

## **Dispute Resolution through Third Party Mediation: Malaysia and Indonesia**

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**Abstract:** Since independence, Malaysia has been involved in territorial disputes and overlapping maritime claims with almost all its neighbours. Some of these disputes were resolved through bilateral and multilateral treaties. However, Malaysia and Indonesia settled the dispute over Sipadan-Ligitan islands by referring the issue to the International Court of Justice (ICJ). This high sense of civility shown by the two countries need to be analysed and appreciated. Documentary analysis shows that the consideration of the geopolitical conditions, the state of bilateral relations the disputing countries were enjoying, security problems, the lack of progress in settling disputes through the bilateral efforts and the weaknesses inherent in ASEAN's dispute settlement mechanism made the two parties to refer their dispute to the ICJ rather than to the ASEAN High Council (AHC). The ICJ's decision, delivered in 2002, was accepted by the two parties as stipulated in the referral agreement.

Malaysia, with a total area of 330,252 square kilometres (sq. km), is composed of two land masses: West Malaysia or Peninsula Malaysia and East Malaysia on Borneo Island.<sup>1</sup> The two parts are separated by the South China Sea with a usual flight distance of 920 nautical miles (nm) or 1711 kilometres (km). With its coastline of some 4,675 km (i.e. West Malaysia 2,068 km, East Malaysia 2,607 km), Malaysia's geographical condition exemplifies the most common boundary problems faced by coastal countries throughout Southeast Asia. Bordered by Thailand, Indonesia, Singapore and Brunei, Malaysia is involved in territorial disputes and overlapping maritime claims with almost all its neighbours. Malaysia's territorial and maritime disputes are located in the Gulf of Thailand, the Andaman

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Sea, the Straits of Melaka, the Straits of Singapore, the South China Sea, the Sulu Sea and the Celebes Sea.

Malaysia (then Malaya) became independent on August 31, 1957. Three years later, on December 21, 1960, the country acceded to the first United Nations Convention, Law of the Sea (UNCLOS I–1958), adopted its Continental Shelf Act on July 28, 1966 and proclaimed the extension of its territorial sea from 3 nm to 12 nm on August 2, 1969. Ten years later, on December 21, 1979 Malaysia published its new map called *Peta Baru Menunjukkan Sempadan Perairan dan Pelantar Benua Malaysia*<sup>2</sup> (New Map Showing the Territorial Waters and Continental Shelf Boundaries of Malaysia) and officially proclaimed its Exclusive Economic Zone (EEZ) on April 25, 1980.

The release of *Peta Baru* has created tension and its claim of various islands has been disputed by at least eight of Malaysia's neighbouring countries. Malaysia adopted several methods in dealing with the disputes. Among others, Malaysia signed an agreement with Indonesia on both continental shelf boundaries (CSB) on October 27, 1969.<sup>3</sup> This was followed by a tripartite agreement with Indonesia and Thailand delimiting their CSB in the northern part of the Straits of Melaka on December 21, 1972.<sup>4</sup> Another treaty between Malaysia, Indonesia and Thailand for joint resource development in the Gulf of Thailand was signed in 1978.<sup>5</sup> Malaysia also signed a treaty demarcating its maritime boundary with Singapore in the Straits of Johor on August 7, 1995.

At that time, Malaysia still needed to solve several territorial disputes involving such as Sabah, Sipadan-Ligitan, Batu Puteh, Lawas, Limbang and the Spratlys. Malaysia decided to settle the disputes over the Sipadan-Ligitan Islands through the International Court of Justice (ICJ) instead of the ASEAN High Council (AHC). The purpose of this study is to understand the nature of the Sipadan-Ligitan dispute and to analyze the factors that influenced Malaysia's decision to settle the dispute through the ICJ rather than the AHC.

### **Geography of Sipadan-Ligitan Islands**

The Sipadan-Ligitan Islands are situated in the Celebes (Sulawesi) Sea off the southeastern coast of the East Malaysian state of Sabah. The two

islands are approximately 15.5 nautical miles apart, and their combined surface area is only 0.1 sq. km (see Map).<sup>6</sup>

Sipadan's coordinates are 4° 07'N, 118° 38'E. It is located at 7 and a half nautical miles (nm) south of the Malaysian Mabul Island, 7 nm southeast of the Malaysian Kapalai Island, 14 nm from Tanjung Tutop of Sempurna and 40 nm off the southern part of the Indonesian Island of Sebatik.<sup>8</sup> Sipadan is physically much larger than Ligitan with a surface area of 0.031 sq. km (7.68 acres). It is unique in that, in contrast to the surrounding reefs, it is the only deep-water oceanic island that does not form part of the continental shelf but rests on top of an extinct volcanic sea mountain cone that rises up to 600 to 700 metres or 2,000 feet from the seabed.<sup>7</sup> Sipadan is ecologically rich and was officially declared a bird sanctuary in 1933. Due to its diverse marine life, Sipadan is considered to be the world's best diving spot. It is not permanently inhabited but supports some vegetation and trees and has been a favourite spot for local fishermen and turtle egg collectors coming from the nearby Malaysian Dinawan to the north of Ligitan Island. It has a lighthouse to its south.

