## SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN (Indonesia/Malaysia)*

### I. INTRODUCTION[1]

A territorial dispute arose between Indonesia and Malaysia in the Celebes Sea in a region made up of innumerable islands, big and small. More specifically, they challenged each other's claim to sovereignty over two small islands, Ligitan and Sipadan, found off the northeast coast of Borneo. Ligitan lies above sea level and has low-lying vegetation and some trees. It is not permanently inhabited. Although Sipadan is bigger, it is only about 0.13 square kilometers in area. It is densely wooded and became permanently inhabited in the 1980s when it developed into a scuba diving tourist resort.

Under a Special Agreement that the parties signed on 31 May 1997 that entered into force on 14 May 1998, they asked the Court to settle their dispute "in the spirit of friendly relations existing between the Parties as enunciated in the 1976 Treaty of Amity and Co-operation in Southeast Asia". Article 38 of the Court's Statute was to provide the applicable law. On 17 December 2002 by 16:1 votes,[2] the Court delivered its judgment on the merits in this case, finding that Malaysia had sovereignty over the Islands.[3]

### II. CHRONOLOGICAL HISTORICAL CONTEXT[4]

The historical background to the dispute is complex but needs to be traced for discussion on the acquisition of territory to be placed in context.

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* This case is based on the judgment of the Court available at <www.icj-cij.org>; also refer [2002] International Court of Justice Reports (forthcoming).

[1] For background information refer [1999] Australian International Law Journal 308; [2000] Australian International Law Journal 401.

[2] Per Guillaume P, Shi V-P, Oda, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-aranguren, Kooijmans, Rezek, Al-khasawneh, Buergenthal, Elaraby JJ and Weeramantry J ad hoc; Franck J ad hoc dissenting.

[3] In 2001, the Philippines sought the Court's permission to intervene in the case under Article 62 of the Statute but this was rejected. For background information refer [2001] Australian International Law Journal 403.

[4] See generally Judgment of the Court paras 14-31.

During the 16th century, Spain established itself in the Philippines to extend its influence there including in the Sultanate of Sulu, an island. When the 17th century started, the Netherlands established itself in Borneo through the Netherlands East India Company (NEIC) that had derived its rights in South East Asia from a 1602 Charter of the Netherlands United Provinces. This allowed NEIC to sign treaties "with Princes and Powers" of the region on behalf of the Netherlands that led to considerable commercial interests in the region, mainly from trade treaties that also provided for NEIC suzerainty and cessation of territory by local sovereigns.

During the 18th century, NEIC continued to establish itself in Borneo. At the same time, the Sultan of Banjermasin exercised his influence in other parts of Borneo, controlling *inter alia* the Kingdom of Berou (also known as Barrau or Barou) composed of three "States" (Sambaliung, Gunungtabur and Bulungan). In northern Borneo, the Sultans of Brunei and Sulu exercised their influence too. Towards the end of this century, NEIC ceased trading and its territorial possessions were transferred to the Netherlands United Provinces.

At the same time, Britain took control of Dutch possessions in Asia. In spite of its commercial interests here, the Netherlands did not establish settlements in Borneo until the early 19th century. However, when the Anglo-Dutch Convention was concluded on 13 August 1814 in London, the new Netherlands Kingdom recovered most of its former possessions resulting in the overlap of British and Dutch commercial and territorial claims in Borneo.

On 3 January 1817, the Netherlands signed a Contract with the Sultan of Banjermasin that ceded Berou and its dependencies to the Netherlands, *inter alia*. On 17 March 1824, the Netherlands and Britain signed another treaty to settle their disputed claims in the region. On 4 May 1826, the Netherlands and the Sultan signed another Contract to reconfirm the cession. In the ensuing years, the three "States" of Berou were separated. On 27 September 1834 the Sultan of Bulungan declared its submission to NEIC authority.

