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**The Brunei-Malaysia Dispute over  
Territorial and Maritime Claims  
in International Law**

*Renate Haller-Trost*



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NB: The opinions and comments contained herein are those of the author and are not to be construed as those of IBRU.

## Contents

1. Introduction	1
2. Brunei's Maritime Maps	2
3. Brunei's Territorial Land Claims	5
3.1 UK/Brunei Treaties after 1888	6
3.2 The Origin of the Claims	9
3.2.1 The Limbang and Rangau	11
3.2.2 The Trusan and Lawas	16
3.2.3 The Transfer of Sarawak in 1946 and 1963	19
3.3 Legal Assessment	20
3.3.1 Change of Sovereignty and Tenure	22
3.3.2 Alienation of Territory	23
3.3.3 Protectorates	24
3.3.4 Geographical Extent of the Limbang	26
3.3.5 Annexation	27
3.3.6 Uti Possidetis Iuris	31
3.3.7 Brunei Bay	33
4. Brunei's Maritime Claims	37
4.1 Territorial Sea	38
4.1.1 Eastern Boundary	38
4.1.2 Western Boundary	39
4.2 Continental Shelf	40
4.2.1 Delimitation with Malaysia	41
4.3 EEZ and Fishery Zone	42
4.3.1 Malaysia	43
4.3.2 Brunei	43
4.4 Effects of Islands and Rocks	44
4.4.1 Western Boundary	44
4.4.2 Eastern Boundary	44
4.4.3 Louisa Reef	48
4.5 Equitable Solution	49
5. Conclusion	52

## Abbreviations

AJIL	American Journal of International Law
ASEAN	Association of Southeast Asian Nations
BFSP	British and Foreign State Papers
BIICL	British Institute of International and Comparative Law
BLRO	Brunei Law Revision Order
BMJ	Brunei Museum Journal
BNBC	British North Borneo Company
BYIL	British Yearbook of International Law
Cmd./Cmnd.	Command Papers, UK (Cmd. [1-9889] 1919-1956; Cmnd. [1-cont.] 1956-)
CO	Colonial Office
EC	European Community
EEZ	Exclusive Economic Zone
FO	Foreign Office
GA	General Assembly of the UN
GAOR	General Assembly Official Records
IBRU	International Boundaries Research Unit, Durham, UK
ICJ	International Court of Justice, Den Haag
ICLQ	International and Comparative Law Quarterly
ICNT	Informal Composite Negotiating Text, UNCLOS III
IJECL	International Journal of Estuarine and Coastal Law, Hull, UK
ISEAS	Institute of Southeast Asian Studies, Singapore
ISIS	Institute for Strategic and International Studies, Kuala Lumpur
ISNT	Informal Single Negotiating Text, UNCLOS III
JAS	Journal of Asian Studies
JMBRAS	Journal of the Malay(si)an Branch of the Royal Asiatic Society
JSBRAS	Journal of the Straits Branch of the Royal Asiatic Society
JSEAS	Journal of South East Asian Studies, Singapore
LO	Law Officers of the Crown
Mal.L.R.	Malaya Law Review
ODIL	Ocean Development and International Law
OR	Official Records
PCIJ	Permanent Court of International Justice
PRO	Public Record Office, London
RIAA	Reports of International Arbitral Awards
RMN	Royal Malaysian Navy
RN	(British) Royal Navy
RSNT	Revised Single Negotiating Text, UNCLOS III
TP	turning points of baselines
UN	United Nations
UNCLOS I	First UN Convention on the Law of the Sea, 1958, Geneva
UNCLOS II	Second UN Convention on the Law of the Sea, 1960, Geneva
UNCLOS III	Third UN Convention on the Law of the Sea, 1982, Montego Bay.

## **List of Figures**

Figure 1:	Brunei Darussalam	53
Figure 2:	Malaysia's Maritime Claims off Borneo	54
Figure 3:	Maritime Boundaries of Brunei Darussalam	55
Figure 4:	Delimitations in Brunei Bay	56
	Selected Bibliography	57



# The Brunei-Malaysian Dispute over Territorial and Maritime Claims in International Law

R. Haller-Trost

## 1. Introduction

This paper analyses an issue which has been widely neglected in international law, namely the land and maritime claims of the Southeast Asian Sultanate of Brunei Darussalam towards its only territorial neighbour, Malaysia<sup>1</sup>.

The reason for this lacuna exists in part because relevant details are not provided by either government. Malaysia has labelled all pending territorial and maritime disputes as confidential, while Brunei maintains that no information will be supplied due to the sensitivity of the issues involved.

This secrecy is, to a certain degree, understandable, given the cultural and historic background of both countries which stress consensus rather than dispute. However, two points must be noted: firstly, the maritime question is not entirely a bilateral issue since other nations are involved due to the complex Spratly Islands controversy<sup>2</sup> - which is a problem that cannot be solved as long as the contesting parties fail to discuss the matter openly; and, secondly, with the current power shifts in the region following the collapse of the USSR and the concomitant withdrawals of the superpowers, a period of transition exists during which new regional unstable factors are likely to emerge. Governments are faced with major policy changes in which the spheres of influence have to be redrawn. To prevent territorial disputes becoming a catalyst for regional upheaval during this process, the ASEAN countries have to show concerted political will to have minor problems eradicated since these have a history of appearing with little notice and may suddenly develop into conflicts incapable of being controlled (see e.g. the Spratly Islands dispute).

Neither Malaysia nor Brunei is prepared to bring their controversies before the International Court of Justice (ICJ) or any other international forum for dispute settlement<sup>3</sup>. Whilst this reluctance is understandable, seen from an academic standpoint, such action would, as a corollary, answer questions of delimitation concerning legal issues which have not yet been adequately addressed in the law of the sea. A case in point is the much needed *opinio iuris* for delimitation cases of internal waters in pluri-state bays between adjacent states, which in this case refers to Brunei Bay<sup>4</sup>.

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<sup>1</sup> for short discussions of parts thereof see Prescott in Morgan and Valencia 1984:48, and Valencia 1991:48ff

<sup>2</sup> see, *inter alia*, Haller-Trost 1990 and 1991

<sup>3</sup> this is in contradistinction to Valencia's assertion (Valencia 1991:53) that Brunei is willing to have the land as well as the sea border disputes brought before the ICJ. Although both countries have signed the UN Charter, in which Article 92 states that "[a]ll members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice", neither state has accepted the compulsory jurisdiction of the Court. That both parties agree to a special *compromis* in order to submit the case to the ICJ, is most unlikely, as both governments are of the opinion that their 'disagreement' is strictly a bilateral matter.

<sup>4</sup> see Map 4. I am indebted to V.L.Forbes (University of Western Australia) for drawing the attached maps

The texts of both Law of the Sea Conventions<sup>5</sup> are silent i) on regulations delimitating internal waters of adjacent and opposite states; and ii) on the question of delimitation in bays bordered by more than one country. Article 10 of UNCLOS III "*relates only to bays the coasts of which belong to a single state*", and Articles 15, 74 and 83 only provide régimes for the delimitation of the territorial sea, the exclusive economic zone (EEZ), and the continental shelf respectively.

The dispute between Malaysia and Brunei is twofold: one aspect concerns land claims originating from the colonial period which, if decided in Brunei's favour, would affect the maritime zones in Brunei Bay (see chapter 3), while the other refers to the overlapping maritime areas in the South China Sea (see chapter 4). The construction of the present Brunei maritime boundaries is partly based on acts executed by the United Kingdom, the former protecting state, and partly on what Brunei itself perceives it is entitled to according to UNCLOS III which it signed on 5/12/1984.

In order to outline the dispute from an international law perspective it is necessary to present a detailed analysis of the *de facto* and *de iure* position. This requires, primarily for the controversy over the *terra firma* claims, a detailed recourse into the historical background of the claims due to the complexity of the situation and the differences in territorial control systems.

## 2. Brunei's Maritime Maps

On 1/1/1984, Brunei gained full independence after having been a British protected state for ninety-six years. Three years later, its Surveyor General published three maps<sup>6</sup> indicating Brunei's maritime zones. The details are as follows:

**Sheet 1** of 1987 - the Map Showing Territorial Waters of Brunei Darussalam (*Peta Yang Menunjukkan Laut Wilayah Negara Brunei Darussalam*) is based on British Admiralty (BA) Chart No. 2109, Edition 18/5/1962, scale 1:200,000. The legend reads:

*"The International Sea Boundaries shown on this map conform to the following Proclamation and Statutory Instruments:*

- (i) *Proclamation by His Highness the Sultan and Yang Di-Pertuan of Negara Brunei Darussalam dated 30th June 1954 No. S 41 of 1954.*
- (ii) *United Kingdom Instrument 1958 No. 1517 The North Borneo (Definition of Boundaries) Order in Council, 1958.*
- (iii) *United Kingdom Instrument 1958 No. 1518 The Sarawak (Definition of Boundaries) Order in Council 1958.*

*This Map is published pursuant to section 3(2) of the Territorial Waters of Brunei Act (Cap.138) and it also shows part of the Continental Shelf of Brunei."*

<sup>5</sup> i.e. the four 1958 Geneva Conventions on the Law of the Sea (UNCLOS I) and the Third United Nation Convention on the Law of the Sea (UNCLOS III)

<sup>6</sup> all marked "*restricted document, for official use only*"

Furthermore, it states the geographical coordinates of the territorial waters limits as:

Point	1	4°47.88'N	113°58.70'E
	2	4°47.55'N	114°11.58'E
	3	4°51.50'N	114°22.60'E
	4	4°59.65'N	114°32.25'E
	5	5°09.40'N	114°44.85'E
	6	5°12.00'N	114°53.24'E
	7	5°13.87'N	114°55.20'E

Reference is made to the permission by the UK Hydrographer for reproducing the chart:

*"solely for the purpose of showing the baselines and maritime limits. These baselines and limits have, however, been prepared and drawn on the chart by the Government of Brunei on their sole responsibility."*

Although the limits of the territorial waters and partly those of the continental shelf are shown, no indication of baseline coordinates is given. Article 4 of UNCLOS III defines the outer limits of the territorial sea as *"the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea"* (marked dark blue on the map). Consequently, it has to be assumed that the following points were used to determine the outer limits of the territorial sea<sup>7</sup>:

Point	1	Tanjong Baram
	2	Kuala Belait
	3	Lumut
	4	a coastal point 3nm northeast of Tutong
	5	Pulau Punyit
	6	Pelong Rocks
	7	Pelong Rocks.

None of the offshore and outlying dangers shown on the chart, situated wholly or partly at a distance not exceeding the breadth of the territorial sea, qualify as baseline points according to Article 13.1 of UNCLOS III, since all are permanently submerged. These are from east to west: Abana Rock, Two Fathom Rock, Littledale Shoal, Brunei Patches, Otterspool Rock, Amcotts Rock, Blunt Rock, Cunningham Patch, Scout Patches (with Scout Rock), Victoria Patches and Brock Patch. The following submerged features lie outside the territorial sea: Champion Shoal, Colombo Shoal, Silk Rock, Iron Duke Shoals (with Nankivell Rock), Ampa Patches (with Magpie Rock), Porter Patch, Fairley Patches, Chearnley Shoal and Browne Patch.

No internal waters are defined on the chart; rivermouths and bays are represented in the same colour as territorial waters. In the southwestern extremities of Brunei Bay, off the Limbang district, a small portion is shown as non-Bruneian waters. Note has to be taken of the fact that,

<sup>7</sup> for the western baseline points see also the Brunei High Court judgment (Criminal Appeal No.5 of 1989) regarding a case of illegal fishing involving three Malaysian fishing boats in Brunei's territorial waters which occurred in March 1989 off *Sungei Tujoh*, just east of the boundary fence at the western Sarawak/Brunei border

in contradistinction to Sheets 2 and 3 published in the following year, no mention of any territorial claim is made on the chart.

**Sheet 2** of 1988 - the Map Showing Continental Shelf of Brunei Darussalam (*Peta Yang Menunjukkan Sempadan-Sempadan Pesisir Negara Brunei Darussalam*) is based on BA Chart No. 2660B, Edition 28/5/1925, scale 1:1,000,000. The legend reads the same as Sheet 1 (i) to (iii) with a comment that this map is published for the purpose of the said *Proclamation* on the Continental Shelf of Brunei. The lateral eastern and western delimitations from the shore to point 5 and 11 respectively are depicted as "*International Boundaries (Sea)*". The coordinates given for the continental shelf are:

Point	1	5°01.15'N	113°44.87'E
	2	5°42.00'N	114°24.24'E
	3	7°35.32'N	111°05.50'E
	4	8°15.23'N	111°56.27'E
	5	4°47.88'N	113°58.70'E
	6	4°47.55'N	114°11.58'E
	7	4°51.50'N	114°22.60'E
	8	4°59.65'N	114°32.25'E
	9	5°09.40'N	114°44.85'E
	10	5°12.00'N	114°53.24'E
	11	5°13.87'N	114°55.20'E

Points 5-11 are equivalent to points 1-7 of Sheet 1 stipulating the limits of the territorial waters; the line between point 3 and 4 is marked on the sea- and landward side as "*Approximate Mainland*", seemingly referring to the equidistance line between Brunei and Vietnam. Once more, the same area in Brunei Bay is marked as non-Bruneian waters, and the same reference regarding baselines is given; but again, there is no indication of such. The map further bears the comment at the bottom that

*"the maritime boundaries depicted on this map are not yet embodied in a delimitation agreement with the neighbouring States concerned. And the maritime boundary in the area of Brunei Bay is also dependent on the outcome of the dispute over sovereignty over the Limbang Territory including the adjacent areas of Lawas, Terusan and Rangau."*<sup>8</sup>

The towns - not the districts - of Limbang and Lawas are marked on the map; those of T(e)rusan and Rangau are not.

**Sheet 3** of 1988 - the Map Showing Fishery Limits of Brunei Darussalam (*Peta Yang Menunjukkan Sempadan-Sempadan Penangkapan Ikan Negara Brunei Darussalam*) is based

<sup>8</sup> i.e. presumably referring to the area of the *Bahagian* Limbang, formerly the Fifth Division of Sarawak (see Land and Survey Department Sarawak, Siri 8, Cetakan 7, 1987). A short note on the problem of Brunei maps: when, in 1962 during the abortive Brunei Revolt, British troops landed in Brunei, there was a severe lack of local maps, military or otherwise. The situation has improved marginally. However, all maps held by the Brunei Government are restricted; so are the ones in the British Library (Map Division) which only holds three of the thirty-six listed (DOS 441, Series T735). Most maps available are of too small a scale to be useful. The *Tactical Pilotage Chart* only names surface features sporadically; the sea charts hardly any. The *Military Survey Map* issued by HMSO is still the most suitable one available, although the quality - being a copy - is rather poor. Map 1, therefore, only provides a rough outline of the area. Incidentally, the existence of faulty maps in possession of the FO and CO was apparently one of the reasons why the British Government agreed to the Limbang annexation (see *supra*); Brown D.E. 1973:89

again on BA Chart No. 2660B, but this time on the 28/5/1925 edition, scale 1:1,000,000. The legend reads as Sheet 1 (i) to (iii), and is followed by:

*"(iv) Territorial Waters of Brunei Act (Cap.138)  
This map is published for the purpose of the Brunei Fishery Limits Act  
(Cap.130)."*

The lateral eastern and western delimitations from the shore to points 1 and 2 (the 100 fathom isobath) are depicted as *"International Boundaries (Sea)"*. The legend further bears the notice:

*"The Brunei Fishery Limits indicated on this map are without prejudice to the claims of Brunei Darussalam to the Limbang Territory including the adjacent areas of Lawas, Terusan and Rangau and any maritime claims associated therewith."*

Again, only the towns of Limbang and Lawas are marked on the map. The coordinates of the fishery limits are given as:

Point	1	5°01.15'N	113°44.87'E
	2	5°42.00'N	114°24.24'E
	3	7°35.32'N	111°05.50'E
	4	8°15.23'N	111°56.27'E
	5	6°59.13'N	111°42'98"E
	6	6°58.80'N	111°55.86'E
	7	7°02.74'N	112°06.86'E
	8	7°15.63'N	112°21.20'E
	9	7°25.37'N	112°33.75'E
	10	7°27.97'N	112°42.13'E

Fishery limits are marked in two colours: (i) dark blue - from the mainland shore to the line connecting coordinate points 5 to 10 marked *"200 Nautical Miles"*, probably measured from the inferred baselines<sup>9</sup>; and (ii) light blue - from the said *"200 Nautical Miles"* line to coordinate points 3 and 4 which again are marked *"Approximate Mainland"*. The *"200 Nautical Miles"* line is parallel to the outer territorial waters line of Sheet 1 and 2 with the exception of coordinate point 6 of Sheet 1, which is equivalent to point 10 of Sheet 2.

No indication of non-Bruneian waters in the southwestern part of Brunei Bay is given on Sheet 3.

### 3. Brunei's Territorial Land Claims

Brunei is divided into two parts (see Map 1) and consists today of four main administrative districts, i.e. three in the western part (Brunei/Muara, Belait and Tutong) and one in the eastern part (the district of Temburong), together constituting an area of 5,765sq.km. Its coastline extends for about 160 km along the South China Sea including Brunei Bay. The only official indication of areas to which Brunei lays claim could be found on the latter two of the above-

<sup>9</sup> Brunei's inferred baselines are at a distance of 12 nm landward from the seven coordinates listed on Sheet 1

mentioned charts. Other maps published by the same authorities merely carry the note in Malay stating that

*"the boundaries shown on this map only cover the regions of Negara Brunei Darussalam under the rule of the Government of Kebawah Duli Yang Maha Mulia Paduka Seri Baginda Sultan and Yang di-Pertuan Negara Brunei Darussalam and does not include the regions which rightfully belong to Brunei Darussalam from the Islamic point of view which are still being administered by another country."*<sup>10</sup>

Further, according to the *Interpretation and General Clauses of the Laws of Brunei*, 1984:

*"Brunei" or "the State" means the State of Brunei Darussalam and includes the Sultanate of Brunei Darussalam and Negara Brunei Darussalam and also includes the continental shelf.*<sup>11</sup>

No reference to any wider or historical claims beyond the present borders are indicated therein. Since the *Interpretation and General Clauses* were enacted in 1984, i.e. in the same year when the *North Borneo and Sarawak (Definition of Boundaries) Order in Council* of 1958 which define the land termini from where the maritime zones are to be measured, were incorporated into Brunei's legislation<sup>12</sup>, it can be assumed that Brunei conceived its territory as not to include the now named areas.

### 3.1 UK/Brunei Treaties after 1888

After 1841, with the arrival of James Brooke<sup>13</sup> in Kuching and the later (1877/1881) arrival of the British North Borneo Company (BNBC<sup>14</sup>), the last stage of disintegration of the once far-reaching Sultanate<sup>15</sup> accelerated.

Due to the disarray existing in Brunei in the latter half of the nineteenth century, the British Government feared that other European powers might assert their sphere of influence in an area which the British considered to be theirs. In order to prevent any destabilization of their

<sup>10</sup> e.g. Daerah Brunei-Muara, Siri BR 1, Lembaran 1, 1984; see also *School Atlas for Brunei Darussalam*, 1990 published by the Curriculum Development Department, Ministry of Education, Brunei Darussalam; emphasis added. None lists detailed territorial claims

<sup>11</sup> BLRO 1/1984, Cap.4:8

<sup>12</sup> BLRO 1/1984, Sup.III and IV

<sup>13</sup> James Brooke (1803-1868) was an ex-Bengal Army Officer. During his visit to Singapore in 1839, he became acquainted with Raffles' ideas and consequently went to Sarawak in order to stamp out - what he understood to be - piracy and curb Dutch expansionism on Borneo. From 1841 onwards, he extended his personal rule eastwards to Baram (for various treaties see Allen, Stockwell, Wright 1981 Vol.II:569-599). He was appointed first British Consul to Brunei and first Governor to Labuan in March 1847

<sup>14</sup> Gustav von Overbeck, an Austrian-Hungarian Baron and Consul in Hong Kong, bought certain rights in North Borneo from an American named Torrey. Since the extent of territorial control was not clear, Overbeck confirmed the acquired rights by way of new treaties with the Sultan and with the *Temenggong* of Brunei (29/12/1877; BFSP Vol.73:1079ff) and - on British advice - with the Sultan of Sulu (22/1/1878, *ibid*:1084). His partner, an Englishman named Dent, eventually bought all rights in North Borneo from Overbeck. Due to Dent's close personal relationship with the Foreign Office, he was able to sell his titles to the *British North Borneo Provisional Association* and applied for a Royal Charter which was granted to the *British North Borneo Company* in 1881 (FO 12/86/111)

<sup>15</sup> during the reign of the fifth ruler, Sultan Bulkeiah (Bolkiah, 1473-1521), Bruneian control stretched over vast parts of Borneo, Sulu and northern parts of the Philippines

trade routes to China and further dismemberment of the Sultanate (worsened by the territorial rivalry between Brooke and the BNBC), the British concluded an *Agreement for the Establishment of a British Protectorate* on 17/9/1888<sup>16</sup>. Although Article I stated that the sultan would continue to govern and administer Brunei as an independent state without interference by the protector into the internal administration, Article II provided for British decision in case of a challenged succession<sup>17</sup>. Article III restricted Brunei's external sovereignty considerably since

*"[t]he relations between the State of Brunei and all foreign States, including the States of Sarawak and North Borneo, shall be conducted by Her Majesty's Government, and all communications shall be carried on exclusively through Her Majesty's Government, or in accordance with its directions; and if any difference should arise between the Sultan of Brunei and the Government of any other State, the Sultan agrees to abide by the decisions of Her Majesty's Government, and to take all necessary measures to give effect thereto."*

This agreement was only partially effective and was designed as such. It lacked, for instance, an equivalent clause as found in the later *Sarawak Residency Agreement* of 1941 which explicitly stated that Britain

*"will at all times to the utmost of its power take whatever step may be necessary to protect the territory...."*<sup>18</sup>

In contradistinction, the 1888 Agreement provided in Article VI only the usual restriction clause that

*"no cession or other alienation of any part of the territory....shall be made by the Sultan to any foreign state, or the subjects thereof [i.e. Brooke or the BNBC] without the consent of Her Majesty's Government."*

No clause in the Treaty provided for the specific duty of Britain as the protecting state to guarantee the borders of Brunei. Neither can such an intention be read into the text, since after the *Protectorate Agreement*, all nobles - including the sultan - continued to sell their rights over their respective lands to the Europeans, and the British consented in most cases<sup>19</sup>. This fact, combined with the ongoing internal power struggles and misrule, ensured that the political situation deteriorated further<sup>20</sup>. To end all encroachments by Brooke, the BNBC or any foreign power on Brunei's territory a *Supplementary Agreement between Great Britain and*

<sup>16</sup> text in BFSP Vol.79:240. Similar agreements had been concluded earlier in the year with the BNBC on 12/5/1888 and with Brooke on 14/6/1888; (ibid: 237, 238)

<sup>17</sup> twice before had Brunei rulers depended on British support for their ascendancy, i.e. Abdul Momin in 1852, and Hashim in 1885. The latter's succession to the throne was rivalled by the *Pengiran Anak Besar* (a nephew of *Muda Hassim*) whose father, (*Pengiran Tajudin*) was killed together with other family members in the 1846 massacre on the orders of Sultan Omar Saifuddin II. This *Anak Besar* became in 1882(?) the *Bendahara* and in 1883 married Hashim's daughter. Later, in 1906, it was on the Resident's advice that Hashim's son should become sultan, and not the *Bendahara* who, according to Brunei custom, would have been preferable since the Sultan's son was still under age. In the event, the *Bendahara* and the *Pamancha* became co-regents, and only after their deaths did Hashim's son ascend to the throne in 1918 as Sultan Muhammad Jamalul Alam II

<sup>18</sup> 22/11/1941, Article 6 (text in Allen, Stockwell, Wright op.cit.:663)

<sup>19</sup> between 1888 and 1905 about eleven more river districts were ceded (for relevant treaties see CO 874/54, and Maxwell and Gibson 1924:202-205)

<sup>20</sup> for details see, *inter alia*, Crisswell 1977

*Brunei Respecting British Protection over the State of Brunei* was signed on 3/12/1905-2/1/1906 which established a Resident whose advice in internal and external matters had to "be taken and acted upon on all questions in Brunei other than those affecting the Mohammedan religion"<sup>21</sup>. This document also confirmed all existing agreements between the two countries. The Resident system was revoked in 1959 and replaced with the *Agreement between the United Kingdom and Brunei on Defence and External Affairs*<sup>22</sup> which still provided for full control of external and defence matters by the UK with a promise to protect the state at all times (Article 2), whilst the sultan regained internal autonomy, except in the case of a state of emergency<sup>23</sup>. The Resident was replaced by a High Commissioner (Article 4) directly accountable to London, and all treaties and agreements subsisting immediately before the commencement of this treaty were confirmed (Article 9.2). This agreement was amended in 1971<sup>24</sup> in reflection of the developments that had taken place during the ensuing twelve years now providing for full internal sovereignty.

