

THE INTERNATIONAL PERSONALITY
OF THE MALAY PENINSULA

The International Personality of the Malay Peninsula

A STUDY OF THE INTERNATIONAL
LAW OF IMPERIALISM

Alfred P. Rubin



PENERBIT UNIVERSITI MALAYA
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1974

Dedication
for my father

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PREFACE

IN one sense this book began when Professor Henry F. Graff unwittingly converted me from a chemist to a lawyer by his enthusiasm and effective teaching of an undergraduate course at Columbia College. In another, it began when I toured South-East Asia as a very young American naval officer in 1953 and 1954. But in the more traditional sense it began as a thesis at the University of Cambridge. It was submitted for the M.Litt. degree and the degree was awarded in 1963. One of the examiners was the late Dr. Victor Purcell who suggested that I try to publish it in Malaya and authorized me to use his name when sending it there. The suggestion, like Dr. Purcell's other suggestions for additions and revisions to the manuscript, was not only useful, but also kind and generous. I owe him a debt difficult to express.

I am indebted to the administration of the University of Oregon for small grants making it possible to have the manuscript typed and prepared for publication without undue regard for the expenses. Miss Kristin Nelson and Mrs. Maxine Lee did yeoman typing service. Miss Susan Thielman did more than yeoman service in helping to prepare the bibliography. My thanks must also go to Dean Eugene Scoles and Mrs. Lois Ackerman of the University of Oregon School of Law for their help in arranging schedules and a hundred small details that could have made a major chore of the routine of preparing the typescript for publication.

At Cambridge my Supervisor of Studies, Professor R.Y. Jennings, the other students and faculty members of the International Law Club from 1957 to 1960, and my students in various international law supervisions all helped, sometimes unwittingly and sometimes with much grace aforethought, to clarify my thinking on many international and jurisprudential questions. Professors Oliver Lissitzyn, Leland Goodrich and Richard Gardner of Columbia University were also contributors to this book, although making their contributions before I knew I was to write it. My debt to Professor Walter Gellhorn, also of Columbia University, is not confined to aspects of this book, or even of my education. He introduced me to both Cambridge and Oregon.

The library personnel of the Cambridge University Library, the SOAS Library at the University of London, the Reading Room of the British

Museum, the Commonwealth Relations Office Library, the Library of the Royal Commonwealth Society, the Army Library at the Pentagon in Washington, D.C., and the University of Oregon libraries were particularly helpful at various points.

Mr. Beda Lim and Mrs. M. Lee of the University of Malaya also deserve particular thanks for their patience and guidance in the final stages.

My family suffered through various stages of this work. That contribution must also be acknowledged with some feeling of guilt, particularly for times when the difficulties of living with an author were compounded by the acute difficulties that go with his revising manuscripts late into the night and waking up in a bad temper as a result.

It is impossible to list the many others who, to a greater or lesser extent, made this book possible. I hope that a general acknowledgement of many kindnesses and professional help will suffice. Of course, responsibility for controversial assertions and errors is entirely my own.

ALFRED P. RUBIN

Eugene, Oregon
June 1970

ABBREVIATIONS

<i>AJIL</i>	American Journal of International Law
<i>BFSP</i>	British Foreign and State Papers
<i>BYIL</i>	British Yearbook of International Law
<i>GS</i>	Grotius Society Transactions
<i>ICLQ</i>	International and Comparative Law Quarterly
<i>JIA</i>	Journal of the Indian Archipelago (Logan's Journal)
<i>JIA(NS)</i>	Journal of the Indian Archipelago (Logan's Journal) New Series
<i>JMBRAS</i>	Journal of the Malayan Branch of the Royal Asiatic Society
<i>JSBRAS</i>	Journal of the Straits Branch of the Royal Asiatic Society
<i>JSEAH</i>	Journal of Southeast Asian History
<i>JSS</i>	Journal of the Siam Society
<i>JTRS</i>	Journal of the Thailand Research Society (name of the Journal of the Siam Society vols. 33-35 (1941-4))
<i>LQR</i>	Law Quarterly Review
<i>PP</i>	British Parliamentary Papers
<i>RdC</i>	Recueil des Cours, Académie de Droit International de La Haye
<i>RDI</i>	Revue de Droit International
<i>RDILC</i>	Revue de Droit International et de Législation Comparée
<i>RGDIP</i>	Revue Général de Droit International Public
<i>ZVB</i>	Zeitschrift für Völkerrecht und Bundesstaatsrecht

Introduction

'Toutes les nations ont un droit des gens; et les Iroquois même, qui mangent leurs prisonniers, en ont un.... le mal est que ce droit des gens n'est pas fondé sur les vrais principes'.

MONTESQUIEU (c. 1747)

ABSOLUTE wickedness is fortunately a rare commodity. But the appearance of wickedness is common. Making seem right what may appear wicked has always occupied men of sensitive feelings and fine minds.

In affairs of state the search for self-justification in theory has usually gone hand in hand with restraint in practice. Normally the society within which justifications are expressed seems to feel sufficient community with the victims of apparently wicked action that the thought of reciprocal treatment, whether or not actually anticipated, has served as an effective restraint.

This book is a study of self-justification in affairs of state. It focuses on the problems faced by statesmen of different societies trying to communicate their justifications within their separate cultures and to each other. The cultures involved are those active in the Malay Peninsula. Because of the evolution of those cultures a chronological exegesis has been chosen rather than tracing separately each thread of a legal concept (for justification in statecraft is international law) from seed to blossom.

The first part of chapter I introduces the concepts of government and international behaviour existing in the Malay Peninsula before the arrival of Europeans in politically significant numbers. The Hindu-influenced Malay concepts of the end of the fourteenth century are described through a short analysis of the epic *Negara-Kertagama*; Muslim Arab approaches to statecraft are then briefly mentioned. The amalgam of Hindu, Muslim and other non-European concepts into the civilization of the Malays in Peninsula in 1500 is set forth in some detail, followed by summaries of Thai and Chinese political organization and approaches to intercourse with foreigners at about the same time. The section concludes with a narrative of political relations among the Malay Sultans and between them and Thailand, setting the stage for the first major encounter with European statesmen. The second part of chapter I briefly describes the European

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background and analyses the justifications felt necessary by the Europeans for their actions in the Peninsula at the beginning of the sixteenth century.

Thereafter, the chronological pattern is more closely followed. Political narrative is interspersed at key points, notably 1640, 1700, 1784 and 1819-26, with detailed legal analyses. At those watershed dates, when significant shifts in the political balance of power occurred in the Peninsula, the thread of political narrative is broken and the frayed ends examined for legal implications.

The emphasis throughout is on the theoretical justifications advanced for political action rather than on the practical economic or other motives for action. Where the facts are in doubt, little space (mainly in the footnotes) is devoted to detailed analyses of the evidence unless pertinent to the central subject of this work: The justifications relied on in the international intercourse of the governments acting politically in the Malay Peninsula.

The Malay Peninsula has been chosen as the geographical focus of this book because of its extraordinary complexity of political action and cultural interaction involving, as it did, European and Malay powers constantly competing within their own societies as well as with each other, and the important third force of Thailand affecting matters also. In this particular area as in few others lie general lessons of law and history and analogies to situations far removed in time and place.

CHAPTER I

The First Contacts

THE MALACCA SULTANATE

THE Malay Peninsula in A.D. 1400 was, as it still is, covered with lush tropical growth pierced by river systems draining identifiably separate areas. Waterways are the natural lines of communication, and such people as settled and built houses in the Peninsula did so, in the main, at confluxes of streams and at shore points. The land-dwelling aborigines had retreated before the more aggressive Malays and had ceased to play any significant role in the economic, political or cultural life of the larger world.¹ Boat-dwelling aborigines, while not joining with the politically organized Malay world, remained on its fringes, occasionally playing an active role; these were the 'Sallates' (the spelling varies widely), called 'sea gypsies' by the Europeans and 'Orang Laut' (men of the sea) by the Malays.² The Orang Laut live the bulk of their lives in small boats in the island-dotted waters of the Malay Archipelago. They seem never to have achieved a stable political organization of their own beyond the temporary concert of a few boat-borne families.

While in Europe medieval political organization developed largely with reference to land tenure and cultivators were frequently legally tied to plots of land, in the Malay Peninsula political organization developed more directly out of kinship and other personal associations. Rulers and ruled could, and frequently did, move from one area to another without affecting their basic political ties. Arable land was plentiful in the Peninsula for the small population, although tropical husbandry did not appeal to the sea-centered Malays of the Peninsula, with the exception of the Menangkabau groups, about whom more will appear

¹R.O. Winstedt, *The Malays: A Cultural History*, 3rd ed., London, 1953, p. 57, points out some significant Malay political and legal forms that may have had their origin in aboriginal customs.

²Ibid. pp. 15-16; C.A. Gibson-Hill, 'The Orang Laut of the Singapore River and the Sampan Panjang', 25(1) *JMBRAS* (1952) 161 et seq. An interesting description, one of many, is in Sherard Osborn, ... *The Blockade of Quedah*, 2nd ed., London, 1860, pp. 255-60.

later.³ Trade was the key to the economic life of the people living at the centre of the sea route between China and India.⁴

Majapahit, the Hindu Ideal and the Founding of Malacca

The political and cultural life of the principal Malay society of the latter half of the fourteenth century is reflected in the *Negara-Kertagama*, by Rakawi (Honoured Poet) Prapañca, a Buddhist clergyman accompanying the court of the ruling Prince of the Java-centered Malayan Kingdom of Majapahit.⁵ The *Negara-Kertagama* indicates settlements in the Malay Peninsula from Kelantan and Kedah in the north to Singapore in the south to be 'tributary' to Majapahit, although it has been suggested that the settlements were more likely to have been mere trading partners of Majapahit than places under effective Javanese political control, and that the poet's words translated as 'tributary' should be read to relate to trade rather than politics.⁶

According to the *Negara-Kertagama*, the concept of kingship in Majapahit was derived from India. Buddhist and Shiwaite clergymen accompanied the Prince in his court and travels. The poem has many allusions to sacerdotal sanskrit text. Noble titles include some that have descended in Malay to our day such as Mantri (mandarin; government official) and Temenggong (military leader).⁷ Others are Indian caste names, such as Kshatriya.⁸ Although the Prince is described in terms larger than life, reminiscent of the descriptions of Hindu deities in Indic epics, such as the *Ramayana*, like a demigod he is given desires, emotions and attributes of very human manliness. The most beautiful girls are brought to the royal compound for his divine pleasure; the Prince enjoys the hunt. Although described as 'blameless' and observing 'the non-violence law' he seems

³J.M. Gullick, *Indigenous Political Systems of Western Malaya*, London, 1958, pp. 29, 118. Gullick's analysis of the non-Menangkabau Malay political organization of 1870 is essentially true of this earlier period also, although Gullick's work has been criticized. See M.G. Swift's review of *Indigenous Political Systems* in 1(1) *JSEAH* (1960) 90.

⁴D.G.E. Hall, *A History of South-East Asia*, London, 1955, pp. 37 et seq. and 51 et seq. summarizes the early economic and political structure of the Peninsula. There are many notable specialized works on the early trade of South-East Asia. One unusual one is T. Braddell, 'The Ancient Trade of the Indian Archipelago', 2 *JLA(NS)* (1857) 237.

⁵An annotated English version of the *Negara-Kertagama* has been published in five volumes: T.G.Th. Pigeaud, *Java in the Fourteenth Century* (Koninklijk Instituut voor Taal-, Land- en Volkenkunde Translation Series 4), The Hague, 1960-3. The Poet identifies his own position in Canto 17 stanzas 8 and 9. See Vol. III, p. 22, and also Vol. IV, p. 547.

⁶Ibid. Vol. III, p. 17 (Canto 14 stanza 2); Vol. IV, pp. 29, 32-3.

⁷Ibid. Canto 10 stanza 1. See also Vol. IV, p. 21.

⁸Ibid. Canto 10 stanza 3. See also H.G. Rawlinson, *India; A Short Cultural History*, 4th ed. London, 1952, p. 25.

boastful of the animals killed at his command; his heart has 'desires'.⁹ The peace and unity of the Kingdom are stressed, but the Prince's victories over other countries are mentioned, from which it is possible to conclude that one of the functions of the Prince was to lead, or at least to inspire, the military endeavours of the Kingdom.¹⁰ The sole font of governmental authority was the Prince; the welfare of the realm was his responsibility, he alone had the power to issue decrees, which, in turn, could not bind his successor; killing miscreants was done on his authority. Such killings were considered 'pure' on account of 'wisdom's paramount power'.¹¹ There are hints of the Prince's role in promoting trade, although described in terms that would be equally applicable to tax-gathering. The precise involvement of the Prince and his family in sea-going ventures for profit or plunder is doubtful.¹²

The peace and unity of Majapahit as recited by Prapañca were less in reality than in idealized court poetry. In addition to the hints of warfare and unrest contained in the poem, there are diplomatic omissions and other evidence sufficient to suggest that in the mid-fourteenth century the coastal trading towns were maintaining commercial and political ventures independently of the policies of the rulers of Majapahit, and in fact there is some question as to the true geographical extent and political power of Majapahit at any time.¹³ It is important to note, however, the theoretical importance of unity and a demigod Prince to Malay concepts of government and his inability to commit his divine successors. Also of significance to later developments is the identification of the pleasures of the hunt and the lustiness of the Prince as admirable despite the Buddhist concern at the possibility of the Prince's responsibility for killing being blameworthy.

Whatever the commercial and political unity of Majapahit may have been, it was broken by the appearance of Malacca as a rival about A.D. 1400. The foundation and early years of the Malacca Sultanate gleaned from European, Chinese and Malay records has been the subject of much

⁹Pigeaud, Canto 17 stanza 26, Canto 31 stanza 5 line 4; Canto 54 stanza 1, Canto 55 stanza 1; Canto 54 stanza 3 line 4; Canto 47 stanza 6 line 4; Canto 99 stanza 1 line 1.

¹⁰Ibid. Canto 16 stanza 5 line 3, Canto 17 stanzas 1 and 3.

¹¹Ibid. Canto 92 stanza 1. See also Vol. IV, p. 546.

¹²Ibid. Canto 15 stanza 3. See also Vol. IV, pp. 37, 503-4.

¹³Dr. Pigeaud postulates a basic conflict of economy between the trading ports and the rice-producing inland areas loyal to Majapahit; see *ibid.* Vol. IV, pp. 501-3. Hall, *op. cit.*, pp. 78-84, gives a summary of scholarly views as to the true extent and power of Majapahit.

scholarly research of extraordinary quality.¹⁴ In summary, it would appear that a Malayan adventurer, probably connected with Sumatran nobility, set up a Majapahit-like court in Singapore Island, from which he was expelled by peninsular Malays at the behest of the Thai Kingdom, whose capital was Ayutthia.¹⁵ He resettled with his followers a little north of the present location of Malacca, finding allies in his difficulties with the Thai from among Muslim merchants from India and the Near East, and from a *deus ex machina* in the form of Chinese exploratory visits and Chinese assertions of authority over Thailand.¹⁶

In return for accepting a subordinate place in the Chinese political order,¹⁷ the Malay ruler of Malacca was assured of peace within that order and in 1419 and 1431 the Chinese appear to have ordered the Thai not to interfere.¹⁸ There are also indications that the ruler of Malacca achieved a precarious peace with the Thai by sending periodical tribute missions to Ayutthia.¹⁹

But the concepts of authority, Kingship and the international order significantly modifying the Hindu tradition in Malacca were far less those of the Thai and the Chinese than those of the Muslim merchants and their missionary friends.

¹⁴A list of European sources appears on the first page of P.E. de Josselin de Jong and H.L.A. van Wijk, 'The Malacca Sultanate', 1(2) *JSEAH* (1960) 20. Perhaps the clearest of many analyses of European, Chinese and Malay records of early Malacca is C.H. Wake, 'Malacca's Early Kings and the Reception of Islam', 5(2) *JSEAH* (1964) 104.

¹⁵*Ibid.* p. 117. According to early European accounts the agent of the Thai in expelling the founder of the Malacca dynasty from Singapore was the Malay ruler of Patani. See Braz d'Albuquerque, *The Commentaries of the Great Afonso D'Albuquerque* (1774 ed.) (W. de G. Birch, trans.), London (Hakluyt Society), 1872-84, Vol. III, pp. 73-76. A less convincing account, implying that the Thai acted directly in the Malay Peninsula at all times is Tomé Pires, *The Summa Oriental* (1512-1515) (A. Cortesão, transl. and ed.), London (Hakluyt Society), 1944, Vol. II, pp. 231-8. In later times the Thai acted in the Malay Peninsula almost exclusively with military forces through the agency of their northern Malayan subordinates. The most detailed statement of Thai involvement in peninsular affairs of the fifteenth century is the mid-sixteenth century account of João de Barros. See G. Ferrand, 'Malaka, le Malāyu et Malāyur', 11 *Journal Asiatique* (11e Ser.) (1918) 391 at pp. 451 et seq.

¹⁶The first Chinese visits were in 1404 and 1405. Formal relations between China and the Hinduized Malay rulers of Malacca began in 1405. Wang Gungwu, 'The Opening of Relations between China and Malacca, 1403-5', *Malayan and Indonesian Studies*, J. Bastin and R. Roolvink, eds., Oxford, 1964.

¹⁷The ruler of Malacca accepted the status of a Kingdom and various insignia of authority from China in 1406. See W. Willetts, 'The Maritime Adventures of Grand Eunuch Ho', 5(2) *JSEAH* (1964) 25 at p. 28; Wake, pp. 116-17 esp. note 48 on p. 117.

¹⁸*Ibid.* p. 117; Ferrand, p. 403 (extract from the *Ming Che*).

¹⁹Wake, p. 117; Braz d'Albuquerque, pp. 73, 79; D. Barbosa, *The Book of Duarte Barbosa* (1518) (M.L. Dames, transl.), London (Hakluyt Society), 1921, p. 179; Pires, p. 238; F. Valentijn, 'Description of Malacca' (1726) (M. Müller, transl., Hon. D.F.A. Hervey, ed.), 13 *JSBRAS* (1884) 49 at p. 69; see also account of de Barros in Ferrand, p. 437.

Arab Muslim Influences

Records of Muslim traders exist evidencing visits to South-East Asia as early as the ninth and tenth centuries A.D.²⁰ By the end of the fourteenth century Muslim missionaries had successfully proselytized the inhabitants of settlements in many parts of the Malay Archipelago, and the political implications of the spread of Muslim culture and trade had brought a Thai reaction in the trading centres of the Malay Peninsula. The climax of the struggle was reached in the 1440s, when Muslim interests supported Raja Kassim's succession to the rulership of Malacca. A Malay Muslim, son of the third ruler and half brother of the fourth, Raja Kassim styled himself 'Sultan' and accepted Islamic teachings in matters of state. His military successes, judicious marriages and the support of his Muslim friends resulted in his being in firm control of the east coast of Sumatra and most of the Malay Peninsula south of the Isthmus of Kra, and the final conversion of the Malay inhabitants of that area, by about 1456.²¹

As might be expected, the Malacca Code²² shows strong Muslim influence in theory. The *Hukum Shera* (Quranic law) is considered of greatest authority, followed in order of authority by the unwritten natural law, *Hukum Akl*, and the Malayan customary law, *Hukum Adat*. The Code appears to direct the use of Quranic law in preference to the other two systems 'whenever it is possible'.²³ This qualification leads to some conceptual difficulties, since Quranic law, the word of God to Muslims, seems not to be binding on the Sultan in some cases, despite Muslim religious theory which makes the work of the Quran binding on its followers in its every letter.²⁴ The difficulty may be resolved by noting that Quranic law has never been supposed to answer all legal questions, and that the

²⁰A ninth century source is mentioned in G. Cœdès, 'The Empire of the South Seas', 35(1) *JSS* (1944) 1 at p. 9. P.K. Hitti, *History of the Arabs*, 6th ed., London, 1956, p. 343, mentions the tenth century as the time of the earliest sources. See Tibbetts, *passim*.

²¹Wake, pp. 122-8. Cf. W.A.R. Wood, *A History of Siam*, London, 1926, p. 88. The tale summarized in the text is based upon Wake's scholarly and convincing reconstruction of events reported in inconsistent versions by the primary sources.

²²T.J. Newbold, *Political and Statistical Account of the British Settlements in the Straits of Malacca...*, London, 1839, Vol. II, pp. 231 et seq. The Malacca Code dates from the early sixteenth century; 1523 or 1524. It was thus compiled after the Malacca Sultanate had ceased to control Malacca, apparently in response to the need felt by the Malay sultanates claiming roots in the Malacca dynasty to have an authoritative record of the laws of Malacca. The earliest surviving texts are reported to be copies made in the eighteenth century. Winstedt, 'A History of Classical Malay Literature', 21(3) *JMBRAS* (1958) 1, p. 136.

²³Newbold, p. 276 note, and p. 277 Article XLI.

²⁴Khadduri, Majid, and H.J. Liebesny, ed., *Law in the Middle East*, Washington, 1955, Vol. I, pp. 4, 61. The Quran is the centre of Muslim legal theory in the temporal world as well as in the spiritual. See Khadduri, *Islamic Jurisprudence; Shafi'i's Risala*, Baltimore (U.S.A.), 1961, pp. 110-2 (para. 87).

phrase 'whenever it is possible' may mean merely that it applies in all cases envisaged by it.²⁵

The Quran itself does contain passages that might be deemed applicable in contacts between different political organizations. One example would be Surah ix, verses 1.7-13, in which treaty observance is enjoined in case of treaties made with other Muslim communities; but breaching treaties with non-Muslims seems to be justified.²⁶ In international affairs the Muslim concepts of law were codified and presented in persuasive form by the late eighth century Iraqi publicist Shaybani.²⁷ Shaybani affirmed the propriety of peaceful arrangements between Muslims and non-Muslims when the non-Muslims were 'too strong for the Muslims to prevail against them and it would be better for the Muslims to make peace with them'.²⁸ Because a state of war was felt by Muslim legal commentators to be the theoretical normal situation between Muslim and non-Muslim powers peace treaties lasting more than ten years were considered improper.²⁹ But Muslim legists proved as resourceful as European legists in finding new ways to justify departing from precedent and theory; by 1535 Ottoman practice had extended the period of treaty life to the lifetime of the sultan who had concluded the treaty.³⁰ Muslim law also contained provision for diplomatic exchanges. A rule of diplomatic immunity, although not always observed, was based on precedents in the life of Muhammad.³¹

The unwritten 'natural law' has never *eo nomine* played a significant role in governmental and international matters in the Malay Archipelago except, perhaps, as a phrase to add weight to arguments based on interest or on other sources of law. Natural law to Aristotle was the law that made flames burn upwards both in Greece and Persia. Man seemed, to Aristotle (and the influence of Aristotle and other Greek thinkers on Arab thought was great), to be a political animal, and social organization appeared 'natural' to him. From this premise he deduced laws necessary to maintain

²⁵Classical Muslim legal theory accepts the behaviour of the Prophet, the consensus of the orthodox community and analogy as bases for legal decision in addition to Quranic law. J. Schacht, *The Origins of Muhammadan Jurisprudence* (corrected ed.), Oxford, 1953, p. 1.

²⁶M.M. Pickthall (transl.), *The Meaning of the Glorious Koran* New York (Mentor Books) n.d., pp. 145-6.

²⁷Khadduri, Majid, *The Islamic Law of Nations*, pp. 26 et seq.,

²⁸Ibid. p. 154 (para. 603).

²⁹Ibid. p. 142 note 1; Khadduri and Liebesny, pp. 354, 364-5, 367. Ten years was the term of Muhammad's treaty with the non-Muslims of Mecca.

³⁰Khadduri, *Islamic Law of Nations*, p. 63.

³¹Khadduri and Liebesny, p. 371.

the 'natural' political order of his time and place.³² By medieval times 'natural law', clearly distinguished from the law of God in Christian as in Muslim thought, was conceived as the law of reason. The place of reasoning in the law today derives from this concept of natural law and is juxtaposed with the so-called 'positive law', which receives its binding effect not from reason but from the defined authority of the law-giver.³³

Malay Custom

Of far greater importance is the *Hukum Adat*, the customary law of the Malays. Various compilations exist of the customary law of trade, shipping, criminal procedure etc.³⁴ However, the customary political system, which is the most important for present purposes, was not prescribed. In fact, two basically different systems of political organization rested on Malay customary law. One, still of some force among the Menangkabau people and leaving many traces in other Malay political groups, seems based on a matrilinear concept of society. Aside from the extended family leaders (the mother's eldest brother was the 'patriarch'), the lowest rung of the political ladder was held by the *Buapa*, the sub-tribal elder. He had minor judicial powers and served as a constable for the tribal chief. The tribal chief, *Lembaga*, was elected by the buapas and some others in the tribe. He could be removed from office by unanimous vote. He represented the tribe in all its external contacts. The territorial chief, *Undang*, was elected in various ways in the different Menangkabau communities, frequently subject to the veto of whatever other higher official might be accepted by the Menangkabau community. The matriarchally ordered Malays seemed to be able to accept external overlordship through accepting non-Menangkabau magnates as capable of vetoing the selection of the undang. It has been suggested that the position of the undang, whose personal authority included the right to tax foreigners, squatters (those living on communal land) and miners (those extracting substance from

³²Cf. R.W.M. Dias and G.B.J. Hughes, *Jurisprudence*, London, 1957, p. 352; E.W. Patterson, *Jurisprudence*, Brooklyn, 1953, pp. 335 et seq.

³³Cf. Dias and Hughes, p. 355; Patterson, pp. 346 et seq.; Sir Frederick Pollock, 'The History of the Law of Nature', 3 *Journal of the Society of Comparative Legislation (New Series)* (1901) 204.

³⁴E.g., J. Rigby, (transl. and ed.), 'The Ninety-nine Laws of Perak', *Papers on Malay Subjects*, Kuala Lumpur, 1929; Sir Stamford Raffles, transl., 'The Maritime Code of the Malays', 3 *JSBRAS* (1879), 143, 4 *JSBRAS* (1879), 1; R.O. Winstedt (transl.), 'Kedah Laws', 6(2) *JMBRAS* (1928) 1; R.O. Winstedt and J.E. Kemp, (transl. and eds.), 'A Malay Legal Digest', 25(1) *JMBRAS* (1952) 1; R.O. Winstedt and P.E. de Josselin de Jong, (transl. and eds.), 'The Maritime Laws of Malacca', 29(3) *JMBRAS* (1956) 22. See Winstedt, *Literature*, chapter XI.

the land), was originally created by and appointed for the convenience of the Malacca Sultan. The power of the undang seems to have concerned matters of importance to a system of government based on land use, rather than matters of importance to a system of government like the matriarchal system based on kinship.

It is important to note the complete absence in the matriarchal system of what would by others be called legislative power. The undang could neither legislate nor initiate judicial action. The tribe itself determined the disposition of petty offences and exercised first-hearing functions, rather like a British Grand Jury, in connexion with more serious offences. Only after the buapas or the tribe were satisfied that some violation of customary law had occurred would the lembaga or undang begin to have a judicial interest.

Thus the main concern of the matriarchal system seems to have been the implementation of tribal organization, and excluded change from above. Without the willing cooperation of the lowest levels of organization, changes decreed from above could not be legally enforced within the matriarchal order. All elections and decisions affecting the whole society had to be accomplished by consensus or unanimity. Thus, while negotiations could take place between the undang or lembaga and foreign representatives, the Menangkabau leaders were incapable under the matriarchal constitution of consenting to obligations in the name of their communities. When, in later years, the Menangkabau sought to include within their constitution a still higher level of officer as equivalent to the neighbouring Sultans, that chief, *Yang di-pertuan* (*Yam Tuan* in colloquial Malay), was selected by the undang from a Menangkabau family and his immediate successors were the husbands of the first Yam-tuan's daughters.³⁵

Although the founder of the Malacca dynasty appears to have been installed as the elected Yam-tuan of matriarchal communities in the Peninsula, the patriarchal Indian model and Muslim teaching sufficiently modified the constitution to make it necessary to look specially at the political organization accepted as 'customary' by the heirs of the Malacca Sultanate. Succession to the position of Sultan remained more or less matriarchal and subject to election by enfranchised magnates. But the Sultan was

³⁵This sketch of the matriarchal constitutional *adat* is taken from Winstedt, *Cultural History*, pp. 81-90. As shall be seen, it is confirmed in later events, particularly in the struggles by European governments to achieve control over the Menangkabau community of Naning. On the lack of legislative authority under the matriarchal system see R. J. Wilkinson, 'Some Malay Studies', 10(1) *JMBRAS* (1932) 67 at pp. 71-5.

not considered subject to the *adat*; he was 'a personage over whose actions none have [*sic*] control'.³⁶ His legislative power was prescribed by custom, despite his theoretical patriarchal authority. Although the Malacca Code defined in unmistakable terms the Sultan's position at the head of the society, there was a system of hereditary officers subject to the Sultan whose customary authority in their prescribed areas was so great that it was normal Malay practice for all or nearly all of the important subordinate officials to affix their seals to decrees intended to be binding on the society as a whole, or, in later practice, to treaties with European powers. Thus, in theory, commitments could be imposed upon society from above by the Sultan, but in practice only with the consent of his higher officials.

The highest of the four officials of the first rank below the Sultan in the Malacca Code was the *Bendahara*. His special authority lay as head of the peasantry and the military forces of the Sultan. He was described as the font of legislative authority throughout the Sultan's domains. Beside him, as second among the almost-equal four, was the *Temenggong*. He apparently had responsibility for internal order; was the principal police and judicial officer of the Malacca Sultanate. The two other first-rank nobles were the *Shahbandar* or chief of the port, and the *Laxamana* or chief of the fleet. Below these four there were eight lesser officials, and sixteen more below them. Lower levels of officials in Malacca were not styled with the honorific 'Mantri'. Near the bottom of the ladder was the *Penghulu*, who was the headman of the *kampong* or Malay village.³⁷

The names of these hereditary officials varied in the Sultanates descended from the Malacca model, presumably as internal political developments raised the prestige or authority of some lesser officials at the expense of the higher ones. The titles described above are the most common, not the titles actually used in Malacca.

Malay Society

The fourth, and in some ways the most important, source of knowledge (or, at least, informed speculation) about Malay views of the international order can be derived from literary and historical Malay accounts of them-

³⁶Newbold, p. 312.

³⁷This sketch of the Malacca-based constitutional *adat* is taken from Winstedt, *Cultural History*, pp. 70-81; Newbold, pp. 275-6, 299, 312-3; Pires, pp. 264-8. On the specific place of the *Shahbandar* see also R.A.C. de Renneville, (ed.), *Recueil des Voyages...*, Amsterdam, 1702-7, Vol. I, p. 303; P. Purbatjaraka, 'Shahbandars in the Archipelago', 2(2) *JSEAH* (1961) 1.

selves. Nothing is more revealing about a people's concepts of right behaviour than the descriptions of admirable characters and noteworthy events contained in their own historical writings. The most eloquent of several Malay histories is the *Sejarah Melayu*, the Malay Annals. The earliest manuscripts of the Annals have been lost, but parts of the most highly regarded surviving text³⁸ seem to have been composed originally in the late fifteenth century.³⁹

In his introduction, the learned translator of the Malay Annals isolates several noteworthy indications of the Malay outlook to be gleaned from the narrative of the Annals.⁴⁰ One is the admiration for quick wit and cunning in dealing with foreigners, and its corollary, the chagrin experienced by a Malay outwitted by his foreign adversary. Another is the Malay concern for genealogy, apparently implying an emphasis on legitimacy in succession and a personal approach to negotiation and faithfulness. The idea of loyalty to an 'East India Company' would seem strange indeed to people for whom the existence of the crown of Malacca was less important than the ancestry of the man possessing it. In some tales loyalty to the person of the patriarchal superior is exalted and juxtaposed for emphasis with injury done to the retainer by the person receiving his loyalty. In one tale the virtue of loyalty is exalted above even the asserted law of God: When the son of the Laksamana is cuckolded by Sultan Mahmud Shah he declares: 'Alas that you are my master! Were you not, assuredly I would drive this spear of mine through your heart'. The Sultan responds: 'What he says is right, I have done him a wrong for which *by the law of God* he could take my life. It is *only* because he is a Malay subject who refuses to waver in his loyalty that he behaves as he is behaving now' (i.e. withholding the fatal thrust of his spear) [emphasis added].

Beyond the foregoing illustrations pointed out by the translator, several other aspects of Malay culture of significance to this study are dramatized or made apparent in the Malay Annals. In one tale of particular interest the hero, Hang Tuah, to avoid death in a fight appeals successfully to the manly honour of his assailant. Minutes later Hang Tuah kills his enemy in precisely reversed circumstances. When the mortally wounded enemy reproaches Hang Tuah for his lack of manly honour and breach of his word,

³⁸Raffles MS 18 in the Library of the Royal Asiatic Society, London. An English translation of *The Malay Annals* by C.C. Brown is in 25 (2 and 3) *JMBRAS* (1952) *passim*.

³⁹Winstedt, *Literature*, pp. 129-32; W. Lincham, 'Notes on the Texts of the Malay Annals', 20(1) *JMBRAS* (1947) 107 at p. 116.

⁴⁰C.C. Brown, pp. 9-10.

Hang Tuah replies: 'Who need play fair with you, you who have been guilty of high treason?' Hang Tuah is loaded with honours for his virtue and valor.⁴¹ Clearly, loyalty and cunning are regarded as virtues superior to what might be regarded as fair play; clearly also, even a villain is revealed as having a highly developed sense of fair play, which may be taken as an indication of the depth of Malay feeling on the point.

Another lesson of the Annals is the ease with which remonstrance slips into bloodshed. Recourse to the knife, the *kris* always worn by Malay nobles, is the common response of a hero to humiliation or injury. When it is not permissible to use the kris on the political superior, to whom, of course, the obligations of loyalty are deeper than the obligations of personal or family honour to the Malay nobles, suicide is made the admirable response. In one tale, an ambassador, Raja Pahlawan, courts death in a foreign court by running amuck rather than hear his master's letter read falsely to imply a subordination to the recipient that the master did not intend.⁴²

Courage and fighting spirit are much admired. The choice of Malacca as the seat of the Sultanate is attributed to the ruler finding that the site 'is a good place, when even its mouse-deer are full of fight'.

It is recognized by the annalists that the hot blood of a loyal servant may not be desirable in a ruler. The dying injunction of Sultan Maliku'l-Tahir to his son and successor warns against being swift to anger, implying that calculated anger is acceptable and at the same time confirming that swiftness to anger was a common characteristic of noble Malays. In the same speech the Sultan orders his son to take counsel with his ministers. This device to temper the reactions of the young sultans by encouraging consultations prior to action is illustrated in several tales. It is a common plea of an older sultan to his heir in the Annals; Sultan Ala'u'd-din reminds his heir that 'no ruler . . . shall prosper or succeed in doing justice unless he consults with those in authority under him'.

In matters of state, it is not surprising for a people emphasizing genealogy to give practical effect to that concern by emphasizing the formalities of loyalty and the perquisites of inherited rank. The sultan's kindred, his principal officials and their kindred of non-royal descent, and the holders of appointive rank are treated with signal honour. A nice sense of relative rank is displayed, and much intellectual energy is spent in composing diplomatic correspondence with just the right hint of subordina-

⁴¹Ibid. p. 86.

⁴²Ibid. pp. 64, 120.

tion, independent equality, or superiority that the sending sultan thinks fitting. In one tale a letter is composed to the ruler of Thailand which is, by the order of the Sultan of Malacca, Muzaffar Shah, 'neither a letter of obeisance nor one of greetings nor one of friendship'. In another, a letter implying subordination by the Sultan of Malacca to the 'Raja of China' provokes sneers from the Sultan of Brunei. In both cases the potentially embarrassing letters are made palatable by the astute action of the ambassadors. In Thailand the ambassadors did the customary ambassadors' homage to the Thai ruler, thus negating the implication of arrogance contained in the letter. To the Sultan of Brunei the ambassadors explained the letter of subordination as meaning that the Sultan of Malacca, Mansur Shah, was sending the obeisance of his servants, the ambassadors, and not his own obeisance to China.⁴³

Diplomatic practice clearly occupied a position of great importance in the international affairs of the Malacca Sultanate. The job of an ambassador, as illustrated above, was a difficult one, calling for much skill and courage. In normal practice, messages were composed at leisure and committed to writing, with care being taken about both style and substance. The tale of the ambassador running amuck illustrates the depth of the ambassador's feeling of his responsibility to make his master's position understood, and the importance attached to hints of subordination among sultans as well as the ease of recourse to bloodshed. In another case, fear of a written letter being misrepresented by the court 'reader' of the sultan to be visited prompts the Sultan of Malacca, Mahmud Shah, to send an ambassador, Tun Muhammad, who has memorized the letter. This is treated as a cunning and exceptional practice.⁴⁴

Diplomatic missions were apparently all *ad hoc*, to deliver letters or perform a ritual ceremony. There is no mention of permanent diplomatic missions. Each sultan apparently felt obliged to receive ambassadors and to maintain them in honour at court during their stay. When an ambassador wished to return home, the permission of the sultan whom he was visiting was invariably sought and obtained. Frequently, a return message was carried by returning ambassadors. In this diplomatic practice, the Malay sultans apparently conformed to the general practice of the entire East at this time.⁴⁵ It is impossible to assert with assurance whether the

⁴³Ibid. pp. 70, 91.

⁴⁴Ibid. pp. 154-5.

⁴⁵C.H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies*, Oxford, 1967, pp. 216-18.

apparent subordination of the ambassador to the whim of the ruler being visited was an acknowledgement of the absolute authority of the receiving sultan within some territorially defined 'state', an acknowledgement of the personal status of ambassadors as 'servants' of sultans, or merely a reciprocal diplomatic usage growing up out of convenience applied reciprocally. The Malay Annals hints the 'servant' explanation being the most likely in its anecdotes of obeisance by ambassadors.

Thailand

Malacca's most powerful non-Malay neighbour during the fifteenth century was Thailand.⁴⁶ The Thai people trace their descent from an immigration of Chinese tribes into the Menam River valley in the twelfth century, where they displaced the Hinduized culture but assumed the Hindu constitutional forms.⁴⁷ The Hindu Code of Manu is normally considered to be the basis for traditional public law in Thailand.⁴⁸ The Code of Manu is not in the modern sense a legal work; rather it is a religious work comparable in a sense to the Book of Leviticus in the Hebrew Bible. Read on another level, the King may represent the character of Everyman and the King's relations with his subjects and other Kings depict man's relations with himself and his neighbours.⁴⁹ But the Code of Manu does indeed have provisions which might have been read literally as advice in statecraft, or, although read philosophically, have influenced through the more subtle channel of personality the actual practice of statecraft. Lecture VII of the Ordinances of Manu is concerned largely with what is stated to be relations between the King and his neighbours. Among the 'ordinary

⁴⁶The name 'Siam' is Chinese and was used by Europeans until the name 'Thailand', a direct translation of the Thai name for themselves, was officially used by the Government of Thailand from 1939 to 1945, and also since 1948. For consistency, the name 'Thailand' is used in this work except in quoted passages using the word 'Siam' and its derivatives.

⁴⁷Prince Dhani, 'The Old Siamese Conception of the Monarchy', 36(2) *JSS* (1947) 91 at p. 92.

⁴⁸T. Masao, 'Researches into Indigenous Law of Siam as a Study of Comparative Jurisprudence', 2 *JSS* (1905) 14. See also W.F. Vella, *The Impact of the West on Government in Thailand*, California, 1955, pp. 320-1. The Code of Manu is translated and edited by E.W. Hopkins in *The Ordinances of Manu*, London, 1884. According to A.C. Burnell who wrote the introduction to the translation, its earliest possible date is the first century A.D., and the most likely date is about 500 A.D. See *ibid.* p. xxvii. It is more than likely that the text translated and edited by Hopkins represents a compilation of much earlier traditions or even older texts. Cf. N.D. Fustel de Coulanges, *The Ancient City* (1864), New York, 1956, pp. 14, 22.

⁴⁹This technique of philosophical exposition was, of course, well-known and much used in early India, just as it was in the biblical and other early religious and philosophical writings with which a European or American reader may be more familiar. Cf. S. Radhakrishnan, *The Principal Upanishads*, New York, 1953, pp. 22-3, 48-51. It is almost impossible to read the actual texts of these writings without being made fully aware of the sophisticated use of concrete symbols to represent subjective perceptions and abstractions.

matters' which the King is admonished to decide in that lecture are 'peace and war, the protection of the kingdom, wealth, protection and the pacification of acquired (*territory*)' [*sic*]. 'Alliances, bribery, and treachery' are proposed as means of overcoming an enemy before battle is attempted;⁵⁰ once battle is joined, treachery is forbidden. Matters of state are to be decided only after consultations with hereditary ministers. Despite the apparently literal intention of the Malay Annals, and the probable intention to use the reference to hereditary ministers to represent aspects of man's personality in the Ordinances, this injunction bears a striking similarity to the dying sultans' advice in the Malay Annals. In battle, humanitarian treatment is required by the Ordinances; it is forbidden to slay those who lack courage, those who offer to surrender, those asleep or without armour, those not engaged in actual fighting, those already engaged in personal combat with another, those wounded or fleeing, or any person by means of poisoned or cruel weapons.⁵¹

In practice the Thai government did not adhere literally to the scheme of the Code of Manu. Ministers were appointive, not hereditary.⁵² The ruler was absolute, semi-divine, checked primarily by extra-legal considerations such as palace intrigues and fear of rebellion. The result was that it was difficult for a Thai ruler to obtain a sincere expression of opinion from a minister. As one learned writer has noted, by the mid-fifteenth century the ruler 'remained, at least in theory, the fountain of justice and supreme judge, and his absolute power "as lord of lives" was even augmented with the increasing despotism and centralization of his rule'.⁵³ The checks on the ruler's absolute authority thus grew out of his internal Thai relations with his family, ministers and subjects. In general the Thai were tolerant of foreigners, who normally lived peacefully there.⁵⁴

China

The last of the notable influences in the Malay Peninsula prior to the arrival of Europeans in force was that of the Chinese. But the important political role of China in the early years of the Malacca dynasty in securing

⁵⁰An alternate reading is given in note 4 on p. 174 of Hopkins (Lecture VII, para. 198): 'Conciliation, bribery, and dissension'.

⁵¹The foregoing provisions are in *ibid.* pp. 154-70, Lecture VII, paras. 54, 56, 57, 90-3, 127, 128, 169, 178, 198, 199 and 211.

⁵²Vella, p. 324.

⁵³H.G. Quartich-Wales, *Ancient Siamese Government and Administration*, London, 1934, p. 178. See also pp. 17, 18 and 73.

⁵⁴*Ibid.* pp. 63-8.

some surcease from Thai pressures has already been mentioned and will be discussed again when political developments are discussed. The medieval Chinese view of the world as essentially concentric rings of more or less barbarian tribes of only peripheral concern to the important world centered upon China was not shared by the Malays, although Chinese power was considered useful enough as a safeguard against Thailand to make periodical formal submissions to China worthwhile. No record exists that a Chinese administrator was ever sent to the Peninsula to take part in the permanent government of any Malay sultanate.⁵⁵ There are some evidences of Chinese origin in the ceremonies surrounding the installation of some Malay sultans,⁵⁶ but no other identifiable traces of theories of Chinese governmental or international relations have been identified in the Malay Archipelago.

Malacca in 1509

Within the counsels of the Malacca Sultanate at the beginning of the sixteenth century the most influential advisers reflected the trading interests of the Arab, Persian and Gujerati Muslim merchants. The most important external consideration was the menace of Thailand. During the early years of the fifteenth century Thailand had claimed lordship over the territory of Malacca itself and had directed military expeditions to enforce that claim even as far south as Singapore Island. Chinese remonstrances had discouraged further Thai actions, and with the support of his Muslim friends the Sultan of Malacca had consolidated his immediate authority over the southern parts of the Malay Peninsula and as far north as Kedah on the west coast and Trengganu on the east. The Thai resisted the political advances of Malacca and the subordination of the petty chieftainships of the Peninsula and Sumatra remained doubtful; but it seems likely that by the end of the century tribute and perhaps some ceremonial symbols of submission were being given to both the Thai and the Sultan of Malacca by at least some of the minor Malay sultanates. In the last decade of the fifteenth century the Thai mounted a series of major attacks on Malacca

⁵⁵T.T. Meadows, *The Chinese and their Rebellions* (1856) (Academic Reprints, Stanford, California, n.d.), pp. 1-5. The first two chapters of H.B. Morse, *The International Relations of the Chinese Empire*, Vol. I, New York, 1910, contain an outline of Chinese government of the nineteenth century with many features pointed out to have been in existence in far earlier times. A formal and permanent office with purview over foreign relations did not exist in China until 1861. Mary C. Wright, 'The Modernization of China's System of Foreign Relations', *The China Reader* (Shurmann and Schell, eds.), New York (Vintage Books), 1967, Vol. I, pp. 210 *et seq.*

⁵⁶Winstedt, 'Kingship and Enthronement in Malaya', 20(1) *JMBRAS* (1947) 129.

THE FIRST CONTACTS

using levies and leadership from the satrapy of Ligor, which, with Patani, was and remained the acknowledged agent of the Government of Thailand in its peninsular entanglements. Malacca and the Sultanate of Pahang, an offshoot of the Malacca dynasty with a separate political identity but close family and commercial ties with Malacca, resisted the attacks from Ligor, possibly aided by forces from the Muslim-dominated minor Sultanate of Kelantan. Kelantan was apparently subdued by the Thai, but successful treachery and fortunate weather for the defenders kept the Thai from occupying Malacca.

Nonetheless, a European visitor in 1506 found Malacca itself tributary to 'Cini' (Siam?). Another European writing in 1518 found Kedah, Pahang and 'Caranguor' (Selangor? Kelang?) tributary, if not more closely tied, to Thailand. A third European, resident in Malacca in 1515, found all of Malacca's peninsular tributaries on the west coast as far south as Singapore to lie 'in the land of Siam', and Pahang on the east coast also to be within Thai 'jurisdiction', although 'always at war with the people of Siam' (which poses some theoretical questions as to what 'jurisdiction' meant to Europeans in the early sixteenth century). On the other hand, one of those sources found Pahang free of Thai authority and another found Malacca wholly independent. A fourth European writer a generation later dated Malacca's independence at 1489, but it seems clear that Thailand had not accepted any degree of independence in the Malay Peninsula until at least twenty years later than that.⁵⁷

THE EUROPEANS

The Hejira, from which the Muslim calender dates, occurred in the year 622 of the Christian era, and the explosive expansion of Muslim power

⁵⁷Primary sources for Thai actions in the Peninsula at the turn of the fifteenth-sixteenth century are Braz d'Albuquerque, p. 82; Pires, pp. 256-64; Ludovico di Varthema, *Travels* (1510) (G.P. Badger and J.W. Jones, transl. and eds.), London (Hakluyt Society), 1863, pp. 224, 274-5; Barbosa, pp. 164, 171, 179; João de Barros, *Decadas da Asia* (1553), (Ferrand, pp. 431 et seq., supplemented by P.E. de Josselin de Jong and H.L.A. van Wijk). Notable analyses of these and other less familiar sources include Wood, p. 88; G.E. Gerini, 'Historical Retrospect of Junkceylon Island', 2(2) *JSS* (1905), esp. p. 12 note 1, pp. 74, 79-80. Ferrand also contains translated extracts of works referring to Malacca including the Ying Yai Cheng Lan and the Sing Tch'a Cheng Lan (early fifteenth century Chinese), Ibn Madjid (late fifteenth century Arab), the Ming Che (Ming Chronicle, Chinese fourteenth to seventeenth century); Sulayman al-Mahri (Arab, early sixteenth century); Hai-Yü (Chinese, mid-sixteenth century), and the more familiar Portuguese works by Vasco da Gama, Barbosa, D'Albuquerque, de Barros, Castenheda, Correa, Couto, Eredia and the Dutchman Valentijn. As noted above, the Malay Annals also contain some references to Malacca-Thai relations. A useful bibliography of Portuguese writers may be found in I.A. Macgregor, 'Johore Lama in the Sixteenth Century', 28(2) *JMBRAS* (1955), Appendix I at p. 115 et seq.

carried the crescent flag into the Iberian Peninsula, which was conquered in the early years of the eighth century. The small Christian pocket of Asturias in the north of what is now Spain was never conquered, however, and over the years extended its control at the expense of Muslim Iberia. By the twelfth century Asturias had become the Kingdom of Galicia, and when, in 1139, Afonso Henriques, a Christian feudatory of Galicia, assumed the title of King, the State of Portugal may be considered to have been born.⁵⁸ With the help of English crusaders, Afonso Henriques captured Lisbon from the Muslims in 1147, and in 1179 a Papal Bull, *Manifestis Probatum*, gave orthodox sanction to Afonso's independence in respect of lands under his control taken from the Saracens. The payment for this Papal recognition was tribute, and in 1198 the Pope addressed the ruler of Christian Portugal as a tributary of Rome. By 1297 the Papal tribute had ceased to be paid.⁵⁹

Power in Portugal tended to centralize at the expense of the nobility and clergy, and the battle of Aljubarrota in 1385 marked the rise of a new order of things in which the personal authority of the King was firmly maintained by a new dynasty. By 1411 peace with the Spanish Christian kingdom of Castile was made, and, no longer struggling for national existence, King John I and his three sons began to search for glory in fighting against the Muslims in Africa. In 1415 Ceuta, a Muslim stronghold in Africa, was captured, and it may be conjectured that John's third son, Prince Henry (his mother was Philippa of Lancaster, daughter of John of Gaunt), was encouraged by this to turn his very considerable administrative talents and intellect to the possibility of further overseas activity. Prince Henry, 'The Navigator', developed and headed an administrative organization in Portugal, collecting information and commissioning voyages down the coast of Africa and to the Atlantic Islands (the Canaries had been first discovered in 1336, but nothing significant had been done to exploit this discovery until a century later) until his death in 1460.⁶⁰ Although the rise of Turkish power in the Eastern Mediterranean caused a readjustment of trade routes, and although Genoese rivalry with Venice for the Mediterranean trade may have prompted Genoa to aid Prince Henry in his attempts to find a sea passage to the East, it has been

⁵⁸Hitti, p. 116; H. Livermore, *A History of Portugal*, Cambridge, 1947, pp. 28, 65.