Ligitan Island's coordinates are 4° 09'N, 118° 53'E. It is located some 21 nm from the Malaysian Tanjung Tutop of Sempurna, 12 nm east of Kapalai Island and 15 nm east of Sipadan Island. It constitutes part of the largest and easternmost reef system of the Ligitan Group.<sup>9</sup> The whole reef system, mostly submerged reef, stretches approximately 20 km from north to south and measures 15 km at its widest point from east to west.<sup>11</sup> Ligitan Island itself is surrounded—north and south—by a group of Indonesian islands with the nearest being 55 nm off the southern part of the Indonesian Sebatik Island, 110 nm south of Maratua Island and approximately 130 nm off the northern Sulawesi group of Sangihe and Kawio Islands.<sup>10</sup> The nearest Malaysian island is Dinawan which is 8.5 nm from the northern tip of the reef. It is inhabited but the only life form it supports is some low bushes and trees. While it is not as popular a tourism spot as is Sipadan, it is frequented regularly by Malaysian fishermen. Like Sipadan, it has a lighthouse on its southern tip.

### **Historical Background of the Sipadan-Ligitan Islands Dispute**

On December 29, 1877, Baron Gustav von Overbeck, Consul to the Austro-Hungarian Empire in Hong Kong, managed to get a 10-

year lease renewal of North Borneo concessions from Abdul Mumin, the Sultan of Brunei. A year later, on January 22, 1878, Overbeck also managed to get concessions from Jamal al-Alam, the Sultan of Sulu, who leased all of Sulu's territories in eastern North Borneo, including all the islands located within three marine leagues (i.e. 9nm) of the coast.<sup>12</sup> In 1881, Alfred Dent-Overbeck's partner obtained a royal charter from the British Government to set up the British North Borneo Chartered Company (BNBC) to run and administer the settlements and economic activities of the leased territory.<sup>13</sup>

In 1888, by virtue of the 1885 *Treaty of Madrid* between Britain, Spain and Germany, North Borneo became a British protectorate together with Brunei and Sarawak.<sup>14</sup> Under the treaty, the Crown Office controlled external affairs, while the BNBC controlled internal affairs. On April 22, 1903, BNBC signed with the Sulu Sultanate *The Confirmation of Cession of Certain Islands off North Borneo Treaty*. The Treaty, *inter alia*, recognised that all islands beyond three marine leagues were surrendered to the BNBC. They included Si Amil, Mabul, Kepala, Dinawan as well as all the other islands situated alongside or around or between the islands mentioned above.<sup>15</sup> The names of the Sipadan-Ligitan Islands were not mentioned in the Treaty. Nevertheless, geographically, Ligitan and Dinawan are part of the same reef system while Sipadan Island is just 7 nm to the southeast of Kepala Island. As such, both Sipadan and Ligitan are considered to be situated alongside, or around or between Dinawan and Kepala.

On July 10, 1907, the United States of America which had occupied the Philippines in 1901, agreed to lease the islands, including Sipadan, to the BNBC which then continued to be in charge of the islands' administration.<sup>16</sup> Significantly, Sipadan and Ligitan were not mentioned not among the islands transferred to America under the *Boundary Agreement between Great Britain and the United States of America*, signed on January 2, 1930, which demarcated the sea boundary in the Sulu Sea between North Borneo and America.<sup>17</sup>

The boundary agreement paved the way, in part, for the present border delimitation between Malaysia and the Philippines.<sup>18</sup> The Sipadan-Ligitan Islands were later put under the jurisdiction of the

Lahad Datu Residency which, in turn, was empowered to issue licenses to egg collectors in Sipadan Island. In 1925, America decided to terminate the lease. Pursuant to that, America and Britain had convened a meeting in 1930 resulting in the conclusion of the *Treaty of Washington* to delimit the borders between the Philippines and North Borneo.<sup>19</sup> Among the islands considered as belonging to North Borneo were Buaning, Lankayan, Mantabun, Matakang, Sipadan and Ligitan. In 1933, the BNBC passed the *Seed Pearls Ordinance of North Borneo* and the *Ordinance of North Borneo Territory of 1930* which led to the declaration of Sipadan as a bird sanctuary in the same year. The Sabah State Government issued the same declaration in 1963.<sup>20</sup> Prior to that in 1917, the BNBC had also authorised the *Turtle Preservation Ordinance of 1917* to regulate turtle egg collecting activities on the island.<sup>21</sup>

The BNBC's rule ended on January 1, 1942 with the outbreak of World War II. After the war, on June 26, 1946, the BNBC passed all its rights over North Borneo to the British Government. On June 24, 1954, the British declared the continental Shelf boundaries (CSB) of North Borneo which was based on a straight baseline connecting the eastern end of Sebatik Island to the Sipadan and Ligitan Islands.<sup>22</sup> North Borneo ceased to be under British rule when it joined the Federation of Malaysia on September 16, 1963. The inclusion of North Borneo to Malaysia was effected by Article I of the *Malaysia Treaty* concluded on July 9, 1963. The Treaty states, *inter alia*, that the territory of the "Colony 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 September 16, 1963). In addition to that, when North Borneo (Sabah) joined the Federation of Malaysia in 1963, its territorial waters were much the same as described in the 1954 British Declaration. The Sipadan-Ligitan islands have been shown to be within Malaysia's CSB ever since.