On 7/1/1979, a further treaty<sup>25</sup> was concluded by which Brunei gained full independence after 31/12/1983 (Article 6). According to Article 1 of one of the annexed documents

*"[t]he existing special treaty relations which are inconsistent with full international responsibility as a sovereign and independent state shall terminate with effect from five years from 31 December 1978."*<sup>26</sup>

Article 2 terminates from the same date specifically the treaties of 1846, 1847, 1878, 1959 1971 and "other agreements, engagements undertakings and arrangements", provided that the termination should not affect, *inter alia*, the status of Labuan and the payment of the cession monies by Sarawak and Sabah. A further *Exchange of Notes* followed on 22/9/1983 which dealt with the detachment of UK naval, land and air forces within Brunei after independence<sup>27</sup>. Two of the three maps annexed to this document are marked with the caption:

*"This map is not considered by either Government as an authority on the delimitation of international boundaries."*

On 1/1/1984, Brunei became a fully independent state and was admitted to the UN as such in the same year as the 159th member-state<sup>28</sup>. None of the above treaties and/or agreements makes any specific reference to territorial claims of the districts Limbang, Lawas, Trusan or Rangau.

<sup>21</sup> Article 1 (text in Maxwell and Gibson op.cit.:151)

<sup>22</sup> 29/9/1959 (BFSP Vol.164:38)

<sup>23</sup> such a case arose in December 1962 during the Brunei revolt. After the abortive rebellion, a state of emergency was declared which is still in effect today being renewed biennially

<sup>24</sup> 23/11/1971, see HMSO Misc.No.12. 1972, Cmnd.4932

<sup>25</sup> HMSO Misc.No.5. 1979, Cmnd.7496

<sup>26</sup> *ibid*:25

<sup>27</sup> UK Treaty Series No.31, 1984, Cmnd.9207

<sup>28</sup> Brunei also joined ASEAN and the OIC (Organization of Islamic Conference) during 1984; it became a member of the Non-Aligned Movement in 1992

### 3.2 The Origin of the Claims

As a preliminary remark, it has to be stressed that, before the residency system was installed, a different type of tenure and, therefore, perception of land control existed in Brunei. This notion of control cannot be equated with what is understood today by territorial sovereignty of the modern nation-state. The matter is complex, and as a detailed analysis of the consequences to rights of territorial claims caused by the conflicting notion of sovereignty rights effecting the territorial claims by the original rulers as determined and permissible under international law is beyond the scope of this paper, the system can here only be explained as far as it is necessary to understand the problem.

In nineteenth-century Brunei three main categories of rights existed by which the nobles (*pengirans*<sup>29</sup>) exerted control over the area generally known as Brunei and through which they received their revenues. These rights were not restricted to administrative provinces, but referred to the right to tax people living in certain areas, mostly bound by geographical features such as mountains or rivers. The notion of absolute land ownership was an alien concept in Malay culture where land was simply used without being an object. The wealth of a ruler lay rather in the number of people within the area of his control since these people had certain obligations towards the ruler, be it the local chief or the sultan. Control has to be understood here on the basis of trade, the extent to which tax collectors were effective, and the ability to ensure followers in rival feuds. The theory that all land was vested in the sultan, as expressed by W.E. Maxwell in 1884 in his analysis of *Malay Land Tenures*<sup>30</sup>, was perceived from a western interpretation of landed property. However, no such system existed in the Malay world before the European influence eventually caused a transformation to a superior ownership of land<sup>31</sup>.

The main forms of tenure in Brunei were:

- (i) *kerajaan* - judicial, fiscal and commercial rights belonging to the sultan<sup>32</sup> ;
- (ii) *kuripan* - encompassing the same rights, attached to the position of the main state ministers (*wazirs*); and
- (iii) *sungei* and *hamba tulin* (or *pusaka*) - privately owned and hereditary fiscal and commercial rights<sup>33</sup>.

It has to be stressed that there did not exist a strict rule of who owned what; much depended on the charisma and power exerted by the individual *pengiran*. At the close of the century, the sultan's *de facto* direct control had diminished, while the owners of *kuripan* and *tulin* rights acted rather independently in their own districts<sup>34</sup>. As Brown remarks:

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<sup>29</sup> in Brunei *pengiran* (*pangaran*, *pengaran*, or *pengeran*) refers to a noble of royal blood, a title originated from the royal court in Aceh and introduced to Brunei probably during Sultan Hassan's time (1605?-1619?) who extended the number of the former two ministers of state to four

<sup>30</sup> JSBRAS XIII:75-200

<sup>31</sup> for details see Wong 1975: chapter 2

<sup>32</sup> at the end of the nineteenth century these areas were mainly near the capital, Brunei Town (now Bandar Seri Begawan). In 1904, the *kerajaan* included Temburong, Muara Damit and the Brunei district (Brown D.E. 1970:182); none of these continued to provide substantial revenues

<sup>33</sup> for details see, *inter alia*, Leys 1885:120ff, McArthur 1904:26,102, Brown D.E. 1970:102, Tarling 1971:5, Ranjit 1984:27

<sup>34</sup> see *infra*

"Though the Sultan may command, it is the district owner and the district owner's subordinates alone who must enforce the command. If the district owner refuses to comply only power could settle the issue, for the sultan had no alternative chain of command reaching into the private owner's district....Private hereditary domains were not intrinsically linked to the official hierarchy of the Sultanate. Holders of hereditary domains were themselves not necessarily office holders, and in fact frequently were not. Even if they did hold office their status qua official had nothing to do with their status as holder of the hereditary domain. Likewise, even though members of the Sultanate's official hierarchy....might reside in a private domain, their status qua official had nothing to do with the administration of that domain. Since very substantial portions of Brunei's dominions were hereditary property, a high level of decentralization of the Sultanate is manifest."<sup>35</sup>

According to the same author, the *kuripan* holders also exercised a great level of autonomy. The main differences lay in the fact that the *wazirs* could not alienate *kuripan* districts without the sultan's consent, and should the *wazir* die, the appanage reverted back to the sultan's purse<sup>36</sup>. The ruler was then, however, not under the obligation to appoint a new *wazir* to whom the district was to be attached. This indigenous pattern of tenure was dissolved after the 1905/6 *Resident Agreement* and replaced by the *Land Codes* of 1907 and 1909.

A further short observation has to be made in regard to the different type of *wazirs*. Under Sultan Abdul Momin, the sultanate provided for four *wazirs*, all nobles of royal blood:

- (i) the *bendahara* can be best described as chief minister; he was also highest official in matters of law after the sultan;
- (ii) the *temenggong* was equal to a war-, naval-, and foreign minister;
- (iii) the *di-gadong* was the keeper of the seal and the treasurer; while
- (iv) the *pamancha*, chief mediator of the Council, was similar to a home minister.

Again no fixed rule existed in regard to rank, order or duties, and there certainly did not exist any written regulations of procedures. As pointed out above, much depended on the power of the individual who would rule by consensus if possible. As shall be shown presently, under Sultan Hashim<sup>37</sup> the circumstances were rather different and therefore produced a different result. He, for instance, did not appoint a *Temenggong* following his own ascendancy from that position to the throne; neither did he fill the post of the *di-Gadong* after the latter's death in 1899(?). During the Residency, only two of the *wazir* positions were retained, whose roles - though prestigious - were purely formal<sup>38</sup>.

<sup>35</sup> Brown D.E. 1970:83

<sup>36</sup> see letter written by Sultan Abdul Momin 3/3/1881 (or probably by the *Bendahara*) to Consul Lees explaining the different traditional rights; text in Leys op.cit.:121ff

<sup>37</sup> born 1825, *Temenggong* 1852-1885, Sultan 1885-1906 under the name of Hashim Jalilul Alam Aqamaddin. Not only was his accession to the throne strongly disputed, also his parentage was questioned as some claimed that he was not the son of Omar Ali Saifuddin II, but that of a Brunei merchant (see Crisswell 1977:42)

<sup>38</sup> Horton *The British Residency in Brunei 1906-1959*, 1984:16. In 1967, the post of the *Temenggong* was re-filled, that of the *di-Gadong* in 1968. Today five main official positions exist in the Sultanate, the fifth being of religious rank (see Brunei Constitution Revised Edition 1984, Part 1 Article 2.1b). However, after the deaths of the last *Pamancha* Mohamed and the *Temenggong* (father of the present Sultan's first wife), only three positions are currently filled, i.e. by the Sultan's brothers

### 3.2.1 The Limbang and Rangau

Three geographical features carry the name Limbang: (i) the river (*batang*<sup>39</sup>); (ii) the principal town; and (iii) the district. The *Batang* Limbang has a length of c. 225 km and is situated between the two parts of Brunei (see Map 1); it is navigable by vessels of three metres draught as far as Limbang town fifteen kilometres above the rivermouth. In the middle of the last century, the inhabitants of the area paid taxes to the Brunei nobles and the district was considered thereby to be part of the Sultanate.

The existing information regarding the land tenure of the Limbang after 1860 varies considerably. Tarling holds that apparently it had mainly been Sultan Abdul Momin's *tulin* land, while the *ulus* (headwaters) seem to have belonged to *Temenggong* Hashim as *kuripan* possession<sup>40</sup>. Other sources indicate that the Limbang was *kerajaan*<sup>41</sup>, or of mixed and changing tenure<sup>42</sup>, or fully owned private property of the *Temenggong*<sup>43</sup>. Low, former Consul-General of Borneo, reported in 1887 that the Sultan had very little property in Limbang, which seemed to have belonged to a rival faction of the royal house, i.e. the *Bendahara* and the *di-Gadong*.

It is impossible to ascertain for certain the exact status of tenure in the Limbang district at the relevant time, i.e. in 1884. The most likely conclusion is that it was partly *kuripan* to the *temenggong*'s office, and partly *tulin* to Sultan Abdul Momin, who bequeathed his rights to the two brothers who continued to serve as *bendahara* and as *di-gadong*<sup>44</sup> when he died. This assumption would explain Hashim's later refusal to appoint a new *temenggong* who would then have benefited from the tax collection<sup>45</sup> since he was in desperate need of money to retain his followers in the factious realm<sup>46</sup>.

Whatever the case may have been, after 1880, various local chiefs<sup>47</sup> rebelled against the excessive arbitrary taxation and in 1884 a revolt broke out during which two of the

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<sup>39</sup> *batang* is in the Malay language, *inter alia*, a coefficient for long, thin objects; since the Limbang is a relatively long river, *sungei* is replaced by *batang*

<sup>40</sup> Tarling op.cit.:313; Crisswell 1971:227

<sup>41</sup> Wright 1970:187

<sup>42</sup> Brown D.E. 1970:Appendix C

<sup>43</sup> letter from Maxwell to Acting Consul General Treacher 22/12/1884 (text in Allen, Stockwell, Wright op.cit.:604; see also Crisswell 1977:50; Runciman 1960:187)

<sup>44</sup> i.e. the above-mentioned *Anak Besar* and Muhammed Hassan or *Anak Tengah*

<sup>45</sup> the main *chukei* (taxes) being an annual poll tax plus *pertolongan* (contribution to royal expenses), *lapis kaki* or *basoh betis* (royal visit tax at arrival), *bongkal sauh* (royal visit tax at departure), *dagang* and *serah* (forced trade); for details see Leys op.cit.:126

<sup>46</sup> for the fragmentation in Brunei and the reasons thereof see, *inter alia*, Wright op.cit.:188ff. Sultan Abdul Momin and the *di-Gadong* Muhammad Hassan initially favoured the BNBC (i.e. Treacher, supported by the FO), while *Temenggong* Hashim and the *Bendahara* were on Brooke's side (supported by the CO which was not in favour of chartered companies). When the *Temenggong* became regent, the *di-Gadong* refused to hand him the seal which was necessary to validate official documents such as treaties, as he was opposed to Hashim's accession to the throne. Although Brooke had supported Hashim's contested claim to the position of sultan, after Brooke's annexation of the Limbang, the Sultan became strongly opposed to the *Rajah*

<sup>47</sup> i.e. mainly Bisayas and Kedayans; although the Muruts, who in general lived in the remote *hinterland* and therefore escaped being included in the taxation system, nevertheless joined the revolt (for a description of local non-Malay tribes see, *inter alia*, McArthur op.cit.:110ff)

*Temenggong's* tax collectors were killed and his launch attacked<sup>48</sup>. Hashim, having been proclaimed regent for the ninety-three year old Sultan in November 1884<sup>49</sup>, decided to cede the Limbang and the Trusan to *Rajah* Charles Brooke a month later, partly because of his inability to reassert control over the districts and collect taxes<sup>50</sup>.

The other reason has to be seen in conjunction with the *Grant of Territory of Si Putong to Kwala Paniow*<sup>51</sup> in November 1884 to the BNBC which included a restriction clause saying that the Sultan, the *Bendahara* and the *di-Gadong* agreed that

*"they will by no means permit or sanction any grant of the lands or territory or of the rights of Government of the territories of the Limbang river and to the northward thereof....without first informing the Sabah Company".*<sup>52</sup>

Hashim, who - although being regent - was excluded from the treaty, considered the area to be under his command, and counteracted his colleagues' move by ceding the Trusan and Limbang a month later to Brooke. As the latter was at that time in England, his representative, Maxwell, signed the Trusan cession (see *infra*) and accepted the Limbang offer subject to the *Rajah's* approval after the latter's return<sup>53</sup>. Maxwell felt that, according to Article X of the 1847 *Treaty of Friendship and Commerce* between Britain and Brunei<sup>54</sup>, consent by the British Government was required. This was obtained from the Foreign Office a year later under the condition that the cession was in agreement with the wishes of the Sultan and that Brooke should never cede any portion of Sarawak to any entity without the British Government's consent.<sup>55</sup> Brooke agreed to the latter<sup>56</sup>, but when he attempted to take possession in 1887, the former *Temenggong* - now Sultan - who promised the cession originally, declined to carry out his agreement<sup>57</sup>. This attitude could be seen as a consequence of Brooke's refusal to help repress

<sup>48</sup> Horton *A Centenary. W.H.Treacher and the Limbang Revolt 1884-5*, 1985:91. This incident was followed by more killings by the Bisayas. Treacher negotiated an accord (20/10/1884; FO 12/61/78) with the local chiefs replacing the Brunei taxes with a poll tax. However, any adherence to that agreement - even partial - was short lived

<sup>49</sup> FO 12/61/113

<sup>50</sup> see Crisswell 1971:220. Charles Brooke (1829-1917) had been in charge of the internal administration in Sarawak since 1858. He became successor to his uncle James as the ruler in 1868 (see *Extract from the Will of Sir James Brooke* 15/4/1867; FO 93/86/3)

<sup>51</sup> i.e. from Sipitang to Kuala Penyu, concluded on 5/11/1884 apparently after excessive bribery by Treacher to the Sultan's court (Runciman op.cit.:187; text of treaty in Maxwell and Gibson op.cit.:173)

<sup>52</sup> this clause was cancelled three years later (2/2/1887) by the then Sultan Hashim

<sup>53</sup> according to Wright (op.cit.:187) the cession money for the Trusan was \$4,500 p.a.; the one for the Limbang originally \$ 5,000. Unfortunately, it seems that the text of the original cession regarding the Limbang has been lost. NB: a note on contemporary currency: the standard currency used for treaty obligations at the time was still the Mexican Silver Dollar. At the end of the century - latest by 1903 - it was replaced by the Straits Settlement dollar. For details regarding Brunei currency see Barrett 1981: chapter 1; for Straits Settlement currency see Pridmore 1955:41 Part 4

<sup>54</sup> signed 27/5/1847 (BFSP Vol.35:14). Treacher, forever trying to prevent Brooke acquiring more territory, may have asserted pressure on Maxwell to take this step in order to delay and complicate the cession (see also FO 12/61/139). The multifunctions exercised by Treacher certainly advanced the BNBC's position in negotiating cession treaties. Besides being the British Acting Consul General for Brunei, simultaneously Treacher also held at the critical time the posts of Acting Governor of Labuan and Governor of the BNBC which, according to Brooke, resulted in a grave conflict of interest (FO 12/61/393)

<sup>55</sup> see documents of 30/5 and 11/6/1885 (text in Allen, Stockwell, Wright op.cit.:605,606)

<sup>56</sup> 30/1/1886 and 6/5/1890 (ibid:607,616)

<sup>57</sup> Crisswell (1971:225) and Runciman (op.cit.:190) maintain that in 1887, after Weld (Governor of the Straits Settlements 1880-1887) had visited Brunei, Hashim agreed to cede the Limbang to Brooke for \$ 20,000 while *Rajah* Brooke offered \$ 6,000 p.a. as cession money which in turn the Sultan refused. Crisswell also states that in 1891, the *Bendahara*, the *di-Gadong* and the local *pengirans* were agreeable to the cession (ibid:227). Stubbs (first chief CO clerk and later Governor of Hong Kong) mentions in his *Memorandum* of 1911:97 that on 7/6/1887 *"the Sultan and all the Chiefs and Councillors concerned, except the Pengiran di-Gadong, made a written application for the appointment of a British Resident to govern the Limbang."* However, this was refused by the British

the revolt in Limbang, an attitude which was - in the Sultan's view probably - a breach of Article 6 of the 1884 *Trusan Grant* according to which Brooke promised

"...that should they [i.e. the sultan, his children, grandchildren and descendants] experience any trouble or affliction at Brunei, the Government of Sarawak will secure them justice, in accordance with the bonds of friendship, as if it were that [the sultan] was personally identified with Sarawak..."<sup>58</sup>

Brooke on the other hand, who tried to obviate the exorbitant taxation of the Brunei rulers, might not have regarded rendering assistance in this case as a just cause. Since 1884, the local chiefs of the Limbang refused to pay taxes, considering themselves no longer under the Sultan's control and subsequently asked Brooke for protection. In June and September 1888 respectively, Sarawak and Brunei became protected states, and in March 1890 Brooke annexed the district<sup>59</sup> justifying his action on the will of the people and their right to choose their own ruler<sup>60</sup>. Although initially the British did not approve of this step, since it did not fulfil the earlier condition of the Sultan's consent, they endorsed the annexation in 1891 based on the wishes of the local chiefs<sup>61</sup>. Hashim protested against Brooke's action to the UK Government<sup>62</sup> and to the Queen, but was reminded that according to the stipulations of the *Protectorate Agreement* he had to acquiesce to the decisions taken by Her Majesty's Government. The Sultan, in return, claimed that the Limbang was part of Brunei and consequently the problem was an internal - not an external - one, and therefore the *Protectorate Agreement* did not apply. However, the British who, after Trevenen's report of 1891, considered the Limbang as having been independent before the annexation, reminded the Sultan of his acceptance that Sarawak was a "foreign state" (Article I of the Brunei *Protection Agreement*) and of the provisions of Article III thereof (see supra). They subsequently maintained that he had to abide by their decision and considered the subject closed.<sup>63</sup>

In 1941, Vyner Brooke<sup>64</sup> made another proposal in connexion with the annexation of the Limbang. He offered a \$20,000 lump sum to the Sultan and an annuity of \$1,000. This offer was approved by Brunei, but blocked by the British High Commissioner. Brooke also offered

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Government on financial grounds. He further reports that in 1888 the Sultan changed his mind again, but that "all the pengirans and chiefs concerned, except the Sultan, would have agreed to the cession to Sarawak failing the appointment of a British Resident in Limbang, and that at least the majority of the Limbang headmen held the same view." (ibid:99). It seems evident that Hashim did not disapprove of the transfer of the Limbang to a foreign power in principle, he only objected to a cession to Brooke, although Runciman (op.cit.:198) reports that, on the other hand, the Sultan so strongly opposed the appointment of a resident that "he would just as soon have accepted the Rajah's offer". In 1904, the *Bendahara* proposed a cession of all his property - which included parts of the Limbang - to Britain in return for a loan of fifteen thousand dollars (McArthur op.cit.:136)

<sup>58</sup> this is according to the translation in Maxwell and Gibson (op.cit.:190); the English text found in FO 12/61 is slightly different

<sup>59</sup> *Proclamation of the Annexation of the Limbang*, 17/3/1890 (*Sarawak Gazette* 1/4/1890:43)

<sup>60</sup> according to Trevenen (Consul from 1890 to 1898, sent on a fact finding tour in the Limbang in 1891), out of the fifteen local chiefs only two were in favour of Brunei rule. He also reported that the Sultan had exercised no control over the region for the last seven years (see *Consul Trevenen to the Marquis of Salisbury* 30/4/1891, text in Allen, Stockwell, Wright op.cit.:626)

<sup>61</sup> see FO Memorandum by Oakes (LO) 5704/20 of 2/5/1899. Even Treacher, who was strongly opposed to Brooke, admitted in 1890 that the people of the Limbang would welcome Sarawak rule (Crisswell 1971:226)

<sup>62</sup> see, *inter alia*, FO 572/27, Inclosure 1 in No.86

<sup>63</sup> *ibid*: Inclosure 2. This was after the three-year period for the Sultan to accept the cession money had expired (see FO *Memorandum Respecting the Annexation of Limbang to Sarawak* 2/8/1898; text in Allen, Stockwell, Wright op.cit.:642). See also the attempt by the BNBC to acquire a lease in 1892 from the Sultan by one of their officers (Mr. Davies) for 100,000 acres of the Limbang district to Mr. Davies' father-in-law (Mr. King). The British Government opposed this lease on grounds that the district was at the time already under Brooke's rule (see FO 572/27 No.15,74)

<sup>64</sup> he was the eldest son of Charles Brooke who succeeded his father after the latter's death in 1917

to the surviving heirs of the former *tulin* holders (the *Bendahara* and the *di-Gadong*) \$60,000 plus \$6,000 annually. According to Horton, these payments were actually made and accepted. After World War II, Ahmad Tajuddin (Sultan since 1924), received an *ex-gratia* payment of \$6,000 for the years 1942-1947 and an annuity of \$1,000 until his death in 1950. When it became evident that many of the 1941 claimants had been paid out on forged entitlements, a new agreement was concluded requiring an immediate payment of \$28,048 and of \$4,674 annually thereafter.<sup>65</sup> However, no payments referring to the Limbang were made to Ahmad Tajuddin's successor, Omar Ali Saifuddin III, father of the present Sultan<sup>66</sup>.

It has been argued that with the confirmation of Brooke's annexation the British Government "*broke one of the fundamental principles of international law*", since this decision "*was injurious and fatal to Brunei*"<sup>67</sup>. This is, however, a misinterpretation of the objective of a protectorate, or in this case, of a protected state, since the main reason for the protecting power to conclude a protectorate agreement was the aversion of a possible extension of another *European* power's influence over the protected territory and not necessarily the independent existence of it (see *infra*). It is quite evident, as will be shown in section 3.3.3, that, in the perception of international law at the time, protectorate agreements *per se* did not involve an intention to guarantee the borders and integrity of territory in the same way as, for example, France guaranteed Monaco's borders in the 1918 *French-Monegasque Treaty*<sup>68</sup>. In the course of history, protected territories became, more often than not, colonies of the protecting state thus losing their semi-sovereign status. Besides, in the Bruneian case, a guarantee of borders would have been difficult due to the fact that the territorial extent of the Sultanate was not clearly defined when the agreement was concluded.

Even though, as pointed out above, the official reason for the *Protectorate Agreement* was to curb Sarawak's and North Borneo's expansionist tendencies, the treaty was worded in such a manner as,

*"not to stand in the way of such a consummation as the absorption, when the time arrives, of Brunei by Sarawak and the North Borneo Company. It would, in fact, enable the sultan to accept the inevitable on the best terms procurable"*<sup>69</sup>.

Although it was Hashim who had originally offered the territory, he never consented to the annexation despite the many attempts made by Brooke, Treacher and his successors, as well as by the FO and the CO. Without entering into the debate as to whether the rule of the persistent objector exists in international law or not<sup>70</sup>, it cannot be argued that the Sultan (and therewith Brunei) exemplified such a role, primarily for the very reason that it was the Sultan (i.e. the internationally recognized ruler of the sultanate) who initiated the cession in the first place.

<sup>65</sup> Horton in McArthur *op.cit.*:244 fn.96

<sup>66</sup> according to present Brunei sources, the other cession monies are still being paid by the Sabah and Sarawak governments. For earlier payments see CO 537/2242

<sup>67</sup> Ranjit *op.cit.*:87

<sup>68</sup> 17/7/1918; Hackworth 1940 Vol.I:79

<sup>69</sup> FO 12/78/165 Minute by Sir R.Herbert 31/1/1888 as quoted by Horton in McArthur *op.cit.*:184 fn.52

<sup>70</sup> for discussion thereof see Charney 1985: section II

Neither can the reason for the Sultan's refusal be interpreted as an adherence to the *amanah* of February 1885 in which the Brunei nobles agreed not to alienate any further territory, since Hashim himself signed various cessions with the Europeans after that event<sup>71</sup>. On the same grounds, the view that the Sultan's persistent refusal is to be interpreted as an example of patriotism, cannot be upheld.

