**International Boundaries Research Unit**

# BOUNDARY & TERRITORY BRIEFING

**Volume 2 Number 2**

## The Territorial Dispute between Indonesia and Malaysia over Pulau Sipadan and Pulau Ligitan in the Celebes Sea: A Study in International Law

***R. Haller-Trost***

# Boundary and Territory Briefing

Volume 2 Number 2
ISBN 1-897643-20-9
1995

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# Abbreviations

| | |
|---|---|
| ABRI | Angkatan Bersenjata Republik Indonesia (Indonesian Armed Forces). |
| ASEAN | Association of Southeast Asian Nations (formed in 1967 out of the Association of Southeast Asian of 1961); founding members: Indonesia, Malaysia, the Philippines, Thailand and Singapore; Brunei joined in 1984, Vietnam in July 1995. |
| AJIL | American Journal of International Law. |
| BA Chart | British Admiralty Chart. |
| BFSP | British and Foreign State Papers. |
| BIMP-EAGA | Brunei, Indonesia, Malaysia and Philippines East Asean Growth Area (see EAGA). |
| BLC | baseline coordinate(s), Indonesia. |
| BNBC | British North Borneo Company. |
| BYIL | British Yearbook of International Law. |
| Cmd./Cmnd. | Command Papers, UK.<br>(Cmd. [1-9889] 1919-1956; Cmnd. [1-cont.] 1956-). |
| CO | Colonial Office, London. |
| DMA | Defense Mapping Agency, Washington. |
| EAGA | East ASEAN Growth Area (Brunei; northern Sulawesi, Maluku, East and West Kalimantan (Indonesia); Labuan, Sarawak and Sabah (Malaysia); Palawan and Mindanao (Philippines). |
| FEER | Far Eastern Economic Review, Hong Kong. |
| fm | fathom(s). |
| FO | Foreign Office, London. |
| ft | feet. |
| GAOR | (UN) General Assembly Official Records. |
| G.N. | Gazette Notification. |
| GSGS | Geography Section General Staff (UK). |
| Hertslet | Treaties and Conventions between Great Britain and Foreign Powers R elating to Commerce and Navigation, 31 vols. (1820-1925). |
| IBRU | International Boundaries Research Unit, Durham, UK. |
| ICJ | International Court of Justice (UN), Den Haag. |
| ICLQ | International and Comparative Law Quarterly. |
| ILM | International Legal Materials. |
| IMS-GT | Indonesia-Malaysia-Singapore Growth Triangle comprising certain Riau Islands and parts of southern Sumatra (Indonesia), Johore (Malaysia), and Singapore . |

| | |
|---|---|
| IMT-GT | Indonesia-Malaysia-Thailand Growth Triangle comprising northern Sumatra and Aceh (Indonesia), Perlis, Kedah, Penang and Perak (Malaysia), and five southern provinces of Thailand |
| ISEAS | Institute of Southeast Asian Studies, Singapore. |
| JIA | Journal of the Indian Archipelago and Eaatern Asia. |
| JSBRAS | Journal of the Straits Branch of the Royal Asiatic Society |
| km | kilometre(s). |
| LSI | Law of the Sea Institute, Honolulu. |
| m | metre(s). |
| MOU | Memorandum of Understanding. |
| nm | nautical mile(s). |
| PCIJ | Permanent Court of International Justice. |
| PILJ | Philippine International Law Journal. |
| PRRI | Pemerintah Revolsioner Republik Indonesia. |
| RIAA | Reports of International Arbitral Awards. |
| sq.km | square kilometre(s). |
| sq.nm | square nautical mile(s). |
| TP | turning point(s) of maritime demarcations (Malaysia). |
| UK | United Kingdom. |
| UKTS | UK Treaty Series. |
| UN | United Nations. |
| UNGA | UN General Assembly. |
| UNTS | UN Treaty Series. |
| US/USA | United States of America. |
| VOC | Vereenigde Oostindische Compagnie (Dutch East India Company). |
| ZOPFAN | (Southeast Asian) Zone of Peace, Freedom and Neutrality. |

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*Legal Status of Eastern Greenland*. Denmark v. Norway. Judgment 5 April 1933. PCIJ Reports, 1933, Series A/B, No.53: 22.

*Manica* Arbitration. UK/Portugal. 30 January 1897. Moore, 1898, Vol.V: 4985

*Minquiers and Ecrehos* Case. France/UK. Judgment 17 November 1953. ICJ Reports, 1953: 47.

*Nuclear Test* Case. Australia v. France; New Zealand v. France. Judgments 20 December 1974. ICJ Reports, 1974: 253, 457.

*Temple of Preah Vihear* Case. Cambodia v. Thailand. Judgment 15 June 1962. ICJ Reports, 1962: 6.

# The Territorial Dispute between Indonesia and Malaysia over Pulau Sipadan and Pulau Ligitan in the Celebes Sea: A Study in International Law

*R. Haller-Trost*

## 1. Introduction

It is common knowledge that international law as we know and apply it today, is still in essence a product of Western thought and perception. Such notions include the principles regarding the acquisition of territory and, therewith, the method of proof for territorial sovereignty. The critique of the dominant Eurocentric character in international law has been vocalised over the past decades, and it might be argued whether the so-called 'classic' rules of territorial acquisition should be a valid basis of analysing a dispute between two Southeast Asian states.

However, both countries involved in the present conflict discussed in this paper are members of the United Nations (UN). They are therefore party to the UN Charter which states in Article 93 that all members of the UN are *ipso facto* parties to the Statutes of the International Court of Justice (ICJ), the principle judicial organ of the UN, which lists in Article 38 the sources of international law being based, *inter alia*, on "*international custom, as evidence of a general practice accepted as law*" and "*the general principles of law recognised by civilised nations.*"

Although neither Malaysia nor Indonesia have accepted the compulsory jurisdiction of the ICJ, both governments have, nevertheless, drafted and signed (together with the other ASEAN members) the 1987 *Manila Declaration*[1] whose Article 4 declares that:

> "*[i]ntra-regional disputes shall be settled by peaceful means in accordance with the spirit of the Treaty of Amity and Cooperation in Southeast Asia and the United Nations Charter.*"

It can be presumed therefore that both countries acquiesce, in general, to the application of the present rules of international law, disregarding their own historical, cultural and legal backgrounds.[2] It is with this premise in mind that the dispute in the Celebes Sea has been analysed according to acknowledged principles of international law.

The records of ICJ judgements show that if a dispute arises as to sovereignty over a portion of territory, it has to be examined - *inter alia* - which of the states has a title superior to the arguments the other claimant might bring forward, and that the juridical factor must be examined not according to the international law in force at the time when the dispute arose, but

1 Signed in Manila on 15 December 1987; text in ASEAN Economic Bulletin, 1988, Vol.4, No.3: 316.

2 Malaysia and Singapore, for instance, decided in September 1994 to take their territorial dispute over Pulau Batu Puteh (Pedra Branca) to the ICJ *(FEER*, 22 September 1994); for details of the conflict see Haller-Trost 1993.

according to the law at the time when the status of the territory in question changed, i.e. by recourse to international law as it was understood at that time.[3] Thus such assessment necessitates an analysis of the territorial status not only at the point in time when the dispute crystallised, but it also requires an evaluation of the documents and the intention of the relevant parties before Malaysia and Indonesia gained independence, since the boundaries on Borneo originate from various treaties between the former colonial powers which controlled this region in the latter part of the 19th century.

This study discusses the dispute over Pulau Sipadan and Pulau Ligitan, two small islands in the Celebes Sea (Laut Sulawesi) lying off the southeastern coast of the East Malaysian state of Sabah (see Figure 2)[4] and analyses whether Indonesia has - as it claims - valid title to them.

As it is with other territorial disputes in the region,[5] little is known with regard to either governments' official argumentation and/or their respective legal basis for the claim. The lack of official information from the relevant authorities[6] therefore necessitates an analysis of the dispute based on publicly available documents and state practice.[7]

## 2. Description

In order to discuss the dispute, it is necessary to give a detailed description of the geographical position of the two islands. This is not only to allow for a correct interpretation of the relevant treaties (Section 4), but is also important in relation to state practice displayed by the parties concerned (Section 5).

3 See *Island of Palmas* Case, 1928, (RIAA, Vol.II: 838) and *Legal Status of Eastern Greenland* Case, PCIJ Reports, 1933, Series A/B, No.53: 46).

4 That throughout the text Pulau Sipadan and Ligitan are referred to as *islands* lies in the fact that both are naturally-formed areas of land, which are above water at high-tide, and have therefore to be considered being in conformity with the specification of islands as given in Article 10 of the 1958 Geneva *Convention on the Territorial Sea and the Contiguous Zone* and Article 121 of the 1982 Third UN *Convention on the Law of the Sea*. Whether either of them falls into the sub-group of *rocks* (Article 121.3) needs closer examination. However, as the issue dealt with in this paper only concerns the question of sovereignty, the argument whether Pulau Sipadan and Ligitan comply with the prerequisites as laid down in the Law of the Sea in order to justify their usage as baseline points from where maritime zones can be measured, is not discussed. The author is indebted to V.L.Forbes (University of Western Australia) for drawing the maps.

5 See e.g. the dispute referred to in fn.2 *supra* or the one between Malaysia and Brunei (see Haller-Trost, 1994).

6 Neither the Indonesian nor the Malaysian government were prepared to provide supporting documentation (personal correspondence in December 1994 and March 1995).

7 With regard to newspaper reports, it has to be noted that probably due to the remote geographical position of the islands, combined with the complex legal, historical and political circumstances, earlier articles often contained factual errors (see e.g. *FEER*, 20 June 1991). Of late it seems, however, that Indonesian assertions are often printed as facts without any qualifying comments, namely that the islands are lying off the coast of Kalimantan (i.e. Indonesia), implying that they are further removed from Malaysia (see Section 2); that there actually exists a bilateral agreement of 1969 which Malaysia has violated (see Section 3 and 5.2.2); that Malaysia claims the Netherlands had transferred the islands to Britain, inferring that at one point of time they had actually been Dutch territory and that the dispute goes back to the last century, although there is no evidence thereof (see Section 4); that Malaysia has only started in 1991 to exercise some state functions over Pulau Sipadan (see Section 5.2); that Malaysia bases its claim on a British map of unknown origin and that Indonesia has always incorporated the two islands within its national maps (see Section 6), while no mention is made to the fact that, over a considerable time, Indonesia did not consider the islands to be under its jurisdiction (see Section 5).

## 2.1 Pulau Sipadan

Pulau Sipadan (4°07'N, 118°38'E) has an oval-shaped surface area of which approximately 0.031sq.km[8] is permanently above sea level. It lies 6½nm to the south of Pulau Mabul's low-water mark and 6nm southeast from the low-water mark of Pulau Kapalai. While the distance from the Malaysian mainland at Tanjong Tutop (Tutup) on the southeastern coast of Sabah is 14nm, the nearest distance to Indonesian territory (the southern part of Pulau Sebatik, see Figure 2) is 40nm. In contrast to most of the surrounding reefs, which rest on a continental shelf covered in general by less than 100 metres of water, Pulau Sipadan is the only deep-water oceanic island *in situ* separated from the continental shelf by an 808fm trench. According to details given in the *Philippine Islands Pilot*, the island,

> "*...is wooded and 50 m (165 ft) high to the tops of the trees; it lies on the NW side of a steep-to reef. Turtles frequent the island in considerable numbers. Pulau Sipadan Lighthouse, a white metal framework tower, with red bands, 22m in height, stands near the S extremity of the island.*"[9]

According to BA Chart No. 1681,[10] the ocean floor drops within 2nm to the northwest to 1,470m, within 5nm to the north to 570m, within 5nm to the east to 1,030m, within 4nm to south to 1,410m, and within 8nm to the southwest to 1,790m. Anchorage is difficult. Geologically, it represents the top of a precipitous volcanic sea-mountain of approximately 600-700m in height on whose peak a coral atoll has formed. The inner part thereof has filled over the years with broken corals and sand, and vegetation started to grow.[11] The island is uninhabited, but has a small reservoir of fresh water and has been visited on a regular basis by fishermen and turtle-egg collectors from nearby Pulau Dinawan. In 1933, it was declared a bird sanctuary,[12] and since 1988, the Sabah Department for Tourism and Environment has built a wildlife preservation office on the island and issued licences to erect some small chalets and beach huts for a scuba-diving resort.[13]

## 2.2 Pulau Ligitan

Pulau Ligitan is part of the largest and easternmost reef system of the Ligitan Group,[14] which lies 3½nm east of Pulau Kapalai and 15½nm east of Pulau Sipadan. The whole, mostly submerged reef stretches approximately 11nm (20km) from north to south and measures 8½nm (15km) at its widest breadth from east to west, showing dry patches of 0.3 to 0.6m in irregular patterns throughout its configuration. The northern tip, which is permanently above sea level, is called Pulau Dinawan[15] on which a village lies. Slightly to the northeast thereof,

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8 This figure is derived from a 1933 document (see fn.158 *infra*) which states that the island has a surface of 7.68 acres; while Wong (1991: 15) mentions an area of 4 hectares, i.e. 0.04 sq.km.

9 *Philippine Islands Pilot*, 1978: 5.82.

10 See also maps showing the *Philippine Islands, Southern Part*, Defense Mapping Agency, Hydrographic/Topographic Center, Washington DC, DMA 92AC092005, 1989.

11 For further details, see Wong, 1991: 15ff.

12 See fn.158 *infra.*

13 See fn.159 *infra.*

14 The *Ligitan Group* is geographically distinct from the *Ligitan Reefs* which lie further to the west.

15 At 4°18.5'N, 118°51.75'E; also written as *Danawan.*

at a distance of about ½nm, lies a separate feature with the name of Si Amil[16] on which a lighthouse has been erected.

The other part of the reef system that is permanently above sea level is Pulau Ligitan, lying at its southern end with a surface area less than Pulau Sipadan. It is shaped in a narrow north-south stretched configuration, drying up to 1.2 metres, through whose middle section runs the 4°10'N parallel. On the southern part of the feature stands a lighthouse at 4°09.75'N, 118°53.5'E. Heavy overfalls and whirls within 1nm off the southern tip of the reef system make access from the south difficult.

The nearest islands to the east are the northern Sulawesi group of Sangihe and Kawio Islands (Indonesia) at a distance of 130nm; the nearest *terra firma* to the south is the 110nm distant Pulau Maratua whose northern tip is used for Indonesia's baseline coordinate (BLC) 39;[17] to the west, the nearest Indonesian territory is Pulau Sebatik at a distance of 55nm, while the distance to the Malaysian Pulau Dinawan at the northern tip of the reef is 8½nm. The island is uninhabited, and only a few low bushes grow on it.[18]

## 3. The Origin of the Dispute

As far as can be ascertained, the first public mention of the dispute occurred in 1982 when an Indonesian naval patrol appeared near Pulau Sipadan to "*investigate foreign troops*" thereon. Both, the Malaysian and the Indonesian governments tried to play down the incident discouraging press coverage, and no clear account of the event was given.[19]

Nine years later, the dispute reappeared in the press when Indonesia accused Malaysia of violating an alleged verbal understanding of 1969, in which it was apparently agreed (according to the Indonesian version) to discuss the question of ownership at a later point of time (see *infra).*[20] It has been reported that Malaysia denies the existence of such an oral undertaking,[21] maintaining that the two islands have always been part of British North Borneo (now known as Sabah) and therefore now belong to Malaysia.[22] The revival of the claim in June 1991 was caused by Indonesia's discovery that Malaysia had built some tourist facilities on Pulau Sipadan.[23] In October of the same year, Malaysian Foreign Minister *Datuk* Abdullah Ahmad Badawi assured his Indonesian counterpart, Ali Alatas, that no more development projects were to be carried out until ownership was determined.[24]

16 At 4°19'N, 118°52.5'E.
17 At 2°19'N, 118°33.8'E.
18 *Philippine Islands Pilot*, 1978: 5.79.
19 See *Akhbar Sinar Harapan*, 5 July 1982; *Straits Times*, 7 July 1982; and *Asiaweek*, 23 July 1982. In the Indonesian article *"foreign"* presumably referred to *"Malaysian"*, although no specific country was named.
20 See fn.29 *infra*.
21 *FEER*, 17 March 1994.
22 *The Star*, 11 October 1991.
23 See e.g. *Business Times*, 5/8 June 1991, and *The Star*, 7 June 1991.
24 *New Straits Times* 12/18 October 1991. Subsequently, when Malaysia gazetted thirty-eight marine parks within its territorial waters in December 1994 *(Business Times*, 15 December 1994), Sipadan and Ligitan were not included.

Indonesia's main argument to ownership seems to be based on the 1891 *Convention Between Great Britain and the Netherlands Defining Their Boundaries in Borneo* (hereafter referred to as the *1891 Convention).*[25] In Indonesia's view, the treaty,

> "*...stipulated that the boundary between Sabah [Malaysia] and Kalimantan [Indonesia] be a straight line which cuts across Pulau Sebatik continuing eastwards and stopping 19km from the Pulau Ligitan Group of islands...Based on this convention both disputed islands would be inside Indonesian waters.*"[26]

It is further maintained that in 1969, when, in the aftermath of the 1963-66 *konfrontasi*,[27] both countries established their continental shelf boundaries in the Straits of Malacca and the South China Sea by treaty,[28] Indonesia "*imposed a status quo on the islands, which prohibit[ed] any activities until an agreement [was] reached*,"[29] but that "*in the meantime some quarters in Malaysia apparently have become impatient and have started to exploit the area for maritime tourism.*"[30]

While in 1969, according to Indonesia, "*both countries agreed that the matter was not a serious one*"[31] (presumably not serious enough for Indonesia to delay its then primary goal of achieving recognition of its archipelagic baselines), it is now recognised that "*the issue is not a simple matter that could be resolved in a day or two.*"[32] Major General Nugroho, Indonesia's Home Ministry Secretary-General, explained in 1991 that,

> "*...the differences between the countries over sovereignty to both islands are understandable as Malaysia and Indonesia, once under British and Dutch colonial rule, respectively, refer to maps inherited from their colonial masters.*"[33]

pointing out in particular the existence of an Indonesian Armed Forces (ABRI) map of 1967 which shows both islands lying within Indonesian waters. Of late, this reliance on cartographic evidence has gained greater importance in Indonesia's argumentation and has been defined as being its 'trump card'.[34]

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25 Signed 20 June 1891, ratified 11 May 1892, (text in BFSP, Vol.83: 41 and [Dutch] Staatsblad, 1892, No.114).

