parallel the parties must be taken to have said, not only in terms but also by comparison with what they said in Article III, precisely what they meant — the line was to “continue along” the parallel.

32. As already noted, that “continuation” had no fixed terminal point. Given the uncertainty over the attribution of island possessions in the area, and equally the resolve of the parties to avoid all future disputes of this kind, this made sense.

33. Such an indefinite line is fully in accord with international practice, as Indonesia has shown in its Counter-Memorial⁴. Nor is it in any way unusual that a line of attribution should extend so far as to dispose of sovereignty over islands some 50 miles from the relevant coast: as Indonesia also showed in its Counter-Memorial⁵, two Conventions of special relevance to this case — the United States-Spain Peace Treaty of 1898, and the 1930 Anglo-United States Convention — do precisely that, in relation to islands well over 50 miles from the nearest mainland or even large island.

34. The lack of a fixed terminal point for the line does not, of course, mean that the line goes on forever, following the 4° 10' N parallel right round the earth: an indefinite line is not the same as an endless line. Like all treaty provisions, it has to be interpreted in its context, and in the light of the treaty's object and purpose. Seen in that light, the line continues only so far as necessary to settle definitively the whole problem of potentially competing Dutch and British territorial claims in the area: it continues so far as necessary to divide islands or territories whose attribution might give rise to future dispute. That certainly included going as far east as Ligitan — and for present purposes there is no need to consider whether there was any further particular point which the line needed to reach.

35. Malaysia, of course, has contended that the line established by Article IV stops at the east coast of Sebatik, and argues that that Article was only intended to deal with the fate of that island — in particular and in practice, its division.

36. That Article IV does deal with Sebatik is not denied by Indonesia. That Article IV stipulates that the 4° 10' N line passes “across” Sebatik, and divides that island along that line is equally not denied by Indonesia. But that, as Malaysia maintains, Article IV provides for a line which *only* deals with Sebatik, and goes *no further* than its east coast, *is* most emphatically denied

⁴Counter-Memorial of Indonesia, para. 5.44.

⁵*Ibid.*, para. 2.14.

by Indonesia. Nothing in the terms of that Article, nor in their context, nor in the object and purpose of the Convention, supports such a view.

37. It is, of course, true that in negotiating the Convention the parties were very interested in the disposition of the island of Sebatik, and in the navigation rights around it. If one starts at the coast at 4° 10' N and goes eastwards, which is what Article IV is about, the first island one touches is Sebatik. So of course the parties had to deal with it there, in the immediate context of that Article, which covered the eastward extension of the line. Neither of the two broad options open to the parties and about which they had negotiated — that is, of attributing Sebatik wholly to Great Britain or wholly to the Netherlands — was acceptable to them. Instead, they decided to divide the island, and to use for that purpose the same parallel of latitude which they had decided would serve their other purposes in the area — and they needed to say so expressly, in order to make clear that the two other possible options were being rejected.

38. But dealing with the island in that way, in what is a subsidiary clause in the single sentence which constitutes Article IV, does not serve to place a limit on the principal thrust of the text: that is that the line “continue[s] eastward along” the stipulated parallel of latitude.

39. The terms of Article IV, while undoubtedly dealing with Sebatik, are equally appropriate for covering also other offshore islands in the area. I say “other” offshore islands for two reasons in particular.

40. The first is that Sebatik itself is of course an island. It cannot be assimilated to the mainland of Borneo — there is a stretch of water several miles wide between it and the mainland. That alone is enough to show that the Convention cannot be regarded as dealing only with the mainland of Borneo.

41. The second reason is that it must not be forgotten that Article IV was dealing with both Dutch *and* British islands in the area. As explained earlier, it is not just the islands lying to the south of the 4° 10' N line which were attributed to the Netherlands, but also those lying to the north which were attributed to Great Britain.

42. The truth is that Sebatik was dealt with in Article IV because, moving eastwards from the coast, it was an island of greater size and significance than others in the area, and because of its impact on navigation rights: for both of those reasons the parties paid considerable attention to it in

their negotiations. But there is nothing to suggest that it was their sole concern. They were settling their potential disputes over possessions to the east of Broershoek, and while Sebatik might have been the most immediate of their problems, the language they adopted covered also the *other* offshore islands, much smaller than Sebatik, in the general area which concerned them.

43. It is also highly relevant that the 4° 10' N line, as it continues eastwards from the coast, crosses only one island — Sebatik. That eastward continuation of the line therefore called for special treatment for only that one island, which is an added reason for it being dealt with in the way it was in Article IV.

44. That the 4° 10' N line as described in Article IV is said to continue “across” the island of Sebatik does nothing to establish that the parties’ intention was that it should stop at the east coast of that island. “Across” is a term which, in its ordinary meaning, carries the meaning of “through and beyond” the object being crossed. The line, in being “continued eastward along” the stipulated parallel of latitude, does indeed cross the island. But that in no way implies that it stops there — and certainly does not do so when there are many other indications, not least of which is the parties’ evident purpose of comprehensive dispute avoidance, that in using the words “continued eastward along” they meant exactly that. Those words are to be applied as they stand.

45. The Parties have expressed different views in their pleadings on a number of grammatical and linguistic points arising on the language of Article IV. Some of these are somewhat rarefied, and require careful consideration, and it is probably better to leave them as they have been set out in the pleadings⁶. At this stage only two points need be made.

46. The first is that the strictly grammatical analysis of Article IV supports Indonesia’s view of its correct interpretation.

47. The second is that, simply on the basis of the plain structure of the text, the main clause of Article IV consists of the proposition that “the boundary-line shall be continued eastward along that parallel”; all the rest, about the island of Sebatik, 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.

⁶See Memorial of Indonesia, para. 5.43 (*g*) and (*h*); Counter-Memorial of Indonesia, paras. 5.19-5.20, 5.23-5.26; Reply of Indonesia, paras. 2.17-2.19.

Explanatory memorandum map

48. While Indonesia is satisfied that the plain, ordinary, normal meaning of Article IV has the result for which Indonesia contends — namely, that the 4° 10' N line continues out to sea so far as necessary to fulfil the Convention's object and purpose — two matters associated with the Convention lend compelling support to Indonesia's view. These are the course of the debates in the Dutch Parliament when the Convention was being ratified, and the amendment which was introduced to the Contract of Vassalage with the Sultan of Boeloengan in order to give effect to the Convention. Both of these matters were officially known to the British Government, which raised no objection to either of them.

49. The Convention made special mention of the need for approval by the Dutch Parliament. Article VIII stipulated that the Convention had to be ratified, and that it would come into force three months after the exchange of ratifications. This exchange of ratifications was to "take place one month, or sooner if possible, after the said Convention shall have received the approval of the Netherland States-General". There was no equivalent reference to approval of the Convention by the British Parliament, so clearly particular importance attached to the need for the approval of the Dutch Parliament. This reflected the differing requirements of the Parties' constitutional procedures.

50. The Dutch constitutional practice called for the Dutch Government, in seeking the approval of the States-General, to submit to it a Bill — that is, a draft law — to that effect. The Bill had to be accompanied by an Explanatory Memorandum. This Memorandum had as its purpose to explain to the States-General the significance of a proposed treaty, and why its conclusion was in the interests of the Netherlands.

51. It was not the practice for such an Explanatory Memorandum to provide an exhaustive analysis of the treaty approval for which was being sought. Rather, the Memorandum would highlight those aspects of the treaty which were likely to be of principal interest to the States-General, such as its main purpose and achievements: in that way the members of the Dutch legislature would be made aware of what it was that they were being invited to approve. The main purpose of the Explanatory Memorandum was thus essentially as part of the political process of securing parliamentary approval for a treaty.

52. The Explanatory Memorandum for the 1891 Convention was of this kind. Given its geographical impact, it was accompanied by a map — which is being referred to here as the “Explanatory Memorandum map”. It is a map which you saw earlier this morning, it is now on the screen, and a copy is also at tab 8 in the judges’ folders.

53. As can be seen, the map depicted a number of lines. These were drawn in order to explain to the States-General what had been agreed in the Convention, as compared with various other proposals which had been on the table in the negotiations. Thus, as stated on the map itself, the map showed, by a blue line, the boundary initially claimed by the Netherlands. It showed, as a yellow line, the boundary claimed by the British North Borneo Company (BNBC). A green line depicted the boundary suggested by the British Government. Finally, a red line showed the line finally agreed in the Convention.

54. Five things about these lines are to be noted.

- (a) First, the area of the overlapping claims of the British North Borneo Company and the Netherlands — that is, the area between the yellow and blue lines — is quite extensive.
- (b) Second, the compromise nature of the agreed line — the red line, particularly along the 4° 10’ N parallel — is evident, dividing more or less equally, as it does, the overlapping claimed areas.
- (c) Third, as already noted, the British Government’s proposed line, the green line running south-east from Broershoek and between Sebatik and Nanoekan, is clearly shown to run out to the open sea: a seaward-extending line was clearly in the parties’ mind at the time. In fact, this depiction extended less far out to sea than did the British proposal itself: as can be seen from the sketch-map already shown to the Court, and at tab 23 of the judges’ folders, the British proposal turned east after passing south of Sebatik and then continued eastwards until well past Sipadan.
- (d) Fourth, even more clearly, the line actually agreed in the Convention — the red line — runs eastwards from the coast at Broershoek, across the island of Sebatik, and continues a considerable distance out to sea, along the 4° 10’ N parallel of latitude.
- (e) Fifth, the same red line — the line agreed in the Convention — correctly reflects the distinction between Articles III and IV of the Convention, to which reference has already been

made. While the eastern, Article IV, line extends seawards, the western, Article III, line stops abruptly at the coast. It is the difference between a line running “to” a named place — Tandjong-Datoe, at the western end — and a line which is “continued eastward along” the specified parallel — 4° 10’ N — at the eastern end.

55. In putting this map to the States-General the Dutch Government were clearly sensitive to the possible charge that they had conceded too extensive an area to the British. They explained, however, that their claimed area was not an unchallengeable claim, and that what they had achieved was, now, “a very accurately delineated boundary” instead of a “highly uncertain boundary”: moreover, that accurately delineated boundary which “has now been accepted . . . obviates all difficulties in the future not only concerning the part of Borneo to which the dispute related but also concerning the whole island”⁷. The Government’s intention to deal comprehensively with *all* possible sources of territorial friction in the area is apparent.