On 23 September 1836, Spain signed a Treaty on Capitulations of Peace, Protection and Commerce with the Sultan of Sulu to guarantee protection to the Sultan in the islands within Spanish jurisdictional

limits, with the exceptions of Sandakan and other areas in Borneo tributary to the Sultan.

In 1844, NEIC recognised the three "States" as separate kingdoms and their chiefs were given the title "Sultan". In 1850, NEIC signed Contracts of Vassalage with the Sultans granting them their fiefdoms.

On 12 November 1850, NEIC and the Sultan of Bulungan signed a Contract of Vassalage. For the first time, the geographical area constituting Bulungan was described in Article 2.

On 19 April 1851, Spain and the Sultan of Sulu concluded an "Act of Re-Submission" that annexed Sulu and its dependencies to Spain.

On 11 March 1877, Spain, Germany and Britain signed a Protocol to permit free commerce and navigation in the Sulu Sea and settle their commercial dispute. Further, Spain would guarantee and ensure that commerce, fishing and navigation for the ships and subjects of Britain, Germany and the other powers in the Sulu Archipelago could operate freely, but without prejudice to its own rights.

On the same day, the Sultan of Sulu signed a Commission appointing Baron von Overbeck as supreme ruler in his stead and asked his allies to accept von Overbeck in his new role.

In the same year (1877), the Sultan of Brunei made three instruments granting Alfred Dent and von Overbeck a large area of North Borneo. However, the grants included territory in Borneo where the Sultan of Sulu had similar claims.

On 22 January 1878, the Sultan of Sulu signed an Agreement with Dent and von Overbeck granting them, as representatives of a British company, his entire rights and powers in certain territories on the mainland of Borneo.

On 2 June 1878, NEIC and the three "States" signed another Contract of Vassalage[5] that described the territory of Bulungan in the annexure.[6]

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[5] The NEIC government approved and ratified the Contract on 18 October 1878.

[6] This statement was almost identical to Article 2 of the 1850 Contract of Vassalage.

On 22 July 1878, a Protocol confirmed the Treaty on Capitulations of Peace, Protection and Commerce signed by the Sultan of Sulu and Spain on 23 September 1836. Under this, Spain was given sovereignty over the entire Sulu Archipelago and its dependencies.

Subsequently, von Overbeck relinquished all his rights and interests in the British company. As a result, Dent applied for a Royal Charter from Britain to administer the territory and exploit its resources that was granted in November 1881. In May 1882, the British North Borneo Company (BNBC) was incorporated as a chartered company that extended its administration to certain islands beyond the three marine league limit described in the 1878 Agreement.

On 7 March 1885, Spain, Germany and Britain concluded a Protocol. The first three provisions were:

> *Article 1*
> The Governments of Germany and Britain recognise the sovereignty of Spain over the places effectively occupied, as well as over those places not yet so occupied, of the Archipelago of Sulu (Joló), of which the boundaries are determined in Article 2.
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> *Article 2*
> The Archipelago of Sulu (Joló), conformably to the definition contained in Article 1 of the Treaty signed the 23rd of September 1836, between the Spanish Government and the Sultan of Sulu (Joló), comprises all the islands which are found between the western extremity of the island of Mindanao, on the one side, and the continent of Borneo and the island of Paragua, on the other side, with the exception of those which are indicated in Article 3. It is understood that the islands of Balabac and of Cagayan-Joló form part of the Archipelago.
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> *Article 3*
> The Spanish Government relinquishes as far as regards the British Government, all claim of sovereignty over the territories of the continent of Borneo which belong, or which have belonged in the past, to the Sultan of Sulu (Joló), including therein the neighboring islands of Balambangan, Banguey and Malawali, as well as all those islands lying within a zone of three marine leagues along the

> coasts and which form part of the territories administered by the Company styled the 'British North Borneo Company'.

On 12 May 1888, Britain signed an Agreement with BNBC to create North Borneo as a British protectorate with Britain being responsible for foreign relations.