26 *The Star*, 7 June 1991; see also map produced by the same newspaper on 27 December 1994.

27 For a short account of this three-year, bilateral conflict, see Kennedy, 1970: Chapter 16; for an in-depth study see Mackie, 1974. The term *konfrontasi* was borrowed from Sukarno's *Trikora (Trikomando Rakjat* or 'Peoples' Triple Command') speech on 19 December 1961 against Dutch presence in New Guinea (see Reinhardt, 1971: 70 and also Sukarno's speech on 17 August 1964; text in Sukarno's *Indonesia's Political Manifesto, 1959-1964*: 314).

28 See the *Agreement between the Government of the Republic of Indonesia and the Government of Malaysia relating to the Delimitations of the Continental Shelves between the two Countries* of 27 October 1969 (text in the United States Department of State's series *Limits in the Sea*, No.1 (hereafter referred to as *Limits in the Sea*)).

29 See Baroto, 1993: 160, and similar: Sutopo, 1991: 333.

30 Sutopo, 1991: 333.

31 Ali Alatas as quoted in *The Star*, 12 October 1991.

32 Badawi *ibid*, and Ali Alatas as quoted in *New Straits Times* of the same date.

33 *Business Times*, 13 June 1991.

34 See *infra* text accompanying fn.185.

# 4. Relevant Treaties

Even though the islands in question are two distinct and separate features, their territorial affiliation will be discussed together because, as will be demonstrated, their legal status with regard to treaties and state practice stems from the same documents.

## 4.1 The UK/Dutch Treaties of 1891, 1915, and 1928

Since Indonesia bases its claim on treaties concluded between the Netherlands and the United Kingdom, three documents have to be analysed. The first concerns the *1891 Convention.*[35] The reason for the conclusion of this agreement goes back to the 1824 *Anglo-Dutch Treaty* when the United Kingdom and the Netherlands divided the Malay region into a British and a Dutch sphere of influence in order to safeguard each other's trade monopolies.[36] When the Englishman James Brooke arrived in Kuching (Sarawak) in the early 1840s with, *inter alia*, the intention of curbing Dutch expansionism, the Dutch protested, arguing that the *1824 Treaty* stipulated that the whole of Borneo was to be under Dutch control. However, before Brooke gained a foothold in Sarawak, Dutch interest in Borneo had been minimal and their influence virtually non-existent, exercising only nominal control in some limited areas along the southern coast.[37]

Until then, the necessity for a greater display of domination (and therewith greater expense) had not arisen, since no European commercial competition challenged Dutch presence on the island. Due to the changed situation in the early 1840s, the Dutch decided to divide that part of Borneo which they understood to be in their possession into two independent administrative areas in order to strengthen their claims to sovereignty; i.e. in 1849, Dutch Borneo was partitioned into the *Westerafdeeling* and the *Zuider-en Oosterafdeeling.*[38] Subsequently they attempted to consolidate their influence and, by separate treaties with the east coast rulers, renewed exclusive rights to establish themselves in the region.[39]

Indigenous rule on the east coast was divided among a number of more or less independent chiefdoms and sultanates of which the most northeastern region, called *Tidung* (or *Tidoengsche landen*) was governed by eight leaders, which sometimes paid tribute to Bulungan (*Boeloengan*; a sultanate lying to the south),[40] sometimes to the Bugis,[41] sometimes

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35 The right of the United Kingdom to sign treaties with foreign states on behalf of North Borneo is based on Article III of the *Protectorate Agreement* of 12 May 1888 (text in BFSP, Vol.79: 237).

36 See the *Treaty between His Britannic Majesty and the King of the Netherlands, Respecting Territory and Commerce in the East Indies*, signed in London 17 March 1824, ratified 8 June 1824 (text in BFSP, Vol.11: 194, and FO 93/46/17); for details see Haller-Trost, 1993: Chapter 7, and Irwin 1955: 105.

37 See Irwin, 1955: 151, 154. After the Dutch East India Company (VOC) established Batavia (Jakarta) as the Company's headquarters in the first half of the 17th century, the Netherlands concentrated mainly on the lucrative trade with the Spice Islands and the development of Java, therewith focusing their control over the Moluccas rather than over Borneo (see also Meilink-Roelofsz, 1962: especially Chapter IX).

38 See *Resolution of the Governor-General of the Netherlands India*, 27 August 1849 (text in FO 572/3/5914).

39 For a list and numerous texts of such treaties, see FO 97/251 and 253. Although, on occasions, some British subjects (e.g. Captain Belcher) achieved the same privileges from local rulers (FO 572/95 and FO 12/86), the UK Government did not ratify these agreements as they considered those regions to be under Dutch control (Irwin, 1955: 155, and Tarling, 1978: 241).

40 See Irwin's Map 2 at 1955: 253.

to Sulu,[42] or which were, at times, independent altogether.[43] Tidung and Bulungan were formerly parts of the Sultanate of Berouw (*Berau*)[44] which was partitioned after a civil war in 1770, and over whose area the Sultan of Bandjermasin (*Banjarmasin*) and the Sultan of Sulu periodically claimed suzerainty depending on the strength of the respective ruler. With the administrative Dutch division, Tidung (including the island of Sebatik), became part of the *Zuider-en Oosterafdeeling* under the administration of the Dutch Resident in Bandjermasin, a town lying approximately one thousand kilometres to the south (see Figure 3). According to an 1850 *Kabinetsbeschikking*, it was decided that the northern border of Dutch control was to extend to latitude 4°20'N.[45]

However, the United Kingdom protested firstly against the Dutch interpretation of the 1824 Treaty, namely the restriction of British expansion in Borneo, arguing that the limitations expressed in Article XII of the Treaty (referring to "*the islands south of Singapore*") could in no way be construed as to prevent the formation of British settlements on Borneo; and secondly against the 4°20'N borderline.[46] As a result, a lengthy correspondence ensued between the Foreign Office (FO) and its Dutch counterpart which was exacerbated by the concessions Baron von Overbeck obtained from Brunei and Sulu in 1877 and 1878 respectively (see *infra)* resulting in the 1881 Grant of a *Royal Charter* by the British Government to the British North Borneo Company (BNBC).[47]

The various proposals during the last century for establishing a mutually acceptable border between the United Kingdom and the Netherlands in east Borneo ranged over a belt of more than 340 kilometres between latitude 3°20'N (Atas River)[48] to latitude 6°25'N (Sugut River),[49] and anything in between. The confusion arose mainly due to the fact that,

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41 The Bugis' main trading centres were Makassar (*Ujung Pandang*) at the southeastern tip of the main Celebes Island (Sulawesi) and in the Moluccas (*Maluku*); from time to time they also monopolised segments of Borneo's east coast, namely Pasir, later Samarinda, Berouw (*Berau*) and, occasionally, parts of Bulungan (see Crawfurd, 1856: 74).

42 See Tarling, 1978: 244.

43 See Warren, 1981: 85.

44 See *Statement Showing the Titles which the Netherland Govt. claim their foreign possession in the India Archipelago* of 25 June 1858 (text in FO 97/249 Enclosure No.1: 391) and *Zitting 1879-1880/86* No.21 in Dutch Ministry of the Colonies, Supplement, No.10.

45 See *Kabinetsbeschikking* of 15 March 1850 (in $L^a$ $G^5$, Kol.,1850, No.84/G, *Very Secret*; as quoted by Irwin, 1955: 157 fn.479); his mention of latitude 40°20'N seems to be a printing error. NB.: On 4 February 1948, the Federation of Kalimantan Timor, consisting of Kutei (*Kutai)*, Bulungan, Gunung Tabur, Sambaliung and Pasir, was formed which constituted an autonomous constitutional unit *(zelfstandige staatkundige eenhede)* of the Netherlands East Indies which were principally so-called self-governing 'neo-lands' (Schiller, 1955: 124ff, 256ff). The independent Indonesian Government only changed the colonial administrative structure in 1953 (see Emergency Law No.3/1953, State Gazette No.9/1953) dividing the province of Kalimantan into thirteen *Kabupatan* (divisions), two *Kota Madja* (major cities) and three Special Regions (Supomo 1954/1964: 76). After internal uprisings in 1956, Kalimantan was divided into four divisions (Hukum: U.U.No.25/1956), i.e. into the *Propinsi Barat* (West), *Tengah* (Central), *Selatan* (South) and *Timor* (East), the latter being 221,440 sq.km with a population of 1,863,059 (Iwan Gayo, 1990: 749; these data are in variation to those given in the Departemen Pendidikan's *Peta Suku Bangsa di Pulau Kalimantan*, 1990: 71 which lists 224,000 people less on a 9,000 sq.km smaller territory for the same period). Most settlements are concentrated along the coast south of Samarinda, c.500 kilometres south of Pulau Sebatik (see Figure 3). Although East Kalimantan's population has tripled in the last three decades, the northeastern region is still only sparsely populated (compare Mackie, 1974: 348 and *Peta Suku Bangsa di Pulau Kalimantan*, 1990: 71). The present administrative boundaries divide the *Propinsi* Kalimantan Timur into *Kabupatan* Pasir, *Kabupatan* Kutai, *Kabupatan* Berau, *Kabupatan* Bulongan together with the *Kota Madja* of Balikpapan and Samarinda (*ibid*: 71).

46 See map No.2, titled *Territory Claimed by Holland* produced in 1882 by the British Intelligence Department, War Office (FO 752/2).

47 Regarding the exchange of letters between 1879 and 1882, see *Parliamentary Papers*, 1882, Vol.LXXXI and BFSP, Vol.73: 1066ff. For text of the *Royal Charter* (1 November 1881), see BFSP, Vol.73: 359.

48 See *Arrêté (Besluit)* of the Governor-General of Netherlands India of 28 February 1846 (FO 572/9 Inclosure 3 in No.96). That this river was perceived to be the agreed Dutch border was later denied by the chief Dutch negotiator, Count de Bylandt, who stated that this line was suppressed by the subsequent publication in the *Journal Officiel Indien* of 1849 No.40 (FO 572/9 No.95). According to Treacher (1890: 53), who was the first BNBC Governor (1881-1887), the borderline lay even further south at 3°N (see also Article 4(b) of the above-mentioned *Besluit* of 1846).

49 See Irwin, 1955: 157.

> "*[t]he [known] geography of Borneo [was] so imperfect, and the boundary-lines of petty States so irregular, so vague, and of so little consequence to the native Rulers.*"[50]

The problem regarding the perception of the indigenous control system *vis-à-vis* the concept of territorial sovereignty within fixed borders has been discussed elsewhere,[51] but the consequences of this dilemma are highlighted in a case like the present where the drawing of borders between two colonial powers in a remote area - at the time of no great importance to them - often seems to have resulted in imprecise demarcations and now lead to the crucial question of defining an exact borderline.

This is especially so in relation to maritime boundaries which require definite ownership of coastal and insular features in order to delimit the various maritime zones correctly. However, the Dutch-British border ensuing from the *1891 Convention* seems to have been an exception to the otherwise frequent practice by the colonial powers of deciding on rather imprecise boundaries. In this case, both Governments were at great pains to demarcate this border in the following years as precisely as technically possible at the time.[52] Nevertheless, it has to be remembered that, since the *1891 Convention* was concluded both six years after the *Second Madrid Protocol* in which Spain had renounced all territorial ambitions over Borneo[53] and three years after North Borneo had become a British protectorate,[54] the mutual boundary was originally perceived to delimit competing colonial spheres of influence rather than constituting a final territorial demarcation between two sovereign states.[55]

In the 1870s, the borders between the spheres of influence of the indigenous rulers *in situ*, namely the sultans of Brunei, Sulu, Tidung and Bulungan were rather vague and partially overlapping. The territories referred to in the grants by the Sultan of Brunei (December 1877) and the Sultan of Sulu (January 1878) to von Overbeck determined as their southern border the Sibuko River (Sungai Sibuko)[56] in Tidung, an area which was "*uiterst schaarsch bevolkt*" and seems to have then been part of Bulungan which, however, "*lijd aan een voordurenden staat van anarchie of machteloosheid der sultans.*"[57] In June 1878, i.e. shortly after the conclusion of the Brunei/Sulu Grants, the Netherlands signed a treaty with the chief of Bulungan whose

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50 As quoted in Hertslet's *Memorandum on the Dutch Frontier on the North-east Coast of Borneo* of 20 June 1882 (text in FO 572/9 No.95).

51 See Haller-Trost, 1994: Section 3.3.1.

52 This is evident not only because two further treaties were concluded in order to clarify the demarcation line more precisely (see treaty documents referred in fns.65 and 70*infra)*, but also due to the continuous correspondence on the matter between 1901 and 1915 (CO 874/499-503), see especially the detailed survey report of 24 February 1913 (CO 874/500: 79ff).

53 Signed between the United Kingdom, Germany and Spain on 7 March 1885 (text in BFSP, Vol.76: 58).

54 See fn.35 *supra*.

55 Although the *1891 Convention* text varies by name from a 'typical' sphere-of-influence agreement (such as e.g. the *Declaration between Great Britain and Germany Relating to the Demarcation of the British and German Sphere of Influence in the Western Pacific* of 6 April 1886; text in BFSP, Vol.77: 42), the *animus* and intention of a number of bilateral colonial power treaties concluded in the second half of the 19th century concerning overseas regions mostly only reflected an abstention of the contracting parties to establish settlements on the other side of the agreed line in order to protect trade monopolies. After the 1885 *Berlin Convention* (text in BFSP, Vol.76: 4) which, however, only referred to the African continent, the respective treaty texts gradually became less vague in determining the respective demarcations, and the rather loose, general classification of 'possessions' and 'settlements' were transformed into legal entities such as 'protectorates', 'protected states', 'colonies', 'dominions' and so forth. Nevertheless, imprecision and ambiguity continued regarding their exact status (for details of British terminology, see Roberts-Wray, 1966: 37ff). But the actual solidification of definite land borders generally occurred only in the ensuing period due to historic consolidation by way of effective administration. This is especially so for remote and inaccessible areas where direct state control was lacking .

56 See Figure 3.

57 See various entries under *Borneo*, *Tidoengsche landen* and *Boeloengan* in the *Encyclopædie van Nederlandsch-Indië*, 1894, Eerste Deel.

territory was defined therein as extending in the northeast up to Batu Tinagat,[58] therefore overlapping with the afore-mentioned grants. In order to solve the problem, the Netherlands and Great Britain decided, when they concluded the *1891 Convention*, that the dividing line on the east coast of Borneo should start on Pulau Sebatik at latitude 4°10'N.[59]

It can be assumed that the 1878 Dutch/Bulungan Agreement, which seems to have been, in parts, a renewal of an earlier treaty of 4 May 1826,[60] was concluded to strengthen Dutch control *vis-à-vis* the British in this remote area. The text of the treaty also lists the islands which were considered to be part of Bulungan and, therewith, under Dutch jurisdiction, namely "*Terakan, Nanoekan en Sebittikh met de daartoe behoorende eilandjes.*"[61] From the geography *in situ*, it is self-evident that this qualification referred to the numerous offshore islands between Sebatik and Tarakan, namely Tina Basan, Sinelek, Bukat, Ahus, Mandul, Baru, Tibi and Bangkudulis. It certainly did not include Pulau Sipadan and Pulau Ligitan which lie at a distance of 40nm and 55nm respectively from the east coast of Pulau Sebatik.[62] Furthermore, the treaty text proves that the Bulungan territory had not extended further to the east than Batu Tinagat,[63] which lies 39nm to the west of Pulau Sipadan.

Except for Article IV of the *1891 Convention*, which concerns the division of Pulau Sebatik along latitude 4°10'N (with the effect that today the northern half is part of Malaysian territory while the south belongs to Indonesia), no mention of any islands lying further to the east was made in the treaty. Consequently, these do not fall within any of the specific attributions of sovereignty made under the relevant subsequent UK-Dutch treaties of 1915 and 1928 (see *infra)*. In Article V of the *1891 Convention* it is stipulated that,

> "*...[t]he exact position of the boundary-line, as described in the four preceding articles,*[64] *shall be determined hereafter by mutual agreement at such time as the Netherlands and the British Governments may think fit.*"

Attempts to survey the area and establish border markers "*where physical features did not present natural boundaries*" were undertaken between 8 June 1912 and 30 January 1913 which resulted in a further bilateral agreement in 1915.[65] This document dealt mainly with the

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58 See Article 2 of the treaty and the attached annex (text in the Dutch Ministry of the Colonies, Supplement, No.10: *Zitting 1879-1880/86*, No.21). Batu Tinagat lies at 4°13'N, 118°00'E (see Figure 2).