56. The red line on the Explanatory Memorandum map clearly bears out Indonesia’s contentions in this present case. In the light of that map, it is simply impossible to maintain that the Dutch Government — and, as will be shown in a moment, the British Government — intended the agreed 4° 10’ N line to stop at the east coast of Sebatik. Article IV of the Convention referred to the agreed line as one which “continued eastward along” the specified parallel of latitude, and the Explanatory Memorandum map shows just that — an abundantly clear illustration of what Article IV meant.

57. The map depicted all the relevant features needed to enable the States-General to decide upon the approval of the Convention. It did not need to show each and every feature of the area covered by it, and in particular every single one of the many small islands offshore the coast of Borneo. The map’s purpose was to illustrate for the States-General the general effect of the Convention, for which there was no need for abundant cartographic detail.

58. Moreover, so far as concerns the small offshore islands, their precise location was at that time, and for that purpose, somewhat beside the point. What mattered was the course followed by the line of attribution at sea: islands south of that line were Dutch, and islands to the north were

⁷Full quotation at Memorial of Indonesia, para. 5.49.

British — without any need to identify them. It was the location of the line which was critical rather than the location of particular small islands, and the map depicted the location of the line with abundant clarity.

59. The map is of great importance as a contemporary exposition of the Dutch Government's views as to what was agreed in Article IV of the Convention. The Explanatory Memorandum, together with the accompanying map, was submitted to the States-General on 25 July 1891, that is just one month after the signature of the Convention. The contemporaneity of it as evidence of the Government's views cannot be doubted.

60. The ratification process with which it was associated is in any event an important act in relation to the treaty being ratified — “of vital importance”, as the Court put it in the *Ambatielos* case⁸. This is particularly so where ratification is expressly stipulated in the treaty to be dependent upon the approval of that party's legislature. The map was an integral part of the Dutch Government's ratification process.

61. And moreover, the map was the basis on which the expressly required parliamentary approval of the States-General was given, thereby meeting the precondition established by Article VIII of the Convention.

62. In all, as public, contemporaneous and official evidence of what the Dutch Government intended and believed to be the effect of Article IV of the Convention, the map is compelling in the conclusions to be drawn from it.

63. Not only was the map known to the British Government by way of its public availability as part of the debates in the States-General, but it was also known officially to the British Government in the context of the 1891 Convention. The British Legation at The Hague followed carefully the ratification debates in the Dutch Parliament, and regularly reported developments back to the Foreign Office. Sir Horace Rumbold, the British Minister at The Hague, sent an official despatch back to the Foreign Office on 26 January 1892⁹ with which he sent two copies of the map: and he drew specific attention to it. He said that it “seems to be the only interesting feature of a document which does not otherwise call for special comment”. But while thus drawing

⁸Full quotation at Memorial of Indonesia, para. 5.51 (a).

⁹Memorial of Indonesia, Ann. 81. See also Memorial of Indonesia, para. 5.54.

particular attention to the map, Sir Horace Rumbold, who was an active participant in the Anglo-Dutch dealings leading to the conclusion of the Convention and would have been familiar with the Convention's content, made no critical comment about the lines depicted on the map.

64. That official transmission of the map back to the Foreign Office elicited no response from the Foreign Office. There is no recorded comment on it; certainly, no indication of any dissent from its depiction of the agreed line. All that the Foreign Office did, apparently, was straight away to place the map in its official records, along with the Convention. In due course, in line with normal Government practice with official archives, the Convention and map were transferred to the Public Records Office — in effect, the official depository for publicly available State archives. And the Dutch Government did the same, and the map has been kept as part of the Netherlands State archives in The Hague.

65. It is thus clear that the Explanatory Memorandum map, which so clearly supports the Indonesian contentions in this case, was both officially known to the British Government at the time and in the context of the 1891 Convention, and was in no way whatsoever objected to by the British Government. The significance of this British official silence in the face of the Explanatory Memorandum map and the texts associated with it can scarcely be overstated. They demonstrated beyond question the Dutch Government's official interpretation of the 1891 Convention.

66. The British Government's knowledge, coupled with the absence of any indication of dissent from the depictions on it of the lines which were the very heart of the Convention, necessarily implies Great Britain's concurrence in the content of the map. That in turn involves irrefutable acquiescence in the depiction of the Convention line, such that all islands to the south of that line — and thus in particular the islands of Sipadan and Ligitan — belong to the Netherlands.

67. There are strong parallels between the circumstances surrounding the Explanatory Memorandum map, and those of the so-called "Livre Jaune" map which was in issue before the Court in the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*¹⁰ case.

68. There, there had been a Franco-British "Additional Declaration" of 21 March 1899: it defined a boundary line by verbal description, but without any map being attached to the

¹⁰*I.C.J. Reports 1994*, p. 6.

Declaration. A few days after the Declaration was adopted, the French Ministry of Foreign Affairs published the Declaration in a “Livre Jaune”. Along with the text of the Declaration, the Ministry also published a map in the “Livre Jaune”. That map was annexed to the official text of the Declaration kept in the Ministry’s archives. The same map was attached to the *exposé des motifs* which accompanied the draft law submitted on 27 March 1899 to the French legislature authorizing ratification of the Declaration. The map was also published in the French press.

69. The map — like the Explanatory Memorandum map — was an official publication; it was contemporaneous with the Declaration it elucidated; it was related to the parliamentary approval process; it was publicly available. There can be no doubt that the British authorities were aware of it, but — as with the Explanatory Memorandum map — no protest or other dissent from it was made by the British Government.

70. In fact, the map differed in certain respects from the description of the boundary given in the text of the Franco-British Declaration. Nevertheless, the Court treated the map as an authoritative interpretation of the Declaration¹¹. The present case is an even stronger example of a map being authoritative, since the Explanatory Memorandum map was entirely consistent with, and in no way different from, the text of the Convention. It shows the line agreed in the Convention and acquiesced in by Great Britain as a correct delineation of the agreed line.

71. The course of dealings between the Dutch and British Governments with regard to the Explanatory Memorandum map can also be seen in other, quite distinct, legally relevant ways. Indonesia has, in its written pleadings, drawn attention to three of these.

72. First, Indonesia has shown that the course of dealings between the two Governments involved in particular the official and contemporaneous publication of the map by the Dutch Government as part of its ratification process, and the failure of the British Government to dissent from the depiction of the agreed line on it, despite its knowledge of the map. Indonesia accordingly submitted in its Counter-Memorial¹² that those circumstances constituted an agreement relating to the 1891 Convention. As such it forms part of the context of the Convention within the meaning of Article 31, paragraph 2 (a), of the Vienna Convention on the Law of Treaties.

¹¹P. 18, para. 28; p. 30, para. 58; p. 37, para. 61; and p. 34, paras. 64-65.

¹²Paras. 5.31-5.34.

73. Second, and either additionally or alternatively, as Indonesia has submitted in its Counter-Memorial¹³, the Explanatory Memorandum map constituted an instrument made by one of the parties in connection with the conclusion of the Convention — namely the Dutch Government, which made and published the map as part of the ratification process required by the Convention — and was accepted by the other party as an instrument related to the treaty — namely, Great Britain, through its knowledge of the map and the circumstances of its publication, accompanied by its failure to dissent from the depiction of the agreed line on the map. Accordingly, the map, as such an instrument, again forms part of the context of the Convention within the meaning of Article 31, paragraph 2 (*b*), of the Vienna Convention.

74. Third, the agreement between the Netherlands and Great Britain which was constituted by the course of their dealings in connection with the map, has a further legally relevant aspect. As shown in Indonesia's Counter-Memorial, it is either, or both, a subsequent agreement between the parties regarding the interpretation of the Convention or the application of its provisions, or subsequent practice establishing the parties' agreement regarding its interpretation. As such, it must, by virtue of Article 31, paragraph 3, of the Vienna Convention be taken into account in interpreting the 1891 Convention, together with the context.

75. For all the foregoing reasons, it is apparent that the Explanatory Memorandum map is of great significance for this case, because of its particular and compelling relevance to the meaning of Article IV of the Convention. It fully bears out the meaning of that provision as derived from the actual language used:

- it was contemporaneous with the Convention;
- it was publicly available;
- it was an official Government document;
- it was prepared for use in the ratification process;
- it was submitted to the States-General; and
- it was known to — indeed was expressly drawn to the attention of — the British Government.

¹³Paras. 5.35-5.36.

76. And the British Government did nothing to indicate, in any way, that it dissented from the depiction on that map of the line which was stated on the face of the map to have been the line agreed in the Convention. A clearer case of acquiescence or implied agreement is hard to imagine.

77. Yet the map's significance does not end there. As was said at the outset, it was prepared and submitted to the States-General as part of the ratification process of the 1891 Convention. It was, together with the Explanatory Memorandum of which it formed part, the basis for the parliamentary debates on the ratification of the Convention.

78. Those debates made one thing abundantly clear. The Dutch Government was commending the Convention to the States-General, whatever niggling doubts the members of the legislature might have about it, on the grounds of "the advantages of the arrangement come to, as settling for good and all the entire question of the boundaries between Dutch and British protected territory in Borneo"¹⁴: or as put by the Government in another part of the debate, the Government had exercised its duty to ensure that "the rights in relation to local rulers both in Borneo itself and on the neighbouring smaller islands are regulated in such a way that difficulties with other Powers need never be feared with regard to their respective claims"¹⁵.

79. Previous uncertainty was being replaced by certainty, *across the board* — "for good and all", future "difficulties . . . need never be feared". And that certainty was being commended to the States-General, and was accepted by it, on the basis of the map forming part of the Explanatory Memorandum. The Court itself has said of another boundary settlement (in the *Temple of Preah Vihear* case), that it thought it

"legitimate to conclude that an important, not to say a paramount object of the settlements of the 1904-1908 period (which brought about a comprehensive regulation of all outstanding frontier questions between the two countries), was to put an end to this state of tension and to achieve frontier stability on a basis of certainty and finality"¹⁶.

The same is true of the 1891 Convention.

¹⁴Memorial of Indonesia, para. 5.56.

¹⁵*Ibid.*, para. 5.61.

¹⁶*I.C.J. Reports 1962*, pp. 34-35. For the full quotation see Memorial of Indonesia, para. 5.59; and also para. 5.60.