The motives probably lay, aside from personal ones<sup>72</sup>, in the fact that Limbang was the closest river district in the vicinity of Brunei Town, and therefore the main source of revenue for whoever held the *kuripan* and/or *tulin* rights; or as Horton puts it "*the people [of the Limbang] supported the largely unproductive population of the Sultanate's capital*".<sup>73</sup> McArthur, later the first Resident in Brunei, remarks in his *Report on Brunei 1904*<sup>74</sup> on the importance of the district to the sultanate, but concludes that "*it seems impossible...to hope that the Limbang, or any part of it, can be handed back to Brunei rule*".<sup>75</sup>

However, as some questions arose in regard to the borders between the Limbang and the Temburong district, an agreement was signed in 1912 between the British Resident of Brunei and the Resident of the Fifth Division of Sarawak acknowledging, *inter alia*, sovereignty of Brunei over the Pandaruan, while allowing Sarawak to collect poll tax in the district<sup>76</sup>. Since

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<sup>71</sup> *amanah* means literally *trust* or *will*, although in this case the document was rather an agreement regarding certain rights of the *wazirs*. The text was signed on 20/2/1885, three months before Sultan Abdul Momin's death. It is apparently a written consent between the sultan and three of his *wazirs* (i.e. all except the *pamancha*) not to cede or lease any further territory. Treacher pointed out that the document only bore the sultan's seal, and that Hashim might have initiated it in order to use it to prevent the earlier Limbang Agreement (Tarling op.cit.:318). This assumption might be only partly correct. Analysing the text (in Brown D.E. 1974 Appendix B), it seems that the document rather was designed to settle the tenure quarrels between the two *tulin* holders of the Limbang, i.e. the *Bendahara* and the *di-Gadong* on one side and Hashim on the other. The former might have feared that Hashim, who most likely would become the next sultan, might claim and appropriate for his own use the revenues of the area since the document specifically refers to the Limbang, and mentions that "*on no account [shall the successors of Sultan Momin] take over rivers being the private property or the inheritance of other people, and Crown slaves shall not be made private property, they must ever so remain to their lawful owners and inheritors according to the customs of our forefathers.*" The *amanah* can hardly be seen as an interdiction to further territorial cessions *per se*, especially since on the same day, the Sultan and the *di-Gadong* ceded in perpetuity the Kawang area (text in Allen, Stockwell, Wright op.cit.:478). Neither was the *amanah* invoked in connection with any subsequent cession; see e.g. *Grant of Sovereign Rights over Inanam, Menggatal, Api-Api, Membakut, Mengkabong and Kuala Lama* of 30/3/1898 and others in CO 874/54

<sup>72</sup> the above-mentioned attack on the *Temenggong's* launch has to be seen as an insult to a ruler in Malay custom; disloyalty and treason against the sultan was perceived as one of the gravest infractions in Malay *adat* which had to be punished (see e.g. chapter IX and XXII of the *Sejarah Melayu* in C.C.Brown's translation 1970); the rebellious chiefs of the Limbang, however, were not of the Malay race

<sup>73</sup> Horton *A Centenary*..1985:91. The population of Brunei Town in 1904 was approximately 12,000 (McArthur op.cit.:138) and the Brunei River is only a short river with no *ulu*. The nearest of such is the Limbang. It has to be remembered that, aside from the coastal trade, the rivers were the lifeline of this jungle-rich and almost impenetrable *hinterland* of Borneo; without them there was no trade, *ergo* no income for the nobles. See also Leys who writes in 1883 "*the city of Brunei is simply a parasite on the Limbang River*" (letter to Earl Granville 3/5/1883 in JMBRAS 1968 XLI:127). If Leys' assumption is true - and it has been repeated by other contemporary sources - it reflects the weakness of the sultanate in the fact that the apparently most important river district was not *kerajaan* and therefore subject to alienation

<sup>74</sup> this report is probably the most comprehensive, albeit biased, account on Brunei available. It is also strictly written from Brunei's view (for instance, McArthur held no talks or meetings with Brooke during the six and a half months compiling the report). He was also only - in his own words - concerned with the "*sentiments of the oppressors*", not the oppressed (McArthur op.cit.:161). From the legal point of view, this report has to be seen as an interference into the internal affairs of Brunei which was in contradiction to Article 1 of the 1888 *Protectorate Agreement*. It nevertheless has been agreed upon that the consequence of this report - namely the 1905/6 *Resident Agreement* - probably saved Brunei from total disintegration

<sup>75</sup> McArthur op.cit.:144.

<sup>76</sup> *Agreement between the Government of Brunei and the Government of Sarawak Relating to the Pandaruan River and District* 21/5/1912 (text in Maxwell and Gibson op.cit.:152)

this was not a satisfactory solution for either side, a new agreement was entered into in 1920, which revoked the 1912 treaty<sup>77</sup>. The new stipulations provided that:

"(1) All lands and rights of every kind and description on the Western (Limbang) bank of the Pandaruan shall belong to and be vested in the Government of Sarawak.

(2) All lands and all rights of every kind and description on the Eastern (Temburong) bank of the Pandaruan shall belong to and be vested in the Government of Brunei",

and that this border was not to be altered without the High Commissioner's and/or the *Rajah's* sanction (Article 4)<sup>78</sup>. Neither border agreement refers to any Bruneian claim to the Limbang.

The separate territorial claim by Brunei to Rangau is not clear: Rangau is a small village between the estuaries of the Limbang and the Pandaruan where a Sarawak custom station was established after the conclusion of the above-mentioned treaty of 1912. Assuming that this claim refers to the section of land surrounding *Kampong* Rangau approximately two kilometres to the east of the Limbang estuary including *Sungei* Rangau and *Sungei* Rangau Damit<sup>79</sup>, any claim to Rangau has to be seen as being part of the Limbang district and cannot be separated therefrom.

### 3.2.2 The Trusan and Lawas

As mentioned above, on 12/12/1884, Hashim, holding the positions of *Temenggong* and regent, ceded the Trusan river district to Charles Brooke<sup>80</sup>. Ranjit holds - apparently following Treacher's view - that the treaty is illegal as it does not bear the Sultan's seal<sup>81</sup>. This is in contradistinction to Maxwell and Gibson's slightly different translation, who show that the sultan's seal was attached to the document<sup>82</sup>, while according to Treacher, the grant was only "*chopped*" by the *Temenggong* and the *Bendahara*, but not by the Sultan and the *di-Gadong*<sup>83</sup>. Treacher's opinion, however, has to be seen as inconsistent since he considered the *Grant of the Putatan River* to the BNBC of March 1884<sup>84</sup> as being valid (a document only signed by *Pengiran Muda Damit* Tajudin, son of *Pengiran Muda Hassim*<sup>85</sup>, and confirmed a month later

<sup>77</sup> 4/2/1920 *Agreement between the Government of Brunei and the Government of Sarawak Relating to the Pandaruan River and the District* (text *ibid*:153)

<sup>78</sup> the borders of today along the Pandaruan are according to this agreement, although relevant maps indicate a demarcation on the eastern bank (see *Bahagian Limbang*, printed by the Land and Survey Department, Sarawak, 1983). For practical purposes the *thalweg* principle should apply, i.e. the principle which is usually resorted to in cases where a navigable river forms the border between two countries. In order to achieve an equitable boundary solution, the border does not follow the physical middle of the river, but runs along the mid-course of the navigable channel (see Oppenheim 1963:532)

<sup>79</sup> see map *Bahagian Limbang*, printed by the Land and Survey Department, Sarawak, 1983; i.e. at 4°49'N, 115°01'E

<sup>80</sup> text in Maxwell and Gibson *op.cit.*:189 and Allen, Stockwell, Wright *op.cit.*:602

<sup>81</sup> Ranjit *op.cit.*:69

<sup>82</sup> according to an attached note, the agreement of 12/12/1884 was but a confirmation of a treaty concluded already six months earlier and signed by the *Temenggong* before his accession to the throne. "*The two agreements are verbatim the same except in respect to the titles of the grantor....*" (Maxwell and Gibson *op.cit.*:190)

<sup>83</sup> see Treacher to Alcock, 20/12/1884 in CO 874/237

<sup>84</sup> 20/3/1884 (text in Allen, Stockwell, Wright *op.cit.*:471)

<sup>85</sup> the indication in the translation provided by Allen, Stockwell, Wright that Tajudin was the son of *Hashim* is incorrect

by the *Temenggong*). The same is true for the 1877 *Grant of the Kimanis and Benoni* by the *Temenggong* to Overbeck<sup>86</sup>. According to Crisswell, Hashim maintained that the Trusan was his *tulin* and that, therefore, the Sultan's seal was not needed<sup>87</sup>.

In Article 1 of the *Trusan treaty*, Hashim cedes

*"the coast from Cape Puan [Tanjong Puan] to the east of the River Trusan as far as the mouth of the River Bumbun, with all the tributaries and the main river of the Trusan as far as their sources together with all their rivers that flow to the coast between Cape Puan and the River Bumbun, and all its territory."*

In accordance with Article 2, Brooke paid Hashim and his successors \$4,500 p.a. as compensation for revenues and levies, while Article 3 states that only Brooke and his successors shall have authority over the ceded lands as Hashim,

*"or his heir or successors, shall not concern himself any further and has truly released [the area] to the Government of...Brooke....or his heirs...."*

Article 4 restricts Brooke and his heirs from ceding or selling the district to any other government, company or private individual without the consent of the British Government.

*Tanjong Puan* lies approximately 12 km west of Kuala Trusan, the point where the *Batang Trusan* flows into the sea<sup>88</sup>. The region described in the treaty covers the catchment areas of the Trusan and a number of short interdigital rivers of which the main ones are the Bangau and the Sundar<sup>89</sup>.

On 7/9/1901, Sultan Hashim signed a further grant with the BNBC over a territory, called the Lawas<sup>90</sup>, lying east of those areas covered in the 1884 *Trusan Agreement*. Therewith he ceded

*"all the sovereignty rights and powers, and all other powers and rights and the like which are included in Our powers and rights over and in the districts lying between the River Sipitang and Terusan including the rivers Merintaman, Mengalong, Merapok, Lawas, Sari, Punang, Lumut (Siang Siang), Kabap, Putus, Pelait, Bumbun and Langareh together with all the lands, sea bays, and rivers not herein mentioned lying on the North of Terusan."*<sup>91</sup>

In return - besides a \$600 annual payment to the Sultan - the BNBC was to confirm all land user rights of the *pengirans* and other people owning property in the said area who had proof

<sup>86</sup> 29/12/1877 (text in CO 874/20 and 54)

<sup>87</sup> Crisswell 1977:50. Brown on the other hand maintains that the Trusan probably was mixed *kuripan* and *tulin* (Brown D.E. 1970:Appendix C)

<sup>88</sup> the *Batang Trusan* has a length of c. 110 km rising near the source of the *Batang Limbang*, lending its name to the district and the major town therein; see Map 1

<sup>89</sup> however, the present-day eastern border between Brunei's Temburong district and Sarawak starts c. 5.4 km east of *Tanjong Puan* along the rivermouth of the *Sungei Bangau* according to the coordinates established in the above-mentioned 1958 *North Borneo (Definition of Boundaries) Order in Council* and *Sarawak (Definition of Boundaries) Order in Council* (BLRO 1/1984, Sup.III and IV)

<sup>90</sup> the principal town is likewise called Lawas which lies 20 km south of the entrance of the river by the same name

<sup>91</sup> CO 874/54/50

of such ownership by way of the Sultan's seal prior to this treaty conclusion<sup>92</sup>. Such declarations existed, for instance, for the Siang Siang and Bumbun district<sup>93</sup>. Subsequently, separate agreements regarding the transfer of *tulin* rights in these districts were signed between the various chiefs and the BNBC or *Rajah* Brooke respectively, all bearing the seal of the Sultan for approval as a precaution against forgery which frequently occurred. Sanction by the British Government in regard to these *tulin* transfers was not anticipated in any of the treaty documents<sup>94</sup>.

What emerges from the text of these agreements is that, since about the end of the 1890s, a distinction and separation between *kerajaan* and *tulin* rights in respect to territorial cessions became more prominent and recognizable. It also demonstrates that the monetary value of the former, held at the outer edges of the realm, was considerably less than the locally collected revenues of the latter. The reason for this has to be seen in the fact that the Sultan's direct control over territory was always greater at the centre than at the periphery, a phenomenon not consistent with the theoretical powers of today's state sovereignty. In this case the Sultan only received \$600 p.a., while the *tulin* holders collectively received \$8,775.

Although the area of the Lawas cession was significantly larger than that of the Trusan transfer, the annual payment to the Sultan was considerably less. It has to be pointed out that these amounts were in no way arbitrarily arrived at, but reflected the amount of control the ruler exercised over a certain area. This is why it is permissible to assume that in 1901, the Sultan's control over the Lawas must have been at the best nominal, although the *Grant of Sovereign Rights over Inanam, Menggatal, Api-Api, Membakut, Mengkabong and Kuala Lama* to the BNBC of 30/3/1898<sup>95</sup> had confirmed his rule over the territory east of *Tanjong* Nosong. Neither can *Rajah* Brooke's control of the northwestern part of this area have been substantial, since he did not protest to Hashim about the fact that parts of the western area - i.e. between *Tanjong* Puan and the Bumbun - had already been ceded to him in the 1884 Trusan deed. In order to prevent further complications, Brooke suggested the drawing of a neutral line between the Trusan and the Mengalong to separate the possession of the BNBC and Sarawak.

On 12/12/1904, i.e. one year before the establishment of a Residency in Brunei, Brooke and the BNBC concluded a treaty, sanctioned by the UK Government, by which the districts lying between the watershed and tributaries of the Lawas and the Trusan rivers were transferred to Sarawak in return for certain mineral rights and privileges for a one-time payment of £4,000<sup>96</sup>. On 20/12/1904, a further deed was concluded between both parties to include the Langarih and

<sup>92</sup> the treaty does not mention any *tulin* rights owned by Hashim, only *hak Pengeran-Pengeran dan lain-lain orang yang ada mempunyai harta dalam daerah yang tersebut itu dan segala pajakan yang telah di-anugerahkan oleh Bawah Duli Yang-di-pertuan....* meaning literally *all rights (privileges) of the Pengerans and other people who owned properties in those afore-mentioned districts and all the leases presented by His Highness....*

<sup>93</sup> see documents of 1890, 1892 and 1900 (in Maxwell and Gibson op.cit.:203-205). It is not quite clear who owned the land east of the Langareh (Langarih, Langarik, Lengari)

<sup>94</sup> this was probably so, because the British held that *tulin agreements* fell under the category exempted from the restrictions of Article VI of the *Protectorate Agreement*, namely that the requirement of British consent did "*not apply to ordinary grants or leases of lands or houses to private individuals for the purpose of residence, agriculture, commerce, or other business*". However, in earlier agreements differentiations were not always made. For text of the later *tulin agreements*, see CO 874/54 and Maxwell and Gibson op.cit.:202-205

<sup>95</sup> text in CO 874/54. N.B.: According to this agreement *Pulau Mengalum* (i.e. Mangalum Island, 31 nm west of Kota Kinabalu) explicitly remained "*under the sovereignty of Brunei and of him who possesses it*". The text does not mention who the owner was in 1898; however, presently the island is Malaysian territory. Brunei has not included the island in its territorial claims.

<sup>96</sup> treaty text in Maxwell and Gibson op.cit.:196ff

Bumbun districts into the previous treaty as if such rights had formed part of the area transferred to Brooke in the earlier agreement.

It was only three months after this exchange that the *tulin* rights of the Lawas and the Merapok were also transferred to Sarawak. Eight months later, the Resident system was installed, and no further cessions occurred. On 28/7/1910, a definite delineated border between North Borneo and Sarawak was drawn which constitutes the demarcation between present-day Sabah and Sarawak<sup>97</sup>.

### 3.2.3 The Transfer of Sarawak in 1946 and 1963

Since all districts claimed by Brunei are situated within today's state borders of Sarawak, the latter's legal status has to be evaluated. After Charles Brooke's death in 1917, his eldest son, Vyner continued the White *Rajah's* rule in Sarawak until December 1941 when the Japanese occupied Kuching. A month earlier, Brooke had signed the above-mentioned agreement with the UK which provided - like the 1905/6 *Brunei Resident Agreement* - for a British appointed Representative (Article 1)

*"whose advice must be asked and acted upon on all matters affecting the relations of the State...with foreign states or the rights and status of foreign nationals and on all matters of defence."* (Article 2)

Since the Sarawak Government lacked the resources to rebuild the war-damaged state in 1945, Brooke offered to cede the territory to the UK. As from 1/7/1946, Sarawak was annexed to His Majesty's dominion and called the Colony of Sarawak<sup>98</sup>. This included all areas presently contested by Brunei. The transfer of Sarawak from Great Britain to Malaysia was effected in 1963 by the *Agreement Concluded between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaysia, North Borneo, Sarawak and Singapore* which states in Article I that

*"....Sarawak....shall be federated with the existing States of the Federation of Malaya as the State [of]....Sarawak....in accordance with the constitutional instruments annexed to this Agreement...."*<sup>99</sup>

In Article IV, the Government of the United Kingdom relinquished sovereignty and jurisdiction over the areas to Malaysia as from 16/9/1963. The Malaysian Constitution in its first article defines the territory of Sarawak as the territory comprised therein immediately before Malaysia Day, i.e. 16/9/1963. This included at the time the territories of the district of Limbang, Trusan, Lawas and Rangau. In contradistinction to Indonesia and the Philippines, Brunei did not protest against the creation of the Federation of Malaysia as such; it only decided not to join in the later stages although at the beginning of June 1963, agreement on

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<sup>97</sup> *Sarawak-North Borneo Agreement* (text in Allen, Stockwell, Wright op.cit.:653)

<sup>98</sup> 26/6/1946 (BFSP Vol.146:172)

<sup>99</sup> *Malaysia Treaty* of 9/7/1963; Cmnd.2094 July 1963

nearly all broad issues of its entry into the Federation had already been reached<sup>100</sup>. Neither is there any official proof that Brunei specifically protested at that point of time against the inclusion of the territories now claimed (see *infra*). According to the 1984 *Interpretation and General Clauses of the Laws of Brunei*, any reference to the "Colony of Sarawak" or "Sarawak" is to be construed as reference to the "State of Sarawak"<sup>101</sup>. Since special reference is made to the status of Sarawak as a colony, it must be assumed that the territorial definition applies to the boundaries of Sarawak for the period between 1946, when it became a British colony, and 1963, when it became part of Malaysia. At all times it included the districts currently claimed.

### 3.3 Legal Assessment

It is not known whether the Brunei Government has presented the Malaysian Government with a legal assessment expounding its claim to the three districts and Rangau. The only published comments are statements which sporadically appear in the media depending on the political situation. In 1970, Omar Saifuddin III, who had abdicated three years earlier (4/10/1967) in favour of his eldest son Hassanal Bolkiah, stated in a radio address that "*Brunei and Limbang are not separated because Limbang belongs to Brunei*"; no mention of the other now claimed districts was made then<sup>102</sup>. Neither can such be found in two later articles of 1974, where it is argued that the continuous occupation by Malaysia of the Limbang represent a grave offence in Islamic law, quoting Koranic verses for punishment of those who violate the rights of others and retain title illegally<sup>103</sup>. It continued that

*"Malaysia cannot deny that Limbang was annexed forcefully by Charles Brooke in March 1890....Since Malaysia is also an Islamic country, Malaysia is obliged to return Limbang to its rightful owners."*<sup>104</sup>

The newspaper article further states that in 1963, before the formation of the Federation of Malaysia, Brunei submitted its claim over the Limbang to the UK Government, an assertion which, however, could not be verified<sup>105</sup>.

The only reference at the time to any territory can be found in the *Borneo Bulletin* reported on 27/4/1963 of a "*Limbang-for-Brunei Uprising*" led by a certain *Inche Amin bin A. Bakir*. However, this movement only referred - as the name indicates - to this specific district and not to the other areas now claimed. Amin presented a memorandum on 31/8/1963 to the eight member UN mission which was then in Sarawak to ascertain the wishes of the inhabitants of

<sup>100</sup> *Borneo Bulletin* 8/6/1963. The main reason for Brunei's rejection to join the new Federation centred around the questions of oil revenue and the Sultan's position of royal precedence among his Malaysian counterparts. Regarding the Sultan's previously pro-merger attitude, see Ranjitt op.cit.: Chapter 7

<sup>101</sup> Laws of Brunei Vol.I, Constitutional Matters (BLRO 1/1984, Cap.4:19)

<sup>102</sup> *Pelita Brunei* 30/9/1970

<sup>103</sup> *Ketegasan Islam and Menjawab Siaran Radio Dari Limbang* (ibid 27/2/1974)

<sup>104</sup> *ibid*; translation mine

<sup>105</sup> neither the Brunei Government nor the British Foreign and Commonwealth Office was able to supply proof of such a document. NB: The PRO documents, selected for permanent preservation, are normally opened to public inspection in the January after they become thirty years old. However, some may be retained in the relevant department of the government under section 3(4) of the *Public Records Act 1958* and may be closed for longer periods. Since research was undertaken in the first half of 1993, access was still denied

Sarawak and Sabah on the question of joining Malaysia<sup>106</sup>. Although he claimed to represent the Malays, Muruts and Kedayans of the area, his authority was questioned by other people from the Limbang<sup>107</sup>; since a different group, consisting of Bisayas, Ibans and Muruts, had expressed the desire to join the Federation<sup>108</sup>. But no contemporary claim from the Bruneian Government is registered, although Sultan Omar Ali Saifuddin delivered an order (*titah*) on 17/7/1963 expressing Brunei's stance towards the creation of Malaysia<sup>109</sup>, the contents of which was repeated in a speech delivered on 31/8/1963 where the Sultan only mentioned that

*"he and his government had decided that it was not in the interest of the state and the people of Brunei to join Malaysia at this time."*<sup>110</sup>

Only after Omar Ali Saifuddin III relinquished his position as Sultan did he try to revive the Limbang claim<sup>111</sup>. This action, however, seems to have been motivated rather by political reasons rather than being based on legal justifications as it was in response to Malaysia's attitude towards the Federation's official support of the Parti Rakyat Brunei (PRB) which had been banned by the Sultan after the abortive rebellion in December 1962<sup>112</sup>.

A possible argument that Brunei did not need to protest against the 1963 *Malaysia Treaty*, because such agreement could be considered as being *res inter alios acta*, cannot be seen as a valid reason for not objecting against the then inclusion of the now claimed territories into Malaysia. Brunei was actively involved in the negotiations leading to the creation of the Federation. If the Sultan felt that he legally had a claim to the Limbang, Trusan, Lawas and Rangau, the issue would have been a major point of negotiations once he decided that Brunei was not to join in the merger. However, the issue was not raised at any level of the extensive discussions.

Nor did the Brunei Government issue any official statements of its claims after independence. On two the occasions when such claims could have been announced to an international forum - i.e. in the *Proclamation of Independence* of January 1984 or during the Sultan's address to the UN General Assembly on 9/9/1984 - no indication of territorial claims beyond the present-day boundaries were expressed.

In the absence of Brunei's willingness to make available its legal position, the analysis of the claim under international law aspects can only be based on and examined according to available documents, their historical and legal relevance, *opiniones iuris* as expressed in judicial settlements, and state practice.

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<sup>106</sup> for details see Haller-Trost 1992: Chapter 6.2

<sup>107</sup> *Borneo Bulletin* 7/9/1963

<sup>108</sup> *ibid*: 31/8/1963

<sup>109</sup> see Sa'adul Khairi Waddin *Titah 1959-67, Sir Omar Ali Saifuddin* 1971:210-213

<sup>110</sup> *Borneo Bulletin* 31/8/1963

<sup>111</sup> Ranjit *op.cit.*: 203

<sup>112</sup> the PRB had won all four district councils in the first Brunei elections held at the end of August 1962. Its leader, A.M.Azarhari, sought to unite Brunei, North Borneo and Sarawak as one independent country, called the *Negara Kesatuan Kalimantan Utara* (NKKU), with himself as Prime Minister and the Sultan of Brunei as Head of State. When Azahari failed to achieve this aim by constitutional means, he decided to take recourse to an armed struggle (7/12/1962). However, his attempts failed, and the Sultan, favouring a merger with Malaya, declared an emergency and outlawed PRB in December 1962; for details see Ranjit *op.cit.*: Chapters 7 and 8

### 3.3.1 Change of Sovereignty and Tenure

The central problem to the complex legal question lies in the different notions (i) of ownership over land, and (ii) of sovereignty exercised by the Sultan of Brunei before and after the country came under direct British influence *vis-à-vis* a present-day interpretation of the terms.