59 See Article 1 of the *1891 Convention*. For the various attempts on both sides to influence the final demarcation line before the conclusion of the treaty, see, *inter alia*, Treacher, 1890: 53ff; Irwin, 1955: 202ff; and Tarling, 1978: 245ff. The decision to agree on the said parallel followed a recommendation by the *Anglo-Dutch Joint Commission* established in 1884 in order to solve the boundary question.

60 See *Zitting, 1879-1880/86*, No.22.

61 See *Beschrijving van de grenzen van het rijk van Boeloengan en opgave van de daaronder behoorende eilanden* (text in *Zitting 1879-1880/86* No.21). See also definition of Bulungan in the *Official Decrees of the Dutch Indies for 1877* in *Staatsblad der Nederlandsch Indië*, No.31, of 2 February 1877 (text in FO 572/6); and correspondence from de Bylandt to Earl Granville of 1 December 1882 where the territory was defined as comprising *"avec les pays de Tidong qui en relèvent ainsi que les Isles Terrahan [Tarakan], Nauvekan [Nunukan], et Sebettikh [Sebatik] appartiennent au territoire Néerlandais"* ('comprising the Tidung regions and its dependent islands of Tarakan, Nunukan, and Sebatik belonging to the territory of the Netherlands') (text in FO 572/15 No.5) [author's translation]..

62 See Appendix 2 on which, however, due to the scale used, only the relatively larger islands are shown.

63 See *Zitting 1879-1880/86*, No.21:43, and the above-mentioned *Memorandum on the Dutch Frontier* (see fn.50 *supra*).

64 Referring to the direction of the mutual boundary from the east coast to Tanjong Datu (Sarawak) in the northwest along the mountain ranges and the *divortia aquarum* of the inner part of Borneo proper.

65 See Article 2 of the *Agreement Between Great Britain and the Netherlands Relating to the Boundary Between the State of North Borneo and the Netherland Possessions in Borneo* of 29 September 1915; hereafter referred to as the *1915 Agreement* (text in Hertslet, Vol.XXVII: 970).

inland border between the Dutch territory and the BNBC.[66] Article 3 thereof refers to a supplementary interpretation arrived at in 1905 concerning Article II of the *1891 Convention.* However, in relation to Pulau Sebatik no changes occurred, and boundary pillars were fixed at 4°10'N on the east and west sides of the island.[67]

In the *Memorandum on the Question of the Interpretation of Article II of the Anglo-Dutch Convention of June 20th 1891, Defining the Boundaries in Borneo* of 4 October 1906[68] special reference was also made to the reading of Article IV of the *1891 Convention*, namely that the word "*eastward*" was to mean that the most eastward point of the bilateral boundary was the east coast of Pulau Sebatik. This clarification provides further proof that an interpretation to the effect of maintaining that the parties intended to include any islands lying east of Pulau Sebatik into the *1891 Convention* is incorrect.

Judging from the voluminous correspondence concerning the mutual border, it can be assumed that should any disagreement have arisen with regard to title of Pulau Sipadan and Pulau Ligitan, such a problem would have been dealt in that correspondence, and, in a case of continuing disagreement, the issue might have been submitted for arbitration, such as, for instance, in the question of the delimitation between Great Britain's and Portugal's sphere of influence south of the Zambezi after no bilateral settlement could be reached regarding the allocation of territories based on the interpretation of an earlier treaty.[69]

The very fact that no dispute over Pulau Sipadan and Pulau Ligitan arose between the Netherlands and the United Kingdom indicates that for the two colonial powers the ownership of the two islands was clear. Such an assumption can also be deduced from the text of a further agreement relating to the same subject, namely the *Convention Respecting the Delimitation of the Frontier Between the States in Borneo under British Protection and Netherlands Territory in that Island* of 26 March 1928 (hereafter referred to as the *1928 Agreement,*[70] concluded in order to clarify further details with regard to the border demarcation. Again no reference to the islands now in contention was made therein.[71] Furthermore, there exists a map called the *Algemeen Wegeplan van het eiland Borneo* issued by the Netherlands East India Government shortly afterwards[72] which shows, *inter alia*, the Dutch islands in the western Celebes Sea. Although Sebatik's southern part, Nunukan, Tarakan and other islands under Dutch jurisdiction are specified, Pulau Sipadan and Ligitan are not included.

The Indonesian argument that the boundary fixed between the British and the Dutch possessions was "*a straight line which cuts across Pulau Sebatik continuing eastwards and stopping 19km [10.5nm] from the Ligitan Group of islands*" does not bear any historic and/or

66 See correspondence in CO 874/499, the UK-Dutch Survey Report of 17 February 1913 in CO 874/500, and correspondence in CO 874/503.

67 See Article 3.1 of the *1915 Agreement*. Information of their placing was already received by *Notification 103 of 1901* (see CO 874/500); later, a marginal correction occurred in 1914 (see CO 874/500 of 16 April 1914).

68 Text in CO 874/499.

69 See *The Manica* Arbitration of 30 January 1897 (text in Moore, 1898, Vol.V: 4,985).

70 Text in BFSP, Vol.128: 323.

71 Also, in an earlier work, compiled by the *Koninklijk Nederlandsch Aardrijkskundig Genootschap* in 1922 (titled *De Zeeën von Nederlandsch Oost-Indië)* in which a large number of islands off the Borneo east coast are listed, neither Pulau Sipadan nor Ligitan are mentioned as being under Dutch sovereignty (*ibid*: 389ff).

72 See FO 925/32048; the date of publication is assumed to be 1932.

legal foundation. Such an interpretation would also leave the question of territorial sovereignty over Pulau Ligitan unsettled, as the latter lies - as mentioned above - 55nm east of Pulau Sebatik. Moreover, if Indonesia's contention of extending the border along the 4°10'N-parallel up to Pulau Ligitan were to be applied, the 20km long feature would be divided between two different states since the said line runs through the middle of the reef, a result that, in all probability could not have been the intention of the parties to the *1891 Convention*, disregarding how much negligence one wants to attribute to the colonial powers when they drew borders.

The reason why the island of Sebatik is mentioned in the *1891 Convention* is firstly due to its geographical position, as it is one of the two main islands in the Telukan Sibuko (Sibuko Bay) which are very closely linked to the mainland, almost occupying the whole of the northwestern part of the bay;[73] and secondly, because it was, in contradistinction to Pulau Sipadan and Pulau Ligitan, inhabited and therefore the population had to be (at least theoretically) incorporated into the administrative system.

It is evident from the above that, despite their prolonged and, initially, heated arguments regarding the demarcation on Borneo, which took three treaties and thirty-five years to settle, for the governments of the Netherlands and Great Britain at no point in time did any uncertainty arise as to title over the two islands. It now has to be examined why this was the case. In order to arrive at a conceivable explanation, it has to be ascertained whether the islands were already perceived to have been an integral part of British North Borneo[74] at the time of the 1891 treaty conclusion.

## 4.2 The Sulu Grants of 1878 and the Confirmation of 1903

In 1877 and 1878, the Austrian Baron von Overbeck, who worked for a company owned by an Englishman called Dent, obtained various grants from the Sultan of Brunei and from the Sultan of Sulu for certain areas in northeast Borneo which included "*all the islands within three marine leagues of the coast.*"[75] However, after the United States of America acquired the Philippine Islands in 1898,[76] uncertainty arose as to whom some of the numerous islands

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73 The shortest distance to the mainland is ½nm. Sebatik and neighbouring Pulau Nunukan (Oost Nunukan, East Noenoekan, Nanokong Island or Nunkan Timor, lying south thereof) are, what Blink (1907: 420) calls, the "*kusteilanden [de] voor de rivieren liggen*" ('coastal islands at the rivers' mouths') [author's translation]. Why in the end Sebatik was to be divided into two parts is probably connected with the intention of sharing coal and oil resources believed to exist thereon (see correspondence of 30 October 1912 to the BNBC by the British-Borneo Petroleum Syndicate, CO 874/499, and *Allied Geographical Section*, 1944: 52). In 1883, the population of Pulau Sebatik stood at 4,245, consisting mainly of Dayak Tidung origin "*van welke nog weinig bekend is*" (see *Encyclopædie van Nederlandsch-Indië*, Eerste Deel**,** 1894: 257, and Blink, 1907: 420). NB: The disregard for local population caused by divisions of islands is, however, not solely reserved to colonial practice, see e.g. the South American Isla Grande de Tierra del Fuego which was divided between Argentina and Chile by a north-south line effected by Article III of the *Boundary Treaty* of 23 July 1881 (text in ILM, 17: 646).

74 Since the *Protectorate Agreement* (Article II thereof, see fn.35 *supra*), the British referred to the area as the *State of North Borneo*. Commonly the region was known as *British North Borneo*, although no such entity existed in legal terms. When the territory became part of the Federation of Malaysia in 1963, it was renamed *Sabah*.

75 See *Grant by the Sultan of Brunei of Territories from Paitan to Sibuco River* of 29 December 1877 (text in CO 874/54), and *Grant by the Sultan of Sulu of Territories and Lands on the Mainland of the Island of Borneo* of 22 January 1878 (*ibid*; hereafter referred to as the *1878 Grant)*. Due to the nexus with the subsequent *1903 Confirmation* by the Sultan of Sulu, only the 1878 Grant is taken into account in this analysis.

76 See *Treaty of Peace between the United States of America and Spain* of 1898 (text in BFSP, Vol.90: 382).

lying along the borderline of the somewhat broadly agreed boundaries belonged. In order to clarify the situation, two so-called confirmation treaties were concluded:[77]

- the *Treaty between the United States and Spain, for the Cession to the United States of any and all Islands of the Philippine Archipelago lying outside the Lines described in Article III of the Treaty of Peace of December 10th, 1898* of 7 November 1900;[78]

- the *Confirmation by the Sultan of Sulu of Cession of Certain Islands off North Borneo* of 22 April 1903 (hereafter referred to as the *1903 Confirmation*).[79]

The latter agreement applied, *inter alia,* to Omadal, Siamil, Dinawan, Kapalai, Mabul[80] "*and other islands near, or round, or lying between the said islands*" and verified that,

> "*...[t]he reason why the names of these islands were not mentioned in the [earlier] agreement, is because it was known and mutually understood that these islands were included in the [1878] grant.*"[81]

According to the *1878 Grant* which included a transfer of islands lying within three marine leagues (i.e. 9nm) of the coast, Mabul was undoubtedly part of the territory transferred as it lies 7½nm from the mainland. As for Kapalai, Siamil and Dinawan, they are unequivocally included in the *1903 Confirmation* since they are referred to by name. Although neither Pulau Sipadan nor Pulau Ligitan are specifically mentioned[82] - probably due to their insignificant import at the time - from the geological description given above, it is evident that Dinawan and Ligitan are part of the same reef system; and Sipadan's nearest *terra firma* is Kapalai at a distance of 6nm to the northwest.

Since both disputed islands are rather small features, frequented only for seasonal procurement purposes, it is not surprising that they were not individually identified. It is evident, however, that both fall under the provision *of* "*other islands near, or round...the said islands.*" The reason why these islands were perceived to have been already included in the *1878 Grant,* in spite of the original qualification of a 9nm limit,[83] lay mainly in the economic connection between them and the trading places of Kinabatangan and Jolo, the capital of Sulu.[84]

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77 Although a fundamental principle of a treaty is the adherence to it due to the *pact sunt servanda* doctrine (now embodied in Article 26 of the 1969 *Vienna Convention on the Law of Treaties),* in the case of incertitude ensuing from ambiguous treaty stipulations, so-called 'confirmation treaties' are occasionally concluded in order to rectify the dubiety (see Oppenheim, 1963: 949). Regarding state practice for the regions relevant here, see besides the two mentioned documents, e.g. the *Confirmation by the Sultan of Brunei of the Grant of Sarawak* to Brooke of 24 August 1853 (text in Maxwell/Gibson, 1924: 187), the *Confirmation of the Baram Cession by the Sultan of Brunei* also to Brooke of 31 May 1885 (*ibid*: 191), and the *Convention between Great Britain and the Netherlands for the Settlement of their Mutual Relations in the Island of Sumatra* of 2 November 1871 which was concluded *"to remove all occasion of misunderstanding"* (text in Allen/Stockwell/Wright, 1981, Vol.II: 301). However, despite such reconfirmation treaties, unequivocalness was not achieved in all cases; see e.g. the matter concerning the Turtle and Mangsi Islands in the Sulu Sea which took another forty-eight years to be settled (text in BFSP, Vol.151: 161).

78 Referring to the Sulu Sea Islands of Cagayan Sulu and Sibutu and their dependencies (text in BFSP, Vol.92: 814).

79 Text in CO 874/54; for reasons leading to this agreement, see e.g. correspondence from the BNBC to the Sultan of Sulu in CO 874/100,1, No.15.

80 Also written as *Mabol*.

81 See *1903 Confirmation;* no article can be cited as the text is not subdivided.

82 Neither is a yet-unnamed patch drying 1 metre, lying 2nm north of Pulau Ligitan to which Indonesia, however, does not lay claim.

83 It was for the same reason that, for instance, Taganak (6°05'N, 118°19'E), although lying 15nm off the Sandakan coast, was included in the *1903 Confirmation* (see *Notification No.117* of 1891 referred to in CO 874/1001 No.321 of 21 August 1900).

84 Kinabatangan was a small but important market town at the mouth of a river with the same name. Due to the latter's length (350km) and navigability, produce from the *hinterland* (e.g. bird's nests, bees' wax and rotan) was brought downstream while marine products (like trepang [holothuria], agar agar [seaweed], sponges, mother-of-pearl shells, tortoise shells, turtle eggs, and pearls) came in from

Local traffic by fishermen and collectors of sea products was linked more to the north than to the south by reason of the external trade routes to China. Although, due to the weakening of the Sulu Sultanate, trade declined in the second half of the nineteenth century, these traditional trade patterns continued, albeit on a lesser scale.[85] The agreed colonial borders were not - nor were they originally meant to be, or could they have been - a deterrent in the exchange of goods or movement of indigenous people, partly because such a restriction would not have been enforceable, neither by the BNBC, the US nor the Dutch authorities.[86] Nevertheless, over time, state control strengthened, and these borders solidified, constituting the basis for those demarcations which became recognised as separating different national state entities by consequence of historic consolidation.[87]

The continuing altercation regarding ownership and affiliation of some islands *in situ*, which finally was settled in 1948,[88] only concerned the position of islands in respect to the BNBC *vis-à-vis* the USA[89] and not *vis-à-vis* the Netherlands. However, these negotiations never involved any discussion concerning Pulau Sipadan or Pulau Ligitan, as there was no doubt for all the parties concerned that they were BNBC possessions due to the *1878 Grant*, or latest, the *1903 Confirmation* with the Sultan of Sulu.[90]

It is quite unlikely that other, additional agreements between the Netherlands and local rulers exist from which Dutch sovereignty over Pulau Sipadan and Pulau Ligitan can be deduced and which would contradict the interpretation that the *1891 Convention* determined the UK/Dutch border at its most eastern part at Pulau Sebatik, as the British Government was already in 1882

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the sea. For trading patterns and an account of the nomadic fishermen (the Samal Bajau Laut), see Warren, 1981: 67ff, 82ff; for details of trading volumes see *Encyclopædie van Nederlandsch-Indië*, 1894, Eerste Deel: 261.

85 That Pulau Sipadan had been part of the present Tawao District can also be construed from an article written in 1792. Therein the author, a certain Mr Dalrymple who had concluded a number of treaties in the 18th century with the Sulu sultans on behalf of the English East India Company, recorded that a place called *Siparran*, famous for its green turtles, was part of a district then called Mangidara, which stretched from Tawao to Sandakan (see Dalrymple, 1792: 527). In all likelihood, he was referring to Pulau Sipadan.

86 Even today, the notion of 'national affiliation' among the indigenous peoples of the various island groups in the area is a concept to which they are relatively unaccustomed, as other criteria of identity are used. The respective (rather new) centres of state authority are at a considerable distance: Manila lies approximately 1,265km to the north, Jakarta 1,700km to the southwest, and Kuala Lumpur 1,770km to the west. In how far the establishment of the planned growth area (the EAGA; see Section 7, *infra)* will lessen the impact of the relatively recently enforced national state borders and revert back to a less controlled movement of people, remains to be seen.

87 Regarding historic consolidation, see Schwarzenberger who writes that *"[t]itles to territory are governed primarily by the rules underlying the principles of sovereignty, recognition, consent and good faith. Initially, as, for instance, in the case of the transfer by way of cession of a territory from one State to another, the validity of a title to territory is likely to be relative. If, however, other states recognise such a bilateral treaty...or estop themselves in other ways from contesting the transfer, the operational scope of the treaty tends increasingly to become more absolute. The more absolute a title becomes, the more apparent becomes the multiplicity of its roots. In this movement from relative to absolute validity, it undergoes a process of historic consolidation."* (Schwarzenberger as quoted by Jennings, 1963: 27 fn.2). Jennings points out that, although this principle has not become a doctrinaire principle as such, it is an obvious one, closely related to that of prescription (*ibid*: 28). Regarding the latter see Oppenheim (1963: 576ff) who states that: "*Prescription in international law may therefore be defined as the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order."*

88 See the *Treaty between Great Britain and the Philippine Republic Regarding the Turtle and Mangsi Islands* of 20 April 1948 (text in BFSP, Vol.151: 161).

89 i.e. since 1946, between Britain and the Philippines, as the territory of North Borneo became a British colony on 10 July 1946 by the *North Borneo Cession Order in Council* (text in BFSP, Vol.146: 173), while the Philippines gained independence from the US six days earlier by the *Proclamation of the Philippine Independence* (text in BFSP, Vol.146: 899).