### **Bilateral Efforts to Solve Sipadan–Ligitan Dispute**

Malaysia's new boundaries of territorial waters, Exclusive Economic Zone (EEZ) and continental shelf, especially on the northern part of the Borneo Island, had greatly overlapped those of Indonesia's Kalimantan which is situated on the southern part of the same island.

In order to solve the dispute, both the Malaysian and Indonesian governments held several meetings in order to delineate their CSB. From September 9 to September 22, 1969, Malaysia and Indonesia held a series of negotiations in Kuala Lumpur. The Malaysian delegation was headed by Mohamad Salleh Abbas from the National Attorney General's Office while Dr. Mochtar Kusumaatmandja of the Indonesian Mining Ministry headed Indonesia's delegation. Both sides agreed that the delineation of respective CSB was to be based on equitable and reasonable principles.<sup>23</sup> In the meeting, both governments reached important agreements relating to the delimitation of their CSB and several overlapping claims on several islands in the Straits of Melaka as well as in the South China Sea.

However, the two countries failed to reach an agreement with regard to certain delimitation points in the Celebes Sea. Specifically, they could not agree on the sovereignty status of the Sipadan-Ligitan Islands which are located off the south eastern coast of Sabah. Malaysia claimed those two islands to be within its continental shelf. Indonesia refused to acknowledge Malaysia's CSB in that particular sea and even counter claimed that the Sipadan and Ligitan Islands were part of its territories. Despite the differences, the representatives of both Malaysia and Indonesia signed the agreement delimiting their CSB on September 22, 1969. Both governments officially enforced the CSB Treaty on October 27, 1969. The exchange of ratification between the two countries was done on November 7, 1969. The Treaty resolved the CSB problems between both countries primarily in the Straits of Melaka, the Straits of Singapore and in the South China Sea (i.e. the western side off the East Coast of West Malaysia and eastern side off the Coast of Sarawak). But it did not resolve the problem in the Celebes Sea.<sup>24</sup>

Pending the resolution of the sovereignty issues of the Sipadan and Ligitan islands, both governments, according to Indonesian accounts, were reported to have agreed verbally to resolve the ownership issues in later meetings.<sup>25</sup> It was also reported that until the ownership issue was settled, both governments would refrain from taking any action such as infrastructural developments which could be deemed to be in breach of the verbal undertaking.

Prior to the next meeting with regard to the Sipadan-Ligitan dispute, both countries convened a commission known as the General

Border Committee (GBC) in 1975. The GBC, also known as the Joint Border Committee (JBC) was tasked to determine the exact border demarcation on Borneo Island between Sarawak and Sabah, on the one hand, and Kalimantan Indonesia on the other. No time limit was set for the GBC to complete its task. 16 years later, in 1991 the GBC had managed to mark 38 per cent of the 2,640km (i.e. at an average of 46km a year) of the mutual border between Kalimantan, Sarawak and Sabah.<sup>26</sup> Judging by the progress the GBC was making at that time, it would have taken not less than 57 years (i.e. until 2032) for the committee to accomplish its mission.

Four years after the formation of the GBC, Malaysia published its new map, *Peta Baru*, showing its territorial waters and continental shelf boundary. It was released on December 21, 1979, ten years after Malaysia signed the CSB Treaty with Indonesia. The *Peta Baru* shows, among others, that both Sipadan and Ligitan Islands are located within its territorial waters and, therefore, are part of Malaysia. Since the sovereignty issue over Sipadan-Ligitan Islands had not been resolved in the CSB Treaty of 1969, the publication of the *Peta Baru* immediately drew Indonesia's response. On February 8, 1980, Indonesia formally objected to the new map of Malaysia claiming, among others, that Sipadan and Ligitan were part of its territories.<sup>27</sup> Malaysia responded by insisting that according to legal and historical evidence the two islands belong to Malaysia.<sup>28</sup> The problem was discussed by the then Malaysian Prime Minister Hussein Onn and Indonesia's President Suharto in a meeting on March 26, 1980. Both agreed that the issue should be resolved through negotiation.

In 1982, an Indonesian naval patrol spotted "foreign troops" stationed on Sipadan Island.<sup>29</sup> Both governments downplayed the incident by discouraging press coverage. The foreign troops were not identified by country, but the speculation was rife, especially in the Indonesian press, that the "foreign troops" were most likely Malaysian.<sup>30</sup> In order to calm the situation, the Malaysian Prime Minister, Mahathir Mohamad, and Indonesian Army General, Murdani, held a meeting in Natuna Island in September 1985.

In 1991, Indonesia discovered that Malaysia had built some tourist facilities on Sipadan and accused Malaysia of having broken its oral undertaking of 1969.<sup>31</sup> The then Malaysian Foreign Minister,

Abdullah Ahmad Badawi, assured the then Indonesian Foreign Minister, Ali Alatas, that no further infrastructure developments would be undertaken until the sovereignty issue of the islands was resolved.<sup>32</sup> However, Abdullah's assurance did not prevent Indonesia from taking retaliatory action. On July 11, 1991, Indonesia seized a 100-tonne Malaysian fishing vessel, *MV Pulau Banggi* belonging to Sabah Fish Marketing along with its 13 crew members in the waters nearby Sipadan and towed it to its naval base in Kalimantan.<sup>33</sup> On July 15, 1991, an Indonesian Customs boat was reported to have landed on Sipadan Island.<sup>34</sup>

Several meetings followed. Mahathir and Suharto met three times consecutively in 1992, 1993 and 1994. No solution was reached in any of those meetings. However, a breakthrough had been made in a separate Joint Commission Ministerial (JCM) meeting between both countries held in October 1991.<sup>35</sup> Both countries agreed to set up a separate new special committee, other than the General Border Committee (GBC), called the Joint Working Group (JWG), to deal specifically with the Sipadan-Ligitan dispute.<sup>36</sup> Members were made up of senior officials from both countries including experts in law and hydrography. Just as in the case of the GBC, no time limit was set for the JWG to arrive at a resolution.