As indicated earlier, the power of a ruler did not lie in the land he ruled, but in the people therein. This is not to say that a Sultan had no influence over the areas generally understood to be under his control; only that these were rights incompatible with sovereignty rights encompassing a claim to territorial title since the realms of Islamic sultanates were defined by varying relationships to the centre (i.e. the Sultan) rather than by fixed geographical frontiers. Personal identification was not so much towards a specific territory, but in an alliance with a certain ruler. Land was *used* rather than possessed and taxes paid on people and produce. One should not confuse the perception of 'sovereignty' of past centuries with that of a strict definition and application in today's nation-state embodied in international law. The term 'sovereignty' of the earlier periods referred more often to the mutual recognized competence to enter into alliances and to sign treaties relating to a certain area and not to sovereignty and jurisdiction over a territory. The plenary power of possessing the former is, however, not necessarily legal proof of also possessing the latter as understood today. Due to the existence of a different régime of rights to land, it is difficult to argue for territorial sovereignty in an area where no such concept existed.

The Sultan was the highest potentate within the realm, the highest religious official, and the highest legal authority, assisted by a council of ministers<sup>113</sup>. In order to enforce decisions, he had to depend on the extent and range of his own alliance network. But this network of interpersonal relations was fluid across time and resulted in ever-changing alliances and factions. Together with the absence of a fixed rule of succession like primogeniture, this system necessitated careful manoeuvring by the ruler to remain at the apex of a highly hierarchical structure. Unless the Sultan was very powerful, it was rather the local chief's choice whether he paid allegiance to a particular Sultan, chose to be independent or even created a new centre of regional dominance<sup>114</sup>.

It seems quite clear that Sultan Hashim could not draw on a significant measure of support from his *wazirs* nor on any help from powerful local chiefs to govern effectively over the realm and, therefore, has to be seen as a relative weak ruler. This weakness led to an attenuation of his power and control and - as a corollary thereof - to the simultaneous emergence of more powerful local chiefs in the various districts. While in pre-British times this state of affairs would probably have 'only' led to a change of rulers, due to the protection of the British, Hashim was kept in power. But in the end, this protection caused a differentiation in legal authority and consequently therewith, in the final outcome, a change to the European-based perception of territorial sovereignty from the indigenous control system. Amongst other changes, this permutation also effected (i) that the supremacy of the state in contradistinction to the previous supremacy of the personal rule of the Sultan replaced the

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<sup>113</sup> in Islam the ruler is not the highest sovereign who is *Allah*. At best he can be the *khalifa* or vice-regent, discharging the duties imposed upon him from above (see Weeramantry 1988:117ff; also Hooker 1986/88:Introduction and *in passim*, and Anwar A. Qadri 1963)

<sup>114</sup> see e.g. the creation of the Sulu Sultanate which broke away from Brunei in the seventeenth century (see Haller-Trost 1992: chapter 1.1)

latter with the former as the acknowledged international personality; and (ii) a determinable, fixed national area whose borders were the perimeter of its territorial sovereignty.

### 3.3.2 Alienation of Territory

Taking these preliminary remarks into account, the legality of the cessions under regional law as understood at the time in question, must now be examined.

It has been said that the treaties are invalid since, under Brunei law, a Sultan had no power to alienate state territory on his own account without the consent of his *wazirs*<sup>115</sup>. Two observations have to be made in this respect: (i) that there are in existence a number of cessions only signed by a Sultan which are not legally questioned<sup>116</sup>; and (ii) that the provision restricting alienation of state territory - especially by treaty - is a phenomenon introduced by the European powers. In order to protect their sphere of influence from rival European nations, they included clauses restricting the various local rulers, only allowing them to cede territory upon the relevant government's consent. These constraints were not part of the indigenous Bruneian law, otherwise the issuing of the *amanah* would not have been necessary.

In relation to the Sultan's responsibility, Brown remarks that

*"[his] obligations, if one can judge at all from what history has preserved to analyse, were diffuse and ill-defined."*<sup>117</sup>

From other sources<sup>118</sup> it is evident - as a logical conclusion of his authority and control as described above - that the foremost obligation of a Malay Sultan was his conduct and allegiance with his people. He was the "*pillar of the State who controlled the Government founded on Muslim and customary law*"<sup>119</sup>. While it is beyond the purpose of this article to examine the different notions of Islamic and nineteenth-century Malay sovereign rights *vis-à-vis* European sovereignty, it has to be pointed out that according to Brunei *adat* law there did not exist any regulations regarding the sultan's powers over land alienation comparable with those expressed, for instance, in the Johore Constitution of 1895 which stated that

*"[t]he Sovereign may not in any manner surrender or make any agreement or plan to surrender the country or any part of the country and State of Johore to any European State or Power, or to any other State or nation, whether because he thinks it a trouble or a burden to him to be a ruler, or because he does not care to rule, or because he desires to obtain, take and accept any payment or pension from another nation or state."*<sup>120</sup>

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<sup>115</sup> Ranjit op.cit.:69

<sup>116</sup> e.g. *Grant by the Sultan of Brunei of Territory Comprising Gaya Bay and Sapangar Bay* of 29/12/1877 (translation in CO 874/54); or *Grant by the Sultan of Brunei of Territories from Sulaman River to the Paitan River* of the same date (ibid)

<sup>117</sup> Brown D.E. 1970:100

<sup>118</sup> e.g. *Sejarah Melayu* chapter III (Brown C.C. op.cit:16)

<sup>119</sup> Brown D.E. 1970:100 quoting Yusof 1958:5. In practice, customary law (*adat*) ruled mostly over religious law, as expressed in the frequently cited statement: "*Custom is real law. Religion is ideal law.*"

<sup>120</sup> Article XV (text in Allen, Stockwell, Wright 1981 Vol.I:77)

The present constitution of Brunei, now also prohibits the Sultan "to surrender or cede, or attempt, negotiate or plan to surrender or cede, Brunei or any part thereof" without the knowledge, advice and consent of the Council of Cabinet Ministers<sup>121</sup>. Analysing the available documents on Brunei, it appears that such an express rule did not exist in the Sultanate during the last century.

### 3.3.3 Protectorates

During the creation of European empires in the nineteenth century, protectorates were established in Asia and Africa in order to acquire rights over certain areas to the exclusion of other European powers<sup>122</sup>. From Johnson's accounts analysing the legal status of protectorates<sup>123</sup>, it becomes evident that no universal concept of their legal status existed that could pass as contemporary customary international law: each case was treated separately. Even when the protector was the same state, no evidence of a general state practice acceptable as law or consistent course of conduct over a certain period of time crystallized into international law. "Official thinking on 'protected'...areas tended to remain vague and elusive"<sup>124</sup>. This problem in no way diminished after the 1885 Berlin Conference. Although initiated in order to accommodate developments in the law governing protectorates, the convention applied only to newly established possessions and/or protectorates in Africa. Furthermore, legal opinions concentrated rather more on problems of jurisdiction over foreign subjects within a certain protected area than on the duties and rights of the protector and the protectee. This also underlines the fact that the obligations with respect to protectorates were primarily concerned with legal issues of European states and not with the mutual responsibilities of the parties to a protectorate agreement.

In two cases brought before the World Court, the status of protectorates have been analysed but from neither can an unequivocal legal rule be deduced of what the international law status of a protectorate was perceived to have been. In the *Advisory Opinion of the Nationality Decrees issued in Tunis and Morocco*, it was held in 1923 that

*"[t]he extent of the powers of a protecting State in the Territory of a protected State depends, first, upon the Treaties between the protecting State and the protected State establishing the Protectorate, and secondly, upon the conditions under which the Protectorate has been recognized by third Powers as against whom there is an intention to rely on the provisions of the treaties. In spite of common features possessed by Protectorates under international law, they have individual legal characteristics resulting from the special conditions under which they were created, and the stage of their development."*<sup>125</sup>

<sup>121</sup> Article 24; Laws of Brunei, Const.II: Succession and Regency (BLRO 1/1984)

<sup>122</sup> these differed in their purpose and legal consequences from those established in Europe like, e.g., the protectorate over the Ionian Islands (effected by a treaty between Great Britain, Austria, Prussia and Russia on 5/11/1815; BFSP Vol.3:140)

<sup>123</sup> Johnson 1973, especially chapter 6

<sup>124</sup> *ibid*:80

<sup>125</sup> *Advisory Opinion PCIJ Reports, Series B, (1923) No.4:27*. These "common features", however, do not appear to go beyond the basic requirements needed to identify the territory as a protectorate

In the second case, i.e. the *Rights of United States Nationals in Morocco*<sup>126</sup>, the Court concluded that certain actions undertaken by France for Morocco, which it was empowered to do according to the relevant protection agreement (i.e. the *Treaty of Fez* in 1912), must be regarded as agreements made by a protecting power within the scope of its authority, intending to bind the protected state.

In the present case such argumentation would mean that (i) the situation has to be judged solely by the *Protection Agreement* of 1888; (ii) since the actions undertaken by Britain have been recognized - or rather not protested to - by third states, the latter's acquiescence can be implied<sup>127</sup>; and therefore, (iii) that the measures executed by the UK Government are binding on Brunei.

Regarding the rights of the protecting state to alienate by its own authority any portion of the territory of which the protected state was composed, the Law Officers held the opinion that - when a treaty is silent on this point - alienation could only be made with the consent of the other contracting parties. This, however, did not - according to the Law Officers - expressly refer to the consent of the government of the protected territory, but to the other European powers being signatories to the same treaty<sup>128</sup>. Although in law *nemo potest plus iuris ad alium transferre quam ipse habet* - and the protecting state did not possess full sovereignty over the protected territory - in cases where a country under a protectorate agreement surrenders its ability to conduct international transactions with third states, the protector

*"can, as a matter of international law, give good title; and moreover, no one else can do so....[and] a number of transfers of territory under British protection have amounted to cession of title."*<sup>129</sup>

Analysing the various contemporary sources referring to protectorates, it becomes evident that there are further examples in existence where the protecting state could legally impose its will *beyond* the full control over external affairs and that the protected state was then *"legally compelled to submit to that will"*<sup>130</sup>. It seems that only in cases where the treaty text expressly provided for the duty of the protecting state to guarantee the borders of the protected state, and the protecting state then acted contrary to these provisions, can one speak of a violation of a treaty obligation, but not necessarily of a violation of international law principles as the relationship between a protecting and the protected state has been perceived to be a matter of *domestic* jurisdiction.

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<sup>126</sup> US v. France, ICJ Reports 1952:176

<sup>127</sup> the Netherlands, in particular, observed Brooke's action and British policy on Borneo very closely and with great apprehension. In the case of the former, the reason lay in James Brooke's original intention to thwart Dutch expansion on the island (see letter of protest written in 1840 by the Assistant-Resident of Sarawak's neighbouring Dutch-controlled territory of Sambas, accusing Brooke of *"meddling in the political affairs"* of Sarawak, asking him to *"withdraw from the scene of contest and leave the Sarawak people to manage their own affairs"*; (for document and details see Irwin 1955: 98ff). In regard to the latter, the Dutch were especially concerned about British activities after the granting of a Royal Charter to the BNBC in 1881 (text in BFSP Vol.11: 194, for details see Haller-Trost 1992: Chapter 3.2.1). During the lengthy and detailed negotiations, which led in the end to the conclusion of the bilateral boundary treaty on 20/6/1891 (text in BFSP Vol.83: 41), no protest from the Dutch delegation was registered in relation to the Limbang annexation of one and a quarter years earlier

<sup>128</sup> see LO Opinion of 29/6/1833 regarding the case of the Ionian Islands (reprinted in McNair 1961:316)

<sup>129</sup> Roberts-Wray 1966:128. For examples of such see *ibid*

<sup>130</sup> for details see Hall 1894:208ff and the Separate Opinion of Judge Anzilotti in the Advisory Opinion on *Austro-German Customs Union* Case (1931 PCIJ Series A/B 41; see AJIL 1931 Vol.25:715)

This latter point was held by the British Government in the case of the alienation of the protected territory of Somalia<sup>131</sup>. In 1954, Britain ceded part of the British protectorate of Somaliland to the Government of Ethiopia referring to the provisions of the 1897 *Anglo-Ethiopian Treaty*<sup>132</sup>. Although the Somalis protested to the British Government, the UK felt that the *Ethiopian Treaty* was an international instrument taking precedence over the agreements previously entered into with Somali tribes, the latter being a matter of domestic jurisdiction. In his analysis of the case, Kamanda arrives at the conclusion that

*"in order to make any alienation of the protected territory valid, it is necessary for the protecting state to be competent to bind the protectorate....Where the protectorate has given its protector, without reservation, the full right to treat and contract with other states with respect to the protected territory, it may be considered to have invested the protector with the powers necessary to make valid contract and to have made the protecting state a judge of the necessity of the case....The treaty may, on the other hand, throw difficulties in the way of alienation of the protected territory. In such a case it must be admitted that such alienation must receive the approval of the inhabitants of the territory."*<sup>133</sup>

Although he cites as an example of such approval the above-mentioned Ionian Declaration, he fails to differentiate between *"the consent of the inhabitants"* as opposed to the *"consent of the protectorate government"*.

Assessing the material available in the Limbang case, it evinces i) that based on the stipulation of the *Protection Agreement*, Britain was competent to bind Brunei as adjudicated in the above-mentioned *Rights of United States Nationals in Morocco* case; and ii) that Britain acted in accordance with the wishes and upon the approval of the local chiefs of the territory in question which it considered to be independent from Brunei<sup>134</sup>. As the *Protectorate Agreement* is silent on the question of express duty of the protector in regard to territorial alienation not covered by the first part of Article VI, it is Article III that provides a conclusive answer for cases of disputes. The text clearly states that the Sultan agreed to abide by the decisions of the British Government in cases relating to any foreign state, and this expressly included Sarawak<sup>135</sup>.

### 3.3.4 Geographical Extent of the Limbang

The question now arises as to the geographical extent of the annexed territory. The 1890 *Proclamation* mentions only *"the Limbang people and their country"* and no definition of a territory in clear terms is made.

<sup>131</sup> Kamanda 1961:205ff. A petition to the UN by Somalia trying to bring the question before the ICJ consequently failed

<sup>132</sup> Cmd.9348, 1955

<sup>133</sup> Kamanda op.cit.:214

<sup>134</sup> see correspondence between Marquis of Salisbury and Sir C. Smith 9/7/1891 (FO 12/88)

<sup>135</sup> alienation of territory against a ruler's consent was not an uncommon occurrence at the time. Besides the examples mentioned in section 3.3.5 *infra*, there exist similar cases relevant for the region. For instance, *Dato Klana Putra* Syed Abdul Rahman, one of the minor chiefs of Sungei Ujong, which was part of the Negri Sembilan confederation under the rule of *Yam Tuan Tuanku Antah*, concluded, *inter alia*, in 1878, a treaty with Sultan Abdul Samad of Selangor whereby the former ceded to the latter certain territories of Sungei Ujong despite the *Yam Tuan's* protest. The present borders between the two west Malaysian states are according to that treaty; for details see Allen, Stockwell, Wright, Vol.I: 296-314

During the second half of the nineteenth century, but latest at the time of the 1885 Berlin Convention, the interpretation of the *hinterland* doctrine, i.e. an acquisition of land to an indefinite extent behind the coast of which discovery has taken place, had been mostly abandoned<sup>136</sup>. Claims to all adjacent inland territory were now limited to as far as geographical configurations would form a natural border, i.e. by rivers, watersheds or mountain ranges<sup>137</sup>. Arbitration delivered at the time in question shows that natural boundaries were mostly used in cases where no clear borders could be relied upon otherwise. Victor Emanuel III, King of Italy, decided in the 1904 *Guiana Boundary Case* between Brazil and Great Britain that the frontier should follow the watershed<sup>138</sup>. The same principle was followed in the four following boundary cases: (i) 1905 between Great Britain and Portugal (Barotseland); (ii) 1906 between Honduras and Nicaragua; (iii) 1907 between Bolivia and Peru; and iv) 1914 between Costa-Rica and Panama<sup>139</sup>. It can be deduced therefore that international law of the time recognised the practice of demarcating territories according to natural geographical divisions between different political entities in cases where such features existed and where delimitation in clear terms had been lacking.

It is therefore permissible to assume that the annexation encompassed the geographical unit of the Limbang drainage basin. While the demarcations are rather distinct in the *ulus* where mountain ranges divide the terrain, in the lowlands the features for delimitation become less defined. While the eastern border is defined by the Pandaruan River, the western boundary in the lowlands, starting from south of *Pulau Berbunut*, follows the *thalweg* of the riverbed of the *Sungei Menunggol*, the *Sungei Melais* and the *Sungei Mendaun* before it turns in westerly direction south of *Bukit Durian Kuning*, then east of *Bukit Kata* and west of *Bukit Gadong* towards a more definable watershed line.

As there are no dominant geographical features in existence in these western lowlands, it has to be assumed that the border therein was defined according to the local headmen's wishes of affiliation to Sarawak<sup>140</sup>.

### 3.3.5 Annexation

No international law analysis of the unparalleled Limbang annexation exists. The uniqueness stems from the fact that in the present case the annexation was executed not by a municipal power - as in most cases - but by a protected state over a territory that was also claimed by another protected state being under the same legal obligation to the same protecting state. To the writer's knowledge these are unprecedented circumstances.

It might be argued - underpinned by state practice as shown in the UK/Somali conflict - that the dispute is not a matter to be adjudicated under international law. However, there are various reasons apparent why the present case cannot be argued under domestic jurisdiction. Firstly, in cases where the protected state is not a colony and therefore not an integral part of

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<sup>136</sup> although still practiced in regard to the sectoral regions at the poles

<sup>137</sup> see Westlake 1894:170

<sup>138</sup> 6/6/1904 (RIAA Vol.XI:23)

<sup>139</sup> 30/5/1905 (ibid:69); 23/12/1906 (ibid:117); 9/7/1907 (ibid:145) and 12/9/1914 (ibid:547)

<sup>140</sup> the report by Trevenen regarding the situation in the Limbang (see *supra*) lists a number of local chiefs. However, no distinct territorial affiliations can be deduced

the protecting state, international law "*steps in so far as the assumption of the protected state affects the protecting country with responsibilities towards the rest of the world*"<sup>141</sup>. And secondly, it also has to be remembered that the reason for analysing the legal position is connected with the question of a maritime delimitation and as demonstrated in the *Anglo-Norwegian Fisheries Case*, the Court explicitly expressed the view that:

"...the delimitation of the sea areas has **always an international aspect**..."<sup>142</sup>,

since a construction of borders between different states is involved. The opinion that the question was not an internal matter was already expressed by the British at the time when Hashim protested to the UK Government in London against Brooke's annexation<sup>143</sup>.

Brooke's Proclamation stipulated that the annexation was subject to British approval. However, as Sarawak was at that time also a protected state whose external affairs were regulated by Britain, it evinces that the annexation of the Limbang by Brooke in 1890 was an unauthorized act, since no authorisation prior to the proclamation had been given or obtained in order to acquire the territory. But as Lindley points out:

*"if an unauthorized annexation of eligible territory has been made in the name of a state, that state can, by subsequent ratification, add its animus to the act done in its name, and its assumption of sovereignty will then be complete."*<sup>144</sup>

Based on the protest of the headmen, the inability of Brunei to collect taxes over seven years and to bring the district again under its control, the territory must be considered to have been "eligible". Although Lindley assumes in the above citation that the annexation is made by the same state which has the power to approve an unauthorized annexation, there exists no *opinio iuris* that in a case where a protecting state consents to an annexation by a protected state after the act has been performed that the annexation should be declared illegal. Although Britain did not in the first instance approve of the annexation, it did add its *animus* in 1891 when it decided that Brooke's possession of the Limbang should be recognized and confirmed upon his entering into an engagement to pay adequate pecuniary compensation to the sultan and to the *pengirans* who had held rights in the district<sup>145</sup>. This offer of compensation was held good for three years, but at the expiration of the period the sultan still refused to accept the annexation. However, this refusal of accepting the *quid pro quo* after the consent by the protecting state had been given, does not render the annexation illegal.

There are in existence a number of cases to elucidate state practice in similar circumstances, where unilateral annexation without the conclusion of a treaty providing for a cession of the territory in question evolved into an effective and actual transfer of territory<sup>146</sup>:

- (i) The annexation to the Kingdom of Sardinia of the provinces of Emilia, later followed by Naples, Sicily, Umbria and the Marches (forming the Kingdom of

<sup>141</sup> Hall 1924:150

<sup>142</sup> UK v. Norway (ICJ Reports 1951:132); emphasis added

<sup>143</sup> see *supra*

<sup>144</sup> Lindley 1926:286

<sup>145</sup> correspondence between Marquis of Salisbury and Sir C. Smith 9/7/1891 (FO 12/88)

<sup>146</sup> these examples are partly taken from Hurst 1924:163-178

Italy). These were not the result of conquest, but followed on a popular vote in favour of a union with Sardinia and upon popular risings which had overthrown and displaced the respective ruling houses<sup>147</sup>.

- (ii) The Prussian annexation of Hannover, Hessen-Kassel, Nassau and Frankfurt of 1866 and 1867<sup>148</sup>.
- (iii) The annexation of Transvaal by Britain in 1877<sup>149</sup>.
- (iv) The annexation of Burma by Britain in 1886<sup>150</sup>.
- (v) The annexation of Madagascar by France in 1896<sup>151</sup>; in this case the island had previously been a French protectorate; and
- (vi) The annexation of Hawaii by the USA in 1898<sup>152</sup>.

None of the above examples is identical with the Limbang scenario, mainly due to the above-mentioned fact that in the latter case it was a protected state that annexed a territory. But in all cases, transfer of title was executed without consent of the respective ruler who felt he or she had a right to the territory in question: for example, protest to the annexing power was received for the Italian provinces from the Duke of Modena, the Duke of Tuscany, the Duchess of Parma, etc; for Burma from King Theebaw; for Hawaii from Queen Liliuokalani. The closest example related to the Limbang situation is probably the annexation of Transvaal. In this case, the farmers north of the Vaal River, whose independence had been recognised by the *Sand River Convention* of 1852, formed an independent state in 1858. After fighting broke out with the local Swazi Chiefs, a British official was sent to the area on a fact finding tour to investigate the situation. The result of the report was that, despite the opposition of the local rulers but in conformity with the inhabitants' wishes, Transvaal became legally part of the British Crown.

Despite the differences, there is no evidence why the annexation of the Limbang should be treated under different legal aspects since the effect of the act is determined by the law of the time when it is executed, as expressed by Max Huber in the *Island of Palmas* Case stating that,

*"...a juridical fact must be appreciated in the light of the law contemporary with it."*<sup>153</sup>

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<sup>147</sup> 18/3/1860 (BFSP Vol.57:1029)

<sup>148</sup> 3/10/1866 (ibid Vol.56:1978ff)

<sup>149</sup> 12/4/1877 (ibid Vol.68:140)

<sup>150</sup> 1/1/1886 (ibid Vol.77:980). The border between Upper Burma and China was defined in the convention of 1894 (BFSP Vol.87:1311) where territorial concessions were made in favour of China for the latter's renunciation of certain claims; no consent by the British Parliament was sought for this act

<sup>151</sup> 6/8/1896 (ibid Vol.89:486)

<sup>152</sup> 7/7/1898 (ibid Vol.90:1250)

<sup>153</sup> *The Netherlands v. The United States*, 4/4/1928; (RIAA Vol.II:845)

The validity of the British consent to the Limbang annexation has not been called into question by third states neither with reference to illegal acquisition nor to the method of procurement undertaken by Sarawak or the UK.

Further, the annexation is not rendered illegal by the fact that no confirmation had been given by the British Parliament, although contemporary British constitutional law was unclear on the necessity of such an act<sup>154</sup>. For instance, in the Amba Bay case (previously a British protectorate in Africa), German sovereignty was recognized in 1887 without the assent of British Parliament<sup>155</sup>. From this and other examples, it can be assumed that in an instance where the territory was 'simply' under protection, such parliamentary consent was not required<sup>156</sup>.