90 Only shortly after the *1903 Confirmation*, the BNBC worried that the US (not the Dutch) might attempt to lay claim to some of the islands, since the Sultan of Sulu had mention to an US interpreter "*that the Islands are American Territory"* (see BNBC Governor Birch's letter of 29 April 1903, text in CO 874/1001). The question was finally settled by the 1930 *Boundary Agreement Between Great Britain and the United States* (in BFSP, Vol.132: 367) from whose text it becomes clear that only some islands *in situ* east of the 119°E meridian were US territory.

in possession of the copies of all relevant treaties.[91] None of the respective texts apply to Pulau Sipadan or Pulau Ligitan. Subsequently, according to the rules of state succession by which *nemo potest plus iuris ad alium transferre quam ipse habet*, the Netherlands could only have transferred to Indonesia in 1949, territory which was part of their own possessions.

# 5. State Practice

## 5.1 Indonesia

It now has to be examined whether any proof can be deduced from state practice demonstrated by independent Indonesia that, despite the fact that it did not inherit title over the territory in question from the Dutch, the government perceived the two islands to have been part of Indonesia before it announced its claim to them.

### 5.1.1 Indonesia's territory

Although Indonesia proclaimed its independence on 17 August 1945,[92] the territorial transfer agreed to by treaty occurred only five years later when the *Charter of Transfer of Sovereignty* between the Netherlands and Indonesia became law on 27 December 1949.[93] By way of this document,

> "*...[t]he Kingdom of the Netherlands unconditionally and irrevocably transfer[red] complete sovereignty over Indonesia to the Republic of the United States of Indonesia and thereby recognize[d the] said Republic of the United States of Indonesia as an independent sovereign State.*"[94]

In 1949, Indonesia became a federal republic divided into 16 component states, governed by its second constitution. However, on 17 August 1950, the federal framework was abolished, and the *Provisional Constitution*[95] for a unitary state (the Negara Republik Indonesia) came into force.[96] In the wake of revolts against the central government on Java (especially in Sumatra, East Indonesia and Kalimantan) martial law was declared in March 1957,[97] followed by the

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91 See *Treaties, Conventions, etc. between the Netherlands and Native Princes in the Eastern Sea*; these documents, which had been officially communicated by the Dutch to the UK before the *1891 Convention*, concerned all agreements between 1843 and 1880 (list reprinted in BFSP, Vol.71: 651; for various treaty texts see FO 97/249-253).

92 See *Jakarta Charter* of 22 June 1945, and *Constitution of the Republic of Indonesia* (Undang-Undang Dasar; text in Blaustein/Flanz, 1990, Vol.VIII: 28, 20).

93 Text in BFSP, Vol.155: 766; for documents regarding the *Round Table Conference* leading to the creation of the *Federal Republic of the United States of Indonesia* (Republik Indonesia Serikat), see UNTS, 69: 386ff.

94 Article 1 of the *Charter of Transfer of Sovereignty* (text in UNTS, 69: 206).

95 i.e. *Undang-Undang Dasar Sementara*.

96 See Supomo, 1954/1964: 2.

97 This occurred after leaders of the regional council in Central Sumatra had proclaimed the *Revolutionary Government of Indonesia* (PRRI) on 15 February 1958, which was, however, suppressed by military force.

guided democracy' policy of Sukarno[98] which resulted in the re-enactment of the 1945 Constitution[99] that is presently still in force.

In order to ascertain the geographical extent of Indonesia, the definition of its territory has to be analysed as expressed in the various constitutions of the republic.

As mentioned earlier, according to the principles of international law, no state can transfer territory to another state over which it itself does not hold valid title. Since the Netherlands neither claimed Pulau Sipadan and Pulau Ligitan, nor exercised actual control over them, it could not have ceded the territory in question to the newly created Republic in 1949. Such a position was expressed in the Second Constitution of 1949 (the *Undang-Undang Dasar Republik Indonesia Serikat),* i.e. the relevant text does not allow an interpretation of a transfer beyond what was known as the 'Netherlands East Indies' (*Nederlands-Oost Indië*). The Dutch possessions of 1949 were based on a number of treaties between 1824 and 1936, constituting the so-called *grondgebied* together with all islands lying within a 3nm belt as determined by the *Territoriale Zee en Maritieme Kringen Ordonnantie* of 11 October 1935.[100] Since neither Pulau Sipadan nor Pulau Ligitan were part of any of the relevant treaties, nor did they lie within 3nm off the *grondgebied,* their territory could not have been part of the Dutch East Indies at the time of transfer of sovereignty to the Indonesian Republic.

While it could be argued that the 1949 Constitution might still have been prejudiced by colonial influence, the *Provisional Constitution* of 1950 can be taken as an authoritative example as to what independent Indonesia itself recognised to be its territory. When it was able for the first time to define its own borders, it did not perceive the disputed islands as having been included in the 1949 transfer, nor did it reserve for itself any claims beyond the former Dutch possessions. Article 2 of the 1950 Constitution states that "*[t]he Republic of Indonesia comprises the whole territory of Indonesia.*" An interpretation given by an Indonesian constitutional scholar and co-author of the said constitution points out that,

> "*...[i]n the Explanation of the Draft Constitution it is stated that the intention of this article is that the territory of the Indonesian State encompasses the territory of the former Dutch Indies...Article 1 of the Charter for the Transfer of Sovereignty transfers sovereignty over Indonesia* ***without exceptions****; thus the transfer of sovereignty covers the whole of Indonesia or* ***the entire territory of the former Dutch Indies****...*"[101]

Whilst this was the position with regard to the *Provisional Constitution*, it has to be examined also whether the present constitution (1945/1959) encompasses any different version of territorial extent. Although no clearly defined territorial limits of the Republic are given therein, the Preamble makes reference to "*the Indonesian people and their territories*". The *Results of the Bandung Constitutional Assembly* clarified this point in Article 1 stating that,

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98 For details see Mackie, 1974: 79ff.
99 See *Presidential Decree* of 5 July 1959 (text in Blaustein/Flanz, 1990, Vol.VIII: 17).
100 See Staatsblad, 1935, No. 497; a list of the relevant treaty documents can be found in Schrieke, 1940: 1ff, see also Westra, 1927: 1ff.
101 Supomo, 1954/1964: 15; emphasis added.

> "*...[t]he Territory of Indonesia, in accordance with that intended at the time of the Proclamation of Indonesian Independence of August 17, 1945, shall encompass all former Dutch East Indies territory, as the situation was at the outbreak of the Pacific War on December 7, 1945.*"[102]

Accordingly, Mochtar Kusumaatmadja (former Minister of Justice, Minister for Foreign Affairs, as well as architect of the *Nusantara* Concept and Indonesia's chief delegate during the Third UN Law of the Sea Conference) quite clearly stated in 1982 that,

> "*...[t]he region of the proclaimed Republic of Indonesia [of 17 August 1945] included all the area of the former Dutch East Indies -* ***no more, no less.***"[103]

### 5.1.2 Indonesia's baselines

The same interpretation of Indonesian territory was unequivocally demonstrated in 1957, when the Government declared its baselines twelve years before Malaysia issued its *Map Showing the Territorial Waters and Continental Shelf Boundaries of Malaysia* (hereafter referred to as the *Malaysian Map*).[104] Due to the instability and threatening disintegration during the 1950s,

> "*...the government [of Indonesia] at the time needed a concept that could simply and clearly be made a symbol of the unity and union of the Indonesian state and nation. The Nusantara Concept, as formulated in the 13 December 1957 government declaration, answered this need.*"[105]

By way of this announcement (generally referred to as the *Djuanda Declaration*)[106] the Indonesian Government proclaimed the breadth of the territorial waters to be 12nm replacing the former Dutch legislation of a 3nm territorial sea,[107] and declared that for the purpose of territorial unity,

> "*...all waters around, between and connecting the islands or parts of islands, that make up the landmass of the Indonesian Republic, disregarding their breadth, are true parts of the regional area of the Republic of Indonesia and*

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102 22 April 1959 (text in Simorangkir/Mang Reng Say, 1980: 118).

103 Mochtar Kusumaatmadja, 1982: 13; emphasis added.

104 i.e. the *Peta Menunjukkan Sempadan Perairan dan Pelantar Benua Malaysia*, published on 21 December 1979 by the Pengarah Pemetaan Negara (Director of National Mapping) Rampaian 97, Cetakan 1-PPNM.

105 Mochtar Kusumaatmadja, 1982: 15.

106 On 13 December 1957, Indonesia issued the *Djuanda Declaration* (named after the then Indonesian Prime Minister H. Djuanda Kartawidjaja; for text see Siahaan/Suhendi, 1989 *Hukum Laut Nasional:* 18; hereafter referred to as *Hukum Laut Nasional)*. This declaration laid claim to approximately 670,554sq.nm internal waters and 98,000sq.nm territorial sea by using the straight baseline method in joining the outermost islands and reefs of the territory Indonesia claimed. Attached to the Act is the list of the baseline coordinates Nos.1-195 from which the territorial sea is to be measured. Although the declaration's preamble states that *"since time immemorial the Indonesian Archipelago has constituted one entity"*, it has to be pointed out that Indonesia's modern configuration did not possess any lineal historic antecedent other than that of the Dutch East Indies. Indonesia's sustained attachment to the archipelagic principle, as enunciated in 1957, represented an attempt to entrench maritime boundaries whose extent was based essentially on treaties concluded during the 19th and the beginning of the 20th century, rather than on earlier empires such as Srivijaya or Majapahit with their centres in southern Sumatra and eastern Java respectively. These previous kingdoms were not legal entities in the territorial sense limited by fixed borders such as the modern nation-state; they were fluid realms based on the extent of their control over the sea. Only when the Europeans arrived and gradually changed the indigenous concept into demarcated entities, did the state and administrative structure become land-oriented (see also Mochtar Kusumaatmadja, 1991: 76).

107 *Territoriale Zee en Maritieme Kringen Ordonnantie,* 1939, Staatsblad 1939, No.442.

> *therefore are parts of the internal or national territorial waters under the absolute sovereignty of the State of the Republic of Indonesia.*"[108]

Three years later, the *Djuanda Declaration* was enacted[109] together with a list of baseline coordinates defining Indonesia's outer limit of these archipelagic waters.[110] According to this list, the Indonesian BLC for the northeast coast of Kalimantan starts at the east coast of Pulau Sebatik with the point determined by the *1891 Convention*, i.e. at 4°10'N, 117°53.7'E (BLC 36 at Tanjung Saima). The demarcation then follows in a southward - and not eastward - direction to BLC 36A (on Pulau Sebatik),[111] BLC 36B (also on Sebatik)[112] and BLC 37 (on Pulau Bunyu).[113]

At the crucial time when Indonesia concentrated on consolidating the limits of its territorial and maritime periphery to "*the outermost islands or part of such islands comprising Indonesian territory,*"[114] no attempt was made to include Pulau Sipadan and Pulau Ligitan into the baseline system, which were then still part of a British colony. Consequently, it can be deduced that Indonesia, which considers the *Nusantara* Concept to be one of the chief foundations for the geographical definition of its territory encompassing all areas which it perceives to belong to the state, did not consider either of the disputed islands to be under its jurisdiction.

Between the 1957 proclamation of the *Nusantara* Concept and its enactment in 1960, Indonesia concluded a number of treaties in order to achieve indirectly acquiescence of its newly defined state borders within the archipelagic concept in the hope that during the Second UN Conference on the Law of the Sea, convened in 1960, Indonesia would be able to display a stronger position to support its case by proof of its neighbours' consent and recognition.[115]

One of these agreements was concluded in 1959 with the Federation of Malaya stating in its Preamble that "*[p]rompted by the desire to restore the relations, which were interrupted by accidents of history...*", both countries, "*shall respect the independence and sovereignty of each other.*"[116] By way of this treaty, which was ratified on 30 April 1960 - i.e. two months after the *Nusantara* Concept had become law - Malaya was asked to acknowledge Indonesia's new baseline system, i.e. to recognise a border which did not include Pulau Sipadan and Pulau Ligitan in Indonesia's territory. Thus, this treaty must be seen as a document Malaysia can

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108 The above translation is taken from Mochtar Kusumaatmadja (1982: 13); the version given in Leifer (1978: 201) using Syatauw (1961: 173ff) as source, varies slightly. The *Declaration* attracted protests, *inter alia*, from the USA, Australia, New Zealand, the UK and the Netherlands, while it was supported by the USSR and the PRC (see Mochtar Kusumaatmadja, *ibid*: 15).

109 See *Act Concerning Indonesian Waters* of 18 February 1960 (Government Regulation in Lieu of an Act No.4 of 1960, State Gazette 1960, No.22; hereafter referred to as the *1960 Act No.4;* text in *Hukum Laut Nasional*: 20, and *Limits in the Sea No.35)*. The delay of the enactment was partly due to the above-mentioned protest and partly due to Indonesia's effort to achieve international recognition of its archipelagic state concept at the 1958 Geneva Conventions. Since such an attempt proved unsuccessful, Indonesia, in the end did not sign the Convention on the Territorial Sea, and only ratified the Convention on the High Sea with a reservation on 10 August 1961 (see fn.121 *infra*).

110 Indonesia presently consists of over 17,500 maritime features (including 11,000 smaller ones which are still unnamed) covering approximately 1.5 million sq.nm of land and water (i.e. including Irian Jaya and the whole island of Timor).

111 4°03.7'N, 117°55.3'E, near East Point.

112 4°03.7'N, 117°55.5'E, at Stone Point.

113 3°28.5'N, 117°52.5'E, at Tanjung Arang (see Figure 2).

114 Section 1.2 of the *1960 Act No.4.*

115 See Mochtar Kusumaatmadja, 1982: 19.

116 See Article 1 of the *Treaty of Friendship Between Malaya and Indonesia* (text in BFSP, Vol.164:232) signed on 17 April 1959 by the then respective Prime Ministers (i.e. H.Djuanda for Indonesia, and Abdul Razak for Malaya who took over the premiership from *Tunku* Abdul Rahman during the 1959 elections from 15 April to 20 August 1959).

rely upon in proving that Indonesia did not have the intention and will to act as a sovereign over the two islands.

Additionally, Indonesia concluded an agreement regarding bilateral naval liaisons in the Celebes Sea with the Philippines in 1960, followed by two further documents in 1961 and 1963.[117] To the latter a map of the so-called "*Search and Patrol Area of Lumba-Lumba*" is attached which shows the baselines for East Kalimantan as described above. This map does not show Pulau Sipadan and Pulau Ligitan as Indonesian territory. Since this document was signed six days before the *Manila Accord* in which, *inter alia*, Indonesia agreed, under certain conditions, to the inclusion of North Borneo into the Federation of Malaysia,[118] it can be cited as an example of Indonesia's perception of its own territory at a time when its relationship with Malaysia was at its worst.[119] It should be noted that in 1961, i.e. two years before the *konfrontasi*, Indonesia did not object or protest against a merger of Singapore, Sarawak and Sabah with the Federation of Malaya; instead it openly endorsed the forthcoming incorporation of the former British colonies into Malaysia at an international platform, namely the UN General Assembly (UNGA), where its Foreign Minister announced the official Indonesian stance on the issue when he stated:

> "***We are not only disclaiming the territories outside the former Netherlands East Indies**, though they are of the same island [Borneo], but - more than that, when Malaya told us of its intention to merge with the three British Crown Colonies...as one Federation, we told them that we had no objections and that we wished them success with this merger so that everyone might live in peace and freedom.*"[120]

Although in the course of the following year, this policy changed dramatically into belligerence, Indonesia did not then, nor later, protest to the United Kingdom or to Malaya specifically that, even if Sabah was to become part of the new Federation, Pulau Sipadan and Pulau Ligitan had to be excluded because they were Indonesian territory.

There exist a number of declarations and pieces of legislation from which it is evident that Indonesia considered (before and after the publication of the Malaysian Map) that the baselines as promulgated by the *1960 Act No.4* are the decisive factor governing the delimitation of all Indonesia's maritime zones, and therewith its territory. Confirmation thereof can be found, *inter alia*, in:

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117 The relevant treaties are: the *Agreement between the Republic of the Philippines and the Republic of Indonesia Concerning the Coordination and Liaison by the Law Enforcement Agencies of the Philippines and Indonesia Operating to Patrol the Waters between the Two Countries* of 27 July 1960 (text in Philippines Treaty Series, IV: 349); the *Agreement between the Republic of the Philippines and the Republic of Indonesia on the Implementation of Coordination between the Philippine Navy and the Indonesian Navy in the Area between the Philippines and Indonesia* of 30 January 1961 (text ibid: 425); and the *Agreement on Naval Liaison between the Republic of the Philippines and the Republic of Indonesia* of 25 July 1963 (text ibid: 761).

118 See Article 10 of the *Manila Accord* concluded between the Federation of Malaya, Indonesia and the Philippines on 31 July 1963 (text in UNTS, 550: 344). The conditions referred to in the said article were later fulfilled.

119 While most of the military action on Borneo during the *konfrontasi* period concentrated on West Sarawak, during abortive attacks, launched from December 1962 to February 1963 on Tawau (Tawao) and surrounding settlements, Indonesian forces did at no time occupy Pulau Sipadan or Ligitan (see also Deputy Foreign Minister Sudjarwo's statement to the UNGA at the 1144th Meeting, 9 September 1964, GAOR S/PV 1144).