Amended Contract of Vassalage

80. The Explanatory Memorandum does not stand alone as contemporaneous evidence of the Netherlands understanding of what the 1891 Convention, and in particular Article IV, meant. That Convention entered into force in 1892. In 1893 the Dutch authorities secured an amendment to the Contracts of Vassalage of 1850 and 1878, setting out the territorial extent of Boeloengan. Just one year after the entry into force of the Convention, the definition was amended to read, so far as relevant, as follows:

“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 [a certain way] . . . 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 . . .”¹⁷.

The final words of this text — the reference to islands “so far as they are situated to the south of the boundary-line” — show that the Dutch Government regarded the effect of the 1891 Convention as being to establish, in relation to islands, a line of territorial attribution extending out to sea.

81. This new text was officially communicated to the British Government on 26 February 1895. The text, with its clear implication as just stated, was in no way challenged by the British Government. Once more, it confirmed — by further silence — the acquiescence in the Explanatory Memorandum map which it had demonstrated by its initial silence.

1915 and 1928 Anglo-Dutch agreements

82. The 1891 Convention, of central importance though it is, is not the only Anglo-Dutch treaty relevant to their common boundary in Borneo, and a brief word needs to be said about two other treaties in this context — particularly in so far as they relate to boundary maps. What follows will only be “brief” because, for the reasons which Indonesia has explained fully in its written pleadings¹⁸, the two treaties are essentially irrelevant to the issues arising in this case.

83. By way of background, it is to be noted that the 1891 Convention itself envisaged, in Article V, that it might be necessary to determine with exactitude the boundary line described in Articles I to IV of the Convention. This is in no way surprising: Articles I to IV are very brief — just five sentences altogether — but they describe a boundary stretching for something over

¹⁷Memorial of Indonesia, para. 5.62.

¹⁸See Memorial of Indonesia, para. 5.65; Counter-Memorial of Indonesia, paras. 5.97-5.118; Reply of Indonesia, paras. 2.37-2.50.

1,200 km overland, through mountainous and heavily forested terrain about which the parties admitted that they knew very little.

84. Accordingly, pursuant to that provision, in 1915 and 1928 the parties concluded further agreements, specifying the land boundary in particular areas. Each of those agreements annexed maps, delineating the more exact boundary lines determined in the area covered by the agreement in question. The 1915 agreement covered the island of Sebatik and a short distance into the mainland of Borneo; the 1928 agreement covered a short distance much further in the interior.

85. These two stretches are indicated by the sketch-map now on the screen, and at tab 28 in the judges' folders: it is a sketch-map which was included in Indonesia's Counter-Memorial as Annex 26. As can readily be seen, the two agreements dealt with only a very small part of the total land boundary between the Dutch and British territories in Borneo — in fact, only about 20 per cent of the boundary.

86. This shows clearly the very limited extent of those two agreements. They, and their annexed maps, are very relevant *to those limited stretches of land boundary*. They say nothing whatsoever about the other stretches of the line agreed in the 1891 Convention.

87. Malaysia has sought to argue that the fact that the 1915 agreement and its map do not show a line extending out to sea to the east of Sebatik means that no such eastward and seaward extension of that line was agreed in Article IV of the 1891 Convention. But this is manifestly not correct. The 1915 and 1928 agreements and their maps did not cover some 80 per cent of the land boundary, but that does not mean that the line established by the Convention did not continue across that other 80 per cent: *of course* it did. The correct position is that the maps annexed to the 1915 and 1928 agreements are wholly irrelevant to any other stretches of the Convention line, whether to the west or the east of the limited stretches those agreements were dealing with.

88. Moreover, one must ask what a Commission charged with what was essentially a task of demarcation could do in the way of demarcating a line at sea, as prescribed by Article IV? There is neither a practical possibility of such a physical demarcation at sea nor, more importantly, any need for it — by establishing that the line followed a parallel of latitude, Article IV of the Convention said all that was needed: that parallel can easily be identified at sea; nothing else is needed.

89. Those two later agreements simply do not address the issue which is at the centre of this case. They do not say anything about the seaward extension of the particular parallel of latitude prescribed by Article IV of the Convention — which, the Court will recall, requires that the line be “continued eastward along that parallel”, crossing as it does so the island of Sebatik. The maps annexed to those two agreements are similarly silent on that issue. As agreed maps, they had an immediate binding force which the Explanatory Memorandum map only acquired by virtue of its publication and Great Britain’s subsequent acquiescence; but in no sense can they be said to prevail over the Explanatory Memorandum map, and the agreement to which it gave rise, in relation to stretches of the Convention line which were beyond the reach of the 1915 and 1928 agreements.

90. That Explanatory Memorandum map, for all the reasons which have been explained both this afternoon and in Indonesia’s written pleadings, is compelling supporting evidence for Indonesia’s interpretation of Article IV of the 1891 Convention. That interpretation follows both from the text of that Article and from the object and purpose which the parties had in mind, namely the wish to deal comprehensively with territorial issues in the area of their mutual concern so as to put an end, once and for all, to *all* potential sources of territorial friction, whether on the mainland or offshore.

91. Mr. President, and Members of the tribunal, that brings me to the end of my presentation of Indonesia’s arguments concerning the meaning and significance of the 1891 Convention. I am grateful to the Court for the courtesy and patience with which it has heard me. I now invite you, Mr. President, to give the floor to Professor Soons, to begin Indonesia’s presentation of events occurring after the 1891 Convention. Thank you very much, Mr. President.

Le PRESIDENT : Je vous remercie beaucoup, sir Arthur Watts. Je donne maintenant la parole au professeur Alfred Soons.

Mr. SOONS:

Confirmation of Dutch title to the islands post 1891

Introduction

1. Mr. President, Members of the Court, my task this afternoon will be to show that the title to Pulau Sipadan and Pulau Ligitan, allocated to the Kingdom of the Netherlands by the 1891 Anglo-Dutch Convention, as just explained by Sir Arthur Watts, was confirmed in the subsequent years by acts by both parties to the Convention. These acts involve: (1) the publication of maps by the BNBC, and (2) naval patrols around the islands by the Dutch, including one highly significant operation by the destroyer *Lynx* and its seaplane, involving even landing on the island of Sipadan. In addition, I will deal with the significance of the internal Dutch deliberations in the 1920s on the delimitation of the territorial sea off Sebatik Island, an issue which had been raised by Malaysia in its Counter-Memorial and which Indonesia will be happy to address since it only underscores the Indonesian position with respect to the nature of the 1891 Convention line.

Maps issued by Stanford's Geographical Establishment, the BNBC's official cartographer

2. First, I will address the maps issued by Stanford's Geographical Establishment in London. Shortly after the conclusion of the 1891 Convention, in the period 1894-1904, Stanford published three maps which clearly indicate that the British viewed the 1891 Convention line as extending offshore, thus leaving islands situated to the north of the line to the State of North Borneo and those to the south of the line to the colony of the Dutch East Indies. Before discussing these maps, however, I want to say a few words on the status of Stanford's Establishment as the official cartographer of the BNBC. Some of the maps issued by Stanford's can incontestably be regarded as official maps issued on behalf of the State of North Borneo, and as a consequence they have a particular value in establishing the views of one of the parties to the Convention.

3. Already in 1888 Stanford had prepared two maps of the BNBC territory specifically for the company. These maps were used by the British in formulating their positions advanced during the negotiations for the 1891 Convention. Indonesia has quoted in its Memorial from a letter from the British North Borneo Company to the British Foreign Office dated 8 March 1889. With this letter, the BNBC provided at the request of the Foreign Office: "two copies of a Map carefully prepared under the direction of the Court of Directors, showing, so far as possible in the present state of geographical knowledge, the limits which they claim in Borneo" (emphasis added)

(Memorial of Indonesia, Vol. 2, Ann. 46). The two copies referred to in this letter have been included in Indonesia's Map Atlas, as maps 3 and 4, and they were shown this morning by Professor Pellet. As you can see from the title of the map now shown on the screen, which is map 3 of our Map Atlas, it was prepared by Stanford for the BNBC in 1888, as an extract from an already existing basemap. The map shown is included in the judges' folders, under tab 25; that probably makes it easier to read the title.

4. As Indonesia has mentioned in its Memorial (para. 6.55), British archival sources show that, following the conclusion of the 1891 Convention, Stanford's Geographical Establishment continued to act as the official cartographer of the BNBC, the Government of the State of North Borneo. On 26 April 1892, for example, the Governor's Office of the BNBC in Sandakan sent correspondence to BNBC Headquarters in London enclosing two sets of plans regarding the mapping of portions of the BNBC territory with the request that these plans be forwarded to Stanford for their maps (Memorial of Indonesia, Vol. 3, Ann. 91). On 8 July 1898, the BNBC Commissioner of Land in Sandakan sent correspondence to London indicating the results of further surveys of the BNBC's territory. I quote from the Commissioner's letter, which you will find in the judges' folders under tab 29: "I hope these 3 tracings and map will be sent to Stanford to place the details on our Territorial Map" (Memorial of Indonesia, Vol. 3, Ann. 92).

5. From this correspondence it is quite clear that the BNBC looked to Stanford for preparing their official maps. This is not disputed by Malaysia in its written pleadings.

6. Mr. President, Members of the Court, I now turn to the maps published by Stanford shortly after the conclusion of the 1891 Convention. Clear confirmation that the British viewed the 1891 line as extending offshore, leaving Pulau Sipadan and Pulau Ligitan on the Dutch side of the line, is provided by a map entitled "Borneo" published by Stanford in 1903. As can be seen from this map, included in your folders under tab 30, the legend of the map explains that the provinces of the BNBC are separated by red lines on the map. The boundaries of the BNBC's provinces can be seen to extend seaward, thus including various offshore islands. You can now see this in more detail. In particular, the southern offshore boundary of the Elphinstone province continues into the sea and coincides with the course of the 1891 line, leaving the island of Sipadan to the south, on the Dutch side of the boundary. To the east of Sipadan the map shows another feature, unnamed,

which Malaysia alleges represents Ligitan (Counter-Memorial of Malaysia, para. 5.10). The feature is located just to the north of the line. We do not know if this was indeed intended to represent Ligitan. Given the limited geographical knowledge of the area at that time it is very well possible that Ligitan was incorrectly situated on the map. But that matters very little for our purposes: what matters is the presence of the line at sea, and the fact that it follows the 4° 10' N parallel of latitude.