Although it can be said that the principle of self-determination has only established itself as a fundamental legal doctrine and imperative right of law since 1961<sup>157</sup>, this does not mean that it has not been argued and/or applied before<sup>158</sup>. Britain, for instance, justified the confirmation of consent to Brooke's annexation on the grounds

*"[t]hat the great majority of the headmen of the Limbang district, who may properly be taken as exponents of the wishes of their people, pronounced themselves in favour of Sarawak<sup>159</sup>,.....[and] that [the headmen] would not come back under the rule of Brunei, but that they would fight, and [that] the Brunei Government could not establish its authority now [1891] any more than they could do in the past....Furthermore in the years 1886 and 1887 most of the Pangerans having interests in the Limbang District, including the Pangeran Bendahara and the Pangeran di-Gadong, wrote letters to the Rajah of Sarawak expressing their wish that he should take over their country....[T]hat the people of Limbang have not recognised the Government of Brunei, and the fact that the Brunei Government are clearly incapable of re-establishing their authority, and that the Government of the Queen is bound to consider the wishes of the people of the District....<sup>160</sup>*

Though probably based more on political rather than on humanitarian grounds, such state practice can be seen as an early example of the recognition regarding the principle of self-determination. It seems that it was only the Sultan who objected during his life-time against the annexation by Brooke, and that with his death the protest also died. Given the system of indigenous control that existed at the time of the annexation, the territory of the Limbang has to be considered as not having been under Bruneian dominance, and since the annexation was executed by a protected state, it was the protecting power, i.e. Britain, that bore the responsibility and legal authority to annul or validate the transfer. And so it did. That the

<sup>154</sup> usually, but not consistently (see *supra*), alterations of boundaries were approved by *Order in Council* or *Letters Patent*

<sup>155</sup> Roberts-Wray op.cit.:122ff

<sup>156</sup> the reason given by Roberts-Wray (former legal adviser to the CO) probably lay in the fact that, usually, Parliament did not legislate for protectorates (ibid:127)

<sup>157</sup> GA Resolution 1514(XV); UN Doc A/4684; GAOR Supplement No.16

<sup>158</sup> see e.g. the above-mentioned case of Transvaal in 1877

<sup>159</sup> 9/5/1891, Sir C.Smith to the Marquis of Salisbury in FO 12/88

<sup>160</sup> 12/8/1891, Sir C.Smith to the Sultan of Brunei (ibid)

annexation, viewed under application of international law principles valid today, might be perceived as unlawful is not a matter for discussion here. However, even in such an event, emphasis on the rights of the local chiefs to self-determination might refute probable arguments as to the annexation's illegality due to alienation without consent regarding the Sultan. At any rate, retroactive introduction of legal opinions cannot negate treaty relations binding on the parties in the period under consideration.

Although Annex No. 1 to the 1979 *UK-Brunei Treaty* terminates "*all...agreements, engagements, undertakings and arrangements*" between both countries and the maps attached to the above-mentioned *Exchange of Notes* of 1983 are not considered to be authoritative in regard to the boundary delimitation, these qualifications cannot affect the boundaries of the Limbang district, at that time already part of Malaysia, a status not challenged at the time of its inclusion. It is a maxim in international law that *pacta tertiis nec nocent nec prosunt*<sup>161</sup>; consequently, two states cannot conclude treaties effecting a change of the territorial status of a third party. The present viewpoint of the Foreign and Commonwealth Office in London to the question whether it is possible to interpret either agreement - i.e. the 1979 Treaty due to the termination of the former special arrangements, and the 1983 document due to the comments relating to the non-binding nature of the attached maps otherwise showing present day Bruneian borders - as an indication that the UK would consider Brunei's claim to the Limbang district as legally justified, is that

*"the issue of Limbang and related claims is a bilateral matter for Malaysia and Brunei, and it is not the intention of the British Government to take a position on an issue involving two sovereign, independent states."*<sup>162</sup>

Malaysia did not have to protest against the 1979 and/or 1983 Agreements since the treaties between Brunei and the UK are *res inter alios acta*<sup>163</sup> and therefore not relevant to Malaysia.

### 3.3.6 Uti Possidetis Iuris

It has been held that the principle of *uti possidetis iuris* in international law - i.e. that the frontiers inherited from colonial times are deemed not to be subject to alteration - is a regionally applied principle rather than a universal one since it originated from the Latin American continent and is based on administrative borders established during the Spanish colonial time. However, its application has been referred to lately in three ICJ cases.

In the *Frontier Dispute Case*<sup>164</sup>, Burkina Faso's claim to the disputed region was based on the boundaries established by the French colonial administration as shown on colonial maps and must have acknowledged the delimitation based on French colonial law, and since they

*"have...expressly requested the Chamber to resolve their disputes on the basis...of the 'principle of the intangibility of frontiers, inherited from*

<sup>161</sup> see also Article 34 of the 1969 *Vienna Convention on the Law of Treaties* laying down the general rule regarding the effect of treaties upon third states: "*A treaty does not create either obligations or rights for a third state without its consent.*"

<sup>162</sup> personal correspondence 2/10/1992

<sup>163</sup> as applied e.g. in the arbitration on the *Frontiers between Columbia and Venezuela*, 1923 (RIAA Vol.I:262)

<sup>164</sup> *Burkina Faso v. Mali* (ICJ Reports 1986:554)

*colonization', the Chamber cannot disregard the principle of uti possidetis...'*<sup>165</sup>.

The Court also noted that the principle was by now firmly established in international law where decolonization was concerned, and continued that:

*following the withdrawal of the administering power.*<sup>166</sup>

The 1978 *Vienna Convention on Succession of States in Respect to Treaties* underpins this interpretation since, although allowing former colonies to enter the comity of states with a 'clean slate'<sup>167</sup>, all treaties effecting a state's boundaries are - according to Article 11 and 12 - not applicable to this provision.

Even more relevant to the borders in Borneo is the Arbitration Tribunal regarding the *Delimitation of the Maritime Boundaries* between Guinea-Bissau and Senegal. Here the Arbitration Tribunal drew a distinction between the *uti possidetis* principle as applied in South America and a wider interpretation of the principle to be applied elsewhere:

*"In Africa, on the other hand, uti possidetis has a broader meaning because it concerns both the boundaries of countries borne of the same empire and boundaries which during the colonial era had already an international character because they separated colonies belonging to different colonial empires."*<sup>168</sup>

The Court also widened the scope of the applicability when it indicated that it was possible to make a connection between the *uti possidetis* principle and maritime boundaries<sup>169</sup>:

*refer to a number of cases of succession in the matter of maritime boundaries in Asia, in consequence of the decolonization which followed the Second World War. The geographical maps of **Malaysia, Philippines and Brunei**, for example, show as maritime boundaries lines the origin of which goes back to the colonial era.*<sup>170</sup>

As it was possible for the Tribunal to make a direct connection between the *uti possidetis* principle and the maritime boundaries specifically for Malaysia and Brunei, it must be assumed that, before the Tribunal could have come to such a conclusion, it must have considered the land boundaries between both countries also being determined by the said principle. Further, in the 1992 judgment of the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras, where the importance of the principle has been stressed as being the fundamental norm applicable to the case, it was held that the essence of the *uti*

<sup>165</sup> *ibid*:565. NB.: Mali is also a signatory to the *Charter of the Organization of African Unity* (24.7.1964) which in Article III requires to respect the sovereignty and territorial integrity of each member state

<sup>166</sup> *ibid*, emphasis added

<sup>167</sup> i.e. the new state "is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of states the treaty was in force in respect of the territory to which the succession of states relates" (Article 16 thereof)

<sup>168</sup> Arbitration Tribunal 31/7/1989: 35

<sup>169</sup> the same position was held in the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras (see ICJ *Unofficial Communiqué* No.92/22:29)

<sup>170</sup> Arbitration Tribunal 31/7/1989: 36, 37; emphasis added.

*possidetis* principle is its primary aim of securing respect for the territorial boundaries at the time of independence, and its application has resulted in colonial administrative boundaries being transformed into international frontiers, stressing the point that it was the colonial and not the local settlement boundaries that affected these international boundaries<sup>171</sup>.

### 3.3.7 Brunei Bay

Following the above elaborations, it can be deduced that one has to separate the territorial claims as indicated on Brunei's maritime charts into

#### *Title to the Limbang district and Rangau.*

As shown above, there is no legal precedent for the Limbang annexation. However, none of the similar cases cited give rise to an assumption that the annexation should be considered illegal in international law. The application of the *uti possidetis* principle further strengthens adherence to the existing borders, as does the state practice exemplified by Brunei itself (see *infra*).

That the issue may be resolved in the near future on the principle of self-determination, e.g. by referendum ascertaining the wishes of the inhabitants of the Limbang, is presently an unlikely prospect given its possible repercussions elsewhere in Malaysia. Other districts or states may insist on the same right, and the result may raise more problems than it solves.

#### *Title to the Trusan and Lawas area.*

The Trusan Lawas cessions are irrefutable under international law principles. They are based - like the other territorial grants referring to Sabah - on legally valid treaties remaining uncontested for one hundred and four years and eighty-seven years respectively. Since the claims are only mentioned on Brunei's second and third maritime chart, they appear to be an 'after-thought' included without any legal foundation. Both treaties are unequivocal cessions, made voluntarily by the person authorized to do so, thereby accepting the *quid pro quo*. Successive governments have relied in good faith upon the effectiveness of these treaties for a considerable period of time. No claim by Brunei to either district can be sustained. Further, on all three maritime charts, Brunei acknowledges explicitly the *North Borneo and Sarawak (Definition of Boundaries) Order in Council* of 1958 in which reference is made to the termini of the land boundaries, firstly, between the then colonies of North Borneo and Sarawak as being the mouth of the Ben(g)kulit River, a point which was established in the aforementioned *Sarawak-North Borneo Agreement* of 1910; and secondly, between the Sultanate and Sarawak. Thus it is submitted that Brunei acquiesced to the established borders, most notably because the *Orders* had already been incorporated into its legislation in 1984, i.e. *after* independence but *before* the claims were made on the maritime charts in 1988.

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<sup>171</sup> ICJ *Unofficial Communiqué* No.92/22:9ff. Presently the ICJ is considering a case regarding the border between Libya and Chad through the Tibesti Mountains. Should the Court choose not to apply the *uti possidetis* principle, the result may be of great consequence to African borders, and to border disputes in general

It has to be emphasized that the first chart issued, i.e. the *Map Showing Territorial Waters of Brunei Darussalam* and therewith the most relevant in regard to land borders, does not mention any territorial claims and any maritime claims associated therewith.

Since the territorial claims of Brunei cannot be supported by international law principles, the *status quo* of the land borders in Brunei Bay prevails. Consequently, no alteration to maritime claims therein, based on a change of boundaries, occurs.

Malaysia's delimitation on Sheet 2 of the Malaysian Map<sup>172</sup> for the western extremities of Brunei Bay (hereafter referred to as Limbang waters) is not clearly differentiated, which is partly caused by the relatively small scale used. Although it shows a line marked as "*international boundary*" which appears to follow the 1958 *Orders in Council*, it does not identify the landward waters as its own internal or territorial waters. Brunei, on the other hand, only shows on Sheet 1 and 2 (referring to the territorial sea and the continental shelf) approximately the same body of water as non-Bruneian.

This area, referred to in the *Order in Council No. 1518* as the "*boundary in the approach to Batang Limbang*" (Article 3.2a), forms a small triangular section starting from the land boundary of Limbang's east coast at the northern extremity of a drying mudflat north of *Pulau Siarau* at 4°51'30"N, 115°2'48"E running in northeasterly direction to a point at 4°51'20"N, 115°4'00"E and then turning northwest to terminate at *Pulau Silama(k)* (4°52'48"N, 115°3'24"E) at the western boundary between Limbang and Brunei. The second coordinates lie 3nm from the Malaysian *terra firma* point *Tanjong Tobu Tobu* (4°51'N, 115°01'E) situated at the eastern bank of the northern end of the Limbang estuary; the third coordinates are at a distance of 3nm from the Bruneian *terra firma* point *Tanjong Lumba Lumba*. The text of the *Order* does not stipulate whether it deals in this instance with 'territorial' or 'internal' waters; it only mentions the "*boundary of the waters*" and no clear deduction can be made since the main purpose of the instrument was to delimit the continental shelf<sup>173</sup>. Neither can it be deduced whether the distance of 3nm mentioned above is a geographical coincidence or was intentionally chosen and could therefore lead to the conclusion that this delimitation was intended to show a territorial sea allocated to the Limbang district.

Be that as it may, although Brunei and Malaysia consider the *Order* still in force, the Limbang waters have to be newly defined since the *status quo* occludes Malaysian territory at the western part of the bay and therefore access to its own EEZ and continental shelf is denied<sup>174</sup>. In order to delimit the various zones in the area, it is necessary to examine the status of Brunei Bay. Although probably identifiable as a 'historic bay' in the wider sense of the term, it is not necessary for either country to define the bay as such in the legal sense.

<sup>172</sup> i.e. the "*Map Showing the Territorial Waters and Continental Shelf Boundaries of Malaysia*" (*Peta Menunjukkan Sempadan Perairan Dan Pelantar Benua Malaysia*) published 21/12/1979. For the maritime claims off East Malaysia see Map 2

<sup>173</sup> see *Explanatory Note* indicating the general purport of the *Order*

<sup>174</sup> the legal consequences of changing a coastline through reclamation of land - and therewith altering a previously established baseline - have not been fully analysed in international law. Although it is beyond the scope of this paper to examine this particular aspect, an interesting legal point would be raised if Brunei decides to physically join its two disconnected parts by way of a landbridge, thus filling in the shallow waters between *Pulau Berembang* and *Tanjong Salirong* which lie at a mere distance of 4½ nm from each other. Regarding a case where a country instituted proceedings against another state for obstructing the right of free passage through an international waterway, see the *Passage through the Great Belt Case* (Finland v. Denmark). However, no judgement was delivered since Finland withdrew its application after accepting compensation of 90 million Danish Kroner to be paid by Denmark (ICJ *Unofficial Communiqué* No. 92/3 of 11/9/1992, and 32 ILM 1993:103)

An interpretation of 'historic waters' was given in the *Anglo-Norwegian Fisheries Case* stipulating them as "waters which are treated as internal waters but which would not have that character were it not for the existence of a "historic title" based upon *possessio longi temporis*"<sup>175</sup>. However, the conventions of the law of the sea do not deal with delimitations in bays bordering more than one country. Provisions are made for delimitations of the territorial sea, the continental shelf and the EEZ for adjacent and opposite states<sup>176</sup>, but a lacuna exists for delimitations of internal waters in general, i.e. for those from the coast to the low-water line, and specifically for delimitations in pluri-state bays, historic or otherwise. Article 7 of the 1958 Convention on the Territorial Sea and Article 10 of UNCLOS III specifically refer only to single-state bays. However, one could argue that the three basic characteristics of a legal definition and régime for bays found in the latter article should also be applicable to pluri-state bays, viz. (i) that the indentation can only be regarded as a bay when its area is as large, or larger than, that of the semi-circle whose diameter is a line across the mouth of that indentation; (ii) the closing line drawn between the low-water elevations of the natural entrance points shall not exceed the distance of 24 nm; and (iii) that the waters enclosed thereby constitute internal waters<sup>177</sup>. The two properties mentioned under (i) and (ii) must exist in order to make a claim to (iii). They do exist in the Brunei Bay case, and therefore the special status of 'historic waters' does not have to be drawn upon<sup>178</sup>.

A case concerning the division of maritime zones in a pluri-state bay was dealt with in the above-mentioned *Land, Island and Maritime Frontier Dispute* concerning, *inter alia*, the boundaries in the Gulf of Fonseca between El Salvador and Honduras and Nicaragua<sup>179</sup>. The Chamber observed that in certain instances the colonial legislative and administrative texts were confusing and conflicting and, therefore, considered it appropriate to examine the situation for the newly-independent countries *after* independence. Although the delimitations in Brunei Bay, drawn by the British, may have been satisfactory while Sarawak and Brunei were still under British control, after independence and the proclamation of the respective 12 nm territorial seas<sup>180</sup>, the status of the maritime zones *in loci* have to be reallocated in order to work out a feasible solution.

Malaysia and Brunei may decide to draw a mutual bay closing line from the Bruneian Pelong Rocks (5°05'N, 115°03'E) to the Malaysian Barat Banks (5°09'12"N, 115°05'E). While the former are a group of sandstone rocks, the highest of which is 12 metres, the latter consist of two shoals of coral and sand and constitute a low-tide elevation as defined in Article 13 of UNCLOS III. The Pelong Rocks lie at a distance of 2 nm north of Brunei Bluff (5°03'N, 115°03'24"E) while the Barat Banks are situated 2 nm from the nearest Malaysian territory, i.e. *Pulau Rusukan Besar*. Since a light-buoy is moored on the southwestern side of the banks, it can be used as terminus for drawing a straight closing baseline between it and the Pelong

<sup>175</sup> UK v. Norway (ICJ Reports 1951:130)

<sup>176</sup> see UNCLOS III Articles 15, 83 and 74 respectively

<sup>177</sup> see *ibid*: Articles 10.2 and 10.4

<sup>178</sup> this does not mean, however, that for pluri-state bays the legal concept of "historic waters" cannot be applied in general. Since no rules exist, states can agree on whatever régime they think is appropriate in a specific case as long as the result is *licet* and does not conflict with any other principles of international law

<sup>179</sup> Nicaragua was allowed to intervene solely in respect of the question regarding the status of the waters in the Gulf of Fonseca

<sup>180</sup> for Malaysia see *Emergency (Essential Powers) Ordinance No. 7 of 2/8/1969*, P.U.(A) 307A, amended by No.10, P.U.(A) 355 of 12/9/1969 and No.11, P.U.(A) 468 of 7/11/1969; for Brunei see *Territorial Waters of Brunei Act*, Cap. 138 of 19/2/1983

Rocks, the length of which is  $9\frac{1}{2}$  nm<sup>181</sup>. Therewith all waters within Brunei Bay receive the status of internal waters according to Article 8.1. of UNCLOS III<sup>182</sup> and, therefore, the principle of sinuosity to delimit territorial waters in a bay does not apply.

Since no régime for the delimitation of internal waters between opposite and adjacent states is provided for in the law of the sea, and the geographical situation in the western part of Brunei Bay is such that the present contended situation creates a conflict, the question of passage and access has to be addressed in a bilateral agreement resulting in a feasible solution specifically applicable for this case.

In theory, the variations are innumerable. However, the waters in Brunei Bay are rather shallow, mainly consisting of silt which tends to shift according to monsoon seasons often only showing a depth of one to two metres near the coast - a fact that restricts the type of vessels to be able to sail in these waters. There exists, however, a straight channel,  $5\frac{3}{4}$  nm in length, to a position  $1\frac{1}{4}$  nm off *Tanjong Salirong* ( $4^{\circ}53'N$ ,  $115^{\circ}06'E$ )<sup>183</sup>. This channel is approximately 180 metres wide and has a depth of 9.4 metres in parts.

Any new delimitations in Brunei Bay should basically still follow the established bilateral borders according to the two *Orders in Council*. To grant Malaysia access to its Limbang district, it seems practical to declare a 'condominium corridor' connecting the Limbang coast with the Brunei-Sarawak maritime border as delimited in the *Order in Council No. 1518* Article 2.1<sup>184</sup>. The approximate length and width of this corridor will be 12 nm and 2 nm respectively, i.e. according to the northern line provided for in Article 3.2 of the said *Order*. Starting from the western bank of the Limbang estuary and the eastern bank of the Pandaruan River, the corridor would follow a northeasterly direction and intersect at point 2.1(h) and 2.1(r) of the *Order in Council No. 1518* with the bilateral maritime boundary between Brunei and Malaysia (see Map 4). While such a corridor should be subject to mutual control, it has to be noted that any condominium may give rise to difficulties in time of war, e.g. if one party is belligerent while the other remains neutral.

Neither Malaysia nor Brunei have differentiated on their sea charts between territorial and internal waters; both show Brunei Bay as territorial sea. Whether - after the drawing of a new bay-closing line - they will have to give due respect to the right of innocent passage within those newly created internal waters in cases where the establishment of straight baselines has the effect of creating internal waters which had previously not been considered as such, only makes reference to straight baselines established in accordance with the method set forth in Article 7, but not to those established under Article 10 or for historic bays. From the legal history of Article 8, no unequivocal conclusion can be derived at in determining whether the

<sup>181</sup> according to Article 7.4 of UNCLOS III "*straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them....*" There is no clear evidence whether a light-buoy will be regarded as "*similar installation*". However, it could be argued that this is so since it serves an equivalent function. Should the Barat Rocks not qualify, *Pulau Rusukan Besar* can be used instead

<sup>182</sup> Malaysia can close the other western entrances to Brunei Bay (i.e. between Barat Bank, Rusukan Besar, Rusukan Kechil, *Pulau Kuraman* and *Labuan*, as well as the eastern entrance between *Labuan* and *Tanjong Sakat*) likewise by straight baselines according to Article 7.1 of UNCLOS III since these features form a fringe of islands in the immediate vicinity of the coast

<sup>183</sup> the *China Sea Pilot* 1975 Vol. II states in its *Supplement* of the 1982 Revised Edition that *Tanjong Lumba Lumba* is the new name for *Tanjong Salirong*. This, however, is not so. According to the Bruneian map titled *Daerah Brunei-Muara* of 1984 (Siri BR 1, Lembaran 1, 1984) they are two different features, lying approximately one kilometre apart

<sup>184</sup> see e.g. the creation of a condominium *sui generis* in the *Land, Island and Maritime Frontier Dispute*; (ICJ Reports 1992 at paras 369-420)

codifiers intended specifically to exclude reference to bays. The main discussion on this point during the conference involved the implications in regard to the EEZ<sup>185</sup>. In the strict application of Article 8.2, no right of innocent passage exists through internal waters delimited by a newly created bay-closing line which now incorporates internal waters which had hitherto not been classified as such.

#### 4. Brunei's Maritime Claims

As pointed out above, the present sea boundaries between Malaysia and Brunei are based on legislation enacted by the UK in 1958 in pursuance of the powers conferred upon the government by the *Colonial Boundaries Act* of 1895<sup>186</sup>. The 1958 enactment was preceded by the *Order in Council Extending the Boundaries of North Borneo*<sup>187</sup>, the *Order in Council Extending the Boundaries of Sarawak*<sup>188</sup> and the Sultan's *Proclamation Extending the Boundaries of Brunei* in 1954<sup>189</sup>. By these latter instruments the areas of the continental shelf - being defined as the seabed and its subsoil which lies beneath the high seas contiguous to the territorial waters - were annexed to the three entities and therewith perceived as being part of them<sup>190</sup>. The *North Borneo (Definition of Boundaries) Order in Council* No. 1517 of 1958<sup>191</sup> determines the boundary in and in the neighbourhood of Brunei Bay between Sabah and Sarawak, while the *Sarawak (Definition of Boundaries Order in Council) Order in Council* No. 1518<sup>192</sup> partly repeats the afore-mentioned delimitations and further determines the borders between Sarawak and the Sultanate on the eastern (Brunei Bay) and western (*Tanjong Baram*) borders, whilst also referring to the boundaries for the Limbang district. Brunei adheres in general to the coordinates derived at from these *Orders*, except that on Sheet 3 (Fishery Limits) no allocation for Malaysian waters is provided for in the western part of the bay.

Over the years there have been five stages in Brunei's maritime claims:

- (i) a legally undefined claim during pre-colonial times;
- (ii) a 3 nm territorial sea since being under British control based on the *Territorial Waters Jurisdiction Act* of 1878<sup>193</sup>;

<sup>185</sup> A/CONF.62/WP.8/Rev.1/Part II; RSNT, 1976

<sup>186</sup> 6/7/1895 (BFSP Vol.87:967)

<sup>187</sup> 24/6/1954 (ibid Vol.161:24)

<sup>188</sup> same date (ibid:25)

<sup>189</sup> 30/6/1954 (ibid:576); see also BLRO 1/1984, Sup.II

<sup>190</sup> regarding the legality of annexing continental shelf areas in British and international law at the time see Marston 1990:249ff,253ff. As he points out, the British action in 1954 of annexing the continental shelf to the coastal state "would probably constitute a breach of customary international law" today, since sovereign rights over the continental shelf are in variance to those over the *terra firma*. He concludes, that there is, however, no evidence that "at any time during the period up to the signatory of the Convention on the Continental Shelf in 1958 did custom or treaty prohibit a coastal state from acquiring sovereignty over the adjacent shelf or from regarding its inherit rights as entitling it to claim sovereignty over the shelf if it so wished."

<sup>191</sup> BLRO 1/1984, Sup.III

<sup>192</sup> ibid: Sup.IV

<sup>193</sup> BFSP Vol.69:202. This legislation refers to "the territorial waters of Her Majesty's dominion" (Article 7), the definition of which was given as, *inter alia*, being "any British possession or any territory which is under H[er] Majesty's protection", see *Finance Act* 1920, 10 & 11 G.5 c.18 s.27(8). The *Territorial Waters Jurisdiction Act* therefore applied to Brunei

- (iii) the annexation of the continental shelf of undefined extension in 1954, delimited in 1988 by a line at a distance of 265 nm from the inferred baseline<sup>194</sup>;
- (iv) a 200 nm fisheries limits in 1983<sup>195</sup>; and
- (v) a 12 nm territorial sea in the same year<sup>196</sup>.