120 Foreign Minister Subandrio's speech at the UNGA in 1961 (GAOR 16th Session 1058th Meeting); emphasis added.

(i) the *Reservation* attached to the ratification of the 1958 Geneva Convention on the High Seas of 10 August 1961;[121]

(ii) the *Declaration on the Continental Shelf* of 17 February 1969,[122] which preceded the 1969 *Continental Shelf Agreement* with Malaysia by eight months and during whose negotiations apparently some allusions to the question of territorial sovereignty over Pulau Sipadan and Ligitan had been made verbally;

(iii) the *Act Concerning the Continental Shelf* of 6 January 1973;[123]

(iv) the *Declaration Concerning the Exclusive Economic Zone* of 21 March 1980;[124] and,

(v) the *Act Concerning the Exclusive Economic Zone* of 18 October 1983.[125]

Up to the present, there has been no revision of the *1960 Act No.4* by which Indonesia's archipelagic waters are to include the two islands.

From the above analysis it can be deduced that Indonesia demonstrated consistent state practice regarding its own perception of its territory by which it did not claim either of the now disputed islands - neither by way of national legislation nor through internationally demonstrated conduct, except in the protest note of 1980 issued as a response to the publication of the Malaysian Map.

Over thirty-five years, i.e. from the declaration of independence in 1945 up to 1980 (a period which included the important stage in Indonesia's realisation of its international borders), the Government did not show any *animus occupandi* by attempting or intending to exercise jurisdiction over the islands nor did it attempt or intend to acquire sovereignty thereof. Even after the latter date, judging from its own municipal law enactments, no concrete attempt to pursue the claim was undertaken until 1991. Based on Indonesia's state practice, as established above, it can be concluded that the claim to the two islands is not supported by any manifestation of acts of sovereignty on the part of Indonesia, neither *de jure* nor *de facto*, neither before nor after the creation of the Federation of Malaysia. It is only since the 1990s that the Government has shown greater efforts to do so. Based on the principles of international law, it is submitted therefore that Indonesia has estopped itself from being able to bring forth the claim after its own action clearly demonstrated that it did not assume the two islands to be part of its territory.[126]

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121 Text in UN Multilateral Treaties, 1989: 737.

122 See Section 1 of the *Pengumuman Pemerintah Republik Indonesia tentang Landas Kontinen Indonesia* (text in *Hukum Laut Nasional:* 69).

123 Section I.1(a) of *Undang-Undang Republik Indonesia tentang Landas Kontinen Indonesia* (Law No.1 of 1973, text *ibid*: 71).

124 Section 1 of the *Pengumuman Pemerintah Republik Indonesia tentang Zona Ekonomi Ekslusif Indonesia* (text *ibid*: 117).

125 *Undang-Undang Republik Indonesia tentang Zona Ekonomi Ekslusif Indonesia* (Law No.5 of 1983, text *ibid*: 119).

126 A state estops itself in respect to future action when it has acquiesced to a particular situation and/or has demonstrated a certain position thereto upon which it cannot act detrimentally later (see Bowett, 1957; MacGibbon, 1958). Such an interpretation was invoked, e.g., in the *Temple of Preah Vihear* Case (ICJ Reports, 1962: 6); see especially Separate Opinion of Judge Fitzmaurice (*ibid*: 62) who pointed out that Thailand was precluded by its own subsequent conduct from later asserting non-acceptance of the map and the line shown thereon regarding the position of the temple in question. While in the *Temple* Case, Thailand's acquiescence arose from its conduct of merely remaining silent (i.e. it did not protest), in the present case, Indonesia demonstrated distinctive and deliberate actions in order to achieve recognition of its national boundaries. See also Libya/Malta *Case Concerning the Continental Shelf* (Application by Italy for Permission to Intervene) where the Court held that since Italy "*has not availed itself of its many*

## 5.2 Malaysia

Although it is always somewhat difficult to prove effective control over uninhabited areas,[127] Malaysia is - in contradistinction to Indonesia - able to draw on certain actions of executed state authority from which it can be deduced that the two islands had been considered to have been part of British North Borneo or, since 1963, of Malaysia.

### 5.2.1 North Borneo/Sabah

In conformity with Articles 6 and 11 of the BNBC *Royal Charter*[128] and Article III of the 1888 UK/BNBC *Protectorate Agreement*,[129] the UK conducted matters between foreign states and North Borneo on the latter's behalf and, at times, legislated for the state before it became a British colony in 1946.[130] This was done by a number of Orders in Council, Ordinances and/or treaties which Britain issued and concluded without any protest from the Netherlands. As examples specifically applying to North Borneo, the following documents can be cited:

(i) the *Convention between Great Britain and the United States of America Relative to the Disposal of Real and Personal Property* of 2 March 1899;[131]

(ii) the *British Order in Council Amending the Straits Settlements Extradition Order in Council of 1889, Respecting Extradition from British North Borneo, and Revoking that of 1896* of 26 September 1901;[132]

(iii) the *British Protectorates Neutrality Order* of 24 October 1904 (plus the *Amendment* of 14 November 1904);[133]

(iv) the *Act of the British Parliament to Enable 'The Fugitive Offenders Act, 1881', to be Extended to Protected States* of 19 May 1915;[134]

(v) the *British Order in Council Relative to Jurisdiction in Matters Connected with Merchant Shipping in North Borneo* of 27 January 1916;[135]

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*opportunities of clearly pointing out to Malta the existence of a disagreement or dispute..., it has, by its 'silence' and 'inactivity', laid itself open for having the claims it would now seek to assert declared inadmissible by virtue of estoppel or preclusion."* (ICJ Reports, 1984: 17).

127 See e.g. the *Eastern Greenland* Case in which the Court observed 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 particular true in the case of claims to sovereignty over areas in thinly populated or unsettled countries" (Legal Status of Eastern Greenland* Case: 46).

128 See fn.47 *supra*.

129 See fn.35 *supra*.

130 See fn.89 *supra*.

131 Text in Hertslet, Vol.XXI: 1088; accession for North Borneo, see *ibid*: 1194; date of *Notification* 30 April 1901 (BFSP, Vol.95: 1008).

132 Text in Hertslet, Vol.XXIII: 676.

133 Full title: *Order in Council Making Provision for the Regulation of the Conduct of the Inhabitants of British Protectorates and other Persons Residing therein during the Existence of Hostilities between Foreign States with which His Majesty is at Peace* (text in Hertslet, Vol.XXIV: 509/520).

134 Text in BFSP, Vol.109: 3.

135 Text in BFSP, Vol.110: 95.

(vi) the *British Order in Council Applying the Provisions of 'The Fugitive Offenders Act, 1881' to the Federated Malay States, Johore, Kedah and Perlis, Kelantan, Brunei, and North Borneo* of 24 October 1916;[136]

(vii) the *Universal Postal Union* Convention of 30 November 1920 which specifically mentions the British protectorates and the Dutch Indies;[137] and,

(viii) the *International Sanitary Convention* of 21 June 1926[138] which the United Kingdom ratified for North Borneo on 9 October 1928,[139] and the Netherlands for the East Indies on 14 November 1930.[140]

These documents can be regarded as demonstrating sufficiently the *animus* of the UK to exercise state functions for North Borneo. The latter two agreements especially show the willingness of the British and the Dutch to include their Borneo possessions in an international convention. As the Court observed in the *Legal Status of Eastern Greenland* Case, if states concluded conventions they normally did not deal with the question as to the specific extent of their territory to which that particular treaty applied, and it was only if any uncertainty arose that such limitations were specifically mentioned.[141] The natural conclusion therefore is that, if no mention to that effect was made, no differences between the parties existed.

That this assumption is correct can be underpinned in the present case by an examination of the *Annual Reports on the East Coast Residency*. These yearly accounts of the province's status refer to regular visits to Tawau (the capital of the East Coast Residency to whose territory Pulau Sipadan and Ligitan belonged) by Dutch officials from the adjacent Netherlands East India territory of Bulungan.[142] None of these rather detailed reports lead to the assumption that any conflict existed at any time over the fact that the two islands were part of the BNBC's territory. The reports also reveal that the BNBC Resident of the province made routine visits to the islands under his jurisdiction, like e.g. to Dinawan, the northern part of the reef on which Pulau Ligitan is situated.[143] That no particular visit to either Pulau Sipadan or Ligitan is mentioned is not surprising, since both islands were barren and uninhabited, and therefore did not necessitate inspection.

Other recorded state functions executed by the BNBC, specifically concerning the area of the disputed islands, refer to the building of navigational aids. Although the exact erection date of the structures on Pulau Sipadan and Ligitan could not be ascertained, they seemed to have been installed at the beginning of this century. There is written evidence that, for instance, the buoy laid on Hand Rock,[144] which lies south of the 4°10'N parallel, was laid by the British on 4 January 1904.[145] Other BNBC-maintained lighthouses, beacons and/or buoys[146] between Batu

136 Text *ibid*: 291.
137 Text in BFSP, Vol.114: 466.
138 Text in UKTS, 1928 No.22 (Cmd.3207).
139 Text in BFSP, Vol.28: 358.
140 Text in BFSP, Vol.32: 539.
141 See *Legal Status of Eastern Greenland* Case: 52.
142 See e.g. *Annual Report on the East Coast Residency* (State of North Borneo) for 1918 and 1919 (text in CO 648/8: 315).
143 *Ibid*: 474.
144 At 4°08.5'N, 118°10.5'E.
145 See *Annual Report for 1903, Tawao* (State of North Borneo Official Gazette) 1 June 1904 (CO 855/18).
146 Some of which are mentioned in the *Annual Report on the East Coast Residency for 1918* and for *1919* (CO 648/8).

Tinagat[147] and Si Amil[148] were erected on Heel,[149] Horn[150] and Lehnert Reef,[151] Gusungan,[152] Pulau Sipadan,[153] Cust Reef,[154] Pulau Ligitan[155] and Si Amil. In contrast thereto, the buoy east of Nunukan, installed in 1903, was laid with the permission of the Dutch East Indies officials.[156]

Further proof of executed state functions can be drawn from a legislation of 1917 when the BNBC Government issued the *Seed Pearls Ordinance of North Borneo*[157] which refers, *inter alia*, to the declaration of a native reserve for the area from Tanjung Melandong in Darvel Bay (Telukan Lahat Datu) to Trusan Treacher (Trusan Tando Bulong), the latter lying 13nm north of Pulau Sipadan; and, more important, the earlier mentioned legislation of 1933 by which Pulau Sipadan was declared a bird sanctuary,[158] an act which was repeated by the Sabah State Government in 1963.[159] No protests were received for any of these actions by the Dutch or, subsequently, the Indonesian authorities.

It seems evident therefore that, after the *1903 Confirmation* at the latest, the islands lying off the southeastern coast of North Borneo and east of Pulau Sebatik lay within the BNBC jurisdiction,[160] and that none of them were in any form administered by the Netherlands. In addition, it should be observed that, although Dutch administration became (relatively) more effective in the *Outer Possessions* at the beginning of the 20th century,[161] colonial authority over its northeastern Borneo possessions (lying at a great distance from the administrative centre at Banjarmasin) was still rather nominal.[162] However, in contradistinction to some evidence of Dutch presence in the Bulungan area,[163] no documentation exists showing Dutch control over Pulau Sipadan or Pulau Ligitan.

147 See fn.58.
148 See fn.16.
149 At 4°14'N, 118°14'E.
150 At 4°16'N, 118°25'E.
151 At 4°15'30"N, 117°16'E.
152 At 4°18'N, 118°33'E.
153 At 4°07'N, 118°38'E.
154 At 4°17'N, 118°43'E.
155 At 4°09.75'N, 118°53.5'E.
156 *The British North Borneo Herald* of 1 September 1903: 216 (CO 855/17); the buoy's position is given as 3°58'5"N, 117°51'E.
157 G.N.141 of 1 June 1917; text in Vol.III of the *Appendices a l'ann.122 à la duplique de la Norvège.* Written Statements (Pleadings, Oral Arguments, Documents 30 April 1951 of the 1951 *Anglo-Norwegian Fisheries* Case, No.25: 707).
158 See State of North Borneo *Official Gazette*, 1 February 1933, No.69, where the island of Sipadan is listed as being part of the Lahad Datu District, which in turn was then part of the East Coast Residency (CO 855/47).
159 *The Star*, 8 June 1991 and *FEER*, 17 March 1994; see also picture of plaque erected on the island in 1963 (in Wong, 1991: 22).
160 See e.g. the *Minquiers and Ecrehos* Case where the Court held that the islands under contention were British possessions, *inter alia*, due to France's inability to produce evidence that it had exercised any form of jurisdiction over the disputed territory (ICJ Reports, 1953: 67).
161 See van Hulstijn, 1926: 88ff.
162 At the beginning of the 20th century, Bulungan seems to have been mainly under the control of a sultan and four *pangarans* (nobles of royal blood) and was visited by Dutch officials from Banjarmasin on a regular basis (Adatrechtbundels, 1917, Borneo Vol.XIII: 315ff). N.B.: It should be pointed out that even today, control by the central government on Java over the sparsely populated northeastern areas of Kalimantan is much less than over other regions, like e.g. Sulawesi or Sumatra (Mackie, 1974, Appendix III), and, although covering an area of over ½ million sq.km., detailed information outside Indonesia concerning Kalimantan *per se* - and Kalimantan Timor (Kaltim) in particular - has only become available in recent years.
163 See fn.142 *supra*, and van Vollenhoven, 1917: 287ff.

The actual transfer of North Borneo from Great Britain to Malaysia was effected by Article 1 of the so-called *Malaysia Treaty* concluded on 9 July 1963[164] which states that, *inter alia,* the territory of the "*Colon[y] of North Borneo shall be federated with the existing States of the Federation of Malaya as the State of Sabah.*" The Malaysian Constitution defines in its first article the territory of Sabah as the territory comprised therein immediately before Malaysia Day, i.e. before 16 September 1963, and this included Pulau Sipadan and Pulau Ligitan since no claim to the islands had been put forward by Indonesia at the time.[165] The latter cannot claim ignorance of the text, since the issue had been discussed at length before and during the Conference of Heads of Government held in Manila from 30 July to 5 August 1963 which led to the *Manila Accord* concluded between Malaysia, Indonesia and the Philippines on 31 July 1963[166] and the *Joint Statement* by the three states issued on 5 August 1963.[167]

From the text of the Malaysian-Indonesian Agreement, concluded in 1966 to end all hostilities between the two countries after the *konfrontasi,* it can be implied that Indonesia recognised, *inter alia,* that Sabah - whose territory, as shown above, then included the two islands - was now part of the Federation of Malaysia.[168] The Indonesian Government did not make any reference at the time to any unsolved questions in relation to a territorial claim on its part. It was only after the Malaysian Map was published in 1979 that Indonesia protested officially against Malaysia's inclusion of both islands, stating that the drawing of Malaysia's maritime boundaries in the Celebes Sea was not in line with the principles of international law and state practice, and that the shown boundaries were against the 1969 agreement.[169] However, Malaysia rejected the protest, stating that the bilateral agreement of 1969 did not concern the delimitations in the Celebes Sea, and that no principles of customary international law had been violated.

Subsequently, title deeds for Pulau Sipadan have been issued to private individuals[170] and since 1988, the Sabah Department for Tourism and Environment has built some structures for stationing Wildlife Department personnel on the island in order to monitor bird and turtle colonies. Furthermore, the permit to the French marine biologist Jacques Cousteau to produce a documentary of the island's turtles[171] in 1989 was issued by the same department, which has also allowed the construction of a number of tourist facilities[172] attracting up to three-hundred visitors weekly during the April - October season since 1991.[173]

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164 Full title: *Agreement Concluded between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaysia, North Borneo, Sarawak and Singapore* (Cmnd.2094, July 1963).

165 In relation to Pulau Ligitan, further proof that it was an integral part of British North Borneo at the time of the transfer from the United Kingdom to Malaysia can be adduced from the *North Borneo (Alteration of Boundaries) Order in Council* of 24 June 1954 by which Britain annexed the continental shelf up to the 100-fm line to the colony's territory (text in BFSP, Vol.161: 24; for details see Haller-Trost, 1994: Section 4). This extension included Pulau Ligitan which lies within the landward side of the said line. With regard to the legality of annexing the continental shelf to a state territory, see *ibid*: fn.192.

166 See fn.119 *supra.*

167 Reprinted in PILJ, Vol.II 1/2:200ff.

168 Article 1 of the *Agreement to Normalise Relations between Malaysia and Indonesia,* signed on 11 August 1966 (text in BFSP, Vol.168: 675).

169 Indonesia's *Nota Bantahan* (protest note) of 8 February 1980.

170 As pointed out by Hamzah, 1984: 360. Dr. Hamzah, formerly of the Malaysian Armed Forces Defence College and the Institute for Strategic and International Studies in Kuala Lumpur, is presently the Director-General of the Malaysian Institute of Maritime Affairs (MIMA), a policy research institute set up in 1993 by the Malaysian Government to deal specifically with national, regional and global maritime issues.

171 Titled *The Ghost of the Sea Turtle.*

172 *The Star,* 8/6/91, and *FEER,* 17/3/94.

173 *New Straits Times,* 7/6/91.

### 5.2.2 Malaysia's baselines

The fact that Malaysia has - contrary to Indonesia - legislated for its territorial sea *in situ*, also has to be considered as an additional verification of its state control.[174] In 1979, Malaysia published the above-mentioned map delimiting its territorial waters and continental shelf.[175] Although the Government has not, as yet, promulgated its baselines from which the various maritime zones are to be measured,[176] by constructing a line 12nm from and parallel to the seaward territorial water limits in a landward direction, one can deduce that Malaysia uses Pulau Sipadan and Ligitan as baseline points (see Section 2).