7. The 1903 Stanford map is direct evidence of what the BNBC considered the limits of its territory following the conclusion of the 1891 Convention. Stanford's status as effectively the official cartographer for the BNBC underscores the important evidentiary value of the map.

8. Apart from this particular map there were other maps published by Stanford shortly after the conclusion of the 1891 Convention which, not surprisingly given Stanford's status as just explained, show the function of the 1891 Convention line. The first was a map in Stanford's *London Atlas of Universal Geography*, edition of 1894. It was the first map of the region published by Stanford after the conclusion of the 1891 Convention, and clearly took account of what was agreed in that Convention. I will show you first the 1887 edition of the map, to illustrate the difference. It is in the judges' folders at tab 31. No lines extending beyond the coast are here to be seen. Now you see the 1894 edition of the same map. We focus on the relevant area of the map. You will find a copy in your folders at tab 32. It is significant that the southern limits of British North Borneo can now be seen to extend out to sea from the island of Sibetik along the 4° 10' N line of latitude to a point well to the east of Sipadan and Ligitan. There can be no other explanation for this southern limit than the fact that it reflected the territorial allocation between British North Borneo and the Netherlands East Indies agreed upon in the 1891 Convention. British possessions were clearly seen to be limited to areas lying to the north of 4° 10' N latitude.

9. The 1904 edition of Stanford's *London Atlas of Universal Geography* contains a map of the region which is similar to the 1894 map. This map is included in Indonesia's Reply, Volume 2, Annex 26.

10. In conclusion: The maps published by Stanford clearly show the same line as the one on the Explanatory Memorandum map; the BNBC recognized that the southern limits of its territory east of the island of Sebatik coincided with the prolongation of the 4° 10' N parallel of latitude

established by the 1891 Convention to a point lying well east of Sipadan and Ligitan. Both islands were clearly recognized as belonging to Dutch Borneo.

Dutch exercises of State functions: the activities of the Royal Netherlands Navy

11. Mr. President, Members of the Court, I now turn to the evidence available from the practice of the Netherlands to the effect that, subsequent to the conclusion of the 1891 Convention, it regarded Sipadan and Ligitan as part of the colony of the Netherlands East Indies. One of the most authoritative instances of evidence of confirmation of sovereignty over territory is the undisputed conduct of policing activities in the territory. Such evidence is indeed available in this case. A highly relevant example of such practice subsequent to the conclusion of the 1891 Convention is provided by the policing activities carried out in the area around Sipadan and Ligitan by a ship of the Royal Netherlands Navy for the purpose of protecting the coastal population against acts of piracy and robbery by people originating from the Sulu archipelago.

12. Indonesia has in its Counter-Memorial shown that the Dutch Navy, since the end of the nineteenth century, periodically patrolled the seas around the islands located off the north-east Borneo coast which were considered to be under Dutch sovereignty (Counter-Memorial of Indonesia, para. 7.47). Indonesia submitted a list of Dutch warships which over the years had been present off the coast of north-eastern Borneo, which shows that the Dutch Government cared about the security of this part of its possessions (Counter-Memorial of Indonesia, Vol. 2, Ann. 32). We mentioned the example of HNLMS *Koetei*, which was present in the area in 1910. This ship's logbook contains an entry for 30 September 1910 specifically mentioning cruising near Sipadan and Ligitan (Counter-Memorial of Indonesia, Vol. 2, Ann. 33). The Malaysian dismissive response to this evidence is perplexing (Reply of Malaysia, para. 3.25). It refers to irrelevant occurrences like that the ship three days earlier near Sibetik Island had arrived at the territorial sea boundary with North Borneo, and later paid a visit to Lahad Datu, a town in North Borneo. The important point, however, is that the ship did not stay close to the mainland coast and Sibetik, but that it continued to Sipadan and Ligitan: those islands too were of interest to the Dutch warship. It sailed close to Sipadan: the logbook mentions a distance of two miles. The ship was not surveying, but patrolling.

13. Another governmental activity carried out in this area by the Dutch is hydrographic surveying. The Dutch Government has always extended its surveying activities to the area around Sipadan and Ligitan, as evidenced by the ship *Macasser*. As mentioned in our Memorial, in October and November 1903 this ship surveyed the waters around Sipadan and Ligitan (Memorial of Indonesia, para. 5.40). Malaysia also mentions this activity in its Memorial (Memorial of Malaysia, para. 7.14), but its interpretation of the report of the commanding officer of the *Macasser*, namely that he appeared to treat all islands mentioned (including Sipadan and Ligitan) as being part of British North Borneo, is unfounded. For surveying purposes it is normal to treat all maritime features in a purely geographical, and politically neutral, way. Rather, the real significance of this report is, again, that it shows Dutch activities in the area, demonstrating that the Dutch had interests there: the Dutch warship was there because of the need to survey the waters surrounding Dutch islands. This survey of the *Macasser* resulted in the publication in 1905 of chart No. 59 by the Netherlands Hydrographic Office. Updated editions of this chart have subsequently been issued several times, based on new data collected by the Dutch Navy. This shows that the Dutch Government continued to regard it as its responsibility to ensure the safety of navigation in this area by maintaining updated nautical charts.

14. Again, the Malaysian response does not convince. In its Reply, at paragraph 3.24, it refers to the charts produced by the Dutch Hydrographic Office as “maps”. Perhaps that explains why it remarks that the Dutch-British boundary line on this chart stops at the east coast of Sebatik. Nautical charts, however, do not identify the State to which islands belong. An extended allocation line into the sea could thus not have been expected here.

15. But, Mr. President and Members of the Court, the most striking example of Dutch acts of sovereignty is provided in the detailed and indeed fascinating account by the commander of the destroyer HNLMS *Lynx*, Lt. Cdr. Smit. This warship, carrying a seaplane aboard, highly effectively patrolled the area in November and December 1921. Indonesia has submitted an excerpt of the report by the ship’s commander to the vice-admiral commanding the naval forces in the Netherlands East Indies (Memorial of Indonesia, Vol. 4, Ann. 120), who had provided the instructions to the commander. From this report, which you will find in your folder under tab 33, it can be seen that the Dutch authorities considered both Sipadan and Ligitan to be islands under

Dutch sovereignty, whereas other islands situated north of the 1891 Convention line were considered to be British.

16. I will first briefly go through the report of the commander of the *Lynx*. Thereafter I will deal with the views expressed by Malaysia in its written pleadings. In the meantime you see behind me on the screen a picture of the *Lynx* with its seaplane hoisted on its stern during one of its patrols in the Netherlands East Indies. The second picture shows the *Lynx*, close to shore, with the seaplane next to it in the water.

17. In essence, the *Lynx* commander's report shows that he carefully avoided venturing within the three-nautical-mile territorial sea limit of islands under British sovereignty, such as Si Amil, which lay north of the 4° 10' N latitude line, the 1891 Convention line. But because Sipadan and Ligitan both lay to the south of that line, the *Lynx* and the seaplane did visit them. Moreover, as we shall see the BNBC authorities were aware of the activities of the *Lynx*. The ship's commander immediately informed the BNBC authorities of his observations concerning the whereabouts of the pirate fleet. The BNBC authorities did not raise any objection to the activities of the *Lynx*.

Mr. President, I was wondering whether, since the next section of our presentation would take somewhat more time, this would be an appropriate natural breaking point. Otherwise I would like to continue for about seven or eight more minutes.

The PRESIDENT: Professor Soons, I think you may finish with the *Lynx* operations for the further seven, eight minutes you mentioned.

Mr. SOONS: Thank you very much.

18. The *Lynx* stayed in the area from 20 November till 5 December 1921. It operated out of the oil port of Tarakan. The first days it patrolled along the coast, in the various river estuaries, up to the territorial sea boundary off Sebatik. Thereafter it made some patrols further offshore: and these are most significant for us.

19. The report of the commander contains the following highly relevant entries:

(i) "25 November 1921: HNLMS *Lynx* then weighed anchor at 1800 hrs and steamed away.

After passing the lightship the lights were doused and we set sail for the island of

Sipadan. We did not meet any proas during the night of 25 to 26 November and arrived at Sipadan at 0600 hrs. Sipadan lies approximately 20 miles from Si Amil. An armed sloop was sent ashore for information, but returned empty-handed.”

The map now on the screen shows this patrol of the *Lynx* to Sipadan, which included the sending of an armed sloop ashore.

- (ii) From the report of the commander of the *Lynx*: “The plane was launched at 1000 hrs and took off easily. The plane flew via Sipadan to the 3-mile limit off Si Amil.”

The map now on the screen shows this reconnaissance flight of the seaplane. The dark blue area around the North Borneo island of Si Amil is the 3-mile-limit of its territorial sea, which the plane clearly respected. But on its return it traversed the airspace of Sipadan.

- (iii) “On Sunday, 27 November at 1830 hrs I received your encoded wireless telegram sent on 25 November at 0940 hrs which reads after decoding: ‘With reference to your wireless telegram, English authorities will be warned without delay. Keep fleet under surveillance. As soon as they leave English territorial waters, seize them and take the Raja’s proa to Tarakan for investigation of the incident responsible for *Lynx*’s presence’ . . .”

- (iv) “28 November 1921: *Lynx* left the roads of Tarakan to sail to Si Amil to try to catch Raja Panglima Djumang of Sulu outside British territorial waters.”

- (v) “The plane made another flight to Si Amil that afternoon, where it discovered the pirate fleet of 40 proas under the leadership of Raja Panglima Djuwang. The plane landed outside the 3-mile limit . . .”

This map shows this second flight by the seaplane. Again, it respected the territorial sea limit of the island belonging to North Borneo.

- (vi) “30 November 1921: Weighed anchor at 2330 hrs, and steamed to Sipadan where no proas were seen. Sailed from there on 1 December to the 3-mile limit on the east coast of Si Amil, where we found 40 proas fishing on the reef. It is gradually becoming clear that they have formed a settlement on Si Amil. Steamed away from Si Amil again in a southerly direction and sailed from Ligitan to South Sibetik.”

The map now shows the second patrol of the *Lynx*, respecting the territorial sea of Si Amil.

(vii) “We launched the plane on 1 December at 0900 hrs., after which it made a tour to Ligitan heading to south Sibetik . . .”