⁵⁹Ibid. pp. 65, 74-75, 87-8, 102-3, 155.

⁶⁰Ibid. pp. 180-1, 183, 185-92; J.H. Parry, *The Age of Reconnaissance*, New York (Mentor), 1964, pp. 33-145 examines in detail the physical capabilities for exploration developed in Europe in the fifteenth century.

suggested that the motivation of Prince Henry lay less in an interest in Asian trade and more in his interest in African trade, scientific curiosity, political rivalry with the Muslim powers in Africa, and Christian missionary zeal.⁶¹

Bartholomeu Dias, a Portuguese Commander, doubled the Cape of Good Hope in 1488, while in the same year Pero da Covilha reached India via Cairo and Aden. In 1498 Vasco da Gama reached Calicut sailing via the Cape, and returned to Portugal to report his achievement the following year. In Calicut, da Gama met with strong opposition from the entrenched interests of Muslim merchants, and when the second Portuguese sea voyage to India returned in 1502 the Portuguese decided on the use of force to establish their trade and religion in India.⁶²

The Portuguese pursued a bloody and effective course against the Muslim traders, and when, in 1505, the Muslims began to construct a war fleet to cut Portuguese lines of communication and trade to India, the Portuguese response was to intensify their attempt to overthrow Muslim power in the centres of Muslim eastern trade: Aden, Ormuz and Malacca, as well as in continental India. In 1506 the Portuguese defeated a Turkish armada at Cananor, establishing for a short time an unchallengeable mastery at sea.⁶³

While the Portuguese were exploring the sea route to India via the African Cape, the Spanish were attempting the same thing by sailing westward and, in 1492, the Genoese adventurer Columbus reached American land. Since both Spain and Portugal were, in the fifteenth century, as a matter of conviction and policy most zealous propagators of the Catholic faith,⁶⁴ and since Portugal, at least, had been operating since 1455 under a

⁶¹Constantinople fell to the Turks in 1453. E. Gibbon, *Decline and Fall of the Roman Empire* (1776-83), New York (Modern Library), n.d., Vol. III, ch. lxviii, pp. 745-85; F.C. Danvers, *The Portuguese in India*, London, 1894, Vol. I., p. 27. See also Livermore, p. 187; Alexandrowicz, pp. 14, 50, 54. It may be noted that the Popes were still preaching new Crusades in 1440 and 1464. S. Runciman, *A History of the Crusades*, Cambridge, 1955, Vol. III, pp. 465, 467.

⁶²Livermore, pp. 220, 221, 230; Danvers, pp. 49 et seq., 77.

⁶³Ibid. pp. 82, 117, 118, 123; the first Portuguese factory in India was established at Cananor in 1501. Egyptian-Venetian fleets combined to defeat the Portuguese in 1508, prompting the Portuguese attack on Diu, a necessary operational base, in February 1509. See Livermore, p. 233.

⁶⁴Spain was cleared of Muslim power only with the fall of Grenada in 1492. The Jews were expelled from Spain in the same year. 'It cannot be denied that Spain at this period surpassed most of the nations of Christendom in religious enthusiasm, or, to speak more correctly, in bigotry'. See W.H. Precott, *History of the Reign of Ferdinand and Isabella*, 3d rev'd ed. (J.F. Kirk, ed.), London, 1841, pp. 300, 375. In Portugal, the fanatic John III came to the throne in 1521, and the Inquisition was established in 1536. See Livermore, pp. 252-5. On the key role of religious fanaticism in Europe generally in the sixteenth century, see J.R. Seeley, *The Growth of British Policy*, Cambridge, 1895, Vol. I, pp. 63-91.

series of Papal permissions to 'attack, subjugate, reduce to perpetual servitude the Saracens, pagans, and other infidels and enemies of Christ, and to take their lands, their property real and personal',⁶⁵ it was natural that the conflicting claims of both Spain and Portugal to vast areas of territory not occupied by Christians should be submitted for Papal compromise. The Pope, Alexander VI, was a Borgia born in Spain in 1431 and raised to the Papacy on 1st August 1492. In response to a Spanish request (Portugal never agreed to the Pope's undertaking the arbitration, but could not deny his authority to pronounce on at least missionary competence in the respective territorial discoveries), two Bulls were issued on 3rd and 4th May 1493, of which the famous *Inter Caetera Divinae* was the second. They were supplemented by a third Bull on 25th September of that year. The Bulls unquestionably favoured the Spanish claim at the expense of Portugal, and it has been convincingly argued that the full tale of the intrigue involved in their promulgation has never been brought to light.⁶⁶

It is doubtful that the Papal Bulls had any effect in solving the political problems arising out of the Spanish and Portuguese rivalry for exclusive rights to exploit the new discoveries.⁶⁷ At any event, in 1494 the Treaty of Tordesillas between Spain and Portugal fixed a line which differed considerably from the line fixed in the Papal Bulls separating areas which were to be open to exclusive rights of exploitation by Spain and Portugal respectively. This line went from north to south through the Atlantic Ocean but, because of inadequate geographical knowledge, could not fix an acceptable line to divide the Spanish from the Portuguese in Asia or the Pacific Ocean. The Spanish had exclusive rights of exploitation on the western, or American, side of the Atlantic line, the Portuguese on the eastern, or African side.⁶⁸

Ferdinand Magellan, a Portuguese in Spanish service, sought to extend Spanish holdings by sailing westward, as was Spanish right under the Treaty of Tordesillas. Rounding the southern tip of South America through the straits since called by his name, Magellan reached the Malay Archipelago in 1521, while his fleet circumnavigated the globe.

⁶⁵E. Nys, 'La Ligne de Demarkation d'Alexandre VI', 27 *RDILC* (1895) 474 at p. 483; cf. S.Z. Ehler and J.B. Morrell, *Church and State through the Centuries*, London, 1954, pp. 144-53.

⁶⁶*Ibid.* pp. 153-9; A. Fremantle, *The Papal Encyclicals*, New York, 1956, pp. 77-80; see also Nys, '... d'Alexandre VI', *passim*.

⁶⁷*Ibid.* p. 491.

⁶⁸*Ibid.* p. 489; H. Vander Linden, 'L'Intervention Pontificale dans la Delimitation des Domaines Coloniaux et Maritimes de la Fin du XVe au Debut de XVIIe Siècle' 20 *RDILC* (3d ser.) (1939) 519; E. Staedler, 'Zur Vorgeschichte der Raya von 1493', 25 *ZVB* (1941) pp. 57 et seq.

Clashes between Spanish and Portuguese forces occurred in the Spice Islands,⁶⁹ and to solve the question of division of exclusive rights another treaty, the Treaty of Saragossa, was entered into between Spain and Portugal in 1529. The effect of this treaty was to separate Spanish and Portuguese interests in the Far East, Spain limiting her interests to the Philippines and Portugal retaining her rights *vis-à-vis* Spain to the Moluccas and the territory to the west of them, excluding the Philippines.⁷⁰

It is not necessary to examine here the rights which the Portuguese may have felt they had in the Malay Archipelago by virtue of these transactions and historical events, for these rights have been frequently commented on by scholars. Furthermore, whatever the legal situation may be said to have been, the actions of the Portuguese would appear to be a more reliable indication of their conception of their rights than a lengthy exposition of a theoretical legal position. But it should be emphasized that Portuguese rights in the Malay area do not appear of themselves, by donation or otherwise, to have included rights of 'sovereignty', temporal authority or control over the indigenous communities, except in the restricted context of missionary activity. The Bull *Inter Caetera Divinae* and its companion Bulls were understood by contemporary jurists to be applicable only to newly discovered territories which were effectively occupied by Spain or Portugal. While discovery coupled with symbolic acts of possession may have sufficed in the case of some land unoccupied by politically organized people, it was early recognized that effective occupation or actual control was a necessary prerequisite of legal acquisition: the right to claim the legal consequences flowing from control.⁷¹ The treaties with Spain did not permit Portugal to exercise any rights in relation to third powers, European or non-European, which Portugal did not otherwise have. These treaties were merely bilateral arrangements

⁶⁹Danvers, pp. 388-90; Prescott, p. 339.

⁷⁰Danvers, pp. 390-1; Livermore, p. 240; E. Staedler, 'Die Westindische Raya von 1493 und ihr Völkerrechtliches Schicksal' 22 ZVB (1938) 165 at p. 184. Spanish retention of the Philippines was in violation of the terms of the Treaty, but was apparently not actively challenged by Portugal. The Treaty of Saragossa was confirmed by Spain and Portugal in 1750. Staedler, 'Die Westindische Raya...', 22 ZVB (1938) 165 at p. 184.

⁷¹Differentiation of the rules of acquisition according to the state of organization of an indigenous population was dictated not only in practice by the inability of Portugal to exercise control over territory already controlled by a powerful political society, but by sixteenth century theory. Cf. G. Butler and S. Maccoby, *The Development of International Law*, London 1928, pp. 20-4; E. Nys, 'Les Jurisconsultes Espagnoles', 14 RDILC (2d Ser.) (1962) pp. 360-87, 494-524, 614-42. See also M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law*, London, 1926, *passim* to p. 47. F.A.F. von der Heydte, 'Discovery, Symbolic Annexation and Virtual Effectiveness in International Law', 29 AJIL (1935) 448 at pp. 451-2.

assuring the signatories that their actions would not be interfered with by acts of the other signatory power in certain defined areas. They do not appear to have been seriously argued to bar either non-signatory European powers or non-European powers from attempting to exercise political authority within the Portuguese or Spanish 'preserves'.

With regard to the Papal Bulls, their purport appears to have been to declare Portuguese (and Spanish) use of force as a missionary means in the areas specified (which certainly included the Malay Archipelago) to be in conformity with the precepts of the religion of the Prince of Peace! '... [Y]ou should and must cause peoples dwelling in those islands and continents to accept the Christian religion', said *Inter Caetera Divinae*. In order to achieve this end, the Bull purported to '... give, concede and assign ... all the islands and mainlands found or to be found ...' on different sides of the line, to the Portuguese and Spanish respectively, saving that this donation was not to infringe on any '... claimed right, belonging to any Christian prince who had actually possessed the said islands and mainlands ...' as of Christmas 1492.⁷² But since, as has been seen, the Treaty of Tordesillas altered the Bull's terms separating newly found lands into exclusive Spanish and Portuguese spheres, by substantially moving the position of the Bull's stated line of separation, it is quite clear that the purported donation of lands was also not considered a serious obstacle to the conflicting expansion of the activities of even the parties themselves.⁷³

One very serious consequence of the mode of thinking exemplified by the passages quoted was that from their first arrival in the Far East the Portuguese evidently did not feel constrained to observe the normal civilities of intra-European intercourse. They felt free, at least during the early sixteenth century, to use force to establish control as their power permitted. Although, as will be seen, this theoretical position was softened somewhat in later years, and the actual behaviour of the Spaniards and Portuguese when once in possession of overseas territory may not have been as reprehensible as later moralists have supposed, the admission of the use of

⁷²Fremantle, pp. 78, 79; Ehler and Morrell, p. 157.

⁷³Witness the Spanish evasion of it which raised the quarrel settled by the Treaty of Saragossa. Witness also Portuguese retention of the entire Brazil area. See Ehler and Morrell, p. 155; Vander Linden, *passim*; von der Heydte, pp. 448-50; A. Decencière-Ferrandière, 'Essai Historique et Critique sur l'Occupation comme Mode d'Acquérir les Territoires en Droit International', 18 *RDILC* (3d Ser.) (1937) 362 at p. 373; Butler and Maccoby, pp. 48-50.

force for missionary purposes was soon construed to permit the use of force generally.⁷⁴

On the other hand, it cannot be said that the effective political authority in Malacca, the centre of trade in the Malay area, was at all loath to use force to combat the introduction of a new trading power in the East, as events were soon to demonstrate. Ludovico di Varthema, an Italian adventurer, reached Malacca between 1504 and 1506 and described it as a turbulent, lawless city.⁷⁵ Owing his prosperity to Arab, Persian and Indian merchants, it is not surprising that the Sultan of Malacca was easily convinced that it would be in his interest to prevent the Portuguese access to his city. Even when commercial interest lay in peace, the Sultan appears to have been willing to use force against the advice of the merchants.⁷⁶

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During the early years of the sixteenth century the Portuguese Cortes (parliament of magnates) rapidly declined in power, and in 1525 there appears to have been no overt complaint raised when King John III announced his intention of summoning the Cortes only once every decade instead of more or less annually as had been the practice. By a similar evolutionary process the military caste of Portugal was brought under direct royal control.⁷⁷ As the delegate of Portuguese royalty Afonso D'Albuquerque was named the Governor-General of Portuguese India in 1509. D'Albuquerque's policy of imperial expansion was adopted as the policy of the Portuguese Crown in the East.⁷⁸ To D'Albuquerque Malacca seemed an essential victim.⁷⁹

⁷⁴Cf. Decencière-Ferrandière, p. 364; F. Despagne, 'Les Occupations de Territoire', 1 *RGDIP* (1894) 103 at p. 105; B.A. Wortley, 'Idealism in International Law: A Spanish View of the Colonial Problem', 24 *GS* (1939) 147; C.G.F. Castañón, 'Les Problèmes Coloniaux et des Classiques Espagnols du Droit des Gens', 86 *RdC* (1954) 561 at pp. 618-19, 683, 689 et seq.

⁷⁵Varthema, pp. 224 note 2, 226-7, 274-5 note 2.

⁷⁶Barbosa, p. 171; Braz d'Albuquerque, pp. 85, 110; Valentijn, 13 *JSBRAS* (1884) 71; De Barros, in de Josselin de Jong and van Wijk, at p. 29.

⁷⁷Livermore, pp. 223-4.

⁷⁸The intrigues between Governor-General D'Albuquerque and his predecessor as Portuguese leader in the East, the Viceroy Francisco D'Almeida, do not directly concern this investigation. Briefly, D'Almeida wanted to limit the Portuguese commitment in the East to the minimum necessary to destroy Muslim trade in India and set up a Portuguese monopoly in India-to-Europe carriage. D'Albuquerque was expansionistic and wanted to seize all the centres of Muslim trade throughout the East. See Danvers, pp. 147-8; Livermore, pp. 233-5.

⁷⁹The grandeur of Malacca in the first decades of the sixteenth century was a matter of common repute amongst the Portuguese. Cf. Barbosa, p. 175: 'Malacca is the richest seaport... in the whole world...'.
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In 1509 Diogo Lopez de Sequeira was sent directly from Portugal to Malacca. Returning to India in early 1510, he told a tale of betrayal at Malacca, the purport of which was that the Portuguese factor, Ruy d'Araújo, and eighteen other Portuguese were being held captive by the Sultan of Malacca. The Portuguese captives were apparently treated reasonably well during their detention, but the transaction was seized upon by D'Albuquerque as justifying a punitive expedition to Malacca.⁸⁰

Yet the very fact of the use of a secular excuse for action appears to indicate that even at this early date the terms of *Inter Caetera Divinae* were not construed to permit Portuguese assumption of authority or pursuit of warlike means in Muslim-held territory on the basis of religion alone. Where an excuse is sought, the implication is unavoidable that an excuse is thought to be necessary, or at least desirable. But it is likely that no excuse would have been considered necessary in reporting events to other European powers at this time, unless the authority of the Bull were to be lessened. Since to their religious consciences the Portuguese could not have required an excuse for the transactions at Malacca, and since these transactions seem to show that the Portuguese did nonetheless feel the need for equitable grounds on which to justify their military action there, it may be concluded that the holding forth as a *casus belli* of what appears to have been claimed to be a breach of duty by Malacca to receive a commercial mission was a step, possibly not in conformity with the European custom of the time,⁸¹ but clearly a step in the direction of removing religion from the theoretical grounds on which force could be claimed to be justified in transactions between Portugal and the Muslim powers.

D'Albuquerque's attitude towards the commercial expansion of Portuguese power must be clearly differentiated from his political attitudes in these affairs; where politics and commerce could not easily be separated, and where the theory of perpetual war between Christendom and the Muslim world conflicted with Portuguese ideas of right international behaviour, as was the case in Malacca, delicate adjustments had to be made in Portuguese views of justifiable action. After completing the subjection of Goa, a trade and power centre of India, in November 1510,⁸² D'Albuquerque sailed for Malacca. Considering all Muslim merchants as his prey, he seized some Javan as well as some Indian vessels, but not the vessels of non-Muslims.

⁸⁰Braz d'Albuquerque, Vol. II, pp. 31, 73-74, Vol. III, pp. 44, 46, 55.

⁸¹Cf. Butler and Maccoby, p. 49.

⁸²Braz d'Albuquerque, Vol. III, p. 14.

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So numerous were the ships that they passed on that voyage, that had it not been Afonso Dalbuquerque's determination to go to Malacca, they could have taken the largest prize that was ever beheld in those parts; for it was just the time of the monsoon when the Moors navigate to the Kingdoms of India which lie to the east of Cape Comorin. . . . But inasmuch as Afonso Dalbuquerque desired to secure peace and friendship with all the Kings and Hindoo lords who have their territories in the South and to trade in their ports—as the King Dom Manuel had ordered that the commerce of Malacca should not be destroyed, —he treated all the ships which he passed on the way with good will and entertainment, and to their captains he showed every kindness in the name of the King of Portugal, and gave them safe conducts, enabling them to navigate—provided they did not go to the Straits [*of Malacca*—and at this they were very well pleased.⁸³

Upon arriving in Malacca waters, his captains advised D'Albuquerque to attack immediately, but he '[t]hought right, for the better qualification of these proceedings in the sight of God, and of the Kings of all that land . . . that he should first of all order a final and formal demand to be drawn up . . .'.⁸⁴ The demand was made for the release of the captives and for restitution of their goods, and after some minor skirmishing the Sultan agreed, returned the men, and gave the Portuguese permission to build a fort in Malacca. But although achieving his commercial ends, this submission to Portuguese demands would have blocked D'Albuquerque's true aim—the capture of Malacca and the establishment of Portuguese political power in the Malay Archipelago—and so further demands were sent to the Sultan, who then prepared for war.⁸⁵ D'Albuquerque took elaborate care to avoid frightening away the merchants of Malacca, even, apparently, placating the Muslim traders.⁸⁶ He also wrote to Thailand, informing the government there that he was about to capture Malacca, and inviting trade, saying: '. . . that the King Dom Manuel . . . having been informed that he [*the Monarch of Thailand*] was a Hindoo and not a Moor [*he was in fact a Buddhist*], had much affection for him . . .', and sending an Ambassador.⁸⁷ In August 1511 Malacca fell.⁸⁸ It seems clear

⁸³Ibid. pp. 60-5.

⁸⁴Ibid. p. 93.

⁸⁵Ibid. pp. 94-7.

⁸⁶In this he was eminently successful at first—so much so that the merchants of Malacca counselled the Sultan to sue for peace. The Sultan, apparently perceiving that it was political control in Malacca which the Portuguese sought, quite naturally refused. See Braz d'Albuquerque, Vol. III, p. 110. D'Albuquerque's tender handling of the five Chinese junks then in Malacca resulted in their good report of his activities being taken to China. Ibid. pp. 98-9, 114.

⁸⁷Ibid. p. 114.

⁸⁸Danvers, pp. 220-8; Braz d'Albuquerque, Vol. III, pp. 125-7.

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that D'Albuquerque regarded Portuguese dominion in Malacca as resting on conquest.⁸⁹ After the fall of Malacca, the Sultan fled to Pahang. His appeal to China for help was rejected by the Emperor.⁹⁰

The Thai response to D'Albuquerque's embassy was favourable as the mission which that Kingdom sent to Malacca found the Portuguese in full and peaceful control.⁹¹ The Thai government does not appear to have pressed any claims in the Peninsula which would derogate from the Portuguese conquests. D'Albuquerque's emissaries in Ayutthia saw Thai preparations for carrying on the fight against Malacca that Ligor had been unable to win; but these plans appear to have been abandoned when Malacca fell to the Portuguese.⁹² It has been inferred from this abstention that the wars between Thailand and Malacca over control of the Peninsula were prompted by the Sultan of Malacca, who was unpopular as a person in Thailand.⁹³ It appears far more likely, however, that with the removal of Malacca as a Malay rallying point, the Thai felt that they could afford to forego their claims to that city in view of the obvious political advantages that would accrue to Thai pretensions in the rest of the Peninsula. It may also have been regarded as mere prudence to accept the fact of Portuguese power, which had been able to accomplish in one short siege what Thailand had been unable to do during the past century.⁹⁴ In 1513 Thailand and Pegu (Burma) sent gifts to the Portuguese Viceroy in Goa in token of their desire for peaceful trade in Malacca. In 1516 the Portuguese impliedly recognized some Thai authority in the sultanates in the north of the Malay Peninsula by seeking (and receiving) Thai permission to establish a factory in Patani as well as other parts of Thailand.⁹⁵

In this way Portuguese political power was established at Malacca. Although the Portuguese had rejected the policy of competitive commercial expansion as a sole end in the decision to capture Malacca, they were increasingly motivated in their political schemes by the prospect of commercial advantage. The appetites were whetted not only by crusading missionary successes, and it was not only the Muslim trade that D'Albu-

⁸⁹Ibid. Vol. III, p. 138.

⁹⁰Ibid. p. 134. When the Portuguese contacted China directly in 1521, however, the Chinese attempted to persuade Portugal to restore the Malay Sultan to his place. Manuel de Faria y Souza, 'Asia Portuguesa' (abstracted and transl. by E. Koek; notes by D.F.A. Hervey), 17 *JSBRAS* (1886) 117 at p. 141.

⁹¹Braz d'Albuquerque, Vol. III, pp. 152-5.

⁹²De Barros, in de Josselin de Jong and van Wijk, at pp. 25-6.

⁹³Braz d'Albuquerque, Vol. III, pp. 158-9.

⁹⁴Cf. Wood, p. 98. The Thai were fighting against Chiengmai in the north at this time.

⁹⁵Wood, p. 98; Danvers, p. 291.

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querque sought to replace. The success of Portugal in gaining control of the centre of the world's spice trade had raised the vision of Portugal beyond the crusades: 'Malacca is a city that was made for merchandise', wrote an official of the Portuguese government in Malacca in 1515: 'Whoever is lord of Malacca has his hand on the throat of Venice'.⁹⁶

⁹⁶Pires, pp. 286-7. But see the letter of Dom Manuel to the Pope dated 6 June 1513 reporting the Portuguese capture of Malacca. W. Noel Saintsbury, *Calendar of State Papers, 1513-1616*, London, 1862, p. 1.

CHAPTER II

European Rivalries Reach The Malay Peninsula

THE ORDER OF PORTUGUESE MALACCA

With the flight of the Sultan of Malacca, Portugal attempted to maintain the political position of that city with regard to the other Malay communities which had been tributary to it, and their encouragement of trade appeared at first to be effective in keeping the old relations intact.¹ Lacking the population to support a large establishment,² a scheme of indirect rule was introduced by which the leader of each of the larger ethnic groups in Malacca was appointed as an intermediary between the Portuguese authority and his group.³ Further, the arbitrary system of taxation in the Sultanate was replaced by a regular duty on prospective profit (estimated by comparing the price of the merchant's cargo at the point at which the merchant received it with its current price in Malacca).⁴ Currency was also standardized.⁵ Trade missions were sent out to Sumatra and Java, and ships were sent to the Moluccas to obtain spices and to encourage the Malay merchants to trade at Malacca.⁶

Having once embarked on an apparently successful political course, the temptation to maintain that position by the use of force appears to have been felt. A Portuguese-supported Malay noble was installed by Portuguese arms in the Sumatran territory of Pedir, whose Sultan did not agree with D'Albuquerque's ideas on the rightful place of Malacca in South-East Asian trade.⁷ Although Pahang is reported to have agreed in 1518 to pay regular tribute to the Portuguese at Malacca, and Patani began to trade

¹Pires, pp. 281-3.

²It has been estimated that the number of Portuguese in Malacca rarely exceeded 600. I.A. Macgregor, 'Notes on the Portuguese in Malaya' at p. 6.

³Braz d'Albuquerque, Vol. III, pp. 128-9. The ethnic groups, other than Portuguese, were Moors (Arab and Indian Muslims), Hindus and Javanese. Danvers, p. 235. D'Albuquerque speaks only of two sub-governors.

⁴Merchants had not been 'taxed' by the Sultanate, but had found it necessary to give 'presents' to officialdom to accomplish their business. Pires, pp. 274, 284.

⁵Braz d'Albuquerque, p. 138; Danvers, p. 331.

⁶Braz d'Albuquerque, pp. 160-4.

⁷Ibid. pp. 168-9; Faria y Souza, p. 136.

with the Portuguese,⁸ difficulties persisted as the ex-Sultan of Malacca and some Javan interests refused to take the Portuguese victory in Malacca as final.⁹

Two factors in Portuguese policy in Malacca contained the seeds of future trouble. Firstly, discrimination practised against the Arab and Indian traders encouraged them to abandon Malacca in favour of Atjeh (spelt also Acheh, Achin), a politically autonomous region at the northern tip of Sumatra. Atjeh gained in power as its economic prosperity increased, and being wholly under the effective guidance of the Arab merchants, it placed Malacca effectively in an almost continuous state of siege for the next 120 years or so.¹⁰ Secondly, the Portuguese, when they found their visions of Malacca's place in South-East Asian politics to be false,¹¹ attempted to assert political power in the surrounding territory, in apparent disregard of claims of right, solely in pursuit of greater physical security for Malacca and greater immediate economic benefit for Malacca-based

⁸Danvers, pp. 341-2. Pahang had fought against the Portuguese during the siege of Malacca. Braz d'Albuquerque, p. 106.

⁹A Javanese fleet was defeated by the Portuguese in 1513. Pires, p. 282. The ex-Sultan did not stop fighting the Portuguese. He was defeated in Muar in 1514, and at Malacca itself in 1516 and 1518, the later attack being based in Muar. The Portuguese invaded the Muar area and put the ex-Sultan to flight in 1523. In 1526 the Portuguese finally captured him at Bintang, and he died shortly afterwards. See Danvers, pp. 293, 337-45, 358, 377-8; Valentijn, *Description of Malacca*, Part II, 15 *JSBRAS* (1885) 119 at pp. 122, 125. A detailed analysis of the career of the ex-Sultan is J.A. Macgregor, 'Johore Lama in the Sixteenth Century', pp. 48-75.

¹⁰Braz d'Albuquerque, p. 146. Highlights of the hostilities between Atjeh and Malacca involved strong Atjehnese attacks on the Portuguese in 1529, 1547, 1569, 1570, 1571, 1573, 1575, 1582, 1584, 1586, 1615, 1627, 1629, 1636 and 1640. In the attack of 1547 Turks and Janizaries, commanded by an Arab, took part. In 1567 the Atjehnese entered into a league of Muslim powers which sent 20,000 men to attack Malacca. Two hundred Portuguese in a defending force totalling 1,400 men were able to withstand the siege. The attack of 1571 was part of the efforts of a general Asian alliance to oust the Europeans. These repeated attacks, and the extremity to which the Portuguese defenders in Malacca were continually pushed, took a heavy toll of Malacca's vigour and trade. See Danvers, Vol. I, p. 388 to Vol. II, p. 269. At times the Portuguese resistance to Atjehnese attacks appeared miraculous to the Portuguese. Fray Sebastien Manrique, *Travels* (1649 and 1654 eds.) (C. Eckford Luard and Fr. H. Hosten, transl. and notes) Oxford, 1927, Vol. I, pp. 182 note 10, 182-6.

¹¹The family of the ex-Sultan of Malacca continued to wield a good deal of political influence among the Malay polities despite his flight from Malacca; thus the Portuguese could never succeed to the full extent of Malacca's political influence in Malaya. The royal families of most of the peninsular Malay States today trace their authority back, one way or another, to the Sultanate of Malacca. See R.O. Winstedt's compilation of family trees, 'The Early Rulers of Perak, Pahang and Acheh', 10(1) *JMBRAS* (1932) 30, pp. 33-4 (Perak), 40-1 (Pahang): p. 301 (Johore, Rhio-Lingga, Trengganu and Pahang from 1699), 300 (Selangor and other Bugis lines); 10(3) *JMBRAS* pp. 132 (the Malacca Sultanate (1530-64)—this is the key to dynastic relations growing up out of the breakup of the Malacca Sultanate), 134 (Johore and others), 145 (descent of collateral non-royal Malacca nobility in the sixteenth and seventeenth centuries), and 150 (descent of non-royal nobility in the eighteenth century in the Sultanate of Johore-Rhio-Lingga-Pahang).

interests.¹² The principal result of this activity appears to have been to excite the Malays to opposition to Portuguese rule in Malacca.¹³

The political targets of all parties apparently followed the interests of the moment alone, and except for the implacable Atjehnese hatred of Portugal it is difficult to find much consistency in the short-term behaviour of either the Malays or the Portuguese in striving for stability.¹⁴

By the early seventeenth century the Portuguese appear to have made a practice of attacking straits shipping whenever the opportunity offered.¹⁵ It seems that Portuguese action in the Straits of Malacca was undertaken in the conviction that possession of Malacca carried with it a legal right to tax, or even to interdict entirely, shipping passing through the Straits or trading with the Malay settlements of the Peninsula's west coast. It is noteworthy that as this concept developed it was applied against European as well as non-European powers when the Portuguese had sufficient force available in Malacca. But just as the Malay communities took every opportunity to retaliate and never appear to have conceded such rights to flow from the mere possession of the city of Malacca coupled with the availability of force, so did Hugo Grotius, the leading European legal theorist of the early seventeenth century, argue that such interdiction of trade was illegal and justified treating the individuals 'who forcibly bar all European nations . . . from access to India' as 'pirates'. This meant, so Grotius argued, that 'it cannot be dishonourable for merchants to take well-deserved vengeance' upon them.¹⁶ Grotius's reasoning by which the

¹²The Portuguese put their puppets in titular power in Pasai (Sumatra) in 1519 (Braz d'Albuquerque, p. 168 (no date given), Faria y Souza, p. 136; Danvers, Vol. I, p. 377, puts the date at 1521), and Bintang in 1524 (Faria y Souza, p. 142; Danvers, Vol. I, pp. 377-8 gives the date as 1525). The Portuguese attempted to open trade in Johore by force in 1537-8; see Danvers, Vol. I, pp. 423-4. A Portuguese blockade of the Tenasserim coast in 1545 led to war with Thailand, whose fleet included Turkish Janizaries, Greeks, Atjehnese, other Muslims and Hindu Indians. Danvers, Vol. I, p. 466.

¹³A Malay coalition actually attacked Malacca in 1550, but was defeated. See Danvers, pp. 494-5.

¹⁴For example, a small Portuguese group fought on the side of Thailand against Pegu (Burma) in 1548, while a larger group of Portuguese adventurers fought on the side of Pegu. Danvers, Vol. I, p. 484. Johore successfully appealed to the Portuguese for help against Atjeh in 1582. Ibid. Vol. II, p. 47. Johore attacked Malacca in 1586. Ibid. pp. 64-73. A Johore plea for help against Atjeh in 1618 was refused. Ibid. p. 200.

¹⁵For example, in 1612 a relief fleet from India to Malacca took a Javanese trading vessel off Kedah, seized some Borneo nobles in Pahang, and attacked three Indian traders off Perak. Danvers, Vol. II, p. 155. The Portuguese apparently never formulated an explicit declaration asserting a right to perform these acts. They did, however, declare their intention, never successfully carried out, of conquering Sumatra. J.H. van Linschoten, *Voyage to the East Indies* (English ed. 1598) (A.C. Burnell, transl.), London (Hakluyt Society), 1885, Vol. I, p. 109.

¹⁶Cf. Hugo Grotius, *De Iure Praedae Commentarius* (1604) (G.L. Williams and W.H. Zeydel, transl.), Oxford, 1950, pp. 327, 237; E. de Vattel, *Le Droit des Gens....* (1758) (C.G. Fenwick, transl.), Washington, 1916, p. 121.

legal results of a classification of 'piracy' were argued to attach to all individuals whose acts were aimed at limiting the use of the seas for commerce regardless of those individuals' relation to any political society, did not restrict the label 'piracy' to acts directed against European interests, although the specific circumstances he had in mind were clearly the acts of Portuguese officers directed against Dutch trade. In view of Grotius's later writings on piracy, however, it is misleading to read too much into these argumentative passages.¹⁷

There is no indication that the Portuguese regarded the Malay communities of the Peninsula as bound to obey Portuguese municipal law as such; rather, the Portuguese claim to right in the Straits of Malacca appears to have been considered to be intimately connected with their possession of Malacca. Since the Portuguese claim to a right to exclusive control of shipping through the Straits seems not to have been accepted as valid by any other of the political groups involved in the affairs of the Peninsula at this time, it may be doubted that the Portuguese view of the rights flowing from the possession of Malacca represented an accurate appraisal of legal relations in Malay waters at this time.

But, it may be argued, if the Portuguese regarded the Malay communities as under a duty to obey Portuguese decrees even without the establishment of Portuguese political power in the Peninsula beyond Malacca, the implication is that the Portuguese regarded themselves as possessing rights on the ground that the possession of Malacca, a single city in the area, was sufficient to constitute a claim to authority in the Peninsula by virtue of the repeated Papal donations or on the basis of cultural or religious differences alone. There is no doubt that there was, in sixteenth century Spain, a strong school of theorists that maintained that exercises of right could validly be supported against non-Christians by Christian powers on the grounds of religion alone.¹⁸ But a closer examination of the position of these writers makes it clear that what was being maintained was not an *ex jure* authority, but a right to use force to acquire control.¹⁹ Furthermore, a school of at least equally persuasive theorists argued forcefully that no

¹⁷Cf. H. Grotius, *De Jure Belli ac Pacis* (1625, 1646 ed.) (F.W. Kelsey and others, transl.), Oxford, 1925, p. 631. See also A.S. de Blécourt, 'Grotius Contra Mare Liberum?', *RDI* (1937) 429. The point will be discussed again below.

¹⁸This was the position maintained by the Franciscan jurists. E. Nys, 'Publicistes Espagnols du XVe Siècle et les Droits des Indiens', 21 *RDILC* (1889) 532 at p. 542; Decencière-Ferrière, pp. 364-5.

¹⁹Nys, 'Publicistes Espagnols...' at pp. 549 et seq., in which the writings of the Franciscan, Sepulveda, are analysed. Sepulveda was the principal spokesman for the 'just exercise of force' school.

such right could be maintained on the basis of religion alone.²⁰ In the debates which were held on the question the second group of theorists emerged clearly triumphant by the end of the sixteenth century, although practice, regardless of theory, appears to have remained bloody. That belligerent relations could legally exist between Christian and non-Christian powers was clearly accepted, and these relations appear to have conformed, both in practice and in theory, to the relations between belligerent Christian powers *inter se* with only minor exceptions.²¹

²⁰For example, see Francisco de Victoria, *De Indis et de Iure Belli Relectiones* (1532, ed. of 1696) (J.P. Bate, transl.), Washington, 1917, pp. 128, 131-7, 145. Victoria, however, found that the Spaniards had a natural right to sojourn peacefully in Indian territories and trade there. Ibid. pp. 151-2. He felt that the denial of this right would justify the use of force to gain its observance. Ibid. p. 154. In a later passage, Victoria seems rather more conscious of the practice of his time in saying 'war with pagans is... perpetual and... they can never make amends for the wrongs and damages they have wrought...' when he seeks to justify the enslavement of Saracen (Muslim) women and children. Ibid. p. 181. Francisco Suárez, in *De Legibus, ac Deo Legislatore* (1612), ch. 19 sec. 9, does not appear to make any distinction between religious groups or cultural groups in deducing a natural law from the internal relations of the universal 'human' society. Francisco Suárez, *Selections from Three Works* (G.L. Williams and others, ed. and transl.), Oxford, 1944, p. 349. See also Alberico Gentili, *De Iure Belli* (1589) (J.C. Rolfe, transl.), Oxford, 1933, pp. 8-9. For more on Gentili's view of universal society, see below. In *De Triplici Virtute Theologica, Fide, Spe, et Caritate* (1621), Suárez expressly denies any right to wage war when the issue is solely religious except to secure the admission of missionaries to a pagan area, and then only after peaceful persuasion ..., pp. 146-9. But '... unbelieving princes may not simply and directly on the ground [of unbelief], be deprived by the Church of the power and jurisdiction which they hold over Christian subjects...'. Ibid. p. 777. Their right to continue as rulers over non-Christian subjects would appear to stand on the same reasoning *a fortiori*. Other spokesmen who sought to uphold the rights of non-Christians against Spanish force included Las Casas, Cano, Soto, and Ramirez. Nys, 'Publicists Espagnols...' at pp. 543-4, 551-5. As early as 1501, debate had arisen in Spain over the use of forced labour in America, and the need for reforms was pressed at the Junta of Burgos in 1511 and again in 1519. Ibid. p. 544. Such debates continued throughout the sixteenth century, but although the Dominicans appear to have carried the day in the great debates at Valladolid, at the close of the century forced labour was still being used in America. Ibid. pp. 553-60; see also C. Barcia Trelles, 'Fernando Vazquez de Machaca', 67 *RdC* (1939) 433, esp. pp. 527-8, for a resumé of the liberal ideas of an influential mid-sixteenth century Spaniard. A thorough analysis of early Spanish practice and theory in America, including an analysis of the Junta of Burgos is set out on pp. 618-19. An excellent short account of the career of Las Casas and the role of the Dominicans in attempting to alleviate the plight of American Indians under Spanish rule in the sixteenth century may be found in W.H. Prescott, *History of the Conquest of Mexico* (1843) London, 1874, Vol. I, pp. 318-27.

²¹Cf. Pierino Belli, *De Re Militari et Bello Tractatus* (1563) (H.C. Nutting, transl.), Oxford, 1936, pp. 92-4; Balthazar Ayala, *De Jure et Officiis Bellicis et Disciplina Militari* (1582) (J.P. Bate, transl.), Washington, 1912, p. 9, in which the laws of war are found to apply to activities of a 'sovereign prince' with no apparent exceptions or religious qualifications; Gentili, p. 25 is more blunt: 'War is not waged on account of religion, and war is not natural with others or even with the Turks. But we have war with the Turks because they act as our enemies.... With other foreign peoples we have commercial relations, but certainly not war.' Cf. Ibid. p. 401. Whatever our municipal law, in relations with other nations, including non-Christian ones, 'it is the practice that the civil law should not apply but rather the law of nations alone', which makes no distinctions on the basis of religion. Gentili, *Hispanico Advocationis* (1613) (ed. of 1661) (F.F. Abbott, transl.), Oxford, 1921, p. 117. Practice seems to have supported Gentili. When the question arose in England in 1628 of whether the (Mus-

If there were no warrant in the particular facts, contemporary theory or contemporary practice for the Portuguese conviction of right in asserting authority over all shipping in the Straits of Malacca by virtue of possession of the city, then this idea must have had roots elsewhere. Since variations on this Portuguese idea will be discussed later, it is worthwhile to speculate about its origin.

It may be remembered that when the Portuguese arrived in India, Malacca was the great collecting point for the spice trade. The Portuguese attack on Malacca was apparently conceived as a political move, with greater stakes than mere entry into competition with the Arab merchants. It thus seems likely that they regarded Malacca as more than the customary trading centre enjoying its pre-eminence because of its geographical position, and in this supposition they were clearly correct. The vast wealth of Malacca and its political ties with the neighbouring communities must have given it the appearance of the headquarters of a political organization. It was apparently the Portuguese expectation that their seizure of the headquarters included the acquisition of control over the outlying areas. To the Malay and Arab factions in Malacca at the beginning of the sixteenth century this view of the political position of Malacca must have appeared to be correct, and it was no doubt upon the report of the Malacca merchants in India that the Portuguese relied for knowledge of the political position of that city. But what was apparently not realized by the Portuguese was the extent to which the political rise of Malacca in fact depended upon Malay allegiance to a rich Malay sultan, and a pattern of trade which made Malacca the most convenient collecting and storage point for the most enterprising and aggressive merchants in the East—the Indian and Arab Muslims. It may also have been important to the growth of Malacca that the Muslim traders enjoyed a high position in the political councils of the Sultanate. With the Portuguese capture of Malacca, the Sultan was put to flight and the Muslim merchants shifted their headquarters to the more congenial territory of Atjeh. Commercial and political power were not to be united again in the area until the foundation of Singapore, some 300 years later. Meanwhile, the Portuguese were left in Malacca, apparently unable to determine why, with possession of what, for geographical and traditional reasons, should have been the centre of South-East Asian trade, and having reformed the government to improve its attractiveness to

lim) Barbary corsairs were to be entitled to the privileges of a status of belligerency it was decided that they were. R.G. Marsden (ed.), *Documents Relating to Law and Custom of the Sea* London, 1915, Vol. I, p. 407 note.

merchants, the expected results did not seem to follow. The 'rightful' place of Malacca was not being respected. The merchants were not using Malacca as their transshipment point as they 'ought'. It may well have been reasoning along these lines that gave rise to the conception of Malacca's 'legal' position in the Straits. That the conception arose, and that there was no warrant for it, appear to be equally clear. The 'traditional' position of Malacca was clearly not a legal position but one dependent upon commercial, political and dynastic facts, all of which were changed by the Portuguese conquest. Only the geographical position of Malacca remained the same, and this advantage, while no doubt proving useful to the Portuguese traders and adventurers sailing out to the Moluccas, was not of itself sufficient to lure the Malay, Indian and Arab traders to the city in which the real advantages and pliable Sultan to which they had grown accustomed had been wiped away.²²

EUROPEAN DISRUPTIONS

It was recognized by the Portuguese from the earliest days of their eastern empire that command of the seas was vital; without it the empire could not stand for long. It was indeed with the entry into competition for the direct trade with the East by the British and Dutch in the last years of the sixteenth century that the true weaknesses of the Portuguese position were exposed, and the end of Portuguese political power in the Malay Archipelago became a certainty when Portugal lost control of the seas.²³

In 1580 the Crowns of Portugal and Spain were dynastically united. Although Portugal remained economically, and to some extent politically, independent of Spain (on the separation of Portugal from Spain in 1640 all the overseas possessions which still remained unconquered by the Dutch and Arabs reverted to Portugal),²⁴ the Dutch, in abjuring their allegiance to the Habsburgs who also ruled Spain in 1581, found it to their advantage to consider the Portuguese territories in the East as territories of Spain, and

²²The two articles by I.A. Macgregor cited above contain an excellent summary of the Portuguese administration of Malacca and the fate of the Malacca dynasty in the sixteenth century. It is not proposed to repeat that analysis here.

²³In 1513 D'Albuquerque wrote to his King, Dom Manuel, '... if once Portugal should suffer a reverse at sea, your Indian possessions have not power to hold out...' Danvers, Vol. I, p. 260. Of course, other European powers than England and Holland were concerned in the destruction of the Spanish-Portuguese monopoly of trade, but not in such a way as to be directly pertinent here. See J.R. Seeley, *The Expansion of England*, 2d ed., London, 1904, pp. 105-37.

²⁴See below. Livermore, pp. 267, 274, 283, 307; Danvers, Vol. I, pp. 270-3.

thus subject to Dutch attack during the hostilities between the Netherlands and Spain.²⁵

First Dutch Voyages

In the early days of the Netherlands' wars with Spain, trade continued between Portugal on the one hand and England and the Netherlands on the other. In 1589, however, Philip of Spain closed Portuguese ports to English ships and commenced licensing privateers in an attempt to cut English trade with Africa and the Orient. Shortly afterwards, he applied the same policy to the Netherlands, seizing fifty Dutch ships off Lisbon and prohibiting all intercourse between Portugal and the rebellious Low Countries in 1594.²⁶ But these moves came too late. The researches of the Dutchmen, John Huyghen van Linschoten and Cornelisz. de Houtman, had already revealed to the Dutch world of commerce the routes and locations concerned in the eastern trade. Although educated Englishmen had never had, as the Dutch had had, access to Portuguese-guarded information, the enterprise of Drake and Cavendish and others made up for their initial lack of detailed data.²⁷

On 2 April 1595 a Dutch fleet of four vessels ran past the Spanish blockade of Texel. Reaching Sumatra in June 1596, the fleet, under Houtman, made contact with the Portuguese at Bantam, in western Java, and established friendly relations with the Malay ruler of that territory. The friendly intercourse thus established did not last long, however, as the jealousy of the Portuguese and, no doubt, the officious behaviour of the Dutch and the intrigues of other Bantam mercantile and political interests, soon made the position of the Hollanders in Bantam precarious. On 26 February 1597 the Dutch left Java for home. Although only 89 men were left of 249 who sailed, they had proved the feasibility of conducting trade with South-East Asia without the intermediacy of Portugal.²⁸

The second Dutch voyage, in which the leading figures were Jacques Cornelisz. van Neck, Wybrant van Warwyk and Jacob Heemskerk, left

²⁵The Dutch revolution was a long process, but the Habsburgs' loss of effective control over the commerce of the Netherlands' cities may be regarded as more or less contemporaneous with the unification of Spain and Portugal in 1580-1. J.L. Motley, *The Rise of the Dutch Republic* (1856), London (The Chandos Classics), n.d., Vol. III, p. 489. Cf. Livermore, p. 283; Danvers, Vol. II, pp. 273-9.

²⁶J.L. Motley, *The United Netherlands* (1860), London, 1875, Vol. III, p. 511; Livermore, p. 274.

²⁷*Ibid.* pp. 274-5; Motley, *The United Netherlands*, Vol. III, pp. 513-15; Parry, chapter 12; Hall, pp. 224-6.

²⁸Renneville, *Recueil des Voyages*... Amsterdam, 1702-7, Vol. I, pp. 201, 281, 301, 305, 321-4, 474.

Texel in May 1598 and returned in June 1599 after a highly profitable trip to Sumatra.²⁹

The first establishment of a political position in the Malay area appears not to have been attempted until June 1599, when Houtman's second expedition arrived in Atjeh and established contact with the ruler of that powerful port. In July an agreement was reached whereby the Dutch were to give the help of their ships in the chronic Atjeh war against Johore in return for a full cargo of pepper. As the Dutch readied their ships for the action against Johore the Sultan of Atjeh and Houtman apparently fell to quarrelling. The cause of the quarrel is unknown, but its outcome was an attack by the Atjehnese on the Dutch during a party on board the Dutch ships. Some of the Europeans escaped, including the English pilot, John Davis, but Houtman did not.³⁰ This appears to have been the only significant clash between Dutch and Malay authorities prior to 1600, as the Netherlands, in their early relations with the Malays, normally tried to limit their business to trade.³¹

First English Voyages

In 1591 Sir James Lancaster sailed to the East from England, arriving at the Island of Penang in June 1592. Lancaster attacked Portuguese shipping in the Straits of Malacca, apparently without giving warning or making excuse. He returned to England with his captured valuables in 1594.³²

In one source it is asserted that Lancaster in his attacks did not differentiate between the vessels of Portuguese and local princes.³³ Although his attacks on Portuguese shipping may have been justified in view of the belligerency then obtaining between England and Spain, it is difficult to see on what legal grounds attacks on indigenous shipping could have been justified. Protestant England never appears to have viewed the Pope's

²⁹Ibid. pp. 509-24.

³⁰Samuel Purchas, *Hakluytus Postumus or Purchas His Pilgrimes* (1625), Glasgow, 1905-7, Vol. II, pp. 312-16. Davis wrote that Cornelisz. de Houtman was killed by the Atjehnese. Survivors of the supposed massacre, including Houtman's brother, Frederick, were found languishing in Atjeh in December 1600 by Paul van Caerden's fleet. In January 1601 Frederick Houtman was again seized by the Atjehnese. Renneville, Vol. II, pp. 152-3. He appears to have been Dutch Governor of Amboina in 1606. Motley, *The United Netherlands*, Vol. IV, p. 391.

³¹Cf. B.H.M. Vlekke, *Nusantara: A History of Indonesia* (rev'd ed.), The Hague, 1959, pp. 111-14.

³²Sir. William Foster (ed.), *The Voyages of Sir James Lancaster... 1591-1603*, London, (Hakluyt Society), 1940, pp. 10-13, 23-4.

