

DECLARATION OF JUDGE ODA

I voted in favour of the Judgment, in which the Court finds that “sovereignty over Pulau Ligitan and Pulau Sipadan belongs to Malaysia” (para. 150). The present case is a rather “weak” one in that neither Party has made a strong showing in support of its claim to title to the islands on any basis. While Malaysia has made a more persuasive case on the basis of “*effectivités*”, its arguments are still not very strong in absolute terms. The Court, however, has been requested to choose between the two Parties in adjudging “whether sovereignty over [the two islands] belongs to . . . Indonesia or to Malaysia” (Special Agreement of 31 May 1997, Art. 2) and, given that choice, the Court has come to a reasonable decision.

* *

In my view, a full understanding of the present case requires an awareness of the underlying facts and circumstances. The existence of the islands of Ligitan and Sipadan has been known since the nineteenth century. However, neither Great Britain nor the Netherlands manifested an interest in sovereignty over or territorial title to the islands in the period before the Second World War and neither Indonesia nor Malaysia took any steps in the post-war period to claim sovereignty over the islands until the late 1960s. Prior to that time, there was no dispute between the two States concerning sovereignty over the islands. If there was any dispute in the late 1960s concerning sovereignty over the islands, it could well have derived from conflicting interests in the exploitation of under-sea oil resources. In fact, any dispute which may have arisen in this period concerned only the delimitation of the continental shelf between the two States, which had become of interest because of the abundance of submarine oil reserves, but *not* sovereignty over the islands.

*

In the mid-1960s, ten years after the adoption of the Geneva Convention on the Continental Shelf in 1958, agreements between neighbouring States to delimit the continental shelf were entered into in all parts of the world where prospecting had pointed to the existence of rich oil reserves: the North Sea, the Gulf of Finland and the Baltic, the Adriatic Sea, the

(Persian) Gulf, the Gulf of Paria, etc. (For a comprehensive survey, see Oda, *The International Law of Ocean Development*, Vol. I, 1972, pp. 373-435; Vol. II, 1975, pp. 63-110.) There was one instance in the 1960s in which a dispute concerning the delimitation of the continental shelf was submitted jointly to this Court after negotiation had proved fruitless: the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 3).

In those days Indonesia, which was blessed with an abundance of oil both on land and offshore, initiated negotiations with its neighbours for an agreed delimitation of the continental shelf. Indonesia concluded agreements with Australia in 1971 and 1972 to divide the continental shelf between them in the area of Timor and the Arafura Sea.

Indonesia's negotiations with Malaysia had started earlier. They resulted in the 1969 Agreement relating to the delimitation of the continental shelf in the Malacca Straits and the South China Sea (off the east coast of West Malaysia and the coast of Sarawak) and the 1971 Tripartite Agreement (with Thailand) covering the northern part of the Malacca Straits but, concerning the area to the east of Borneo, they became deadlocked in September 1969. The Parties then agreed to suspend negotiations on this question. The Parties have chosen to consider the date of the breakdown of their negotiations over the delimitation of the continental shelf to be the "critical date" in respect of their dispute concerning sovereignty.

*

Prior to these negotiations, Indonesia and Malaysia had granted Japanese oil companies (Japex and Sabah Teiseki, respectively) concessions for oil exploration and exploitation in this area. The concession areas did not overlap, as the southern limit of the Malaysian concession lay along 4° 10' 30" latitude north and the northern limit of the Indonesian concession along 4° 09' 30" latitude north. Furthermore, Ligitan and Sipadan did not lie in either concession area. Neither Indonesia nor Malaysia claimed that its concession area had been violated by the other Party (see Judgment, para. 31).

Even though the Special Agreement states that "a dispute has arisen between [Indonesia and Malaysia] regarding sovereignty over Pulau Ligitan and Pulau Sipadan" (Special Agreement of 31 May 1997, preface), in fact the only dispute which existed in or around 1969 was one concerning the delimitation of the continental shelf. That delimitation dispute would have been referred more properly to the Court by joint agreement, as in the *North Sea Continental Shelf* cases.

It should also be noted that the Application by the Philippines in 2001

for permission to intervene in the present case did *not* concern either Party's title to the two islands but the delimitation of the continental shelf between the Parties. In other words, the Philippines showed its concern as to the effect which the delimitation of the continental shelf between Indonesia and Malaysia would have on its own interests.

* *

In the 1960s, the prevailing rule concerning the delimitation of the continental shelf was the one set out in the 1958 Convention on the Continental Shelf:

"the boundary of the continental shelf . . . shall be determined by agreement . . . In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line [in the case of opposite States]" (Art. 6, para. 1).

This provision is extremely ambiguous because it neither makes clear the baselines (i.e., whether or not offshore or mid-ocean islands should be included) from which the median line should be measured nor does it explain the "special circumstances" which justify departing from a median line in connection with certain islands: namely, whether and to what extent the very existence of islands, their size, their social or economic characteristics, their distance from the mainland, etc., could be considered "special circumstances".

I suspect that the main concern of both Parties in their negotiations on the delimitation of their respective continental shelves related to the definition of the baselines and the role in terms of the "special circumstances" test to be played by the scattered islands just south of the north-eastern coast of Borneo. The Parties might then have realized the potential significance of the islands of Ligitan and Sipadan — over which neither Party had claimed sovereignty. In fact, they might have concluded that sovereignty over these islands would entitle them to a much wider continental shelf. Particularly in Indonesia's case, sovereignty over these islands, situated at some distance from its own coast might have gained for it a much wider share of the continental shelf.

In my view, it is significant that each State (and particularly Indonesia), which prior to the 1960s had shown no interest in sovereignty over these two islands, suddenly realized that sovereignty would strengthen its hand in respect of the continental shelf negotiations. The issue of sovereignty arose only as a result of the Parties' manœuvring for better bargaining positions in the continental shelf delimitation.

This resulted from a misconception on the part of the Parties, who failed to understand that, in accordance with the "special circumstances" rule, a delimitation line could well have been drawn disregarding these two extremely small, socially and economically insignificant islands.

*

It is important to keep in mind that sovereignty over two tiny, uninhabited islands, on the one hand, and those islands' influence on the delimitation of the continental shelf, on the other, are two quite different matters.

Though Malaysia has now been awarded sovereignty over the islands, the impact of the Court's Judgment on the delimitation of the continental shelf — which has been the leading issue in the negotiations between the two States since the 1960s — should be considered from a different angle. Today, the rule concerning the delimitation of the continental shelf is set out in Article 83 of the 1982 United Nations Convention on the Law of the Sea calling for "an equitable solution". The main question remains how "equitable" considerations apply to these tiny islands for the purpose of the delimitation of the continental shelf.

In conclusion, I submit that the present Judgment determining sovereignty over the islands does not necessarily have a direct bearing on the delimitation of the continental shelf, which has been a subject of dispute between the two States since the late 1960s.

(Signed) Shigeru ODA.