(viii) “The plane then flew on from Ahus to the east of Mandul and from there directly to the island of Sipadan and the nearby Si Amil, where the fleet of 40 proas were still fishing. Received a wireless telegram at 1100 hrs through Tarakan from the Resident in Banjarmasin as follows: ‘Regarding your signal yesterday, if pirates outside our territory and no threat to settlements expected, no further measures from *Lynx* needed’”.

This map, finally, shows the third flight of the seaplane. It flew over Ligitan and Sipadan, but respected the territorial sea of Si Amil. All five maps just shown are included in the judges’ folders, under tabs 34 and 35.

20. The operations of the *Lynx* and its seaplane make it abundantly clear that Pulau Sipadan and Pulau Ligitan were considered to be under Dutch sovereignty. The warship entered the territorial sea of Sipadan twice, and an armed patrol even went ashore. The seaplane flew over Sipadan and Ligitan. Since there does not exist, and did not exist at that time, a right of overflight within the territorial sea of a foreign State, the seaplane could only have entered the airspace over the islands if it considered them Dutch territory. These actions should be contrasted with those of the *Lynx* and its seaplane when near islands north of the 1891 Convention line: their territorial seas were scrupulously respected. In Indonesia’s view, these operations could serve as a classroom example of how territorial sea limits are respected during maritime law enforcement operations. This may be, then, an appropriate break time. Thank you.

Le PRESIDENT : Je vous remercie beaucoup. La Cour va suspendre pour une dizaine de minutes.

L’audience est suspendue de 16 h 30 à 16 h 40.

Le PRÉSIDENT : Veuillez vous asseoir. L’audience est reprise et je donne la parole au professeur Soons.

Mr. SOONS: Thank you, Mr. President. After having described in some detail the operations of the *Lynx* and its seaplane before the break, I now turn to Malaysia's treatment of the *Lynx* operations.

21. Malaysia, in its Counter-Memorial and Reply, shows its embarrassment with this crystal clear display of the Dutch views on the extent of its territorial possessions based on the 1891 Convention. It simply dismisses the significance of the *Lynx* expedition. It does not answer the Indonesian arguments, but merely states that the incident has nothing to do with Dutch territorial jurisdiction over any islands whatsoever. Presumably because the *Lynx* was engaged in combating piracy, as stated in paragraph 3.26 of Malaysia's Reply. Apparently Malaysia is of the view that a warship may anchor in a foreign territorial sea and put a boat ashore on a foreign island, to seek information of the whereabouts of suspected pirates, without prior permission from the coastal State's authorities. A foreign warplane may fly over islands also without prior permission. Perhaps Malaysia will better explain its views later this week. Indonesia submits that also at that time colonial powers were jealous of their territorial jurisdiction. Especially in border areas they would be alert. The BNBC authorities would certainly have protested if they had been of the opinion that the Dutch operations had trespassed on their territory.

22. Finally, Malaysia dismisses the *Lynx* incident as insignificant because it was the only such reported case of display of Dutch policing activities in the area. It is true that the report of the commander of the *Lynx* is the only such report that Indonesia has been able to retrieve from the colonial archives in the Netherlands or, for that matter, Indonesia. The problem here is that such reports normally would never have reached the archives in the Netherlands. These reports are routine matters. They stayed in the East Indies, where they were kept in the archives of the Commander Naval Forces, Netherlands East Indies. These archives, at least for this period, do not exist anymore; they were in all probability destroyed in March 1942 during the invasion of the Dutch East Indies. The only reason why this particular report, as an exception, was available in the archives in the Netherlands is that it was sent to The Hague by the Governor-General of the Netherlands East Indies in December 1922 as an annex to a letter dealing with the issue of the delimitation of the territorial sea between the Netherlands East Indies and the State of North Borneo off Sebatik island, a matter which I will discuss in a moment (see Counter-Memorial of

Malaysia, Vol. 2, Ann. 4). But at this point I should already stress that it appears from the record of these internal deliberations in the Netherlands and the Netherlands East Indies during the 1920s that not a single Dutch official involved questioned the correctness of the *Lynx* commander's actions during the patrol in November/December 1921.

23. In connection with the Malaysian remark on the paucity of Dutch acts of sovereignty over Sipadan and Ligitan, such as the *Lynx* operations, it should be stressed that the nature and intensity of the control over territory required from a State by international law for it to uphold its sovereignty in the face of possibly competing claims varies according to the nature of the territory in question. We have referred to pronouncements to this effect in international arbitral and judicial decisions in paragraph 7.52 of our Counter-Memorial. The Dutch activities with respect to these very small, remote and uninhabited islands must be considered more than sufficient for this purpose.

24. In conclusion, the operations of the *Lynx* show that its commander, following his instructions from the highest naval authority in the Netherlands East Indies, scrupulously respected the 1891 Convention line as allocating territorial sovereignty over the offshore islands in the area. In particular, the landing on Sipadan of armed Dutch naval personnel, the visit to the vicinity of Ligitan and its repeated overflying by the seaplane constituted acts *par excellence* of the exercise of governmental authority with respect to the islands. Is law enforcement not the clearest display of State functions? These actions therefore confirm the title to Sipadan and Ligitan vested in the Netherlands by virtue of the 1891 Convention.

Significance of the internal Dutch deliberations on territorial sea delimitation

25. Mr. President, Members of the Court, I now come to my third and last point to be addressed in this presentation. Another issue which Malaysia and Indonesia have been discussing in the written pleadings concerns the significance of the internal deliberations within the Dutch Government in the 1920s relating to the possible delimitation of the territorial sea on the east coast of Sebatik island. These discussions and their outcome are in full conformity with the views expressed by Indonesia about the meaning of the 1891 Convention line. In dealing with this

matter, Malaysia has been confusing the question of delimitation of the territorial sea, which is not the subject of the present dispute, with the question of title to territory.

26. Indonesia was fully aware of the file in the Dutch archives dealing with this issue since, as I just mentioned, the report of the commander of the *Lynx* was part of that file. But it is essentially irrelevant for our case, as I will explain. Contrary to what Malaysia seems to imply, Indonesia has not suggested that the 1891 Convention line was from the outset intended also to be, or in effect was, a maritime boundary in the sea area east of the island of Sebatik. Rather, as submitted by Indonesia in its Memorial and Counter-Memorial, the line was considered to be an allocation line: land areas, including islands, located to the north of 4° 10' N latitude were henceforth considered to be British, and those lying to the south were Dutch. That such land territory and islands generate a territorial sea which may require delimitation is another matter.

27. At the time of the conclusion of the 1891 Convention and the internal Dutch deliberations during the 1920s, the only maritime jurisdictional zone that was generated by sovereignty over land was the territorial sea, extending to a maximum breadth of three or possibly four nautical miles measured from the baselines of the coastal State. In cases of adjacent coastal States, and of opposite coastal States where the distance between their respective coasts was less than 6 nautical miles, a delimitation of the respective territorial seas would in principle be called for. This was the case of the area east of Sebatik island, where, as the result of the 1891 Convention, the land boundary met the sea on the eastern shore of the island and thus the question arose how exactly the territorial sea boundary east of that point should be drawn. In addition, depending upon the course of this boundary, the delimitation with the territorial sea of the opposite mainland — Batoe Tinagat — might have come into play since Cowie Bay, the local area, is less than 6 miles wide.

28. The internal Dutch discussions are accurately described in Malaysia's Counter-Memorial (Counter-Memorial of Malaysia, paras. 4.10-4.18). The discussions focused on the various options available in these particular circumstances. One option was to consider the 1891 Convention as *also* constituting offshore — that is, up to 3 nautical miles — a territorial sea boundary. The other option was to apply the applicable rule of general international law: that would prescribe a line drawn perpendicular to the coast at the terminus of the land boundary.

29. On the screen you can see now a sketch which was used in the internal Dutch debates; it was included by Malaysia in its Counter-Memorial, as insert 5 at page 76. Malaysia also produced its own sketch, as insert 6 at page 77, which perhaps is clearer: it is now shown on the screen, and is included in the judges' folder under tab 36. I need to point out here that the legend of this sketch mixes up the two lines; the red and black colours in the legend, or on the sketch, should be reversed. The black line on the sketch — A-D — is obviously not the prolonged land boundary, but a line perpendicular to the coast. The red line — A-B — corresponds to the prolonged land boundary. Incidentally, when you look at this sketch you will notice how negligible the area involved in fact was; it was truly a very minor issue.

30. The internal Dutch discussions reveal that differing views were expressed by various government officials on the preferred option, but the final view expressed in September 1926 by the Minister for Foreign Affairs, who had the final authority in such matters, was that the perpendicular line should apply and that it was not opportune to raise the matter with the British Government. And so it was decided. The matter was never raised with the British by the Dutch Government.

31. According to Malaysia, the discussions during 1922-1926 show that "the Dutch colonial officers themselves did not at the time think a maritime boundary had been established by the 1891 Convention". That conclusion is correct, and is entirely consistent with Indonesia's view that the 1891 Convention line, extending to the east of Sebatik Island, was an allocation line. It should be stressed here again that any maritime boundary at the time could only have been a territorial sea boundary extending no more than 3 miles from the coast. But the 1891 line east of Sebatik had a different purpose. It represented a line separating territorial possessions, and because there were no insular possessions lying within 3 miles of the coast of Sebatik the 1891 line of attribution was represented as a straight line along the 4° 10' N parallel of latitude. Consequently, there is nothing incompatible between the 1891 Convention line and the Dutch internal discussions as Malaysia tries in vain to imply.

32. It is also important to point out that the internal Dutch discussions of 1922-1926 were entirely restricted to the territorial sea boundary off Sebatik Island and did not involve the islands of Sipadan and Ligitan. This can easily be explained by the fact that in the case of those two

islands no territorial sea delimitation questions arose since they are located at distances of more than 6 miles from the nearest North Borneo islands of Kapalai and Dinawan.

33. In conclusion: the internal Dutch debates on the territorial sea delimitation off Sebatik Island do not contradict the position taken by Indonesia in the written pleadings in this case about the nature and significance of the Convention line, which is that it allocates title to islands located beyond Sebatik: to the north of the line, title belonged to North Borneo, and to the south, to the Netherlands.

34 Mr. President, Members of the Court, I thank you again for your attention. Mr. President, may I ask you to call on my colleague, Mr. Bundy, who will continue Indonesia's presentation.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. Je donne maintenant la parole à M. Rodman R. Bundy.