³³Renneville, Vol. I, p. 302.

donation of 1493 as effective against themselves.³⁴ There could be no pretence that Malay shipping was in fact under the control or authority of Portugal, for although the license of the Portuguese Captain of Malacca was purportedly necessary for venturers sailing between Malacca and islands in the Archipelago,³⁵ in fact the Portuguese appear to have been able to exercise no authority at all in Sumatra, and the political power of Atjeh appears to have equalled that of Portugal in the surrounding seas.³⁶ Resting as it does solely on a Dutch source, the statement that Lancaster sacked local shipping must be viewed with caution. There appears to be no hint of attacks on any other than Portuguese ships in the English sources, implying that the British writers of the time considered such attacks to be improper even if they did occur (and thus not to be talked about). Most of the information from British sources about Dutch free-booting activity in the area at this time appears to be similarly suspect. But soon this comes clearer.

The East India Companies; Attempts to Regulate Trade

On 31 December 1600 Queen Elizabeth of England issued letters patent incorporating a company under the style of 'The Governor and Merchants of London Trading into the East Indies'.³⁷ Although, according to the terms of the letters patent of this Company all of Her Majesty's subjects were forbidden to trade in the East without the Company's permission, it may be noteworthy that as early as 1604 one of the 'Committees' of the Company was sending out a venture to Sumatra on his private account.³⁸

The Company's first voyage, under Sir James Lancaster, departing from England in April 1601, was charged with establishing political relations with the ruler of Atjeh. Following his wonted practice, Lancaster took and sacked a Portuguese East India trader off the coast of Africa in June 1601. Arriving in Atjeh in June 1602, he found many trading ships, including

³⁴J. Westlake, 'Le Conflit Anglo-Portugais', 23 *RDILC* (1891) 241 at p. 255.

³⁵Purchas, Vol. X, pp. 165 et seq.: Journal of Ralph Fitch, Merchant of London, 1583-1591, p. 198, describing Malacca as it appeared to Fitch on his visit there in 1588. See Alexandrowicz, pp. 71-7, for an outline of the Portuguese system of 'cartazes'.

³⁶Cf. Linschoten, Vol. I, pp. 104-10. Linschoten was writing of conditions in the late 1580s. See also Vlekke, p. 111, in which the defeat of a Portuguese fleet by Javanese and Chinese traders is described.

³⁷Purchas, Vol. II, pp. 366-91; excerpted in C. Stephenson and F.G. Marcham, *Sources of English Constitutional History*, New York, 1937, pp. 401-31.

³⁸'Committee' is the word used in the letters patent to describe each individual member who was entitled to participate in the transaction of the Company's business. Purchas, Vol. II, p. 347, tells of John Davis piloting a voyage to the East on the private account of Sir Edward Michelbourn. Sir Edward Michelbourn's name appears in the list of Committees of the Company in the letters patent of 1600. Purchas, Vol. II, p. 366.

Indian, Pegu, and Patani vessels, and a Dutch factory. He was kindly received, and was invited to lodge in the Dutch factor's house.³⁹

Lancaster presented a long and respectful letter from Queen Elizabeth to the ruler of Atjeh. In it, the Queen pointed out that the English regarded themselves as enemies of Spain and Portugal, as also did Atjeh. In these circumstances, it was requested that the English, who should be considered the natural friends of Atjeh, apparently because of possessing some of the same enemies, be allowed to establish a factory.⁴⁰ Lancaster had already prepared a draft agreement in which the English commercial terms for trading in Atjeh were set out. The actual grant made by Atjeh does not follow the words of the English draft, although it appears that at least some of the English traders felt that the substance of the final grant was the same as originally proposed by the English.⁴¹ It will be instructive to examine more closely the differences between the English desiderata and the Atjehnese grant.

The first, and principal, English demand was for free trade in Atjeh, with the right to import and export goods free of any duty. All the other terms of the English demand involved the erection of a system of personal law which would govern the English traders in their activities in Atjeh territory. In particular, disputes between Englishmen alone were to be solved by the application of English law by the English factor; the estates of Englishmen dying in Atjeh were to be administered and distributed according to English law; English people who 'hurt' Atjehnese, however, were to be subject to the punishment prescribed by Atjehnese law provided such punishment did not involve forfeiture of the goods of the Englishmen's superiors. (Thus, since all goods in the factory would be to some extent the Company's goods, in effect this was an attempt to limit the Company's risk of loss due to its servants' misconduct; reasonable enough in those undisciplined times.) Finally, Atjehnese who 'hurt' Englishmen were to be punished (*i.e.*, the Atjehnese government was not to avoid its responsibilities under this agreement by inciting private persons to act against the English); and contracts were to be inviolable. This last stipulation was presumably meant to oblige the Atjehnese or possibly the ruler of Atjeh to conform to European concepts of contract. The extent to which this implied the removal of the contracts entered into between English

³⁹Foster (ed.), pp. 75-6, 78, 90-1. The 'factory' was a trading-lodge and warehouse used by all large traders in the East at this time. The 'factor' was the man in charge.

⁴⁰The letter is set out in Foster (ed.), pp. 94-6.

⁴¹*Ibid.* pp. 155-60.

traders and the ruler of Atjeh from the purview of the normal law of Atjeh (which probably permitted the sovereign to ignore his own undertakings with impunity just as was theoretically true in most European states at this time)⁴² is not clear. In a final clause, the Atjehnese were to agree not to attempt to convert Englishmen to the Muslim religion or make them conform otherwise to the laws of Atjeh.

The actual grant gave permission to the English to trade in Atjeh 'on the same terms as all other foreigners', but this was stipulated to include an absence of customs dues. It is certainly implied that such dues could properly be charged by the Atjeh authorities in future if they were charged of all foreign traders.

Although the English law regarding estates was agreed to be made applicable to the property of Englishmen dying in Atjeh, and, by its silence on the subject, it may be taken that disputes solely involving Englishmen and not brought to the attention of the Atjehnese authorities might be settled by the English in their own way, it was explicitly provided that Englishmen owing debts in Atjeh were to be liable to be held in that territory. All cases involving parties of differing nationalities were to be decided according to the law of the defendant—but there is no mention of tribunals. It may thus seem that the sophisticated trading interests in Atjeh, while not willing to deal away their authority in many cases, appear to have been willing to allow significant concessions to the English traders. It also seems clear that in fact the English demands had not been substantially met. They were certainly not explicitly met in the formal terms of the grant. Nonetheless, terms had been agreed on the basis of which it seemed possible for the English to conduct trade in Atjeh.⁴³

⁴²H. Street, *Governmental Liability*, Cambridge, 1953, chapter I.

⁴³The provision concerning the law applicable to the estate of a decedent Englishman was prompted by the European apprehension of the *droit d'aubaine* (*jus albinagii*) by which the sovereign asserted the right in parts of Europe to confiscate the estate of an alien dying in his territory. Alexandrowicz, pp. 123, note Q, regards this treaty of 1602 as part of the evolution of general international law away from such confiscations. But the *droit d'aubaine* remained the law in some parts of Europe for a further 200 years. See L. Oppenheim, *International Law* (H. Lauterpacht, ed.), Vol. I, 8th ed., London, 1955, p. 690. The literarily inclined reader may be amused by the reference to the *droit d'aubaine* in the first page of Laurence Sterne, *A Sentimental Journey*, London, 1768.

The *droit d'aubaine*'s equivalent in Muslim law allowed inheritance even in the absence of treaty when the deceased was a temporary sojourner and his heirs were known. Treaties expanding on those exceptions exist between Christian and Muslim powers in the middle ages. See M.L. de Mas Latrie, *Traité de Paix et de Commerce... Concernant les Relations des Chrétiens avec les Arabes de l'Afrique Septentrionale au Moyen Age* (Paris, 1866), New York, n.d., Vol. I, pp. 93-4. Examples of such treaties include the treaty of 1305 between Venice and Tunis (article 20) and the treaty of 1358 between Pisa and Morocco (reciprocal articles 4 and 14) in *ibid.* Vol. II, pp. 66 and 211. Mössner, *Die Völkerrechtspersönlichkeit und die Völkerrechts-*

Before leaving the East, Lancaster gave the Sultan a gift of part of the valuables taken from a Malacca-bound Portuguese ship captured in the Straits, and received in return gifts from the Sultan for Queen Elizabeth. A letter was given to Lancaster for his Queen which spoke only of the desirability of a military alliance between Atjeh and England against Spain. Lancaster returned safely to England in September 1603.⁴⁴

Shortly after the second voyage sent out by the Company had arrived in the East, James I of England made peace with Philip III of Spain. In the peace settlement the Spaniards gained the right to keep Englishmen out of the Indies and to try them before the Inquisition.⁴⁵ The English appear never to have answered the overtures of the Sultan of Atjeh for a military alliance against Spain. Nor does it appear that with the ending of the reasons enumerated by Queen Elizabeth for Anglo-Atjehnese friendship, permission to maintain the English factory in Atjeh or the Atjehnese grant were considered by the English to have lapsed or become any less effective. On the other hand, as shall be seen, in their activities in the Straits of Malacca the English did not hesitate to enhance their position in Atjeh by the display of antagonism towards the Portuguese.

On 20 March 1602 the States General of the Netherlands granted a charter to one great Company, in which all former trading companies were invited to merge, and to which was granted a monopoly of Dutch enterprise east of the Cape of Good Hope and west of the Straits of Magellan. Control over the affairs of the Company was apportioned among

praxis der Barbareskenstaaten, Berlin, 1968, pp. 141-2 notes 270-1, mentions that there were fifty-three treaties between European and North African Muslim powers expressly denying the applicability of local (Muslim) law to the property of Europeans dying in the Barbary states. Twelve of these treaties were reciprocal, protecting Muslim inheritance rights in France and Spain. The earliest two treaties cited by Mössner are both dated 1685. Early treaties solely between European powers creating exceptions to the *droit d'aubaine* for the benefit of merchants include the treaty of 29 January 1642 between Great Britain and Portugal, Article IX (benefit of British merchants in Portugal only) and the treaty of 13/23 May 1667 between Great Britain and Spain, Article XXXIII, which is reciprocal. See L. Hertslet, *A Complete Collection of the Treaties and Conventions at Present Subsisting Between Great Britain and Foreign Powers; so far as they relate to Commerce and Navigation...*, London, 1820-1925, Vol. II, pp. 1, 140. The *droit d'aubaine* was law in England apparently from the time of the Norman conquest. But a leading case of 1221 (4 Hen. III) already finds exceptions in the case of merchants whose business requires a long abode abroad. 145 E.R. 3. See also Sir Frederick Pollock and F.W. Maitland, *The History of English Law*, 2d ed., Cambridge, 1898, Vol. I, p. 459. By 1552 the *droit d'aubaine* had been effectively abolished in England by an opinion of the Judges of the Court of Common Pleas: '*q un Alien q nest enemy Le Roy poit aver biens & lesses in Engliter & poit fair son testament de eux tout soit que il nest denizen*'. Benloe 36; 123 E.R. 28. See also W.S. Holdsworth, *History of English Law*, Vol. IX, Boston, 1926, p. 97.

⁴⁴Foster (ed.), pp. 108-12, 120.

⁴⁵The pertinent parts of the Treaty, misdated 1604, are set out in their pristine ambiguity in Danvers, Vol. II, p. 327 note.

large investors nominated by the governing bodies of the individual Dutch States with a fixed proportion of directors to come from each State. All Dutchmen were to have the right to take shares in the Company, and provinces and cities were also encouraged to subscribe. The Company was empowered to make treaties with the Indian powers in the name of the States General. Although the Company was empowered to raise and administer military forces, those forces were required to pledge allegiance to the States General as well as to the Company. The Dutch Admiralty was to have a certain proportion of the prizes captured by the Company's ships. It may thus be seen that the ties between the actual government of the United Netherlands and the Company were very close indeed, and unlike the English Company, which appears to have been essentially a private body operating under advantages granted by the Crown, the Dutch Company can be viewed as *ab initio* an arm of Dutch national government.⁴⁶

With regard to the sultanates in South-East Asia, the Dutch Company was empowered to contract obligations and obtain concessions in the name of the States General of the Netherlands, while the English Company was empowered to enter into agreements only in its own name. The authority of the Dutch Company was delegated to it by the States General, the Government of the Netherlands, while the powers of the English Company were granted by the Crown alone. Thus, as the relation of Crown to Parliament changed in England, so the position of the English Company changed in English municipal law. From the first, the engagements of the English Company with foreign princes were not considered in English law to be binding on the state.⁴⁷

Monopoly Treaties; Trade Law

Although in their relations with the sultanates of the Malay area the two Companies presented a superficially similar face, a difference in the intensity of the actions of the two Companies was immediately apparent. When the ruler of Amboina, a spice-producing island, sent an embassy to Bantam in 1604 to ask help in ousting the Portuguese from his island, the Dutch were apparently willing to enter into political relations with him, while the English (England was then at peace with Portugal) contented

⁴⁶Motley, *The United Netherlands*, Vol. IV, pp. 125-6. Some of the economic consequences of the union of sovereign authority and profit-making are forcibly pointed out in Adam Smith, ... *The Wealth of Nations* (1776), London, 1890, pp. 645-6.

⁴⁷Cf. Sir Courtney Ilbert, *The Government of India*, Oxford, 1922, p. 9.

themselves with securing a license to trade in Amboina from the Portuguese.⁴⁸ When the Dutch finally captured the Portuguese outpost in Amboina, the English, who were buying spices there, found that the inhabitants refused to continue selling to them without a Dutch license. Accordingly the English withdrew to seek cargo elsewhere.⁴⁹ In general, while the English concentrated their efforts on securing factories and concessions of exclusive trade, the Dutch set about attempting to establish some sort of Dutch state authority in the important trading areas. Thus, while the English and Dutch remained on fairly friendly terms in the areas where both were on a footing of equality, as where there were fairly stable and effective Malayan administrations, for example in Bantam and Atjeh, in the areas in which no such administration existed conflicts between the English and the Dutch were inevitable. The Dutch sought to secure their exclusive rights to trade in the Malay territories by an expansion of Dutch political authority; the English sought the same commercial ends by treaties of exclusive economic concession which depended for their effect upon the maintenance of authority in the local rulers.⁵⁰

In negotiations between the Dutch and the English in 1613, with Grotius appearing for the Dutch, the question of whether a third state could legally be ousted from trade by treaty between one European state and a Malay community was the centre of argument. The English, arguing against the right of any state to impose restrictions on the trade of another, cited Grotius's own writings against him. (Apparently the English were willing to forego their own monopoly rights; they were being heavily outnumbered by powerfully equipped Dutch fleets in the area at this time and must have found monopoly treaties difficult to obtain and impossible

⁴⁸B. Corney (ed.), *The Voyage of Sir Henry Middleton...* (1606), London (Hakluyt Society), 1855, pp. 23, 28.

⁴⁹*Ibid.* pp. 28, 79.

⁵⁰On early 'peaceful co-existence' between the English and the Dutch see C.R. Markham (ed.), *The Voyages of Sir James Lancaster...*, London (Hakluyt Society), 1877, pp. 109 (describing the friendly reception given Captains Keeling and Hawkins in Banda, 1609), 110 (Keeling establishes a factory in Bantam, October 1609), 248 (Ralph Crosse greeted in a friendly manner by the Dutch in Atjeh, April 1613). For an excellent summary of major causes and events in the early rivalry see Hall, pp. 235-51. As late as 1620 the English and Dutch were formally co-operating in Jambi to keep the purchase price of pepper low where neither could secure a monopoly. J.E. Heeres, *Corpus Diplomaticum Neerlandico-Indicum*, (Koninglijk Instituut voor de Taal-, Land- en Volkenkunde von Nederlandsche-Indië, vols. 57, 87 and 91), 's-Gravenhage, 1907-34, Vol. I, pp. 156, 174.

One example, perhaps typical, of the practical effects of the conflicting policies may be seen in the case of Bali in 1609, where the English concluded a secret treaty with the local ruler during the progress of hostilities between the Balinese and the Dutch, which would give to the English a monopoly of the Balinese spice trade. The Dutch, needless to say, were furious when they discovered this. Markham (ed.), pp. 109-10.

to enforce against the Dutch traders.) Grotius defended his integrity by pointing out that the Portuguese action against which he had argued was a unilateral restriction on the trade of second powers, while in the instant cases, to hold that a Malay community could not deal away its right to trade with a third state in return for Dutch political protection would violate the liberty of all political societies to enter into binding treaties. Negotiations broke down, as they did again in 1615, without an agreement being reached.⁵¹

Since the Dutch rights rested upon treaty engagements, it was against the legal validity of such treaties that the English were forced to argue in 1613 and 1615. The legal argument appears to have assumed the capacity of the Malay communities to make treaty commitments which would bind them internationally; the argument was directed instead against the assumption of the Dutch that any treaty terms agreed to between two parties could be binding in international law against third parties. Grotius recognized the 'unequal' nature of these Dutch-Malay bargains, and apparently felt constrained to treat them as different from 'equal' treaties in some ways. Although he found that 'unequal' treaties might impair sovereignty, he was quite clear that they do not do so *ex jure*.⁵²

The English writer, Richard Zouche, on the other hand, was very reluctant to find such treaties entirely conformable to the 'Law between Nations'. After defining such law in general terms, in words that would appear to include the Malay princes in the class of those 'who hold sovereign power', he noted that

... no reason can be found why it should not be lawful to enter into treaties of commerce and the like with the heathen for the common advantage. . . Yet an exception must be made . . . if war is to be made on men of the same religion. . . . [*i.e.*, *Christians*].

In his careful phrasing he seems to be unable to reach the conclusion that such treaties as the Dutch were making with the Malay sultanates were not valid, but it is apparent that he was reluctant to agree to their validity.⁵³ It is interesting to note that as late as 1650, when Zouche's work was

⁵¹G.N. Clark, 'Grotius's East India Mission to England', 20 GS (1934) 45 at pp. 76, 79-80; Blécourt, pp. 431, 433; Hall, p. 238. An excellent detailed treatment of the legal points appears in Alexandrowicz, chapter 3, esp. pp. 57-9.

⁵²Grotius, *Belii ac Pacis*, pp. 130-6, 394-7, 403, 516; cf. Alexandrowicz, pp. 149-51.

⁵³Richard Zouche, *Iuris et Indicis Fecialis, Iuris Inter Gentes et Quaestionum de Eodem Explicatio* (1650) (J.L. Brierly, transl.), Baltimore, 1911, pp. 1, 101.

first published, the desirability of the unity of Christendom against those of other religions was felt to have some bearing on the rules of international law. While both practice and theory seemed to be tending in the direction of including non-Christian communities in the family of states contemplated by international lawyers and comprehended in international law, progress in that direction appears to have been reluctant on the part of Zouche. Grotius also was conscious of differences between Christian and non-Christian powers, but his interest seems to have been primarily political, and he unquestionably included non-Christians in his concept of membership in the international community and as able to enter into mutually binding treaties with Christian powers.⁵⁴

Ousting the Portuguese; Trade War

The position of the English merchants in Malay waters was equivocal. Since England had made peace with Portugal in Europe, it was no longer convenient for the English to pose as military allies of the Malay rulers in actual military action; Portuguese licences were forthcoming for trade in the spice islands under their control. Thus it appeared to the English desirable to stabilize the political situation in the area in order to secure favourable conditions for peaceful trade. Yet, since the Dutch regarded themselves as being at war with Spain (and therefore Portugal) in the early seventeenth century, and since the most powerful Malay rulers were antagonistic towards the Portuguese,⁵⁵ it was very difficult for the English to compete against the Dutch in trying to gain the confidence and trade of the Malay sultanates in areas not directly under Portuguese control. It is not surprising, therefore, that the English merchants on occasion behaved towards the Portuguese in a less than friendly manner.

The tenth voyage of the English Company in 1612, while not typical, may certainly be taken as indicative of English attitudes in the East. Departing from England in February 1612, the fleet of four vessels engaged in several battles with Portuguese and non-European shipping off India between October 1612 and January 1613. Arriving in Atjeh in April 1613 the fleet was welcomed by the Sultan and the Dutch factors. On 14 May, some Portuguese arrived in Atjeh with an (Atjehnese?) Ambassador from Johore (the Atjehnese had, at this time, just entered into active hostilities

⁵⁴Grotius, *Belii ac Pacis*, pp. 397, 402-3.

⁵⁵There were occasional Portuguese representatives even in Atjeh in the early seventeenth century. Cf. Foster (ed.), pp. 100-1. But Portuguese diplomatic intercourse with the Malay powers on a basis of peaceful equality seems exceptional.

against Johore). Leaving one of their number on board their ship, the Portuguese went ashore, presumably to conduct the Ambassador safely to the Atjehnese Court. The English thereupon overpowered the lone sentry, and seized the Portuguese vessel.

Upon this action, the King [of Atjeh] sent a messenger to Captain Best, to ask. . . whether he intended to act the part of friend or foe. Captain Best satisfied the messenger that his intentions were friendly; and on the following day . . . presented him [the King] with the junk, everything on board her being intact. The King kindly accepted the gift.

A short time later the Sultan granted the English the privilege of erecting a new factory in one of his Sumatran dependencies, and confirmed the exemption from customs duties which the English claimed by virtue of the agreement between Captain Lancaster and the Sultan of Atjeh in 1602. In view of the lack of specific information it is difficult to comment on the Atjehnese action of accepting as a gift the English present of a Portuguese ship taken under such conditions, but the role of the English, then ostensibly at peace with Spain and Portugal, seems to be not above reproach.⁵⁶

The Dutch, in their relations with Portugal in the Malay Archipelago, made no pretence to friendship, nor did the Portuguese expect otherwise. Evading a Spanish blockade, a Dutch fleet of twenty-one ships left the Netherlands in 1601. Near Sumatra, a small unit of this fleet was told of a Portuguese attempt to blockade Bantam in order to prevent the Dutch trading there. Five Dutch ships attacked the thirty Portuguese vessels blockading Bantam roadstead, and on Christmas Day 1601 the Portuguese fled. Following up this victory, the Dutch established their military superiority over the Portuguese in the spice islands, and defeated a Portuguese attempt to rid themselves of their enemy, Johore.⁵⁷

In 1606 the Dutch were in a position to attack Malacca directly. Accordingly, on 17 May 1606 the Dutch Admiral Matelieff de Jonghe concluded a treaty of military alliance with the Johore authorities.⁵⁸ The Johore negotiator wished to exchange his help against the Portuguese in Malacca

⁵⁶Markham (ed.), p. 228 (Journal of Ralph Crosse), at pp. 228, 233-43, 250-5.

⁵⁷Purchas, Vol. V, pp. 197-226, contains a good summary of Dutch-Portuguese rivalry and instability in the early seventeenth century. A more modern Dutch account is in Vlekke, pp. 117-20.

⁵⁸Valentijn, Part II, 15 JSBRAS (1885) 135. The text of the treaty is on pp. 136-7. It is also in B. Bort, 'Report of Balthasar Bort on Malacca', (1678) (M. J. Bremner, transl., C.O. Blagden, intro. and notes), 5(1) JMBRAS (1927) 1, pp. 10-12. The Dutch text is in Heeres, Vol. I, pp. 41 et seq.

EUROPEAN DISRUPTIONS: OUSTING THE PORTUGUESE

for Dutch help against Atjeh, but this proposal could not be accepted by the Dutch, whose relations with Atjeh were quite profitable and friendly in 1606. An ambiguous compromise was therefore reached in the key article of the treaty: 'Both parties promise to assist each other faithfully against the Portuguese and Spaniards, but not in the case of a war with another nationality, unless it be to stand upon the defensive only'. Other articles of the treaty were concerned with the division of spoils: the Dutch were to gain Malacca in the name of the States General, 'but the surrounding country will be under the King of Djohor' except for such 'as we may require to fortify the town'. The relations which were to obtain between the Dutch and Johore after the capture of Malacca involved a Dutch monopoly of Johore trade, as it was provided that '[n]o other Dutch or European merchants may trade in the countries of the King [of Johore], without . . . leave from our [Dutch] Governor at Malakka . . .'. Malacca was besieged both on land and sea by the combined Dutch-Johore forces from May to August 1606. Meanwhile, the Portuguese Viceroy of India, having been commanded 'by the King [of Portugal] to take Achen [Atjeh] . . .; and then to goe and spoile Jor [Johore] and chastise the Moluccas for giving the Hollanders traffique. . .', appeared. His forces sacked the city of Atjeh and after a short battle off Malacca, forced the Dutch fleet to retire; the fruitless siege was abandoned. While the Portuguese were celebrating their victory, Matelieff appears to have fallen upon their fleet and done considerable damage. A second Portuguese relief fleet was defeated in September 1606. The Portuguese were never again to be able to withstand the Dutch at sea in the region.⁵⁹

After the failure of the siege of Malacca, Matelieff returned to Johore where a second treaty was negotiated which, based on the provisions of the first treaty, adjusted Dutch-Johore relations in the light of the failure of the military venture and the lack of spoils to be divided. It seems to have been the Dutch position in the negotiations that the part of the first treaty that envisaged Dutch sovereignty in Malacca became 'void', but that all other terms, including the military alliance and the Dutch monopoly of Johore trade, should remain in force. Eventually, however, entirely new terms seem to have been reached by which, in return for a personal loan from Matelieff (this was to save Matelieff difficulties in the Netherlands;

⁵⁹The foregoing account is taken principally from Purchas, Vol. IV, pp. 21-2 (William Finch's Journal), and Motley, *The United Netherlands*, Vol. IV, pp. 387-91. Since Motley's tale is taken from Dutch sources (see *ibid.* p. 393 note 114) the account in Purchas has been preferred where the two are inconsistent. See also Purchas, Vol. V, p. 219.

he was not empowered to spend public funds), Johore was to provide the Dutch with such goods as the Dutch required. Dutch trade was to be permitted in Johore, apparently on monopoly terms; Dutch vessels were to come within the authority of the Sultan of Johore when in his territory; the terms of the compromise military alliance were to be continued, each party to assist the other in cases of defence.⁶⁰

The defeat of Matelieff's siege did not diminish the pace of Dutch advance elsewhere in the Archipelago, nor did the Dutch abandon hope of capturing Malacca from the Portuguese. In November 1608 the Dutch seized a Portuguese ship off Malacca and attempted to renew the siege. Johore's power being at the time otherwise disposed, the Dutch made an unsuccessful attempt to lay siege without their help. On 14 January 1609 they were joined by twelve Johore ships, but the Dutch Captain soon lost interest and moved on to the Moluccas.⁶¹

While it would be perhaps fruitless to enumerate in detail the various Dutch attacks on Malacca shipping and abortive sieges which occurred all through the second, third and fourth decades of the seventeenth century, the effects of this constant Dutch harassment of the Portuguese headquarters in South-East Asia are worth noting. As early as 1612 it was noted by a British observer on the scene that Malacca's position as a trade centre had been ruined, and that the Portuguese were already cutting down their stocks in the factories dependent upon Malacca in Patani and Thailand.⁶² By 1637 it appears that a Dutch ship was stationed a mere two leagues outside Malacca roadstead, attacking Portuguese shipping.⁶³ Although the Portuguese were able, in 1629, to inflict a last crushing defeat on Atjeh,⁶⁴

⁶⁰Valentijn, Part III, 16 JSBRAS (1886) 289 at pp. 293-4. Heeres, Vol. I, pp. 77 et seq. See also Bort, p. 13, where part of the second treaty of 1606 is set out as follows: '... all the articles contained in the agreement... dated May 17... are confirmed. But since it has not pleased God Almighty that we should as yet have been able to conquer the town of Malacca, and therefore certain clauses on both sides cannot be maintained... the parties will postpone such to a further opportunity....'

'And, since it is necessary for the furtherance of the commerce of their subjects... that the States [*General of the Netherlands*] should have a secure and safe place for the collection and safe keeping of their goods... his Majesty the King of Johore shall give to the States or their Captain such a place as they shall desire... that they may... possess it in place of Malacca...'. Matelieff was a Director of the United Company. Motley, *The United Netherlands*, Vol. IV, p. 227.

⁶¹Purchas, Vol. V, pp. 220-2. Apparently the Dutch were aided by a group of Sallates; however, the reference is not clear. On the Dutch advance elsewhere, see Vlekke, pp. 122 et seq.

⁶²Peter Floris, *Voyage to the East Indies in the Globe, 1611-1615* (W.H. Moreland, ed.), London (Hakluyt Society), 1934, p. 42.

⁶³Manrique, Vol. II, pp. 18-19.

⁶⁴Danvers, Vol. II, pp. 228-32; Vlekke, p. 122, sees this defeat as marking the beginning of Atjeh's downfall as a military power in the Straits area.

and this display of Portuguese power was apparently sufficient to attract Perak and Pahang into the Portuguese camp for a time (Pahang seems to have considered itself an equal ally of Portugal),⁶⁵ it was clearly insufficient to avert the impending catastrophe. In 1636, when the Sultan of Atjeh seized and imprisoned the Portuguese representative at his capital, the Portuguese were unable to retaliate, and when the Dutch blockaded the Straits of Singapore in that same year, communication between Malacca and the East was cut. Pressed by Dutch attacks in Brazil, the Portuguese were unable to support their Far Eastern possessions, and when the Dutch and Atjehnese finally appeared as allies before Malacca, the end of Portuguese dominion in the Malay Peninsula was in sight.⁶⁶

The English, although allied with the Portuguese in their military activities in India since 1635, did not go to the aid of Portuguese Malacca, and even the home country was in no position to send the urgently needed men to help defend this centre of Portuguese influence.⁶⁷

NON-EUROPEAN DISRUPTIONS

Thailand

When the Portuguese first arrived in Malacca that city was disputing a Thai claim to suzerainty. The relations of Thailand with the other Malay sultanates in the Peninsula were by no means clear.

At the end of the sixteenth century Pahang and Patani were observed to be tributary to Thailand, thus presumably some sort of Thai authority extended further south in the Peninsula. But whether that authority had any more tangible manifestations than tribute, whether Thailand claimed any right to control practical affairs in Pahang and Patani, is not clear. Indications are that more tangible rights were not openly exercised, as Thai territory itself was reported to begin only some 120 miles north of Patani.⁶⁸ Since this last observation may have been made on the basis of ethnic and

⁶⁵Danvers, Vol. II, pp. 232-3, 235.

⁶⁶Danvers, Vol. II, pp. 258-66. The Dutch and Atjehnese had co-operated in blockading Malacca as early as 1633. By 1640 the position of Portuguese Malacca was considered hopeless. Ibid. pp. 269, 278.

⁶⁷Ibid. p. 240. The rivalry between the English and Dutch in the Malay area had reached a peak with the Dutch judicial killing of an English trading group in Amboina in the Moluccas in 1623. Purchas, Vol. X, pp. 507-22. As early as 1608 it appears that the Portuguese were reduced to sending children to Malacca as troops. Cf. letter, Hugh Lee to Thomas Wilson, W. Noel Saintsbury, p. 172. An impressive account of the collapse of the Spanish Empire in the mid-seventeenth century is in J.H. Elliott, *Imperial Spain* (1963), New York (Mentor Books), 1966, pp. 329-45.

⁶⁸Linschoten, pp. 120-1.

cultural indications alone, it cannot be given much weight as evidence of political or legal relations. To the seventeenth century lawyer, the mere payment of tribute, if not detracting otherwise from the ability of a government to act for itself in international affairs, would not have meant that the tributary government should be regarded by third parties as legally incapacitated in international relations.⁶⁹

When the English established a factory in Patani in 1612 there does not appear to have been any effective political authority active in Patani which depended on Thailand for guidance in the conduct of Patani's external relations,⁷⁰ nor does Thailand appear to have taken any interest in the politics and dynastic struggles of Patani and Pahang at this time.⁷¹ Yet this was apparently not due to mere inattention, for there was a Thai Ambassador in Atjeh in 1613 leading an influential, although not actively political, role in that Sultanate's affairs.⁷² When the British and Dutch engaged in fighting in the waters reckoned (apparently by all) to be within Patani in 1619 the Thai did not seem to take any notice. This must be contrasted with the Thai response in 1624, when the Portuguese were compelled by Thai insistence to return a Dutch ship which they had captured in Thai waters.⁷³

But apparently the Queen of Patani felt herself to be under some form of Thai authority for, in 1632, taking advantage of Thailand's preoccupation with internal difficulties and complications with Portugal, she expressly declared her independence of Thailand. The Thai thereupon attempted to assert what they felt to be their legal right to control in Patani, but their expedition was unsuccessful.⁷⁴ Although Patani, by granting factories to the Dutch and English in the second decade of the century, and by successfully withstanding a Thai expedition in 1632, may be said to have established a claim to independence whatever might have been its previous relation with Thailand, the Thai were not willing to allow their claimed dependency to relieve itself of its obligations so easily. In 1634 a stronger expedi-

⁶⁹Grotius, *Belli ac Pacis*, p. 136.

⁷⁰John Anderson, *English Intercourse with Siam in the Seventeenth Century*, London, 1890, pp. 48-56; Floris, pp. 32-40.

⁷¹Floris, pp. 41, 72-3.

⁷²Markham (ed.), pp. 249, 252, tells of discussions between the English and the Thai Ambassador in Atjeh in April or May 1613. The Thai Ambassador interceded successfully to procure a pardon for an Englishman who had been condemned to death by an English jury in Atjeh in 1613 for drawing his sword against the leader of the English trading fleet.

⁷³Wood, pp. 167-8; W. Blankwaardt, 'Notes Upon the Relations Between Holland and Siam', 20 *JSS* (1927) 241 at p. 249.

⁷⁴Wood, pp. 177, 179.

tion was sent. Although this second Thai expedition was also unsuccessful, sufficient pressure was built up to influence the Queen of Patani to accede to Dutch advice in 1636 and submit peacefully to Thai pretensions to ultimate authority.⁷⁵ There is little question that after 1636 Patani was universally regarded as a part of Thailand. Patani authority at this time extended formally as far south as the territory drained by the Trengganu river, although it appears likely that control of this area was in fact in the hands of a Johore or Pahang chief.⁷⁶ There is no indication of Thai control south of Patani on the east coast of the Malay Peninsula in Portuguese times.

On the west coast, that is in the sultanates centred round the rivers of the Peninsula draining into the Straits of Malacca, the situation was less clear. The Portuguese regarded Kedah, and probably even the Selangor territory as being under Thai authority.⁷⁷ But in the relations of Kedah with the Dutch and with Atjeh in the early seventeenth century the Thai seemed to play no part. The Dutch treated Kedah as independent in its external affairs at least as early as 1642, when a bilateral treaty was concluded directly between the Dutch and Kedah.⁷⁸ Still, the Dutch apparently felt it advisable to contract with the Thai in 1664 for permission to trade in the Peninsula north of Kedah.⁷⁹ In 1674 a Thai tribute mission arrived in Kedah to collect its tribute. When the Dutch intervened the Thai envoys seem to have quitted Kedah without securing it.⁸⁰ Apart from the fact that in its attack on Patani in 1634 the Thai appear to have had the power, and presumably the legal right, to press the Kedah troops into their service,⁸¹ there seems to be no record of successful Thai assertions of authority or control south of Ligor in the seventeenth century. But it should be borne in mind that the absence of documentation does not necessarily imply that nothing was in fact happening. Thai exactions of tribute may well have

⁷⁵Ibid. pp. 179, 180; Blankwaardt, p. 249.

⁷⁶M.C. ff. Sheppard, 'A Short History of Trengganu', 22(3) *JMBRAS* (1949) 1 at pp. 9-11; cf. Pires, Vol. II, p. 263.

⁷⁷Barbosa, Vol. II, pp. 164-5.

⁷⁸R.O. Winstedt, 'Notes on the History of Kedah', 14(3) *JMBRAS* (1936) 155, at p. 164; Heeres, Vol. I, p. 364.

⁷⁹Blankwaardt, p. 252; Heeres, Vol. II, p. 280. The treaty does not mention Kedah by name, although Ligor, Kedah's immediate northern neighbour in the Peninsula at this time, is explicitly mentioned. Thus, it may be doubted that the Dutch intended to acknowledge Thai authority in Kedah at all. Whether this can be used to cast doubt on Thai conviction of their own authority must remain doubtful in view of the lack of information and records from Thailand. See Chapter 3 notes 44 and 45.

⁸⁰Thomas Bowrey, *A Geographical Account of Countries Round the Bay of Bengal, 1669 to 1679* (R.C. Temple, ed.), Cambridge, 1905, p. 266 note 3.

⁸¹Winstedt, *Kedah notes*, p. 162.

taken place in the Peninsula without the knowledge of Europeans there. The total destruction of the capital of Thailand by the Burmese in 1767 makes a search of Thai records impossible.⁸² Still, the available evidence seems to indicate that by the latter half of the seventeenth century Thai authority did not extend in any very stable form south of Patani (including the Trengganu territory) in the east, and south of Ligor in the west.

It is interesting to note that the affairs of Thailand's claimed Malay provinces were, in the Thai bureaucracy, subordinate to the Thai Ministry of War until at least 1658.⁸³

Malay Sultanates

It may be remembered that upon the conquest of Malacca by the Portuguese in 1511 the Malay Sultan, Mahmud Shah, and his retinue were forced to flee. His resistance to the Portuguese did not end until his death. At that time, the leadership of the Malays who were still loyal to the old Malacca Sultan passed to his two sons, one of whom, Raja Muzaffar, established himself as Sultan in Perak, and the other, Ala'u'd-din Riayat Shah II, claimed succession to the rights the Malacca Sultan had had in Johore.⁸⁴ Thereafter, Johore led the non-Atjeh Malay opposition to the Portuguese in the Peninsula, sometimes in cooperation with Perak and other Malay sultanates in the Peninsula and Sumatra (all of which, except Perak, being regarded as in some measure subordinate to the authority of the Sultanate of Johore as successor to the Malacca Sultanate) but occasionally as a single power.⁸⁵ To complicate further the political picture in the Peninsula, the increasing power of Atjeh, first making itself felt in Johore's Sumatran territorial dependencies, appears to have been employed against Johore as much as against the Portuguese. Even Ligor joined in the struggles against the Portuguese.⁸⁶

⁸²Wood, p. 249.

⁸³G.E. Gerini, 'Historical Retrospect of Junkceylon Island', 2(2) JSS (1905) 1 at p. 18.

⁸⁴See above notes 9 and 11.

⁸⁵A completely reliable account of the history of Malay politics in the Peninsula in the sixteenth century does not appear to be available. The nearest approach appears to be F.J. Moorhead, *A History of Malaya and her Neighbours*, London, 1957, Vol. I, pp. 195 et seq. The works of R.O. Winstedt, particularly his 'A History of Malaya', 13(1) JMBRAS (1935) 1, and his 'A History of Johore (1365-1895 A.D.)', 10(3) JMBRAS (1932) 1, are useful but rather out of date in places, and of less value due to lack of bibliography and citation. Some demonstrably misleading assertions cast doubt upon the reliability of some assertions whose (unattributed) sources cannot be found and checked. However, since Dr. Winstedt is recognized as a leading authority on Malayan history, it has seemed wisest to accept his assertions of fact throughout except where convincing contrary evidence is available.

⁸⁶Cf. Danvers, Vol. I, pp. 454-5, telling of Muslims attacking Portuguese trade in Ligor in 1540-1.

Major attacks on Malacca by the Malay powers headed by Johore occurred in 1550-1, when a coalition of Malay rulers from Bantam, Perak, Pahang and other places was held off, and in 1586, when attacks and a blockade led by Johore forced the Portuguese to retaliatory and preclusive action. Johore was invaded and worsted. Seeing the Portuguese taxed to the limit of their power, the Atjehnese, who never seem to have been able to form a stable military alliance with any Malay power, attacked Malacca themselves, but withdrew due to internal problems in Atjeh. Freed by the Atjehnese attack from the immediate pressure of the Portuguese attack on Johore, the Malays attacked again, but were defeated by Portuguese reinforcements from India, which temporarily defeated Atjeh also and dispersed the Johore fleet. The Portuguese attacked Johore again, and sacked its capital in August 1587.⁸⁷

Illustrative of the complexity of the relations among Portugal, Atjeh (the political arm of Arab and Indian trade resisting European inroads) and Johore (the Malay Sultanate following traditional Malay approaches to politics), are some events of the early seventeenth century. Matalieff's 1606 defensive treaty with Johore had no direct result, as further Dutch efforts in the Archipelago were directed at areas other than those involved in peninsular politics. One indirect result, however, was apparently to convince Atjeh that the time had come to win its dispute with Johore for dominance in the area. Johore's demonstrated willingness to deal with the Dutch again showed that the interests of Atjeh and Johore were incompatible. The existence of an uncontrollable Sultan, accepted as legally competent to speak for Johore, was a threat to Atjeh to the extent he dealt in matters affecting commerce, however indirectly, with Europeans.

Johore attacked Pahang in June 1612, apparently to bring to heel the Sultan (Abdul-Kadir Alaedin Shah), who, at least in the opinion of the Sultan of Johore, had been insufficiently respectful. The Sultan of Pahang was husband to a sister of the Sultana of Patani. Nonetheless, Patani appears to have been antagonistic to the ambitions of Pahang, perhaps for reasons of Thai interest. The Sultan of Pahang therefore kept his wife near him in Pahang, probably as an inhibition to both Patani and to Johore (which as an ally of Pahang would have liked to avoid fighting Patani) and spread the word about that Borneo (the Sultanate of Brunei) was preparing to aid Pahang against both Johore and Patani.⁸⁸ Affairs re-

⁸⁷Danvers, Vol. I, pp. 494-5, Vol. II, pp. 64, 69, 70-3; Macgregor, 'Johore Lama', *passim*.

⁸⁸Floris, pp. 41, 81.

mained precarious until the next fighting season when, in June 1613, Atjeh broke the stalemate by attacking Johore and putting the Sultan to flight.⁸⁹ The Sultan's brother was seized, carried off to Atjeh, married to a daughter of the Sultan of Atjeh, and returned to Johore by the Atjehnese who supported his pretensions to the dignity of Sultan of Johore.⁹⁰

The following year, 1614, Atjeh again invaded Johore and took the Sultan prisoner (which Sultan is not clear; presumably the old, 'legitimate' one), and forced him to stay in Atjeh, where he eventually died. His dynastic successor was harried throughout the old Malacca-Johore territories, driven out of Lingga by Atjeh in 1623, and died in 1637. In 1634 the Dutch appear to have regarded Johore and Pahang as part of the dominions of Atjeh. Nonetheless, on the death of the Sultan of Atjeh the then active heir to the Malacca-Johore dynasty apparently rallied his followers and in 1639 the Dutch made a treaty with him, as Sultan of Johore, for military co-operation against the Portuguese in Malacca.⁹¹

Elsewhere on the west coast in the sixteenth and early seventeenth centuries the influence of trade centering around Atjeh brought some wealth and stability. Perak, with a society and dynasty descended from the Malacca Sultanate, co-operated with Johore in the 1550 attack on Malacca,⁹² and appears to have been otherwise active in dynastic and commercial affairs, eventually bringing about the animosity of Atjeh. In 1575 Perak was captured by Atjeh, which thereafter sought to monopolize Perak's tin and spice trade. Perak appears to have remained strongly under the influence of Atjeh after this, although apparently retaining its identity as a separate political entity.⁹³

At the end of the sixteenth century Kedah appears to have been entirely independent.⁹⁴ But its location as a commercial rival to Malacca, more congenial to Muslim traders than the Portuguese city, led the Portuguese to regard its trade as a fit object of attack. A Javanese trader was taken by

⁸⁹Markham (ed), pp. 255-6. Some twenty Dutchmen were taken captive in Johore by the Atjehnese in this action, and several others were slain in the fighting. Cf. Floris, pp. 77, 81, 87.

⁹⁰Floris, p. 102. The lady is identified as the Sultan of Atjeh's sister by R.J. Wilkinson, 'Events Prior to British Ascendancy', *Papers on Malay Subjects, History, Part I*, Kuala Lumpur, 1908, p. 49.

⁹¹Ibid. pp. 49-50; Wilkinson's dates may be a slightly inaccurate. There is evidence that the Sultan of Johore was a highly honoured guest in Atjeh in June 1615. Purchas, Vol. IV, p. 284 (Journal of John Milward). See also C.A. Gibson-Hill, 'On the Alleged Death of Sultan Ala'u'd-din...', 29(1) *JMBRAS* (1956) 125.

⁹²Danvers, Vol. I, p. 494.

⁹³Moorhead, p. 198.

⁹⁴Linschoten, Vol. I, p. 103.

THE ORDER OF THE PENINSULA TO 1640: EUROPEAN APPROACH

the Portuguese off Kedah in 1612, and in 1613 a Portuguese mission returning from Thailand attacked and sacked the ports of Kedah and Perlis. Since the Portuguese mission had just received permission from Thailand to construct a fort anywhere in that region, (in recognition of Portuguese help in fighting against Burma) it must be concluded either that Portugal did not regard Kedah as a part of the Thai dominions at this time, or that Kedah had forcibly resisted a Portuguese attempt to carry out the concession granted by Thailand, thus denying Thai authority.⁹⁵ In subsequent activities in the Peninsula, Kedah seems to have taken little active part.⁹⁶

In 1619 both Kedah and Perak were reduced to a state of direct subservience by Atjeh, at least for a time.⁹⁷

THE ORDER OF THE PENINSULA TO 1640

The three major cultural groups interacting in the Malay Peninsula in the first four decades of the seventeenth century felt their rights to act there to be based on concepts of order and political relations that were remarkably diverse. To the Europeans, the problem of defining the basic unit of international intercourse, the state, was the centre of attention, and the legal rights of the state in Christendom to deal with analogous political units governing territory outside of Europe and people who were not Christian was the subject of considerable thought. To the Thai, the central problem seemed to involve how to handle the visiting Europeans in Thailand. As long as traditional Thai rights in the Peninsula were not disturbed, the Thai seemed oblivious of the threat posed to those rights by continued European activities and the European emphasis on finding in each scrap of territory a sovereign from whom commitments could be obtained.

To the Malays, as the power of Muslim traders receded the emphasis on the forms of independence was related to notions of dignity, and the concentration on dynastic issues led the sultans to tread lightly in commercial matters in return for immediate help in the matters of greater concern. It would be useful at this point to pause for a moment to examine some of the implications of these approaches.

The European Approach

The seventeenth century was, in Europe, a time of flux in political relations. The Peace of Westphalia in 1648 was a landmark of European poli-

⁹⁵Danvers, Vol. II, pp. 155, 164. Perlis was under the control of Kedah at this time.

⁹⁶Cf. Bowrey, p. 261.

⁹⁷R.O. Winstedt, 'History of Kedah', 81 *JSBRAS* (1920) 29 at p. 31.

tical organization and legal thought.⁹⁸ Before 1648, however, it may be said that in matters of political and economic power the sixteenth century European prince did not conceive himself to be legally restricted to any great extent in his behaviour towards his contemporary princes, although in theory there were some restrictions.⁹⁹ Those restrictions concerned with the right to wage war were apparently considered by most writers of the sixteenth and seventeenth centuries to apply in theory not only to transactions of European sovereigns *inter se*, but also to transactions between European and non-European sovereigns.¹⁰⁰ But during the seventeenth century at least, a concept of the unity of secular Europe (or, occasionally, Christendom) appears to have emerged. In this way, the groundwork was laid for differentiating in law between the group of European states, whose relations *inter se* were governed by international law, and groups of communities outside of Europe, whose relations *inter se* appear to have been of no concern to the text-writers, but whose political and economic relations with European states were at this time still considered to be more or less within the general international law system as defined in Europe. The substantive rules of this international law system were assumed to be the rules applied by European states *inter se*, generalized to include all international transactions wherever occurring, whoever the 'states' parties.¹⁰¹ Precedents, by which the particular laws governing

⁹⁸A. Nussbaum, *A Concise History of the Law of Nations*, rev'd ed., New York, 1954, pp. 115, 117.

⁹⁹See, e.g., Butler and Maccoby, pp. 107-14, in which the theory of *bellum justum* from St. Augustine to the time of Grotius is analysed. See also *ibid.* p. 162.

¹⁰⁰See above notes 20 and 21. Cf. also Samuel Rachel, *De Jure Naturae et Gentium Dissertationes* (1676) (J.P. Bate, transl.), Baltimore, 1916, p. 157 (somewhat qualified on pp. 164 and 173-4); Johann Wolfgang Textor, *Synopsis Juris Gentium* (1680) (J.P. Bate, transl.), Baltimore, 1916, pp. 6-7, 251-2; Samuel von Pufendorf, *De Officio Hominis et Civis Juxta Legem Naturalem* (1673) (F. Gardner Moore, transl.), New York, 1927, *passim*, esp. pp. 103-5; Pufendorf, *De Jure Naturae et Gentium* (1660) (C.H. and W.A. Oldfather, transl.), Oxford, 1934, pp. 967-8; cf. also W. Wynn, *The Life of Sir Leoline Jenkins...*, London, 1724, Vol. II, pp. 790-1, letter from Sir Leoline Jenkins (Privy Counsellor 1679-84) to the King, 11 February 1680: '... Moors and Turks... cannot be proceeded against as Pirates..., but are to have the Privileges of Enemies in an open War...', because the rights of Government are recognized in the Algerian community 'as well by several Treaties of Peace and Declarations of War, as by the Establishment of Trade and even of Consuls and Residents among them by so many Princes and States, and particularly by your Majesty...'.
¹⁰¹E. Nys, 'La Nation et le Rôle de l'Europe en Droit International', 5 *RDILC* (2d Ser.) (1903) 57, 111 at p. 121; cf. Grotius, *Belli ac Pacis*, p. 403. Rachel, on p. 164 wrote: '... Now not all nations are known; so how can there be any manifestation of the consent... of all of them about any arbitrary matter? Indeed, I do not think that all known nations are under the obligation of this Law. And although there may be certain principles of a common Law of Nations which bind all the more cultured of known peoples, still I will not make any general assertion to that effect about any Law of Nations'.