On 20 June 1891, the Netherlands and Britain signed a Convention to define the boundaries between the Dutch possessions in Borneo and other states on that island under British protection.

Meanwhile, the Spanish-American War began, which was ended by the Treaty of Peace of Paris, 10 December 1898. Under Article III, Spain ceded the Philippine Archipelago, as defined by certain lines, to the United States.[7] On 7 November 1900, under another treaty Spain ceded to the United States all the islands belonging to the Philippine Archipelago but lying outside the lines described in Article III.[8]

On 22 April 1903, the Sultan of Sulu and BNBC signed a Confirmation of Cession wherein certain islands[9] were deemed part of the original grant to Dent and von Overbeck in 1878. Other islands near, around or lying between the named islands were also included. However, all the islands were situated beyond the three marine league limit.

In 1903, the United States navy visited the area in *USS Quiros* where Ligitan and Sipadan were located. This led to BNBC protests when it placed flags and tablets on islands claimed by BNBC. Britain and the United States exchanged communications including a memorandum dated 23 June 1906 with an accompanying map marking the area BNBC wished to administer. Following an Exchange of Notes dated 3 and 10 July 1907, the United States waived temporarily its right to administer the islands on the map.

On 28 September 1915, Britain and the Netherlands signed a boundary agreement relating to North Borneo and Dutch possessions there with

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[7] See Judgment para 115.
[8] Ibid.
[9] The islands were Muliangin, Muliangin Kechil, Malawali, Tegabu, Bilian, Tegaypil, Lang Kayen, Boan, Lehiman, Bakungan, Bakungan Kechil, Libaran, Taganack, Beguan, Mantanbuan, Gaya, Omadal, Si Amil, Mabol, Kepalai and Dinawan.

map attached.[10] On 26 March 1928, they signed another agreement to delimit part of the frontier between the summits of Gunong Api and Gunong Raya. A map was also attached.[11]

On 2 January 1930, the United States and Britain concluded a boundary treaty that entered into force on 13 December 1932 to delimit the area between the Philippine Archipelago and North Borneo and divide certain islands between them.[12]

On 26 June 1946, BNBC and Britain signed an agreement whereby BNBC transferred its interests, powers and rights in North Borneo to Britain thereby making North Borneo a British colony.

On 9 July 1963, Malaya, Britain, North Borneo, Sarawak and Singapore concluded an agreement to create Malaysia by federating North Borneo, Malaya and Sabah.

In the 1960s following independence, Malaysia and Indonesia granted oil prospect licences off Borneo's east coast of Borneo. On 6 October 1966, Indonesia granted the first oil licence, to a foreign company. It was a production sharing agreement between Permina (its state-owned company) and the Japan Petroleum Exploration Company Limited. The northern boundary of one of the areas affected ran eastwards in a straight line from the east coast of Sebatik Island.

In 1968, Malaysia granted oil prospect licences to Sabah Teiseki Oil Company that precipitated conflicting claims between the parties. This crystallised in 1969 leading to a continental shelf delimitation agreement on 27 October 1969 that entered into force on 7 November 1969. However, this agreement excluded the area lying east of Borneo where Ligitan and Sipadan were found. When efforts to settle their dispute failed, the parties referred it to the Court by special agreement.

## III. THE ISSUES

Generally, there were four main issues. The first concerned the "critical date" when the Parties would refrain from any action that could alter

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[10] See Judgment paras 70-72.
[11] Ibid para 73.
[12] Ibid para 119.

the *status quo* of the islands. This meant that their statements or actions after this date would be irrelevant to the present case and could not be introduced in evidence. This was a particularly relevant point because they were presenting evidence on their activities in Ligitan and Sipadan to show *effectivités* or effective administration. The three remaining issues were related to how title to those islands was acquired, namely, convention, succession or *effectivités*.