The JWG held its first meeting on July 6, 1992.<sup>37</sup> The committee found out that beside the task to find a resolution of the Sipadan-Ligitan dispute, which it was originally entrusted to do, it was also entrusted to deal with 15 other bilateral problems including issues relating to the EEZ delimitation, Aceh refugees, piracy, smuggling, illegal workers and illegal fishing. In this 1992 meeting, Malaysia voiced its fear that Indonesia's current build-up of warships and aircraft around the disputed islands would lead to unfortunate incidents. Indonesia heeded to Malaysia's concern and minimised its military presence.<sup>38</sup>

The JWG held its second meeting on January 26 and 27, 1994. No progress was made. In fact, the second JWG meeting lasted for only half an hour.<sup>39</sup> In March 1994, Malaysia was reported to have denied the existence of the oral undertaking, as claimed by Indonesia, given in 1969.<sup>40</sup> In May 1994, the head of the Malaysian JWG delegation, Ahmad Kamil Jaafar, was reported as stating that the JWG was no longer "the right body to discuss the claims."<sup>41</sup> After

the JWG held yet another meeting on September 8, 1994, Ahmad Kamil, frustrated by the slow progress made, declared that the September meeting would be the last meeting to be held at the official level.<sup>42</sup>

### **Referring the Sipadan-Ligitan Dispute to the ICJ**

On the whole, it had taken Malaysia 18 years (1980–1998) under two of its Prime Ministers (Tun Hussein Onn and Tun Mahathir Mohamad), numerous meetings at official and ministerial levels, and no fewer than three special commissions—the General Border Committee (GBC), the Joint Commission Ministerial (JCM) and the Joint Working Group (JWG)—before it finally concluded that bilateral efforts to settle the Sipadan-Ligitan dispute would be of no avail. Not only did the bilateral negotiations failed to produce desirable results, they were also costly in terms of time and money. Instead of settling the dispute, the efforts at negotiation had the opposite effect of polarising the disputing parties and exacerbating the problem.

In defending their claims to Sipadan-Ligitan Islands, both Indonesia and Malaysia tended to look to their naval forces' superiority to consolidate their positions. Despite declarations that they would settle the dispute by peaceful means, leaders and official of Malaysia and Indonesia frequently exchanged remarks of a militant nature. For example, in 1993, the former Malaysian Armed Forces General, Yaacob Mohd. Zain, that military action was the only answer to unsolved territorial disputes.<sup>43</sup> A typical Indonesian response was an Indonesian naval spokesperson's announcement that its forces would continue patrolling the islands because they "belong to us and we will defend them."<sup>44</sup> The crisis reached its peak in 1994 when Malaysian Defence Minister, Najib Tun Razak, visited Sipadan Island. Although the visit did not give rise to any incident, the military situation remained tense. Several subsequent stand-offs between the armed forces of both countries were reported to have taken place in the following years.<sup>45</sup> Even though there was no exchange of fire in any of the stand-offs, the possibility of a military clash between Malaysia and Indonesia was not ruled out.

On September 14, 1994, Malaysia first proposed to Indonesia to have the dispute referred to the ICJ instead of the AHC.<sup>46</sup> Malaysia's proposal did not receive a positive response from the Indonesian

government. The Chief of the Indonesian Armed Forces argued that Malaysia should not allow a third party like the ICJ, which did not understand the problem, to sit in such a dispute.<sup>47</sup> The then Indonesian Foreign Minister, Ali Alatas, was also confident that Malaysia would agree with Indonesia that the AHC was preferable to the ICJ.<sup>48</sup> Realising that the proposal had led to growing public discontent, especially in Indonesia, further talks over Sipadan-Ligitan dispute were conducted in secrecy.

Eventually, in October 1996, after two years of futile efforts to persuade Malaysia to decide in favour of the AHC, the then Indonesian President Suharto agreed to refer the sovereignty dispute of the Sipadan-Ligitan islands to the ICJ.<sup>49</sup> On November 2, 1998, Indonesia and Malaysia submitted their intention to the ICJ by notifying its Registrar of the *compromis* (mutual agreement to submit the dispute to the ICJ and be bound by the Court's decision) signed by both countries on May 31, 1997 in Kuala Lumpur.