The idea is expanded on pp. 173-4. 'Now in my view the Law of Nations, properly so called, is to be considered as made up of two parts, Common and Peculiar [*proprium*].... I

some political transactions were evidenced, occasionally included contemporary transactions between European and Muslim rulers with no apparent distinction being made between these precedents and those established by intra-European transactions.¹⁰²

One modern writer argues persuasively that the lawyers, the 'natural law' theorists, basing their views of international law on 'reason', treated all 'states' as equal and tended to find non-European political groups to be as much 'states' as European groups. The other major group of European lawyers, the 'positive law' theorists, basing their views of international law on consent, found the consent of non-European governments to the principles of international law difficult to infer, and thus tended to exclude non-European political groups from equality with European states. His researches lead him to the conclusion that the natural law theorists generally set the tone of international law as conceived in Europe until the early nineteenth century, when positive law theory achieved dominance.¹⁰³ It should be borne in mind that there were in fact two opposed theories of international law influencing European actions in the Malay Peninsula, although both groups of theorists during the seventeenth century supported the validity of treaties between European and non-European communities, and neither went so far at that time as to support assertions of European rights in the Malay Archipelago over the active dissent of the governments established there.

call that Common which many, or maybe most, nations—at any rate the more cultured ones—use, and by which they are linked together.... It would, then, be permissible, according to Grotius, to sub-divide what we have called Common Law of Nations into the part which is of wide operation... and the part... which obtains only among the more cultured peoples, or Christians'.

The sections in Grotius to which Rachel refers here include certain distinctions relating to the use of poisoned arrows in war and the fixing of an arbitrary time limit as the minimum for possession to amount to capture in war. Grotius, *Belli ac Pacis*, Book 3, chapter 4, note 16, and Book 3, chapter 6, note 3. The equating of 'cultured peoples' with 'Christians' seems significant. See also Textor, p. 252: '... The treaty of the Emperor Charles V with the Bey of Tunis against the Turks was lawful, but the treaty of King Francis of France against the Christians was unlawful; because the latter enured to the hurt of the whole Christian commonwealth...'.

¹⁰²For example, Textor, pp. 6-7: '... [i]f on one occasion only anything touching peace or treaties has been observed as binding under the dictates of Reason, between the Romano-Germanic Empire and the Turkish, between the Kings of Spain and France, between the British and Dutch... etc., nothing hinders us from declaring it to be part of the Law of Nations.'

Pufendorf, *De Jure Naturae*..., pp. 967-8, cites an instance involving Ceylon to argue for the interdependence of states in matters of defence. He clearly views his natural law as universally applicable because based upon reason. His citation of precedent is not a part of an inductive reasoning process, but is used to confirm the natural principle he perceives intuitively.

¹⁰³Alexandrowicz, p. 235.

Since, despite the seeds of theoretical difference, European concepts of international behaviour were applied by Europeans in their relations with the indigenous governments of South-East Asia in the seventeenth century, one vital development in the substantive law of Europe of this time must be noted. This was the shifting of an acceptable *casus belli* from grounds of justice to grounds of pride, or, to put it more bluntly, expediency.¹⁰⁴ This feeling on the part of the European powers involved in the affairs of the Malay Peninsula after 1641, that political or economic ends could properly be sought by means of force, was, thus, merely an extension of the European international morality of the time to contacts between European and non-European polities without any differentiation of legally justifiable behaviour being attempted on the basis of differences in culture.

Even where differences in culture were considered, the principal theorists of the seventeenth century felt that these differences did not justify a difference in concepts of law to be applied in international contacts. However, differences in culture did exist, and even some natural law theorists noted that in some cases intra-European relations might be viewed in a different light from relations of European powers with powers of different civilization.¹⁰⁵ But because the dominant natural law concept of inter-

¹⁰⁴Butler and Maccoby, pp. 115-17. Of course, legal excuses were still sought for hostilities in Europe, but they became centered about 'insults to the flag'. Cf. Cornelius Bynkershoek, *Questionum Juris Publici* (1737) (Tenney Frank, transl.), Oxford, 1939, *passim*. It appears that the Anglo-Dutch wars of the middle and late seventeenth century were ostensibly fought to safeguard the respect due the English flag in 'British seas': 'What matters this or that reason', said an Englishman at the time of the second Anglo-Dutch war. 'What we want is more of the trade which the Dutch now have'. Quoted in A. T. Mahon, *The Influence of Sea Power Upon History*, London, 1890, p. 107. As shall be seen, the Dutch claims that Malacca was entitled of right to certain trading advantages and control of Straits shipping, may be viewed as a legal camouflage to justify the imposition of trade restrictions by treaty on the Peninsula's Malay sultans. While the need for legal camouflage may be taken to indicate the feeling that there were restrictions on the right of states to use force to achieve their ends, it must be agreed that this camouflage was so flimsy as to cast doubt upon the effectiveness of the feeling as a material restriction on behaviour. Nussbaum, pp. 129-30, points out that the legal safeguards which grew up in Europe around the conduct of hostilities during the period between the Peace of Westphalia (1648) and the Congress of Vienna (1815) seem to reflect the position of hostilities as a political game, rather than a matter of protecting legal rights. The customary use of war in the eighteenth century, and even the nineteenth and twentieth centuries up till the Pact of Paris (1928), as an extra-legal (*i.e.*, political) measure, merely 'a legally recognized reaction against a legal wrong', is asserted in Oppenheim, Vol. II, 7th ed., London, 1952, p. 178 note 4.

¹⁰⁵Suárez wrote in *Selections from Three Works (De Triplici Virtute Theologica...)* (1621), sec. 1 paras. 9 and 10, that the Christian faith does not give men 'the privilege of violating the *jus gentium*'. However, he added that if unbelieving princes resist the introduction of Christian preachers and missionaries into their territories 'they may be coerced', although cautioning that preachers sought to be imposed by 'arriving' with an army may arouse reasonable apprehensions with regard to their purposes, and 'hence, even as a general rule [*the unbelievers*] may justly defend themselves'. See above note 20. Both Gentili, publishing in 1588, and Richard Zouche, publishing in 1650, use Greek, Roman and Hebrew precedents in

national law in Europe included a world-wide scope of operation, it was to be expected that such differences as might develop between intra-European legal rules of conduct and rules applicable between Europeans and non-Europeans would logically be regarded both as parts of this 'international law'. It is important to note, thus, that practices obtaining in relations between a European state and a Malay government, while undoubtedly defined by Europeans as being within the world-wide system of international law in the seventeenth century, were not necessarily considered to form binding precedents, or even to be evidence of universal norms of legal behaviour. Similarly, precedents of intra-European transactions were not necessarily taken to be legally binding as norms applicable to the activities of European interests in the Malay area.

The Thai Approach

In the seventeenth century the external relations of Thailand, so far as they are pertinent here, were in practice of two entirely different sorts. Towards the European representatives with whom Thailand came in contact, and towards Atjeh, intercourse and intrigues at this time did not as a rule differ markedly from the intercourse of European powers *inter se*.¹⁰⁶

their expositions of the law of nations; however, both were troubled by the differences between Christian and Muslim polities of their own times. Gentili expressly holds it lawful to conclude treaties of commerce with 'the Turks', but is silent as to other treaties (*Hispanico Advocationis*, p. 117; *De Iure Belli*, p. 401). Zouche concurs with Gentili regarding treaties of commerce, but says that to this general rule 'an exception must be made if the heathen are likely to derive great increase of strength from such an alliance; much more if war is to be made on men of the same religion...'. Zouche, p. 101. See Alexandrowicz, chapter 5.

¹⁰⁶Anderson, *English Intercourse*, is the standard work on these affairs. Another work of very great interest which supplements Anderson in important ways is Maurice Collis, *Siamese White*, London, 1936. Until internal change resulted in the ousting of English and French commerce from Thailand in 1688, a fourway European rivalry for Thai trade, involving the Portuguese, Dutch, English and French, had degenerated into a complex network of political intrigue. Louis XIV even had a grand scheme to convert the King of Thailand to the Roman Catholic faith. See E.W. Hutchinson, 'The French Foreign Mission in Siam during the XVII Century', 26 *JSS* (1932) 1. Atjeh sent Muslim missionaries to Thailand in 1668. Wood, p. 196. On Thai Missions to Europe, see Fr. P. Carretto, 'Vatican Papers of the XVII Century', 35(2) *JTRS* (1944) 173. Thailand was threatened with force by the English Company in 1687, and so great was the King's appreciation of the niceties of European political organization at this time that he declared war on the Company while stating his view that this did not imply war with the state of England, and non-Company Englishmen in Thailand at the time were apparently not adversely affected. See Wood, p. 209.

It is not proposed to analyse the very complicated seventeenth century political intrigues in Thailand in this work, and the interested reader is referred to the works cited. With the close of direct intercourse with the British and French in 1688 and 1691 respectively, Thailand became isolated from important European political influence. *Ibid.* p. 220. The Dutch maintained their tin monopoly, originally granted by Thailand in 1664 and renewed in 1688. *Ibid.* pp. 217-18. The Dutch factories in Thai territory languished, however, and those in Ligor and Ayutthia were closed in 1706. The factory at the capital was reopened in 1747, and the concessions renewed in 1755, but with the sack of the capital by the Burmese in 1767, and

In its relations with the Malay sultanates of the Peninsula, however, there appeared to be less sophistication. Although the Thai territorial authority does not seem to have been accepted further south than Patani on the east coast and Ligor on the west, tribute was certainly exacted from most of the sultanates in the Peninsula.¹⁰⁷ The Thai-appointed ruler of Ligor, the most powerful of the Malay-populated peninsular territories, was nominally responsible for the good order and tribute of the southern Malay communities. It appears that the Thai never concerned themselves at all with the internal affairs, or even the external affairs, of the more southerly Malay sultanates, but that some right to authority in at least Kedah was felt to exist was demonstrated in the Thai impressment of Kedah troops into the force sent to subdue the Patani uprising in 1634.¹⁰⁸

There are reasonable grounds for conjecture that the relations between the Thai and the Malay communities of the southern Peninsula were amorphous; that the Thai had grounds in past practice to regard the Malay polities as being in a sort of vassalage, in which the ultimate authority of Thailand was recognized by the passage of tribute but in which the day to day management of affairs was traditionally left to the head of the Malay community. Whether the Malay chief is better viewed as having acquired his authority from his own people, merely confirmed or passively accepted

a last gift of cannon by the Dutch in 1770, the last remnant of commercial intercourse between Thailand and Europe ceased. See Blankwaardt, 'Notes upon the Relations between Holland and Siam', pp. 254-7.

The only lasting effects of the seventeenth century intrigues in Thailand appear to have been the popularizing of firearms and their manufacture, and the creation of a group of Christian, Portuguese-speaking inhabitants. During the period 1767-1809 Thailand was trading principally with China, and China was the only foreign country maintaining formal political relations with Thailand. There were, however, Indian merchants still trading there, so it must be presumed that Thailand was never totally ignorant of developments elsewhere in the world. In 1809, following a Burmese attack on Junk Ceylon Island (Ujong Salang), Thailand appears to have contacted the British and the Portuguese in order to buy arms, but European attention does not appear to have been attracted to Thailand until 1818, when the Portuguese entered into a treaty and sent a Consul to Bangkok. Prince Damrong Rajanubhab, 'The Introduction of Western Culture in Siam', 20 *JSS* (1927) 89 at pp. 92-5. Catholic missionaries, apparently without political influence, were present in greater or lesser numbers throughout this period except for a few years (1779-82), when they were forbidden the kingdom by royal decree. Gerini, p. 45.

¹⁰⁷Gerini, p. 121. See also the excellent and detailed history of Thai connexions with the Malay States drawn up as an argumentative brief by Henry Burney, British negotiator of a treaty with Thailand in 1825-6 at Bangkok. H. Burney, *The Burney Papers*, Bangkok, 1910-14, Vol. II, Part IV, pp. 122-211, esp. pp. 124-7, 132-7. Passage of tribute to Thailand even from Johore in 1718 was reported by a European traveller. Alexander Hamilton, *A New Account of the East Indies* (1727), London, 1930, Vol. II, p. 85. The date is reported erroneously by Hamilton as 1719. See *ibid.*, Vol. I, p. xxxi. See also J. Crawford, *Journal of an Embassy from the Governor-General of India to the Courts of Siam and Cochin China...*, London, 1830, Vol. I, p. 45.

¹⁰⁸See above. Winstedt, *Kedah notes*, p. 162.

by Thailand, or as having acquired it by some revokable delegation of Thailand, thus being legally dependent to some extent on some form of subservience to Thailand, is not clear. The legal situation probably varied from sultanate to sultanate and over time. In the northern sultanates of Kedah and Kelantan at least, some Thai acknowledgement of the propriety of succession seems to have been required before a new Sultan could legally assert authority.¹⁰⁹ But whether the acknowledgement was revokable, and whether in any case it was accepted as legally necessary by the genealogy-minded Malays, are doubtful.

The legal implications of the tribute which was passed by most, if not all, of the Malay sultans to Thailand during the seventeenth and eighteenth centuries, are equally cloudy. This tribute took the form of a gold and silver 'tree', called in Malay the *bunga emas*, whose value has been so variously reported that it seems safe to say that it served primarily a symbolical function and the value was not a matter of uniform practice. But it seems impossible to determine the extent to which the passage of the *bunga emas* was conceived by the parties to imply any degree of submission to the recipient's authority or control. Not only did Thailand itself send the *bunga emas* to China at least as late as the early nineteenth century,¹¹⁰ but it is interesting and instructive to note that on his ascending the throne of Thailand in 1851, King Mongkut wrote to the (British) Government of the Straits Settlements his intention to 'send . . . you . . . some golden and silver flowers which, by custom of Siam, are presents for information of new enthronement or recent crown of country . . .'.¹¹¹ There is no likelihood at all that Thailand intended to indicate any form of political submission to Great Britain by this gift.

The extent of Thai rightful authority in Kedah has been described as including tribute and 'contributing in war to the assistance' of Thailand 'in men, arms, and provisions by immemorial usage',¹¹² and it is believed that this description is accurate. In the other Malay territories south of

¹⁰⁹Kedah: cf. James Low, 'An Account of the Origin and Progress of the British Colonies in the Straits of Malacca', 3 *JIA* (1849) 599 at p. 610; Kelantan: cf. W.A. Graham, *Kelantan, A State of the Malay Peninsula*, Glasgow, 1905, pp. 47-8. Of course Kelantan was still part of the Thai satrapy of Patani in the seventeenth century, as was Trengganu. Cf. Sheppard, pp. 9, 11.

¹¹⁰J. Anderson, 'Political and Commercial Considerations Relative to the Malayan Peninsula and the British Settlements in the Straits of Malacca' (1824), 8 *JIA* (1854) 134 at pp. 150-2. Whether Thailand considered herself as under rightful Chinese authority is doubtful, as would be the precise degree of that authority even if a scintilla were conceded to exist.

¹¹¹G. Cœdès (ed.), 'The English Correspondence of King Mongkut', 20 *JSS* (1927) 1 at pp. 3-4. The letter was repeated a month later in almost identical words. *Ibid.* p. 9.

¹¹²Crawford, Vol. I, p. 45, Vol. II, p. 217.

Kedah in the west coast and Patani (including Kelantan and Trengganu) in the east, there does not appear to have been any evidence of Thai control beyond the Malays' obligation of sending the *bunga emas*. Since there is plentiful evidence, as shall be seen, that all of these southern sultanates felt capable of treating with external powers without reference to Thailand in the seventeenth century and after, and since the Thai do not appear to have objected to the practice, it may be supposed that Thai rights fell short of the rights of a sovereign in those territories as those rights were defined in European concepts of international law.¹¹³

Thai relations with the Malay sultanates, while undoubtedly those of a superior with an inferior, in practice did not seem to have involved a concept of complete political subordination. But precisely how closely Thai rights may be said to have approached sovereignty must, for lack of information, remain a matter of conjecture. Thai authority appears to have been greater in Kedah than in any of the territories to the south,¹¹⁴ and Thailand seems to have been fully sovereign in Ligor and Patani in the seventeenth and eighteenth centuries. It is not proposed to analyse here the changes in the details of Thai relations with these territories. The impression given is that of Thailand conscientiously feeling able to assert rights of control in the Peninsula amounting to sovereignty in Kedah and, although with less certainty, perhaps over all the Malay sultanates. At the same time the Malays apparently felt no kinship with the Thai, and used every reasonable opportunity to assert their complete independence of Thai authority.¹¹⁵ When this was realized by British observers in the early nineteenth century it was described by some as a self-asserted licence in Thailand to wreak havoc whenever she had the force available, and by

¹¹³Grotius, *Belli ac Pacis*, pp. 102, 130-7; Vattel, p. 11. Of course, there are gradations of 'sovereignty' recognized by the international law of Europe which do not differ markedly from the gradations felt by the Malays and the Thais (*ibid.* p. 20) and which have generated similar arguments as to legal right. See A.P. Rubin, 'The Sino-Indian Border Disputes', 9 *ILCQ* (1960) 96.

¹¹⁴Although Kedah appears to have been under strong Atjehnese influence in the mid-seventeenth century—in 1619 the Atjehnese defeated Kedah and took its Sultan captive (Winstedt, *History of Kedah*, p. 31)—this Atjehnese authority is regarded by some later writers as a mere hiatus in an otherwise more or less continuous Thai domination. Cf. Burney, Vol. II, Part IV, pp. 128-9.

¹¹⁵The relations were not stable. For an excellent general review see Burney, Vol. II, Part IV, pp. 122-62. That outline is truly remarkable for its overall accuracy and impartiality. In his later writings Burney is not so reliable. Although this summary contains some errors in detail, it remains the most impressive work on the subject. Considering the time it was written and the state of knowledge and emotional forces at play (cp. this part of Burney with Anderson, 'Political and Commercial Considerations...') it must be considered an extraordinary work.

others as giving rise to a situation in which the Malay chieftains were consciously using British ignorance to further their own petty aims in the Peninsula through contracting treaties with the British which they, the Malays, had no legal right to conclude without Thai authority.¹¹⁶ Both these views appear to have been equally reasonable interpretations of the picture presented by the state of relations between the Malay sultanates and Thailand until the nineteenth century.

The Malay Approach

Two legally significant principles seem to have underlain Malay actions: first, that treaties are binding only to the extent the personalities and motives on both sides remained the same; and second, that war was a normal recourse to solve public disputes of any kind. Both of these inferences rest in part on negative evidence. In the first case the evidence is the absence of any record of written treaties between Malay sultans prior to the introduction of European treaty practices. It has already been noted that in Majapahit the acts of the ruler did not bind his successor. Furthermore, in the practice of the sixteenth and early seventeenth century, although many treaties between Malays and Europeans were concluded, there are no examples of those treaties continuing beyond the achievement of their initial purposes. In the second case, although the motives for war may be deduced from the surrounding facts, there seem to be no examples of formal declarations of war; the motives appear frequently to have been dynastic or commercial, well-known to the opposing side; and no practice of publishing legal-like rationales for resorting to hostilities appears to have existed. Of course, it is possible that some 'insults' were felt to require a military response. But it does not appear to have been necessary to base a military response on an allegation of insult. There appears to have been a generally loose practice of forming and dissolving military alliances, and shifting from friendly to hostile relations and back, as immediate interests changed.

These practices of the Malays proved confusing to the Europeans, whose treaty practice was conceived as leading to stability and whose insistence

¹¹⁶Compare Anderson, 'Considerations', 1 *JIA* (NS) (1856) 299 at p. 304; Burney, Vol. II, Part II, p. 121, Minute by Governor Fullerton of Penang, at p. 127; Crawford, *Journal*, Vol. II, p. 217; with Burney, Vol. II, Part IV, pp. 135-7; Crawford, *Journal*, Vol. I, p. 246; and Low, 'Account of the Origin and Progress of the British Colonies...', 3 *JIA* (1849) 609, p. 616.

on stating a *casus belli* was evidenced, as noted above, as early as D'Albuquerque's first appearance at Malacca.¹¹⁷

¹¹⁷Alexandrowicz, pp. 83-184, analyzes in great detail the treaty practice and theory of Europeans acting in South Asia. He also notes that treaty relations existed between the two major Muslim Empires of Persia and the Ottoman Turks in the sixteenth century, but in general his researches confirm the accuracy of what is stated above to have been the approach to treaties taken by the Malay sultans.

The Frustration of Dutch Power

THE CAPTURE OF MALACCA

By 1640 the Portuguese possession of Malacca was very precarious indeed. The Perak tribute (paid in tin) was no longer forthcoming, and although one-third of the tin production of the Peninsula still flowed through Malacca as the most convenient port, the remaining two-thirds apparently left Perak and Kedah via Atjeh, where it was split between the Atjehnese and the Dutch. The Dutch had also succeeded in ousting the Portuguese from trade with Johore.¹

In preparation for the attack on Malacca the Dutch had solicited the help of Atjeh and Johore. Atjeh had refused help,² much to the disappointment of the Dutch who, while unwilling to let Atjeh have a greater share of the tin trade, seemed anxious to preserve good relations with that still powerful trading kingdom.³ Johore reportedly sent a contingent of 2,000 men, some of them Menangkabau, all of whom seemed willing to help end the Portuguese power in Malacca. Apparently about 1,500 of these men, as well as some forty ships, constituted the Johore contingent in the actual siege.⁴

In June 1640 a Dutch fleet was commissioned by the Governor-General in Batavia (Djakarta, Java) to capture Malacca 'from the Portuguese, our hereditary enemies, not only for the expansion of trade, but to strengthen our influence and prestige over the neighbouring Indian monarchs . . .'. The commander of the Dutch fleet was instructed to give preference whenever possible to Atjeh over Johore 'because of the great commercial benefits we derive now and hope to derive from them in future'. Far from

¹Baretto de Resende, 'Account of Malacca' (1638) (W.G. Maxwell, ed.), 60 *JSBRAS* (1911) 1 at pp. 7, 11. Tin from Perak was the most lucrative product of the Malay Peninsula until the twentieth century. Cf. Ginsburg and Roberts, *Malaya*, Seattle, 1958, chapter 10, esp. pp. 391, 400.

²Valentijn, Part IV, 22 *JSBRAS* (1890) 225 at p. 226.

³P.A. Leupe, 'The Siege and Capture of Malacca...' (Mac Hacobian, transl.), 14(1) *JMBRAS* (1936) 1 at pp. 36-7.

⁴*Ibid.* p. 35; Valentijn, Part IV, pp. 226, 231.

wooing the Menangkabau, the Dutch Commander at Malacca was ordered to warn them 'not to assist the Portuguese' at the risk of being 'assaulted'.⁵ Three months later, the Commander of Dutch forces at Malacca told the Governor-General that the Menangkabau were 'very faithful to us'.⁶

In December 1640, while the siege of Malacca continued, the Duke of Braganza made a successful bid for the throne of Portugal, and after some sixty years Spanish domination of Portugal was ended.⁷ In the state of communications obtaining between Europe and South-East Asia at this time, of course, the news could not have reached Malacca or Batavia for several months.

In January 1641 Malacca fell to the Dutch assault. Although the Johore contingent did not take a direct part in the final assault, it was considered to have obeyed orders and been very helpful to the Dutch.⁸ On 24 January 1641 jurisdiction over the territory of Malacca was decreed to lie in the States General of the United Netherlands and the Prince of Orange, and the Portuguese Crown's rights of property were assumed by the United Dutch East India Company. Great results were expected to follow, as the demonstration of Dutch force was apparently expected to induce Atjeh, as a gesture of friendship, to grant the Dutch trading rights in the west coast of Sumatra.

Twenty-one slaves were released by the Dutch in Malacca, apparently contrary to a Dutch undertaking to deliver them to 'the barbaric Moores' (Johore?). In the Dutch view, '[s]uch unChristianlike and inhuman acts would have kindled the wrath of God on this city and its Government inviting all sorts of plague'.⁹ Parenthetically, one can but wonder at the circumstances which the Dutch had originally felt would justify their having given the undertaking to their allies and what were the advantages which prompted their un-Christianlike promise. One can also wonder what this demonstration of Dutch observance of their treaty obligations meant to the people of Johore.

⁵Leupe, pp. 12, 17-18, 20. Letter of the Governor-General to the Commander in Chief of the Malacca fleet, dated 29 July 1640. As to *casus belli*, it may be remembered that by this time the Dutch had been at war with Spain more or less continually for some sixty years, and Spain included Portugal.

⁶Ibid. p. 33. Letter dated 9 November 1640.

⁷Livermore, pp. 279-80.

⁸Letter of the Governor-General in Council to the Directors of the Dutch Company dated 31 January 1641. Leupe, p. 48. Cf. Valentijn, Part IV, p. 231.

⁹Leupe, pp. 47, 48 and 50. Batavia's abhorrence of slavery in 1641 was not shared by many in the world at that time. Dutch merchants were leaders in the African slave trade. See C.R. Boxer, *The Dutch Seaborne Empire: 1600-1800*, New York, 1965, p. 239.

THE CAPTURE OF MALACCA

The Dutch Commander's order that the defeated Portuguese be granted full freedom was criticized by Batavia as being 'contrary to all customs and rules of war', although this order was credited with helping to avoid an undisciplined pillaging of the city.¹⁰

On 7 September 1641 Justus Schouten, the Dutch Commissary in Malacca, wrote a long report to the Governor-General in Council. In it, after noting that the original Portuguese policy of coercion in their attempt to gain control of the trade of the Straits of Malacca in the early sixteenth century had failed, and that until the arrival of British and Dutch antagonists Portuguese Malacca had flourished as a free port, he recommended that kindness, not coercion, be the rule in Dutch treatment of Malay traders, and that supremacy at sea be maintained by the presence of a strong fleet.¹¹ The Governor-General favoured the principle of this part of Schouten's report, for he wrote to the Directors in Holland on 12 December 1641 that he and his Council 'favour the idea of free trade in Malacca', but felt it necessary to reserve government monopolies in pepper and a part of the tin trade.¹²

It may be noted that this Dutch Government monopoly of part of the trade of the Peninsula was apparently related in Dutch thinking to their possession of Malacca. In the development of Dutch concepts of their authority in the Peninsula, this basic link of Dutch right to control trade with Dutch control over only one of several possible channels of trade should be distinguished from other Dutch rights arising out of treaty or usage but not tied to control over Malacca.

In his report Schouten went to some length to describe the political situation in the Malay Peninsula. It is apparent that despite Dutch efforts, no reconciliation between Johore and Atjeh could be immediately

¹⁰Letter of Commissary Justus Schouten to the Governor-General dated 19 February 1641. Leupe, p. 58. See also letter by Governor Van Twist of Malacca to the Governor-General in Council dated 17 February 1641. Ibid. p. 52. See also ibid. p. 12, in which the first Dutch Commander at Malacca was empowered in 1640 to employ only 'all approved methods and tactics of warfare' (emphasis added). Karl Marx, in *Capital*, (1890 ed.), London, (Everyman), Vol. II, pp. 833-4, sets forth a radically different version of the fall of Malacca, but his citation to T.S. Raffles, *History of Java and its Dependencies*, London, 1817, does not support it, nor do the works cited here or those of any other authorities that have come to my attention.

¹¹The letter appears in Leupe, pp. 69-144. See esp. pp. 100, 136. The description of the commercial system of Portuguese Malacca is, of course, not entirely accurate, but seems to be rather a generalization of later Portuguese policy, when all hope of coercion had been lost as the Dutch achieved command of the seas. It is somewhat more accurate if viewed as a statement of Portuguese policy towards the Menangkabau territories near Malacca.

¹²Ibid. p. 60.

achieved.¹³ Some sort of *modus vivendi* between those two antagonistic powers was made a short time later after the death of the ruler of Atjeh, the economic decline of Atjeh making it somewhat more amenable to Dutch wishes. Eventually a treaty was negotiated between the two territories, which included the express condition 'that they should never send Ambassadors to each other' and that each party 'should remain within the boundaries of his . . . country, and refrain from all hostilities'.¹⁴ This appears to be the first example of a written treaty between two Malay powers, and the hand of the Dutch interest in the stability of the area is too clear to allow it to be regarded as a spontaneous development.

In the Peninsula itself the Dutch seem to have been interested primarily in the Menangkabau communities surrounding Malacca. Schouten states that the villages of 'Ringy' and Naning had been under the rule of Malacca as 'vassals' of the Crown of Portugal. Muar and Rembau he considered to be under the rule of Johore. Apparently the title of Temenggong was attached by the Portuguese to their officer entrusted with liaison between Malacca and the Menangkabau villages, but Schouten seemed to think that this office carried with it the right to exercise coercive power in the Menangkabau communities. Apparently he was wrong, but he appeared genuinely puzzled by the unrest in Naning and Ringy, which he attributed to the rebellious nature of the Menangkabau and their contumacious disobedience of their lawful chiefs. It is not clear whether his remarks on the failure of coercion by the Portuguese in Malacca were meant to apply to Portuguese contacts within the Peninsula as well as in the Straits. In these circumstances, it is difficult to determine just what Schouten felt to be the appropriate policy with regard to Naning and Ringy when he advocated that they should be governed by the Dutch in Malacca exactly as they had been governed at the time of the Portuguese. It seems quite clear, however, that he imagined a considerably larger control to lie of right in the Government of Malacca than was likely ever to have been exercised by the Portuguese (or even the Malacca Sultanate) in the Menangkabau area.¹⁵

Peace was concluded in Europe between the Dutch and Portuguese on 12 June 1641. The Portuguese were thus ostensibly excluded from the hostilities still in progress between the Dutch and Spanish. This treaty fixed

¹³Ibid. pp. 72, 75, 76.

¹⁴Indicative of Dutch negotiating leverage with Atjeh, at one point the Queen even had to give the Dutch the late King's jewellery in partial satisfaction of his debts. Valentijn, Part IV, pp. 236, 237.

¹⁵Leupe, pp. 73, 88-9, 88, 100, 117-18, 133-4; cf. T. Braddell, 'Notes on Naning', 1 JIA (NS) (1856) 194.

that date, 12 June 1641, as determinative of rightful possessions in the East, and thus, since the Dutch achieved control of Malacca the previous January, the Portuguese claims to Malacca were legally terminated by the Dutch conquest.¹⁶ The Portuguese did not appear again as an organized influence in the political affairs of the Malay Peninsula.

FRUSTRATIONS ARISING FROM MALAY CONCEPTS OF LAW

Naning

Having secured a peninsular headquarters with the capture of Malacca, the Dutch moved quickly to define their political position and improve their economic position in the Peninsula. The first steps were directed towards the achievement of physical security for Malacca and a definition of Malacca's territory in the surrounding area. To this end a mission was sent to Naning. An oath of some sort of allegiance was taken from the Naning people, and a provisional Temenggong, as liaison officer, was appointed to convey Dutch demands to the Menangkabau. A Malay was installed by the Dutch as chief of Naning.¹⁷

Apparently these Dutch-appointed officials were not considered by the Menangkabau Malays of Naning as having any rightful authority; but whether the objection was to the violation of the Menangkabau constitution in their appointment, or the violation of that constitution in their assertions of authority is not clear. It seems the Dutch assumed that the principal difficulty was that the Naning people did not recognize the form of the Dutch appointment, and later, on 15 August 1641, a treaty was concluded between the Dutch and four tribal chiefs of Naning by which the Menangkabau officials promised fidelity to the Dutch authorities and acknowledged Dutch jurisdiction over Naning in certain cases.¹⁸

But the unsuitability of the Naning constitution for the imposition of control from above soon made itself apparent. In 1643 Naning, with the

¹⁶Danvers, Vol. II, pp. 273-4.

¹⁷H.P.N. Muller, 'The Malay Peninsula and Europe in the Past' (P.C. Hoynck van Papendrecht, abstr. and transl.), 67 *JSBRAS* (1914) 58 at p. 73; Schouten's Report, Leupe, p. 73.

¹⁸The Dutch were to receive some of the property of the deceased in cases of intestacy or judicial killing. A tithe on Naning agricultural production was to be sent to Malacca. It is doubtful if these indicia of sovereignty, for they were certainly meant to be such by the Dutch, can have been regarded as implying any degree of subservience by the Naning people further than the acts themselves. Heeres, Vol. I, pp. 349 et seq.; Newbold, Vol. I, pp. 198-9; the treaty is set out *in extenso* in Bort, pp. 56-60. In Bort's report, only three Naning Chiefs were indicated to have signed the treaty.

encouragement of the neighbouring Menangkabau community of Rembau was reported to be '... in a very rebellious and disorderly state, refusing to obey their chief... on account of the banishment by the Dutch of one of their chiefs... ; and complaining that the administration of justice was not according to their customs'.¹⁹

An expedition was sent into Naning in 1644 headed by the Dutch Governor of Malacca himself. Governor Van Vliet was well greeted by the people of Naning, and he in turn exhorted them to lead an industrious life in order that 'malignity would... be entirely eradicated'. Six points were laid before the four tribal chiefs, including, in addition to a tithe on rice, Dutch control over the selection of tribal chiefs, public demonstrations of obedience by the people towards their chiefs and the chiefs towards the Dutch, and a provision that labourers from Naning should be obliged to clear part of the river route between Malacca and Naning (presumably to make the Dutch exercise of control easier). The principal objection of the Naning people appears to have been over forced labour (which was really not excessively onerous), for they said, 'they considered themselves as his [*the Dutch appointed Penghulu (Undang) Naning's*]... subjects, not his slaves'. The Penghulu of Naning affirmed to the Dutch that his authority was limited and that he had no power to command obedience. The Dutch, however, seem to have doubted this, and at their insistence the Naning people were made to agree in full to the terms. It is not clear whether their approval was unanimous; however, Van Vliet seemed confident as he wrote: 'everything at Naning has turned out to our wishes. Rajah Merah [*the Penghulu*] and the chiefs were very submissive, and the inhabitants very obedient to our orders'.²⁰

Van Vliet then proceeded to Rembau to continue his course of 'eradicating malignity', but so great was the disturbance among the Menangkabau occasioned by his visit to Naning that he was forced to return in somewhat unseemly haste to Malacca before the malignity in Rembau had been completely eradicated. Remembering that Rembau was subject to Johore, the Dutch then requested the Sultan of Johore (Abdu'l-Jalil Shah) to pacify his people. The Sultan, however, apparently realized that his power over Rembau was in fact not as extensive as the Dutch assumed. As was clearly demonstrated in Naning, the mere payment of tribute and yielding of some jurisdictional authority did not seem to carry any impli-

¹⁹Newbold, Vol. I, pp. 199-200.

²⁰Ibid. pp. 202-4, 208. Van Vliet's own report is Newbold's principal source. Quotes are from Newbold's translations of the Dutch documents.

cation of overall authority or legislative power to anyone under the Menangkabau constitution or concepts of government. He excused himself explaining that the Menangkabau were really under the Bendahara whom, at the insistence of the Dutch, he sent to pacify them.²¹

This attempt at pacification apparently did not bear the fruits of peace, for an expedition of six Dutch soldiers, going to Nanning in 1644 to force the return of some 'black Christians' who had been held by the Menangkabau since the fall of Malacca, was ambushed by Rembau men and slaughtered. In response to this action the Dutch sent out a force of 300 men on 8 February 1645 'to attack and exterminate the men not only of Romboow but of Nanning also, because they had combined and united with the former since the aforesaid treachery and massacre . . .'. The Dutch burned a few huts, but found it impossible to follow up their advantage.²²

In February 1646 a Dutch force of over 500 men occupied and razed Nanning village, but had to return to Malacca when their supply lines were threatened. The Dutch therefore appear to have been quite surprised when a short time later the Nanning people asked for terms although they were not under immediate pressure. Although no question appears to have arisen as to the desire of Nanning for terms, it is interesting to note that the Menangkabau people who signed the basic treaty appear to have been Rembau officials. Nanning magnates agreed to the undertaking also and renewed their agreement to the treaty of 1641.

The Draconian terms dictated by the Malacca authorities were condemned as excessive by the Governor-General in Batavia in view of the Dutch provocation of the Menangkabau people. Batavia ordered the remission of the capricious death penalty which had been stipulated for Rembau and Nanning people (to be chosen by those communities from among their better class of people) as punishment for the killing of the six Dutchmen in 1644, but approved the other stipulations as a deterrent to possible future troubles in Nanning. In November 1646 seven Nanning officials were granted ceremonious 'pardons' in Malacca, and the Dutch strongly asserted their (Dutch) political right to authority and control in Nanning in no uncertain terms. The terms of the Nanning submission included provision for the return of Governor Van Vliet's baggage, lost in his retreat from Rembau in 1644, and return of kidnapped persons (no doubt

²¹Winstedt, *A History of Malaya*, pp. 128-9.

²²Bort, pp. 60-1.

meant to include the 'black Christians'). Naning was to pay the Dutch the cost of their military expeditions, and the leaders were to humble themselves publicly before them. The payment of 'homage, as was customary in former times' was also stipulated. The public humiliation was apparently considered achieved in the activities of November 1646. The homage, consisting of a tithe on paddy, proved to be worth less than the expense of collecting it.²³

A rather different account of the Naning difficulties of the early 1640s is put forth in another source,²⁴ which indicates a far larger role in the political affairs of the Menangkabau territories and a greater antagonism towards the Dutch on the part of Johore than is evidenced by the reports based on Dutch documents in other works. The principal facts, however, seem agreed, as it is apparent that Naning and the other Menangkabau territories at this time played a purely defensive role, resisting Dutch attempts to assume authority over them by adherence to their traditional constitutional systems, and resisting force with force when necessary. The degree of actual control exercised over any of the Menangkabau communities by Johore seems to have been slight, although relations between those territories and Johore appear to have been close, and Johore appears to have been considered, of right, somehow superior to the Menangkabau communities. Despite the seeming political dominance of Johore, the constitutions of the Menangkabau territories appear to have prevented the exercise of any significant political or economic control sought to be imposed from above, and the Sultan of Johore appears to have been aware that his position in Menangkabau territory was primarily ceremonial.

The Dutch did not abandon their efforts to consolidate the authority in Naning to which they seem to have felt themselves entitled by inheritance from the Portuguese. In 1652 they took the opportunity of reprimanding the chiefs of Naning for having carried out a judicial killing without Dutch permission. In reply, a small amount of paddy was sent to Malacca ostensibly as the overdue tithe, but actually probably as a bribe

²³Ibid. pp. 62-5, 67-8; Winstedt, *A History of Malaya*, pp. 124-9; Heeres, Vol. I, pp. 481-3; Newbold, pp. 213, 215-6. The account in Newbold of the Naning difficulties in 1644 is very amusing indeed, being told largely in the words of the Dutch themselves. It is strongly reminiscent of Washington Irving's Knickerbocker history of New York which humourously relates the actions of the Dutch in Nieuw Amsterdam at this period. Newbold's account is repeated by several later writers, but occasionally with a humourless, anti-Dutch arrogance which makes rather distasteful reading. This is particularly marked, and, in view of the troubles between the British and Naning at the time, ironically naive in P. J. Begbie, *The Malayan Peninsula*, Madras, 1834, pp. 50-8.

²⁴But rather less clearly documented. T. Braddell, 'Notes on Naning', pp. 194-6.

to ensure the continued Dutch abstention from active interference in Naning's internal affairs. In 1664 the Dutch once again felt it desirable to attempt to assert their 'rights' in Naning, and a small force was sent into the Menangkabau territory to display Dutch power. Firing on a group of Menangkabau farmers driving their water-buffalo home in the evening the Dutch killed two Naning peasants and returned to Malacca, where the Governor-in-Council recorded his opinion that this activity would frighten off the Menangkabau and prevent them from disturbing the Dutch.²⁵ It does not appear that this show of force was accompanied by any attempt to assert greater control in the Naning area, and the facts that the Dutch had no effective authority in Naning, and that they felt justified in taking measures intended to increase the security of Malacca from Naning threats, coupled with the constant assertions of a Dutch right to authority in Naning, present a contradictory situation. Naning appears to have continued to pay tribute and deference to the Dutch in Malacca, while heartily resisting Dutch assertions of authority in the actual affairs of Naning.

While this state of affairs appears to have been entirely consistent with the previous Naning relations with the Sultanate and the Portuguese rule in Malacca, it seems to have left the Dutch feeling that somehow the rightful position of the rulers of Malacca was being compromised. Following another Naning rising in 1677 three Naning nobles were reported to be confined in the Dutch prison in Malacca 'for they are dangers [*sic*] and seditious men'.²⁶ In 1679 the Dutch claim to have permitted Naning to enter into a treaty with Rembau.²⁷ In 1701, in an attempt to solve the problem of Naning, the Dutch obtained from Johore, the Malay inheritor of the claims of the Malacca Sultanate, a cession of Johore's rights in Naning. While the Dutch probably felt this to give them complete legal authority in Naning, it does not in fact appear to have altered their position. In 1703 the Penghulu of Naning resigned, and the Dutch were able to have his brother elected to succeed him, but it appears that this election was effected only under Dutch pressure and in the presence of the Dutch-appointed Malay Captain from Malacca.

The tithe continued to be paid as before, at a merely nominal level, and in 1746, when the collection had fallen to a mere 200 gantangs (quarts) of

²⁵Ibid. p. 196.

²⁶Bort, pp. 94-5.

²⁷The contents of this treaty are not known. Braddell, 'Notes on Naning', p. 196. However, the text of a 1680 treaty will be mentioned below, which may be the one referred to by Braddell. See below, p. 81.

paddy per year, a fixed payment of 400 gantangs was substituted by the Dutch for the 'tenth'. On account of the poverty of Naning half of this fixed levy was remitted. It has been suggested that in fact the remission was due to Dutch inability to collect more than the Naning people were willing to pay.

The Dutch continued to send occasional military missions into Naning when unrest in that territory was felt to threaten Malacca, but whatever the causes of the supposed unrest, the Naning people remained united in their opposition to Dutch authority. Wanting merely to be left to themselves, the people of Naning apparently did not object to the Dutch preventing them from being contacted by any outsiders, and the Dutch seem to have considered their success in isolating Naning almost completely from external contacts, and the payment of nominal tribute to Malacca, as constituting a sufficient exercise of the authority to which they felt themselves entitled in Naning.

In 1758 the Dutch entered into a treaty with Johore by which the Menangkabau communities of Rembau, Sungei Ujong and Johol, which lie between Naning and Johore, were detached from Johore. Whatever Johore's rights were in these three territories (plus Naning again), they were made over to the Dutch. This treaty does not appear to have affected Naning's position except, perhaps, to restrict to some extent her contacts with her Menangkabau neighbours, but this is by no means clear. In 1776 the Dutch again raised the Naning tribute to 400 gantangs, but even this was reported to represent considerably less than a tithe of Naning paddy production.²⁸

Since one of the immediate objects of the Dutch capture of Malacca had been the establishment of control over the tin trade of the Peninsula, it is not surprising that steps towards the achievement of that end were taken almost immediately. In 1642 Johore was reportedly induced to sign away to the Dutch a right to submit all shipping in the Straits of Malacca to the west of Malacca to the requirement of procuring a Dutch passport.²⁹ However, any asserted right in Johore to exercise control over non-Johore shipping in the Straits of Malacca must clearly have been felt to derive from Johore's ancestor, the Malacca Sultanate; it appears doubtful in fact that Johore had retained until the mid-seventeenth century any effective

²⁸Ibid. pp. 196-9.

²⁹R.O. Winstedt, 'A History of Perak', 12(1) *JMBRAS* (1934) 1 at p. 26; however, Bort, p. 177, reports in 1678, 'No written treaties made with Johore since the conquest of Malacca are found in the secretariat here...'. As usual, Winstedt does not state his source.

control over non-Johore Straits shipping. But the Dutch denial of any right in Portugal to control Straits shipping and the uncertainty of all parties whether a right to control Straits shipping was a legal perquisite of the old Sultanate of Malacca, make it preferable to view the Dutch action in securing a treaty from Johore not so much as an attempt to derive control, but to end the possibility of Johore having any legal basis for disputing the actual control the Dutch must have expected to achieve themselves.

It is interesting to note that this legal action was taken by the Dutch to justify what with physical power they certainly expected themselves to enforce in any event. In fact, throughout their time of importance in peninsular affairs, the Dutch appear to have been consistent in resting their longer term claims upon treaty right. They do not appear to have hesitated to use force to obtain a favourable treaty.

Perak and Atjeh

It has been noted that after 1575 Perak was strongly under the influence of Atjeh, although retaining in form some sort of political individuality, and it has also been noted that by 1640 two-thirds of the Perak tin production was going to Atjeh, where it was being divided between the Atjehnese and the Dutch. The Dutch apparently continued receiving that share of the Perak tin through their arrangements with Atjeh, although in 1641 they had attempted, unsuccessfully, to cut off all the non-Malacca (including the Atjeh) part of Perak's tin export and monopolize the entire trade. The Dutch pressure did have its effect, however, in helping to drive out Indian traders from the Perak trade, and by 1649 the Dutch in Malacca and the Malay Atjehnese appear to have achieved an effective control over the entire commerce of Perak.³⁰

In August 1650 a treaty was entered into directly between the Dutch and Perak in which the Perak chiefs are described as 'dependent' upon Atjeh. It was negotiated in the presence of an Atjehnese official and later confirmed in Atjeh. It stipulated that Perak should be bound not to trade in tin with any other merchants than those of Atjeh and the Netherlands. The terms of the Dutch-Atjehnese tin arrangement were declared applicable to the territory of Perak, and the Dutch established a factory in Perak.³¹

³⁰Winstedt, 'A History of Perak', pp. 26-8.

³¹W.E. Maxwell, 'The Dutch in Perak', 10 *JSBRAS* (1882) 245 at pp. 246-7; Bort p. 142; Heeres, Vol. I, pp. 538-41.

In 1651 the entire Dutch staff in Perak was killed by the people of Perak. Accordingly, in 1653, the Dutch are reported to have attempted to stabilize their position in Perak by another treaty. But this treaty does not seem to have had any effect in later events.³²

In 1655, still another treaty was concluded between the Dutch and Perak (described as 'obedient to the Royal Court of Atjeh'). By this a very heavy indemnity was saddled upon Perak as punishment for the massacre of 1651, the terms of the 1650 treaty were declared to be 'in full force' and a 1651 treaty (not appearing in any known collection) was superseded. Provision was also made for a new factory to be built by the Dutch, and jurisdiction over Dutch personnel in Perak was apparently considered to lie exclusively in Dutch tribunals, as the 1655 treaty provided that 'Criminals of either nation will be punished by their own Tribunals'. All those implicated in the 1651 massacre, including the Shahbandar of Perak, were to be executed. This treaty, like its predecessors, proved to be unenforceable.³³

In July 1657 the Dutch decided to apply military pressure to both Atjeh and Perak to obtain satisfaction for the incident of 1651 and to achieve their tin monopoly. This decision was actually carried into operation in 1659, and on 23 September 1659 Atjeh capitulated and a treaty was entered into between the Dutch and Atjehnese concerning the Perak tin trade. The terms initially proposed by the Dutch were nearly identical with the terms of the 1655 treaty between the Dutch and Perak. The formal terms finally negotiated in Batavia were more moderate. The Dutch engaged to forgive the Perak nobles their part in the 1651 massacre, a heavy indemnity was to be paid the Dutch in the form of a small reduction in the fixed price of tin deliveries over a very long period of time, and the entire tin production of Perak was to be split on equal terms between the Dutch and Atjeh.³⁴

It is apparent, however, that the Dutch were unable to obtain their share of the Perak tin at the penalty price, and this attempt to fix the price of tin appears to have been abandoned in practice by the Dutch. The fact that Perak refused in practice to consider itself bound by the expressed wishes of the Government of Atjeh seems to have led the Dutch to consider the constitutional connexion between those two territories as that of a mere

³²Winstedt, 'A History of Perak', pp. 27-9. No other source found mentions this treaty. As usual, Winstedt's source is not acknowledged.

³³Maxwell, 'The Dutch in Perak', pp. 247-8; Heeres, Vol. II, pp. 77, 151.