### *(a) The Critical Date*

#### (i) Indonesia

Indonesia argued that the critical date was found within the context of delimitation discussions on their respective continental shelves. This had resulted in a delimitation agreement on 27 October 1969. However, during the discussions when Malaysia claimed sovereignty to the islands the parties had undertaken in an exchange of letters dated 22 September 1969 to refrain from any action that would alter the islands' *status quo*. Indonesia claimed that 1969 therefore became the "critical date in the present dispute". As such, the parties were then "legally neutralized" and their later statements or actions became irrelevant. This meant that since 1979, Malaysia's series of unilateral measures were fundamentally incompatible with the undertaking given to respect the position existing in 1969. Those measures included maps showing the islands to belong to Malaysia and the establishment of tourist facilities on Sipadan contrary to earlier maps. Indonesia added that it had always protested those measures.

#### (ii) Malaysia

Malaysia claimed that when the parties discussed their continental shelf delimitation in 1969, neither Indonesia nor its predecessors expressed any interest in or claimed the islands. Although the critical date was important, it was not so much in relation to the admissibility of evidence but its weight. A tribunal could always consider post-critical date activity if the party presenting it showed that the activity had started prior to that date and continued thereafter. When scuba-diving activities on Sipadan became a popular sport and resulted in a tourist trade Malaysia had accepted the sovereign responsibilities to protect the environment and meet the basic needs of visitors there.

**(iii) The Court**

The Court noted that it could not consider acts occurring after the critical date on which the dispute crystallised unless the acts were a normal continuation of prior acts and did not improve the parties' legal position.[13] As a result, it analysed *effectivités* primarily from the period before 1969, the year in which the parties asserted their respective title claims, and from the nature of their activities during this period.

**(iv) Separate Opinion of Oda J**

Here, it is worthwhile considering Oda J's reasoning in his Separate Opinion. He stated that prior to 1969, there was no dispute between the parties over the islands' sovereignty. If there was any dispute in the late 1960s over such sovereignty, it could have derived from conflicting interests in the exploitation of undersea oil resources. Any dispute that arose during this period concerned only the delimitation of the continental shelf that became of interest due to the abundance of submarine oil reserves, *not* sovereignty, over the islands.

Oda J added that in the mid-1960s, ten years after the 1958 Geneva Convention on the Continental Shelf was adopted, neighbouring states had entered into agreements to delimit the continental shelf where rich oil reserves were expected. The areas included the North Sea, Gulf of Finland and the Baltic, Adriatic Sea, Persian Gulf, and Gulf of Paria.[14] In one case when agreement was unsuccessful, the parties had sent their dispute to the Court for determination. This was in *North Sea Continental Shelf*.[15]

During this period, Indonesia (blessed with an abundance of oil both on land and offshore) initiated negotiations to delimit the continental shelf with its neighbours. This resulted in the following agreements:

(1) with Australia in 1971 and 1972 to delimit the continental shelf between them in the Timor and Arafura Sea area;

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[13] Arbitral Award in the Palena case, 1966 38 International Law Reports 79-80.

[14] For a comprehensive survey, see Oda S, The International Law of Ocean Development (1975, Sijthoff & Noordhoff, The Netherlands) Volume I (1972) at 373-435; Volume II at 63-110.

[15] [1969] International Court of Justice Reports 3.

(2) with Malaysia in 1969 to delimit 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
(3) with Thailand in 1971 to delimit the northern part of the Malacca Straits (the Tripartite Agreement).

However, when the parties became deadlocked in September 1969 over the area to Borneo's east, they agreed to suspend negotiations and consider that date to be the "critical date". Oda J concluded:

> By 1969, moreover, the window of opportunity for *effectivités* had closed. The Parties, in their status quo agreement (described by the Agent for Indonesia in CR 2002/27, pp. 16-17, paras. 13-18), in effect had determined the critical date by which new acts and facts could not be adduced to support the claim of either Party. Evidence of new *effectivités*, such as the establishment of a deep-sea diving resort, are inadmissible in evidence of Malaysian title.