### **The ICJ: Malaysia's Choice of Dispute Settlement**

Headquartered in the Hague, the Netherlands, the ICJ is a principal judicial organ under the United Nations (UN), empowered to sit on a wide range of disputes between UN member countries including territorial disputes. Malaysia's decision to opt for the ICJ instead of the AHC was influenced by the neutrality factor associated with the ICJ. Malaysia's main reasons for not referring the Sipadan-Ligitan dispute to the AHC were summarised in a statement issued by former Foreign Ministry Secretary-General, Ahmad Kamil, as follows: (1) Malaysia did not want to "burden" other ASEAN countries with having to mediate on such a delicate issue, (2) the High Council could not be expected to play a neutral role since Malaysia also has territorial issues with other ASEAN members, and (3) the procedure could jeopardise relations between Malaysia and the ASEAN High Council's members.<sup>50</sup> These points need further elaboration.

Malaysia's preference for the ICJ was based on the following reasons. First and foremost, Article 59 of the ICJ Statute reads that its decision has binding force in terms of an enforcement mechanism regulating the conduct between the disputing parties and in respect of that particular dispute. Accordingly, should a breach of the ICJ decisions occur, disputing countries may bring the case to the UN

Security Council for further action as provided for in the UN Charter, Chapter IV: Pacific Settlement of Disputes, Article 33–38.<sup>51</sup>

Secondly, not only does the ICJ help to eliminate doubts about neutrality, impartiality and enforcement mechanisms, its decisions are also clear cut. Thirdly, and more importantly, the ICJ settlement is a good way to “depoliticise” the dispute. Fourthly, it helps to improve and strengthen Malaysia’s prestige and image in the international arena as a peaceful, civil and moderate ASEAN core member country that upholds international norms and treaties. Fifthly, it effectively protects Malaysia from any form of intervention and interference from third parties with vested interest in the outcome of the dispute.

Finally, Malaysia was also cognisant of the fact that it needed to finalise the demarcation of its maritime boundary baselines defining its territorial waters, EEZ and continental shelf before October 14, 2006.<sup>52</sup> With regard to the deadlines, it has to be noted that there exists no mechanism to ascertain the definite period of time the ICJ needs to conclude a case. For example, the ICJ took 8 years to hand down its judgment in the sovereignty dispute involving Bahrain and Qatar (1991–2001).<sup>53</sup> However, there have been other sovereignty disputes where the ICJ took less time to conclude a case. For example, the ICJ concluded the case of *Libya versus Chad* in 4 years (1990–1994) and the case of *El-Salvador versus Honduras* (1986–1992) in 6 years.<sup>54</sup> Despite these uncertainties, having referred the dispute to the ICJ in 1998, Malaysia apparently was confident of completing the task of demarcating its maritime boundaries within a period of eight years.<sup>55</sup>

### **The AHC**

Unlike the ICJ, the AHC does not have a permanent Court or office. It is basically a body of member country committees, set up upon acceptance of appointment as provided for in the Treaty of Amity and Cooperation (TAC), with a task to mediate in disputes involving TAC member countries. TAC is a treaty signed by ASEAN members with several non-ASEAN countries like Russia, India and China in 1976 and 2003. The analysis of the history, rules and procedures of the AHC provides insights into the key factors influencing Malaysia’s stand with regard to the AHC. Firstly, AHC has never been called upon to mediate a dispute. Consequently, the idea of constituting

the AHC, for the first time was considered as setting a risky precedent. Secondly, the jurisdiction and power of the AHC implies that it is not a constitutional judicial dispute settlement procedure as the ICJ is. The AHC has no stipulation analogous to Article 59 of the ICJ Statute, which describes the Court's binding power. Specifically, Article 15 of the TAC empowers the Council to offer to constitute itself to recommend ways to settle disputes (i.e. through mediation, inquiry or conciliation), but not to impose the necessary enforcement mechanism that would give its recommendations or judgments binding power. The absence of a binding power or enforcement mechanism suggests that the AHC, in its character and substance, is a form of bilateral negotiating effort, not an institutional dispute resolution procedure. The Council does not have the necessary power to oblige disputing parties to accept and apply its recommendations and decisions. In its entirety, the institutionalisation of the AHC serves as no more than a "restraining" mechanism with the main aim to diffuse any possible threats or disputes in the region. In short, AHC is not constituted for dispute settlement.

Thirdly, Article 14, Rule 3, Part III of the Rules and Procedure Document of the TAC concerning the membership of the AHC raises a number of questions. It states that the body of the Council shall be comprised of the ASEAN TAC signatories. The major disadvantage of this arrangement is that the impartiality of the AHC can be thrown in doubt, since one or more of the Council members may be engaged in disputes with one or more of the disputing countries or for other reasons have a vested interest in the outcome of the arbitration. The perceived lack of impartiality could then lead to a deterioration in the relations between the Council member-countries and the disputing countries.

Finally, the rules and procedures of the AHC do not elaborate on the types of disputes over which it has jurisdiction. Additionally, it does not contain any stipulation analogous to Article 38 of the ICJ Statute which empowers the Court to adjudicate on disputes arising from conflicting interpretations and applications of international treaties, international customs and the general principles of laws. Thus, it is doubtful whether the AHC is entitled or qualified to adjudicate or arbitrate on rules of international law especially with regards to territorial disputes.

Taking into consideration all of the above considerations, it is easy to understand Malaysia's decision to refer the Sipadan-Ligitan dispute to the ICJ rather than the AHC..