³⁴Maxwell, 'The Dutch in Perak', p. 249; Winstedt, 'A History of Perak', p. 30; the treaty is set out in Bort, pp. 138-40; and Heeres, Vol. II, pp. 151, 568.

tributary to its feudal superior. But instead of regarding Perak as any less bound by the treaty of 1659, the Dutch seem to have sought to displace Atjeh in her economic relations with Perak, and, by 1678, to monopolize the entire tin trade except for a nominal amount which it was regarded as discreet to permit to pass as 'tribute' to Atjeh.³⁵ In 1663 the Dutch abandoned their ineffective factory and placed a naval blockade on the Perak coast. The blockade apparently also proved ineffective. In 1670 the Dinding Islands, off the Perak coast, were occupied by the Dutch for use as a military post to help enforce the Dutch blockade. By 1678 the price of tin in Malacca was some 25 per cent higher than the 1659 treaty-fixed price, which the Dutch still felt to be their legally sanctioned price for Perak tin.³⁶

Meanwhile, relations between Perak and Atjeh had become strained by the obvious inability of Atjeh to prevent Dutch interference with what Perak apparently felt to be a right to unrestricted export of tin. As early as 1663, Perak had refused to pay Atjeh any tin tribute, and had threatened to ask Johore for protection from Atjehnese force. But the hope of Johore's power being able to stand as a bulwark between the peninsular territories and external interests was not based upon a realistic appraisal of Johore's actual military position at this time. In 1664, the Atjehnese traders still appear to have been taking a large part of the Perak tin, and the Dutch blockaders were not attempting to interdict more than half of the Perak tin exports for fear of arousing the active hostility of Atjeh.³⁷

In 1663, there can be no question that the Dutch regarded Perak as being under the domination of Atjeh, although the precise legal effect of this domination seems to have been but vaguely considered. Yet, as a result of quarrels in Perak between the Dutch factor (before the factory was withdrawn) and the Perak nobles, it appears that Perak negotiators were taken to Malacca by the Dutch without reference to Atjeh.³⁸ The Dutch view of the Atjehnese at this time was not at all complimentary.³⁹

³⁵Bort, pp. 143-4.

³⁶Maxwell, 'The Dutch in Perak', p. 250; Maxwell does not cite his sources. Bort, p. 142, says the blockade was instituted in 1663 with the abandonment of the Dutch factory in Perak. Maxwell, 'Dutch Occupation of the Dindings, etc.', 11 JSBRAS (1883) at p. 169; Bort, pp. 152-60.

³⁷Winstedt, 'A History of Perak', pp. 33-6.

³⁸Direct diplomatic communication between the Dutch and Perak certainly existed by 1679. See Heeres, Vol. III, p. 217.

³⁹Renneville, Vol. VII (Voyage de Gautier Schouten aux Indes Orientales, Part II), pp. 127, 135. Gautier Schouten should not be confused with Justus Schouten, who was Commissary at Malacca in 1641. On page 131 Gautier Schouten describes the Atjehnese as: '*... malins, fiers, orgueilleux, audacieux, rusez, trompeurs, perfides, traitres, sanguinaires, ne tenant aucun compte de leur parole quand ils l'ont donnée, ni de leurs promesses, ni de leurs sermens...*'.

To trace the gradual detachment of Perak from Atjeh, if indeed, in the ever-shifting Malay politics of the Peninsula at this time, it would be accurate to speak of any Perak attachment to Atjeh in any legally significant sense, is impossible in the present state of information. Perhaps, therefore, it will suffice to note that the isolation of the Malay sultanates of the Peninsula from those of Sumatra and Java⁴⁰ appears to have been hastened in the case of Perak by the Dutch attempt to enforce an economic advantage, founded upon treaty with all the Malay parties concerned, and apparently consistent with the European view of justifiable international behaviour at the time. The attempt to apply European concepts of statehood and inter-governmental relations to the relations between Atjeh and Perak led the Dutch into gross confusions of thought and inevitable frustration of policy. To the Dutch, the ruler of Atjeh was either 'sovereign' in Perak or not. If so, then the Atjehnese were violating their treaty of 1659 with the Dutch in not effectively controlling the Dutch share of the Perak tin trade. If not, then the Atjehnese were incorrect in pretending to authority in Atjeh. In fact, it appears likely that Atjeh had a claim to political authority in Perak which included neither a right nor a legal ability to control Perak's trade with third powers. Whatever powers were exercised by Atjeh in Perak by virtue of the use of force, as immediately after the 'conquest' of 1575, it is amply clear that the Perak people did not regard Atjehnese authority as legally effective in matters of general trade. The only ways in which the Dutch could assume the rights to a share of the Perak tin within the legal framework of inter-governmental action in the Malay Peninsula at this time would appear to have been either to act directly against Atjeh's share of the trade, or to hold the Perak factory with force. Neither alternative could have been pursued without arousing the opposition of Atjeh, which, for political reasons, the Dutch were unwilling to do.

Kedah

The position of the Dutch in Kedah was similar in many ways to their position in Perak. In 1641, a Dutch envoy to Kedah obtained a promise from the Sultan, Rijalu'd-din Shah, that Arab and Indian traders would not be permitted in Kedah without a pass from the Dutch at Malacca, and that half of Kedah's tin production would be sold to the Dutch. Rights over a pearl fishery said to exist off the Kedah coast were denied the Dutch,

⁴⁰ *Tous ces peuples, savoir de Queda [Kedah], Pera [Perak], Malacca, Johor [Johore], Pahang, Patane [Patani], Ligor & quelques autres qu'on comprend encore parmi les Malais, ont beaucoup de rapport avec ceux de Java...* Renneville, Vol. VII, p. 119.

however, 'for fear of Siam'. The Dutch were unsatisfied with the operation of their concession from Kedah, and in 1642 a blockade was instituted along the Kedah coast.⁴¹

When the Sultan of Kedah died, his son and successor entered into a treaty with the Dutch on 15 July 1642 by which half of all tin exports from Kedah were to be consigned to the Dutch Company at specified fixed prices, and a system of Dutch passes issued at Malacca was to govern the external trade of Kedah. Even the vessels of the Sultan himself were to be subjected to Dutch search to avoid evasion of the Dutch treaty-based claim to half the Kedah tin export. The attempt to control the trade in the Straits by means of passes appears to have failed, as the Portuguese and English also gave their traders permission to carry on commerce in Kedah, and the Dutch requirement was apparently ignored.⁴²

In 1658 the Kedah people killed nine of the crew of the Dutch Company's yacht *Hoorn*, and shortly afterwards the Dutch retaliated by instituting another blockade of Kedah. When the delivery of Kedah's tribute to Thailand was delayed by the Dutch blockade in 1660, the Sultan apologized to the King of Thailand for it. But in 1663, the Dutch appeared to have considered Kedah somehow subordinate to Atjeh, and Kedah was not included in a contemporary description of countries subject to Thailand. The Dutch blockade was apparently in operation in 1668 and after, and was instrumental in forcing the English, in 1674, to abandon the factory they had attempted to place in Kedah in 1669. In 1673 an English ship trading to Kedah was seized and condemned in prize by the Dutch blockaders.⁴³

In 1664 the Dutch, by blockading the Menam River, managed to get a treaty from Thailand by which some trade concessions, not including any explicit reference to tin, were granted to the Dutch throughout the King's dominions.⁴⁴ It is not clear whether Kedah was intended to be included, but in view of the absence of explicit reference to the tin trade, and the Dutch view that Kedah was politically tied to Atjeh apparently to the

⁴¹Winstedt, *Kedah notes*, pp. 162-3.

⁴²Ibid. pp. 164-5; Bort, pp. 134-5; Heeres, Vol. I, p. 364. The succession in 1641 is mentioned by Winstedt, but no evidence for Winstedt's view is known. Winstedt's own genealogy of the Kedah royal family 14(3) *JMBRAS* (1936) 186 (reproduced in Skinner, Appendix A) lists Sultan Sulaiman Shah being succeeded by Sultan Rijalu'd-din Shah in 1625 and Sultan Rijalu'd-din Shah reigning until 1651. There is no completely reliable genealogy of the Kedah house. Bastin, *Personality*, p. 146 note 3.

⁴³Winstedt, *Kedah notes*, pp. 156, 166; Renneville, Vol. VII, pp. 119, 127, 135; Bowrey, pp. 266 note 3, 267 note 1 et seq. See also Muller, pp. 66-7 on the unsuccessful Dutch attempts to blockade Kedah.

⁴⁴Hall, p. 303; Heeres, Vol II, p. 280. Clause 2 of the treaty makes the trade concessions applicable in '*Siam, Ligor, Oetjang Salang en alle andere plaatsen des coninx...*'.

exclusion of Thailand, it is doubtful that the Dutch considered themselves as deriving any rights in Kedah by virtue of this treaty. That, in fact, Thailand had rights in Kedah which might have been felt by the Thai or the people of Kedah to hinder Dutch assertions of right based on the treaty of 1642 appears likely, but there does not appear to be sufficient evidence on the point to warrant any definite assertions. The rigidity of the Dutch view, which seems to have been that Atjehnese right must exclude Thai right in Kedah, appears to have been typical of the Dutch approach to analyses of the political relations of the Malay territories at this time.⁴⁵

In 1678 the Dutch still appear to have been continuing their blockade of Kedah, although a large part of the Kedah tin appears to have been successfully slipping through the blockade in English and Arab ships. An indemnity was still felt by the Dutch to be owing from the Sultan of Kedah on account of an incident in 1652 in which some Dutch officials were apparently held for ransom in that territory. The Sultan of Kedah apparently continually refused to send negotiators to Malacca or Batavia to attempt to settle matters with the Dutch,⁴⁶ and so it might be inferred that the Dutch blockade was not able to achieve its primary purpose, namely to establish Dutch rights in Kedah on a footing favourable to Dutch interests. It is amply clear that the people of Kedah did not consider the treaty of 1642 to be binding on them. But whether this was on grounds of the Kedah constitution, Malay concepts of international relations, Kedah-Thailand ties, or, as the Dutch seemed to feel, sheer refractoriness, it seems impossible to determine.

Johore

The Dutch did not, in their early years in Malacca, conclude any treaties or enter into direct relations on a governmental level with the people of Sungei Ujong and Kelang, who lived on the west coast of the Peninsula between Perak and the Menangkabau areas adjacent to Malacca. These people produced a fair quantity of tin, little of which went to Malacca, as the largest part of it entered the trade of South-East Asia via Atjeh, Bengkalis and the Malay traders of Pahang and Riau. The people of Kelang and Sungei Ujong (the tin came via Sungei Ujong) were Menangkabau, and the Dutch blockade of Naning, which was part of the Dutch attempt

⁴⁵Normally, the Dutch apparently considered as subject to Thailand only those places with Governors known to have been appointed in Thailand or Thai by race. Cf. Heeres, Vol. I, pp. 414, 415 note 2.

⁴⁶Bort, pp. 124, 134, 142.

to isolate this territory from independent external relations, also appears to have had as its object the cutting off of Sungei Ujong's tin trade with Atjeh and Bengkalis in the hope of being able to conclude an agreement with Johore which would drive the remainder of the peninsular tin trade to Malacca. Johore was considered by the Dutch to have ultimate authority over Sungei Ujong and Kelang, as over the rest of the peninsular Menangkabau communities.⁴⁷

In 1677 Naning and Rembau, among other Menangkabau territories, joined with Sungei Ujong in electing a Sumatran leader, and an attack on Malacca was begun on 27 March of that year. The attack was repulsed. The Dutch continued to consider themselves at war with the Menangkabau until 25 January 1680, when a treaty was concluded between the Dutch Company and Naning and Rembau, by which Naning agreed to pay a tithe on its produce to the Dutch and to make Malacca its only point of external trade. The Menangkabau negotiators appear in the treaty as 'Ambassadors . . . on behalf of Johore'.⁴⁸

Although the Dutch considered those two territories as being distinct, the relations between Johore and Pahang were so complex during the seventeenth century, particularly from a dynastic view, that it seems likely that no clear division between the political and economic interests of the one and the other can be made with assurance.⁴⁹

In contrast, the claims of Johore, as the descendant of the old Malacca Sultanate, to political authority in Sumatra appear to have been weakened by the obvious inability of the Johore Sultan to exercise effective control over the local magnates and merchants. In the sixteenth century the first objects of the rising power of Atjeh and its Arab merchants had been the Sumatran dependencies of the old Malacca Sultanate, and, with the decline of Atjeh, some of these Sumatran territories assumed an independence of action which made itself felt against Johore.

There can be little doubt that one of the reasons for Johore joining with the Dutch in 1640 in the assault on Malacca was the idea on the part of Johore that somehow, once the Portuguese were gone, Johore's 'rightful' position as successor to the Malacca Sultanate and as leader of the Malay political world in the area would be resumed. It might even be asserted

⁴⁷*Ibid.* pp. 68-9, 141, 186.

⁴⁸*Ibid.* pp. 68-73, 177; Heeres, Vol. III, pp. 198-209; J. McQuoid, 'Notes of Dutch History in the Archipelago', 1 *JIA* (NS) (1856) 141 at p. 174.

⁴⁹Renneville, Vol. VII, p. 119; W. Linehan, 'A History of Pahang', 14(2) *JMBRAS* (1936) 1 at pp. 29-44.

that Atjeh's failure to come to terms with Johore following the Dutch success at Malacca in 1641 was in part prompted by the Atjehnese fear of such a resurgence by Johore. In Malacca itself, the Johore officials did in fact attempt to exercise a degree of authority over Muslim traders that excited Dutch interest, and Johore's claims to authority in Malacca were believed by the Dutch to be a possible source of future trouble.⁵⁰ But in 1673, a surprise attack by the Sumatran territory of Jambi set the Sultan of Johore, Abdul Jalil Shah II, to flight. The Sultan and his followers found shelter in Pahang, and soon after he died in 1677 his successor, Ibrahim Shah, reoccupied Johore. The Dutch agreed to send an envoy to Ibrahim in Johore in 1678 to congratulate him on his accession and to 'confirm the alliance, peace and friendship always maintained between Johore and Malacca'. But, as the enmity between Johore and Jambi still continued, and Johore was reported to have 'many warships', it was felt desirable by the Dutch to keep close watch on Johore's activities, 'for the Johorites are not well disposed to Malacca and must rather be regarded as false friends'.

It is interesting to note that despite the expressed view of Menangkabau rightful subservience to Johore in the Peninsula at this time (1678), the Dutch considered themselves at war with the Menangkabau while attempting to maintain peaceful relations with Johore. It does not appear that this modification of the normal Dutch rigid application of absolute classifications to the political facts of the Peninsula excited any comment. It is clear that the supposed subservience of the Menangkabau areas to Johore in the 1640s and later did not in fact involve any right in Johore to assume any of the normal perquisites of a sovereign in that territory. Nonetheless, after the forces of Jambi had sacked Johore the Sultan of Johore requested the Dutch authorities to protect his Menangkabau territories (principally Muar) from an anticipated attack by Jambi. The authorities in Batavia agreed to 'take them over' and to keep the forces of Jambi out.⁵¹

In January 1685 the Sultan of Johore, Ibrahim Shah, died, and the policy of Johore was determined by the Bendahara, ruling in the name of a regent during the minority of the heir to the sultanate. On 6 April of that year, the Dutch entered into a treaty with Johore concerning trade in Siak, a Sumatran territory whose relations with Johore appear to have been con-

⁵⁰Bort, pp. 176-7.

⁵¹Ibid. pp. 176-8. The Dutch reckoned all those peninsular Menangkabau polities which were not rightfully under Malacca to be rightfully under Johore. Ibid. p. 69.

sidered a continuation of the subservience once owed the Malacca Sultanate. However, the Malay version of this treaty differed so widely from the Dutch version that its terms were never considered by either side to have been observed by the other.⁵²

In 1689, a Danish ship arrived in Malacca *en route* to Johore to gather a cargo of pepper. The Dutch, while attempting to dissuade the Danes from going on to Johore on the grounds that such an expedition would be useless since the Sultan of Johore had agreed to trade only with the Dutch, did not prevent the sailing of the Danish ship, which collected a cargo in Johore 'to their own and the Natives' Satisfaction'. The agreement referred to was probably that proposed by the Dutch on 9 April 1689 by which the Dutch Company was to enjoy a monopoly and toll-free trade throughout the Sultanate of Johore. But this agreement was apparently aimed at terminating the Johore and Siak trade with Muslim merchants, and the extent to which it was felt to oblige Johore to restrict its trade with other European powers is unclear. The principal object of the agreement seems to have been to secure to the Dutch a limited monopoly (specie, cloth and tin) in Siak until the young Sultan of Johore, Mahmud Shah, came of age. Even Johore's own trade with this Sumatran dependency was to be restricted to minor items and was to be subjected to Dutch inspection.⁵³

In 1691 the Bendahara died and the Sultan assumed power in Johore in his own right. He sent a mission to Batavia to request that the Siak portions of the agreement of 1689 be 'rescinded'. It is not clear whether this mission was successful. The young Sultan of Johore, who was not at all an attractive person, was slain by one of his subjects in 1699, ending the direct line of the Malacca Sultanate. His current Bendahara set himself up as the new Sultan of Johore (Abdu'l-Jalil Riayat Shah), but with the failure of the old Malacca line, and with Johore being politically weak, the position of the Johore Sultan as the natural leader of the peninsular Malays was weakened. Partially as a result of this the political developments in the Peninsula in the eighteenth century involved the splitting off from Johore's authority of the Sumatran and west coast Malay sultanates which were once under the remote authority of the Johore Sultan (or subordinate status not

⁵²Wilkinson, 'Events Prior to British Ascendancy', p. 51; Winstedt, 'A History of Johore', p. 47; Heeres, Vol. III, pp. 380 et seq. The point at issue was whether Johore had agreed to the Dutch request for trading rights in Sumatra and the Peninsula, or merely to permit the Dutch to negotiate for those rights with the subordinate local authorities. Compare Dutch draft, Heeres, Vol. III, pp. 380-1, with Malay reply, pp. 385-6.

⁵³W. Dampier, *A New Voyage Round the World (Supplement)* (1717) (John Masefield, ed.), London, 1906, Vol. II, p. 87; Winstedt, 'A History of Johore', p. 47.

amounting to legal subservience but which nonetheless influenced the dynastic and political affairs of the Peninsula until this time).⁵⁴

Conflicting Views of Law

In the foregoing narrative Dutch policy was marked by repeated attempts to find a 'sovereign', conclude a binding treaty with him, and then live by the favourable terms of the treaty until more favourable terms became advisable, at which time force would be used to extort them if possible from the Malay sovereign closest to hand with a claim to authority. Yet, as has been seen, difficulties arose as much from Dutch successes as from Dutch failures. The 'sovereign' always seemed to lack the authority to enforce obedience to his treaties in territory ruled by another Malay sultan, no matter what the appearance of subordination had been. Furthermore, even within his own territory, the Malay sultans, when one could be found with ostensible authority, did not always seem to observe their treaty commitments as perceived by the Dutch. Yet the Dutch continued to rely on treaties as the legal basis for asserting rights against Malay governments. Equally noteworthy in view of the long history of transactions and the sophisticated merchant contacts, the Malay rulers continued to consent to treaties which on their face seemed 'unequal', that is, those which gave to the Dutch more in long-term benefits than the sultans themselves received.

The two observations, that the treaties were not observed in the way the Europeans expected them to be, and the willingness of the Malays to grant apparently unequal concessions, are really two faces of the same truth: that the Malay concept of treaty was not the same as the European. It is clear that during the last decades of the seventeenth century the Malays did in fact hold treaties to be binding for a short period and while relations between the parties remained more or less the same. Evidence for this assertion can be found in Johore's sending of envoys to Batavia in 1691 to secure rescission of the agreement of 1689, as noted above, and Atjeh's reported observance in 1689 of an agreement dated 1675 granting the English tariff concessions.⁵⁵ On the other hand, Atjeh is reported in 1702 to have regarded the concession of 1675 as no longer binding, although no specific quarrel between the English and Atjeh is reported

⁵⁴Wilkinson, 'Events Prior to British Ascendancy', pp. 51-2, 56; Winstedt, 'A History of Johore', pp. 47, 50.

⁵⁵Hamilton Vol. II, pp. 54-55; Dampier, Vol. II, p. 62.

to have arisen giving Atjeh a colourable claim of right to regard the treaty as void.⁵⁶

Two Malay treaty law concepts may be posited as alternative explanations consistent with the known facts. First, it is more than likely that the Malays regarded treaties as no longer binding when the immediate purposes for which they had been concluded had either been achieved or had failed. A similar theoretical avoidance of treaty obligations had been developing in Europe at the same time in the so-called doctrine of *rebus sic stantibus*. That doctrine, by which a provision was implied in every treaty rendering the treaty void upon the arising of unforeseen circumstances, was first formulated as an international law doctrine by the Spanish natural law theorist Suárez and the British jurist Gentili in the sixteenth century. It was approved by Grotius with some qualifications. In 1669 a Dutch author proposed expanding the theoretical reach of the doctrine to the point that he argued a treaty to be binding only as long as it was advantageous to both parties to keep it. Officially, the Dutch publicly condemned that extension of the doctrine and the leading Dutch publicist of the seventeenth century, Cornelius Bynkershoek, restricted the validity of the entire doctrine almost to vanishing point.⁵⁷ It may be asserted that the Malay approach to treaty obligations may have been similar to approaches taken in Europe at the same time, and resisted both in Europe and the Eastern Archipelago by the Dutch.

Alternatively, the Malays may have regarded commercial treaties as they undoubtedly regarded treaties of political alliance, as in their nature limited to a few years. This would have been a natural step to a people who regarded treaties as personal obligations of a specific reigning ruler rather than obligations of a continuing organization such as a state or a trading corporation. As noted in chapter I above, Muslim law had fixed an arbitrary ten years as the theoretical maximum duration for treaties with non-Muslim powers but by this time had extended that period to the lifetime of the Sultan. The practice of fixing the duration of treaties was still in the process of formation in Europe in the seventeenth century, where 'perpetual' duration was normally stated in political treaties, and

⁵⁶Hamilton, Vol. II, pp. 55-7. It should be borne in mind that the sole evidence of relations between Atjeh and the English at this time is a Scottish sea captain-merchant, seeking to take advantage of concessions granted by Atjeh to Englishmen. Hamilton's reaction to Atjeh's trying to levy duties on his merchandise was to blockade the port for nine days until Atjehese merchants forced the Sultan to change his tariff policy.

⁵⁷A concise review of the history of the doctrine called *rebus sic stantibus* is in Nussbaum, pp. 96, 171.

normally ignored after political circumstances had changed. A limit on duration was normally fixed and stated in commercial treaties in Europe, but the absence of a term fixing duration cannot be said to have implied unlimited duration in commercial matters in Europe.⁵⁸ The Dutch do not appear to have regarded the people of Perak and Kedah, who, they felt, consistently ignored their treaty obligations,⁵⁹ with near the moral outrage professed against Atjeh despite the fact that Atjeh normally kept its word during the reign of the Sultan giving a promise.

In these circumstances, it may be supposed that the legal language of confused antipathy used by the Dutch against Atjeh was less a reflection of Dutch shock at Malay perfidy than a reflection of Dutch frustration at finding the mechanism of treaty legally as ineffective in the Malay Archipelago as in Europe to secure permanent advantages which would outlast the power that had been necessary to secure the desired concessions. Assertions of supposed rules of law have always been ineffective to maintain rights which are not acknowledged by the party sought to be charged. Assertions of supposed rules of law have always been in used Europe to bolster morale and to justify the use of force by Europeans. It is in this context that one must regard continued Dutch assertions of legal right in the Archipelago, and not as evidence of differences between European and Malay concepts of international law in the seventeenth century.

But the effects of Europeans' assertions of legal right differed in the Malay Archipelago from the effects in Europe, for the European merchants and colonial administrators were in the vanguard of European power, and assertions of right backed with power frequently become inviolable rules. The seeds were being sown for the weeds that would blossom with European assertions of a later period that international law outside of Europe followed different substantive rules than the international law reciprocally binding the states of Europe.

THE ORDER OF THE PENINSULA IN 1700

It has been seen that in their relations with the Malay territories of the Peninsula, the Dutch attempted to make their actions conform to ideas of international law as understood by them. The failure of treaties to establish and stabilize Dutch economic and political gains in the Malay territories,

⁵⁸A concise summary of European practice in fixing a duration on treaties in the seventeenth century is in Butler and Maccoby, pp. 518-19, 521.

⁵⁹Bort, p. 134.

whether due to constitutional facets of Malay political organization, as was primarily the case in the Menangkabau areas, or to a Malayan approach to international relations which did not give the same continuing weight to treaty engagements that the Dutch claimed was proper, must have convinced the Dutch of the need to establish some sort of control which would serve the purpose of the treaties which had failed them. It may be remembered that upon their conquest of Malacca the Dutch were advised that the new regime in Malacca 'should resemble the old at least in appearance' and that the Malay sultanates be influenced by kindness and not coercion, although a strong fleet was felt to be advisable 'to maintain supremacy of the sea'.⁶⁰ With the failure of kindness to achieve the results sought by the Dutch in the Peninsula, the influence of the fleet was tried to enforce the rights asserted by the Dutch on the basis of the favourable treaties their negotiators had obtained. But although the power of the Dutch fleet could procure more favourable treaties in Kedah and Perak and immediate concessions wherever needed, without the continued presence of the fleet the treaties procured with its aid seemed to be no more effective than those procured by the arguments of friendship.

It proved to be but a small step from the temporary use of sea power to achieve the treaties which the Dutch regarded as a necessary legal basis for the operation of their trade in the Peninsula to the use of the fleet to coerce the trade which the Dutch felt regardless of treaty ought to be centered in Malacca. On 21 November 1668 orders were issued for a regular patrol of Dutch vessels to control the shipping in the Straits of Malacca. The object of this action was the declared policy that '... in order to prevent ships and vessels from passing Malacca without first calling there and paying the customary dues, the Straits must be constantly occupied and patrolled.'⁶¹

It is interesting to note the assertion that the basis of the Dutch right to extract shipping dues was stated to be custom. *Faute de mieux*, it may be argued that the assumption of a customary basis for a right in the possessor of Malacca to control the shipping of the Straits was an extension of the idea originally noted in the years of the Portuguese possession, and impotence, in that city. Yet it is ironic, but clear, that the very reason for the imposition of the Dutch patrol was the lack of any feeling on the part of the Muslim traders, and, indeed, other Europeans traders than the Dutch,

⁶⁰Leupe, pp. 133, 136.

⁶¹Bort, pp. 179-83.

that the possession of Malacca by itself imported any rights at all to control the trade of the Malay Peninsula.

The Dutch patrol regulations were directed primarily against Portuguese and Arab traders. Force was apparently to be used to compel them to call at Malacca when they appeared in the Straits. In the 1668 regulations the trade of Johore merchants, trading between points in the Johore 'Empire' (including the Sumatran dependencies: Siak, Bengkalis and others), was not to be interfered with.⁶² Of course, the Dutch considered themselves at peace with Johore in 1668. But the Dutch did not purport to justify their 'patrol' on the basis of belligerency. Thus it seems difficult to reconcile the assumption that this Johore trade was considered independent of Malacca, while the trade of the Arabs with the same territories was stated to be customarily bound to be carried via Malacca. The reasons for the Dutch permitting intra-Johore trade while interdicting Johore's external trade are clear in policy, but the purported legal basis for this distinction seems to be doubtful.

Under the patrol instructions the English were to be encouraged to call at Malacca but violence was not to be used against them. This exemption of the English from the coercive provisions of the Dutch patrol regulations was, of course, a reflection of Dutch-English political relations in Europe; the peace of Breda ending the Second Anglo-Dutch war was concluded in 1667, and these patrol regulations were first promulgated in November 1668.

Evidence is sparse as to the actual operation of the various Dutch blockades of the Peninsula's west coast, which were rationalized as a means of enforcing treaty rights, unlike the Straits patrol which, as has been seen, was rationalized as a customary right of the possessor of Malacca. The one recorded instance of an English ship being actively interfered with by the Dutch occurred in 1673, during the Third Anglo-Dutch War, and was apparently regarded as a belligerent action against a declared English enemy.⁶³ Thus there does not seem to have been any Dutch legal action directed against shipping in the Straits of Malacca founded on the 'customary' rights of Malacca except action against Portuguese and Arab traders.

⁶²Ibid. p. 182.

⁶³The Third Anglo-Dutch War began in March 1672 and a peace treaty between England and the United Provinces was signed on 19 February 1674. See Mahan, *The Influence of Sea Power upon History*, pp. 144-58. It was noted above that the English ship seized in 1673 was condemned in prize. The incident is mentioned in Bowrey, p. 266 note 3.

In fact, the Dutch may have felt their activities against the Arab traders to have been based upon the existence of a state of war between their territories and the Netherlands. When Atjeh was blockaded in 1656-9, although the real aim of the blockade was to compel 'Aatchin . . . to buy from the Honourable [*Dutch*] Company', the legal ground for the interdiction of Atjeh's trade was 'that we were at war with Aatchin and that no traffic is permissible with an enemy'. When Muslim traders from India attempted to evade the Dutch Straits patrol by using ships of English nationality or taking on a few Englishmen as part of the ships' complements, as long as the English permitted the flying of the English flag the Dutch felt that 'there is as yet nothing else to be done than to follow the latest orders of their Honours in Batavia'. The greatest discretion was considered necessary in such cases 'so that no trouble may be made . . . for our Government in Europe'.⁶⁴

After the treaty of 19 February 1674 ending the third Anglo-Dutch War, regulations dated 8 March 1675 were agreed to between the Governments of England and the Netherlands regarding their relations in South-East Asia. The Dutch position at the negotiations appears to have been that they had the right in the Straits to maintain a blockade and close some places to European trade, and this seems to have been considered on a different basis than their asserted right to enforce their trade monopolies based on treaty. Failing to reach any overall settlement of the problems of commercial rivalry, the parties agreed to a rather complex arbitration system, with disputes to be submitted to the King of England or the States General for the satisfaction of each other's claims; failure to do 'right justice' within six months of the time of the complaint was to be the occasion for the appointment of arbitrators and an umpire appointed by them whose final decisions should be binding. It is not clear whether any arbitration ever took place under this agreement.⁶⁵

To recapitulate: It appears that the Dutch felt their right to control the trade of the Peninsula derived from something in addition to their treaty rights; the basis of this other right was not expressed in direct, legal terms, but it is difficult to see any other possible legal explanation than the feeling that bare possession of Malacca carried with it these rights of control.

It does not appear that the Malay governments themselves accepted this Dutch view of the rightful relations between the possessor of Malacca and

⁶⁴Bort, pp. 132-3.

⁶⁵Ibid. pp. 191-4.

the peninsular governments. There is no evidence that they ever acquiesced in the Dutch assumptions of non-treaty right, and in fact this failure of the Malays to comport themselves in accordance with Dutch ideas of rightful trade patterns and political relations was the source of the conflict which appeared to the Dutch to necessitate the institution of a Straits patrol and which thus gave rise to the actions which evidence the Dutch conviction of their legal right to institute such a patrol. It is patent that the English and other European powers as well as the Malays did not agree with this Dutch assertion of a right to control Straits shipping at this time and thus, as was the case with similar Portuguese assertions earlier, it would seem that such assertions cannot be viewed as stating a valid substantive rule of international law.

Still, while the Dutch retained control of the seas of South-East Asia, and were the principal European contact of the governments of the Peninsula, this Dutch view of right would necessarily have to be regarded as of greater weight than a mere assertion. It was a principle on which the Dutch acted, as has been seen, and since Dutch power made it more or less effective in operation it may perhaps be regarded as a local practice, accepted as law by the most powerful local authority, and, as such, of significance in the future relations of the Malay governments with external powers.

During the latter half of the seventeenth century, although the Dutch attempted to restrict the external contacts of the Malays to Malacca at least in some trading matters, this attempt was in general unsuccessful. English trade with Kedah seems to have been maintained at a moderate level. An English attempt to establish a factory there was abandoned in 1674. It is reported that an official English demand for satisfaction arising out of the taking of an English ship near Kedah roadstead by Orang Laut marauders in 1675 was addressed (to no result) to the Sultan of Kedah. Thus it would appear that Kedah maintained a full international voice at this time.⁶⁶ In 1689 the English were very welcome at Atjeh.⁶⁷ The English view of matters was that the Malays would have been happy to trade with any visitors but were hindered by the Dutch.⁶⁸

East Asian traders were also an important factor in South-East Asian commerce, as a Dutch patrol of the Straits of Singapore was instituted in 1678 for the express purpose of intercepting Chinese, Japanese and

⁶⁶Bowrey, pp. 262-3, 267 note 1.

⁶⁷Dampier, Vol. II, pp. 44-6.

⁶⁸Ibid. p. 62.

Philippine junks, which were to be 'kept away from Johor and brought to Malacca to trade there' in order to 'deprive Johor of that traffic' (apparently such a patrol had been in effect earlier too).⁶⁹ These activities directed against East Asian traders, however, did not bring about conflicts on the international level. Both Japan and China at this time were attempting to prevent, rather than encourage, foreign trade, and the people of both these countries had been forbidden by their own central governments to engage in external trading expeditions.⁷⁰ It is not clear whether the Philippine vessels to be intercepted included trading vessels from Spanish Manila. Spain was friendly to the Netherlands in Europe at that time. At all events, the blockade was either ineffective or was regarded by the Spanish as only a minor impediment to trade. Manila's trade with India in 1678 and the years immediately after was flourishing under the governorship of Juan de Vargas Hurtado. If the blockade applied only to Malay traders of the Philippine Archipelago, of course the Spanish authorities would have had no objections. There was considerable unrest in the Philippines during the seventeenth century and any suppression of the activities of Filipinos not subordinate to Manila would presumably have been welcomed by the Spanish authorities.⁷¹

To summarize: The Dutch felt justified in using force to secure monopoly trade treaties. They also felt justified in using force to enforce monopoly trade treaties. In some instances, they felt justified in using force to control the pattern of trade even in the absence of treaty and where no attempt was being made to secure a treaty. In the latter situation, the Dutch apparently felt justified in their actions to enforce what they regarded as customary rights of the possessors of Malacca.

It was impossible for the Malay powers of the Peninsula to distinguish between Dutch exercises of force to secure or to enforce a treaty in most cases since by Malay concepts the older treaties the Dutch sought to enforce were in the main not legally binding. Not knowing future Dutch plans, it was also impossible in practice to distinguish between blockades institut-

⁶⁹Bort, p. 187. Other reasons for the patrol involved Dutch quarrels with China more directly. See H.B. Morse, *The Chronicles of the East India India Company Trading to China*, Oxford, 1926-9, Vol. I, pp. 5, 44-6; H.B. Morse, *The International Relations of the Chinese Empire*, New York, 1910-8, Vol. I, pp. 47-9.

⁷⁰G.B. Sansom, *The Western World and Japan*, London, 1950, pp. 149-50, 181.

⁷¹Hall, pp. 203, 234; E.H. Blair and J.A. Robertson, *The Philippine Islands*, Cleveland, 1903-9, Vol. XLII, p. 16. Blair and Robertson's comprehensive collection of documents contains those related to insurrections in the Philippines in the seventeenth century after 1648 in Vol. XXXVIII on pp. 99 et seq. European alliances of this time are analysed in J.R. Seeley, *The Growth of British Policy*, Cambridge, 1895, Vol. II, pp. 207 et seq.

ed for the purpose of later securing a treaty and patrols for the purpose of enforcing fancied customary rights independently of treaty. Thus, to the Malays the Dutch blockades and patrols, no matter how rationalized by the Dutch, appeared to present the same face (a familiar one in the history of the Peninsula): A people powerful at sea were punishing less powerful traders (including some sultans) at whim.

To the European and other non-Malay traders, the Dutch presented a different face. In those cases in which the foreign power might take offence no attempt was made to interfere with its shipping. Interference with the shipping of traders not based in the Malay Archipelago was restricted to vessels flying the flags only of those powers whose own policies favoured restrictions on seaborne trade.

Elsewhere in the Archipelago the Dutch behaved similarly. In Java the Dutch used force to establish treaty rights and then to ensure their observance.⁷² In Bantam (Java) a Dutch monopoly treaty forced the English to give up their factory in 1683, and three years later, after the ruler of Benkulen in West Sumatra asked for English help in resisting an expected attack from Javanese Malays and a Dutch attempt to force them to agree to a monopoly treaty, the English set up a factory there. Although the local Malay authorities denied later that political concessions had been granted the English, an agreement with the Sultan giving the English a monopoly in Benkulen's spice trade appears to have been concluded, and it is doubtful that the Benkulen people gained much by asking help of the English in preference to entering into the usual treaty relations with the Dutch. In 1690 it was reported that two of the up-country chiefs dependent on Benkulen were in the stocks at the English factory 'for not delivering enough pepper', and attempts were made by the Malays to drive the English from their factory.⁷³

By Dutch action against the Malay sultanates elsewhere in the area the Portuguese were driven from all their possessions and stations in the Archipelago except for part of Timor, where they remain to this day, and the Danes were driven from the area entirely.⁷⁴

⁷²Vlekke, pp. 163-84.

⁷³In addition to the selection of documents contained in John Bastin, *The British in West Sumatra (1685-1825)*, Kuala Lumpur, 1965, information on early British activities in Benkulen has been taken from Dampier, Vol. II, pp. 103-4; Hamilton, Vol. II, p. 183; R.J. Wilkinson, 'More on Bencoolen', 19(1) *JMBRAS* (1941) 101 at p. 103; Vlekke, p. 181; and Wurtzburg, *Raffles of the Eastern Isles*, London, 1954, p. 428. The monopoly system on pepper deliveries was finally abolished by the British in 1801. See Bastin, p. 123 (document 90, last paragraph).

⁷⁴Vlekke, p. 181.

While the actions of the European powers in the Malay area appear in the main to have conformed to European concepts of justifiable international behaviour at this time, the European actions aimed at the enforcement of a monopoly system of trade resulted in a political situation significantly different from that obtaining in Europe by the close of the seventeenth century. The economic results of the establishment of a forcibly maintained monopoly system have been roundly condemned, sometimes in rather exaggerated terms, particularly by the nineteenth century disciples of Adam Smith to some of whom all evils appeared the result of a departure from the natural principle of free trade.⁷⁵ But it is easier to condemn a policy fixed centuries ago than it was to plan that policy at the time. Although monopoly treaties, as opposed to monopoly trade practices internally, were not concluded among European states, the mercantile and political activities of the European powers in the Malay area during the period up to the end of the seventeenth century appear to have conformed to the ideas of right expressed in Europe by some states as valid in their relations with each other. Therefore, it would seem as illogical as it is futile to attach a moral condemnation to the European policy makers of the seventeenth century. Furthermore, the activities of the Europeans in the Peninsula in the seventeenth century do not appear to have differed in kind from the trade and military activities of the Malacca Sultanate or the uses of force by Thailand. Where the activities of the Europeans differed from those of the earlier powers in the area seems to have been more in the degree of success which greeted their efforts and the use of sophisticated political organizations to exploit successes than in any startling differences in concepts of justifiable international behaviour. However, the seeds of difference had been sown, as noted above. Their first flowering involved the law and practice of piracy.

⁷⁵See, e.g., the fascinating essay, T. Braddell, 'The Europeans in the Indian Archipelago in the 16th and 17th Centuries', 1 *JIA* (NS) (1856) 313. Of course free trade doctrines had appeared in isolated instances as early as the end of the seventeenth century. J. Viner, *Studies in the Theory of International Trade*, London, 1955, p. 92.

Eighty-Six Years of Instability

THE INTERNATIONAL LAW AND THE PRACTICE OF PIRACY

ONE of the principal effects of the trade pattern enforced by the Dutch at the beginning of the eighteenth century in the Malay Archipelago was to lead Europeans to regard as legally unjustifiable any trade which did not conform to the terms of the monopoly treaties. In later years the carrying on of this trade was denominated 'piracy', and to the indigenous traders violating the monopoly treaties the label 'pirates' was attached, along with the legal consequences of that label.¹

The concept of piracy as including acts of depredation on the seas not licensed by a political power with which normal intercourse was at least from time to time maintained is to be found in ancient writings known to Europe.² Although it is not clear that such acts of depredation were considered violations of law in the ancient world, the Third Lateran Council in A.D. 1179 condemned piracy when its victims were Christian. Mutual promises to deal harshly with 'pirates' appeared in the capitulations of the thirteenth century between Italian trading states and Muslim powers in the Near East. Diplomatic correspondence of the early fourteenth century

¹Braddell, 'The Europeans in the Indian Archipelago in the 16th and 17th Centuries' at p. 328. It must be borne in mind throughout the following discussion that the Dutch use of force appeared to the Malays legally justified by Dutch power and the tradition of the powerful mulcting the weak regardless of treaty considerations or the possession of Malacca. To the Europeans the existence of monopoly treaties was regarded as an essential basis for the right to use force against third parties, and the desire for a treaty or the possession of customary rights attributable to occupation of Malacca were effective legal justifications for the use of force only against the second parties, the sultans and traders against whom rights were to be enforced directly. Therefore, the Europeans saw a vital difference between Dutch force applied to enforce treaties and Malay depredations committed with no treaty in mind. The Malays saw no such difference in principle between their own and Dutch actions.

²See, e.g., Thucydides, *The Peloponnesian War* (B. Jowett, transl.), New York, 1942, Book I, chapters 5, 8; Suetonius, *Lives of the Twelve Caesars* (J. Gavorse, transl.), New York (Modern Library), n.d., p. 4; Plutarch, *Lives of the Famous Greek and Romans* (Dryden transl.), New York (Modern Library), n.d., p. 855. The first published edition of Plutarch's *Lives* was in 1517. Ibid., introduction by A.H. Clough, p. xxiii.

contains many complaints among the sovereigns of England, France, Spain and Flanders regarding the alleged piracies committed by each others' subjects. In the *Intercursus Magnus* of 1496 between England and Burgundy, it was provided that the goods of 'pirates' were to be liable to seizure for use in compensating their victims, but no actual definition of piracy appears, nor are any physical punishments mentioned. It seems to have been in contemplation that the pirates might be and remain subjects of one or the other party and under the protection of that party. The French-Ottoman capitulations of 1535 included provision for stringent measures to be taken against 'pirates'.³

In England there apparently was a common law crime of 'piracy' over which the Admiral had jurisdiction. This jurisdiction seems to have been based on the existence of the crime alone, and personal jurisdiction over the one accused of the crime appears to have rested on capture or arrest rather than on nationality of either the accused or his victim.⁴ Jurisdiction over the crime was finally made exclusive in the admiralty courts of England, and during the reign of Henry VIII the procedures of those courts in criminal cases were made similar to common law criminal courts by a statute which has been incorrectly but often cited as the origin of British jurisdiction over 'piracy'.⁵ Since this statute does not define 'piracy', but speaks instead of 'treasons, felonies, robberies, murders, and confederacies hereafter to be committed in or upon the sea, or in any other . . . place where the Admiral or Admirals have or pretend to have power, authority or jurisdiction . . .', the ingredients of the common law crime of 'piracy' are not deducible from it.

Gentili, writing in 1588, is somewhat more helpful. He denied that the Frenchmen captured by Spain after the expulsion of Dom Antonio from Portugal in 1580 were properly treated as pirates because it was clear from their having received written authority from the King of France that 'it was that King whom they served, not Antonio'. It is clear that he felt that this connexion with a state authority should have been sufficient to re-

³Nussbaum, pp. 9, 31, 56, 68; Butler and Maccoby, pp. 213-14; R.G. Marsden (ed.), *Select the Pleas in, the Court of Admiralty*, London (Selden Society, Vols. VI and XI), 1894-7, Vol. I, p. xiv.

⁴W.S. Holdsworth, *A History of English Law*, London, 1922-8, Vol. I, pp. 550, 553 note 6 et seq. The actual practice is the subject of some comment by Cockburn, C.J., in *R.v. Keyn (The Franconia)* [1876] 2 Ex. Div. 163-7. Details may be gleaned from Marsden's two Selden Society volumes, *passim*.

⁵S. Morrison, (ed.), 'A Collection of Piracy Laws of Various Countries', *Research in International Law of Harvard Law School*, Part V, 26 *AJIL* (Supp.) (1932), p. 910; D.P. O'Connell, *International Law*, London, 1965, Vol. II, p. 717. The Statute is 28 Hen. VIII c. 15 (1536).

move them from the international law category of pirates, although he appears to have agreed with the Spanish contention that in so far as they served Dom Antonio, the unsuccessful pretender to the Portuguese throne, they may have deserved the label (and its legal results). To deprive unsuccessful rebels, especially those with a dynastic claim of right, of the benefits of a status of belligerency may seem harsh today, but it was apparently the practice of the times. The benefits of that status were felt by Gentili to go to 'those who have officially declared war upon us or upon whom we have officially declared war', but no definition of the political characteristics of the body able to make such an 'official' declaration appears. 'Pirates' were those against whom no official declaration of war has been made but with whom warlike acts might be exchanged. A further clue to Gentili's thought is supplied by his observation that 'piracy is contrary to the law of nations and the league of human society. Therefore war should be made against pirates by all men . . .'. The implication is that 'human society' (*i.e.*, not restricted to 'civilized' or 'European' or 'Christian', but including all nations) is in league, *i.e.*, that there is a political order which unites the entire world, and that it is possible for some men to place themselves outside this order, by doing which they become 'pirates'. The method by which they may place themselves in this position appears to have been by engaging in doing acts of war without an 'official' declaration.⁶ But this formulation is clearly unsatisfactory, for it would seem perfectly possible for a state to enter into hostilities with another without any declarations and without losing its right to be dealt with as a member of the international community and without having its commissioners treated as pirates. That in fact happened, and in 1628 an English Order in Council forbade privateers molesting the Barbary corsairs because of English unwillingness to go to war with Algiers. The corsairs were not felt to be properly classifiable as pirates.⁷

In 1604, as has been seen, Grotius attempted to bring the concept of piracy into play in order to justify Dutch use of force against the Portuguese in the Far East. ' . . . [I]t was . . . through a common maritime right

⁶Gentili, *De Jure Belli*, pp. 15, 26, 124.

⁷Marsden (ed.), *Documents Relating to Law and Custom of the Sea*, p. 407 (see Chapter 2 note 21); Bynkershoek, *Questionum Juris Publici*, pp. 98-9. Evidence which strongly supports the view that the Barbary corsairs of the early seventeenth century could not logically have been classified as 'pirates' because their activities in the Mediterranean Sea did not differ to any substantial degree from the activities of European adventurers, privateers and others whose activities were not considered to involve 'piracy' by the governments of Europe at that time is impressively marshalled in Sir G. Fisher, *Barbary Legend*, Oxford, 1957, pp. 137 et seq.

possessed by other free nations also, that the Roman people were authorized to distribute fleets . . . to punish pirates captured at sea', he wrote. But Grotius did not attempt to define piracy except to observe that ' . . . the name of 'pirate' [*may be*] . . . appropriately bestowed upon men who blockade the seas and impede the progress of international commerce'.⁸ This definition was made broad so that it could be interpreted by Grotius to include 'the Portuguese', and it does not purport to be a complete definition but only the description of one class of persons who might be considered to deserve the legal results attaching to the many acts which he felt could be denominated 'piracy'. It was never generally accepted, as other states of Europe, including England, later asserted the right to exclusive control of large areas of the seas.⁹ In 1625 Grotius condemned pirates as 'the common enemy of mankind', but, except for denying them the benefit of international law's requirement of *bona fides* in political relations and denying that they could form a political society cognizable in international law, he attempted no closer definition of their place in international relations.¹⁰ Although his views as to the legal inability of pirate groups to form a political society cognizable in international law may be thought to indicate a feeling on the part of Grotius that the relations of a pirate to some group which is cognizable in international law, *e.g.*, a state, was significant, Grotius did not pursue this line of reasoning or relate this feeling to an explicit definition of piracy.

Of the other major international law publicists of the seventeenth century, Pufendorf also mentioned piracy, but, like Grotius, he merely drew legal results from attaching the label without attempting to define the facts from which those legal results were felt to flow.¹¹

In England, Sir Leoline Jenkins attempted to define the crime of piracy in a charge given to a Jury at a session of admiralty in 1668. After explaining that their jurisdiction was limited strictly to the jurisdiction of admiralty he noted that under some circumstances the entire body of the seas could be considered as within admiralty jurisdiction and said:

You are therefore to enquire of all *Pirates and Sea-rovers*, they are in the Eye of the Law *Hostes humani generis*, Enemies not of one Nation . . . only, but of all Mankind. They are outlawed, as I may say, by the Laws of all Nations. . .

⁸Grotius, *Praedae*, Vol. I, pp. 237, 327.

⁹Butler and Maccoby, pp. 40-53. Cf. below note 14.

¹⁰Grotius, *Belli ac Pacis*, pp. 373, 631.

¹¹Pufendorf, *De Jure Naturae et Gentium*, Book IV, chapter ii, 8.