While there have been no major disputes between Malaysia and the Sultanate before 1979<sup>197</sup>, after the publication of the 1979 Malaysian Map, Britain protested to the Malaysian Government on behalf of Brunei in August 1980 and again in May of 1981<sup>198</sup>. Understandably, this protest only concerned Malaysia's extension of the continental shelf and not the common lateral territorial sea boundaries, since these were based on the above-mentioned action previously executed by Britain itself.

In order to analyse the various overlapping claims between Malaysia and Brunei, one has to look at the separate sections in parts, i.e. the eastern and western delimitations of the territorial sea, the continental shelf, the EEZ and fishery zone, and the effects of islands and/or rocks.

## 4.1 Territorial Sea

There are two points at which the territorial sea between both countries has to be determined:

- (i) at the eastern border (near Barat Rocks); and
- (ii) at the western border (near *Tanjong Baram*).

### 4.1.1 Eastern Boundary

As pointed out above, the correct baseline from which Brunei and Malaysia should measure their respective maritime zones on their eastern border is the straight baseline connecting Petong Rocks with Barat Rocks (see Map 4), converting Brunei Bay to internal waters. There are two possibilities to determine the common baseline borderpoint:

- (i) the intersection of the new closing line with the present *Order in Council* line; or,
- (ii) the coordinates of the perpendicular bisector as the equidistant line of the closing line.

<sup>194</sup> it has to be pointed out that Brunei's seaward delimitation line of its continental shelf is in default of UNCLOS III Article 76.7. This article stipulates that "*the coastal State shall delineate the outer limits of its continental shelf, where the shelf extends beyond 200 nautical miles from the baseline...by straight lines not exceeding 60 nautical miles in length*". Brunei's one single straight line marginally exceeds this set maximum

<sup>195</sup> 1/1/1983 *Brunei Fishery Limits Act* (BLRO 1/1984, Cap.130)

<sup>196</sup> 19/2/1983, *Territorial Waters of Brunei Act* (BLRO 1/1984, Cap.138)

<sup>197</sup> in January 1976, a rather minor incident occurred off the coast of Labuan, where Malaysia accused Brunei of violating its territorial sea (*New Straits Times* 19,24/1/1976)

<sup>198</sup> Note 020/4 and 177/2 of the British High Commission at Kuala Lumpur of 4/8/1980 and 26/5/1981 respectively

While the latter solution moves the common territorial sea terminus measured from this point marginally to the north, the former corresponds to point 7 (5°13.87'N, 114°55.20'E) of the present territorial sea terminus.

#### 4.1.2 Western Boundary

The Malaysian map only acknowledges Brunei's maritime claims up to the 100 fathom isobath terminating at 5°02'N, 113°46'E on the western border. According to the *Order in Council* No. 1518 Article 4.2(a), the territorial sea boundary between Sarawak and Brunei near *Tanjong Baram* starts from the land point at 4°35'20"N, 114°5'00"E and extends in a straight line north for about 4 nm to the 6 fathom isobath. Since Britain adhered to the 3 nm territorial sea at the time the *Order* was issued, the outer limits of the territorial waters consequently terminated at 3 nm from the coast. Presently the territorial sea of Brunei terminates at a distance of 12 nm from *Tanjong Baram*, a *Malaysian* town, therefore lying at a distance of 14 nm - instead of 12 nm - from the mutual borderpoint which lies 6 nm east of *Tanjong Baram*. Beyond the 6 fathom isobath, the border diverges from this straight line, bends very slightly to the east, turns at the 10 fathom isobath to the west and continues beyond the 20 fathom isobath at a 45° angle again in a straight line in a northwesterly direction (see Map 3).

This common sea border was basically constructed on the median line principle governing the delimitation of the territorial sea between adjacent states according to Article 12 of the 1958 Geneva Convention on the Territorial Sea. The UK issued the *Order in Council* two days after it signed all four Geneva Conventions, and it can be assumed that it drew the boundary line, as described above, in order to reach a compromise regarding the lateral delimitation (i.e. to follow the median line principle) and the requirement that the continental shelf should normally not depart to any appreciable extent from the general direction of the coast.

Although this stipulation was only expressly stated in Article 4.2 of the 1958 Territorial Sea Convention concerning the drawing of straight baselines, it also reflects a basic principle as, for instance, articulated in the *First Decision* of the arbitration in the *Delimitation of the Continental Shelf* between the UK and France, stating that

*"[a] state's continental shelf, being the natural prolongation under the sea of its territory, must in large reflect the configuration of its coast".*<sup>199</sup>

If Britain would have continued with the lateral continental shelf delimitation extending the perpendicularity of the median line, the result would have been contrary to the intention of Article 1 of the 1958 Continental Shelf Convention. To overcome this problem, the current line was constructed. The reason why the curvature occurs where it does - and not, for instance, at the 3 nm territorial sea mark - has to be seen in the intention of Britain to divide

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<sup>199</sup> ICJ Reports 1977:57

the wells of the Fairley-Baram Oilfield<sup>200</sup>, just north of the present seaward territorial delineation, equitably between Sarawak and Brunei<sup>201</sup>.

The fact that the current lateral territorial sea delimitation line does not follow the median line principle in its entire length is not in default of the law of the sea regulations. Article 12 of the 1958 Convention on the Territorial Sea and Article 15 of UNCLOS III allow that an agreement between adjacent states can diverge from the equidistance principle which, however, shall be applied if no agreement exists. Both articles also endorse a non-equidistance solution in cases

*"where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance",*

with the median line principle.

## 4.2 Continental Shelf

According to Malaysia's *Continental Shelf Act 1966* (revised 1972)<sup>202</sup>, the continental shelf is defined as

*"the seabed and subsoil of submarine areas adjacent to the coast of Malaysia but beyond the limits of the territorial sea of the States<sup>203</sup>, the surface of which lies at a depth no greater than 200 metres below the surface of the sea, or, where the depth of the superadjacent [sic] waters admits of the exploitation of the natural resources of the said area, at any greater depth."*<sup>204</sup>

Comparing the above text with the Malaysian Map, it evinces that an inconsistency exists between the Malaysian legislation and the areas claimed as continental shelf areas on the said map.

Article 1.2. of the Malaysian Constitution lists Sabah and Sarawak as part of the territory of the Federation with the proviso in Article 1.3 that

*"each of the States mentioned are the territories comprised therein immediately before Malaysia Day."*

<sup>200</sup> see BA Chart No. 2109 of 1926, New Edition 1986. The closeness of the oilfields under different national jurisdiction has created a similar problem as the Bubiyan conflict between Iraq and Kuwait in 1990, where the latter accused the former of drilling in a non-vertical manner tapping illegally on the adjacent country's oil reserves. It is believed that Malaysia and Brunei presently operate a so-called 'pooling' or 'unitization' scheme to overcome the problem. Regarding the 'law of capture' and drilling by two different nations from a common sub-surfaced oilfield see Siddayao 1978:107ff. On the importance of oil in Brunei see Hamzah 1980

<sup>201</sup> Valencia (1991:48) mentions that the division concerns the oilfield of South Fairley One; however, according to the *Foreign Scouting Service Chart Malaysia Eastern Sheet* (A000-20 275963), this field lies 6 nm to the east. Although it has been pointed out (Prescott op.cit.:48, repeated by Valencia ibid) that the present demarcation favours Brunei by 300 sq.nm, a result, where Britain would have caused the curvature to turn at the 3 nm point, would have been in Brunei's favour to an even greater extent, since the continental shelf line would have run approximately 4 nm further to the west

<sup>202</sup> Laws of Malaysia Act 57, amended version Act 83. The *Continental Shelf Act* entered into force for East Malaysia on 8/11/1969. The Act does not refer to the *Orders in Council* of 1958 which is so because the legislation originally only applied to the States of Malaya, i.e. West Malaysia, for which it entered into force already on 28/7/1966

<sup>203</sup> i.e. the individual states forming the Federation of Malaysia

<sup>204</sup> Article 2 of the *Continental Shelf Act*

These provisions were agreed upon in Article 1 of the above-mentioned *Malaysia Treaty* of 9/7/1963. Therefore, when the Federation came into existence on 16/9/1963, Sarawak and Sabah already comprised within their respective boundaries the continental shelf as annexed in 1954, whose seaward delimitation was subsequently extended by the *Continental Shelf Act* in 1969. This act, which had been in force for East Malaysia ten years before the publication of the Malaysian Map, provides only for

*"the seabed and subsoil of submarine areas adjacent to the coast of Malaysia but beyond the limits of the territorial sea of the States"*<sup>205</sup>.

Consequently Malaysia cannot - according to its own legislation - legally claim the continental shelf adjacent to Brunei's coast as shown on the Malaysian Map.

The eastern boundary of the continental shelf as shown on Sheet 2 of Brunei's maritime charts is the extension of the torso delineation of the 1958 *Order in Council* from the latter's end point at 5°42.00'N, 114°24.24'E in a northwesterly direction now terminating at 8°15.23'N 111°56.27'E. The western demarcation runs almost parallel to the eastern border terminating at 7°35.32'N, 111°05.50'E being the extension of the torso line from 5°01.15'N, 113°44.87'E.

#### 4.2.1 Delimitation with Malaysia

In the 1966 version of the *Continental Shelf Act*, Malaysia annexed in a Schedule the text of Article 6 of the 1958 Continental Shelf Convention to the legislation which was specifically referred to in Article 2 of the Act. Malaysia, being party to the 1958 Geneva Convention, adhered to Article 6.2 of the 1958 Continental Shelf Convention which stipulates that

*"[w]here the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest point of the baselines from which the breadth of the territorial sea of each State is measured."*

That this schedule and the reference to it was omitted in the 1972 revised version of the *Continental Shelf Act* does not change the obligation to delimit the continental shelf between both parties. Both countries have signed UNCLOS III, thereby indicating general consent with the text, although neither state has ratified the convention<sup>206</sup>. Even though UNCLOS III is not in force yet<sup>207</sup>, certain régimes thereof have crystallized to develop into customary international

<sup>205</sup> *ibid*; emphasis added

<sup>206</sup> Malaysia signed on 10/12/1982; Brunei on 5/12/1984. While Brunei has shown no signs to ratify UNCLOS III, Malaysia's Law Minister *Datuk Syed Hamid Albar* has indicated the government's intention to do so (*Business Times* 22/12/1992). Malaysia is also party to all four 1958 Geneva Conventions (by accession on 21/12/1960); Brunei is not

<sup>207</sup> according to Article 308, the convention shall come into force twelve months after the date of deposit of the sixtieth instrument of ratification or accession. Since this requirement has been fulfilled with the ratification by Guyana (16/11/1993), UNCLOS III will enter into force in November 1994.

law<sup>208</sup>. The dispute resolution concerning the delimitation of the continental shelf between adjacent states according to Article 74 is one of them<sup>209</sup>.

Paragraph 1 of this article stipulates that the continental shelf of neighbouring countries

*"shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."*

No agreement exists between the independent entities of Brunei and Malaysia in regard to the sea delimitations except those inherited from Britain. When Sarawak became part of the Federation of Malaysia, the latter agreed to the then existing boundaries, as did Brunei when it attained independence. Neither country has revoked the relevant legislation enacted by the UK in 1958, and both have adhered to the *Order in Council* as far as it goes<sup>210</sup> which is in accordance with Article 74.4 of UNCLOS III stating that

*"[w]here there is an agreement in force..., questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement."*

For the remaining sector both countries have to come to an agreement in order to achieve an equitable solution (Article 74.1). If none can be reached within a reasonable period of time, the parties shall resort to the procedures provided for in Part XV of UNCLOS III (Article 74.2).

Article 295 for Part XV (*Settlement of Disputes*) foresees the help of "*local remedies*" before submitting the case to a court or tribunal as provided for in Article 287. The local remedies undertaken have to be seen in the light of continuing bilateral negotiations (see *infra*).

### 4.3 EEZ and Fishery Zone

The régimes concerning the delimitation of the EEZ between adjacent countries (Article 83 of UNCLOS III) are identical with the above-mentioned regulations of the continental shelf delimitation (Article 74).

<sup>208</sup> for a summary of the *Development of Ideas concerning the Delimitation of the Continental Shelf* see Chapter II, Section III of Oda's Dissenting Opinion in the judgment in the *Case Concerning the Continental Shelf* between Tunisia and Libya (ICJ Reports 1982:184ff)

<sup>209</sup> in the *Gulf of Maine* Case (Canada/USA; ICJ Reports 1984) where the Chamber was asked to determine and draw a single maritime boundary for the continental shelf and exclusive fisheries zone without any indication being given by the parties concerned as to the sources from which such line was to be derived at, the Chamber found that the equidistance rule contained in Article 6 of the 1958 Convention on the Continental Shelf did not have mandatory force between Canada and the US although both countries were parties to it and had ratified the text. The reason given was that when it came to the delimitation of a single maritime boundary, the result should be "*in compliance with the governing principles and rules of law, applying equitable criteria and appropriate methods accordingly*" in order to produce an equitable overall result (ibid:344). The Chamber arrived at that conclusion pointing out that the texts of Articles 74 and 83 of UNCLOS III (although in this case signed but not ratified by only one party) were relevant as already applied in the judgment of the *Case Concerning the Continental Shelf* between Tunisia and Libya (ibid 1982:92) and may be regarded as consonant with general international law on the question of delimitation

<sup>210</sup> as evidenced by the respective charts; see also the above-mentioned judgment of the Brunei High Court, Criminal Appeal No.5 of 1989, Criminal Case No.KB/CC/99/89

### 4.3.1 Malaysia

Malaysia enacted an EEZ in 1984<sup>211</sup> and published its *Fisheries Act* in 1985<sup>212</sup>. According to Article 1.1 of the EEZ legislation, the Act applies also to the continental shelf. The provisions pertaining to the continental shelf are in addition to, and not in derogation of, the provisions of the earlier *Continental Shelf Act* (Article 1.2). Consequently, in cases of inconsistency, the *EEZ Act* shall supersede any conflicting or inconsistent provisions of other applicable written law (Article 1.3). The definition of the continental shelf in the *EEZ Act* is according to the provision of the *Continental Shelf Act* 1966 (Article 2); while the EEZ is defined as an area beyond and adjacent to the territorial sea of Malaysia and to a distance of 200 nm from the baselines (Article 3.1), except where there is an agreement in force regulating the delineation between neighbouring states (Article 3.2). The King may, if considered necessary, alter the limits of the EEZ as long as they do not exceed the stipulated 200 nm (Article 3.4).

Malaysia's fisheries waters are defined in the same Act in Article 2 as

*"all waters comprising the internal waters, the territorial sea and the exclusive economic zone of Malaysia in which Malaysia exercises sovereign and exclusive rights over fisheries."*<sup>213</sup>

Although the Office of National Mapping has not yet published an official map showing the EEZ coordinates, it can be assumed, that in the case of the East Malaysian coast bordering the South China Sea, the EEZ extends to a distance of 200 nm parallel to the inferred baselines. Where this distance exceeds the waters available due to the presence of a legal claim by neighbouring countries - as perceived by the Malaysian Government - the seaward boundary of the EEZ is congruent with the continental shelf boundaries as shown on the Malaysian Map.

### 4.3.2 Brunei

Although expected to do so soon, at the time of writing, Brunei has not promulgated an EEZ, but declared its fishery limits in 1983<sup>214</sup>, the size of which is approximately 18,550 sq. nm<sup>215</sup>. Although it defines the seaward border of the fishery zone in Article 3.1 of the *Fishery Act* to be at 200 nm measured from the baseline, on Sheet 3 (showing the Brunei Fishery Limits) the fishery zone is extended to what Brunei perceives to be the equidistance line with Vietnam, i.e. to a line marked as "Approximate Mainland" at a distance of 265 nm from Brunei's inferred baselines<sup>216</sup>. However, an extension to the median line should, according to Article 3.2 of the

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<sup>211</sup> Laws of Malaysia Act 311

<sup>212</sup> Laws of Malaysia Act 317; replacing the *Fisheries Act* of 1963 (Amend.1973). N.B.: Malaysia is considering amending this Act; however, at the time of writing, legislation has not yet been enacted

<sup>213</sup> see also Part I of the *Fisheries Act* 1985

<sup>214</sup> 1/1/1983, *Brunei Fishery Limits Act*, (BLRO 1/1984, Cap.130). After completion of this article, Brunei proclaimed its EEZ on 21/7/1993, the boundaries of which are identical with those of the *Fishery Limits* (see map: Series: Misc.1, Edition: 1, JUAB Sheet 4)

<sup>215</sup> i.e. 70 nm x 265 nm for the extended fishery limits; for the fishery zone ending at the "200 Nautical Mile" line, the area is c. 14,000 sq.nm. Chua, Chou, Sadorra (1987:5) give a size of 38,600 sq.km for the fishery limits and 9,400sq.km for the continental shelf zone; Alexander (1982:21) mentions that Brunei has an *EEZ* of 7,100 sq.nm. This, however, is at variance with Brunei's maritime charts

<sup>216</sup> the resultant overlapping claim of approximately 200 sq.nm between Brunei and the Philippine Kalayaan area (west of Amboyna Cay) is not discussed in this paper; neither is the overlapping claim with Vietnam regarding the Bombay Castle, Johnson Patch, Orleans Shoal, Rifleman Bank and Kingston Shoal

*Fishery Limits Act*, only apply as a transitional measure, in cases where the median line is *less* than 200 nm from the baselines.

The common lateral border termini between Malaysia's EEZ and Brunei's Fishery Limits lies at point 5 of the Sheet 3, i.e. at 6°59.13'N, 111°42.98'E (western side) and point 10 of the same chart at 7°27.97'N, 112°42.13'E (eastern side).

#### 4.4 Effects of Islands and Rocks

There are various features in existence which have to be considered when drawing the demarcation lines for the continental shelf, fishery zones and/or EEZ between Malaysia and Brunei. On the existing maps, neither Malaysia nor Brunei have taken any of them into account for bilateral delimitation lines.

##### 4.4.1 Western Boundary

To the west of Brunei's present westerly lateral continental shelf line lie the Luconia Shoals. This group is geographically divided into two sub-groups

- (i) the South Luconia Shoal (*Gugusan Beting Patinggi*) of which all but the Luconia Breakers (*Hempasan Bantin*) are submerged. This latter feature is at the best to be defined as a rock and therefore may only effect a 12 nm territorial sea. Such a zone will not overlap with any Brunei claim. If the Luconia Breakers are considered to be a low-tide elevation, they do not have a territorial sea of their own since they are wholly situated at a distance exceeding the breadth of the territorial sea from the mainland<sup>217</sup>;
- (ii) the North Luconia Shoals (*Gugusan Beting Raja Jarum*): as all features are submerged, no maritime zones can be claimed therefrom by Malaysia. Consequently no overlap occurs.

##### 4.4.2 Eastern Boundary

The following features are situated in the vicinity of Brunei's present easterly lateral continental shelf boundary and therefore may effect different maritime zones than shown on either country's maritime maps

- (i) Royal Charlotte Reef (*Terumbu Samarang Barat Besar*);
- (ii) Swallow Reef (*Terumbu Layang Layang*); and
- (iii) Amboyna Cay (*Pulau Kecil Amboyna*).

The main issue is the necessity to establish the status of these features, i.e. whether they are to be identified as 'mere rocks' or as 'fully-fledged islands'. It seems, that they all fall into a category of naturally formed *sandy* islets above water at high tide, which cannot sustain human

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<sup>217</sup> Article 13.2 of UNCLOS III

habitation or economic life of their own. Therewith they give rise to a problem which was not satisfactorily addressed and resolved during the UNCLOS III negotiations, namely which maritime zones should these tiny, uninhabited coral-sand features effect which lie beyond the territorial sea of any country's maincoast and have previously been under no particular national jurisdiction?

Since Article 121.3 only refers to "*rocks which cannot sustain human habitation or economic life of their own*" (hereafter referred to as 'mere rocks'), it may be argued that even small bare, sandy islets, of less than 0.01 sq.km, can effect the full range of all legal maritime zones. During the legislative history of Article 121 exhaustive discussion in regard to the definition of the term 'island' took place<sup>218</sup>.

Analysing the *travaux préparatoires* of the said article, it emerges that unity only existed in the declaration that "*an island is a naturally formed area of land, surrounded by water, which is above water at high tide*"<sup>219</sup>. This is verbatim the definition already laid down twenty-four years earlier in Article 10 of the Convention on the Territorial Sea and Contiguous Zone. Despite the discussions of differentiating between islands in relation to their size, their population thereon or the absence thereof, their geological configuration and geographical situation, and other relevant factors<sup>220</sup>, at the 33rd Informal Meeting in April 1975, the above-mentioned ISNT based its formula on the work done during the Second Session of the Conference<sup>221</sup> and by the Sea-Bed Committee which was the preparatory organ for the Conference. In 1975, during the Third Session of the Conference<sup>222</sup>, the text, as it stands now, was proposed<sup>223</sup> and in spite of a revived discussion in 1980<sup>224</sup>, no changes occurred. Various countries objected (i) against the discrimination of the term 'rock' being neither a legal nor a scientific distinction<sup>225</sup>; and (ii) against the ambiguity incorporated in the phrase "*cannot sustain human habitation or economic life of their own*"<sup>226</sup>.

During the course of the debate Fiji, New Zealand, Tonga and Western Samoa, proposed a draft<sup>227</sup> of what is now Article 6, which refers to islands situated on atolls and to islands having fringing reefs. However, this article only applies to "*the baseline for measuring the breadth of the territorial sea*" from reefs, a geological term for which it does not provide a legal definition. According to *A Manual on Technical Aspects of the United Nations Convention on the Law of the Sea 1982*, the physical features of a reef are

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<sup>218</sup> see UN Office for Ocean Affairs *The Law of the Sea - Régime of Islands* 1988 Part II; see also *ibid*: Part I for the pre-UNCLOS III debate; for a detailed discussion on the subject of *Maritime Zones of Islands in International Law* see Symmons 1979

<sup>219</sup> presumably referring to the mean high water level; this wording was mainly intended to prevent artificial structures or submerged features acquiring a territorial sea

<sup>220</sup> see e.g. draft articles presented by Romania (A/CONF.62/C.2/L.18), or by Turkey (A/CONF.62/C.2/L.55) or in the joint African proposal (A/CONF.62/C.2/L.62/Rev.1.)

<sup>221</sup> 20/6 - 29/8/1974

<sup>222</sup> 17/3 - 9/5/1975

<sup>223</sup> A/CONF.62/L.8/Rev.1 of 6.5.1976 differs only marginally from the earlier version of 7/5/1975

<sup>224</sup> for various proposals and expressed views see *Régime of Islands* 1988:45ff

<sup>225</sup> e.g. Venezuela, GAOR 135th Meeting

<sup>226</sup> e.g. Iran, GAOR 137th Meeting

<sup>227</sup> A/CONF.62/C.2/L.30

*"a mass of rock or coral which reaches close to the sea surface or is exposed at low tide. That part of a reef which is above water at low tide but submerged at high tide is a 'drying reef'."*<sup>228</sup>

That means, a reef is neither an island nor a rock as referred to in Article 121, since it is not permanently above sea level at high tide<sup>229</sup>. A reef's structure is often made up by corals which are bottom-dwelling marine invertebrate organisms of the class anthozoa which together with a plant, called zooxanthellae, build the reef. Only the upper section of a coral reef is organically active, because sunlight is required for growth. It is usually exposed at low tide, but must be covered at high tide, since the organism dies when permanently uncovered<sup>230</sup>.

Subsequently the question arises as to which régime applies in cases where a coral reef emerges - for various reasons - permanently above water. Some may argue that it is to be considered to fall into the category of being a 'mere rock'<sup>231</sup>, and Article 121.3 applies. However, in the geological definition, it is not a rock. The part that emerges is the skeletal structure of the dead coral polyps consisting of calcium carbonate.

Neither can a coral cay be considered a rock, since it is

*"a 'low' island formed entirely from the sedimentary debris created by the reef on which it stands, sediments which have been swept into a particular part of the reef by wave action. No continental rocks are associated with coral cays which are thus clearly differentiated from 'high' islands with fringing reefs usually found closer to the mainland....Initially, the embryo cay is little more than an unstable sand bank, changing its position on the reef flat by tens of meters with every change in weather conditions. As it increases in size, however, such movement becomes smaller and, while changes to the shape of the cay may still take place, its position on the reef becomes more stable....[T]ides built it up to levels which are overlapped only a few times a year and seabirds begin to nest on its crown. These birds bring in seeds of plants, either attached to their feathers or in droppings. The initial vegetation is usually in the form of low creepers which help to stabilise the sand surface. The young island has a dune capping which rises above the highest tides."*<sup>232</sup>

This means that if a feature is a coral cay, (i) it consists of triturated animal skeletons; and (ii) it may be of rather unstable formation. But in any case, it is not a rock. Since there is a geological difference between rocks and configurations made out of coral remains, according to the text of Article 121, they effect different legal régimes once the reef or cay emerges out of the water and is permanently above the high tide sea level.