### *(b) Title by Convention*

#### (i) Indonesia

Generally speaking, Indonesia argued that the Islands were not *terra nullius* during the relevant period relying on the 1891 Convention to found its title. It argued that Article IV of the Convention established the 4° 10' north parallel of latitude as the dividing line between the British and Dutch possessions in the area where the islands were found. Since they were located south of that parallel, Indonesia argued that under the Convention, title to them became vested in the Netherlands and later in Indonesia when it succeeded the Netherlands.

#### (ii) Malaysia

Malaysia also argued that the Islands were not *terra nullius* during the relevant period. Similarly, it argued that it had acquired title to the islands by convention. However, this took the form of a *chain of title* thereby rejecting the 1891 Convention as the basis for title. Malaysia based its arguments on two reasons. First, read as a whole, the Convention showed that Britain and the Netherlands only used the Convention to clarify the boundary between their respective land

possessions on Borneo and Sebatik (both larger islands). Secondly, the delimitation line stopped short, at Sebatik's easternmost point, and therefore could not be the boundary line.

**(iii) The Court**

The Court accepted that the islands were not *terra nullius* during the relevant period, noting that the parties argued diametrically opposed reasoning to found their claims.

After examining the 1891 Convention within context and in light of its object and purpose, the Court held that it did not establish an allocation line determining sovereignty over the islands out to sea on Sebatik Island's east. As such, Indonesia could not use the Convention to found its title to the islands. The Court found that the *travaux préparatoires* and the parties' subsequent conduct confirmed this conclusion. Also, the maps did not contradict this conclusion. Consequently, the Court held that although Article IV determined the boundary between the parties, this stopped at the eastern extremity of Sebatik Island and did not establish any allocation line further eastwards.

***(c) Title by Succession***

As noted above, both Indonesia and Malaysia had argued succession as their basis for title, their reasoning being diametrically opposed.

**(i) Indonesia**

Indonesia claimed that it had acquired title as successor to the Netherlands, the latter's title coming from contracts concluded with the Sultan of Bulungan as original title-holder.

**(ii) Malaysia**

Malaysia denied that the islands ever belonged to the Sultan of Bulugan as claimed by Indonesia. Instead, Malaysia founded its claim on a "chain of title" that began when the original sovereign, the Sultan of Sulu, transferred title to Spain. This, in turn, passed to the United States, Britain (on behalf of North Borneo), the United Kingdom of Britain and Northern Ireland and, finally, Malaysia.

**(iii) The Court**

The Court rejected Indonesia's argument that it obtained title as successor to the Netherlands. The Court noted that in the 1878 Contract between the Netherlands and the Sultan of Bulungan, the Sultan's island possessions were described as Terekkan/Tarakan, Nanoekan/ Nanukan and Sebittikh/Sebatik and their surrounding islets. When amended in 1893, this list referred to the three islands and islets in similar terms and took into account Sebatik's division based on the 1891 Convention. The Court stated that the words "the islets belonging thereto" only referred to the small islands in the immediate vicinity of the three islands named, and not to islands located further than 40 nautical miles. The Court therefore rejected Indonesia's claim that it inherited title to the islands from the Netherlands under these contracts.

The Court also rejected Malaysia's argument that its title came from a series of transfers of the original title (chain of title) by the original sovereign, the Sultan of Sulu.

***(d) Title by Effectivités***

Since the Court found that neither Indonesia nor Malaysia could base their title to the islands on the 1891 Convention or on succession, it considered next if title was obtained *effectivités*. In this regard, the parties had to show that their activities evidenced an actual and continued exercise of authority, namely, sovereign intention and will.

**(i) Indonesia**

To show *effectivités,* Indonesia cited activities on the islands and their surrounds, such as the presence of the Dutch navy and other Dutch ships from 1895-1928 as shown in annual reports presented to the Dutch parliament on the colonies *("Koloniale Verslagen")*. More specifically, the Dutch ship, *Macasser,* had conducted hydrographic surveys in the region and around the islands in October and November 1903. In November-December 1921, the Dutch destroyer, *HNLMS Lynx,* visited the area and its patrol team went ashore Sipadan. The plane carried aboard *HNLMS Lynx* traversed the air space and waters of Ligitan while respecting the three-mile zones around Si Amil and other

islands deemed under British authority. The report on *HNLMS Lynx's* voyage showed the Dutch had deemed the islands to be under its sovereignty while other islands north of the line established in 1891 were deemed British.