Mr. BUNDY: Merci, Monsieur le président. Mr. President, Members of the Court:

THE DEFECTS IN MALAYSIA'S TREATY-BASED CHAIN OF TITLE

1. It is, as always, a great honour to appear before this distinguished Court on behalf of the Republic of Indonesia in this important case. Before turning to the substance of my remarks, Mr. President, I would also like to pay tribute to a close friend and colleague, Keith Highet, who was a member of Indonesia's team when this case was started, and would have handled the materials and the part of the case that I shall address this afternoon. Sadly, Mr. Highet is not with us today.

A. Introduction

2. Up to this point, Indonesia's presentation has focused on the events of the late nineteenth and early twentieth centuries on which its title to Ligitan and Sipadan is based. My task this afternoon is to shift the focus from these considerations to the elements of Malaysia's case. Now, as the Court will be aware, Malaysia's claim to Ligitan and Sipadan is based on two separate, but by no means consistent, strands of argument.

3. The first — the so-called "treaty-based" argument — is grounded on the proposition that Malaysia acquired title to Ligitan and Sipadan by virtue of a series of legal grants from each of its

predecessors in interest. Those predecessors in interest, in chronological order, were the Sultan of Sulu, Spain, the United States and Great Britain (Counter-Memorial of Malaysia, para. 2.2 and Reply of Malaysia, para. 5.1).

4. The second Malaysian thesis is based on the contention that, regardless of where the treaty-based title lies, Malaysia still possesses sovereignty over the islands as a result of what is claimed to be a long-standing administration of the islands.

5. I shall be addressing the first of these arguments — the treaty-based claim and tomorrow my colleague and friend, Professor Pellet, will rebut the Malaysian argument based on alleged British and Malaysian administration over the islands. As Indonesia will show, neither of Malaysia's arguments are well-founded. And neither, particularly when viewed in the light of the 1891 Convention and the *mutual* conduct of the Parties, can displace what was Dutch, and what is presently Indonesian, title over the islands.

B. Malaysia's claim that title passed from the Sultan of Sulu to Spain, thence to the United States, thence to Great Britain and finally to Malaysia

6. With that introduction, let me turn directly to the gist of Malaysia's treaty-based claim. In summing up the essence of this part of Malaysia's case, I can do no better than the words of Malaysia's own Counter-Memorial where the position was put in the following terms:

“Malaysia's claim is based on acquisition by Spain of the possessions of the Sultan of Sulu. The islands adjacent to North Borneo which were situated beyond the three maritime league limit of the 1878 Sulu grant, Ligitan and Sipadan among them, remained under Spanish sovereignty. These possessions were transferred to the United States by the Treaty of 7 November 1900. The United States in turn transferred them to Great Britain by the Treaty of 2 January 1930.” (Counter-Memorial of Malaysia, para. 2.2.)

7. The Court will appreciate that, in order for this thesis to succeed, Malaysia bears the burden of proving that each of the links of its chain of title is sound: in other words, that each of the relevant entities — be it the Sultan of Sulu, Spain, Great Britain or the United States — possessed a demonstrably valid title to both islands which could be passed on to its successor. If even one of these links fails, then the legal foundation for Malaysia's case collapses. Obviously, none of the entities listed in the chain of title could pass on title to the islands which it did not

possess itself (*nemo dat quod non habet*). And if there was no title to pass on or if the chain was broken, then there was no title for Malaysia to inherit by means of State succession.

8. My remarks, Mr. President, will be directed at showing that at each stage of the process, Malaysia's thesis breaks down. In particular, I shall show that:

- (i) There is no evidence that the Sultan of Sulu ever possessed, or even thought that he possessed, sovereignty over Ligitan or Sipadan. The Philippines Application for Permission to Intervene last year has reinforced this point. I'll come back to that.
- (ii) There is likewise no evidence that Spain considered that it held title to the islands. Spain was utterly indifferent to islands lying so far south and west of its possessions in the Philippines.
- (iii) There is also no evidence to suggest that the United States considered that it inherited the islands from Spain at the end of the Spanish-American War. While there may have been some initial uncertainty on the part of the United States Navy shortly after the 1900 Treaty was signed, the United States itself never laid claim to the islands and the State Department knew full well that they lay to the south of any possessions the United States had inherited from Spain.
- (iv) Accordingly, there was no title to the islands that the United States could have ceded to Great Britain under the 1930 Anglo-American Treaty even if the United States had wanted to. Of course, the 1930 Treaty was not a treaty of cession, as I shall show. But the important point is that the United States had no interests in Ligitan and Sipadan prior to 1930, the 1930 Treaty did not deal with them, and thereby the islands were not transferred to Great Britain pursuant to that Treaty.
- (v) And finally, if Great Britain had no title to the islands that had been ceded to it by the United States, it follows that Malaysia could not have inherited title upon achieving independence.

9. The end result is that not simply is one of the links in Malaysia's chain broken; each and every one of them is fatally flawed. This being the case, Malaysia cannot base a claim to either Ligitan or Sipadan on the theory that it inherited title as a consequence of a series of legal transfers from each of its predecessors in interest.

1. The Sultan of Sulu did not possess sovereignty over Ligitan or Sipadan

10. Let me turn first to the position of the Sultan of Sulu. As Professor Pellet has shown, Malaysia has introduced absolutely no evidence demonstrating that the Sultan of Sulu ever exercised any sovereign rights over either Ligitan or Sipadan. There was no Sulu presence on the islands, no Sulu jurisdiction exercised over them and no attempt by the Sultan to advance any kind of claim to either of the islands.

11. It is this total lack of evidence of an original Sulu title that led Indonesia to observe in its written pleadings that Ligitan and Sipadan never formed part of the Sulu Archipelago or of the Sultan's North Borneo possessions (Memorial of Indonesia, para. 7.25). Malaysia agrees with the first part of that statement. Indeed, Malaysia's own Counter-Memorial expressly concedes that Ligitan and Sipadan were not considered to be part of the Sulu Archipelago (Counter-Memorial of Malaysia, para. 3.14).

12. Where the Parties differ is over the question whether Ligitan and Sipadan were nonetheless part of the Sultan of Sulu's North Borneo possessions. Malaysia claims that they were (Counter-Memorial of Malaysia, para. 3.14). But this assertion, as I shall show, is contradicted by the record.

13. In the first place, Sipadan and Ligitan both lie more than nine miles from the mainland coast, and that point is not disputed by the Parties. So the islands could not have been part of the Sultan of Sulu's North Borneo possessions that were transferred to Messrs. Dent and Overbeck in 1878, no matter how one wants to characterize that grant.

14. Secondly, if there is one country which should have a first-hand appreciation as to whether the Sultan of Sulu ever claimed or exercised sovereignty over a particular territory, it is the Philippines. After all, the Philippines is the successor to the Sultan of Sulu's domains. As we heard during the oral proceedings on the Philippines Application to intervene, the Philippines claim to a portion of North Borneo is based on the historic rights of the Sultan of Sulu. Moreover, as we were also informed, the Philippines considers that its national territory comprises all territories over which the Philippines has an historic right or legal title (CR 2001/1, pp. 33-34).

15. Obviously, we are not here today to debate the merits of the Philippine claim to a portion of Sabah. Indonesia took no position on that point a year ago, and it takes no position today. What

is important, however, is that the Philippines has expressly disavowed having any claim — any territorial interest whatsoever — over Ligitan and Sipadan. This was made clear by the Diplomatic Note sent by the Philippines to Indonesia on 5 April 2001 and it was reaffirmed during the oral proceedings on the intervention last year (see Judgment of 23 October 2001, para. 45). As the 5 April 2001 Diplomatic Note stated, and you can find this at tab 37 of the judges' folders: “[T]he Government of the Republic of the Philippines wishes to reassure the Government of the Republic of Indonesia that it does not have any territorial interest on Sipadan and Ligitan islands.”

16. The inescapable conclusion is that the Philippines does not consider Ligitan or Sipadan ever to have formed part of the Sultan of Sulu's historical possessions. In so far as the Philippines, as the successor in interest to the Sultan of Sulu, does not maintain that either Ligitan or Sipadan ever formed part of the Sultan's possessions, then it is impossible to see how Malaysia can suggest that the islands were once within the Sultan's domains. They were not.

2. Spain never possessed title to the islands

17. I turn now to the question whether there is any evidence that Spain had title to the islands. This is the second link in the Malaysian chain, and here I will deal with two aspects of the matter. First, I shall examine the legal instruments pursuant to which Spain succeeded to the rights of the Sultan of Sulu. These were the 1836 Capitulation between Spain and the Sultan and the 1851 Renewed Act of Submission. Also relevant is the 1885 Protocol between Spain, Great Britain and Germany. Secondly, I will consider the issue whether, apart from these legal instruments, there is any independent evidence of Spanish sovereignty over either Sipadan or Ligitan.

(a) *The 1836 Capitulation between Spain and Sulu*

18. Turning first to the 1836 Capitulation, that Capitulation between the Sultan of Sulu and Spain. Pursuant to that Capitulation Spain offered the Sultan its protection over islands within the limits of Spanish jurisdiction (Memorial of Malaysia, Ann. 1). The jurisdiction of Spain was defined in the 1836 Capitulation as extending “from the western point of Mindanao to Borneo and the [island of] Paragua (Palawan), with the exception of Sandakan and the other countries tributary to the Sultan on the continent of Borneo”.

19. That language, standing alone, in no way supports the notion that Spanish possessions included Sipadan and Ligitan. Let us examine the map, if we may. The 1836 Capitulation refers to Spanish jurisdiction spanning the area from the western point of Mindanao to Borneo and to Palawan Island. That does not suggest, even on a prima facie basis, Spanish jurisdiction over islands such as Sipadan and Ligitan which lay far to the south.

(b) *The 1851 Act of Submission*

20. The 1851 Act of Submission is equally of no help to Malaysia's case. (Memorial of Malaysia, Ann. 4.) It simply recorded the Sultan's agreement to the establishment of Spanish sovereignty over the island of Sooloo with all its dependencies, which were thereby incorporated into the Philippines Archipelago.