<sup>228</sup> quoted by Beazley 1991:1; emphasis added

<sup>229</sup> classification allotted to maritime features in their names can not be relied upon, neither in the English nor indigenous version. The reason lies in the fact that they were named before their geological character needed to be determined. They represent - if at all - only the topographic configuration and not the geological composition or origin thereof

<sup>230</sup> Hamblin 1989:324; Clark and Cook 1983:275; see also White 1987

<sup>231</sup> for an example whether a mid-ocean rock can generate its own shelf, see the Rockall dispute in Symmons (op cit:184ff) and Brown, E.D. (1978). Rockall is a bare ocean rock between Iceland and Ireland measuring 0.000241 sq.miles claimed by the UK

<sup>232</sup> description taken from the *Great Barrier Reef* of the Marine Park Authority, National Library of Australia, n.d.:18ff

If an emerged reef is a 'mere rock', Article 121.3 applies; if it is made of coral debris, the said article does not apply. It may be argued that the very absence of including coral reefs and/or coral cays into Article 121.3 proves that they are exempted, and that even these small, bare and uninhabitable islets can effect the full range of maritime zones.

On the other hand, it can be maintained that the very existence of Article 121.3 shows that the Committee wanted to prevent that countries claim vast maritime zones (previously considered as high sea) due to the presence of such small, uninhabited, barren islets, and that the term 'rock' actually stands for any comparable physical configuration - disregarding its structural composition<sup>233</sup>. The difference whether it can effect a 12 nm territorial sea or the full range of maritime zones then only lies in the fact whether it can or cannot sustain human habitation or economic life of its own *before* development.

Such a narrow interpretation could be seen to be in line with the notion of 'equity', a principle, however, which has not been legally defined much beyond the *dictum* that

*"as a legal concept [it] is a direct emanation of the idea of justice"*<sup>234</sup>,

and that equity does not necessarily imply equality<sup>235</sup>. In his Dissenting Opinion to the judgment in the *Case Concerning the Continental Shelf* between Tunisia and Libya, Judge Oda calls this principle a "*blanket concept susceptible of diverse interpretation*"<sup>236</sup>, which may lead to judicial subjectivism, especially when its assessment goes beyond the norm of law into the political, social, economic and, lately also, environmental realm<sup>237</sup>.

The precise size of the three above-mentioned features is not available, but none of them is a 'mere rock'<sup>238</sup> and therefore may effect - beside the territorial sea and a contiguous zone - also an EEZ and a continental shelf. Malaysia has only allotted a territorial sea around Amboyna Cay and Swallow Reef, but not around Royal Charlotte Reef, and only Amboyna Cay was used in determining two turning points of the outer Malaysian continental shelf boundaries, namely TP 53 and 54, which are constructed as points of equidistance from Spratly Island proper and Amboyna Cay respectively.

In the case that Malaysia can prove to be the rightful owner of the three features *vis-à-vis* the other claimants in the Spratly Islands conflict<sup>239</sup>, it has to apply Articles 74 and 83 of UNCLOS III in regard to the demarcations with Brunei. The said articles provide that the delimitation of

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<sup>233</sup> it has to be remembered that, for instance, a cay with a radius of twenty metres could effect an EEZ of 125,600 sq.nm, a result that may crucially conflict with the essence of the principle of equity

<sup>234</sup> *Case Concerning the Continental Shelf* between Tunisia and Libya (ICJ Reports 1982:60)

<sup>235</sup> *North Sea Continental Shelf* Cases, (Federal Republic of Germany v. Denmark and Federal Republic of Germany v. The Netherlands; ICJ Reports 1969:49)

<sup>236</sup> *Case Concerning the Continental Shelf* between Tunisia and Libya (op.cit.:255)

<sup>237</sup> without entering into the debate of the position of 'equity' in the legal context (see e.g. Kwiatkowska 1988), it has to be pointed out that beside the subjectiveness in determining of which factors constitute an equitable result in each case and to whom, as a concomitancy, the application of this method may be detrimental to one of the intrinsic characteristics of law by undermining its predictability and certainty

<sup>238</sup> although Prescott maintains that Swallow Reef and Royal Charlotte Reef are rocks (op.cit.:48), the present writer has viewed aerial photographs thereof which quite clearly show that they are coral cays. However, no precise assumption of size could be deduced from these pictures

<sup>239</sup> for details see Haller-Trost 1990

the continental shelf and the EEZ between adjacent states shall be effected by agreement on the basis as pointed out in section 3.2 and 3.3 *supra*. Like in the *Gulf of Maine Case*, a single maritime boundary for both zones would be a practical solution as already indicated on the Brunei charts<sup>240</sup>.

#### 4.4.3 Louisa Reef

A territorial dispute exists between Malaysia and Brunei over the ownership of one feature, i.e. Louisa Reef (*Terumbu Samarang Barat Kecil*), which lies at 6°20'N, 113°16'E on the continental shelf/fishery zone corridor of Brunei, approximately 125 nm from the coast. This controversy constitutes the major obstacle in the negotiations between both governments which deny that any other country than their own has a legal claim to Louisa Reef.

Little is known about the history of the reef (geologically and otherwise), except that it probably consists of two separate features<sup>241</sup>. A navigational light in the form of an obelisk - presently maintained by Malaysia - is constructed on the eastern submerged feature. The western part seems to be a rocky coral reef, one metre above sealevel at high tide, but unable to sustain human habitation or economic life of its own. Thereupon the Chinese erected a stone-marker which was removed by the Malaysian Navy in 1988<sup>242</sup>.

Malaysia, which included the feature within its continental shelf claim, did not allocate a territorial sea to it nor did it use it as a baseline point to delimit the continental shelf; neither did Brunei. Leaving aside the other contestants and analysing only the dispute over sovereignty between Malaysia and Brunei, the following has to be noted

Malaysia argued for ownership over certain islands and reefs in the South China Sea on the basis that the insular features are situated within the (unilaterally promulgated) boundaries of its continental shelf. In 1983 and in 1988 the Malaysian Government stated that

*"[t]he islands and atolls are under Malaysian sovereignty, and Malaysia has in the past reaffirmed its jurisdiction....They are within Malaysia's continental shelf area and Malaysia's sovereignty over them has been officially declared though the new Map of Malaysia, published on December 21st, 1979....The claim is in line with the Geneva Convention of 1958 pertaining to territorial waters and continental shelf boundaries, and the UN Convention on the Law of the Sea, as well as other international practices."*<sup>243</sup>

If Malaysia maintains this legal position<sup>244</sup>, it consequently will have to concede to its neighbours the same right. Thus Brunei would have a claim to Louisa Reef in the same way as

<sup>240</sup> regarding the EEZ-Continental Shelf parallelism see Kwiatkowska 1989: chapter I.2

<sup>241</sup> DMA 71ACO71027, 8th ed. 1991, Defense Mapping Agency Hydrographic/Topographic Center, Washington

<sup>242</sup> the inscription reads in translation: *the People's Republic of China/Ministry of Geography and Minerals/Ocean No.4/1987 tenth month*

<sup>243</sup> *New Straits Times* 25/2/1988; see also 19,23/5/1983

<sup>244</sup> this line of argumentation, however, reverses the fundamental factors regarding the rights to maritime zones since it is title to territory that generates these rights and not vice versa. Though in cases where no better legal basis exists for the appropriation of uninhabited and formerly unclaimed islands situated on a country's continental shelf, there might emerge a tendency to place these features under the jurisdiction of that coastal country

Malaysia asserts its claim to some of the southern Spratly Islands, since Louisa Reef does not lie on the continental shelf adjacent to the coast of Malaysia, but on the shelf adjacent to the coast of Brunei.

On the other hand, if Malaysia argues that its title to the reef is based on the fact that it has exercised effective state control over the feature due to its maintenance of the obelisk in an - at least until 1980 - undisputed manner, it will have to correct its reasoning in the *Pulau Batu Puteh* case<sup>245</sup>, where it denies Singapore title to that feature (on which a more substantial structure is built) despite the fact that Singapore exercised control over *Pulau Batu Puteh* for over one hundred and twenty years.

#### 4.5 Equitable Solution

A number of solutions for the Malaysian-Bruneian overlapping claims have been suggested<sup>246</sup>. Most of them, however, are rather theoretical in nature and are not necessarily based on present international law principles<sup>247</sup>. Before any practical and acceptable solution can be suggested, two elementary preconditions have to be fulfilled

- (i) Both countries have to publish correct baselines from their respective mainlands and insular features. Without this prerequisite no maritime delimitation can be measured and negotiated. In order to arrive at a realistic result, detailed charts have to be produced<sup>248</sup>.
- (ii) In order to apply Article 121, it has to be established whether the off-shore features are islands and rocks.

Only then can an effective solution in accordance with Articles 74 and 83 be attempted. Negotiations have to take into account the existence of various agreements which have, until now, been recognized and adhered to by both states. Some talks have been in progress since 1987 with bilateral official meetings commencing in 1989. Although neither government is prepared to elaborate on their progress, in February 1992, Sultan Hassanal Bolkiah agreed with the Malaysian Government to have the maritime delineation issue between both countries addressed to by a Joint Commission<sup>249</sup>. To the writer's knowledge this body has not been convened at the point of writing, but since the willingness of both parties have been expressed, one can argue that in the interim, Article 83.3 of UNCLOS III prevails, i.e.

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<sup>245</sup> see Haller-Trost 1993

<sup>246</sup> e.g. Prescott op.cit.:48 and Valencia 1991:51

<sup>247</sup> most suggested solutions are derived from Article 6 of the 1958 Convention on the Continental Shelf, referring to the equidistance principle for lateral delimitations. Yet this article did not, even before Article 74 of UNCLOS III was drafted, represent or crystallize into a pre-existing or emergent rule of customary international law, nor did state practice prove such development, see e.g. *North Sea Continental Shelf* Cases (ICJ Reports 1969:45). Here the Court decided that the use of the equidistance method for delimitation was not obligatory (ibid:53)

<sup>248</sup> it is believed that the Malaysian Mapping Department is in the process of producing new maps in conjunction with the RMN and other relevant departments

<sup>249</sup> at the same time also four *Memoranda of Understanding* and an agreement on cooperation covering matters related to defence, information, education and air services were signed (Business Times 15/2/1992)

*"Pending agreement...., the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such agreement shall be without prejudice to the final delimitation."*

These "provisional arrangements" seem to exist since Britain's above-mentioned first protest in 1980. In 1981, it was proposed that the delimitation of the continental shelf between the two states should be effected through an outward prolongation of the established lateral lines defined by the two 1958 *Orders in Council*<sup>250</sup>. Not much is known regarding further discussion between the UK and Malaysia, but the first meeting between Malaysia and independent Brunei was held in Bandar Seri Begawan on 24-25/5/1987 headed by the foreign ministers of both countries. Since then a number of bilateral discussions have taken place which resulted in the decision to form the said Joint Commission.

Another factor which has to be considered is the issue of proportionality, which is closely related to the governing principles of equity<sup>251</sup> and which is a possible factor - among several others<sup>252</sup> - in a delimitation case. As stated in the *Decision* of the 1977 *Anglo-French Court of Arbitration*

*"[t]he factor of proportionality may appear in the form of the ratio between the areas of the continental shelf to the length of the respective coastlines....But it may also appear, and more usually does, as a factor for determining the reasonable or unreasonable - the equitable or inequitable - effects of particular geographical features or configurations upon the course of an equidistance-line boundary."*<sup>253</sup>

Also in the 1985 judgment of the *Case Concerning the Continental Shelf* between Libya and Malta, reference to "the element of a reasonable degree of proportionality" was made<sup>254</sup>, but the Court did

*"not consider that an endeavour to achieve a predetermined arithmetical ratio in the relationship between the relevant coasts and the continental shelf areas generated by them would be in harmony with the principles governing the delimitation operation. The relationships between the length of the relevant*

<sup>250</sup> at the same time, Britain stated that the Sultan of Brunei proposed to adopt the principle of the median line between Brunei and Vietnam regarding the seaward boundary of Brunei's continental shelf. Since it was perceived that Malaysia's continental shelf line as shown on the 1979 Malaysian Map between TP 53 and 54 represented this median line, Brunei's own continental shelf claim terminated in accordance with the Malaysian delimitation. As can be deduced from Sheet 2 and 3, showing the Continental Shelf and the Fishery Limits, Brunei does not adhere to this assumption any more, since it shows its revised perception thereof, i.e. a line north of Rifleman Bank. A definition of Brunei's understanding of the median line is found in Article 3.2 of the 1983 *Brunei Fishery Limits Act* as being a line "every point of which is equidistant from the nearest points of, on the one hand, the baselines referred to in subsection (1) and, on the other hand, the corresponding baselines of other countries."

<sup>251</sup> see e.g. the *North Sea Continental Shelf Cases* (ICJ Reports 1969:52) and the *Case Concerning the Continental Shelf* between Libyan Arab Jamahiriya and Malta (ICJ Reports 1985:43)

<sup>252</sup> analysing the various references to proportionality in international arbitration, it evinces that the importance of proportionality is only relevant in the later, mostly final, stage of the delimitation process

<sup>253</sup> *Anglo-French Arbitration, First Decision* 1977:58

<sup>254</sup> *Case Concerning the Continental Shelf* between Libya and Malta (op.cit.:44,53)

*coasts of the Parties has of course [to be] taken into account in the determination of the delimitation line.*<sup>255</sup>

The Court then looked at the result and found that there was

*"certainly no evident disproportion in the areas of the shelf attributed to each of the Parties respectively such that it could be said that the requirements of the test of proportionality as an aspect of equity were not satisfied."*<sup>256</sup>

Brunei's South China Sea inferred baselines have an approximate length of 70 nm, while Malaysia's *overall* straight baselines are more or less 1,750 nm long<sup>257</sup>; this leads to a ratio of 1:25. Taking the different geographical facts into account, an arithmetical proportionment would lead to an unpractical and unreasonable result. Since a certain element of proportionality should be reflected in the outcome in so far that an equitable result is achieved, and since

*"the only absolute requirement of equity [in relation to proportionality] is that one should compare like with like"*<sup>258</sup>

only the coasts in the relevant area should be examined. In the *Tunisia/Lybia* case<sup>259</sup>, the Court decided to establish the area relevant to the question of proportionality not on a point of law, but by defining points of "*cartographical convenience*". Similarly, in the present case, an area delimited by *Tanjong Simpang Mangayau* (7°3'N, 116°46'E) and *Tanjong Datu* (2°05'N, 109°38'E), i.e. the coastline of Brunei and East Malaysia adjacent to the South China Sea, would fulfil the requirement of comparing "like with like". The ratio then becomes 1:7.

Leaving the possible claims of third states aside, the present width of the corridor as shown on Brunei's charts, commencing at the eastern lateral boundary from a proposed Brunei Bay closing line and on the western side from the present mutual borderpoint of the inferred baselines, would represent an equitable result, as required by general international law principles expressed in Articles 74 and 83 of UNCLOS III.

If no resolve in regard to title over Louisa Reef can be found, joint ownership of the feature and/or joint maintenance of the obelisk could be contemplated<sup>260</sup>. Should the western section thereof fulfil the criteria as stipulated in Article 121 of UNCLOS III, a surrounding territorial

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<sup>255</sup> *ibid*:55

<sup>256</sup> *ibid*

<sup>257</sup> i.e. according to the modified version, namely with the corrections in the Straits of Malacca and along the northwesterly coast off Sabah. (The length of Malaysia's actual coastline is approximately 2,590 nm). Although in the *Tunisia/Lybia* Case, the Court held that "*the element of proportionality is related to lengths of the coasts of the States concerned, [and] not to straight baselines drawn around those coasts*" (*ibid*:76), it nevertheless did not take into account the "*small inlets, creeks and lagoons*" (*ibid*:91) and therewith departed to a certain extent from its own *dictum*. In the present case - when the total coastlines of both countries are compared - it seems to be more equitable to base the ratio on the respective correct baselines and not to follow all the sinuosities of the Malaysian coast, beside the fact that maritime zones are always measured from the baselines and not from the coast as such

<sup>258</sup> *ibid*:75

<sup>259</sup> *ibid*

<sup>260</sup> see e.g. the bilateral treaty concluded between South Africa and Namibia, namely the *Agreement on the Joint Administration of Walvis Bay and the Offshore Islands* (9/11/1992; text in 32 ILM 1993:1152). The rules of procedure therein are governed by consensus (*ibid* Art 4.2), a principle Malaysia and Brunei subscribe to strongly. Such analogous arrangement between the latter two countries would be less complex to implement, since the Louisa Reef, in contradistinction to the West African area, is not inhabited

sea and contiguous zone can - like the condominium corridor in Brunei Bay - be jointly controlled to the exclusion of third states.

## 5. Conclusion

Principles of international law confirm the present territorial borders and provide an equitable solution for the maritime boundary issue. Whilst the approach extrapolated above may not fully satisfy either government, an agreement thereto and an implementation thereof will serve as an example to all ASEAN members exemplifying that, without the will to accept compromise, territorial and maritime disputes will not and cannot be solved. Article 13 of the 1976 *Treaty of Amity and cooperation in Southeast Asia* states that

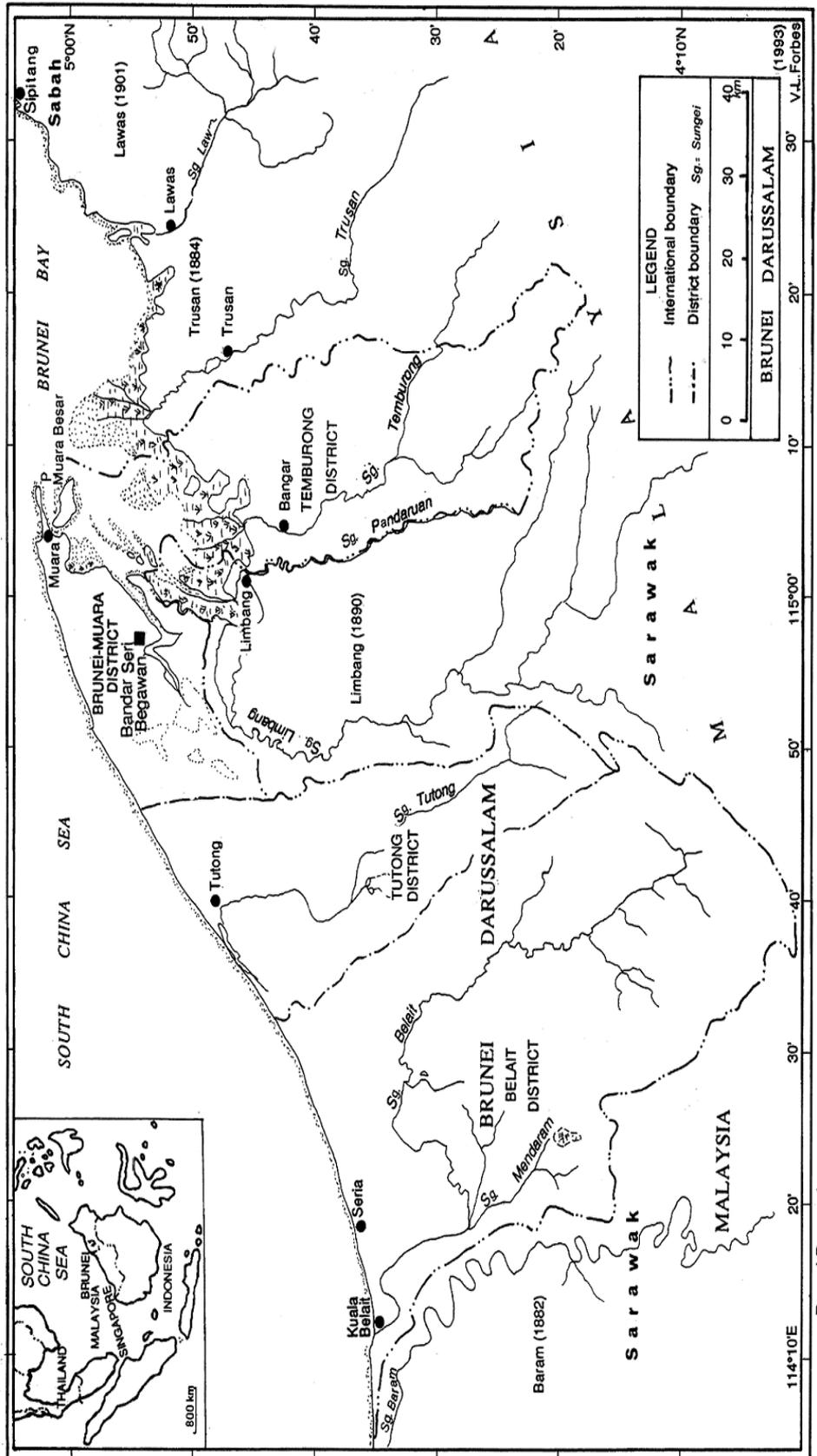
*"[t]he High Contracting Parties shall have the determination and good faith to **prevent** disputes from arising"*<sup>261</sup>

Only greater intra-ASEAN cooperation - a cooperation beyond a mere economic alliance which may prove to be insufficient in a case of a serious recession - can preserve the security and stability of the region upon which the future of the respective countries and the whole region depends. The regional security conference held in Singapore in May 1993 between the ASEAN countries (with Vietnam, Laos and Papua New Guinea as observers) on the one side and Canada, the EC, the USA, Japan, Australia, New Zealand and South Korea is the first of its kind and seems to indicate a growing willingness to tackle such issues formally.