### **The Decision of the ICJ**

In December 2002, the ICJ decided in favour of Malaysia. Principally, the ICJ deliberated on three major considerations presented by Malaysia and Indonesia to prove the legality of their respective claims of sovereignty over the islands: (1) titles through treaty/convention (2) titles through succession and (3) titles through *effectivités* (effective administration).<sup>56</sup>

In the matter of titles through treaty/convention, the Court rejected Indonesia's submission of the 1891 Convention between Britain and the Netherlands. It is to be noted that in the Convention the line drawn at latitude 4° 10' north dividing the British and Dutch possessions stop at the Sebatik Island—and does not extend to the nearby Sipadan-Ligitan Islands. The Court reasoned that the Convention could not be interpreted as implying an allocation line establishing sovereignty over the islands to the east beyond the island of Sebatik.

In the matter of titles through succession, the Court rejected both Malaysia's and Indonesia's submissions that each had inherited the titles over the islands from their respective colonial predecessors. The Court ruled that both countries were arguing on the basis of "diametrically opposed reasoning, each of them claiming to hold title to those islands." In simpler terms, the Court found that neither country held a specific treaty-based title to Sipadan-Ligitan Islands.

Finally, in the matter of titles through effective administration, the Court rejected Indonesia's submission that the continuous presence of Indonesian fishermen and the Dutch and Indonesian navies in the vicinity of Sipadan-Ligitan Islands could be accepted as proof of activities evidencing an actual, continued exercise of authority over the islands, i.e. the intention and will to act as sovereign. The Court argued that it could not be ascertained that the naval authorities concerned had considered Sipadan-Ligitan Islands and the surrounding waters to be under the sovereignty of the Netherlands or Indonesia. The Court also argued that the Indonesian

fishermen activities could not be seen as *effectivités* because they did not take place on the basis of official regulations or under governmental authority.

On the other hand, the Court accepted Malaysia's submission that the Turtle Preservation Ordinance of 1917 which oversaw the turtle egg collection activities as exercised by BNBC had established a degree of legal administrative and quasi-judicial acts. The Court also agreed that the construction of a lighthouse on Sipadan in 1962 and another on Ligitan in 1963 had demonstrated the exercise of a state's sovereignty over the islands. The Court maintained that such acts of *effectivités* cover a considerable period of time and show a pattern revealing an intention to exercise state sovereignty. The Court added that neither the Netherlands nor Indonesia had ever objected to or protested over such activities carried out by either the British or Malaysia. Therefore, under the basis of the third submission—Malaysia's *effectivités* of the Sipadan-Ligitan Islands—the ICJ ruled, by sixteen votes to one, that the sovereignty over Pulau Ligitan and Pulau Sipadan belonged to Malaysia.

### **Conclusion**

Based on the preceding discussion, it can be suggested that Malaysia's decision for the ICJ was equally influenced by the conditions immediately surrounding the disputes as well as conditions prior to and after the expected resolution of the dispute. Immediate factors include the lack of progress made in bilateral negotiations and the consideration of the strong and weak points of available dispute settlement mechanism. Longer term factors include the geopolitical conditions prevailing, the history of relatively harmonious bilateral relations with Indonesia and the need for future cooperation on security and other problems.

It is worth noting that the question of territorial sovereignty does not involve anything numerical or tangible, which makes the pacific settlement of such a dispute difficult to achieve. By settling territorial disputes via an international arbitration body like the ICJ, instead of the regional AHC, Malaysia and Indonesia had shown that in the interest of maintaining good bilateral relations, disputing countries need more than a verbal commitment to peace and traditional civility. They need the mediation of a neutral third party, international law,

and a dispute settlement procedure with enforcement mechanisms and binding power. To this extent, Sipadan-Litigan Islands case has set a precedence for the settlement of disputes among ASEAN member countries.

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## Notes

1. Mohd. Ayop Abd. Razid ed., *Malaysia: Facts and Pictures, 2005* (Kuala Lumpur: Department of Information Services Malaysia, 2005), 2. See also Jameah Mohd. Jan ed., *Malaysia: Official Year Book 2004* (Kuala Lumpur: Department of Information Services Malaysia, 2004), 71.
2. *Peta Baru Menunjukkan Sempadan Perairan dan Pelantar Benua Malaysia*. 1979. Map. Rampaian 97, Cetakan 1-PPNM, Syit 1 (Kuala Lumpur: Directorate of National Mapping Malaysia, 1979).
3. U.S. Department of State, International Boundary Study, Series A Limits in the Seas, *Indonesia—Malaysia Continental Shelf Boundary*, no. 1, January 21, 1970 [online] available from [www.state.gov/g/oes/ocns/c16065.htm](http://www.state.gov/g/oes/ocns/c16065.htm), accessed on August 8, 2006.
4. Lee Yong Leng, *Southeast Asia and the Law of the Sea: Some Preliminary Observations on the Political Geography of Southeast Asian Seas* (Singapore: Singapore University Press, 1980), 21.
5. B. Louis Sohn and Kristen Gustafson, *The Law of the Sea in a Nutshell* (Minnesota: West Publishing, 1984), 65.
6. R. Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia: An International Law Perspective* (Cambridge, MA: Kluwer Law International, 1998), 417-424.
7. James Dowling, *The Significance of Ligitan and Sipadan: Indonesia vs Malaysia, 1998–2002* (London: IBRU, AR/5091, 2004), 4. See also Trost, *The Contested Maritime and Territorial Boundaries of Malaysia: An International Law Perspective*, 228.
8. R. Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia: An International Law Perspective*, 227. Sebatik Island is divided into two parts; the northern part belongs to Malaysia while the southern part belongs to Indonesia.
9. The Ligitan Group is geographically distinct from the Ligitan Reefs, which lie further to the west.
10. Trost, *The Contested Maritime and Territorial Boundaries of Malaysia: An International Law Perspective*, 228.