Before the dispute crystallised in 1969, the Indonesian Navy visited Sipadan many times and Indonesian fishermen continued to ply their trade around the islands, a traditional activity. Indonesia tendered evidence recording continued visits to the islands from 1950-1970. On 18 February 1960, it passed Act No 4 concerning Indonesian Waters to define its archipelagic baselines and waters and the territorial sea. Although it did not use the islands as base points for this definition, it argued that the omission did not indicate it disregarded the islands as its territory. The reason was that it had prepared the Act hastily to provide a precedent recognising the concept of archipelagic waters before the Second United Nations Conference on the Law of the Sea was held from 17 March-26 April 1960. It argued further that when doing so it diverged as little as possible from the existing law of the sea where one of its principles provided that baselines should not depart too much from the general direction of the coast.

**(ii) Malaysia**

In reply, Malaysia argued that the Dutch and Indonesian naval activities were very limited and could not evidence the continuous exercise of state activity in and in relation to the islands. Even 25 years after independence (the post-colonial era), Indonesia had shown no interest in the islands. Neither did it manifest any presence in the area, try to administer the Islands, nor enact legislation or pass ordinances or regulations governing the islands or their surrounding waters. In spite of Indonesia's contentions, the fact was that Act No 4 (1960) and its attached map had defined the outer limits of Indonesian national waters by using baselines that excluded the islands as reference points.[16] As a result, the islands could not be regarded as belonging to Indonesia.

On the other hand, Malaysia based its *effectivités* argument on effective administration of the islands and presented diverse evidence in support.

[16] On this point, Malaysia admitted that it had yet to publish a detailed map of its own baselines although it had published its continental shelf boundaries in 1979 that incorporated the islands: Judgment para 131.

For example, the colony of North Borneo regulated and controlled the collection of turtle eggs on the islands, a significant economic activity then. This was as early as 1914 when Britain regulated and controlled this activity. Further, disputes arising from the activity were referred to British North Borneo officials for resolution and the 1917 Turtle Preservation Ordinance applied in the Islands until the 1950s at least. A licensing system for fishing was also established around the islands. A bird sanctuary on Sipadan was created in 1933 and the North Borneo authorities built two lighthouses, one on Sipadan in 1962 and another on Ligitan in 1963. In fact, since independence, Malaysia has continued to maintain the sanctuary and lighthouses. It has regulated tourism on Sipadan and since 25 September 1997 the islands have been protected areas under its 1997 Protected Areas Order.

Responding, Indonesia denied that the acts Malaysia relied upon, whether taken in isolation or as a whole, were sufficient to establish the islands' continuous peaceful possession and administration, factors needed for creating territorial title. Although Indonesia did not contest the facts that Malaysia presented on the turtle activities, it argued that the British regulations and dispute resolution rules exercised personal (not territorial) jurisdiction. Further, although it had not objected to the lighthouses (because they were of general navigational interest), it contested the evidentiary value of Malaysia's bird sanctuary and the lighthouses as *act à titre de souverain.*

**(iii) The Court**

The Court acknowledged that particularly in the case of very small islands, such as Ligitan and Sipadan, that were also uninhabited, not permanently inhabited or of little economic importance at least until recently, *effectivités* would generally be scarce. Further, it would not consider the activities as constituting a relevant display of authority unless they made unmistakably specific references to the islands. In other words, it would accept regulations or administrative acts of a general nature as *effectivités* only if their effect or terms were clear. The Court referred to the following statement by the Permanent Court of International Justice in *Legal Status of Eastern Greenland (Denmark v Norway):*[17]

[17] Permanent Court of International Justice (1933) Series A/B, No 53 at 45-46.