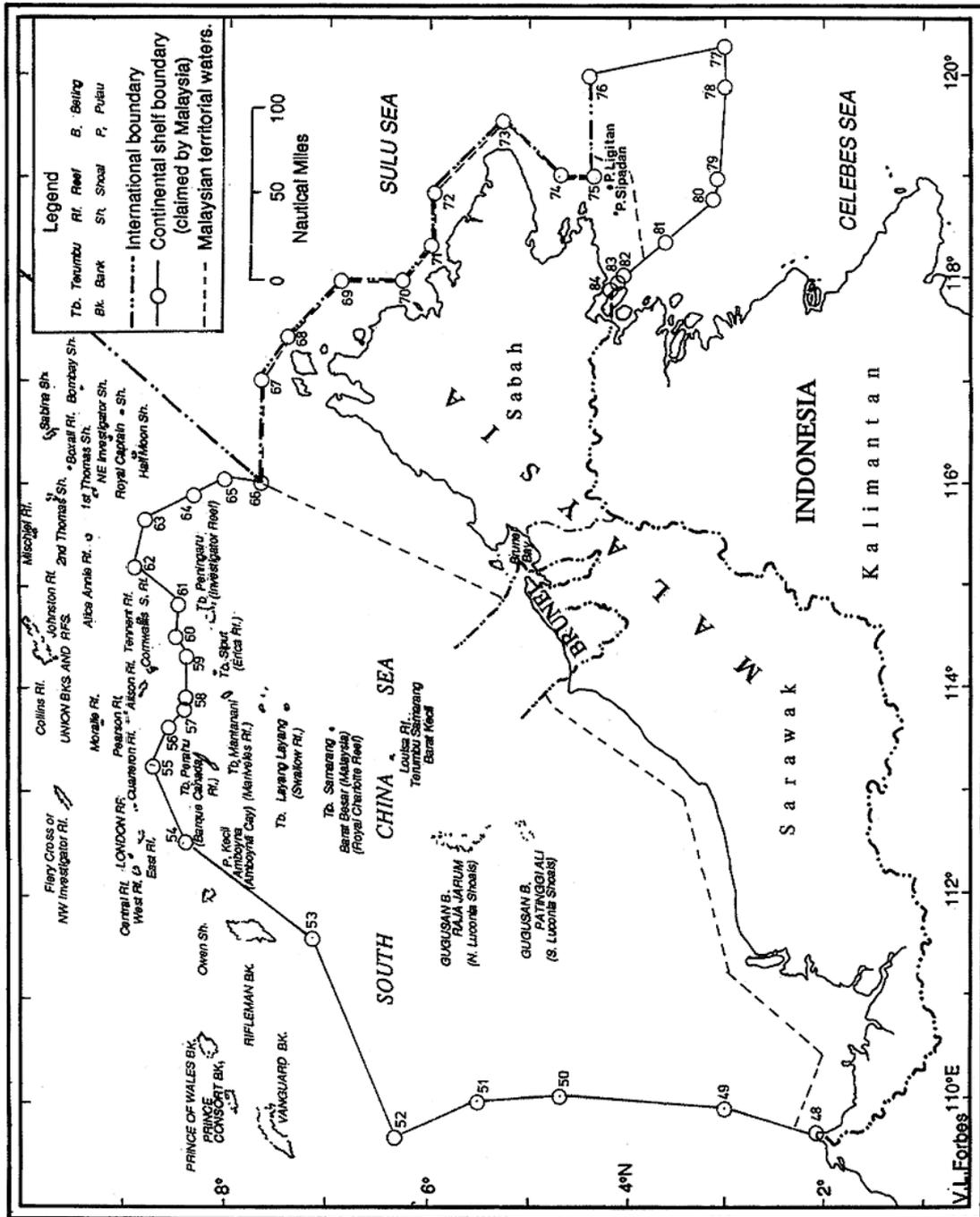
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<sup>261</sup> emphasis added; signed by the original five ASEAN members on 24/2/1976; Brunei, Laos, Papua New Guinea and Vietnam have acceded thereto (text in Hänggi 1991: 64)

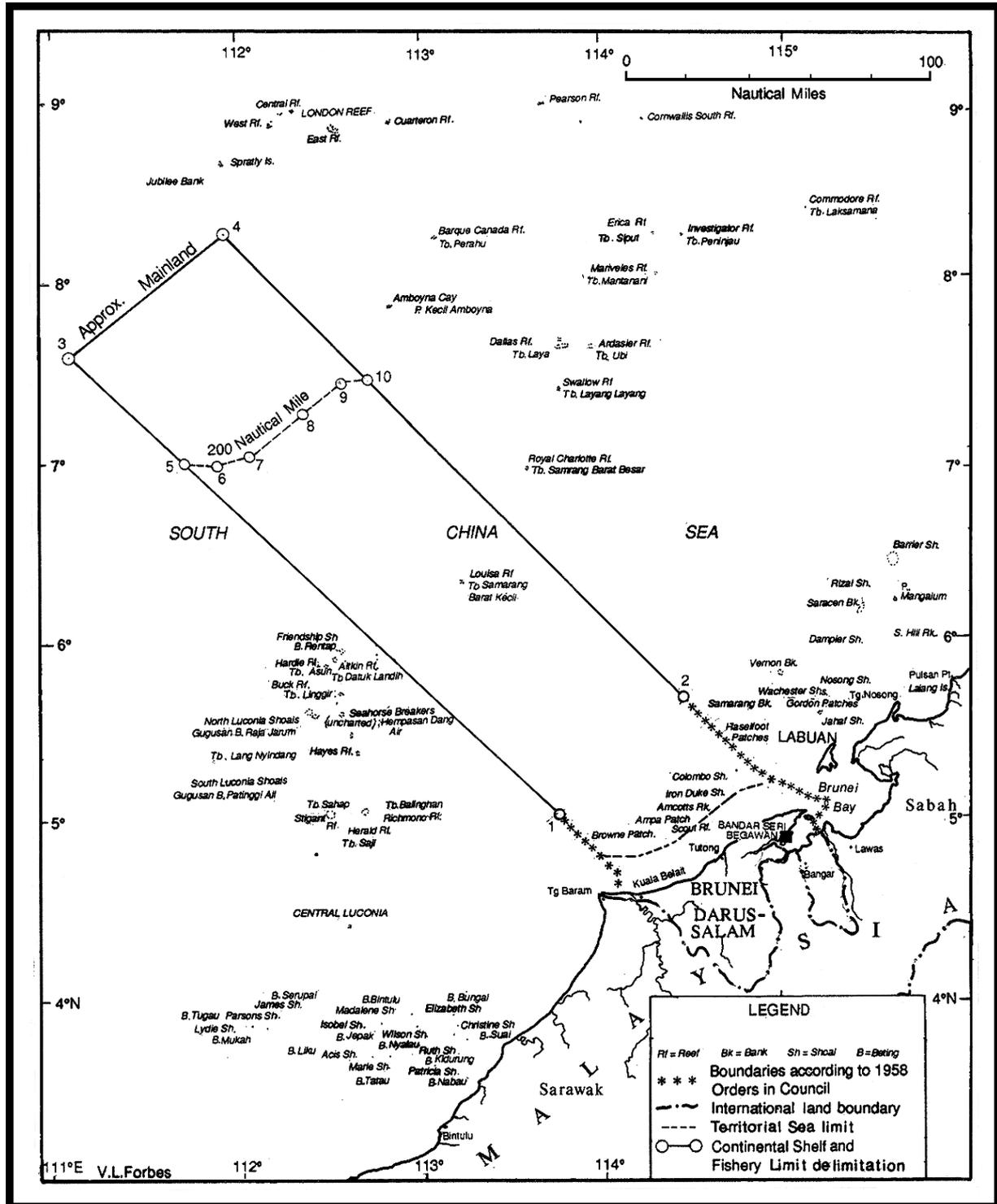
Map 1: Brunei Darussalam



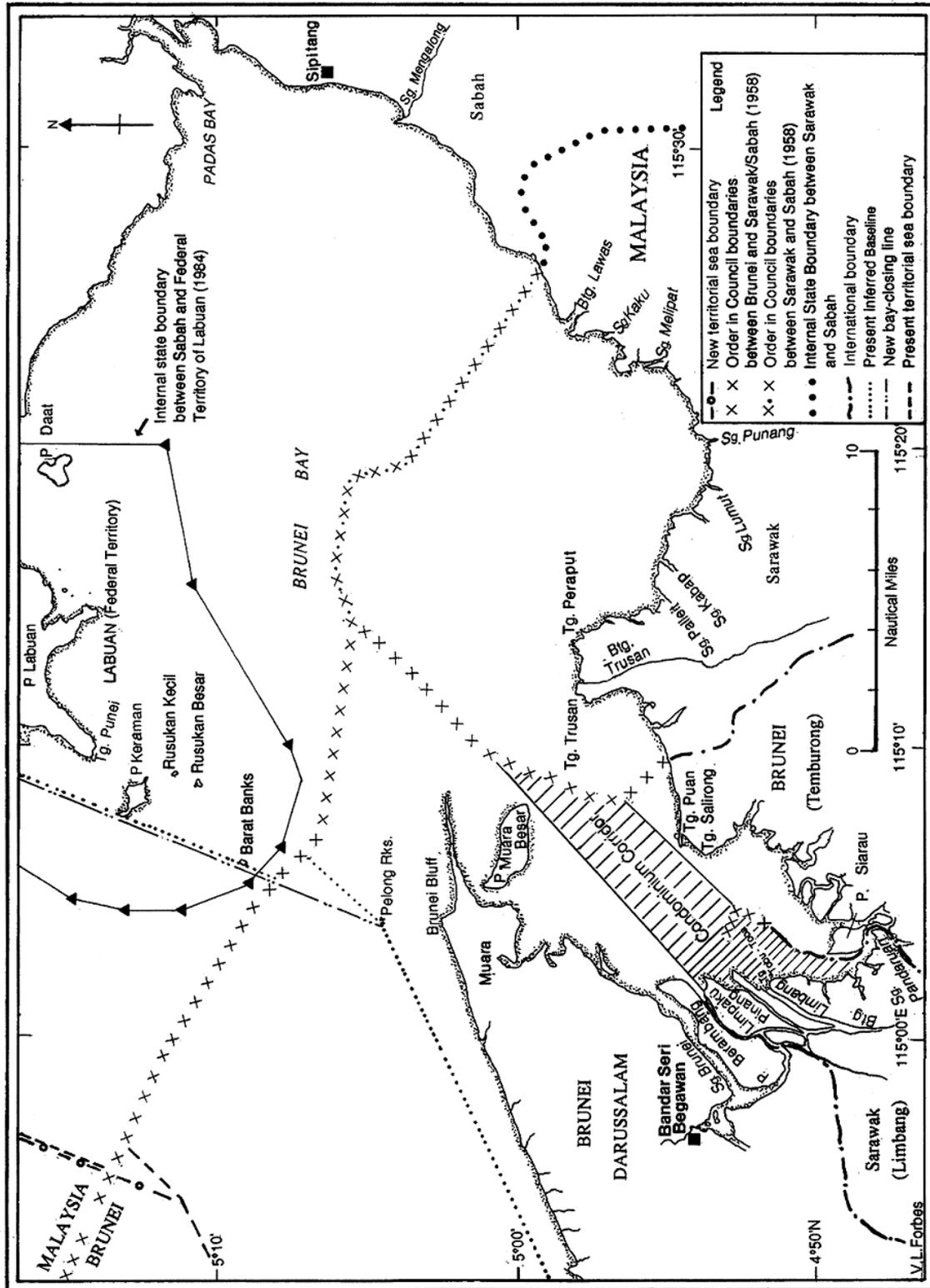
**Map 2: Malaysia's Maritime Claims off Borneo  
(as published 1979)**



**Map 3: Maritime Boundaries of Brunei Darussalam  
(as published 1988)**



Map 4: Delimitations in Brunei Bay



## Selected Bibliography

- Alexander, L.M. (1982) *Marine Regionalism in the Southeast Asian Seas*, (Research Report No.11), Hawaii: East-West Environment & Policy Institute.
- 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. I/II, London: Ocean Publication Inc.
- Anwar A. Qadri (1963) *Islamic Jurisprudence in the Modern World*, Lahore: Sh. Muhammad Ashraf.
- Barrett, W.L.S. (1981) *Brunei And Nusantara: History In Coinage*, Bandar Seri Begawan: Brunei History Center.
- Beazley, P.B. (1991) *Coral Reefs and the 1982 Convention on the Law of the Sea*, Paper presented at IBRU Conference, Durham (UK) 1991.
- Bouchez, L.J. (1964) *The Regime of Bays in International Law*, Leyden: A. W. Sythoff.
- Brown, C.C. (1970) *Sejarah Melayu* (trs.), Kuala Lumpur: Oxford University Press.
- Brown, D.E. (1970) *Brunei. The Structure and History of a Bornean Malay Sultanate*, Brunei: Star Press.
- Brown, D.E. (1973) 'Maps and the History of Brunei', *BMJ*, 1973:88-90.
- Brown, D.E. (1974) 'Sultan Mumin's Will and Related Documents', *BMJ*, 3/2:156-170.
- Brown, E.D. (1978) 'Rockall and the Limits of the National Jurisdiction of the UK' (Part 1 and 2), *Marine Policy*, 2/3:181-211 and October:275-303.
- Brunei (1984) Constitution of 1984.
- Business Times, Kuala Lumpur; various articles.
- Borneo Bulletin, Kuala Belait; various articles.
- Charney, J.I. (1985) 'The Persistent Objector Rule and the Development of Customary International Law', *BYIL*, XVI:1-24.
- Chua, T.E., Chou, L.M. and Sadorra, M. (1987) *The Coasta Environmental Profile of Brunei Darussalam*, Bandar Seri Begawan: Fisheries Department, Ministry of Development.
- Clark, I.F. and Cook, B.J. (eds.) (1983) *Perspectives of the Earth*, Canberra: Australian Academy of Science.
- Crisswell, C. (1971) 'The Origin of the Limbang Claim', *JSEAS*, 2:218-228.

- Crisswell, C. (1972) 'Some Historical Aspects of the Local Sovereign Rights in the 19th Century Brunei', *Journal of Oriental Studies*, X:51-61.
- Crisswell, C. (1977) 'Pg. Anak Hashim's Role in Brunei Affairs prior to his Accession to the Throne in 1885', *The Sarawak Museum Journal*, XXV/46:41-54.
- van Dyke, J.M. and Brooks, R.A. (1983) 'Uninhabited Islands: Their Impact on the Ownership of the Oceans', *ODIL*, 12/3-4:265-289.
- Ely, N. (1972) 'Seabed Boundaries between Coastal States: The Effect to be Given Islets as Special Circumstances', *International Lawyer*, 6/2:219-236.
- Emery, K.O and Ben-Avraham Z. (1972) 'Structure and Stratigraphy of China Basin', *The American Association of Petroleum Geologists Bulletin*, 56/5:839-859.
- Evans, M.D. (1991) 'Maritime Delimitation and Expanding Categories of Relevant Circumstances', *BIICL*, 40:1-33.
- Fawcett, J.E.S. (1949) 'Treaty Relations of British Overseas Territories', *BYIL*, XXVI:86-107.
- Furnivall, J.S. (1956) *Colonial Policy and Practice*, New York: University Press.
- Government of Brunei Darussalam (1988) *Brunei Darussalam in Profile*, London: Shandwick.
- Hackworth, G.H. (1940) *Digest of International Law*, (Vol.I), Washington: United States Government Printing Office.
- Hall, W.E. (1894) *Foreign Powers and the Jurisdiction of the British Crown*, Oxford: Clarendon Press.
- Hall, W.E. (1924) *A Treatise on International Law*, Oxford: Clarendon Press.
- Haller-Trost, R. (1990) *The Spratly Islands: A Study on the Limitations of International Law*, Occasional Paper, Canterbury: University of Kent.
- Haller-Trost, R. (1991) 'Limitations of International Law: the Case of Malaysia's Territorial Claims in the South China Sea', in: R.D. Hill et al, *Fishing in Troubled Waters*: 216- 236, Hong Kong: University of Hong Kong.
- Haller-Trost, R. (1992) *The Sabah Question: Application of International Law Regarding the Malaysian-Philippine Dispute in North Borneo*. (unpublished paper), Melbourne: Monash University.
- Haller-Trost, R. (1993) *Historic Legal Claims: A Study of Disputed Sovereignty over Pulau Batu Puteh (Pedra Branca)*, Maritime Briefing, 1: 1 Durham (UK): IBRU .
- Hamblin, W.K. (1989) *A Textbook in Physical Geology*, New York: Macmillan Publishing Company.

- Hamzah, B.A. (1980) *Oil and Economic Development Issues in Brunei* (Research Notes and Discussion Papers No.14), Singapore: ISEAS.
- Hamzah, B.A. (1991) *The Oil Sultanate*, Kuala Lumpur: Mawaddah Enterprise Sdn.Bhd.
- Hänggi, H. (1991) *ASEAN and the ZOPFAN Concept*, Pacific Strategic Papers, Singapore: ISEAS.
- Hardstone, P.C.N. (1978) 'Protected State or New Nation? Brunei: A Case Study in Political Geography', *Tijdschrift voor en Econ. en Soc. Geografie*, 69:165-171.
- Hodgson, R.D. (1973) *Islands: Normal and Special Circumstances* (Research Study), Washington: Bureau of Intelligence and Research.
- Hodgson, R.D. and Smith, R.W. (1976) 'The Informal Single Negotiating Text (Committee II): A Geographical Perspective', *ODIL*, 3/3:225-259.
- Hooker, M.B. (1970) *Readings in Malay Adat Law*, Singapore: Singapore University Press.
- Hooker, M.B. (ed.) (1986/88) *The Laws of Southeast Asia*, Singapore: Butterworth.
- Horton, A.V.M. (1984) *The British Residency in Brunei, 1906-1959*, Occasional Papers No.6, Hull: University of Hull.
- Horton, A.V.M. (1984) 'The Pandaruan Issue (1884-1920)' *Sarawak Gazette*, July:26-30.
- Horton, A.V.M. (1985) 'A Centenary: W.H. Treacher and the Limbang Revolt, 1884-5', *The Sarawak Journal*, XXXIV:91-99.
- Horton, A.V.M. (1985) 'Brunei, Sarawak and the Kota Batu Lands (1903-1917)', *BMJ*, 6/1:62-74.
- Horton, A.V.M. (1986) 'The Signing of the 1905-1906 UK-Brunei Treaty', *BMJ*, 6/2:125-127.
- Horton, A.V.M. (1986) 'Charles Brooke and the Mining Concessions in Brunei 1888-1924', *JMBRAS*, XXXIX:49-72.
- Horton, A.V.M. (1986) 'Sir Charles Brooke's Visit to Brunei: April-May 1906', *BMJ*, 6/2:116-127.
- Horton, A.V.M. (1988) 'M.S.H. McArthur and Brunei 1904-1908 or "A Dying Kingdom" Reprieved', *BMJ*, 6/4:1-33.
- Horton, A.V.M. (1989) 'A Note of the Brunei-United Kingdom Treaty of 1888', *BMJ*, 7/1:1-5.
- Hughes-Hallett, H.R. (1940) 'A Sketch of the History of Brunei', *JMBRAS*, XVIII Part 2:23-42.

- Hurst, C.J.B. (1924) 'State Succession in Matters of Tort', *BYIL*, V:163-178.
- Huxley, T. (1990) 'Brunei: Defending a Mini-State', in: Chin Kin Wah (ed.) *Defence Spending in Southeast Asia* (2nd reprint), Singapore: ISEAS.
- Hydrographer of the Navy (1975) *China Sea Pilot* (Vol.II 4th ed.), Taunton: Hydrographic Department.
- ILC Yearbook (1962) *Juridical Régime of Historic Waters, Including Historic Bays*. Study Prepared by the Secretariat. Doc. A/CN. 4/143. Vol. II:1-26.
- India Office Library, London, various documents.
- Irwin, I. (1955) *Nineteenth Century Borneo*, 's-Gravenhage: Martinus Nijhoff.
- Jennings, R.Y. (1958) 'The Commonwealth and International Law', *BYIL*, XXX:320-351.
- Johnson, W.R. (1973) *Sovereignty and Protection. A Study of British Jurisdictional Imperialism in the Late Nineteenth Century*, Durham (USA): Duke University Press.
- Kamanda, A.M. (1961) *A Study of the Legal Status of Protectorates in Public International Law*, Annemasse: Université de Genève.
- Kwiatkowska, B. (1988) 'Equitable Maritime Boundary Delimitation - A Legal Perspective', *IJECL*, 3/4:287-304.
- Kwiatkowska, B. (1989) *The 200-Mile EEZ in the New Law of the Sea*, Dordrecht: Martinus Nijhoff Publishers.
- Lagoni, R. (1984) 'Interim Measures Pending Maritime Delimitation Agreements', *AJIL*, 78:345-368.
- Leifer, M. (1978) 'Decolonisation and International Status: The Experience of Brunei', *International Affairs*, 54:240-252.
- Leigh, M. (1983) 'Reflection on Political Change, Sarawak in Malaysia: 1963-1983', *The Sarawak Museum Journal*, XXXII/53:159-166.
- Leys, P. (1885/1968) 'Observation on the Brunei Political System, 1888-1885' (with notes by R.M. Pringle), *JMBRAS*, XLI:117-130.
- Lim Joo-Jock, (1976) 'Brunei: Prospect for a "Protectorate"', *Southeast Asian Affairs*, 149- 164.
- Lindley, M.F. (1926) *The Acquisition and Government of Backward Territory in International Law*, London: Longmans, Green & Co.
- Low, H. (1880) 'Selesilah (Book of Decent) of the Rajas of Bruni', *JSBRAS*, V:1-35.

- MacGibbon, I.C. (1954) 'The Scope of Acquiescence in International Law', *BYIL*, XXXI:143-186.
- MacGibbon, I.C. (1958) 'Estoppel in International Law', *ICLQ*, 7:468-513.
- MacGibbon, I.C. (1958) 'Some Observations of the Part of Protest in International Law', *BYIL*, XXX:293-319.
- Marston, G. (1990) 'The Extension of the Maritime Boundaries of Certain British Colonies under the Colonial Boundaries Act 1895: a Special Case?', in: *International Boundaries and Boundary Conflict Resolution* (1989 Conference Proceedings), Durham (UK): University of Durham.
- Matassim Haji Jibah (1978) 'Pengiran Indera Makhota Shahbandar Mohammed Salleh and James Brooke in the History of Brunei', *BMJ*, 1978:38-51.
- Maxwell, W.G. and Gibson, W.S. (1924) *Treaties and Engagements Affecting the Malay States and Borneo*, London: Jas Truscott & Son, Published by Authority.
- McArthur, M.S.H. (1904/1987) *Report on Brunei in 1904* (comp. by AVM Horton), Athens: Ohio University Center.
- McNair, A. (1961) *Law of Treaties*, Oxford: Clarendon Press.
- Mervyn Jones, J. (1945) 'Who are British Protected Persons?', *BYIL*, XXII:122-129.
- Mohamed Ibrahim bin Haji Mhd. (1985) 'Impact of the EEZ on Malaysian Fishery', *Development Forum* (SERU, Kuala Lumpur), XV/1:8-16.
- Moorthy, V. (1982) 'Changes in the Federal Ownership and Exploitation of Petroleum Resources in Malaysia', *Mal.L.R.* 24:186-204.
- New Straits Times, Kuala Lumpur, various articles.
- Omarali bin Pengeran Anak Hashim (1988) 'Brunei in the Sarawak Gazette', *BMJ*, 6/4:138-149.
- Ong, T.M. (1983) 'Modern Brunei. Some Important Issues', *Southeast Asian Affairs*, 71-84.
- Oppenheim, L.F.L. (1963) *International Law* (Vol.I 8th ed.), London: Longmans.
- Parke, M.L. et al. (1971) 'Structural Framework of Continental Margin in South China Sea', *The American Association of Petroleum Geologists Bulletin*, 55/5:723-751.
- Parry, C. (ed.) (1970) 'Law Officers' Report Borneo 1847-1866' in: *Law Officers' Opinion to the Foreign Office 1793-1860* (Vol.13), Farnborough: Gregg International Publishers.
- Pelita Brunei, Bandar Seri Begawan, various articles.

- Prescott, J.R.V. (1984) 'Brunei's Potential Maritime Boundaries', in: J. Morgan and M.J. Valencia (eds.) *Atlas for Marine Policy in Southeast Asia*, Berkeley: University of California.
- Pridmore, F. (1955) *Coins and Coinage of the Straits Settlement in British Malaya, 1786-1951*, Published by Authority.
- Public Record Office, London, various documents.
- Ranjit Singh, D.S. (1984) *Brunei 1839-1983*, Singapore: Oxford University Press.
- Reinhardt, J.M. (1970) 'Administrative Policy and Practice in Sarawak: Continuity and Change under the Brookes', *JAS*, 29/4:851-862.
- Reisman, W.M. (1989) 'Reflections on State Responsibility for Violations of Explicit Protectorate, Mandate, and Trusteeship Obligations', *Michigan Journal of International Law*, 10:231-240.
- Roberts-Wray, K. (1966) *Commonwealth and Colonial Law*, London: Stevens & Sons.
- Runciman, S. (1960) *The White Rajahs. A History of Sarawak from 1841 to 1946*, Cambridge: University Press.
- Sa'adul Khairi Waddin, (1971) *Titah 1959-1967. Kebawah DYMM Paduka Seri Baginda Maulana al-Sultan Sir Omar Ali Saifuddin*, Brunei: Dewan Bahasa dan Pustaka.
- Sarawak Gazette, Kuching, various articles.
- Sarawak Tribune, Kuching, various articles.
- Sidayao, C.M. (1978) *The Off-Shore Petroleum Resources of South-East Asia*, Kuala Lumpur: Oxford University Press.
- Siddique, S. (1985) 'Negara Brunei Darussalam. A New Nation but an Ancient Country', *Southeast Asian Affairs*, 99-108.
- Smith, H.A. (1932/1935) *Great Britain and the Law of Nations* (Vol.I/II), London: P.S.King & Son Ltd.
- Straits Times, Singapore, various articles.
- Stubbs, R.E. (1905-1911/1968) 'Two Colonial Office Memoranda on the History of Brunei' (ed. and annotated by D.E.Brown), *JMBRAS*, XLI:83-116.
- Symmons, C.R. (1979) *The Maritime Zones of Islands in International Law*, The Hague: Martinus Nijhoff Publication.
- Tarling, N. (1970) 'Britain and Sarawak in the Twentieth Century: Raja Charles, Raja Vyner and the Colonial Office', *JMBRAS*, XLIII:25-52.

- Tarling, N. (1971) *Britain, the Brookes and Brunei*, Kuala Lumpur: Oxford University Press.
- Tarring, C.J. (1887) *British Consular Jurisdiction in the East*, London: Stevens and Haynes.
- Treacher, W.H. (1886/1890) 'British Borneo. Sketches of Brunai, Sarawak, Labuan and North Borneo', *JSBRAS*, XIX:13-74; XXI:19-121.
- UNCLOS I OR (Vol I.) 1958: *Historic Bays. (Memorandum by the Secretariat of the UN)*. Preparatory Document No.1 (Doc. A/CONF.13/1).
- UN Office for Ocean Affairs and the Law of the Sea (1988) *The Law of the Sea. Régime of Islands* (Legislative History of Part VIII, Art. 121), New York: UN.
- Valencia, M.J. (1991) *Malaysia and the Law of the Sea*, Kuala Lumpur: ISIS.
- Weatherbee, D.E. (1983) 'Brunei. The ASEAN Connection', *Asian Survey*, Vol.XXIII/6:723-735.
- Weeramantry, C.G. (1988) *Islamic Jurisprudence*, Houndmills: Macmillan.
- Westlake, J. (1894) *Chapters on the Principles of International Law*, Cambridge: University Press.
- White, A.T. (1987) *Coral Reefs*, Manila: International Center for Living Aquatic Resources Management.
- Wong, D.S.Y. (1975) *Tenures and Land Dealings in the Malay States*, Singapore: Singapore University Press.
- Wright, L.R. (1970) *The Origins of British Borneo*, Hong Kong: University Press.