11. Ibid.

12. Nik Anuar Nik Mahmud, *Pulau Sipadan dan Pulau Ligitan: Isu Sempadan dan Kedaulatan* (Bangi: UKM Publisher, 2003), 86–87. A marine league is equal to three nautical miles.

13. C. Mary Turnbull, *A Short History of Malaysia, Singapore and Brunei* (Singapore: Graham Brash, 1981), 165.

14. Nik Anuar, *Pulau Sipadan dan Pulau Ligitan: Isu Sempadan dan Kedaulatan*, 24.

15. R. Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia: An International Law Perspective*, 237–238.

16. Nik Anuar, *Pulau Sipadan dan Pulau Ligitan: Isu Sempadan dan Kedaulatan*, 72.

17. Khadijah Muhamed and Tunku Shamsul Bahrin, “Scramble for the South China Sea: The Malaysian Perspective,” in *Fishing in Troubled Waters: Proceedings of an Academic Conference on Territorial Claims in the South China Sea*, eds., R.D. Hill, G. Norman Owen, E.V. Roberts (Hong Kong: Centre of Asian Studies, 1991), 242–243.

18. Trost, *The Contested Maritime and Territorial Boundaries of Malaysia: An International Law Perspective*, 157.

19. Nik Anuar, *Pulau Sipadan dan Pulau Ligitan: Isu Sempadan dan Kedaulatan*, 135.

20. R. Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia: An International Law Perspective*, 248; Nik Anuar, *Pulau Sipadan dan Pulau Ligitan: Isu Sempadan dan Kedaulatan*, 88; Speech by Sabah Chief Minister Aman Musa, “Jejak Merdeka Sabah: 1957–2003” (Sabah: The Road to Independence), August 28, 2003 [online] available from <http://www.sabah.gov.my/press/docs/2003000126.htm>, accessed on August 28, 2006.

21. “International Court of Justice, Press Release 2002/39, December 17, 2002” [online] available from <http://www.icj-cij.org/icjwww/idocket/iinma/iinmaframe.htm>, accessed on April 8, 2006.

22. The declaration officially put Sipadan and Ligitan within North Borneo territorial waters. The declaration was not protested either by the Philippines or Indonesia. See, Nik Anuar, *Sipadan dan Pulau Ligitan: Isu Sempadan dan Kedaulatan*, 79–80.

23. Nik Anuar, *Pulau Sipadan dan Pulau Ligitan: Isu Sempadan dan Kedaulatan*, 79.

24. See U.S. Department of State, International Boundary Study, Series A Limits in the Seas, *Indonesia—Malaysia Continental Shelf Boundary*.

25. *The Star*, June 7, 1991.

26. *Business Times*, January 26, 1995.

27. Khadijah Muhamed and Tunku Shamsul Bahrin, "Scramble for the South China Sea: The Malaysian Perspective," 242.

28. Nik Anuar, *Pulau Sipadan dan Pulau Ligitan: Isu Sempadan dan Kedaulatan*, 83.

29. M.J. Valencia and Jaafar Abu Bakar, "Malaysia and Extended Maritime Jurisdiction: the Foreign Policy Issues," *Malaysian Journal of Tropical Geography*, vol. 10 (1984): 60. See also *Akhbar Sinar Harapan*, July 5, 1982, *Straits Times*, July 7, 1982, *Asiaweek*, July 23, 1982.

30. In the same year, Malaysia and Indonesia had entered into a bilateral agreement concerning issues of sea navigation, over flight, construction of underwater communication cables between East and West Malaysia and fishing rights for Malaysian fishermen in Indonesia's archipelagic waters.

31. *Business Times*, June 5 and 8, 1991; *The Star*, June 7, 1991.

32. *New Straits Times*, October 12 and 18, 1991.

33. *Ibid.*, July 12, 1991.

34. *Ibid.*, July 16, 1991.

35. *Ibid.*

36. *Ibid.*, October 12, 1991.

37. *Ibid.*

38. *Ibid.*, January 31, 1992.

39. *Ibid.*, January 27, 1994.

40. *Far Eastern Economic Review*, March 17, 1994.

41. *Business Times*, May 30, 1994.

42. *Straits Times*, September 9, 1994.

43. *Ibid.*, February 27, 1993.