As demonstrated in Section 5.1, Indonesia has by its own state practice shown that the area lay outside the limits of its jurisdiction and that its sovereignty did not extend further than the limits it set by its own actions. From this and other international undertakings,[177] Malaysia could have reasonably deduced at the time it delimited its territorial waters and continental shelf in 1979 that Indonesia did not claim sovereignty over the two islands. Indonesia's protest to the Malaysian Map in 1980 with regard to the ownership of Pulau Sipadan and Ligitan has to be considered as being objectionable, *inter alia,* because Malaysia, and its predecessor had for a considerable time (*possessio longi temporis*) continuously and peacefully exercised the necessary jurisdiction over the islands without opposition from another state.[178]

The alleged verbal understanding of 1969 has no standing in international law if it cannot be substantiated with more than a unilateral assertion of its existence. Unless some yet to be produced written minutes or other verifiable records of the said negotiations can be supplied, it is difficult to attribute any legal significance to the statement.

The question of binding effect accredited to oral statements has been addressed in the already-mentioned *Legal Status of Eastern Greenland* Case of 1933 where Norway argued that an oral statement made by its Foreign Minister Ihlen to the Danish representative, to the effect "*that the Norwegian Government would not make any difficulties in the settlement of the question concerning the sovereignty of Greenland,*" could not be relied on against Norway. However, the Court rejected this view, stating that a reply of this nature *is* "*beyond all dispute...binding upon the country to which the Minister belongs.*"[179]

Of a later date is the 1974 decision in the *Nuclear Test* Cases, where the Court considered the legal significance of statements made by the French President with regard to the termination of atmospheric nuclear tests in the South Pacific. The Court stated that:

> "*[w]hen it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally*

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174 For similar argumentation see *Legal Status of Eastern Greenland* Case: 53ff, where the Court found *that "the legislation fixing the limits of territorial waters...are also manifestations of the exercise of sovereign authority."*

175 See fn.104 *supra*.

176 For details see Haller-Trost, 1995.

177 *Inter alia*, not to raise the question with UK authorities when the territory was still under British control, or the agreements concluded with the Philippines in the early 1960s (see fn.117 *supra*).

178 See fn.126 *supra*and the *Legal Status of Eastern Greenland* Case: 45, quoting the *Island of Palmas* decision.

179 *Ibid*: 36, 71.

> *required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with the intent to be bound..., is binding...Of course, not all unilateral acts are binding, but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound - the intention is to be ascertained by interpretation of the act...With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form.*"[180]

However, the significant difference to the present case is that the statements made in the *Ihlen Declaration* and in the French announcements were recorded in some form or other which could be produced as proof that they were actually made.[181] This does not seem to be the case with regard to the comments made during the 1969 Malaysian - Indonesian negotiations, and no intention of a legally binding effect can be construed from these alleged remarks, especially since the result of the negotiations - the *Continental Shelf* Agreement[182] - makes no reference to any unsolved matters in the Celebes Sea. Article III of the treaty text, which states that,

> "*...[t]his agreement shall not in any way affect any future agreement which may be entered into between the two Governments relating to the delimitation of the territorial sea boundaries between the two Countries*,"

refers to the fact that the continental shelf delimitation in the Straits of Malacca and in the South China Sea were agreed upon before a bilateral treaty with regard to the territorial waters delimitation in the said areas had been concluded.[183] In contradistinction thereto, the comments made by the Indonesian foreign ministers in 1961 and 1982[184] have to be seen as having a legal effect equivalent to that of the *Ihlen Declaration.*

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180 *Nuclear Test* Case, ICJ Reports, 1974: para. 43-45.

181 i.e. the *Ihlen Declaration* was recorded by the Foreign Minister himself, while the French statements were either made in form of communiqués, at a press conference or before the UNGA.

182 See fn.28 *supra*.

183 A *Treaty on the Delimitation of the Boundary Lines of the Territorial Waters of the two Nations in the Straits of Malacca* was signed on 17 March 1970 (text in *Limits in the Sea No.50)*; no agreement has yet been concluded for the territorial waters in the South China Sea.

184 See text accompanying fns.119 and 102; while the first statement was made before the UNGA, the second has been printed in the acclaimed *Indonesian Quarterly* (a journal of policy oriented studies published by the Centre for Strategic and International Studies, Jakarta) after its original version was delivered at the Law of the Sea Discussion Panel in 1982 (see Mochtar Kusumaatmadja, 1982: 12).

## 6. Cartographic Evidence

As mentioned earlier, Indonesia also claims proof of title from existing maps of the area, perceiving such evidence as its 'trump card'. Izhar Ibrahim, the Foreign Ministry Director-General of Political Affairs, reiterated Indonesia's stand on the issue on 11 February 1995 before an Indonesian Parliamentary Commission which deals with security and foreign affairs matters, declaring that,

> "*Malaysia only started to include Sipadan and Ligitan Islands on its national map in 1969. In fact, the two islands were on Indonesia's national map before 1969...Therefore, it was Malaysia that snatched the two islands by including them on its national map in 1969. Malaysia cannot prove that Sipadan and Ligitan Islands were on its national map before 1969. This is our trump card.*"[185]

Furthermore, the Indonesian Foreign Ministry spokesman, Irawan Abidin, stated that,

> "*...the islands had long been included in new Indonesian maps...Indonesia's claim over the islands was that its maps, based on a 1891 Anglo-Dutch accord, had* ***always*** *incorporated the islands. Malaysia, by contrast only began including the islands in maps from 1969...Jakarta did not protest at the time as both countries had just ended the Confrontation period.*"[186]

The issue of cartographic evidence with regard to territorial disputes was discussed at length in the *Frontier Dispute* where the Court commented:

> "*...[w]hether in frontier delimitation or in international territorial conflicts, maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise from their intrinsic merits: it is because such maps fall into the category of physical expression of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of circumstantial kind, to establish or reconstitute the real facts...The only value [maps] possess is as evidence of an auxiliary or confirmatory kind.*"[187]

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185 As quoted by *Kompas*, 16 February 1995.

186 As quoted by *Straits Times*, 16 February 1995; emphasis added.

187 *Case Concerning the Frontier Dispute*, ICJ Reports, 1986: 582, 583; see also Separate Opinion of Judge Abi-Saab, according to whom "*maps in themselves never constitute a legal title of any kind, either principal or subsidiary*" (*ibid*: 661).

A similar view was expressed by Judge Gros in his *Declaration* following the 1977 *Beagle Channel* Arbitration, namely that cartographic evidence might only be a corroborative factor and that, if no authoritative map is attached to the actual relevant treaty signed by both parties, no useful purpose can be served by attempting to prove title on the basis of such evidence due to the lack of impartiality of the map-making authority.[188]

The *1891 Convention* makes no reference to any specific map expressing the cartographic interpretation of the treaty text. The provision in Article V, as quoted above, namely that "*the exact position of the boundary line...shall be determined hereafter* [i.e. after the date of signature]" referred to the later surveys of the actual boundary demarcations. These surveys, however, only applied to the territory west of 4°10'N on the east coast of Pulau Sebatik, which represented the very eastern terminus of the UK-Dutch border.[189] Since no map is, nor was intended to be attached to the *1891 Convention*, Indonesia's claim over the islands based on a map allegedly relating to that treaty - but drawn up at a later point of time by its own authorities - cannot be seen as a valid legal proof to establish territorial title.

Even in the unlikely event that maps would attain a degree of legal force in the present case, the Indonesian argument "*that Malaysia cannot prove that Sipadan and Ligitan Islands were on its national map before 1969*" has to be rejected as justification for title in Indonesia's favour, *inter alia*, because there is also no proof that Indonesia itself included the islands into its maps in a consistent and continuous manner. If it had, there would be no need to decide to draw a "*new national map*" as announced in February 1995.[190]

Apart from the issues raised above with regard to Indonesia's drawing of its baselines in 1957, the following has to be added concerning various maps indicating Indonesian national territory. Although access to the earlier-mentioned ABRI map of 1967, on which Indonesia apparently bases its claim, could not be obtained, there is publicly available a series of maps drafted and printed between 1963 and 1965 by the Indonesian Army Topographical Directorate titled *Atlas of Indonesian Resources (Atlas Sumber-Sumber Kemakmuran Indonesia).*

The information shown in this set ranges from data on annual rainfall and density of cultivated land to fish concentration, mineral deposits and distribution of population to maps showing the Indonesian territory. The map representing the latter, called *Wilajah Indonesia 1945-1965*,[191] shows in a very small scale[192] the boundary between Malaysia and Indonesia on Borneo by way of a line of broken crosses ('xxxx') which extends east of Pulau Sebatik approximately to the south of the Ligitan Reefs, which seem to be equivalent to the 19km-distance claim as mentioned above. Pulau Sipadan and Ligitan are not shown on these maps.

It is, however, inconceivable that the Indonesian Government can deduce territorial title from such a map because, although all maps of the series show the same symbol for international boundaries, namely a demarcation indicated by small crosses, on some maps the borderline

188 *Beagle Channel* Arbitration, 1977, text in ILM, 17: 632, 675.
189 See e.g. map attached to the *1928 Agreement* (FO 925/32035).
190 See *Kompas*, 16 February 1995. Malaysia subsequently protested to Jakarta against the publication of this 'new map' *(Japan Economic Newswire*, 9 June 1995).
191 See map No.A8; the legend actually mentions *"1950 - 1662"* [sic]
192 No information of scale used is given.

terminates on the actual east coast of Pulau Sebatik,[193] on some it terminates west of this point,[194] on some it extends for a various number of crosses to the east,[195] while on others it ends in the vicinity of Batu Tinagat on the mainland of Borneo.[196] Should the ABRI map mentioned by the Indonesian Government be part of the above set, or of equal source and quality, it has to be rejected, not only because of the legal reasons stated above, but also due to its inaccuracy and inconsistency.

Other maps, e.g. one published by the Department of Education and Culture in 1990 in the *Peta Sejarah Propinsi Daerah Kalimantan Timur* Series,[197] show on the first map titled *Indonesia (Peta 1)* the whole territory of the republic. Here, the boundary line between East Kalimantan and Sabah terminates east of Pulau Ligitan. On *Peta 2*, showing the province of East Kalimantan *(Propinsi Kalimantan Timur)*, the same international boundary ends approximately five kilometres east of Sebatik. The same limitation is shown on *Peta 18* which depicts the border together with the offshore islands for the year 1957, i.e. the year Indonesia drew its baselines. Neither Pulau Sipadan nor Ligitan are shown.

The argument that *Peta 2* and *18* only show the borders of the Bulungan district, but are not authoritative for areas outside that region has to be repudiated, since the two islands - if they are Indonesian territory - must be part of Bulungan. That this is so can be deduced from recent publications, like the *Ensiklopedi Nusantara* and the *Profil Propinsi Republik Indonesia: Kalimantan Timur*, which both list Pulau Sipadan and Ligitan now as being part of Bulungan.[198] However, in a book called *Kalimantan Membangun* published in 1979[199] which carries a foreword by the then Deputy President Adam Malik and, therefore, can be assumed to represent an official view of the government, neither Pulau Sipadan nor Ligitan are listed as Bulungan islands.

Also, Indonesia's *Gazetteer Nasional*, which records all geographical features of the country and was published in 1978 (i.e. nine years after the *Continental Shelf Agreement* with Malaysia), does not list either island as belonging to the republic.[200] Later material, published after 1980, which includes Pulau Sipadan and Ligitan in its island-register as being part of Kalimantan Timur has to be regarded as inadmissible proof for territorial sovereignty, since in international law 'correctional' measures conducted by the claimant state after a dispute crystallised are considered void of any legal effect as a claim to, or evidence of sovereignty over the territory in question, as such actions have to be seen as a stratagem taken in order to improve the claimant's legal position.[201]

Undoubtedly, there exist a number of British and Malaysian maps which do not show Pulau Sipadan and Ligitan. But this is also true for Dutch and Indonesian maps. As pointed out above, both features are of rather small size, and the scale used for maps relating to Borneo is often too small to include them. In general, it is only after the dispute arose that this otherwise

193 See e.g. maps Nos.J2 (Marine Fish, 1965) and K3 (Mineral Deposits, 1965).
194 See map No.R3 (Index Geographical Maps, 1965).
195 See map No.E1 (Corn Production, 1965).
196 See map No.E20 (Food Crops, 1965).
197 i.e. *Map Series Showing the History of the Province of East Kalimantan.*
198 See e.g. Widjiono Wasis' *Ensiklopedi Nusantara* of 1989: 547, and *Profil Propinsi Republik Indonesia, Kalimantan Timur*, 1992: 38.
199 See Tjilik Riwut, 1979: 59.
200 See *Nama-Nama Geographi*, Dokumen No.12, 1978, issued by the *Badan Koordinasi Survey dan Pemetaan Nasional.*
201 See Fitzmaurice, 1955/56: 41.

remote area of the Celebes Sea attracted greater attention, at which point Malaysia and Indonesia started consciously to also include their smaller offshore islands and reefs into their respective maps.

This does not mean that Malaysia - or the UK - did not perceive them to be under their jurisdiction before 1969. There exists, for instance, a map showing the territory of North Borneo for the year 1941 from which it can be seen that Pulau Sipadan and Ligitan were both charted as part of the British protectorate.[202] In this case, the map-making authorities took special pains to include Pulau Sipadan, although it lies actually outside the map's perimeter (Pulau Ligitan lies within the limits of the map). Since Indonesia does not deny that the UK, and subsequently Malaysia, are the legal successors to the territory formerly known as the State of North Borneo and itself attempts to make use of maps as proof for territorial title relying on Dutch maps, it would have to accord Malaysia the same right. Therefore, even in the improbable occurrence that in the present case maps should be merited with more than a corroborative factor, the allegation that "*Malaysia only started to include Sipadan and Ligitan Islands on its national map in 1969*" has to be rejected.

## 7. Attempted Dispute Settlement

In attempting to solve the issue, various steps have been undertaken.[203] But despite the existence of a General Border Committee (GBC),[204] whose task it is to determine the exact demarcation on the Borneo mainland between Sarawak and Sabah on the one hand and Indonesia on the other, both countries agreed that the islands dispute involves responsibilities different from those of the GBC.

Consequently a separate body was established in July 1991 which met at the Joint Commission Ministerial (JCM) Meeting in October 1991 where, for the first time, the dispute was formally discussed.[205] Since no consensus as to whom the islands belong could be reached, as both countries rigidly adhered to their own facts and figures produced to support their respective claims,[206] it was decided that the matter should be studied by a newly created Joint Working Group (JWG) comprising senior officials of both countries including experts in law and hydrography.[207] During its first meeting on 6 July 1992, it emerged that the committee's task was not only to find a solution to the Sipadan/Ligitan dispute, but that fifteen other unsolved

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202 See map *The State of North Borneo, 1941* (GSGS, No.4311) published by LHQ Cartographic Coy. Aust. Survey Corps, October 1944.

203 *Inter alia*, discussions between Prime Minister Mahathir and General Murdani during the former's visit to the Natuna Islands in September 1985, and President Suharto's meeting with Prime Minister Mahathir in 1992, 1993 and 1994; however, no breakthrough towards a settlement was reached during these negotiations.

204 Sometimes referred to as the Joint Border Committee (JBC). Convened in 1975, this committee has marked, to the present, 38% of the 2,460km mutual border between Kalimantan and Malaysia *(Business Times*, 26 January 1995), i.e. approximately 46km per year. As the terrain concerned is extremely difficult to survey, both countries have consented *"in their mutual interest to undertake the boundary demarcation work without any time constraints...even 25 years may not be sufficient to complete the work"* (Indonesian Armed Forces Vice-Admiral Sudibyo Rahardjo as quoted in *Business Times*, 13 June 1991).

205 *The Star*, 7 June 1991.

206 *New Straits Times*, 12 October 1991.

207 *Ibid*.

bilateral problems were put on the agenda.[208] How far a solution to one issue is linked to the successful conclusion of another is not clear, but it seems that, should the results be interdependent, the islands dispute will take rather a long time to be solved. In the meantime, it has transpired that neither country, despite an earlier agreed urgency to conclude the territorial question, has put forward a definite timeframe for the solution of the dispute,[209] and neither the JCM nor the JWG seems to have made any substantial progress despite their various meetings and exchange of documents.[210] At the time of writing, no solution on a bilateral level is in sight. On the contrary, it seems that not only has a stalemate occurred,[211] but also that both sides have hardened their stance and now display an increasingly inflexible attitude.[212]

All intra-ASEAN declarations dealing with regional security and cooperation stress the need to strengthen bilateral cooperation, good neighbourliness, abstention from the threat or use of force, and adherence to the principles of respecting the sovereignty and territorial integrity of other countries.[213] However, despite the requirement "*to prevent disputes from arising*", as expressed in Article 13 of the *Treaty of Amity and Cooperation in Southeast Asia*,[214] the controversy over Pulau Sipadan and Ligitan - rather than being resolved - has instead gained momentum since 1991. Despite repeated declarations from either side to settle the issue by peaceful negotiations without resorting to any acts of aggression,[215] Malaysia has warned that,

> "*...[t]erritorial claims if not handed wisely, could spark military confrontation; [they] could lead to war if not handled judiciously and immediately.... [W]e have to accept the fact that at times [i.e. when diplomacy fails], military force is the only answer,*"[216]

while a spokesperson for the Indonesian Navy declared:

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208 The others relating, *inter alia*, to the questions of piracy, smuggling, the influx of Indonesian illegal workers into Malaysia, illegal border crossings into Sarawak and Sabah, illegal fishing, the repatriation of Acheh refugees, the delimitation of an EEZ, the survey and safety of ships passing through the Straits of Malacca, and questions of trade, commodities, tourism, air services, and education. Solutions to some of these issues have been addressed in a number of bilateral MOUs signed during 1993.

209 *Business Times*, 8 June 1991.