*That which is called Robbing upon the Highway, the same being done upon the Water, is called Piracy: Now Robbery . . . implies not only the actual taking away of my Goods, while I am, as we say, in Peace, but also the putting me in Fear, by taking them away by Force and Arms out of my Hands, or in my Sight and Presence; when this is done upon the Sea, without a lawful Commission of War or Reprizals, it is downright Piracy.*¹²

In another charge before an admiralty session at the Old Bailey Jenkins traced admiralty jurisdiction over pirates in whatever waters found to the tacit agreement of 'all sovereign Princes that have Ships and Subjects at Sea', and found this jurisdiction in international law to be exercisable by 'all Nations and Sovereign Princes that meet with them'. The competence of the English admiralty courts, however, he found not in international law, but in the legislation 28 Hen. VIII c. 15 (1536) continued by the statute 3 Jac. I c. 4 (1606). That part of the statute of Henry which brings robbery-within-the-territorial-limits-of-admiralty-jurisdiction into the competence of admiralty courts in England he apparently regarded as bringing the international crime of piracy into admiralty purview.¹³

But where the Crown was considered to have undoubted sovereignty within its land territory and on certain portions of the seas,¹⁴ and thus any act of force in these areas not authorized by the Crown must have constituted a breach of the King's peace, the situation on the seas beyond those considered to be within the Crown's dominions was quite different. The additional qualification of the absence of a lawful commission to perform acts of force was legally necessary if the analogy of 'piracy' to 'robbery' were to be maintained. But the concept of piracy being a breach of the King's peace was firmly embedded in Jenkin's thought. It was not merely the act which constituted piracy, but the victim of the act he felt had to be either an Englishman or 'a Foreigner . . . if he be *de Amicitia Regis*', and thus '*eo nomine* under the King's protection . . .'. Under this definition, acts amounting to robbery as defined in English municipal law, committed against persons who might be considered under the protection of the King of England (which, by a legal fiction, might include persons on very distant seas who had never heard of England), and not in pursuit of a law-

¹²Wynn, *Jenkins*, Vol. I, pp. lxxxv et seq. Sir Leoline Jenkins was a Judge of the Court of Admiralty of England, Ireland and the Cinque Ports from 1664 to 1669. His influence on English admiralty law was immense. See *ibid.* pp. xii-xiii.

¹³*Ibid.* pp. xci, xciv.

¹⁴Jenkins regarded large areas of the seas as within English territorial jurisdiction. *Ibid.* p. xc; Vol. II, pp. 699-700.

ful commission, *i.e.*, without such a commission or in excess of its terms, were to be considered piracy.¹⁵

A further ramification of this idea of a constructive 'King's peace' on the high seas was the implication that an accused 'pirate' might at least in some circumstances be protected by the intercession of his sovereign. In an official letter dated 3 April 1675, Jenkins drew a distinction between 'a Pirate who is a Highwayman' and those on board 'a lawful Man of War' sailing under the commission of a country, even though that commission had been exceeded. In the latter case, Jenkins felt that the Crown had a right to interpose on behalf of the King's subjects who were involved (they were Scots) even though the commission, as well as being exceeded, was issued by the sovereign of a foreign country. The distinction between a 'Highwayman' and a ship exceeding its commission appears to be unsatisfactory, and the rationale given by Jenkins for the continued right to interpose was much broader than that case: '... there is no third power that can give a Law that shall be decisive or binding between two independent Princes, unless themselves shall please to do it (which seldom happens) and then cannot be extended beyond the cases expressed by that Treaty'.¹⁶

It would thus appear that, in Jenkins' view, a 'pirate' could be relieved of the legal consequences of his acts in either of two ways: by the interposition of any sovereign authority issuing a commission, or by the interposition of the sovereign to whom he legally owed allegiance. To the extent to which this view was accepted as part of the definition of piracy at international law in Europe,¹⁷ therefore, failure to accord to non-European

¹⁵*Ibid.* Vol. I, p. xciv.

¹⁶*Ibid.* Vol. II, p. 714.

¹⁷There are, of course, other definitions of 'piracy' to be found in writings of this time, but none as elegantly stated or as often cited with approval in Europe as the Jenkins formulations given here. Specific arguments as to the legal authority of a claimant in a dynastic struggle to license privateers were heard in England in the 1690's when the ousted King James II and his French ally, Louis XIV, issued commissions to Englishmen to prey on the shipping of supporters of the new dynasty of William III and Mary. See 12 How. St. Tr. 1269 et seq. But to the extent the definition of 'piracy' in England was considered to include some political acts, and despite the views expressed by Gentili a hundred years earlier with regard to Dom Antonio's commissioners and the view taken by Spain with regard to those holding French commissions, the international community in Europe never attached the legal consequences of 'piracy' to those depredations which were politically motivated. Thus the English 'rule' to the extent it exceeded Jenkins' formulation was, like the Spanish rule of a century earlier, only a rule of municipal law, not a rule of international law; it was applied only to those acting against the prosecuting sovereign's interest rather than to political-robbers generally. In the legislation specifically expanding the definition of 'piracy' in England as a result of the legal arguments raised in the 1690's (11 & 12 Wm. III c. 7 Sec. VIII (1700)) the part of the definition which included some politically motivated acts applies only to Englishmen acting under foreign commissions, not to foreigners acting under foreign

sovereigns the right to issue valid commissions or to interpose on behalf of their subjects who had performed acts which might otherwise have been considered to merit the legal results of the label 'piracy', would be significant. It would seem that non-European sovereigns would in that case be denied some of the powers of European sovereigns at international law, *i.e.*, either the power to issue commissions authorizing acts which might, without some form of commission, be regarded as piracy by the international law of Europeans, or the power to interpose between their subjects and other sovereigns in cases involving accusations of 'piracy'.

In practice the classification 'piracy' slowly came to be widely attached to the activities of Malay and other seafarers in the waters about the Peninsula. In the sixteenth century D'Albuquerque nowhere uses the term or the concept of piracy in writing of the non-European territories with which he came in contact. Varthema, writing in 1510, mentions 'sea-robbers' in referring only to the politically unorganized Sallates, but does not attach such legal classifications to any politically organized groups. Linschoten, writing at the end of the sixteenth century, does not speak of piracy.¹⁸

The first use of the term in specific connexion with South-East Asian political events appears to have been Grotius's use of it in 1604 to describe the Portuguese attempt to close the Straits of Malacca to Dutch vessels in his attempt to justify Dutch retaliation. Purchas, writing in 1625, apparently attaches the word only to the Sallates in saying that the Dutch attack on Malacca in 1608 was aided by fifteen 'Frigats of Blacke Pirates [*who*] adjoynd themselves to the Hollanders'.¹⁹ It is, of course, possible that Johore ships were meant. The term was applied to the Dutch themselves by the Portuguese cleric, Sebastien Manrique, writing in 1649.²⁰ Bowrey appears to combine the precedents of Varthema and Purchas in referring only to the Sallates as 'absolute Piratts'²¹ in 1679.

The first time the word appears to have been applied to any politically organized Malay community appears to have been in 1717 when Dampier, writing of events in 1689, speaks of the Malay depredators of the west coast

commissions. In effect, it attached the label 'piracy' to acts which in more traditional language would be labeled 'treason'. The attempt to make the municipal offence of 'treason' subject to international law by switching labels, if such it was, failed to impress the international community in Europe.

¹⁸Braz d'Albuquerque, *passim*; Varthema, p. 241; Linschoten, *passim*.

¹⁹Purchas, Vol. V, p. 221.

²⁰Manrique, Vol. II, pp. 12, 18, 25.

²¹Bowrey, p. 237 note 2.

of the Peninsula as '... the Pirates who lurk on this Coast'.²² It was Dampier's view that the 'so many petty Robberies and Piracies as are committed by the Malays on this Coast' were probably caused by the policy of the Dutch. '... [W] here there is any Trade to be had, yet not sufficient to maintain a Factory . . . , so as to secure the whole Trade to themselves, they [*the Dutch*] send their Guardships . . . ' to prevent any other trade.²³ Yet, as has been seen, these Dutch activities were consistently aimed at compelling the Malay traders in question to conform to what the Dutch regarded as the legal order of the Archipelago or in an exercise of belligerency consistent with European ideas of the law of war. While the Malay Sultans could resist these Dutch blockades by organized political actions it appears that they did so, and, as has been seen, the word piracy was not attached to this resistance in the seventeenth century.

With the firm establishment of Dutch power in the Straits of Malacca, resistance on the part of the Malays became more difficult and the Malay tactics perforce changed. Isolated attacks against the weaker Dutch outposts replaced long campaigns. For example, the Dutch Dindings fort was attacked one November evening in 1689 by a Malay force of undeterminable political connexions in what was clearly a politically motivated act.²⁴ In the main, Malay resistance to the forcible disruption of their desired trade patterns, however desperate and violent it became, at this time remained apparently politically organized.

Although Atjeh, like the Sultanate of Malacca, had prospered largely through the efforts of Arab and Indian traders, by the eighteenth century in the smaller Malay sultanates of the Peninsula, the first, and occasionally, the only, merchant in his country was the sultan. Of course, within the areas served by some peninsular river systems there was trade, and small Malay traders did visit Malacca and did take part in wider trading ventures, particularly trading peninsular produce to Thailand for rice.²⁵ Bugis traders, Malays from the Celebes, also began to play a large part in the

²²Dampier, *A New Voyage Round the World*, Vol. II, p. 88.

²³Ibid. p. 87.

²⁴Ibid. pp. 93-8. Shortly afterwards another such attack was successful and the Dutch Dindings garrison was massacred. In 1693 the Dutch abandoned the Dindings, but attempted to preserve their assumed 'sovereignty' over the island by the symbolic act of erecting a pillar there with Dutch markings on it. In August 1695 the Dutch re-erected the pillar, which seems to have been pulled down by the Malays, and Batavia ordered that it be visited annually. This order was repeated in 1721. From 1745 to 1748 the Dutch once again attempted to maintain a fort in the Dindings, but on 18 October 1748, after the establishment of a factory in Perak, the Dindings station was finally abandoned by the Dutch. Maxwell, 'Dutch Occupation in the Dindings', 11 *JSBRAS* (1883) 169 at pp. 169-70.

²⁵Cf. Crawford, *History of the Indian Archipelago*, Vol. III, pp. 152, 185.

economic and political events of the Peninsula towards the end of the seventeenth century.

Since the Dutch regarded the trade of Johore and the west coast sultanates as closed to all but Dutch commerce by virtue of the Dutch possession of Malacca and monopoly agreements with the Sultans of Johore, Perak and Kedah, much of this activity was regarded by the Dutch as violating their rights. When possible, the Dutch compelled the small traders to call at Malacca. The duties at Malacca do not appear to have been particularly onerous, but the disruption of the authority of the Malay sultans over their own people appears to have been great. Deprived of their accustomed courses of trade (and deprived of part of their accustomed income by the necessity of losing time and paying duty at Malacca), and freeing themselves to some extent of the restraint of their local sultans, some of the Malay merchants turned to depredation against European shipping when possible, and against Malay shipping when available, as a means of livelihood. These depredations by the Malay traders were never on a great scale in the seventeenth century, but appear to have been confined to petty robbery when the occasion offered.²⁶ More significantly, the sultans appear to have regarded themselves as justified in pursuing a continual course of depredation against Dutch shipping. Both types of depredation were denominated by the Dutch as 'piracy' by the beginning of the eighteenth century.²⁷

²⁶Dampier, Vol. II, pp. 86-8.

²⁷Braddell, 'Europeans in the Indian Archipelago ...', p. 328: 'They [*the Malay sultans*] only followed the example set by the Europeans themselves in taking possession of whatever they were strong enough to retain. Afterwards, when the Europeans had ruined all the native trading ports in the Archipelago... they became obnoxious to the attacks of those they had driven to such courses. They then gave the name of piracy to the exact course which they had seen no impropriety in following themselves'. This seems a bit harsh, but with the dropping of the requirement of lack of a state's commission to warrant attaching to an act the legal consequences of piracy, the result described by Braddell seems to have actually happened. The implied exclusion of the Malay polities from the universal society envisaged by Gentili and others seems to have gone unnoticed. The Malay sultanates retained this ambiguous status in the minds of Europeans during much of the eighteenth and nineteenth centuries, with effects that shall be examined below.

Vlekke, pp. 206-8, denies that the 'piracy', which he regards as first 'noticed' by Europeans in the early eighteenth century, was a result of the Dutch monopoly system and suppression of the customary trade routes. He believes that the denomination of the Eastern centres of 'piracy' as such was the result of Europeans beginning to differentiate between honest trade and robbery—*i.e.*, the application of the changing European idea of commerce to the Malay sultans who, like sixteenth century European lawyers, did not differentiate between trade and pilferage, but whose ideas of commerce did not change as did those of Europe. There may be some truth in this argument, particularly as regards the 'piracies' of organized political communities of Malays, such as those of Sulu and other areas beyond the reach of the direct effects of the Dutch blockades. But why the Sulu communities should have been considered 'piratical', and those of Algeria not at this time, Vlekke leaves

There is very little source material through which the legal development can be traced. Nonetheless, it is clear that the principal effect of attaching the label 'piracy' to these activities was to incline the Dutch to treat as criminals those to whom the label was attached. While the sultans were occasionally called pirates there do not seem to be any instances where they themselves were actually treated as criminals, but the Malay nobles of lesser rank who were involved in trade violating a monopoly treaty or in military adventures against Dutch outposts were apparently suppressed without regard to the international law concerning belligerency which would have been applied in Europe in similar circumstances at that time. Furthermore, by ignoring the legal power of the Malay rulers to issue valid commissions to engage in hostilities against the Dutch and to interpose royal authority between their subjects and the Dutch, the constitutions of the Malay communities were undermined. The Malay traders were drawn away from their political connexions with their acknowledged sultans and closer to political dependence on the Dutch authorities in Malacca. Using force against the sultans' military arms, although justified as suppression of piracy, meant directing force against the most important trading areas and traders, as those were the communities which turned most readily to a course of depredation. Another significant effect was to encourage the Malay sultans to deny their involvement in this undercurrent of depredation, which in fact they sponsored, in order to avoid the ignoble consequences of being considered by the Dutch as pirate chiefs instead of princes of states.

The development of these ideas and their transformation into a justification for frankly political action will be dealt with in Chapter VI below. For the present, it is significant to note the beginnings of the adjustment of the European idea of piracy to fit the realities of the seas of the Malay Archipelago.

unanswered. Furthermore, it is not clear that the more remote sultanates were unaffected by the change in nodal trade patterns.

But even if Vlekke's views were persuasive with regard to the more remote trading sultans, with regard to the Malay sultanates of the Peninsula, Java and Sumatra, there appears to be strong evidence that petty pilferage increased markedly in the last years of the seventeenth century, and that the organized raids of Malay nobles on trade were a departure from the pattern of earlier years. It may be noted that the acts of the unorganized Sallates had always been considered to constitute 'piracy', even in the sixteenth century, while the legal tag, and legal results of attaching the tag, was not fixed to the activities of the organized Malay communities until the beginning of the eighteenth century. In these circumstances it is difficult to believe that the activities of the Malay sultans in the direct trade areas did not change during the last years of the seventeenth century.

COUNTERVAILING POWER: THE BUGIS

IN the closing years of the seventeenth century a new political power was growing out of the commercial expansion of the Bugis areas of the Celebes which had an immense impact on the political development of the Malay sultanates of the Peninsula. The Dutch capture of Macassar in 1668 had the result of driving the adventurous Bugis traders out of their own land, where they were unwilling to submit to the Dutch monopoly regulations. Even the 'free' Bugis, who were nominally allies of the Dutch and not subject to direct regulation, became involved in military adventures throughout the Archipelago.²⁸ Before 1687 Thailand had felt it desirable to send a military expedition to suppress Bugis activity.²⁹

Although the Bugis had made themselves felt as a political force in the Peninsula by sporadic activities towards the end of the seventeenth century, it was not until 1718 that they appeared as an organized and consistently identifiable power, or group of powers, in peninsular politics. A Portuguese traveller arriving in Johore in 1718 found the Sultan, Abdu'l-Jalil Riayat Shah, growing in power in the Peninsula. An English and a Danish ship were there trading when the Portuguese vessel arrived. The Portuguese seized a seaman from the Danish ship to make him pay a debt to a Portuguese merchant. Despite the advice of one of his magnates, the Sultan did not interfere in this incursion on Johore's exclusive authority to rule commerce in its own territory. Similarly, the Sultan did not interfere when the Portuguese fought a battle with a group of Bugis merchants. The reason for the Sultan's leniency in dealing with obstreperous Portuguese was apparently his greater concern with obstreperous Bugis. The Portuguese were in Johore in March 1718 when Raja Kechil, based in Siak, defeated the Sultan of Johore. Playing a fine game of bluff and diplomacy the Portuguese allied themselves with the Sultan, but not so deeply that they could not change sides and become friendly with Raja Kechil after the Sultan fled. The Portuguese found themselves able to mediate in a quarrel between the Bugis and the English after having persuaded Raja Kechil to mediate favourably to the Portuguese between the English and themselves.³⁰

²⁸Crawfurd, *History of the Indian Archipelago*, Vol. II, p. 60, Vol. III, p. 149; Dampier, Vol. II, p. 38; Vlekke, pp. 170, 179, 205-6.

²⁹Dampier, Vol. II, p. 38.

³⁰Antonio de Albuquerque, 'Journal' (T.D. Hughes, transl. and ed.), 13(2) *JMBRAS* (1935) 111 at pp. 115 et seq.

In 1718 also the Scottish sea captain Alexander Hamilton found the Bugis-supported Sultan of Johore (Sulaiman Badr al-'Alam) in Trengganu, fleeing from the dynastic skirmishing in his realm in which Bugis forces were playing a leading part.³¹ In 1720 Hamilton rejected a Bugis bribe and defeated a Bugis attack on Trengganu. After he left the area a Bugis raid was made on the town of Trengganu and the Sultan of Trengganu was killed by the raiders. Apparently the Dutch were deeply involved in the Johore skirmishing, and in an effort to counter Dutch interference Sulaiman Badr al-'Alam Shah offered Hamilton whatever concessions he might want in return for British protection. Hamilton turned down the offer, as he had reluctantly turned down an offer of Singapore Island in 1703 by Abdu'l-Jalil Riayat Shah, because of his belief that the East India Company would not want to get involved in the internal affairs of the Peninsula. A written offer to concede Pahang was made by Sulaiman Badr al-'Alam Shah to the French also in 1720, but the French also failed to take advantage of it.³²

It seems clear that as the Bugis spread their political power over the Malay Peninsula, of the European interests only the Portuguese and Dutch were willing to become involved in the Malay politics of the time. Of those two, only the Dutch had the bases, military strength and the longer term commercial interest to play an active role against the Bugis.

One result of these developments was the depreciation of Patani's once great trade as the security necessary for stable commerce was lost.³³ Although the relation between Trengganu, Patani, and Johore was in some doubt, and the Sultan killed by the Bugis in 1720 was probably Johore's appointee, with the withdrawal of Johore's power from the region, a distinct Trengganu dynasty arose which, though allied with Johore in the fights against the Bugis of the eighteenth century, trod its own path in the later political adjustments.³⁴

³¹Hamilton, Vol. II, p. 81. The date given there is 1719, but see *ibid.* Vol. I, pp. xxx-xxxi. The Articles of Union, by which the Kingdoms of England and Scotland were united in the Kingdom of Great Britain, took effect on May 1st, 1707. The Act of Union is 6 Anne c. 11.

³²Hamilton, Vol. II, pp. 52, 82-4. Sultan Sulaiman was in Trengganu in 1720, a fugitive from Johore where Raja Kechil of Siak had temporarily seized power. Sulaiman finally found allies in the Bugis who restored him to authority in Johore in 1722 and formally installed him in Riau with the title Badr al-'Alam Shah. Winstedt, 'A History of Johore', 10 (3) *JMBRAS* (1932) 1 at 55-6.

³³Hamilton, vol. II, p. 84. It is interesting to note that Hamilton in 1720 regarded Patani as subordinate to Johore, and records that the whole of Johore was tributary to Thailand. He saw the *bunga emas* delivered in Thailand in 1718 and spoke with the envoy from Johore at that time. *Ibid.* p. 85. Antonio de Albuquerque regarded Johore as newly independent of Thailand on 1718. Antonio de Albuquerque, pp. 119-20.

³⁴Sheppard, 'A Short History of Trengganu', 22(3) *JMBRAS* (1949) at pp. 9-11, 13-17.

But Johore, the descendant of the old Malacca Sultanate, was the great prize in peninsular politics, and in 1722 the Bugis obtained a treaty from Sulaiman Badr al-'Alam Shah, the Sultan of Johore, whom they had raised to that position and who owed his continued eminence to Bugis support. This written treaty is of very great interest as embodying the constitutional relation between Bugis leaders and the purported *de jure* Sultan of Johore and Pahang (which were treated as a single Sultanate). It is clear from the terms of the treaty and the balance of military power that from 1722 onwards the Bugis were the real rulers of Johore, and the *de jure* Sultan and his successors legally figureheads. The efforts of the sultans to free themselves of Bugis control led to repeated outbreaks of fighting in which the Sultan's faction was frequently allied with the Dutch, who apparently feared the great increase in Bugis power as a threat to their dominance of the Straits of Malacca. Treaties between the Sultans of Johore and the Bugis were made in 1734, 1741, 1748 and 1752, but do not seem to have been effective in uniting Bugis and Sultan's interests. Finally, in 1759, the Bugis defeated the peninsular Malays, and the withdrawal of the Sultan of Trengganu to his own territory in 1760 marked the end of active Malay resistance to the Bugis domination of Johore.³⁵

Very little in the way of detail regarding the conflicts involving Bugis, peninsular Malays and Dutch seems to be available which would shed light on the legal problems involved, as the Bugis activities seemed motivated by political ambition against which the peninsular Malays were defending, and the Dutch interests coincided with those of the peninsular Malays to the extent that the Bugis domination threatened Dutch economic interests. The Dutch based their economic advantages primarily on treaty; the Bugis clearly did not consider themselves bound to observe the terms of economic concessions which the Dutch had obtained from the peninsular sultans in the seventeenth century. There is no clear evidence that the Dutch considered the Bugis legally bound to continue these treaties as the Bugis took over control of peninsular territory, and there is no evidence whether or not the Bugis, in engaging the Dutch directly, felt the need to justify their actions in legal terms. The results of the Bugis activity and the changes in the political structure of the Peninsula by 1784 were a great increase in Dutch military commitment in the area, which the Dutch could scarcely afford, and a great increase of Bugis economic and

³⁵Winstedt, 'A History of Johore', pp. 56-8; Sheppard, pp. 13-17.

political power in the Straits area. The Bugis were in a position to challenge Dutch control just as Atjeh a century and a half earlier was able to challenge the Portuguese.

Culturally, the Bugis were participants in the same world that was preserved in literature in the *Sejarah Melayu*. In the Bugis history of Riau and Johore, the *Tuhfat al-Nafis*, the same emphases appear on genealogy and honour, perhaps even more accentuated. War was begun to 'wipe away her shame' when the Bugis chief Upu Daeng Parani wed Tengku Tengah and received the title of *Yam Tuan Muda* (normally translated 'Young Chief'). Rudeness is considered a horrid breach of the rules of right conduct.³⁶

Politically, the Bugis were not descended from the Malacca Sultanate and apparently felt free to institute a system of indirect rule by which the real power lay in a Bugis *Raja Muda* or *Yam Tuan Muda* acting through a peninsular Malay sultan. Since, as noted above, the direct line of the Malacca dynasty had died out in 1699 this flexibility in permitting indirect rule allowed the Bugis to fit their system of political control to the exigencies of each particular Malay community in which they appeared without any conflict of loyalties. The post of *Raja Muda* descended in the Bugis line regardless of the fate of the particular peninsular sultan through whom the Bugis ruled each community.

By 1784 the Bugis had achieved their maximum independent authority in the Malay Peninsula and it might be well to pause at this point and outline the course of politics in the sultanates leading up to the events of 1783-6.

In 1784 the Johore Sultanate still survived, with a 'legitimate' Malay Sultan in *de jure* control, but with a Bugis dynasty supplying a *Raja Muda* who wielded *de facto* power. The seat of the Sultanate had become the Island of Riau, south of the Straits of Singapore, where both the Sultan and *Raja Muda* held court. Riau was the centre of Bugis power in the Peninsula, and the position of *Raja Muda* was hard fought for among the Bugis nobility.

Pahang remained part of the Sultanate of Johore, but was thinly populated and did not play an important role in the struggles of this time. It was ruled *de jure* by the Sultan of Johore, but *de facto* by his Bendahara, who seems to have become a semi-independent ruler who nonetheless continu-

³⁶Winstedt, 'A Malay History of Riau and Johore', 10(2) *JMBRAS* (1932) 320. The pages of this translation are numbered backward from 320 to 303.

ed to acknowledge the ultimate authority in his territory of the Sultan of Johore.

Trengganu seems to have achieved a position of complete independence of Johore by 1760, largely by its refusal to recognize the authority of the Bugis Raja Muda. Trengganu had been allied with the Dutch in repelling a Bugis-Johore attack on Malacca in 1756.³⁷ Whether Trengganu was subordinate to Thailand in 1784 seems unclear since Thailand had not been in a position to assert any authority in the Peninsula after the sack of Ayutthia by Burma in 1767. After the Thai re-occupied Patani in 1786, Trengganu feared a Thai attempt to assert full authority over itself,³⁸ and this may have been evidence of Trengganu's doubt over its legal right to existence independent of Patani, which, as has been seen, was long considered to be Thai territory despite its racially Malay population. By 1786 Trengganu was sending a triennial *bunga emas* to Thailand.³⁹

It seems to be impossible to discover the position of Kelantan and Patani, but it is likely that the fall of Thailand to Burma in 1767 prompted the setting up of completely autonomous governments in those territories, unless, of course, Kelantan was still part of Patani at that time. It is doubtful, however, that this autonomy, if it existed at all, could have been stable, since it is certain that Thailand, upon regaining her strength by 1786, re-established authority in those areas.⁴⁰ Whether this exercise of authority was confined merely to tribute collections, or involved further elements of control in Kelantan, is not clear. It may be supposed that Thai authority in Kelantan was at least as strong as Thai authority in Trengganu, which is

³⁷Ibid. and Winstedt, 'A History of Malaya', 13(1) *JMBRAS* (1935) at p. 154. Some of these developments will be detailed below in the discussion of Bugis-Dutch and Bugis-Menangkabau conflicts.

³⁸J.R. Logan (ed.), 'Notices of Pinang', 2 *JIA* (NS) (1858) 202, letter by Francis Light to the British Governor-General of India and Council dated 25 November 1786, at p. 203.

³⁹Wood, pp. 240-73. In 1781, when Thailand had recovered its strength somewhat, it moved to re-establish its political authority in the northern Peninsula. Trengganu fought with Thailand to help bring Ligor under Thai control once again, and in 1782 Trengganu began delivering triennial *bunga emas* to Bangkok. The extent to which these facts signified a recognition by Trengganu of Thai rights to political authority in Trengganu is doubtful. Sheppard, pp. 18-19; Burney, Vol. II, Part IV, p. 131. Burney reports the *bunga emas* to have been resumed first in 1786. This report by Burney to the British Government in India is dated 2 December 1826. The borderline between that kind of 'feudatory' status which does not impair international personality, and that kind of subservience in which evidence of international competence is better considered to flow from a delegation of authority from a political superior is difficult to draw even when all facts are clear. See Vattel, pp. 20-1. In this case, Thailand's relations with Trengganu defy precise classification.

⁴⁰Wood, p. 273. Patani was conquered and occupied by Thailand in October 1786. Logan (ed.), 'Pinang', 2 *JIA* (NS) (1858), Light's letter, 25 November 1786, p. 203.

further south and therefore controlled only through the co-operation of Kelantan in the normal course of peninsular affairs.

On the West coast the situation was even more complex. The Menangkabau areas had suffered many reverses in fortune. In 1717 the Sumatran Menangkabau Raja Kechil had displaced the then Sultan of Johore as chief of the Menangkabau in the Peninsula. Raja Kechil was then defeated by the Bugis and forced to change his Johore capital from its old site in the Peninsula to the island of Riau. He was defeated again at Riau as the Bugis set up Sulaiman Badr al-'Alam in the Sultanate and founded their dynasty of Rajas Muda. Raja Kechil fled to Siak, in Sumatra, and resumed his Sultanic dignity. His attack on the Bugis in Riau in 1728 was unsuccessful, as was a Bugis attack on him in Siak the following year. In 1745 the Bugis-supported Sultan of Johore, who henceforth had best be called the Sultan of Riau, for that was his capital and principal domain, in an effort to increase his own authority by getting rid of his Bugis masters, purported to grant Siak to the Dutch along with the usual tin monopoly which was to run throughout his territories, in return for Dutch military aid. In 1755 the Dutch finally placed the Sultan of Riau in control of Siak by ousting the Menangkabau Sultan's successor, and in return for this recovery of Siak the Sultan of Riau granted the Dutch further trade concessions, including a tin monopoly in Selangor, Klang and Linggi.⁴¹

In 1758 following a Dutch defeat of the Bugis after a Bugis attack on Malacca, the Sultan of Riau's Bugis 'Viceroy' of the Menangkabau area ceded Rembau and Linggi outright to the Dutch.⁴² In effect, however, as shall be seen, the Menangkabau territories appear to have continued to consider themselves as *de jure* autonomous, just as they had when the similar situation had arisen during the previous century. The Menangkabau rebelled against their Bugis-Riau 'rulers' and ousted them. They were not replaced by Riau, as instead, in 1759, the Sultan of Riau himself purported to grant the Dutch sovereignty over Rembau, Sungei Ujong, Naning, and the rest of his peninsular possessions including Johore.⁴³ It does not appear

⁴¹Wilkinson, 'Events Prior to British Ascendancy', pp. 53-6; Muller, p. 75; Hall, pp. 291-2; What rights the Sultan of Riau had to cede in Selangor are not clear. As has been seen, the Sultans of Johore-Riau rarely bothered to consider the actual extent of their authority in making concessions to the Dutch, and the Dutch did not seem to concern themselves with comparing claims of ancient right with current practice in their relations with the Malay sultans.

⁴²PP, C. 1320 (1875), p. 13. Thomas Braddell's outline of the history of the Menangkabau States in the Peninsula, pp. 11 et seq., is excellent. See also Winstedt, 'A History of Malaya' p. 154. The Agreement is in Newbold, Vol. II, pp. 437-9.

⁴³PP, C. 1320 (1875), p. 13; Begbie, p. 62.

that this purported cession had much effect in practice. However, in 1773, when the Menangkabau territories decided to elect their own chief again to lead them in a united front against the Bugis, it appears that they first obtained permission from the Dutch and the Sultan of Riau to the importation of their chosen leader from Siak.⁴⁴ There appears to be no record of the activities of the Menangkabau territories for the succeeding years, as the new *Yam Tuan* seems to have achieved his principal task in maintaining Menangkabau autonomy without significant conflict with his powerful neighbours.

Selangor, populated largely by Menangkabau, was the scene of some Bugis settlement in the early years of the eighteenth century. By 1743 a Bugis noble with local connexions on his mother's side, had become effective Sultan of Selangor. He retained close ties with the Bugis lords in Riau and joined in the attack on Malacca in 1756, but the establishment of a Bugis dynasty in Selangor seems to have been in effect the creation of a new political entity. The community which evolved into the state of Selangor was apparently a Bugis settlement splitting off from the centre of Bugis peninsular power, Riau, rather than a growth of the Menangkabau communities that had settled the land earlier. The authority of the Sultan and his successor in fact does not appear to have extended beyond the Bugis riverine settlements and (later) the tin mines of the interior.⁴⁵

In the first half of the eighteenth century Perak was torn by internal struggles, complicated by sporadic Bugis raids. The Dutch, attempting to maintain their trading concessions in that territory, re-established their Dindings station in 1745, Batavia stipulating in its letter of instruction to the Governor of Malacca that no Bugis were to be included in the garrison of thirty European and thirty Malay troops to be stationed there. In 1747 the Dutch re-established their factory in Perak and concluded another of the usual monopoly treaties for the delivery at a fixed rate of Perak tin. The following year the Dindings station was abandoned and its garrison shifted to Perak proper.⁴⁶ On 17 October 1765 the Dutch concluded yet another treaty with Perak, by which the Dutch factor was to have the right to examine all ships departing from Perak, including those of the

⁴⁴This election apparently continued an earlier practice by which Menangkabau leaders were sent into the Peninsula by the Menangkabau Kingdom of Siak in Sumatra. R.J. Wilkinson, 'Notes on the Negri Sembilan', *Papers on Malay Subjects*, Kuala Lumpur, 1911, pp. 18-19, 21. R.J. Wilkinson, 'Sri Menanti', *Papers on Malay Subjects, Second Series*, No. 2, Kuala Lumpur, 1914, pp. 3-6; Winstedt, *The Malays: A Cultural History*, p. 87.

⁴⁵Wilkinson, 'Events Prior to British Ascendancy', pp. 63-4.

⁴⁶Maxwell, 'Dindings', pp. 169-70.

Sultan. The Sultan further undertook 'to assist the Dutch Garrison on all occasions and not permit the equipment of pirate vessels'. The word 'pirate' is not defined. There is evidence that the Dutch Perak factory was abandoned sometime between 1770 and 1783, but it was apparently re-established in 1786.⁴⁷ Throughout this period, it seems that Perak was subjected to constant Bugis harassment, and this may account for the Sultan's willingness to enter into apparently disadvantageous treaties with the Dutch. Further, the Dutch espousal of the cause of the Sultan of Perak was undoubtedly helpful to him in securing his safety in internecine struggles between himself and his theoretically subordinate chiefs.

Kedah was also the object of Bugis raids. Basing themselves in the Bugis settlements in Selangor, the threat to Kedah had become so strong in 1771 that the Sultan of Kedah was, by the fear of Bugis invasion, prompted to offer the entire Kedah coast, from Kuala Kedah to Penang, to a British merchant, Captain Francis Light, in return for protection.⁴⁸ It is likely that this fear of Bugis attack can be read to imply Bugis dominance in the territory of Perak and may thus account for the abandonment by the Dutch of their Perak factory about this time. Since the British were unwilling at this time to undertake additional military commitments in the area, the negotiations fell through, and rather than turn to the weakening Dutch for help Kedah was soon overrun by the Bugis, who seem to have acquired control of Kedah's trade while leaving the political structure of that Sultanate unchanged.⁴⁹

Although there seems to be no evidence of a direct clash between the Bugis and Thailand at this time, it may be noted that in 1720 Thailand had put down an uprising in Kedah.⁵⁰ After the Burmese defeat of Thailand in 1767, Thailand was not in a position to assert the authority it undoubtedly felt was its right in Kedah.⁵¹ Thus in 1784 Kedah, pressed by the Bugis

⁴⁷The text of the 1765 treaty may be seen in Maxwell, 'The Dutch in Perak', p. 262 or Winstedt, 'A History of Perak', p. 52. See also Maxwell, 'The Dutch in Perak', p. 266. It seems likely from the historical context and later events that Bugis vessels and ships of the Sultan himself were intended to be considered 'pirate vessels' when not conforming to the Dutch conception of lawful traders.

⁴⁸A. Wright and T.H. Reid, *The Malay Peninsula*, London, 1912, pp. 56-7; K.G. Tregonning, *The British in Malaya*, Tucson, 1965, pp. 16-30. See below.

⁴⁹Winstedt, 'A History of Malaya', p. 156.

⁵⁰J. Low, 'An Account of the Origin and Progress of the British Colonies in the Straits of Malacca', 3 *JIA* (1849) 599 at p. 601.

⁵¹See above note 39. Ligor lies to the north of Kedah. As to Thai feelings of right, see J. Low, 'A Retrospect of British Policy in the Straits of Malacca...', in Burney, Vol. V, Part I, pp. 1-70, dated 22 June 1842. Low's argument is not always clear, but then, neither is the historical evidence.

and Dutch and fearful of a Thai resurgence after the Thai reoccupation of Ligor, was very anxious to find some way of acquiring the powerful protection from her predatory neighbours that only a military alliance could give. For such an alliance, it was to be expected that great concessions might be granted. But in view of Kedah's long history as the victim of monopoly trade treaties and some traditional Thai claims to authority, her legal ability to contract such an alliance was far from clear. It would have been consistent with past Malay practice to regard the old treaties as lapsed with the inability of the Dutch and Atjehnese to continue to enforce observance of them, and in fact it does not appear that any serious question of their continuance did arise. The only serious legal obstacle to such an alliance would therefore seem to have been the question whether Kedah had the right to conduct international relations in such a way as to imply a complete independence from Thailand.

From available evidence the Bugis interest in Kedah is far from clear, and it seems likely that no detailed definition of Bugis rights in Kedah was ever attempted. It does not appear either from present sources or from later developments that the Bugis in Selangor felt their rights in Kedah to depend on any other base than Bugis power to extort the advantages sought, and no attempt other than the immediate threat of force appears to have been made to establish a legal basis for those advantages. Neither do the sultans of Kedah appear to have felt obliged to allow the Bugis to continue their favourable position with regard to Kedah trade.

It may be seen, therefore, that Bugis power in the Peninsula in 1783 represented a considerable military force with political power along the entire length of the Straits of Malacca from Riau to Kedah. This force was not organized under a single leader, but was generally led by the Raja Muda of Riau, who had to contend with a strong more or less independent and sometimes rival headquarters in Selangor. The political position of the Bugis was strengthened by their effective control of the Johore dynasty, now centered in Riau, and thus a loose linkage of all the Malay people of the Peninsula, Bugis and others, could be effected if the key figure, the Raja Muda, could bring it about. In 1784 came the climax, when this was attempted and Malacca was attacked by a strong force based in Selangor.⁵²

The Dutch were hard pressed at first, and sent appeals to Trengganu and Kedah for help against the Bugis. Trengganu seems actually to have

⁵²Winstedt, 'A History of Malaya', pp. 158-61.

come to the assistance of the Dutch in Malacca, but Kedah, now being threatened by the Thai, who were re-establishing their control in Patani, refused to help.⁵³ Trengganu's relations with Thailand at this time are not clear. The attack was defeated, the Raja Muda of Riau killed, and the Dutch occupied the capital of Selangor, concluding a treaty with Ibrahim, the peninsular, *i.e.*, non-Bugis, noble with the best claim to be Sultan of that territory. This treaty, dated 13 August 1784, recites Dutch claims to Selangor derived from conquest, and purports to establish a feudal relation between the territory of Selangor and the Dutch East India Company. It specifies in detail terms by which the Dutch occupation of Selangor was to be effected and all Bugis kept out of the territory. The Selangor Sultan was reduced to the status of a figurehead, promising to enforce by the law of Selangor total submission in Selangor to Dutch authority. Batavia and Malacca were to have supervision over dynastic matters in Selangor. All European nations other than the Dutch, and all Bugis and Chinese ships were apparently to be denied entry to the ports and territory of Selangor. This treaty was modified slightly on 29 July 1786, but not so as to affect these relations.⁵⁴

Following up their advantage, the Dutch proceeded to Riau, where the Bugis were put to flight and a treaty concluded with the Sultan of Riau. This treaty, dated 2 November 1784, was also signed by the four members of the Sultan's Council, including the Temenggong and Bendahara. As in the Selangor treaty, the Dutch purported to derive sovereignty over the territory of the Riau Sultanate from the '*droit de la guerre*', and then granted the immediate rule to the Sultan as a feudatory of the East India Company. Various constitutional arrangements are set out which would have had the effect, if accepted as valid and binding by both parties, of giving the Dutch full control over all the affairs of the Riau Sultanate

⁵³Logan (ed.), 'Pinang', Letter by Francis Light to the Governor-General of India in Council dated 15 February 1786, 2 *JIA* (NS) (1858) at p. 182.

⁵⁴The treaty is set out in G.F. de Martens, *Recueil des Principaux Traités...*, Göttingen, 1801, Vol. VII, pp. 71 et seq. Article I says: 'Den Koning... by vervolg zig daar in zullen komen nederzetten verbinden, zig om aan de Nederlandsche Ost Indische Compagnie, als aan haaren beschermheer, gehouw en getrouw te wezen...' etc.

The exclusion of the Chinese appears in article VI of the Dutch version of the Treaty, but there is no mention in that version of the Bugis. In de Martens' French translation the Bugis are mentioned but not the Chinese. Taken in historical context, it is likely that both were excluded in the original Dutch, but that the exclusion of the Bugis from Selangor was inadvertently omitted from de Martens' reprint. It is difficult to imagine how a mention of the Bugis could have been included in the French translation without some mention of the Bugis in this article of the Dutch master copy. C.D. Cowan, 'Governor Bannerman and the Penang Tin Scheme, 1818-1819', 23(1) *JMBRAS* (1945) 52 at p. 74 mentions the July revision.

including the territories of Pahang and Johore, with the Sultan and his magnates reduced to the level of hereditary middlemen standing between the ultimate authority of the Dutch and the immediate implementation of Dutch policy in the territory of the Sultanate. The Bugis were explicitly excluded from Riau, the capital, although not, apparently, from other parts of the territory of the Sultanate, and were excluded from holding any posts in the figurehead Government. All Europeans other than the Dutch were purportedly excluded from the territory of the Sultanate; Chinese commerce was to be permitted except in the goods reserved to Dutch monopoly. Dynastic matters were to be supervised by the Governments of Malacca and Batavia. All earlier treaties between the Sultan and the Bugis were purportedly nullified.⁵⁵ In both the Selangor and Riau treaties an article appears prohibiting 'piracy'. But in neither is 'piracy' defined.

THE ORDER OF THE PENINSULA IN 1784

THESE two treaties follow, more or less, the pattern of Dutch eighteenth century treaties throughout the Malay Archipelago,⁵⁶ but to determine their legal effect in the Peninsula a closer analysis of particular facets would be helpful. Two points seem to stand out relating to the powers the Dutch must have conceived themselves to have acquired by virtue of their conquests, and the conclusion of the treaties and the operation of the principle *pacta sunt servanda*.⁵⁷ First, the relations purportedly set up by the treaties seem to have involved European words of art, growing out of a system of land holding and the relations between a subordinate to a superior sovereign peculiar to a feudal system as developed in Europe which was quite

⁵⁵De Martens, pp. 87 et seq. The principal events of the Dutch victory are recounted in the preamble to the treaty.

⁵⁶Cf. Braddell, 'Europeans in the Indian Archipelago,' pp. 329-34.

⁵⁷The Dutch clearly felt the maxim, which derives from Roman Law, to apply to contacts between themselves and the Malays. Time and again, as has been seen, the Dutch exerted great efforts to extract treaty rights from the Malay rulers only to find their supposed rights ignored as soon as the Malay rulers were no longer threatened by Dutch force. Nonetheless, they continued to extract their treaties and claim Malay perfidy when the treaties were not observed. The same views were apparently held by the British. Cf. Instructions given to Captain Cook dated 6 July 1776, V. Harlow and F. Madden, *British Colonial Developments 1774-1834: Select Documents*, Oxford, 1953, p. 4; Lindley, pp. 26, 44-7. It is not proposed to deal here with the interesting question as to European observance of the maxim *pacta sunt servanda* as applied to treaties between European and non-European people after the legal 'acquisitions' had taken place. See D.P. O'Connell, 'International Law and Boundary Disputes', *Proceedings of the American Society of International Law*, 1960, Washington, 1960, p. 77 at p. 81; R.P. Anand, 'Role of the New Asian-African Countries in the Present International Legal Order', 56 *AJIL* (1962) 383 at p. 387.

foreign to the concept of the Malay nobles with whom these treaties were made. Second, the treaties involved some promises on the part of the Malay rulers which they could not constitutionally fulfill, as had clearly been the case in the Naning troubles of the seventeenth century and later, or which involved yielding powers to the Dutch which the Malay rulers themselves did not possess. As a result, the Dutch did not acquire the full extent of the legal rights apparently assumed by them to have come by virtue of either their conquests or the subsequent treaties. In Selangor, for example, by setting up a non-Bugis claimant to power, in so far as that claimant was not regarded by his supposed subjects as the possessor of authority, (his 'subjects' were mostly Bugis and Menangkabau), it seems clear that the feudal chain may not have been conceived by the Malays to effect more than the relations between this Sultan and the Dutch. The extent to which the Sultan's inferior chiefs may have had authority which could not constitutionally be restricted by the Sultan seems not to have been considered. Furthermore, in the relations of feudal loyalty as defined in European terminology, it may be wondered if the Muslim Sultan can have conceived himself owing the abstract duties of faithfulness to either Christians or to an abstract government or company which may have possessed European legal personality in the eighteenth century, but which could not, after all, lead him personally in battle.⁵⁸

It is certainly clear from subsequent events that the Sultan did not feel any bond of loyalty to have tied him to the Dutch Company or the Malacca Government. While the same considerations may be conceived to have applied in Riau, the Riau situation was still further complicated by the fact that the Sultan had not been the wielder of effective power in Johore or Pahang or the Menangkabau territories since the victories of the Bugis in 1722. While the Bendahara, who seems to have had effective control of Pahang, and the Temenggong, who had effective control of the territory of Johore by the end of the eighteenth century, both signed the treaty, they did so not as possessors of independent political authority, but as members of the Sultan's Council, and the extent to which they may have

⁵⁸This same point was raised indirectly as recently as 8th March 1946, when Mr. Gammans, M.P., queried citizenship proposals for the planned Malayan Union on the ground, *inter alia*, that one cannot logically swear allegiance to a 'Union' of States. 420 H.C. Deb. 55. col. 662. Although allegiance is commonly sworn to a Republic today (in the United States of America the pledge is 'to the flag of the United States of America and to the Republic for which it stands') it may be doubted that the political organization represented by constantly changing individuals could have been conceived of as an object of allegiance by Malay rulers in 1784.

felt the Dutch power to have extended to the territories in which they were the effective rulers may be a matter of some doubt.

A further factor requiring notice is the Dutch assumption in the Riau treaty that it lay within their power to nullify prior Bugis treaties with the Sultanate. In so far as this nullification was felt by the Dutch to be within their powers as a result of Dutch 'conquest' of Riau, it probably conformed to the legal theory and practice of Europe.⁵⁹ However, whether the legal arrangements for the government of Riau embodied in the treaty of 1784 can be said to have amounted to an extinction of the legal personality of the Riau Sultanate is not certain. Merely taking over a right to represent the Sultanate in international affairs would not appear in the international law of Europe to have given the Dutch the right to abrogate treaties which the Sultanate could not have abrogated by itself. A mere constitutional change cannot empower a state to abrogate its pre-existing treaties.⁶⁰

Therefore, the extent to which the Dutch considered themselves legally entitled to abrogate the former treaties of the Riau Sultanate might be considered an indication of the extent to which the Dutch considered the Sultanate not entitled to the full position accorded a state in the law of nations. But the precise legal position is sufficiently cloudy to cast a shade of doubt upon the reliability of such a far-reaching conclusion drawn from this particular set of facts. In so far as the Dutch regarded the Riau-Bugis treaties as basically constitutional documents, there would appear to be no reason in international law why they could not have been abrogated by the settling of a new constitution on the polity of Riau. But these subtleties of European legal concepts cannot be said to have been understood or acquiesced in by the Malays whom the Dutch sought to bind to them. It is apparent from subsequent events that neither the Sultans nor the Bugis regarded the Selangor or Riau treaties as binding upon themselves. Rather, they regarded the hostilities between themselves and the Dutch as continuing, and the binding effect of the treaties they appear to have considered inseparable from Dutch use of force. The extent to which the

⁵⁹The prior treaties of a state which has ceased to exist are conceived to lapse, normally, in the international theory and practice of Europe. See examples cited in D.P. O'Connell, *The Law of State Succession*, Cambridge, 1956, pp. 16-26. However, since the Sultan of Riau continued in his position as *de jure* head of the entity of Riau it is not clear that Riau, if it ever was considered to be fully a 'state' by the Dutch, had legally ceased to exist as a 'state'. The establishment of feudal relations by itself did not result necessarily in the loss of international personality by the feudal inferior. See Vattel, pp. 20, 21.

⁶⁰O'Connell, *The Law of State Succession*, pp. 28-31; Oppenheim, *International Law*, Vol. I, pp. 948-9.

British regarded these treaties as legally binding on the Malay parties will be examined below.

The Bugis nobles continued to fight the Dutch, and it appears that the non-Bugis Sultan of Riau, despite his treaty, fled from Dutch control and induced Ilanun communities to join him in an attack on the Dutch in Riau.⁶¹ Despite early surprises, the attacks were ultimately unsuccessful as the Bugis were forced to yield once again after having re-established their control in Selangor. In Riau, the Dutch were able to conclude another treaty, dated 7 February 1787, with the Sultan by which they acquired full administration over the Riau Sultanate's territory, leaving to the Sultan jurisdiction over disputes involving Malays only, as all other matters were to be within the powers of the Dutch 'Resident' in Riau to consider and decide. The Sultan's sources of money were also prescribed within narrow bounds.⁶²

There can be no doubt that after the conclusion of the treaty of February 1787 legal power to conduct the affairs of the Riau Sultanate lay with the Dutch Resident. But, as was the case two and a half years before, the Sultan of Riau does not appear to have considered himself bound by the terms of this treaty with the Dutch. His Ilanun allies drove the Dutch from Riau in May 1787, but proved untrustworthy friends as they also drove the Sultan from his capital. The Dutch returned and drove the Ilanuns out. The Sultan then organized a military coalition of Malay powers. The object of the Malays was feared to be to drive all Europeans from the area, but the coalition was defeated by the Dutch and British separately in 1790 and 1791. Upon the death of the Sultan of Trengganu in 1793 the coalition dissolved.⁶³

⁶¹Wilkinson 'Events Prior to British Ascendancy', p. 57. The Ilanuns were Malays from Mindanao, in the Philippine Islands. O. Rutter, *The Pirate Wind*, London, 1930, p. 31. By the early nineteenth century the Ilanuns were probably the leading Malay sea power, and the Malay and Bugis nobles made little attempt to hide their connexion with Ilanun attacks on European and Malayan shipping. Cf. Letter of Sir T.S. Raffles to Lord Minto (then Governor-General of India), undated but probably May or June 1811, in Lady Sophia Raffles, *Memoir of the Life and Public Services of Sir Thomas Stamford Raffles...*, London, 1830, pp. 45-6. See also S. Baring-Gould and C.A. Bampfylde, *A History of Sarawak under its Two White Rajahs*, London, 1909, pp. 93-4.