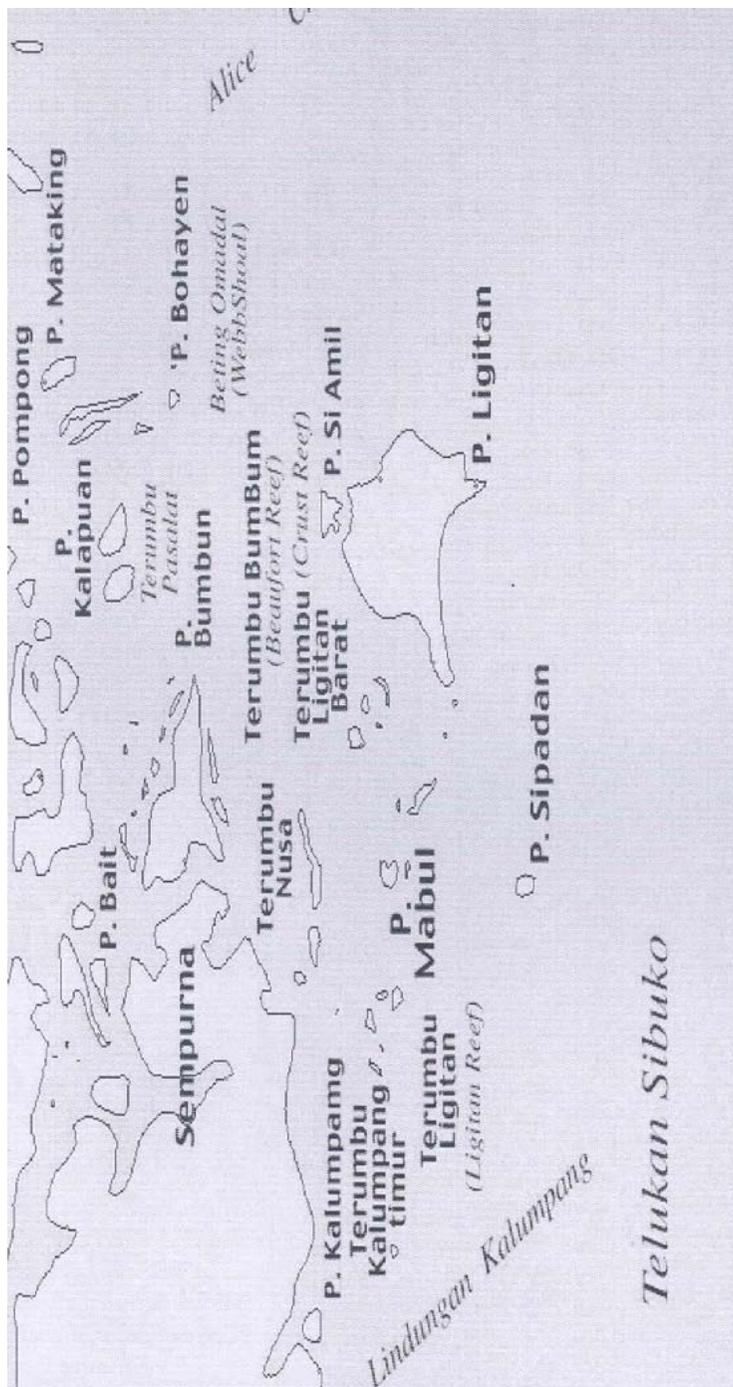
44. *Business Times*, October 15, 1993.

45. *Reuters World Service*, June 6, 1995.

46. *Straits Times*, September 14, 1994.

47. *Ibid.*, October 8, 1996.
48. *Merdeka*, January 4, 1996.
49. *Straits Times*, October 8, 1996.
50. *Straits Times*, September 13, 1994. Ahmad Kamil was Malaysia's head of delegation for JWG who declared, in May 1994, that JWG should cease to be the body to discuss on resolving Sipadan–Ligitan dispute.
51. M. Sara Mitchell and R. Paul Hensel, "International Institutions, Cooperation and Compliance with Agreement," 2005 [online] available from <http://www.saramitchell.org/mhio1205.pdf>, accessed on June 12, 2006. See also R.R. Churchill and A.V. Lowe, *The Law of the Sea* (UK: Manchester University Press, 1999), 451–453.
52. *Utusan Malaysia*, May 26, 2005. The deadline has subsequently been extended to 2009.
53. Victor Prescott and Olive Schofield, *The Maritime Political Boundaries of the World*, 2<sup>nd</sup> ed. (Netherlands: Martinus Nijhoff Publishers, 2005), 261.
54. "International Court of Justice; List of Cases Brought to the Court Since 1946," [online] available from <http://www.icj-cij.org/icjwww/idecisions.htm>, accessed on January 10, 2006.
55. In 2004, Malaysia's Minister of Natural Resources and Environment, Adenan Satem, stated that, except for the base points over Batu Puteh Island, Malaysia's joint border survey with Indonesia involving Sarawak–West Kalimantan and Sabah–East Kalimantan including the demarcation base points in Sipadan and Ligitan had been resolved. However, four base points in Sarawak and five in Sabah respectively had not been resolved (*Utusan Malaysia*, September 14, 2004).
56. "Summary of Judgment of 17 December 2002," International Court of Justice: Press Release 2002/39bis [online] available from [www.icj-cij.org/icjwww/idocket/iinma/iinmaframe.htm](http://www.icj-cij.org/icjwww/idocket/iinma/iinmaframe.htm), accessed on August 4, 2006. See also Clive Schofield and Ian Storey, "Energy Security and Southeast Asia: The Impact on Maritime Boundary and Territorial Disputes," *Harvard Asia Quarterly*, 9, no. 4 (2005).

Appendix: Simpadan and Ligitan Islands



Adapted from Peta Baru Menunjukkan Simpadan Perairan dan Pelantar Benua Malaysia. Map (Kuala Lumpur: Directorate of National Mapping Malaysia, 1979).