210 *The Star*, 9 July 1992.

211 *Ibid*.

212 The second meeting of the JWG, scheduled over two days (26-27 January 1994), lasted but half an hour *(New Straits Times*, 27 January 1994). Discussions on the island dispute during the third JCM meeting scheduled for 26-28 May 1994 were postponed due to Ali Alatas' by-pass operation *(FEER*, 9 June 94); furthermore, the Head of the Malaysian delegation mentioned that the JCM might *"not be the right body to discuss the claims" (Business Times*, 30 May 1994).

213 See e.g. Preamble of the *Bangkok Declaration* of 8 August 1967 (text in Rieger, 1991: 101); Preamble of the *Kuala Lumpur Declaration on the Zone of Peace, Freedom and Neutrality* of 27 November 1971 (ZOPFAN, text *ibid*: 59), and others.

214 Signed on 24 February 1976 (text in ILM, 27: 610).

215 *Business Times*, 9 June 1991, and *New Straits Times*, 29 January 1992. Malaysia's apprehension, voiced during the 20th GBC Meeting in January 1992 regarding *"a recent build-up of Indonesian warships and aircraft around the islands had raised fears of untoward incidents between the two countries"*, was responded to by Indonesia's willingness *to "reduce its military units to the barest minimum" (New Straits Times*, 31 January 1992) and an assurance from both sides of *"no use of force against citizens of either country" (Business Times*, 29 January 1992). In the preceding year, the 100-tonne Malaysian fishing vessel *MV Pulau Banggi*, belonging to the state-owned Sabah Fish Marketing Sdn.Bhd. including its 13-member crew, had been seized by Indonesian forces c.5nm off Pulau Sipadan and taken to the East Kalimantan naval station at Tarakan *(New Straits Times*, 12 July 1991). Furthermore, an Indonesian customs boat was reported to have landed on Pulau Sipadan during the same month (*ibid*, 16 July 1991). Recurring Indonesian naval patrols near and around both islands have been lately explained as *"a logical thing"*, because, *"geographically, [the islands] are located on the northern latitude of Indonesian territorial waters"* (Head of Indonesian Navy Information Unit, Colonel Totok Murdho Laksito as quoted by *Kompas*, 16 February 1995). This statement, however, does not rely on facts: even Pulau Sipadan (the island closer to Indonesian territory) lies at a distance of 35nm from the seaward demarcation of the territorial sea as declared by Indonesia.

216 Malaysian Chief of Defence Force General *Tan Sri* Yaacob Mohd Zain, as quoted in *Straits Times*, 27 February 1993.

> "*We have stepped up patrols in the area...Those islands belong to us and we will defend them. We always defend our state against any possible problem.*"[217]

Although previously both countries made it quite clear that a solution will be sought strictly on a bilateral basis and no adjudication by third parties will be undertaken,[218] Malaysia proposed to have the dispute resolved by the ICJ[219] as the last JWG Meeting in September 1994, ending again in a deadlock, did not produce any progress towards a result.[220] Malaysia is of the opinion that,

> "*...[s]ince it is very clear that both parties cannot accept each other's claims and cannot reach a decision, it is natural that we go to a third party.*"[221]

Whether Indonesia, which still prefers a solution by way of bilateral negotiations,[222] or - failing such - a decision by the ASEAN High Council,[223] will agree in the end to Malaysia's suggestion, has to be seen.[224] The High Council, referred to by Indonesia, is provided for in Chapter IV of the above-mentioned *Treaty of Amity and Cooperation* of 1976.[225] The relevant articles read:

> "*Article 14: To settle disputes through regional processes, the High Contracting Parties shall constitute, as a continuing body, a High Council comprising a Representative at ministerial level from each of the High Contracting Parties to take cognisance of the existence of disputes or situations likely to disturb regional peace and harmony.*
>
> *Article 15: In the event no solution is reached through direct negotiations, the High Council shall take cognisance of the dispute or the situation and shall recommend to the parties in dispute appropriate means of settlement such as good office mediation, inquiry or conciliation. The High Council may however offer its good offices, or upon agreement of the parties in dispute constitute itself into a committee of mediation, inquiry or conciliation. When deemed necessary the High Council shall recommend appropriate measures for the prevention of a deterioration of the dispute or the situation.*
>
> *Article 16: The foregoing provision of this Charter shall not apply to a dispute unless all the parties to the dispute agree to their application to that dispute. However, this shall*

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217 *Business Times*, 15 October 1993. That these statements are not to be taken as mere rhetoric can be seen from an unreported incident during Najib Tun Razak's visit to Pulau Sipadan in 1994 when the military situation became especially tense, while a few other stand-offs between the two navies have occurred over the last few years *(Reuters World Service*, 6 June 1995).

218 *New Straits Times*, 12 October 1991, and *The Star*, 18 July 1993.

219 *Business Times*, 12 September 1994.

220 After the meeting, the Head of the Malaysian delegation remarked *"...the time has come for us to accept the inevitability that this, insofar as the officials' level is concerned, is the last meeting." (Straits Times*, 9 September 1994).

221 Mahathir as quoted in *Straits Times*, 14 September 1994. This statement was made at the same time when Malaysia agreed with Singapore to have the territorial dispute over Pulau Batu Puteh in the Singapore Straits adjudicated by the ICJ (see fn.2).

222 *Straits Times*, 10 September 1994.

223 *New Straits Times*, 17 September 1994.

224 Although in September 1994, Indonesia rejected the Malaysian proposal publicly *(Straits Times*, 17 September 1994), of late, Ali Alatas has hinted *"that Indonesia might refer the dispute to the ICJ if diplomatic measures fail";* these measures may now include a political solution *(Business Times*, 27 June 1995).

225 That this treaty, to which all ASEAN countries are members and to which Vietnam, Laos and Papua New Guinea have acceded, is part of the ASEAN Cooperation framework, can be derived from Section *A. Political*, Article 2 of the *Declaration of ASEAN Concord* (signed on the same day as the *Treaty of Amity and Cooperation*; text in Rieger 1991: 105) and from the *Manila Declaration* (see fn.1 *supra*).

*not preclude the other High Contracting Parties not party to the dispute from offering all possible assistance to settle the said dispute. Parties to the dispute should be well disposed towards such offers of assistance.*

*Article 17: Nothing in this Treaty shall preclude recourse to the modes of peaceful settlement contained in Article 33(1) of the Charter of the United Nations. The High Contracting Parties which are party to a dispute should be encouraged to take initiatives to solve it by friendly negotiations before resorting to the other procedures provided for in the Charter of the United Nations.*"

To the present, the High Council, comprising the ASEAN foreign ministers, has never been convened, and it is open to question whether it will agree to play the role as envisaged in the treaty text taking into account Malaysia's disapproval to have the present dispute brought before this body for mediation and/or arbitration. The reason given why Malaysia is favouring a judgement by the World Court instead, is that,

> "*Malaysia chose the International Court so that the other Asean countries would not be burdened with the pain of deciding whom the islands belong to as both Malaysia and Indonesia are their Asean colleagues.... [T]he Asean High council also could not be expected to play a neutral role since Malaysia also has territorial issues with other Asean members such as Singapore and the Philippines...We don't want to trouble other Asean members on this issue. This method can also jeopardise relations between Malaysia and Indonesia and other members of the council. Frankly, this suggestion to refer the issue to the council is difficult for Malaysia to accept.*"[226]

Malaysia probably has also further reservations against submitting the case to the ASEAN High Council, because firstly, the powers of this body are rather vaguely defined and the principles on which a decision is to be reached might not necessarily be founded on legal arguments.[227] Secondly, because it seems apparent from the text that the High Council can do no more than to make recommendations, but no obligation exists that the parties to a dispute are bound to comply with the result.[228]

That Indonesia will agree to an adjudication by the ICJ is presently doubtful, taking its past state practice into account. When Portugal tried to bring a case against Indonesia before the World Court in 1991 concerning the annexation of East Timor, Portugal was unsuccessful, since Indonesia does not accepted the compulsory jurisdiction of the Court, neither unconditionally, nor upon the condition that it will accept the jurisdiction as being compulsory in relation to any other state willing to accept the same obligation.[229]

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226 Malaysian Foreign Ministry Secretary-General *Tan Sri* Ahmad Kamil Jaafar (head of the JWG) as quoted in *Straits Times*, 13 September 1994, and *Business Times*, 12 September 1994.

227 No equivalent to Article 38 of the ICJ Statutes exist.

228 Again, no analogous stipulations to Article 59 of the ICJ Statutes are included in the treaty text.

229 This right is embedded in Article 36.2 of the ICJ Statute. Subsequently, Portugal instituted proceedings against Australia concerning the rights of the East Timorese people with regard to the so-called *Timor Gap Treaty* between Indonesia and Australia. However, in the recent judgement, the Court held that it could not adjudicate upon the case in the absence of Indonesia's consent, as the very subject matter involved an examination of Indonesia's rights (see *Case Concerning East Timor*, ICJ *Unofficial Communiqué* No.95/19 of 30 June 1995).

It also seems unlikely that Indonesia will set a precedent by accepting the Court's jurisdiction by a so-called *compromis* in an eventual Celebes Islands case.[230] Whether it will change its position might depend on the result of a case which is expected to be submitted to the ICJ in the near future, namely the dispute between Malaysia and Singapore concerning Pulau Batu Puteh (Pedra Branca), where the question of territorial ownership also dates back to the interpretation of documents during the colonial period and to state practice.[231] However, unless Indonesia can provide different legal argumentations than those discussed in this study, it seems that it does not have valid title to Pulau Sipadan and Ligitan when possession is determined by the rules of territorial acquisition as agreed to in international law, and that therefore Malaysia is the rightful owner.

This is a situation Indonesia seems increasingly to realise, as of late opinions have been voiced in its media that "*bilateral talks should lead to a compromise to achieve an acceptable solution without either party having to lose face.*"[232] Whether such an approach will lead to a condominium solution[233] or one that is motivated by the powers of economics, which have been most evident since 1994,[234] has to be seen. The latter, activated *inter alia* by the recent establishment of the East ASEAN Growth Area (EAGA),[235] might also serve to improve the sometimes strained *ASEAN Spirit* and the frequently invoked *serumpun factor*,[236] whose frameworks have been tarnished by the fact that two predominantly Malay members of ASEAN with a land area of 1,648,000sq.km and 332,965sq.km respectively, are unable to reach agreement over the ownership of a territory concerning a combined area of less than half a square kilometre.

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230 The only treaty that could be found in which Indonesia agreed to refer a dispute to the ICJ is the *Treaty of Friendship between The Republic of the Philippines and the Republic of the Indonesia* of 1 June 1951. While *"disputes relating to matters which are essentially within the domestic jurisdiction"* are exempted, the question *"whether the dispute is international in character or is exclusively within the domestic jurisdiction...should be submitted for decision to the International Court of Justice, unless the Parties agree to have the question decided by other means."* (see Article II thereof).

231 See fn.2; however proceedings have not, as yet, been instituted.

232 As reported by Indonesian radio on 10 June 1995 referring to an editorial in the Indonesian daily *Jayakarta.*

233 In international law a condominium is defined as *"a piece of territory consisting of land or water [which] is under the joint tenancy of two or more states, these several states exercising sovereignty conjointly over it"*; for details, see Oppenheim, 1963: 453. For instance, in 1899 Great Britain and Egypt established a condominium over the Sudan; the United States and Germany over Samoa in the same year, and in 1914 Great Britain and France over the New Hebrides. See also the creation of a condominium *sui generis* in the Case concerning the *Land, Island and Maritime Frontier Dispute* (ICJ Reports, 1992 at para. 369-420, *Unofficial Communiqué* No.92/22: 28ff).

234 e.g. Malaysia's reverse investments in Indonesia in 1994 grew by 978% to M$ 603.39 million from M$ 55.98 million the year before *(Business Times*, 7 March 1995; (US$ 1 ~ M$ 2.5)).

235 Presently three intra-ASEAN growth areas are planned of which the Southern Triangle (also known as *IMS-GT)* comprises certain Riau Islands together with parts of southern Sumatra (Indonesia), Johore (Malaysia), and Singapore; while the Northern Triangle *(IMT-GT)* includes North Sumatra (Indonesia), parts of northwest Malaysia and Southern Thailand. The eastern area *(BIMP-EAGA)* encompasses Brunei; northern Sulawesi, Maluku, East and West Kalimantan (Indonesia); Labuan, Sarawak and Sabah (Malaysia); Palawan and Mindanao (Philippines). Although in November 1994, the first mechanisms for the EAGA were established in deciding to set up an East ASEAN Business Council for joint developments in tourism, telecommunication, fisheries, forests, shipping and human resources, and an overhaul and expansion of air and sea route among *"EAGA cities" (Straits Times*, 20 November 1994), there seems to be evidence that Indonesia is trying to dominate the events; see, *inter alia*, its earlier cancellation of the proposed meeting in June 1994 in Davao (Mindanao) in reaction to an international *Asia-Pacific Conference on East Timor* which was to be held in Manila during the same month *(FEER*, 2/16 April 1994). Jakarta perceived the event as an interference of an ASEAN member state in its own internal affairs. Of late, however, efforts have been intensified to get the project off the ground, despite recent guerrilla attacks by the Moro Islamic Liberation Front in southern Mindanao *(Straits Times*, 25 April 1995): during the third EAGA ministerial meeting in Sarawak in June 1995, fourteen MOUs worth a total of some M$400 million (c. US$160 million) were signed, of which a M$100 million joint venture between Malaysia and Indonesia for the development of an 18,000-hectare oil palm plantation in Kalimantan was the most notable *(Xinhua News Agency*, 17 June 1995).

236 *serumpun* meaning '*same stock'*. Reference to this special bond between the two Malay nations, based on common roots and heritage, was evoked in respect of the status of bilateral relations e.g. by Abdullah Zawawi Haji Mohamad (former Malaysian Ambassador to Indonesia) in a paper presented at the *Second Malaysia-Indonesia Conference* (Penang, December 1990), where he stressed that *"the serumpun factor has indeed given us a commonality of view and perceptions"* (author holds copy thereof).