⁶²Winstedt, 'A History of Johore', p. 66.

⁶³Winstedt, 'A History of Malaya', pp. 158-61; Low, 'Account of the Origin and Progress of the British Colonies...', pp. 611-13; Sheppard, p. 22. The composition and activities of the Malay coalition of 1788-91, if, indeed, it remained active so long, are discussed in scholarly fashion in D.K. Bassett, 'Anglo-Malay Relations, 1786-1795', 38(2) *JMBRAS* (1965) 183, pp. 201-2, 206-10. Some doubt exists as to the role of Trengganu and the strength and objects of the coalition seem to have been vastly exaggerated by the Dutch and British administrators in Malacca and Penang. These events are considered in somewhat more detail below.

Climax: The British Return

BRITISH PRESENCE IN THE PENINSULA

WITH the expulsion of the East India Company's factory at Bantam in 1683 and the establishment of the Benkulen factory as a consequence, English presence in the Malay Archipelago was almost entirely confined to the west coast of Sumatra. Of course, occasional British traders and adventurers, like Hamilton and Dampier, found their way into other parts of the Archipelago, but for a number of years the only organized activity of the East India Company involved maintaining the West Sumatra interests and the unsuccessful attempt to establish new British interests in Borneo.¹

In 1770, however, Captain Francis Light, the agent in the northern part of the Malay Peninsula for a Madras commercial firm, managed to interest the British authorities in India in the possible benefits of opening a trading station in Kedah. Seeking British protection from the Selangor-based Bugis, the Sultan of Kedah offered Light the facilities of Kuala Kedah, and later expanded this offer to include the entire Kedah coast

¹The East India Company was re-chartered periodically. The major reorganization of 1708 and the various intrigues surrounding it are admirably summarized in Adam Smith, ... *The Wealth of Nations* (1776), London, 1890, pp. 587-8. It is necessary for present purposes only to note that the East India Company, in effect the same legal body that was Chartered first in 1600, continued to be the sole political organ of British authority in the area throughout the eighteenth century. See below note 16.

A factory established at Banjarmassin in 1702 was driven out by Malays in 1706. Baring-Gould and Bampfylde, p. 48. A Dutch factory set up at Banjarmassin in 1747 was more successful. A British factory was established at Balambangan in 1762, but was driven out by Malays from the Sulu Archipelago after a series of raids in 1773-5. Rutter, pp. 56-75; Baring-Gould and Bampfylde, p. 43. Labuan, in northern Borneo, was first ceded to the East India Company by the Sultan of Brunei in 1775. Rutter, p. 73. It is not proposed to examine British interests in Borneo in detail here. Those interested may consult Graham Irwin, *Nineteenth Century Borneo: A Study in Diplomatic Rivalry* (Verhandelingen van het Koninklijk Instituut voor Taal-, Land- en Volkenkunde, Vol. 15), The Hague, 1955.

In 1760 the French destroyed the British settlements in Sumatra, but the Benkulen factory was re-established in 1763. Baring-Gould and Bampfylde, p. 46.; Bastin, *The British in West Sumatra*, p. 71 note 254. A trading factory was maintained in Atjeh after 1763. Wright and Reid, p. 56. It seems to have been abandoned before 1782, in which year an unsuccessful attempt was made to re-establish it. A similar attempt in 1784 also failed, due, it is said, to the state of anarchy prevailing there. Low, 4 *JIA* (1850) p. 7.

See also Tregonning, *The British in Malaya*, chapters II and III for a review of official British probings for a foothold in the Archipelago in the last half of the eighteenth century.

from Kuala Kedah to Penang. The offer was tempting enough to provoke the British into sending a qualified political agent to Kedah to attempt to secure a treaty from the Sultan which could serve as a legal basis for the establishment of British political interests in his territories.² It may be that the Sultan's original offer to Light had not involved explicit political strings, as it may have been the Sultan's intention merely to involve the British politically in Kedah's affairs as a means of frightening away his Bugis antagonists.³ But when it became clear to him that the British were unwilling to become involved in Kedah affairs further than defending whatever might be ceded them, he lost patience with the negotiations and finally broke them off on the excuse that the king of Thailand had strictly forbidden him ever to let any Europeans settle in his kingdom.⁴ Whether such a prohibition had actually come from Thailand, and whether, if so, the Sultan of Kedah actually felt himself legally bound to obey it, must remain matters of doubt. It is interesting to note, however, that even if the Sultan had invented this excuse, his appeal to the legal power of Thailand to limit his competence to act within his own territory seems to evidence an appreciation on his part, communicated to the British negotiators, that he was not entirely a free agent but was, at least to some extent, subject to the orders of Thailand. The British appear to have made no attempt to contact the Thai government, and the project of a Kedah base was temporarily dropped.⁵

In about 1783 (the precise date is not ascertainable) a British ship, the *Betsy*, arrived at Riau, apparently fleeing from French and Dutch pursuers.⁶ Upon a promise of one-third of the booty, the Sultan of Riau (the

²Wright and Reid, pp. 56-7; Tregonning, pp. 9-10, 14-30.

³There is some evidence that this was so in the disillusionment expressed most bitterly by Light in a letter to his Madras principals in 1771, after the breakdown of the negotiations: 'This useful lesson I have learnt, that no contracts, no promises, no behaviour however civil and complaisant will bind the Malays to your interest—nothing but force.... I want nothing but force. The King is ready to grant me anything I desire'. Wright and Reid, pp. 60-1. If Light's conception of the bargain was one of unilateral British benefits, it may be that his views were based on good experience. However, there is reason to believe that the Sultan always expected a *quid pro quo*, as shall be seen, in which case one must doubt the reliability of Light's judgment.

⁴Winstedt, *Kedah notes*, p. 180.

⁵The position of the government of Thailand in 1771 was chaotic. It is doubtful that any actual commands had issued to Kedah from Thailand within the five or six years preceding the events of 1771, and it is almost certain that no obedience could have been enforced in Kedah by Thailand at this time. No comment seems necessary on the morality of the Sultan in not mentioning restrictions on his capacity to conclude treaties at the start, rather than at the finish, of negotiations.

⁶The maritime war of 1778-83 was then in progress. See Mahan, *The Influence of Sea Power upon the French Revolution and Empire*, pp. 505-41. Spain, France and the Netherlands were allied against Great Britain.

Bugis Raja Muda was no doubt the real party in interest) permitted the pursuers to effect their capture.⁷ On 31 May 1784 Captain Thomas Forrest was commissioned by the Governor-General and Council in Bengal to proceed to Riau to remonstrate with the Sultan about the impropriety he had committed in having 'suffered this infraction of the rights of his port'. The Sultan was to be urged to procure 'restitution or indemnification' for the East India Company from the Dutch.⁸ The British may have considered the actions of the French and Dutch to have been contrary to the law of nations, but, if so, the basis for this view is not clear.⁹ The accusation seems to have rested on a view that Riau was neutral in the struggle between the British and the French, for if Riau were not neutral then it would be hard to see how the capture could be considered to violate rights of either Riau or Great Britain. It therefore appears that the basis of the British claim (which was really directed against Riau), was the failure to observe the conduct which the British felt was owed by a neutral.¹⁰ However, it seems from Forrest's commission that he was not to make an important issue of this impropriety; his main task was to be the achievement of a British base in Riau territory. As the Sultan had already signified

⁷The outright refusal of the Dutch pursuers to keep their word to the Raja Muda regarding the split of booty seemed to the British to be the *casus belli* for the Bugis attack on Malacca in 1784. T. Graham, 'An Historical Sketch of the Circumstances which Led to the Settlement of Penang...', (1794), Harlow and Madden, p. 59.

⁸Harlow and Madden, pp. 11-12. The impossibility of this request was, of course, not apparent to the British. The Dutch capture of Riau did not occur until October 1784.

⁹The Declaration of 1675 by Great Britain and the States General of the Netherlands provides for the free passage of each other's vessels to and from neutral ports. Navy Department, *Extracts from the Several Treaties Subsisting between Great Britain and other Kingdoms and States* ..., London, 1741, pp. 107-8. This Declaration was renewed by the parties in 1716, 1729 and 1731. Ibid. pp. 139-40. Article XVII of the Maritime Treaty of Utrecht, 1713, between Great Britain and France similarly provides for the 'Liberty and Security' of the subjects of each party sailing 'from the Places, Ports and Havens of those who are Enemies of both, or of either Party'. Ibid. pp. 5-6. It may be doubted that these articles were intended to abridge a belligerent right of capture when Britain and France or the Netherlands were themselves at war with each other. There is little question that were the Sultanate of Riau classifiable as 'neutral' in the incident, then the French and Dutch actions would have violated her neutrality, and perhaps given rise to a right in Riau to demand restitution of the vessel to Riau waters. *The Vrow Anna Catherina* (1803), 5 C. Rob. 15; cf. C.J. Colombos, *The International Law of the Sea* (4th rev'd ed.), London, 1959, p. 521. But since Riau consented to the French and Dutch actions it is difficult to understand how a claim could arise. In any event, it would seem that the claim should have been Riau's and not that of the British.

¹⁰The Treaty of Utrecht, 1713, provided as between France and Great Britain in article XXXVII of its maritime phase: 'Neither of their most Serene Royal Majesties shall permit, that the Ships... of the other be taken upon the Coasts, or in the Ports or Rivers of their Dominions, by... any Prince... or State whatsoever. And in Case such a Thing should happen, both Parties shall use their Authority and United Force that the Damage done be made good'. Navy Dept., p. 15. The British apparently felt that this provision accurately expressed a generalizable international practice amounting to customary law, since Riau's impropriety and the request for restitution seem to have rested in the British view on an obligation to prevent British ships being taken by her enemies in Riau waters.

to Captain Forrest his desire for a connexion with the British, as was the case in Kedah in 1771, it was hoped that holding out the lure of British friendship would suffice to obtain the concessions sought without any material obligation being assumed. '... [Y]ou will be particularly careful ...', ran Forrest's instruction, 'to avoid every expression that can be construed into a promise by which this Government can be committed'.¹¹ By the time Forrest arrived in Riau, however, the Dutch had driven the Bugis out and assumed control.¹²

In 1786 the political situation in Riau was extremely complicated. The Raja Muda, having become an accomplice to the looting of a British ship, can hardly have expected friendship from that quarter; the perfidy of the French and Dutch in not allowing him his share of the booty had precipitated the battle which ended in his death. The Sultan, inviting British entanglements in order to play British power against, among others, his nominal Bugis subjects, now finding himself a virtual creature of the Dutch, was attempting to raise a Malay force. The British were anxious to acquire a base in the area of the Straits of Malacca, but were unwilling to enter into any commitments with non-European powers as part of the bargain they sought. The Dutch, having enjoyed control of the commerce of the entire Archipelago for nearly 150 years, were forced to expend large amounts of energy and wealth to maintain their monopolies against disregard by Malay powers of the treaties forced upon them by the Dutch, and were, with reason, fearful of the possibility of increased British competition in area.¹³

The conflicts that followed thus occurred on three different levels. On one, intra-Malay rivalries and quarrels led the Malay sultans to look to any powerful influence as a potential means of frightening away the Bugis, and the more intense the intra-Malay pressures became, the more readily would Malay sultans grant concessions in writing to their European 'friends' in the hope of entangling these strong people in the local tussles. The British seemed ideal friends, for they were not as numerous nor did

¹¹Harlow and Madden, pp. 11-12.

¹²British views on these developments are set out in the 'Orders from the Court of Directors of the East India Company to Lord Cornwallis, Relating to the Straits of Malacca, 1786', Harlow and Madden, pp. 52 et seq. In brief, the British policy was that: 'without embroiling ourselves with the Dutch, or giving them any well founded jealousy of our intending to... rival them in the spice trade... every practicable method should be tried for extending our commerce'. It was also the policy of the British to observe: 'strictest attention to the faith of treaties with European powers'. Interestingly, no mention is made of faith in treaties with non-European powers.

¹³Vlekke, pp. 233-4. The Treaty of Paris, 1783, re-opened the Archipelago to British shipping. Mahan, pp. 505-41.

they seem as ambitious as the Dutch. In Kedah particularly, friendship with the British must have appeared desirable in so far as it would provide active allies in the contentions with the Dutch and Bugis, and possibly even open the way to the Sultan's being able to improve his estate at the expense of Thailand's resurgent claims to authority. It may be remembered that Thailand reconquered Ligor, Kedah's northern neighbour, in 1782.

On the second level the Dutch in 1786 were engaged in legal manoeuvres in Europe, and just as the policy of the Dutch administrators in the East varied with the philosophical and political climate of Europe, so Dutch political relations with the other states of Europe were reflected in events in the East.¹⁴ Although rivalries in the East affected the political outlook in Europe,¹⁵ it is certain that the ultimate decisions, not always wise ones, were made in European capitals and were influenced more by European considerations than by any thought that the Eastern interests of any of the major powers of Europe were other than tributary and inferior in estimation to the European soil from which these orders issued. The day of the adventurer of the seventeenth and eighteenth century had passed, and the day of the cautious venturer dawned. In both Great Britain and the Netherlands, the political arm of the home government took over the management of the affairs of traders in the East,¹⁶ and this centralized control was unhesitatingly exercised, as shall be seen.

¹⁴Vlekke, pp. 231-7. It may be noted that Vlekke's dates are not always accurate.

¹⁵J.R. Seeley, *The Expansion of England*, London, 1904, p. 114.

¹⁶The Dutch East India Company was always so intimately bound to the political organs of state that the final abolition of the Company in 1799 produced no marked change in political relations between the Dutch authorities in the Malay area and the home Government. Vlekke, pp. 239-41.

The acquisition of Parliamentary control over the affairs of the British East India Company was rather more complicated. Ilbert, *The Government of India*, Oxford, 1921, pp. 19-27. It was never maintained that the Company could exist without a periodical renewal of its term-Charter, and during the period 1688 to 1693 Parliament successfully established its right to be the Charter granting organ of Government in place of the Crown. The first actual Parliamentary assertion of control over the affairs of the Company at a time when renewal of the Charter was not in question was in 1767, when Townshend's Act, 7 G. III c. 57, saddled an amercement upon the Company in return for allowing the Company to retain possession of its Indian territories. In 1773, North's Regulating Act, 13 G. III c. 63, was passed which provided in detail for the Government of the Company's Indian possessions, and forbade the subordinate Presidents in Council (including the President in Council of Benkulen) 'making War against any Indian Princes or Powers without the Consent... of the Governor-General and Council' of India except in cases of immediate necessity (article 9). The Governor-General and Council were declared to be subordinate to the Court of Directors in London.

While the question of the Company's authority being attributable to the Crown or the state of Great Britain was not expressly dealt with, the establishment of courts of law by the Crown with Parliamentary approval was stipulated within the territories over which the Governor-General of India and his Council had jurisdiction, as was the assumption of jurisdiction over all British nationals residing in Bengal, Behar and Orissa. The need for Parlia-

On the third level the Dutch were engaged in political manoeuvres in two worlds. On the one hand they were attempting to maintain an economic and political dominance in the Malay Archipelago by the use of two legal adjustments. The principal legal adjustments came from their treaties, whose political implications had never been willingly observed by the Malays, and whose economic implications had been observed only while their burdens did not become so onerous as to make breach of the treaty a lesser appearing evil to the sultan involved than its continued observance. The other legal adjustment was in the silent development of the concept of piracy in the Malay area to include the political activities of all Malay groups with which the Dutch were not in treaty relations, as well as those violating the Dutch interpretation of treaties by trading within the Archipelago in paths not including Dutch ports of call.¹⁷ There is, unfortunately, little direct evidence of this change in legal meanings during the eighteenth century, but the feeling of European adventurers that the Malay people with whom they came into contact were not entitled to treatment beyond that accorded pirates, and their attaching the label 'pirates' to

mentary approval was certainly a victory for those who wanted the state, rather than the Crown, to be considered the source of the Company's authority abroad. See Ilbert, pp. 42-8.

Pitt's Act of 1784, 24 G. III c. 25, completed the job of subordinating Indian affairs to the political control of Parliament. Ibid. p. 63; Ramsay Muir, *The Making of British India*, Manchester, 1917, pp. 79, 130, 167-8. Pitt's Act set up a complete scheme of government for British controlled territory in the East, in effect converting the political organization of the East India Company into an arm of the British state. The Governor-General and Council were expressly forbidden to engage in war '... or enter into any Treaty for making War against any of the Country Princes or States in India, or any Treaty for guarantying the Possessions of any Country Princes or States...' without express authority from the Company's London Directors, except in the direst necessity (article 35). Subordinate Presidencies were forbidden to '... negotiate or conclude any Treaty of Peace or other Treaty, with any Indian Prince or State (except in Cases of sudden Emergency...) unless in pursuance of express Orders from the ... Governor-General and Council...' or their London superiors. The Company's London officers, the Court of Directors, were made entirely subordinate to a Board of Control in matters of government and taxation (articles 3, 6, and 11). The Board of Control was unquestionably established as an arm of the Crown under a Secretary of State, and subject to Parliamentary supervision on the same terms as the rest of the Crown's administrative organization was (articles 1 and 2). The question of whether Parliament was to be considered the legal sovereign over the Company's territories in India was again left open. V.A. Smith and P. Spear, *The Oxford History of India*, 3rd ed., Oxford, 1958, p. 522.

The policy of the British Government with respect to the expansion of British authority in the East was stated in article 34 of Pitt's Act: '... (T)o pursue Schemes of Conquest and Extension of the Dominion in India, are Measures repugnant to the Wish, the Honour, and Policy of this Nation...'

¹⁷Cf. Vlekke, p. 235. A very similar development was, in fact, taking place during the eighteenth century with regard to the Algerian state. Fisher, pp. 301-2. The thesis of Fisher's book, admirably supported by references to source documents, is that the nineteenth century's idea of 'Barbary piracies' of the sixteenth, seventeenth and eighteenth centuries was based upon European misconceptions and downright falsifying of fact. See, e.g., ibid. pp. 61-5. Cf. Braddell, 'The Europeans in the Indian Archipelago in the 16th and 17th Centuries', pp. 328-9.

these people indicates a method of thought that cannot have developed suddenly. As has been noted, the seeds of change had been planted by the end of the seventeenth century.

One reported episode of the late eighteenth century is interesting in showing a stage in the trend of European thought between the acceptance of a Malay community as a state whose relations with other states are regulated by the reciprocal rules of international law, and classifying Malay communities as something entitled to less than the status of a state in international law. During the Maritime War of 1778-83 the French appear to have captured a British vessel in Kedah waters. Against the resistance of the French, the authorities of Kedah seized the 'prize'. The French captors then offered to buy the British ship back for 50 per cent of its value. This offer was refused, as the Kedah authorities said that 'if the Kings of France and England adjudged it a lawful prize he would pay the Frenchmen, if not the English'. It appears that the Sultan and his Laxamana refused to return the ship to the French pending some authoritative determination of who should have it, and it is possible that its cargo was confiscated by Kedah, but the final outcome of the transaction is not reported. Because of this, it may be supposed that the ship was not confiscated by Kedah, as that would have been likely to have evoked an outcry from the British author of the report of the events described.¹⁸ Therefore, it is probable that the Kedah authorities kept the cargo and returned the ship to the British. In view of the uncertainty surrounding the incident it would be unwise to comment further than to observe that the Kedah apprehension of the illegality of the French belligerent seizure within Kedah's waters seems to conform to European practice of the time, while a confiscation by Kedah of the ship's cargo probably would not.¹⁹ The offer of the Kedah authorities to apply the law of Europe as understood by France and England, the two parties actually in contention, seems to have been ignored by the French and British sea captains in Kedah at this time.

¹⁸Logan (ed.), 'Pinang', Francis Light to the Governor-General of India, 12 September 1782, 2 *JIA* (NS) (1858) pp. 198 et seq. Light in the same letter observes (p. 201): 'little confidence is to be placed in these people...', and seems to have attempted to support this assertion in all his correspondence with India.

¹⁹The taking of property by state action would appear to be able to give rise to an international claim unless justified either against the private individuals whose property was taken as no violation of minimum standards of justice (see H.W. Briggs, *The Law of Nations*, 2d ed., New York, 1952, pp. 601 et seq.) or justifiable as a lawful exercise of state power by way of reprisal, belligerent rights, etc. It is not proposed to analyse this case more closely since the facts are so much in doubt.

There is also mention of an incident in which the Sultan of Kedah appears to have confiscated a ship which the British claimed to have been taken from them by force. Since the respective claims to the vessel are not made clear, it is difficult to comment. It does not appear that it was common Malay practice to seize trading vessels. In another case a ship belonging to the British Captain Scott was driven ashore in Kedah, and her cargo seized by the Laxamana. The basis for the seizure appears to have been that the cargo and ship were abandoned, although the facts are unclear. Upon Captain Scott's refusal to leave Kedah when ordered by the Sultan to go, all the commanders of vessels in Kedah, including the British Captain Forrest, were called together by the Sultan and asked what was 'the custom or law in Europe if a stranger was ordered by the King to go away and refused'. All the Captains agreed that such a person might be put to death, and Captain Scott was forced to leave.

It might be imagined that the episodes of the 'prize' and the expulsion of Captain Scott would have signified Kedah's willingness to abide by European practices, at least when those practices conformed to the Sultan's own sense of justice in Kedah, in Kedah's intercourse with European venturers, and this willingness might be supposed to have been applauded by the traders. But in fact all the incidents cited were raised as reasons why the European merchants ('everyone') 'feared and hated' the Laxamana, who was the leading Kedah official below the Sultan who was involved in all these actions.²⁰

THE ACQUISITION OF PENANG

IN February 1786 the British Governor-General of India received a letter from the Sultan of Riau offering to accept 'a seal, a flag and an army, that you may maintain me and protect me... and may all of us put ourselves under the Flag of the English Company, and may not live under the Flag of the Dutch Company...'. There is evidence in this letter that the Sultan was writing on the advice of a British Captain. At about the same time the Bugis Sultan of Selangor, now returned to his territory after the departure of the Dutch, wrote to the Governor-General inviting trade and an alliance. His letter makes no mention of any legal disability saddled on him by virtue of any transactions with the Dutch. At the same time came a letter from the Sultan of Kedah, Abdullah Marhum Shah, informing the

²⁰Logan (ed.), 'Pinang' 2 *JIA* (NS) (1858), pp. 200, 202. All quotations are from letters of Captain Francis Light.

Governor-General that in response to Captain Light's having informed him that he, the Governor-General, wanted the island of Penang off the Kedah coast, he, the Sultan, had

instantly given to our . . . friend Captain [Light]. . . , to plant the Hon'ble Company's English flag upon Pulo Penang. . . Moreover we have made known to the said Captain all our desires, which being come to the knowledge of our friend [the Governor-General] and accepted, with all possible speed send people to take possession and remain in Pulo Penang. Whatever necessities this island does not afford shall be supplied by us. . .

A full exposition of terms was submitted by the Sultan at the same time. It seems clear from this letter that the Sultan of Kedah regarded the planting of the British flag in Penang as only a preliminary measure, advantageous to both sides. The British undoubtedly felt the planting of their flag to be a sign of possession which would exclude the possibility of the negotiations being interrupted by the intervention of a peaceful third power. The Sultan of Kedah undoubtedly hoped the British flag would signify publicly an entanglement of British interest in Kedah territory which he must have hoped would serve to deter Dutch, Bugis and Thai political activities in his domains. It is certainly clear from the words of this letter that the Sultan did not consider actual British possession to begin until the British accepted his terms.²¹

Ignoring the letters from Riau and Selangor, which the British may have felt were disabled, by virtue of their treaties with the Netherlands, from incurring the international obligations which the British sought to contract with them, the British immediately responded to the offer from Kedah. John MacPherson, Governor-General of India in the short interval between the incumbencies of Warren Hastings and Lord Cornwallis,²² wrote to the Sultan that he had transmitted to England the Sultan's terms, and pending a response from his superiors had ordered Light, as agent of the East India Company, to 'plant the Honourable Company's colours in Pulo Pinang and to defend that island against all invaders'. A warship was ordered to the area to defend the island and, astoundingly, to protect the coast of Kedah. He informed the Sultan of the warship and its mission and further informed the Sultan:

It is not my intention to subject to any duties or impediments the vessels or merchandize that may come to Pulo Pinang, but . . . should it happen that my

²¹Ibid. pp. 187-9.

²²Muir, p. 169; Smith and Spear, p. 530.

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friend may become a sufferer by the English Company settling at Pinang, I will take the same into consideration and recompense my noble friend and brother.

The instructions given by the Government of India to Light actually provided for him to take 'regular possession of the island', and advised him 'to make a place tenable with your little force against an enemy'.²³

Since permission had not yet come from London for such an acquisition of territory, and from the words of the Sultan's letter it seems clear that no cession of the territory had been agreed as yet, it is difficult to understand this action of MacPherson's. It seems to have exceeded his powers under Pitt's Act, doubly so in so far as it represented a guarantee of Kedah's territory against external seaborne attack.²⁴ There can be little doubt that the Sultan was knowingly encouraged by the letter to him to infer that the British authorities had accepted his terms. But the Kedah rulers had had plentiful experience of European practice before this, and when Light arrived in Kedah he found the Laxamana of Kedah to be a very astute gentleman indeed.

Before going further, it may be well to look at the full terms originally submitted by the Sultan of Kedah to Light, and to see to what extent the British authorities were in fact willing to accept them. The terms follow:

- I. That the Honourable Company shall be guardian of the seas; and whatever enemy may come to attack the King shall be an enemy to the Honourable Company, and the expense shall be borne by the Honourable Company.
- II. All Vessels . . . coming . . . to the port of Quedah [Kedah], shall not be . . . hindered by the Honourable Company's Agent . . . to buy and sell with us, or with the Company at Pulo Pinang, as they shall think proper.
- III. The articles opium, tin, and rattans, being part of our revenue, are prohibited; and . . . places where these articles are produced, being so near to Penang, that when the Honourable Company's Resident remains there, this prohibition will be constantly broken through, therefore it should end, and the Governor-General allow us our profits on these articles, *viz.*, 30,000 Spanish Dollars every year.
- IV. In case the Honourable Company's Agent gives credit to any of the Kings' relations, ministers, officers, or ryots [*peasants*], the Agent shall make no claim the upon King.

²³Logan (ed.), 'Pinang', 2 *JIA* (NS) (1858) pp. 193, 194.

²⁴See articles 34 and 35 of Pitt's Act abstracted above, note 16. Cornwallis's opinion of MacPherson's conduct as Governor-General, although not with this particular action in mind as far as can be learned at present, was not complimentary. Smith and Spear, p. 330.

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- V. Any man in this country, without exception . . . , who shall become an enemy to us shall then become an enemy to the Honourable Company; nor shall the Honourable Company's Agent protect them. . .
- VI. If any enemy come to attack us by land, and we require assistance from the Honourable Company, of men, arms or ammunition, the Honourable Company will supply us at our expense.²⁵

In forwarding these terms to the Governor-General and Council,²⁶ Captain Light added his comments to each term. He advised acceptance of the first two articles,

for it gives to the Honourable Company the rights of Admiralty and the privileges of fisheries, and will prevent any other European from interloping²⁷. . . The Honourable Company for this article may demand the free and unlimited privilege of visiting, buying, selling, wooding, watering and fishing, on . . . all the islands, bays, rivers, &c., within the king's dominions, also to search for and work any mines upon any of the islands.

With regard to the third article, Light gave his opinion that the Sultan would be willing to sell to the Company a monopoly in these three items of revenue for a mere 10,000 Spanish Dollars. It is not clear whether Light meant that sum to be paid annually or as a single payment once for all. The fifth term, said Light, 'comprehends the principal and almost only reason why the king wishes an alliance with the Honourable Company'. Light made no mention at all of the sixth term, and, although it is clear that he had not confused the fifth with the sixth, it may be doubted that he himself was entirely clear on the political position of Kedah at the time his comments were written.²⁸

When he returned to Kedah, Light carried with him the responses of the Governor-General and Council which followed item by item each term of the Sultan's original offer. These were as follows:

- I. This Government will always keep an armed vessel stationed to guard the Island of Penang, and the coast adjacent, belonging to the king of Quedah.

²⁵Sir W.G. Maxwell and W.S. Gibson (eds.), *Treaties and Engagements Affecting the Malay States and Borneo*, London, 1924, p. 95.

²⁶On the distinction between the Governor-General and Council, and the later designation of Governor-General in Council, see Smith and Spear, p. 523; Muir, p. 178; Independent Powers of Governors Act, 1793, 33 G. III, c. 32.

²⁷'Interloping' was a word of art referring to acts of traders in the area of the Company's monopoly who traded on their private account without express permission. Collis, pp. 15, 16-18.

²⁸Logan (ed.), 'Pinang', 2 *JIA* (NS) (1858) pp. 190-2.

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- II. All vessels . . . bound to the port of Quedah, shall not be interrupted. . . but left entirely to their own free will. . .
- III. The Governor General in [*sic*] Council, on the part of the English East India Company, will take care that the King of Quedah shall not be a sufferer by an English settlement being formed on the Island of Penang.
- IV. The Agent of the Honourable Company, or any person residing on the Island of Penang, under the Company's protection, shall not make claims upon the King of Quedah for debts incurred by the King's relations, ministers, officers, or ryots; but the persons having demands upon any of the King's subjects, shall have the power to seize the persons and property of those indebted to them, according to the customs and usages of that country.
- V. All persons residing in the country belonging to the King of Quedah, who shall become his enemies, or commit capital offences against the State, shall not be protected by the English.
- VI. This Article will be referred for the orders of the English East India Company, together with such parts of the King of Quedah's requests as cannot be complied with previous to their consent being obtained.²⁹

The ambiguity of article 3, the narrowing of article 5 to near meaning merely that the British would not intervene in the petty squabbles of Kedah, the avoidance of any commitment under article 6, as well as the narrowing of article 1 to imply, ambiguously, that the British would protect merely whatever they were ceded even if it involved patrolling the bit of Kedah coast forming the opposite side of Penang harbour, clearly fell far short of the Sultan's demands. There appears to be no hint in either Light's comments or in the responses (labelled by the British, 'agreements') of the Government of India, that the Sultan's terms were considered precatory, or that British agreement to some treaty with him was not still necessary before the legal basis could be set for a British occupation of Penang. Yet Light had already been instructed to raise the British flag on Penang and prepare to defend it.

On 29 June 1786 Captain Light anchored in Kedah. The next day he went ashore. There he found that Kedah had been ordered by Thailand to supply food and arms to the Thai troops fighting against Burma. Light recorded his impression that the Thai demand was based on no law but that of force, observing that the people of Kedah were weak and that during the Thai wars with Burma they had sided with either side as interest prevailed. It is clear from his narrative, however, that the Thai certainly felt themselves able to demand support from Kedah as of right,

²⁹Maxwell and Gibson, p. 95.

and that Kedah was neither surprised nor resentful of the demand; only fearful of the results of compliance should the Burmese again defeat Thailand.³⁰

On 8 July Light had an audience with the Sultan and Laxamana. After having Light translate the Governor-General's letter, the Sultan observed that the Governor-General had 'deferred entering into a treaty with him until an answer should arrive from Europe, and as that was the case it was needless going to Pinang and incurring an expense which might perhaps prove useless'. To this Light replied that the major expense was the coming to Kedah, and the additional expense of going to Penang would make little difference. At this, the Laxamana asked whether the Company had agreed to pay 30,000 dollars annually for the Penang trade. Light replied that he did not know, but was certain that the Company 'would not allow the king to be a sufferer by their settling in his country without making him an adequate recompence'. The Laxamana then asked whether, if the Company's final offer should not prove agreeable to the Sultan, Light would return to Bengal quietly. 'To this', says Light in his Journal, 'I made no answer'.³¹

On 11 August 1786, Light raised the British flag in Penang.³² On 12 September he wrote to the Governor-General of India from Penang that the Sultan was cooler towards him than he had expected, attributing this coolness to intrigues of the Dutch. In reviewing the political situation in Kedah, he mentioned that Kedah had voluntarily paid the *bunga emas* to Thailand upon the Thai's having driven the Burmese from Kedah (presumably in 1782, when Ligor was re-taken) but his concept of rightful political dominance seems inextricably connected to the feeling that cultural similarities were necessary, and so he came to the conclusion that the Malay state of Kedah cannot have ever been legally subordinate to Thailand.³³

Light's concept of political organization being necessarily tied to cultural similarities in the Malay Peninsula is at best superficial. England itself had political dominance over people regarded as culturally different, in India as well as in Wales and Ireland. To deny on the grounds of culture the possibility that Thailand might have had political rights in Kedah was to deny to Thailand legal powers in the Malay Peninsula which Light

³⁰Logan (ed.), 'Pinang', Extracts from Light's Journal, 2 *JIA* (NS) (1858) p. 195.

³¹Ibid. pp. 196-7.

³²J.W. Norton Kyshe, *Cases... Straits Settlements, 1808-1884*, Singapore, 1885, Vol. I, p. iv.

³³Logan (ed.), 'Pinang', 2 *JIA* (NS) (1858) pp. 197-201.

would certainly not have denied to any European group. If Light were not merely superficial, he was disingenuous. In so far as the cultural differences between the Kedah Malays and the Thais were felt to be mere evidence of the lack of a legal tie between the political organizations of those two peoples, it may be observed that the evidence should not have been considered of itself sufficient to overcome the clearer evidence of the triennial passage of *bunga emas* from Kedah to Thailand, and the clear Thai belief, apparently acquiesced in by Kedah, of Thai right to exercise some degree of political authority in Kedah. In addition to noting the passage of *bunga emas*, Light also noted that the Sultan of Kedah had recognized the right of the Thai military governor of the area to summon representatives of Kedah to him in Sanggora. When the Sultan's brother-in-law was rejected as an emissary by the Thai, the Sultan sent his own son with full powers to consent to Kedah's joining with material aid in the war against Burma. It is not clear whether Kedah was believed to have any legal right to refuse to send aid. In fact, as Light must have known, Kedah complied with all the Thai demands and the negotiations appear to have concerned amounts and terms of delivery only.³⁴

Of course, Kedah had also complied with a Burmese demand for the *bunga emas*, but apparently only between the Burmese sacking of Ayutthia and the Thai military revival (*i.e.*, 1767-82(?)). When Burma had demanded military supplies from Kedah in 1785 they were supplied, but only very scantily, and a letter was at that time written to Thailand seeking to excuse the Kedah action. It does not appear that Kedah sent any letters to Burma to excuse her support of Thailand in 1786. Light suspected that the Sultan of Kedah would turn Penang over to Thailand if requested by the Thai, but instead of drawing the obvious legal conclusions, viewed this possibility as evidence of the perfidy of the Malays and Thai and wrote that he thought it 'absolutely necessary we should have such a force here, as will defend the place against any country power . . .'.³⁵

After the Thai conquest of Patani in November 1786, Light noted that the Sultan of Kedah was obeying the Thai injunction not to admit any of the Patani Malay refugees into his territory, but attributed this obedience to fear. The Sultan was apparently willing to admit these refugees if Light would permit them to settle opposite Penang and would undertake to

³⁴*Ibid.* p. 195.

³⁵*Ibid.* p. 201, letter, Light to the Governor-General, 12 September 1786, from Penang.

assist Kedah if attacked.³⁶ It may be suspected that this represented a further attempt to entangle the Company in Kedah affairs in order to help the Sultan break his legal (or political) ties with Thailand. There was no doubt in Light's mind that protection from Thailand was the principal object of the Sultan of Kedah's negotiations with the British at this time. But 350 years of Kedah contact with Arab, Indian and European traders and administrators were presumed to be forgotten, as Light seems to have believed that the nobles of Kedah were willing to invite the British into their territory for the sake merely of ensuring a British-protected haven to run to in the event of an unprovoked attack upon them by the supposedly savage and barbarous Thai. Having once gained possession of Penang, it is not clear that Light considered any further dealings with Kedah to be legally or morally necessary, but he did suggest to the Governor-General on 5 October 1786 that an annuity of 10,000 dollars might be advisable in view of the proximity of Kedah and the dependence of Penang upon Kedah for supplies, as the fair 'value of the King's friendship'.³⁷

The Laxamana of Kedah remained mistrustful of Light and his request that Light interfere against Patani (which was fighting against Thailand near Ujong Salang, which Burma was defending)³⁸ was prudently denied by Light.³⁹ As noted above, Light mistrusted the Laxamana and, since it is likely from these events that the Laxamana saw through the British plan of taking full possession of Penang before the Kedah desiderata were agreed to, Light's mistrust was probably well founded. Light apparently saw no wider implications in the Laxamana's request being for British interference on the side of Thailand, although from his analysis of Kedah's relations with Thailand it might have been thought he would find this request odd.

On a review of the facts, it seems likely that Light, in his narrations regarding Kedah, was either not entirely accurate, departing from accuracy in ways which seem designed to suit his commercial interests, or was a singularly unperceptive observer. In regard to his opinions as to the legal-cum-political situation, he seems to have tried to find Kedah rightfully independent of Thailand against the weight of evidence and circumstance. Whether or not this finding was encouraged by conscious thoughts of

³⁶Letter, Light to the Governor-General and Council, 25 November 1786, from Penang, *ibid.* p. 202 at p. 203.

³⁷Letter of 12 September, *ibid.* pp. 201-2. Letter, Light to the Governor-General, 5 October 1786, *ibid.* p. 202. See also p. 200.

³⁸*Ibid.* p. 202. G.E. Gerini, pp. 135-8, gives an interesting perspective on Thai relations with Ujong Salang and Penang at this time.

³⁹Logan (ed.), 'Pinang', 2 *JIA* (NS) (1858) p. 202.

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British political or mercantile advantage, or represented an unconscious adjustment of thought by which relations in the Malay Archipelago were felt to differ inherently from relations which the same facts would have indicated in a European context, it is impossible to tell. But it seems clear that as a result Light behaved differently in the Penang transaction than would have been legally justifiable for a European negotiator had that transaction occurred in Europe, and he seemed to feel that his behaviour was justifiable and the resistance of the Malays evidence of perfidy and unreasonable animosity.⁴⁰

Light's ultimate plan for Kedah was that it should, in its entirety, be declared 'under our protection', and this view was put forth in a letter from Light to the Government of India on 7 May 1787.⁴¹ The advantages expected by Light from this course were: 1) the settlement of the Penang cession, since nothing short of such 'protection' appeared to be acceptable to the Sultan as a *quo* for the *quid* of cession; 2) the securing of Penang's supplies, since it seems to have been felt that an arrangement involving 'protection' would 'oblige the King to furnish the Settlement at all times with provisions'; and 3) 'preventing other European nations from settling in any other part of his country'. To support his argument on political grounds, Light asserted that the Thai would make 'an insolent and troublesome neighbour' should they be 'permitted to take possession of his country', and pointed out that '[t]he Danes, the Dutch, and the French have solicited permission' to set up small installations in Kedah, and 'should the King consider himself aggrieved or disappointed by the English, he may in despair seek for other alliance'. Light's concept of 'protection', in so far as it appears to have *ex jure* involved Kedah in an obligation to supply the British settlement at Penang and forced other European powers to keep out of Kedah, appears to have approximated that of the Dutch of this time. Since the Sultan's original terms of 1786 were more in the nature of an offer of equal alliance than a submission to British monopoly of Kedah's external contacts, it is difficult to imagine sources other than Dutch practice for Light's view of legal relations in the Malay Archipelago. Yet, as has been seen, the Dutch practice depended upon the setting of legal bases for their monopolies and other advantages not felt to rest by custom in the

⁴⁰The evidence of Light's consciously concealing Thai claims of right from his political superiors in India is overwhelming. Light's knowledge of Thai pretensions is abundant. See, in addition to the material cited above, Kachorn Sukhabanij, 'Siamese Documents Concerning Captain Francis Light', *Papers on Malayan History* (K.G. Tregonning, ed.), Singapore, 1962, pp. 1-9.

⁴¹Sir F. Swettenham, *British Malaya*, rev'd ed., London, 1948, pp. 42-3.

possessors of Malacca, through the conclusion of treaties. It may be that Light thus felt it possible in 1787 to conclude a treaty which would give the British the three listed advantages in Kedah. It is interesting that he used the word 'protection' to define this relation by which it is clear he intended the 'protected' community to be deprived of international competence to deal with other European states. Although the basis of the 'protection' was apparently to be a British obligation to defend Kedah from Thailand, it seems abundantly clear that the interest Light was really seeking to protect was that of the British merchants and traders to operate in Kedah without fear of other European competition or Asian entanglements beyond the simple and clear-cut one of isolating Kedah from its Asian neighbour to the north. It may thus be confidently asserted that the concept of 'protection' in 1787 really involved the isolation of the party to be protected from all external political contacts except the major contact with the 'protecting' power.

It is also interesting to note that Light in 1787 did not regard British rights in Penang as settled, nor did he dismiss Thai claims to Kedah (thus, impliedly, to Penang) as groundless. Rather, he seems to have conceived of a Thai right to occupy Kedah as something within the contemplation of the Sultan, and the primary reason for the Sultan's willingness to enter into political relations with the British.

From these documents, it has not been possible to confirm Light's view that Kedah would have been willing to enter into a 'protection' agreement of the sort he envisaged; rather, Kedah throughout seems to have insisted on procuring a treaty by which the British would agree to the six 1786 terms without reservation. Yet these terms seem to contain no implication of isolation for Kedah. On the contrary, article 2 seems to preclude such an interpretation. In these circumstances it seems likely that Light's activities were aimed at securing the backing of the British Government in India to a plan by which British mercantile interests could be allowed free play in the territory of Kedah as a whole, a plan which would appear to have benefitted Light and his employers more than any other party, and which the Supreme Government (as the British Government in India was called) could not view sympathetically.

Among the Malay powers of the Peninsula, the sight of the British flag in Penang was apparently interpreted as heralding a change in British policy to one of willingness to become involved in peninsular politics. The Sultan of Selangor wrote to the Supreme Government inviting an

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occasion to hoist the British flag in his territory over a British fort, and asking for arms. The Sultan of Trengganu wrote asking for British help in resisting an expected attack from Thailand.⁴²

On 22 January 1787 the Supreme Government instructed Captain Light to avoid 'any measures that may involve the Company in military operations against any of the Eastern Princes', but permitted the 'countenance or influence of the Company' to be used to protect the Sultan of Kedah, providing Light refrained completely from any 'acts or declarations that may involve the honour, credit or troops of the Company'.⁴³ At about the same time the Sultan of Kedah, perhaps realizing his tactical error in having permitted the British to occupy a piece of his territory without first obtaining a written agreement as to the terms of the occupation, represented to Light that he was a Thai vassal, and incapable, legally, of ceding Penang. A year later, when the Thai demanded a contingent of Kedah troops to help in the war against Burma, Kedah responded with a levy of 5,000 men. The Kedah request for arms was not complied with by the British in Penang. A dispute over whether the British were bound to supply arms to Kedah seems to have developed, the Sultan resting his view of right on the terms of article 6 of the Sultan's treaty offer, which he insisted had been impliedly accepted by Light's occupation of Penang coupled with Light's avoidance of any explicit denial of the acceptability of article 6.⁴⁴ It seems likely that the Sultan was attempting to hold the British to the terms of his original offer, although he may have been willing to modify some of them in view of the letter from Governor MacPherson, whose contents were made known to the Sultan by Light before the occupation of Penang. It doubtless appeared to the Sultan at this time that his choice lay between accepting some modification of his original terms, or insisting on the British abandoning Penang. Still hoping to obtain the concessions which prompted his first offer of Penang to the British, he seemed not willing to offend them needlessly if his objects could yet be obtained. He seems to have been inclined to construe the existing transactions as evidencing an agreement which should bind the British at this time, rather than attempting to force them to abandon Penang.

⁴²Logan (ed.), 'Pinang', 2 *JIA* (NS) (1858) p. 203; Cf. Bassett, 'Anglo-Malay Relations, 1786-1795', 38 (2) *JMBRAS* (1965) 183 at pp. 195-9, 201-3.

⁴³Low, 'Account', 3 *JIA* (1849), p. 609; Swettenham, p. 42.

⁴⁴Low, 'Account', 3 *JIA* (1849), pp. 609-11. The precise representation made by the Sultan to Light regarding his subordination to Thailand is not clear. Low, who seems to have obtained his information from old Penang records and files, does not go into detail.

In hopes of pressuring the Supreme Government into agreeing to his terms, the Sultan notified Light that if the British did not agree to the proposed article 6 and denied their obligations under it, he would not have any scruples in seeking the help he needed from other powers. Receiving no satisfactory answer he then sent missions to the Dutch, who despatched three ships to Kedah and began a blockade of Penang, and to the French at Pondicherry in India.⁴⁵ The Dutch found the Sultan pressed by Thailand, and were apparently not willing to undertake commitments which might involve them in war with that eastern kingdom. The negotiations between Kedah and the Dutch were broken off and the blockade of Penang withdrawn by the Dutch.⁴⁶

In July 1789 negotiations were still continuing between the Sultan and Light as to the terms of the British occupation of Penang. In that month, Light wrote to the Supreme Government that the Sultan had refused an outright sale of the Island, and Light's offer of a 4,000 dollar annuity during British possession was also rejected. Instead the Sultan reiterated his demand for a promise of help by supplying arms and men in case of an attack on Kedah from Thailand, which Light evaded by saying that the approval by the King of Great Britain would be necessary for such an undertaking.⁴⁷ Since this demand was already under consideration in London as article 6 of Kedah's original terms, and it seems to have been well understood on all sides that the British occupation of Penang continued legally to rest upon Kedah's sufferance only, it may have been felt by the Sultan that the three years of delay in responding to his demands evidenced a want of good faith on the part of the British. At any rate, by the end of 1790, more than four and a half years after he had submitted his terms, and more than four years after Light had begun the British occupation of Penang, the Sultan seems to have decided that the time had come to demand a withdrawal of the British from his territory. When the British refused to move out, he decided to use force and, in December 1790 the Malay coalition attacked the British settlement with 8,000 men and a reported 120 pieces of ordnance. The attack appears to have collapsed primarily

⁴⁵France was in no position to engage in additional activities in the East in 1789. Pondicherry fell to the British at the start of the European wars with revolutionary France in 1793. See Mahan, *The Influence of Sea Power upon History*, pp. 464-7; also the same author's *The Influence of Sea Power upon the French Revolution and Empire*, London, 1892, Vol. II, p. 215.

⁴⁶Low, 'Account', 3 *JIA* (1849), p. 611.

⁴⁷Swettenham, pp. 44-5; Bassett, pp. 203-4.

SOME LEGAL AND POLITICAL IMPLICATIONS

due to a want of co-operation among the Malay factions composing the force.⁴⁸

At this time the Sultan of Kedah was reported to have seized some 30,000 dollars worth of property belonging to British merchants operating out of the rapidly growing settlement in Penang, and he sent further demands to Light. In response to these demands and what must have been considerable prodding from his merchant friends Light reluctantly paid the Sultan 10,000 dollars, apparently with bad grace, for the Supreme Government felt it necessary to counsel forbearance pointing out that the compensation had not yet been fixed for the Sultan's loss of trade, as had been promised.⁴⁹ This view seems to imply that the Government of India felt itself bound by the terms it had sent to the Sultan of Kedah via Captain Light in 1786, and if so it may be that it regarded the Sultan's permitting Light to occupy Penang as implying an acceptance of these terms. This interpretation of the facts, while supportable to some extent, seems to be somewhat distorted, as the Sultan and Laxamana were quite clear about their unwillingness to accept the Supreme Government's offer of terms until satisfied as to the British commitment to defend Kedah's coastline, allow Kedah to purchase arms, and pay a large annuity. For the British to regard their counter-offer as an acceptance of Kedah's initial offer seems to involve a grossly inaccurate reading of the terms of the Malay demand and a definite tone in the British reply that the British surely would not at the time have agreed that it held.

SOME LEGAL AND POLITICAL IMPLICATIONS OF THE BRITISH RETURN

It is hard to see how any meeting of minds can be inferred from the facts of the Penang transaction. The development of attitudes by which

⁴⁸Low, 'Account', 3 *JIA* (1849), p. 611. The totals may have been double this; Low's report is not clear. The lower figure seems much more likely. Later researchers who may lack some of the material available to Low conclude that the only allies available to Kedah at this time were the Ilanuns from Mindanao. See, e.g., Tregonning, pp. 80-3. Bassett, pp. 204-5 gives an excellent summary of these events based on a critical reading of Light's despatches to the Governor-General of India.