21. Once again, it is instructive to refer to the map; the island of Sooloo is now being highlighted on the map. Clearly that island, together with its dependencies, could not and did not include Sipadan and Ligitan which lie over 100 nautical miles away. Indeed, Malaysia itself is on record in this case as admitting that Sipadan and Ligitan did not form part of the Sulu Archipelago. (Counter-Memorial of Malaysia, para. 3.14.) So the 1851 Act of Submission can hardly be said to be evidence of Spanish sovereignty over the disputed islands.

(c) *The 1885 Protocol*

22. If we turn to the 1885 Protocol, it too does nothing to advance the Malaysian thesis (Memorial of Malaysia, Ann. 15).

23. The 1885 Protocol was concluded between Great Britain, Spain and Germany. Its purpose was to ensure commercial freedom for German and British vessels trading in the Sulu Archipelago and to obtain a renunciation by Spain of any claim to sovereignty over the Sultan of Sulu's North Borneo possessions which had formed the basis of the 1878 grant to the BNBC. Pursuant to Article I, the Protocol provided as follows:

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

24. Article II then repeated the formula that had appeared in the 1836 Capitulation. It stated:

“The Archipelago of Sulu (Jolo), 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 (Palawan) on the other side, with the exception of those which are indicated in Article III.”

25. In Article III, Spain renounced in favour of Great Britain all claims of sovereignty on the continent of Borneo, which then belonged or had belonged to the Sultan of Sulu, including all islands within a zone of 3 marine leagues (or 9 miles) from the coast. And as I have said, the Parties agree in this case that Ligitan and Sipadan were not covered by this arrangement given that they lay more than 3 marine leagues (or 9 miles) from the coast.

26. The 1885 Protocol also stipulated that if Spain were to occupy any other islands in the Sulu Archipelago other than those that it then occupied, it would notify Great Britain and Germany accordingly.

27. As of 1885, Spain did not occupy either Ligitan or Sipadan. Nor did Spain ever do so afterwards. In these circumstances, it is impossible to see how any of the instruments mentioned in Malaysia’s pleadings — be they the 1836 and 1851 Capitulations or the 1885 Protocol — establish the existence of Spanish sovereignty over Ligitan and Sipadan.

28. If, Mr. President and Members of the Court, there are no legal instruments which show Spanish title to the islands, what about other kinds of evidence? Is there any anecdotal evidence that Spain, nonetheless, considered itself to be sovereign over the islands? Perhaps the best way to answer this question is to quote Malaysia’s own written pleadings and to see what Malaysia has to say about the issue. Here is a sample of what Malaysia has to say:

- First, from Malaysia’s Reply: “There is no evidence that Spain paid any attention to the islands off the Borneo coast, whether within or outside the nine nautical mile line. Indeed, all the evidence is to the contrary.” (Reply of Malaysia, para. 2.19.)
- Next, “Spain appears to have been quite indifferent”. (Memorial of Malaysia, para. 5.19.)
- Further, “So far as those islands were concerned, the remaining question concerned the identification of which islands belonged to Britain because they were within three marine leagues of the Borneo coast, and which belonged to Spain . . . But in fact that question was not raised even by Spain.” (Memorial of Malaysia, para. 5.20 (c).)
- And fourth, “The Spanish have never claimed or exercised any sovereign rights over them [meaning the islands] as far as I know.” (Memorial of Malaysia, para. 5.30, quoting a local BNBC official in North Borneo.)

29. Mr. President, Members of the Court, these kinds of admissions by Malaysia are an extraordinary basis on which to try to construct a theory that Spain held title to Ligitan and Sipadan. It is in the light of the *complete absence* of any evidence of Spanish title over the islands that Malaysia's very pertinent observation made in its Counter-Memorial deserves to be recalled. There Malaysia stated: "Evidently, if Spain had no rights over Sipadan and Ligitan in 1898, there was nothing it could have transferred to the United States by the Treaties of 1898 and 1900." (Counter-Memorial of Malaysia, para. 3.17.) That, Mr. President, is a statement which Indonesia fully agrees with.

30. These same considerations dispose of Malaysia's argument that, even if the 1891 Convention had been intended to allocate Ligitan and Sipadan to the Netherlands, this would have been impossible because Great Britain had no title to cede given that the islands are said to have been Spanish at the time. (Reply of Malaysia, paras. 1.8 (4) and 1.14.) But this proposition simply begs the question which Malaysia has to prove. The fact of the matter is that Spain neither possessed sovereignty over the islands nor acted as if it did. There was, therefore, no impediment whatsoever to Great Britain and the Netherlands agreeing in the 1891 Convention that the 4° 10' N latitude would serve as the line separating their respective possessions in the area. Not surprisingly, Spain, just as Great Britain, saw no reason to protest the Dutch Explanatory Memorandum map depicting this line, to which Sir Arthur has referred.

3. The lack of any United States claim over the islands

31. Having dealt with the first two links in Malaysia's treaty-based chain of title, I can now turn to the position of the United States. Malaysia not only contends that the United States received the islands from Spain at the end of the Spanish-American War, but also that the United States independently claimed them afterwards. (Counter-Memorial of Malaysia, para. 3.1 (d).)

32. Such confident assertions may not be surprising given the nature of Malaysia's case, but as I shall show, they are advanced at the expense of mischaracterizing, and in some cases ignoring, the key evidence. Since this part of Malaysia's claim really lies at the heart of its case, I hope, Mr. President, the Court will indulge me while I examine the evidence in some detail.

(a) *The 1898 and 1900 Spanish-United States Treaties*

33. In 1898, following the Spanish-American War, Spain ceded to the United States under the Treaty of Peace of Paris the archipelago known as the Philippine Islands including the islands lying within the line that now appears in red on the screen. (Memorial of Indonesia, Ann. 93.)

34. Pursuant to Article III of that Treaty, those possessions were limited on the south along a line drawn across the 4° 45' N latitude. The Parties agree that neither Ligitan nor Sipadan were included within this cession, and that can clearly be seen from the map (Counter-Memorial of Malaysia, para. 3.19).

35. Two years later, on 7 November 1900, the United States and Spain entered into a further agreement for the cession of additional islands lying outside the limits set by the 1898 Treaty (Memorial of Indonesia, Ann. 94). The 1900 Convention contained one substantive provision which reads as follows — and you can find in tab 38 of the judges' folders:

“Spain relinquishes to the United States all title and claim of title, which she may have had at the time of the conclusion of the Treaty of Peace of Paris, to any and all islands belonging to the Philippine Archipelago, lying outside the lines described in Article III of that Treaty and particularly to the islands of Cagayan Sulu and Sibutu and their dependencies, and agrees that all such islands shall be comprehended in the cession of the Archipelago as fully as if they had been expressly included within those lines.”

36. The Court will see on the screen — now being highlighted — the islands of Cagayan Sulu and Sibutu to which particular reference was made in the 1900 Treaty. The fact that neither of these islands, nor their dependencies, lies in the vicinity of Ligitan or Sipadan reinforces the position that the United States inherited no sovereignty over these two islands from Spain even under the 1900 Treaty. Spanish possessions transferred to the United States simply did not extend that far to the south-west.

37. But notwithstanding this, Malaysia argues that the 1900 Treaty was understood as covering Ligitan and Sipadan (Memorial of Malaysia, para. 5.25). The principal basis on which Malaysia advances this contention centres upon a voyage that a United States naval vessel, the *Quiros*, made to the region in the summer of 1903 and a provisional map that was thereafter issued by the United States Department of the Navy. It is this portion of Malaysia's case which suffers from a highly selective recitation of the facts. Let me go through them with the Court's indulgence.

(b) *The voyage of the “Quiros” and the 1903 United States provisional map*

38. Indonesia does not dispute the fact that in June 1903 a United States naval vessel, the *Quiros*, undertook a fact-finding mission in the course of which it visited a number of islands lying more than nine miles off the mainland coast of Borneo. The logbook of the *Quiros*'s captain — Lt. Boughter was his name — indicates that Sipadan was amongst the islands visited although Ligitan was not.

39. What Indonesia does dispute is Malaysia's claim that Lt. Boughter's actions evidence a claim by the United States of sovereignty over the islands. It is true, it is true that Lt. Boughter purported to claim the islands on behalf of the United States. But the important point, passed over in silence by our colleagues, is that the State Department, which was responsible for deciding on United States claims in the region, completely disassociated itself from Lt. Boughter's actions and did not advance any claim to Ligitan or Sipadan based on the voyage of the *Quiros* ³⁴ or on any other basis, for that matter.

40. To appreciate the true position, it is necessary to refer to another element which is central to Malaysia's case. And that is a map which is chart 2117, issued by the United States Hydrographic Office at the request of the Navy in June 1903, and you will find a copy of this map at tab 39 of the folders.

41. Mr. President, the Court, I trust, will readily see why Malaysia is so attached to this map. Malaysia has highlighted the caption indicating “boundary line” on the map — a line which conveniently encompasses both Sipadan and Ligitan. Malaysia has also highlighted the caption indicating that the features enclosed by this line are “under the sovereignty of the United States of America”. In Malaysia's view, “[t]his map represented a public assertion by the United States of its sovereignty over the additional islands ceded to it by the 1900 Treaty, an assertion which occasioned no reaction from The Netherlands” (Memorial of Malaysia, para. 5.26).

42. From a reading of Malaysia's pleadings, one might be forgiven for having the impression that this was the end of the story. A United States naval officer claimed Sipadan and Ligitan for the United States and a map illustrating the claim was issued shortly thereafter. But the facts are otherwise.

43. Take the map, for example — the map on the screen. Malaysia acts as if it represented a definitive assertion of United States sovereignty over the islands. But what Malaysia has neglected to inform the Court is that the map showing the so-called “boundary line” encompassing Ligitan and Sipadan was subsequently forwarded by the War Department to the United States Secretary of State with a request to the State Department to confirm whether that boundary line was correct or an error (Reply of Indonesia, Ann. 8). And you will find that request in the document at tab 40.

44. The Secretary of State responded on 23 October 1903 (Memorial of Indonesia, Ann. 104). Despite the fact that Indonesia referred to this crucial document in both its Memorial *and* in its Counter-Memorial and annexed a copy, Malaysia has persisted in ignoring its existence in all of its written pleadings. We have included it, for the Court’s convenience, at tab 41. Here are some of its relevant passages, and I quote from the letter of the Secretary of State, in response to the map:

— “This department [in other words the State Department] did not undertake to trace the line demarking the respective jurisdictions of Great Britain and Spain to which latter the United States has succeeded *in toto*. We are not in a position to apply on the charts the line described in general terms by the conventions entered into by Spain and Great Britain and Germany.”