**Figure 1:** ***Map of Southeast Asia***

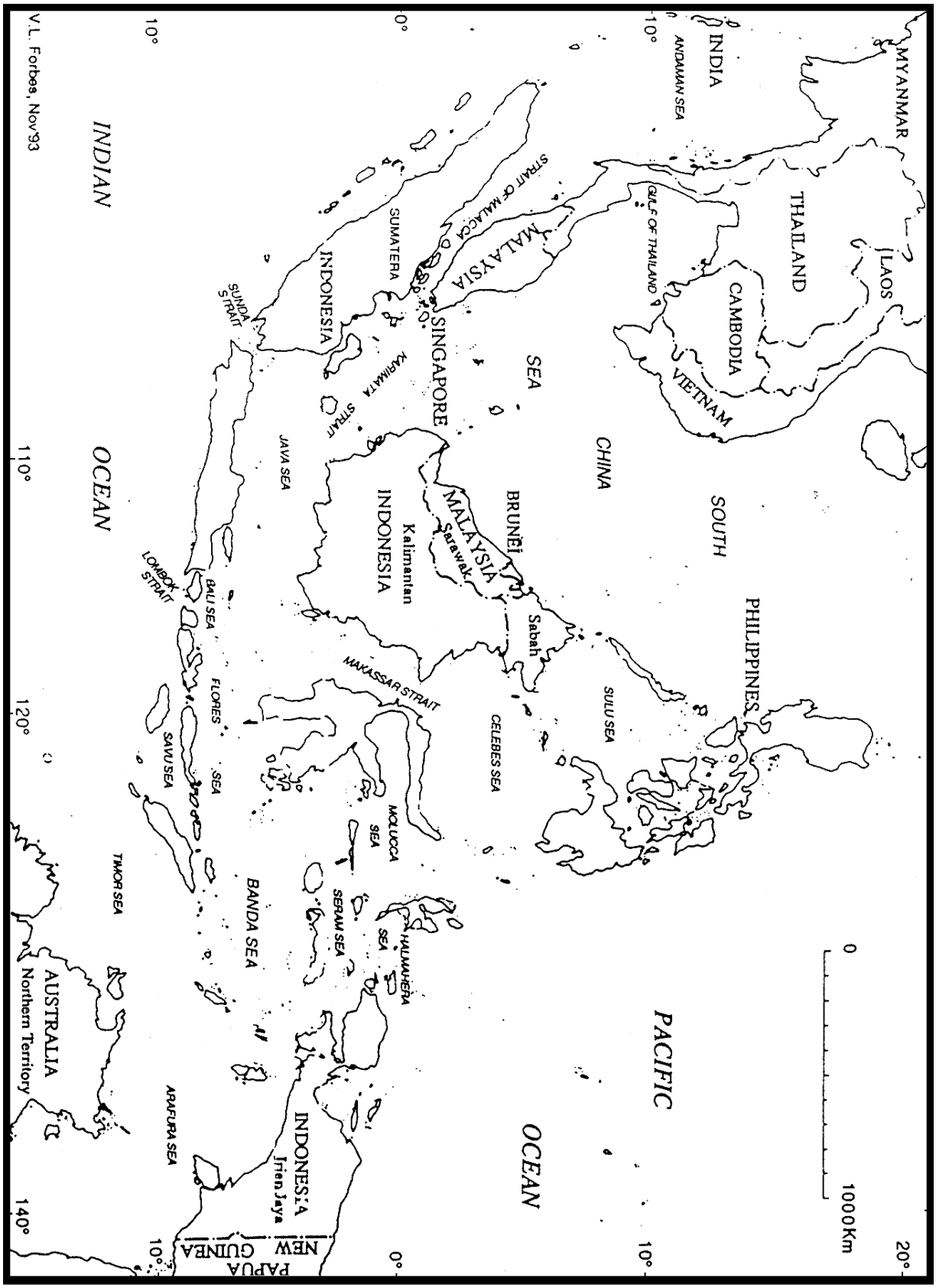
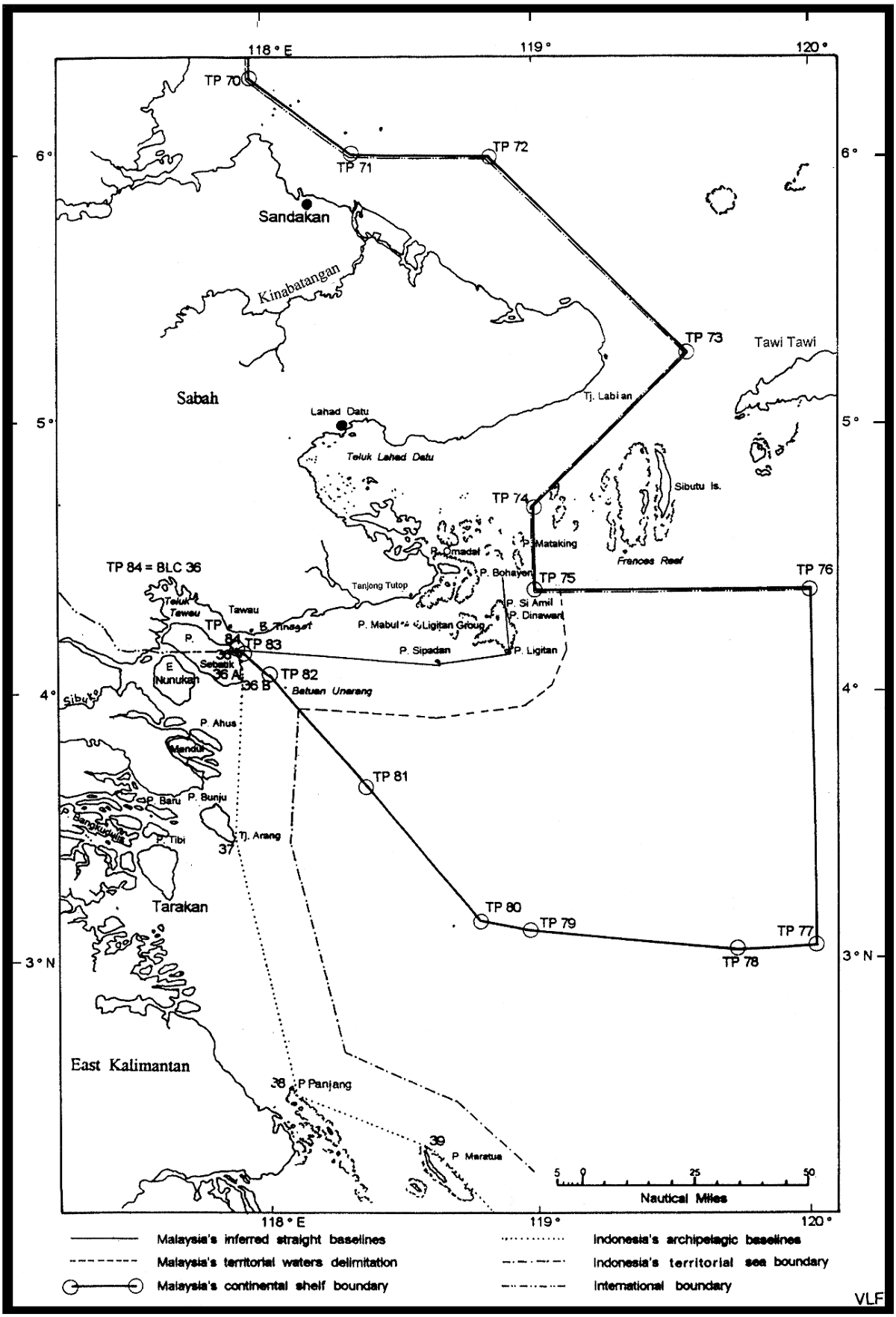
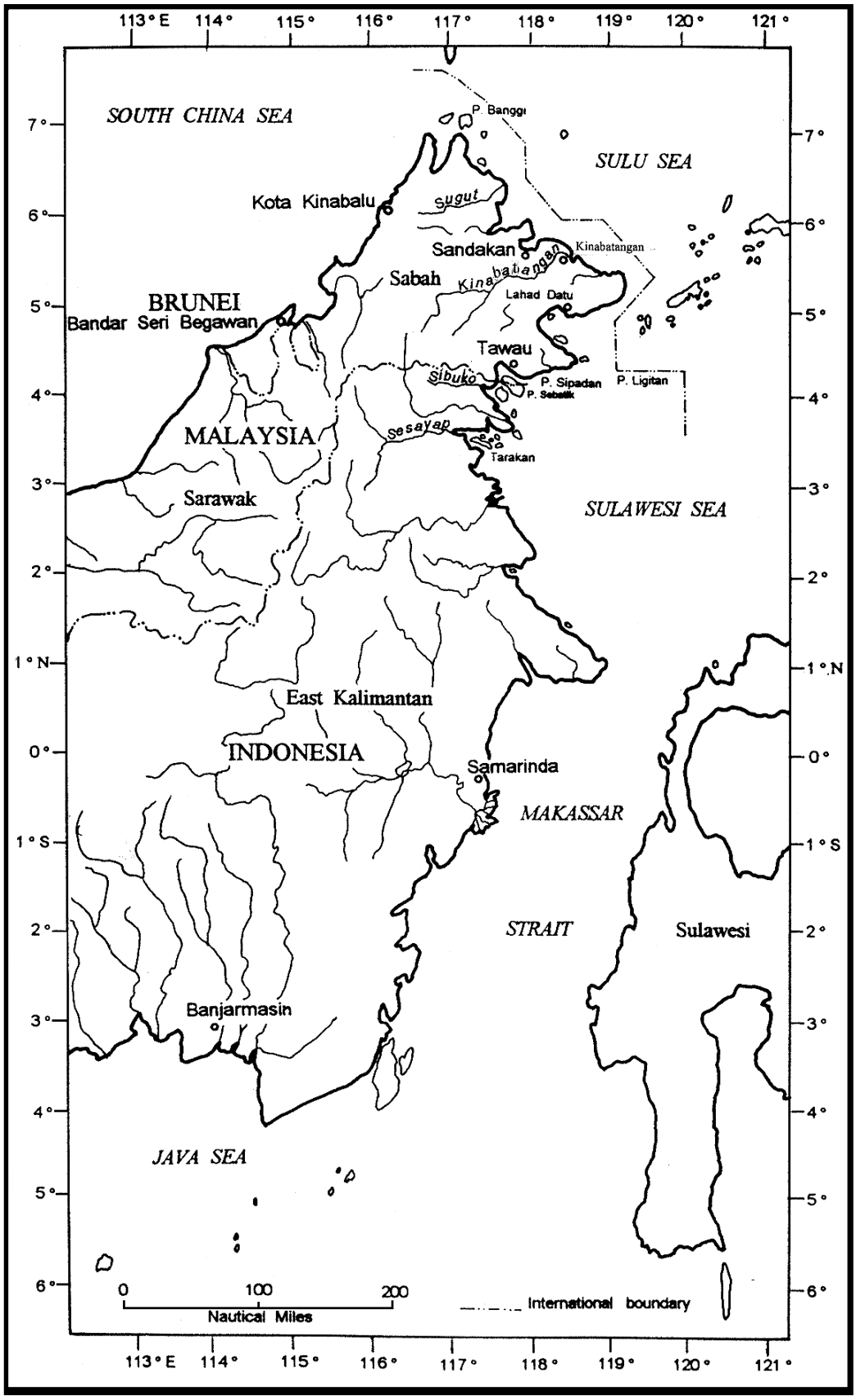


**Figure 2:** ***Malaysia's and Indonesia's Maritime Delimitations in the Celebes Sea***



## Figure 3: *East Borneo*



# Selected Bibliography

Adatrechtbundels (1917) *Borneo* (Vol.XIII), 's-Gravenhage: Martinus Nijhoff.

Algemeen Rijksarchief, Den Haag; various documents.

Allen, J. de V., Stockwell, A.J. and Wright, L.R. (eds.) (1981) *A Collection of Treaties and Other Documents Affecting the States of Malaysia, 1761-1963* (Vol.II), New York: Oceana Publications Inc.

Allied Geographical Section (1944) *Southwest Pacific Area Terrain Study* (No.90).

Baroto, A. (1993) 'Similarities and Difference in Malaysia-Indonesia Relations: Some Perspectives', *Indonesian Quarterly*, XXI, 2: 151-70.

Blaustein, A.P. and Flanz, G.H. (eds.) (1990) *The Constitutions of the Countries of the World: Indonesia* (Vol.VIII), Dobbs Ferry: Oceana Publications Inc.

Blink, H. (1907) *Nederlandsch Oost- en West-Indië*, Leiden: E. Brill.

Bowett, D.W. (1957) 'Estoppel before International Law Tribunals and its Relation to Acquiescence', *BYIL*, XXXIII: 170-202.

Crawfurd, J.A. (1856/1971) *Descriptive Dictionary of the Islands and Adjacent Countries* (Historical Reprints), Kuala Lumpur: Oxford University Press.

Darymple, A. (1792) 'Essay Towards an Account of Sulu', Reprinted in *JIA*, 1849, III: 512-567.

*Encyclopædie van Nederlandsch-Indië* (1894-1919), 's-Gravenhage: Martinus Nijhoff.

Fitzmaurice, G.G. (1955-56) 'The Law and Procedure of the International Court of Justice, 1951-54: Points of Substantive Law', Part II in *BYIL*, XXXII: 20-96.

Haller-Trost, R. (1993) 'Historic Legal Claims: A Study of Disputed Sovereignty over Pulau Batu Puteh (Pedra Branca)', *Maritime Briefing*, Vol.1, 1, Durham: International Boundaries Research Unit, Durham University.

Haller-Trost, R. (1994) 'The Brunei-Malaysian Dispute Over Territorial and Maritime Claims in International Law', *Maritime Briefing*, Vol.1, 3, Durham: International Boundaries Research Unit, Durham University.

Haller-Trost, R. (1996) 'Some Comments on the 'Territorial Sea and Continental Shelf Map' of Malaysia', *Ocean Yearbook 12* (in publication), Chicago: Chicago University Press.

Hamzah, B.A. (1984) 'Malaysia and the Law of the Sea: Post-UNCLOS III Issues', in: Park, Choon-ho and Park, Jae Kyu (eds.) (1987) *The Law of the Sea: Problems from the East Asian Perspective*: 356-364, (Proceedings of the Law of the Sea Workshop, Seoul, July 1984), Honolulu: LSI.

van Hulstijn, P. (1926) *Van Heutsz en de Buitengewesten*, s'-Gravenhage: Luctor et Emergo.

Hydrographer of the Navy (1978) *Philippine Islands Pilot* (NP 33), Taunton: Hydrographic Department.

Indonesia (1963-65) *Atlas of Indonesian Resources (Atlas Sumber Sumber Kemakmuran Indonesia)*, Jakarta: Indonesian Army Topographical Directorate.

Indonesia (1978) *Gazetteer Nasional: Nama-Nama Geografi*, Dokumen No.12, 1978, Jakarta: Badan Koordinasi Survey dan Pemetaan Nasional.

Indonesia (1986) *Peta Sejarah Propinsi Daerah Kalimantan Timor*, Jakarta: Departemen Pendidikan dan Kebudayan.

Indonesia (1990) *Peta Suku Bangsa di Pulau Kalimantan*, Jakarta: Departemen Pendidikan dan Kebudayan.

Irwin, G. (1955) *Nineteenth Century Borneo*, 's-Gravenhage: Martinus Nijhoff.

Iwan Gayo (1990) *Buku Pintar Nusantara*, Jakarta: Penerbit Upaya Warga Negara.

Jennings, R.Y. (1963) *The Acquisition of Territory in International Law*, Manchester: Manchester University Press.

Kennedy, J. (1970) *A History of Malaysia*, New York: Macmillan.

Koninklijk Nederlandsch Aardrijkskundig Genootschap (1922) *De Zeeën van Nederlandsch Oost-Indië*, Leiden: E. Brill.

Leifer, M. (1978) *International Straits of the World: Malacca, Singapore, Indonesia*, Alphen aan den Rijn: Sijthoff & Noordhoff.

MacGibbon, I.C. (1958) 'Estoppel in International Law', *ICLQ*, 7: 468-513.

Mackie, J.A.C. (1974) *Konfrontasi. The Indonesia-Malaysia Dispute 1963-1966*, Kuala Lumpur: Oxford University Press.

Maxwell, W.G. and Gibson, W.S. (1924) *Treaties and Engagements Affecting the Malay States and Borneo*, [London]: Published by Authority (printed by Jas Truscott & Son).

Meilink-Roelofsz, M.A.P. (1962) *Asian Trade and European Influence*, The Hague: Martinus Nijhoff.

Mochtar Kusumaatmadja (1982) 'The Concept of the Indonesian Archipelago', *Indonesian Quarterly*, X, 4: 12-26.

Mochtar Kusumaatmadja (1991) 'Joint Development of Oil and Gas by Neighbouring Countries', in: Couper, A. and Gold, E. (eds.) (1993) *The Marine Environment and Sustainable Development: Law, Policies, and Science*, 248-252, (Proceedings 25th LSI Annual Conference, Malmö, August), Honolulu: LSI.

Moore, J.B. (1898) *History and Digest of the International Arbitration to Which the United States Has Been a Party*, Vol.V, Washington, D.C.: US Government Printing Office.

Oppenheim, L.F.L. (1963) *International Law,* Vol.I, 8th ed., London: Longmans.

*Profil Propinsi Republik Indonesia, Kalimantan Timur* (1992), Jakarta: Yayasan Bhakti Wawasan Nusantara.

Public Record Office, London; various documents.

Reinhardt, J.M. (1971) *Foreign Policy and National Integration: The Case of Indonesia*, Monograph Series No.17, New Haven: Yale University Southeast Asia Studies.

Rieger, H.C. (compl.) (1991) *ASEAN Economic Cooperation* (Handbook), Singapore: ISEAS.

Roberts-Wray, K. (1966) *Commonwealth and Colonial Law*, London: Stevens & Sons.

Schiller, A.A. (1955) *The Formation of Federal Indonesia, 1945-1949,* The Hague: van Hoeve Ltd.

Schrieke, J.J. (1940) *Inleiding in het Staatsrecht van Nederlands-Indië*, Haarlem: Tjeenk Willink & Zoon.

Schwarzenberger, G. (1957) 'Title to Territory: Response to a Challenge', *AJIL* 51:308-24.

Siahaan, N.H.T. and Suhendi, H. (eds.) (1989) *Hukum Laut Nasional,* Jakarta: Penerbit Djambatan.

Simorangkir, J.C.T. and Mang Reng Say (1980) *Around and About the Indonesian Constitution of 1945* (Tentang dan Sekitar Undang-Undang Dasar 1945), Jakarta: Penerbit Djambatan.

Sukarno (n.d.) *Indonesia's Political Manifesto 1959-1964* (Tahun 'Vivere Pericoloso'), Jakarta: Prapantja: 281-328.

Supomo, R. (1954/1964) *The Provisional Constitution of the Republic of Indonesia* (trs. by G.N. Jones), Ithaca: Cornell University Press.

Sutopo, A.R. (1991) 'Relations Among Indonesia, Malaysia and Singapore: From Confrontation to Collaboration and Re-alliance', *Indonesian Quarterly,* XIX, 4: 326-43.

Syatauw, J.J.G. (1961) *Newly Established States and the Development of International Law,* The Hague: Martinus Nijhoff.

Tarling, N. (1978) *Sulu and Sabah,* Kuala Lumpur: Oxford University Press.

Tjilik Riwut (1979) *Kalimantan Membangun*, (Hak Pengarang Dilindungi oleh Undang-Undang), n.p.

Treacher, W.H. (1887/1890) 'British Borneo. Sketches of Brunai, Sarawak, Labuan and North Borneo', *JSBRAS,* XIX: 13-74 and XXI: 19-121.

United Nations (1989) *Multilateral Treaties*, New York: UN.

United States Department of State, *Limits in the Seas,* No.1, 1970; No.35, 1971; No.50,1973; Washington, D.C.: Office of the Geographer.

van Vollenhoven, C. (1917) 'Bestuur', in: *Encyclopædie van Nederlandsch-Indië,* Vol. I: 279-88.

Warren, J.F. (1981) *The Sulu Zone 1768-1989,* Singapore: Singapore University Press.

Westra, H. (1927) *De Nederlandsch-Indische Staatsregeling,* 's-Gravenhage: Martinus Nijhoff.

Widjiono Wasis, (ed.) (1989) *Ensiklopedi Nusantara,* Jakarta: Mawar Gempita.

Wong, M.P. (1991) *Sipadan. Borneo's Underwater Paradise,* Singapore: Odyssey Publishing.

Newspapers:

*Akhbar Sinar Harapan* (Indonesia)
*Asiaweek* (Hong Kong)
*Business Times* (Malaysia)
*Far Eastern Economic Review* (Hong Kong)
*Japan Economic Newswire* (Japan)
*Jayakarta* (Indonesia)
*Kompas* (Indonesia)
*Reuters World Service* (UK)
*The New Straits Times* (Malaysia)
*The Star* (Malaysia)
*The Straits Times* (Singapore)
*Xinhua News Agency* (People's Republic of China)