> [A] claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority. Another circumstance which must be taken into account by any tribunal which has to adjudicate upon acclaim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power.
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> It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.

Indonesia's arguments concerning *effectivités* had relied on two main premises as seen above: (1) the Dutch and Indonesian navies had plied the islands' vicinity continuously; and (2) Indonesian fishermen had traditionally plied the waters around the islands. The Court rejected both. First, the Court held that the facts did not support the argument that the navies deemed the islands and surrounding waters to be under Dutch or Indonesian sovereignty. Secondly, the Court held that the activities of private persons could not constitute *effectivités* if not conducted under official regulations or state authority, the reason being that *effectivités* should constitute *acts à titre de souverain* reflecting the intention and will to act in that capacity.

Accepting Malaysia's arguments, the Court observed that although Malaysia's activities were modest in number, they were diverse in character and included "legislative, administrative and quasi-judicial acts" over a considerable period. This evidenced "an intention to exercise State functions in respect of the two islands in the context of the administration of a wider range of islands." The Court also observed that "neither Indonesia nor its predecessor, the Netherlands, ever expressed its disagreement or protest" to these activities.

Examining the law on *"effectivités"*, the Court stated that it had ruled on the legal relationship between *"effectivités"* and title in the past. In

*Frontier Dispute (Burkina Faso/Republic of Mali),*[18] the Court held that a distinction should be drawn among several eventualities. Even if *effectivité* did not co-exist with any legal title, it should still be considered.[19] Consequently, the Court therefore held that Malaysia had title to the islands based on *effectivités*.

Addressing Malaysia's evidence regarding *effectivités*, the Court found that under the 1930 Convention, the United States had relinquished any claims it had to the islands. Britain did not claim sovereignty over the islands beyond the 3 marine league limit for North Borneo. However, other states did not assert their sovereignty or objected to North Borneo's continued administration there and Britain had permitted BNBC to administer the islands, a position the United States formally recognised after 1907. As such, this could not be ignored, including the regulatory and administrative measures concerning the collecting of turtle eggs and the establishment of the bird reserve. On the other hand, the construction and maintenance of lighthouses were not normally deemed manifestations of state authority[20] and what the Court had stated in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*[21] applied:

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

In concluding, the Court found that although Malaysia's activities were few, they were diverse and included legislative, administrative and quasi-judicial acts. They covered a long period and showed a pattern

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[18] [1986] International Court of Justice Reports 587 para 63.

[19] See also Territorial Dispute (Libyan Arab Jamahiriya/Chad) [1994] International Court of Justice Reports 38 paras 75-76; Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Equatorial Guinea intervening) Judgment, Merits [2002] International Court of Justice Reports (to be published).

[20] Minquiers and Ecrehos, Judgment [1953] International Court of Justice Reports 71.

[21] Judgment, Merits [2001] International Court of Justice Reports para 197.

intended as the exercise of state functions in the two islands within the context of the administration of a wider range of islands. Indonesia and its predecessor, the Netherlands, had not expressed their disagreement or protest to Malaysia's activities. In 1962-1963, Indonesia did not even remind North Borneo or Malaysia after its independence that the lighthouses were constructed on territory deemed to belong to it. This was unusual behaviour.

**(iv) Separate Opinion of Oda J**

Oda J was ambivalent about the Court's majority reasoning when determining *effectivités*, stating:

> I do not agree, but neither do I really disagree, with the Court in its weighing up of the *effectivités* adduced by Indonesia and Malaysia to support their respective claims of title...To weigh, on the one hand, occasional administration of turtle egg harvesting and of a bird sanctuary – neither of these, apparently, *in situ* – together with the establishment of a few navigational lights (by Britain/Malaysia) against, on the other hand, naval and air patrolling and piracy-control (by Indonesia) appears to me like trying to weigh precisely a handful of feathers against a handful of grass: it can be done, but not very convincingly.