The letter continued:

— “Any line drawn by either party in interest for itself alone would necessarily be tentative unless assented to by the other party.”

The letter continued:

— “Under these circumstances this department is unable to either confirm or alter the line drawn *ex parte* upon the chart you have received from the Hydrographic Office of the Navy Department.”

The letter did remark, however, that:

— “The prolongation of the red tracing from the eastward of Sibutu to and around Sipadan Island and thence northwardly to Darvel Bay would probably require to be supported by evidence that Sipadan and the included keys and rocks had been recognized as lying within the dominions of Sulu described in the conventions between Spain on the one hand and Great Britain and Germany on the other. This is a question of fact which the Department of State has no means of determining and considering which an opinion would be mainly *ex parte*.”

The letter then added the following very important observation:

— “The Treaty of Nov. 7, 1900, by expressly including the Island of Sibutu may have intended such inclusion as *exceptional* and as a *limit* to the claims of Spanish dominion to the southwest of the Sulu group.”

45. Again, it may be useful to place a map of the area covered by the 1900 Treaty on the screen in order to understand the implications of what the Secretary of State was saying in this letter. The important point referred to by the Secretary was that the limit of Spanish possessions relinquished to the United States in 1900 in the south-west was in all likelihood restricted to Sibutu Island and its immediate dependencies — features which lie well to the north and east of Ligitan and Sipadan. As will be seen, this continued to be the United States position in subsequent negotiations with Great Britain culminating in the signature of the 1930 Anglo-United States Treaty. Throughout this period, from October 1903 to 1930, the United States never advanced claims to any islands lying to the south-west of Sibutu and its dependencies.

46. The Secretary of State’s letter of 23 October 1903 concluded with the following recommendations:

“Under all the circumstances I am not prepared to advise the insertion of the red and black boundary lines upon the copies of the War Department’s official map of the Philippine Islands. Instead of doing so, I suggest that a note be printed either in the general legend of the map or in brackets *in situ* to the effect that by a treaty signed November 7, 1900 Spain relinquished to the United States all title to islands belonging to the Philippine Archipelago and lying outside the lines described in the Treaty of Peace of December 10, 1898, and in particular to Cagayan-Sulu and Sibutu and their dependencies.”

47. As a result of this letter, Mr. President, instructions were given to the United States Hydrographic Office to delete the “boundary line” that had been drawn around Ligitan and Sipadan on the map which Malaysia has relied on (Reply of Indonesia, Ann. 9). A new map was accordingly prepared in accordance with the Secretary of State’s directions. A copy of that map is now shown on the screen and is also included at tab 42. Perhaps Malaysia will explain in its oral presentation why it did not see fit to disclose this map.

48. As the Court will observe, this map is the second edition, replacing the provisional map that was relied on by Malaysia. There is *no* boundary line around Ligitan and Sipadan and *no* caption saying that the islands are under United States sovereignty. Instead, in accordance with the Secretary of State’s instructions, the wording from the 1900 Treaty is reproduced at the bottom of the map. In short, Mr. President, Malaysia’s map — or, at least the boundary line on that map —

disappeared! That puts to rest Malaysia's argument that — and I am quoting from Malaysia's pleading — “whatever definition might be given to the ‘Sulu Archipelago’, the United States did in fact claim all these islands, as the 1903 map shows” (Counter-Memorial of Malaysia, para. 3.20; see also, Reply of Malaysia, para. 2.25). It also disposes of Malaysia's criticism that the Netherlands should have reacted to the map. Quite simply, there was nothing to react to since the boundary line had been deleted.

49. If any further evidence is required demonstrating that the United States did not endorse Lt. Boughter's rather zealous claim of sovereignty over islands such as Ligitan and Sipadan lying south of Sibutu Island, it is provided by the letter that the Secretary of the Navy sent to the Commander-in-Chief of the United States Asiatic Fleet on 11 March 1904; the Commander of the Asiatic Fleet would, I imagine, have been Lt. Boughter's superior (Memorial of Indonesia, Ann. 107). A copy of this letter may be found at tab 43. It stated:

“The subject of the sovereignty of the islands off Borneo is now under discussion. You will therefore, in order to avoid complications, refrain from any assertion of United States sovereignty or any act of possession of those islands off Borneo while the subject is under discussion.”

50. As a result of these developments, and bearing in mind the Secretary of State's view that Sibutu Island and its immediate dependencies represented the southernmost limits of the possessions acquired from Spain under the 1900 Treaty, the United States issued a new map illustrating the extent of its jurisdiction in the Philippines. That map is being placed on the screen and a copy appears at tab 44 of the folder.

51. The Court will see that the blue line on this map represented the limits of United States possessions acquired under the 1898 Treaty with Spain. The red line represented the view taken by the United States as to the extent of the possessions it had acquired pursuant to the 1900 Treaty with Spain.

52. If we enlarge the relevant area of the map, it can clearly be seen that the United States did not consider that it had acquired sovereignty over Ligitan or Sipadan from Spain under the 1900 Treaty. The red line falls well to the north of both islands. This is another map which Malaysia neglected to produce with its pleadings. As can be seen, it fundamentally contradicts

Malaysia's theory that the United States possessed sovereignty over the disputed islands which it could have passed on to Great Britain in 1930.

(c) *The 1903 Confirmation of Cession also supports Indonesia's case*

53. Mr. President, there is another development which took place in 1903 which, although it was embraced by Malaysia in its initial Memorial, has now turned out to be something of an embarrassment for our distinguished opponents. This was the Confirmation of Cession signed by the Sultan of Sulu on 22 April 1903, a copy of which is at tab 45.

54. This is a very peculiar document. It stated that the Sultan, of his own free will, was pleased to cede to the Government of North Borneo "all the islands in the neighbourhood of the mainland of North Borneo from the Island of Bangii to Sibuku Bay". It then listed the islands in question. I will not attempt to read out these islands, but they are in the document and on the screen.

"These are their names: Mulayangin, Mulayangin Kechil, Malawali, Tigabu, Bilian, Tagapil, Langkayan, Boan, Lahiman, Baguan, Mantanbuan, Gaya, Omodal, Siamil, Mabul, Kapalai, Dinawan, and other islands near, or round, or lying between these said islands named above."

The Confirmation then concluded:

"The reason why the names of the islands are not mentioned in the agreement made with Baron de Overbeck and Mr. [now Sir] Alfred Dent on the 19th Muharram 1295, corresponding to the 22nd January 1878, is because it was known and mutually understood that these islands [the ones listed there] were included in the grant of the countries and islands mentioned in the Agreement above referred to."

55. The Court will note that neither Ligitan or Sipadan were mentioned in this document. It may assist the Court if the location of each of the features that were named in the confirmation are identified on a map; you can also see this at tab 46 of your folders. Here they are, together with an indication of the 3-marine-league — or 9-mile — limit of the BNBC's jurisdiction.

56. It is quite clear that the whole purpose of the 1903 Confirmation was to enable the BNBC artificially and after the fact to claim title to islands lying more than 9 miles from the coast — in other words, to islands which were not covered by the original 1878 grant to the BNBC or the 1885 Protocol. As such, it was a trumped-up document. Even Malaysia concedes that the

British Government did not view the Confirmation as having any legal validity whatsoever (Memorial of Malaysia, para. 5.35, and Counter-Memorial of Malaysia, para. 3.16).

57. Nonetheless, Malaysia persists in maintaining that the Confirmation was intended to encompass Ligitan and Sipadan even though they were not referred to in the document itself (Memorial of Malaysia, para. 5.34). For as Indonesia pointed out in its Counter-Memorial, this presents our colleagues on the other side of the Bar with something of a dilemma.

58. If the Confirmation was meant to cover Ligitan and Sipadan as Malaysia suggests, then its effect would have been to vest title to the islands in the BNBC. However, Malaysia's principal argument — its main argument — is that in 1903 title vested in the United States. How could title vest and lie in two different entities simultaneously? That is a question Malaysia has not bothered to answer.

59. Be that as it may, the true position is that title vested *neither* in the BNBC *nor* in the United States at the time. The BNBC had no title because the islands, by Malaysia's own admission, were not within the Sultan of Sulu's 1878 grant to the BNBC or within the 1885 Protocol. The United States had no title for the reasons that I have explained a few moments ago.

60. Moreover, regardless of its legal defects, the fact remains that the 1903 Confirmation did not name Ligitan and Sipadan as islands that were being ceded to British North Borneo even though it would have been perfectly possible to have done so had the intention been to include them. Other very small islands were named in painstaking detail: why not Sipadan and Ligitan? The answer lies in the fact that it was well known to the BNBC in 1903 that Ligitan and Sipadan did not belong to North Borneo. With the Court's indulgence, let us return to the map.

61. It is no accident that all of the islands named in the 1903 Confirmation lie to the *north* of the 4° 10' N latitude which was agreed in 1891. The BNBC had no hesitation in claiming those islands as long as the Sultan of Sulu would go along with the arrangement. But islands lying *south* of the 4° 10' line such as Ligitan and Sipadan were another matter since these had been allocated to the Netherlands by the 1891 Convention. They were thus not covered by, and not named in, the 1903 Confirmation.

62. This position was confirmed by the map of the area that Stanfords published for the BNBC just four months after the 1903 Confirmation was entered into — a map which was referred to earlier this afternoon by Professor Soons.

63. Here is that map once again. Note, if you would, Mr. President and Members of the Court, that all of the islands named in the 1903 Confirmation fall within the limits of the BNBC's territorial domains which lie to the north of the 4° 10' line of latitude. Sipadan and Ligitan fall to the south of that line, and hence on the Dutch side of the boundary. And that explains why they were not named in the Confirmation.

64. At the end of the day, the 1903 Confirmation of Cession adds nothing to Malaysia's case. If anything, it provides further evidence that Ligitan and Sipadan were considered to be Dutch by virtue of the fact that they lay to the south of the 4° 10' N latitude.

Mr. President, with your permission I would suggest that that might be an appropriate point to break for the afternoon.

Le PRESIDENT : Je vous remercie beaucoup, Monsieur Bundy. Nous allons effectivement nous arrêter là. La séance est levée. La prochaine séance aura lieu demain matin à 10 heures.

L'audience est levée à 18 heures.