He found the Court had no coherent table of weights and measures for assessing and comparing the *effectivités* pleaded nor could it expect to do so given their ephemeral nature. He found it unconvincing to prefer a party's limited activities while discounting those of the other party without some effort to develop neutral principles by which the relative weight of their respective *effectivités* could be compared. This problem was augmented by the brief period from which evidence of *effectivités* could be pleaded properly. There was also no evidence to show that prior to 1930, Britain believed itself to have title to either Ligitan or Sipadan and the BNCB had not claimed any act of administration (however slender) *à titre de souverain* prior to that date.

In *Island of Palmas,* Huber J held that the demonstration of *effectivités* should consist "in the actual display of State activities, such as belongs

only to the territorial sovereign".[22] Thus, to qualify, the claimant state should undertake activities not as a good neighbour or gratuitous inter-meddler but in an exercise of sovereign responsibility for the territory concerned. Also, since the Court in *Kasikili/Sedudu Island (Botswana/ Namibia)*[23] had found that the harvesting activities of fishermen did not constitute occupation *à titre de souverain,* the same principle applied to turtle egg collectors. Similarly, Malaysia's construction of lighthouses on the islands could not evidence occupation *à titre de souverain* when seen by itself and without reference to the 1891 Convention. In 1998, the arbitral award between Eritrea and Yemen had held:[24]

> The operation or maintenance of lighthouses and navigational aids is normally connected to the preservation of safe navigation, and not normally taken as a test of sovereignty.

This was especially so when, as in the present case, the territory was subject to a competing claim of sovereignty based on conventional title against which mere *effectivités* was held in *Land, Island and Maritime Frontier Dispute* to be of little evidentiary value.[25] The Court had also pointed out in *Frontier Dispute* that where the territory which was the subject of the dispute was effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title.[26] Further, the Court held in *Sovereignty over Certain Frontier Land* that acts of local authorities largely routine and administrative in character were insufficient to displace Belgium's sovereignty established by Convention.[27]

Consequently, Oda J described *effectivités* as "rubber spears when wielded against the shield of conventional title." In this case, since

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[22] (Netherlands/USA), Reports of International Arbitral Awards (RIAA), Volume II at 839.

[23] Judgment [1999] II International Court of Justice Reports 1095 at para 75.

[24] Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), 9 October 1998 at 91 para 328; Minquiers and Ecrehos, Judgment [1953] International Court of Justice Reports 70-71.

[25] (El Salvador/Honduras; Nicaragua Intervening), Judgment [1992] International Court of Justice Reports 472 para 181, 516 para 266.

[26] (Burkina Faso/Republic of Mali), Judgment [1986] International Court of Justice Reports 587 para 63.

[27] (Belgium/Netherlands), Judgment [1959] International Court of Justice Reports 229.

Indonesia had claimed title under the 1891 Convention, he rejected the claim that the "minor *effectivités* presented by Britain and Malaysia" could not better resolve the question of title to Ligitan and Sipadan than the Convention. He stated:

> If I were disposed to weigh the handful of Malaysian true *effectivités* against that of Indonesia, I could conceivably join the majority opinion on that count. But were I to agree with the Court –*arguendo* – that a few turtle eggs and signal lights do, indeed, have greater *gravitas* than the voyage of HNLMS *Lynx*, that would still not get me across to the other shore. In my opinion, these are token acts of no legal value. For *effectivités* to be weighed at all, they must not only be performed *à titre de souverain* but also upon *terra nullius* or, at least, upon territory whose title has not been dispositively determined. Both Malaysia and Indonesia have argued that at all relevant times, neither Ligitan nor Sipadan were *terra nullius*, and I agree with them. The one solid legal instrument before this Court is the Convention of 20 June 1891 between Britain and the Netherlands. It is to that sturdy instrument I now turn. Against it, properly construed, an *effectivités*-based claim cannot stand.