⁴⁹Low, 'Account', 3 *JIA* (1849), pp. 611-12. The Sultan's demands included a demand that the British defend the entire sea coast of Kedah; make arms available for the Sultan's purchase; and pay 10,000 dollars annually to compensate the Sultan for his loss of revenues and to enable him to buy the military supplies he felt he needed. Clearly, these demands come close to articles I, III and VI of the Sultan's original demands of 1786. Since, at this time, after the collapse of his attempt to force the British off the Island, the Sultan cannot have felt his political position to have been very strong although his legal position remained unchanged, it may be supposed that these represented in fact the minimum terms that the Sultan uncoerced would agree to.

the British felt it justifiable to authorize the occupation and defence of this piece of foreign territory, while reserving to themselves the right to determine the extent of the obligations undertaken in return, seems noteworthy. It may be doubted that a similar transaction occurring in Europe would have been considered legally justifiable.⁵⁰ But it can be suggested that the assumed right of the greater power to determine the extent of its obligations to the weaker was part of a growth which made the concept of a concert of European great powers, with legal rights conceived to come from the fact of political power alone, possible in the next generation.⁵¹

It appears that whatever the British notion of the respective obligations under the Penang transactions, the Malay notion was entirely different. There is convincing evidence that the Malays and Ilanuns were preparing to attack Penang in April 1791. Light construed a more or less routine demand by the Sultan of Kedah dated 9 April 1791 into a 'Declaration of War' and attacked first and without warning, destroying the Malay fleet on 12 April. On 19 April the Malays rallied and the Sultan of Kedah led a second armed attack on the British settlement in the Island of Penang with a reported 8-10,000 Malays. The attack was beaten off with the loss of only 4 killed and 20 wounded out of the 400 European and Sepoy troops engaged in the defence. The full Malay losses could not be ascertained but may be presumed to have been great. On 23 April the Penang mercantile community petitioned Light for permission to attack Kedah themselves, but Light wisely turned aside from bellicose counsel and attempted to

⁵⁰The concept of treaty as involving a meeting of minds was well-established in Europe long before this. See Butler and Maccoby, pp. 94-102. The application of European treaty practice to relations with the Malay polities has been noted above. In the treaty law of Europe of the late eighteenth century 'good faith' was considered an overriding obligation, Vattel, p. 374 (Book II, sec. 163), even in contacts with non-Christian political societies. C. Wolff, *On the Law of Nations Treated According to a Scientific Method* (1749), Washington, 1934, Sec. 552, said: '*... interquascunque Gentes sanctitas fidei eadem est, non attenda eacum religione*'. A ruse was considered a breach of this good faith even among belligerent nations at this time. Vattel, pp. 145, 146 (Book III, Secs. 174, 177). However, it may be borne in mind that the factual consequences of the successful deceit were considered to give rise to a new legal relation incorporating those consequences as part of the *status quo*, and therefore entitled to the protection of international law. Vattel, p. 167 (Book III, Sec. 192).

⁵¹See Nussbaum, pp. 187-8. The Congress system, effective from 1815 to 1822, by which the Great Powers purported to come to agreements binding on all of Europe, has been called 'political' rather than 'legal', but the conviction of righteousness necessary to justify the classification of an attitude as legal, rather than moral, is patently an elusive object for investigation. There is little doubt that the Great Powers felt that they had at least the moral right to control many political and some economic affairs in Europe. Butler and Maccoby, pp. 353-6. It is believed that this attitude did not differ markedly from that of the British Government in India during the time under discussion. If anything, the attitude of the British in the East approached more closely a conviction of legal right, *opinio juris*, than that of the Concert of Europe. This feeling is evident throughout the cited material.

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smooth matters over with Kedah by negotiation and by sending 5,000 dollars to the Bendahara as an installment on the yearly stipend.⁵²

Immediately after the defeat of the attack of 19 April 1791 a draft treaty (dated 20 April 1791) was negotiated between Light, as representative of the East India Company, and the Sultan of Kedah. This draft was signed on 1 May 1791, further modified, and replaced on 12 August 1791 with what was apparently intended to be a definitive treaty.⁵³ The definitive treaty was called 'preliminary' because it would not become formally binding until ratified by Light's superiors in India.

In the treaty of 12 August 1791, the sum of 6,000 dollars was fixed as the annuity to be paid to Kedah, to continue during the British 'possession' of Penang; and no terms at all appear either to grant that possession to the British or to imply any British obligation to defend the Kedah coast or permit the Sultan to buy arms and raise troops in Penang. In short, it has all the appearance of a settlement meant to stabilize the *status quo*, leaving the British in lawful possession of Penang without any further attempt to justify the title.

Article 2 of the treaty obliged Kedah to permit food supplies to pass from the Kedah coast to Penang.

The assumption of an obligation to pay the Sultan of Kedah an annuity during possession seems evidence that the British felt their presence in Penang involved a diminishment of the estate of the Sultan of Kedah for which the British were obligated to compensate. It is not clear from the contemporary correspondence whether the British considered the Sultan's estate diminished merely by the detriment to Kedah trade which the occupation of Penang was expected to cause, or by the actual loss of territory in which he exercised the rights of a sovereign. In either case the Sultan's loss of revenue derived from taxes connected with trade made the

⁵²Low, 'Account,' 3 *JIA* (1849), pp. 612-13; Bonney, 'Francis Light and Penang', 38(1) *JMBRAS* (1965) 152; Bassett, pp. 206-10; Tregonning, p. 82. Low misdates the events to May and does not mention the British attack of 12 April. The later writers do not mention the Malay attack on 19 April. The practice of paying the Sultan \$10,000 per annum was apparently considered to be an established obligation by this time, although no other direct evidence as to its origin seems to be available beyond what has been related and cited above. Despite many vicissitudes, some of which will be analysed below, \$10,000 per annum has remained the stipend felt to be proper and owing by the possessors of Penang to the sovereign of Kedah. That amount is still paid today to the Sultan of Kedah by the Government of Malaysia. See the Constitution of the Federation of Malaya, First Schedule to the Federation of Malaya Order in Council, *Statutory Instruments* 1957, No. 1533, Article 157(7). This provision of the 1957 Constitution of Malaya continues in the Constitution of Malaysia. (Letter Ref. 10.92 dated 14 August 1968 to the author from the First Secretary, Information, Embassy of Malaysia, Washington, D.C., U.S.A.)

⁵³Low, 'Account,' 3 *JIA* (1849), p. 613. The Treaty is in Maxwell and Gibson, p. 96.

basic loss seem commutable to money terms. But in the latter case the annuity would have been regarded as something like a quit-rent, while in the former case it would have been considered merely a moral obligation. Although there can have been no doubt in the late eighteenth century of the right of a non-European ruler to be possessed of legal sovereignty over territory (a written document was normally considered requisite for the transfer of rights from non-European governments as well as from European), the absence of documentation evidencing a transfer of rights, coupled with the assumption of possession which must clearly be regarded as a deliberate ambiguity in the 1791 treaty, seem to imply that the British well knew the legal doubts surrounding their acquisition of Penang.

But it is clear that from the first the Supreme Government was intent upon achieving possession of that island. In so far as the transaction resulting in British assertions of a right to rule Penang evidences a disregard of what were normally considered to be the legal requirements of achieving legal possession, it may be concluded that violations of international law were involved. *Prima facie*, the disregard of Kedah's sovereignty over Penang, which sovereignty had been unquestioned until after the British actually occupied that island, must evidence a violation of international law, for this disregard appears to stand as an isolated instance and is not supported by contemporary or later practice as conforming to any general international practice either in the Malay Archipelago or in any other area in similar circumstances. The ambiguities surrounding the British assertions of rightful possession in later documents, as well as the traditional feelings of the British inhabitants of Penang in later years, support this view.⁵⁴ Later developments will make more clear the extent to which the Penang transaction was a step in the conscious differentiation of norms to

⁵⁴The continued payment today of \$10,000 per annum to the Sultan of Kedah can be traced to British uneasiness concerning the terms by which Kedah was, in later years, officially considered to have been acquired as of 1786. Attempts to absolve the merchant adventurer Light from the discredit later felt to surround this transaction, and to substitute the figure of an anonymous and heartless Company in his place, e.g., Swettenham, pp. 36 et seq., seem to be contradicted both by facts as far as known and probabilities.

Until recent years there has been a marked tendency in British writers analysing this transaction to read into the relation of the adventurer Light and the distant Company the same relations that later existed between the Government of India (and, later still, the Colonial Office) and its political officers on the scene. Such attempts, it is believed, completely alter the perspective to the detriment of accuracy. Similar attempts to read a feeling of trust and confidence into the relations between Light and the magnates of Kedah seem to evidence a similar confusion as to context, and are clearly inconsistent with available source material. It is clear that the Sultan of Kedah, in permitting Light to occupy Penang, was, quite consciously, attempting to entangle the British in Kedah's affairs by taking a well-understood risk. His failure was not due to ignorance or a romantic attachment of Malay chiefs to British officials, but Light's and the Supreme Government's perfidy.

distinguish between actions occurring between European powers, and those between a European and a non-European community.

In 1792, while the Supreme Government was pondering the 'preliminary' treaty, a Thai mission to Penang demanded a gift of rice, which was refused by Light.⁵⁵ It does not appear that any Thai claims on Penang were investigated at this time, but all were summarily dismissed. Occupied with Burma and other affairs, the Thai were in no position to carry their objections to the British settlement of Penang to issue, and it was not until some years later that the question was again raised.⁵⁶

On 25 February 1793 the East India Company finally made its decision on the Kedah treaty, sending a directive to Penang that 'no offensive and defensive alliance should be made with the Rajah of Kedah'. There was no suggestion that Penang should be returned to Kedah although it appears clear that the practical effect of the directive of the London authorities was to deny articles 1 and 6 of the Kedah terms of 1786.⁵⁷

The next opportunity for the Sultan of Kedah to show his displeasure at events occurred in 1796, when French ships were in the neighbourhood. The Sultan awaited the approach of the French vessels then closed his coast to Penang trade, threatening Penang's food supply. The British appear to have regarded his action as a breach of article 2 of the treaty of 1791, which it undoubtedly was. In reply the Sultan demanded a new treaty which would increase his annuity. The British rejected this demand and a gunboat was stationed alongside the prahu of the Kedah Ambassador to Penang. The Sultan of Kedah then seems to have lifted his embargo.⁵⁸

In September 1799 Abdullah Marhum Shah, the Sultan of Kedah, died and was succeeded by his brother, Za'yuddin, who seems to have been, by Malay law, the rightful claimant despite the claims of the late Sultan's son.⁵⁹ During the civil upsets that occurred during this short and disturbed reign, negotiations were undertaken resulting in the conclusion of a treaty between the British Government in Penang and the weak Sultan of Ke-

⁵⁵Low, 'Account', 3 *JIA* (1849), pp. 613-14; Kachorn Sukhabanij, pp. 7-8.

⁵⁶Cf. Wood, p. 274. See below.

⁵⁷Low, 'Account', 3 *JIA* (1849), p. 614.

⁵⁸Ibid. pp. 615-16. See Mahan, *French Revolution*, Vol. II, pp. 215-18. The French vessels never actually reached Penang. Tregonning, p. 133.

⁵⁹Low, 'Account', 3 *JIA* (1849), p. 616. Cf., J.M. Gullick, pp. 54-61. Although Gullick is speaking of the period 1830-74 it is believed that the same principles applied at this earlier time.

dah.⁶⁰ This Sultan's annual stipend was raised again to 10,000 dollars in return for his cession to the Government of Penang of the strip of Kedah coast immediately opposite that island. Arrears of the 6,000 annuity (now called a 'gratuity') were agreed to be paid by the British. The British undertook to defend the newly received strip of territory (which they named 'Province Wellesley') from all 'enemies'; but it was not specified whose 'enemies' were to be kept out. Other provisions of the 1800 treaty repeated the terms of the 'preliminary' treaty of 1791 in formalizing relations between the British territory and Kedah in such matters as rights to provision, exchange of escaped criminals and free trade within each other's territory.

There is no clarification as to the legal classification of the British acquisition of Penang in the treaty and no mention of the terms of British tenure. Since all prior treaties are expressly cancelled, this treaty was taken by the British as marking the end of legal argument in the international sphere concerning the Penang transaction between Great Britain and Kedah. British acquisition of Province Wellesley was expressly provided for by cession from Kedah as *quid pro quo* for an increase in the annuity. Doubts as to the precise terms of British acquisition of Penang itself persisted for very many years, but the British refused to acknowledge officially any further claims advanced by the Kedah authorities after this point.

In conclusion, it may be observed that the transaction, from the first occupation of Penang under representations that can only be considered to have been made in bad faith, to the conclusion of the definitive treaty during the short reign of a weak Sultan whose tenure was unstable and who was suspected by the British of being not competent to cede Kedah

⁶⁰The late Sultan's son (Ahmad Tajuddin Shah) was finally invested with authority over Kedah by Thailand in a ceremony at Bangkok, and was installed in Kedah in 1802 upon the abdication of his uncle. Low 'Account', 3 *JIA* (1849), p. 616. The uncle (Za'yuddin) who was effective Sultan from 1800 to 1802 appears to have been dissolute and controlled by his Ministers and his women, of whom there seem to have been many. See the report of Lieutenant-Governor Sir George Leith to the Supreme Government on the negotiations of 1800, Logan (ed.), 'Pinang', 5 *JIA* (1851), p. 354.

The text of the treaty is in Maxwell and Gibson, p. 98. The British seem to have regarded this treaty as binding Kedah immediately, while the Supreme Government took two years to decide to ratify it. The ratification is called a 'confirmation' in Maxwell and Gibson. See, however, Logan (ed.), 'Pinang', 5 *JIA* (1851), p. 354, for the details and for appropriateness of considering the 'confirmation' a 'ratification' in the contemplation of the British authorities of the time. The Supreme Government rebuked Lieutenant-Governor Leith for his violation of his powers under Pitt's Act, since the treaty itself did not contain provision for ratification. It is not clear whether the Court of Directors felt itself free not to ratify the treaty, as it was clearly in the British interest and was in fact ratified.

territory because of his not having been invested by Thailand,⁶¹ could be considered discreditable to the British and, if not illegal in all its aspects, indicating a view of international law that is hard to reconcile with the legal obligation of *bona fides* applicable in Europe.

The inability of the British to classify their acquisition of Penang in terms of European concepts of international law⁶² resulted immediately in difficulties in making provision for the application of any recognized system of laws within the territory of Penang, by depriving the Supreme Government's legal advisers of the resort to principles of reception of law which are usually held applicable to cases of 'cession', 'conquest', or 'occupation of *territorium nullius*'. There was, of course, no dispute as to the extent of Penang. There was also no dispute that the British intended to exercise authority over the whole island although establishing only a single settlement at first. The question concerned what law applied in the territory of Penang taken as a whole. Was that law different from the law applying to the British settlers within the fortified settlement? That is, were the people in Penang who were not British subjects to be treated as bound by all the terms of British law; were British subjects to be considered bound by any foreign law? It had been the established British practice that territory ceded to the Crown retained its own laws except insofar as modified by the Crown;⁶³ territory conquered by the Crown also retained its existing laws except so far as contrary to the Christian religion;⁶⁴ but territory which was uninhabited received the English law of its colonists (even if the

⁶¹The Sultan's possible lack of competence seems not to have been mentioned by the Penang officials in their reports to the Supreme Government at the time. Some of the overwhelming evidence before Penang in 1800 is recited succinctly in the condensation of Burney's report of 9 March 1827 in Burney, Vol. II, Part V, at p. 172. Other obvious hints of Thai involvement in the Kedah constitution have been mentioned above.

⁶²In 1912 it was called a 'peaceful conquest'. Wright and Reid, p. 87. The usual view of the 1820s was that it was a 'cession' under the terms of the Sultan's original offer of 1786 as modified by later discoveries as to his subordination to Thailand. Cf. Burney, Vol. II, Part II, p. 165, memorandum by Burney to the Supreme Government dated 3 May 1825, at pp. 170-1; Anderson, 'Political and Commercial Considerations', at p. 269. This is probably the only point on which Burney and Anderson were in full agreement.

⁶³Campbell v. Hall (1774), 1 Cowp. 204, 20 How.St. Tr. 239. Conquered and ceded territory are not differentiated as regards continuance of their local laws until such time as they are changed by the Crown.

⁶⁴Privy Council Memorandum of 9 August 1722, 2 Peere Williams 75. Coke's dictum, that this rule of the continuity of the law of newly acquired territory does not apply to pagan territory in general (Calvin's Case (1605), 7 Coke 2a: 'But if a Christian King should conquer a Kingdom of an Infidel..., there *ipso facto* the Laws of the Infidel are abrogated...') was impliedly overruled by the Privy Council Memorandum and explicitly overruled by Campbell v. Hall except as regards oriental factories. Cf. Blankard v. Galdy (1694), 2 Salk. 411; R.T.E. Latham, *The Law and the Commonwealth*, Oxford, 1949, pp. 515-18. The particular case of Penang, which was an 'oriental factory', will be examined in detail here.

colonists were Scots!), as modified by local circumstances rendering parts of it inapplicable.⁶⁵

Upon Light's first establishing a British authority in Penang, the Governor-General of India in Council, on 21 June 1787, recorded his view that he was 'not . . . at liberty to make any permanent regulations for the Police of Prince of Wales' Island without express authority from Europe', and that Light's delegated authority therefore extended only over non-English persons.⁶⁶ While the Governor-General's views on his liberty to make regulations for Penang probably rested on policy considerations and a reading of Pitt's Act which he must have felt deprived him in British municipal law of the power to acquire territory by treaty with any non-European prince without special authorization from London, his view of Light's authority over persons not entitled, at British municipal law, to the protection of British municipal law requires some comment. The assertion of a legal right to apply laws to the non-British portion of the inhabitants of Penang implies clearly a territorial jurisdiction in that island either as a delegation of authority from the Sultan of Kedah or as a perquisite of British sovereignty. Had Light's authority derived from the Sultan, however, there would seem to have been no need to derive the same authority from the Supreme Government. But if Light were acting as an agent of the Supreme Government, then it would appear that the British were asserting a right to govern foreigners in foreign territory, because had Penang been regarded as British territory no question could have arisen over the extent to which jurisdiction could be exercised by delegation in the name of the Supreme Government.⁶⁷ The irregular acquisition of Penang had, therefore, anomalous legal ramifications.

While the extent to which Light's authority was directly exercised over

⁶⁵Blankard v. Galdy; Latham, pp. 516-17; Privy Council Memorandum of 9th August 1722.

⁶⁶Logan, (ed.), 'Pinang', 4 *JIA* (1850), p. 643.

⁶⁷Of course, this 'jurisdiction' would not have been exercisable by Light unless appropriate authority had been delegated to him by the Supreme Government, the Crown or Parliament, as appropriate. But the problem was conceived to be not a problem of delegation, but of a right in any arm of the British Government to delegate authority to anybody in the territory of Penang. It is a tenet of British constitutional law that without a delegation of authority from the Crown in some form, no Englishman can presume to exercise jurisdiction in criminal matters over another. See W.R. Anson, *The Law and Custom of the Constitution*, Vol. II, Part II, 4th ed. (A.B. Keith, ed.), Oxford, 1935, p. 330; A.V. Dicey, ... *Law of the Constitution*, 9th ed., London, 1945, pp. 183-8, 193-4.

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non-English people in Penang is doubtful,⁶⁸ his lack of authority over his compatriots was clearly felt to have serious legal consequences as early as 1793, when John Sudds, a British sailor who killed his employer on a yacht anchored off the Nicobar Islands, was the subject of an 'official' enquiry by the Penang authorities. The Calcutta court was the nearest British court with appropriate jurisdiction, and, on the grounds of irregularity in the entire procedure and the impossibility of conducting the trial in far-off Calcutta, Sudds was eventually released without trial.⁶⁹ The views that the Governor-General in Council had expressed in June 1787 about the need for authority from Europe before he could assume a liberty to make regulations for the governance of Penang were reiterated by the Governor-General in Council in January 1788 and on 1 August 1794, and by the Advocate General of India in his note of 23 April 1793 on the Sudds case.⁷⁰ The new Advocate General gave his opinion at about this time that although the Governor-General was authorized to enact laws for the governance of Penang, it would be 'prudent' to 'obtain a cession of the sovereignty of the island in express terms, by a treaty with the King of Queda, before such laws were enacted'. He also felt that British subjects would be under the civil jurisdiction of the Government of Penang, but that the nearest competent criminal courts were those in India.⁷¹

In short, it appears that as time passed the British began to assume a right to exercise the attributes of sovereignty in Penang, although clearly recognizing that this effective acquisition was unsupported by the normal legal underpinning. Yet it was felt necessary to be able to classify the British presence in Penang as 'sovereignty' in order to justify the exercise of jurisdiction in Penang according to British municipal law, which insisted upon legislative and judicial competence over British subjects being delegated to the local British authorities according to constitutional principles which tied the effect of legislation to some specific

⁶⁸Actually, native headmen administered justice each to his own ethnic group. Each group lived in its own quarter of Georgetown, the principal settlement in Penang, and was delegated police responsibility for its own area. See Kyshe, Vol. I, p. vii. The headmen were appointed by the British. Ibid, footnote p. xviii. The British assertion of a right to exercise this authority appears never to have been questioned.

⁶⁹Penang had the witnesses and evidence, Calcutta alone had a court which could exercise *in personam* jurisdiction over Sudds. Neither could both try and convict the obviously guilty Sudds. Logan (ed.), 'Pinang', 5 *JIA* (1851) pp. 2-6. See also Tregonning, p. 47.

⁷⁰Logan (ed.), 'Pinang', 5 *JIA* (1851), p. 294.

⁷¹The exact date of this opinion is doubtful; it was sometime between 1793 and 1800. Logan (ed.), 5 *JIA* (1851), p. 295.

territory,⁷² and in order to exclude the exercise of jurisdiction in that island by the Sultan of Kedah. In the absence of a cession or conquest the British seem to have had no clear basis in the international law of Europe of this time for the exclusion of Kedah's authority from Penang, at least until sufficient time had passed for the British to be able to claim that they had displaced his sovereignty by prescription.⁷³

The desire of the British to construe the earlier transactions into the basis of a British claim to sovereignty in Penang took the interesting turn of encouraging the British to classify their occupation of that island as having effect under a Kedah cession. In 1800, Sir George Leith in taking up the duties of Lieutenant-Governor of Prince of Wales's Island was instructed by the Supreme Government that no time should be lost in liquidating the arrears of the sum which the Company 'are bound' to pay to Kedah's Sultan annually 'as a consideration for the cession of the Island'. Europeans were to be under Leith's authority, which they were forbidden to flout, and Leith was empowered to send offending Europeans to India for disciplinary action to be taken against them there. Europeans were to be required by Leith to 'render themselves amenable' to his civil courts, and to criminal jurisdiction in minor matters in which the 'party injured' could be compensated by 'damages'.⁷⁴ It may be doubted that the Supreme Government had in mind what are normally considered to be 'criminal' sancteons today, as apparently something akin to tort liability was contemplated by the legal advisers to the Governor-General in drawing up this last specification. It is clear that all criminal jurisdiction, *i.e.*, the legal power to try European offenders against the peace of the sovereign of Great Britain in the territory of Penang, was reserved to the Crown's courts in India.⁷⁵ In effect, the only real authority given to Leith to exercise over Europeans was authority to deport them to India. It is interesting to note that the word 'Europeans' is used throughout Leith's instructions,

⁷²Of course, Parliament could legislate effectively for British subjects wherever located, but this was not done. Jurisdiction was not given to British courts in the territory of Malaya (or Penang) to hear cases involving British defendants or respondents, as the territorial basis of jurisdiction appears to have been the only basis considered available to the Government of Penang. In the absence of express submission by the British settlers there, no effective British jurisdiction was considered to be exercisable over them. Kyshe, Vol. I, p. vii.

⁷³Cf. Vattel, p. 356 (Book II, §140): '*La prescription est l'exclusion de toute pretention à quelque droit, fondée sur la longueur du temps pendant lequel on l'a négligé...*'; Wolff, secs. 358, 364.

⁷⁴Logan (ed.), 'Pinang', 5 *JIA* (1851) p. 155 at p. 156-8.

⁷⁵In North's Act of 1773 Parliament authorized the Crown to administer justice over British subjects in Bengal, Bihar and Orissa. 13 G. III c. 63, secs. 13-14. See Ilbert, pp. 47-8. See above note 16.

and the authority of the British Government of Penang seems to have been considered divided into two classes: authority over Europeans, and authority over non-Europeans. No attempt is made to distinguish British subjects from other Europeans. Leith's authority over non-Europeans was apparently assumed to be complete.

In general, the terms of Leith's instructions leave the impression that no adequate legal base was felt to exist for British sovereignty over Penang in terms of the territorial power which was the legal basis for legislative jurisdiction over Europeans, and it seems highly significant that even lacking this base, jurisdiction over non-Europeans was apparently felt to be complete. It is difficult to understand except on the basis of a cleavage felt to exist between the legal position of Europeans and non-Europeans in British municipal law, how the Government of Penang could have been felt to have differing competence over those two classes if the territory of Penang were truly felt to have become British by cession. Yet no clear evidence of such a cleavage can be found beyond this speculative inference. It is therefore believed that a more convincing explanation may lie in the analogy of the British acquisition of Penang with a military occupation. As an occupying power the British had the right to make laws binding on the territory of Penang during their occupation, but the actual passage of 'sovereignty' to the British would not have been felt to be complete until a stability were felt to have arisen and the British rule achieved in the contemplation of permanence.⁷⁶ The legal results of this classification of events would seem to match well the legal results felt by the British to flow from the Penang transactions until 1800, and the attempt to read British authority back into a purported cession of 1786 or 1791 may thus be regarded as a confusion growing out of the difficulty of producing legally sufficient evidence of the transfer of sovereignty. It may thus be concluded that the attributes of sovereignty over Penang were achieved by mere assumption, best considered a conquest made in violation of the normal rules of belligerency of the time, and the sovereignty itself passed by prescription when the British intention of permanent possession became fixed and the situation stabilized in conformity with the terms of the 1800 treaty. The doubts and confusions arose out of the unwillingness of the British to admit to themselves their original violation of European norms of international behaviour, coupled with the strongly felt need to comply with British

⁷⁶Cf. R. Y. Jennings, 'Government in Commission', 23 *BYIL* (1946) 112 at p. 123.

municipal law in establishing a civil authority with territorial jurisdiction in Penang.⁷⁷

The slow but steady growth of the British conviction of their possession of full sovereignty in Penang is graphically illustrated in the correspondence regarding slavery in Penang, among other institutions;⁷⁸ the letters of Mr. Dickens, a lawyer sent to Penang as judicial officer who found he had no delegated judicial authority, and found also that the very right of the Supreme Government to delegate that authority was subject to some doubt, are of great interest.⁷⁹ By first construing the situation of Penang into a position in which an analogy between Penang and deserted or unpopulated land could be drawn, Dickens arrived generally at the conclusion that Light's garrison brought with it English law to the area of the settlement but that the rest of Penang was a sort of jurisdictional no-man's land.⁸⁰ However, on learning that Penang had not been unpopulated in 1786, Dickens wrote another minute, in which he denied the force of his earlier line of argument and construed the earlier transactions into a cession to the East India Company of full sovereignty in Penang as of 1786.⁸¹ By 1805, after four years in Penang, Dickens' view was that whatever the doubt surrounding the earlier transactions may have been, the fact was that the East India Company possessed 'sovereignty' (presumably intending to mean 'political power') in Penang, and therefore ought to possess the legal rights of the sovereign.⁸² It is certain that by 1805 the British

⁷⁷Later attempts to classify British acquisition of Penang rested heavily on the construction of a 'treaty' out of the events of 1786. However, when the issue arose as to the actual terms of this treaty in 1821, as shall be seen, it was not resolved to anybody's satisfaction. Many people in the Government of Penang, and later legend, persisted in regarding the Company as under an obligation to defend Kedah physically from Thai attack. The Company, of course, refused to do this, and must be regarded as legally justified in this refusal since the obligation to defend Kedah was clearly rejected at the time of the purported agreement. Thus, whether a violation of norms of conduct occurred in 1786 or in 1821 depends upon whether the transaction of 1786 implied an acceptance of Kedah's offer to cede Penang or a counter-offer by the British authorities. On one date or the other the British must have acted inconsistently with international law as understood to bind the conduct of states in Europe in their transactions with each other.

⁷⁸Parliament did not abolish the slave trade until 1 January 1808. R. Coupland, *The British Anti-Slavery Movement*, London, 1933, p. 110. Slavery as a status was judicially declared contrary to the Common Law of England on 22 June 1772 by Lord Mansfield. Ibid. p. 55. However, slavery persisted in British colonies until the Abolition of Slavery Act became law on 29 August 1833, and the slaves were legally emancipated on 31 July 1834. Ibid. p. 142.

⁷⁹Logan (ed.), 'Pinang', 5 *JLA* (1851), pp. 167 et seq., 189 et seq., 293 et seq., 296, 297 et seq.

⁸⁰Ibid. pp. 193-208, Letter by Dickens dated Calcutta, 1st October 1800.

⁸¹Ibid. pp. 208-10. Dickens gives no details as to this construction, but sets out the English municipal law results that he felt should flow from British acquisition of Penang by occupation. This letter is dated Calcutta, 22 January 1801.

⁸²Ibid. p. 293. The Memoir is dated Georgetown (Penang), 22 October 1805. It is not entirely clear, and seems to reflect doubts in Dickens's mind as to the legal status of Penang.

regarded themselves as possessing those rights; in that year Penang was made a Presidency of India, and Philip Dundas was appointed Governor.⁸³ A judicial charter establishing the authority of the new Presidency's courts over all persons in Penang was issued by London in 1807.⁸⁴

LAWYERS' PROBLEMS

THE question of classifying the reception of British judicial and legislative authority into Penang was not definitely resolved until 1858, when Sir R. Benson Maxwell in Penang delivered a judgment in the case of *Regina v. Willans*.⁸⁵ While purporting to abstain on the question of whether the Governor-General in Council actually had sovereignty over Penang before 1807 when such sovereignty was actually fully exercised by the issuance of the judicial charter, the decision avers that Light's troops constituted only a garrison, and brought British law to Penang only *intra mures* the settlement although it is explicit in regarding the 1786 transaction as a cession of Penang as a whole to the Company in trust for the Crown, and classifies Light's authority as 'quasi-sovereign'. The decision finds the 'infidel' exception to Calvin's case⁸⁶ not material, saying that in any case Muslim law by its own terms cannot be administered by non-Muslims and so cannot have been the *lex loci* of a British possession. It holds that the introduction of English law, even in the case of ceded territory, must be a matter of the nationality of the persons settled in that territory. Since Light's garrison could only carry British law *intra mures*, and the non-British settlers in early Penang could not establish Malay or Chinese law as the *lex loci* of a 'British Possession', Sir Benson found no *lex loci*, either in fact or in law, to

⁸³PP, 1805 X 40, p. 33. The governmental minister with authority over the affairs of the East India Company approved the proposal of the Company's Court of Directors to make Penang a fourth Presidency of India, the other three being Bengal, Madras and Bombay. The Governor-General was President of Bengal, and the chiefs of Government of the other Presidencies were styled Governor or President interchangeably. See Pitt's Act, Secs. 19-21, 31-2, 36, 44. See also the Independent Powers of Governors Act, 1793, 33 Geo. III c. 32, especially article 10.

⁸⁴The Charter was issued in a Letter Patent of the Crown dated 25 March 1807. Kyshe, Vol. I, p. xl. The gist is given in Logan (ed.), 'Pinang', 5 JIA (1851) 301-5.

⁸⁵3(1) JIA (NS) (1859), p. 27; Kyshe, Vol. III, p. 16. This definitive interpretation lasted only until 1871 when the facts were reinterpreted and misrepresented again in the decision in *Fatimah et al. v. D. Logan et al.*, Kyshe, Vol. I, p. 255. See below note 89. The Privy Council finally found a way to ignore all the facts by still another patent misrepresentation in the 1875 decision in *Yeap Cheah Neo et al. v. Ong Cheng Neo* [1875] L.R. 6 P.C. See below note 88. The question of how British concepts of private international law were received in Penang is still the subject of learned research. See Manring, 'National Integration and Legal Systems: Malaysia' 10 (1) *Malaya Law Review* (1968) 29, *passim*.

⁸⁶See above, note 64.

have bound the territory of Penang. The law applicable to Penang before 1807, therefore, he found to have been the personal law of the people living there, and cases of conflicting laws he felt should have been handled by the principles of natural law and equity which, he said, 'in the case of English sovereigns and judges is English law'.⁸⁷

While there is much that is doubtful in point of logic and history in the decision,⁸⁸ it seems to have been part of the later British 'retroactive rationale' of the acquisition by occupation of Penang, and was therefore accepted as an accurate statement of the facts and their legal implications.⁸⁹

⁸⁷British lawyers still are inclined to identify British common law with natural law and equity in international contexts. See Lord Asquith's award in the Abu Dhabi Arbitration (1951), 1 *ICLQ* (1952) 247 at p. 251. L.C. Green, *International Law Through the Cases*, London, 1959, p. 390 at pp. 391-2.

⁸⁸Sir Benson's remarks on Muslim law were probably correct. J. Schacht, *The Origins of Muhammadan Jurisprudence*, p. 211. However, it is difficult to see why an English judge, deriving his authority from the Crown, could not administer substantive Muslim law as a conflict of laws choice of law. Maxwell in general seems to confuse substantive law with legal power. The case actually held, probably wisely, that *faute de mieux* personal law should have been the substantive law applied in Penang until the British sovereign decreed otherwise. In questions of family law and status this is, in effect, the normal British practice. There are many later cases involving succession and status in which a personal law has been applied in the British Straits Settlements. See M. Wolff, *Private International Law*, 2d ed., Oxford, 1950, pp. 1-4, 275 et seq.; R. St. J. Braddell, *The Law of the Straits Settlements: A Commentary*, 1st ed., Singapore, 1915, pp. 72-3, 77 et seq. More complex questions have been decided by the usual British conflicts rules, which modify the law of England in British overseas possessions even where that law in general applies. Latham, p. 517 note 2; Yeap Cheah Neo *et al v. Ong Cheng Neo*, [1875] L.R. 6 P.C. In this latter Privy Council case the court was faced with the question as to what was the substantive law in Penang prior to 1807, but avoided answering by alleging, incorrectly, that 'there is no trace of any laws having been established there before it was acquired by the East India Company'. The court further attempted to avoid its dilemma by not making the date of that acquisition explicit, although it seems to have been assumed to have been 1786, since the only modes of acquisition contemplated by the court were cession or settlement of unpopulated (therefore, impliedly, not subject to any sovereignty) territory. In so far as the court regarded Kedah jurisdiction as never encompassing Penang, it was clearly incorrect.

Maxwell's view regarding English law as having been imported into Penang as the personal law of the settlers is in accordance with the normal British view regarding the establishment of English substantive law in newly settled land. Latham, p. 516. However, since almost from the beginning the settlers in Penang were preponderantly Chinese and Malay, this approach does not seem to supply a satisfactory rationale for the reception of English law in Penang. It would be probably a better view to regard English substantive law as entering Penang with the 1807 Charter of Justice, and English conflict of law rules as entering at the same time but being applied retroactively to 1786 by British courts. Of course, had sovereignty over Penang passed to the British in 1786, other legal considerations would apply.

⁸⁹3(1) *JIA* (NS) (1859) p. 27, editor's note; *contra*, Fatimah *et al. v. D. Logan et al.* (1871), Kyshe, Vol. I, p. 255, in which it is said that 'The Law of England is that Englishmen occupying a barbarous or uninhabited country carry with them the laws and sovereignty of England'. Penang is described as 'virtually uninhabited' and the British acquisition seems to be assumed to rest on Light's purported annexation of 1786 and the reception of English substantive law first achieved by the assimilation of his garrison to a 'settlement'. It may be doubted that this perception of facts is accurate, and therefore the drawing of legal interpretations gives rise to some contradictions. It may be said, however, that the Fatimah case presents the facts as accepted in 1871 in much the same way that the Willans case presented them as accepted in 1858.

LAWYERS' PROBLEMS

It was an embarrassing fact, and therefore ignored by Sir Benson, that between 1786 and 1800 British jurisdiction in Penang was assumed to involve judicial authority only over non-Europeans. Although the twenty years of British occupation of Penang had given the British authorities the feeling that Penang was rightly under British authority in all matters, when the judicial charter of 1807 was issued it was that charter that was conceived by contemporary officials to give local courts for the first time jurisdiction over British subjects who did not voluntarily submit to it in Penang and who were not otherwise subject to British control by virtue of military or other status.

The Expansion of British Influence

PRELUDE: THE BRITISH OCCUPATION OF MALACCA AND JAVA: RAFFLES

WHILE it is not necessary to outline here the rapid changes of political alignment in Europe during the last two decades of the eighteenth century, one development was of outstanding importance to the Malay Archipelago. This was the outbreak of the general European war following the execution of Louis XVI in France, which made the Netherlands and the British allies in Europe, the French conquest of the Netherlands and the total defeat of British troops in the Low Countries. The Dutch Stadtholder, the Prince of Orange, fled to England on 17 January 1795, and issued the 'Kew Letters' in February 1795, directing all Dutch colonial governments '... to admit ... the troops that will be sent thither on the part of His Great Britannic Majesty ... and to consider them as troops and ships of a power in peace and alliance ... who come to prevent the colony from being invaded by the French. ...'.¹

Although there has been some doubt whether the British took over Malacca peacefully in accordance with the terms of the Letter, it appears that in the main the Dutch in Malacca obeyed the order, and that the British occupation of Malacca in 1795 was achieved under the terms which the Kew Letters implied.²

Despite what seems to have been the intention of the Kew Letters, however, the British decreed the ending of Dutch authority in Malacca. A British military government was instituted there instead,³ but it was always clear that British authority was to be temporary. The Dutch Courts of Justice continued to operate as before, apparently under delegated authority of the British, who appear to have considered themselves 'sovereign' in Malacca, although not interfering in the administration of Dutch

¹See Mahan, *The Influence of Sea Power Upon the French Revolution and Empire*, Vol. I, pp. 19, 32, 34, and 170. A Kew Letter is reproduced in Muller at p. 77 note 4.

²G. Irwin, *Governor Couperus and the Surrender of Malacca*, 29(3) *JMBRAS* (1956) 86.

³Newbold, Vol. I, p. 124 note.

substantive law as the *lex loci* in that territory.⁴ It was thus apparent that, as far as the British were concerned, the legal effect of the Kew Letters and the action in Malacca taken pursuant to them was to vest sovereignty over that territory in the British, but in contemplation of its being transferred back to the Dutch when the French threat should cease.

The peace of Amiens of 1802 ended a phase in the Napoleonic wars in Europe. In the peace terms it was provided that the British would restore to the Netherlands all the possessions and colonies which had been occupied or conquered by British forces during the war.⁵ However, before the transfer of power could be effected, war broke out again in Europe, and so the British stayed on in Malacca.⁶

On 20 September 1805 the Supreme Government ordered the fortifications of Malacca to be destroyed, as it was determined that the British garrison should be withdrawn from Malacca and its dependencies in view of their expensive maintenance and the lack of corresponding financial benefit from possession of these posts. The fortifications of Malacca, largely dating back to Portuguese days, were to be razed to deprive the Dutch of any advantage should they, the Dutch, decide to return there. The actual destruction was carried out in 1807, but some of the more important public buildings were saved on the responsibility of the British Resident of Malacca, William Farquhar.⁷

In August 1814, a Convention signed in London obligated the British to 'restore to the Prince Sovereign of the United Netherlands . . . the . . . Establishments which were possessed by Holland at the commencement of the late War, *viz.*, on the 1st January 1803, in . . . Asia. . .'.⁸

Malacca was one of the places to be returned under his treaty, and on 21 September 1818 Malacca was handed back to the Dutch. The British attempted to charge the Netherlands some sort of maintenance fee for

⁴T. Braddell, 'Notes on Malacca', 1 *JIA* (NS) (1856), p. 46. However, see C.B. Buckley, *An Anecdotal History of Old Times in Singapore*, Singapore, 1902, (reprinted Kuala Lumpur, 1967), Vol. I, p. 103, in which it is indicated that justice was administered in Malacca in the name of the States General of the Netherlands during the period 1795-1818.

⁵Martens, *Recueil des Principaux Traités...*, Supplement II, Göttingen, 1802, p. 563, Article III,

⁶Muller, p. 80; Winstedt 'A History of Malaya,' 13 (1) *JMBRAS* (1935) 1 at p. 204.

⁷Logan (ed.), 'Pinang', 6 *JIA* (1852), p. 21; Wurtzburg, p. 58.

⁸2 *BFSP* 370; the British retained Malta and the African Cape Colony, among other places, for 'strategic' reasons, and access to the returned colonies by British merchants was stipulated as a condition of their return. Letter, Lord Castlereagh to Lord Liverpool dated 19th April 1814, Harlow and Madden, p. 67. See also the British Cabinet Memorandum of 26th December 1813, in which the policy of maintaining the European balance of power by strengthening Spain and the Netherlands was decided. Harlow and Madden, pp. 66-7.

their administration in Malacca, but the Dutch refused to pay it on the grounds that the British occupation was a conquest, not involving any obligations on the part of the conquered people to pay for the unwanted imposition of a foreign administration, and also on the apparently reasonable grounds that the British had not bothered to preserve anything in Malacca but had taken what they could from that settlement and then attempted to destroy its usefulness. The matter appears never to have been definitively settled in point of law; a compromise arrangement was eventually worked out by which the Netherlands agreed to make some small payments.⁹

The British occupation of Malacca and the departure of the Dutch had interesting side effects in the Malay Archipelago. In assuming the rights of sovereignty in Malacca, the British purported to acquire similar rights in all places 'dependent' upon that territory. In 1795 the Dutch denied that Riau was such a place. After a short occupation, the British abandoned Riau in 1798, and it appears that the Bugis, who had been banished by the Dutch, returned.¹⁰ Apparently as a dependency of Malacca the Dutch factory in Perak was turned over to British authority,¹¹ but it appears that some time after the British took over the Dutch factory there, it was abandoned. In 1800 a group of Perak nobles offered the Sultanate to the Malay Sultan of Riau, but the Bugis, with greater plans, prevented him from accepting. In 1804 Selangor invaded Perak and established a direct Bugis control in that territory, although leaving the Perak dynasty in nominal authority. The Bugis withdrew from Perak in 1806.¹²

As part of the ordering of affairs between the Bugis of Selangor and the Malays of Perak, a treaty was concluded in 1804 by which Selangor was given the right to take half the duty charged by Perak on its people's tin exports. According to the statements of the Sultan of Selangor some twenty years later, the Bugis conquest of Perak in 1804 had involved complete acquisition of authority in Perak by the Selangor Bugis, and before the

⁹Begbie, p. 71; Newbold, Vol. I, pp. 129-35; Harry J. Marks *The First Contest for Singapore: 1819-1824* (Verhandelingen van het Koninklijk Instituut voor Taal-, Land- en Volkenkunde, Vol. 27), 's-Gravenhage, 1959, pp. 21, 23. Satisfaction of the British pecuniary claims was swallowed in the general terms of the settlement of 1824, for details of which see below. Marks's excellent book is exhaustive on that settlement.

¹⁰Begbie, p. 70; A.C. Baker, 'Anglo-Dutch Relations in the East at the beginning of the 19th Century', 64 *JSBRAS* (1913), pp. 36-40; Winstedt, 'A History of Malaya', p. 169.

¹¹Baker, pp. 36-40, setting out a Minute by Governor Fullerton of Penang dated 25 April 1825; Low, 'Account', 3 *JLA* (1849), p. 615; Marks, pp. 47, 55-7.

¹²Winstedt, A 'History of Perak' 12 (1) *JMBRAS* (1934) 1, pp. 60-4. See the Perak genealogy, 10(1) *JMBRAS* (1932) 33, 34.

evacuation of 1806 it had been the Bugis who had raised the Sultan of Perak to his throne by delegation. The Sultan of Perak, in a letter to the Sultan of Selangor dated 24 May 1825 acknowledged the validity of the 1804 agreement and agreed that Selangor had ultimate authority in the territory of Perak.¹³

The 1804 treaty, which contained provisions giving Selangor some sort of authority in Perak, was examined by a British officer in Selangor in 1825, but no precise translation of it seems to have been made, as the British, because of their policy at the time, preferred to deny its validity *in toto*. Although the Sultans of both Perak and Selangor apparently regarded the treaty as binding upon themselves, no great objection appears to have been raised by them when it was eventually disregarded by the British in 1825. Whether this failure of the Sultans to object to the British interpretation of legal relations set up by treaty between Perak and Selangor in 1804 would better be interpreted as evidence of the low regard paid to treaties by Malay rulers, of a feeling that the treaty had lost legal force *ex jure*, or of acquiescence in a British right to order peninsular affairs regardless of prior rights, cannot be confidently decided at this point.¹⁴

In 1811 the British used military force to take over Java. They were resisted by the Dutch government there, which was obedient to the French-controlled government of the Netherlands in Europe. Thomas Stamford Raffles, a brilliant young protégé of the Governor-General of India, was placed in charge of the British Government of Java with the rank of Lieutenant-Governor and the British assumed all the rights of the 'sovereign'. Thus, although Dutch individuals held high positions in the governments of Malacca and Java, after 1811 the ultimate authority over all European governmental activity in the area lay in British hands. In accordance with the terms of the Convention of 1814 and in spite of the

¹³Letter, Sultan of Selangor to Governor Fullerton dated 26 August 1825, Burney, Vol. II, Part III, p. 46 at pp. 46-7, 49.

¹⁴John Anderson's report dated 26 August 1825, *ibid.* at p. 38. Events to be discussed in chapter VIII below affected the legal and political situation in many ways before 1825. The disregard of the treaty of 1804 is much more significant in determining British conceptions of their rights in the Peninsula than in determining Malay attitudes, which were clearly more influenced by political facts at this later time than by legal convictions of right. If it were necessary to classify the Malay attitude towards the treaty at that time, it might not be too far wrong to say that they regarded the treaty of 1804 as having lapsed either by mutual consent, by material change in circumstances which were not envisaged by its drafters, or by mere passage of time.

strong objections of Raffles, Java was returned to the Dutch on 19 August 1816.¹⁵

Benkulen remained in British hands throughout the period, and the only incident of significance there was a rising of the inhabitants against the British administration in 1805—when the British Resident was killed. The rising was put down in an exceedingly harsh manner. It seems likely that it was caused largely by the attempt of the British Resident in Benkulen to impose some sort of taxation on people not clearly within his territorial jurisdiction. This assumption of rights greater than could be supported on the basis of explicit donation or past practice in the area seems to have been made permanent by the military force used to suppress any resistance to it.¹⁶

During his tenure in Java, Raffles laid the basis in treaty to wide British rights in Sumatra. The most important of these arrangements resulted from a daring expedition which conquered Palembang. When the Sultan fled the British placed on the throne of that Sultanate a weak Malay who ceded the large and tin-rich, strategically-located islands of Bangka and Billiton to the British on 17 May 1812.¹⁷ In return for this cession, the British promised the Sultan that they would maintain him in his newly achieved status, and 'protect' him in his 'independence'.¹⁸ Raffles's idea of 'independence' seems to have been close to Light's and involved a general British overlordship by which the Malay princes were to be encouraged 'voluntarily' to recognize the 'suzerainty' of the Governor-General of India. In 1819, in another context, Raffles referred to the proper relations between the British and the states of the Peninsula saying: '... it will be proper to maintain an influence by the means of occasional negotiation,

¹⁵Wurtzburg, p. 119, chapters VIII-IX, p. 399. Raffles had his 30th birthday on June 30, 1811. The Proclamation of 11 September 1811 provided that all the normal legal incidents of 'sovereignty' should tie the inhabitants of Java to the British Government, and British authority was stated to be 'unconditional'. Persons living in Java were referred to as 'His Majesty's Subjects' regardless of their place or time of birth. Dutch laws were to remain in force 'until the pleasure of the Supreme Authorities in England shall be known'. Jurisdiction in legislative and judicial matters was declared to be delegated by the Governor-General of British India to the Lieutenant-Governor. Ibid. pp. 171-3. One unexpected benefit to the British from their way of administering Java from 1811-16 was to tar the most able of Dutch officials in Java with the brush of suspicion of disloyalty, leaving the Dutch no knowledgeable people on whom to rely in the negotiations with the British leading up to the Treaty of 1824. Marks, p. 248.

¹⁶Raffles, *Memoir*, pp. 301-3; R.J. Wilkinson, 'More on Bencoolen', 19(1) *JMBRAS* (1941) 101 at p. 107. See also H. Eric Miller, 'Extracts from the Letters of Col. Nahuijs', 19(2) *JMBRAS* (1941) 169 at pp. 182-3.

¹⁷Wurtzburg, pp. 210-12.

¹⁸Raffles, *Memoir*, pp. 42-3, 308-9.

which, while it shall secure every commercial object, will protect them from the interference of a foreign European power'.¹⁹ But most of Raffles's immediate political arrangements were defeated by the Supreme Government and London regarding them as not binding the East India Company or the United Kingdom. This view was justified on the basis of Raffles's failure to observe the British municipal law necessity of conforming to the terms of Pitt's Act. None of the treaties he concluded in Sumatra except the one with Atjeh appear to have been ratified by the London authorities.²⁰ With the details of Raffles's career in Java, and later as Lieutenant-Governor of Benkulen, little need be said here. His policy was to open to British trade as many of the communities in the area as he could make treaties with, while denying any intention to become involved in the internal affairs of those communities or to act in any way that might restrict the free passage of commerce, which he seems to have regarded as the touchstone of all that is good in man.²¹ In practice he was less of a free trader than his frequently stated sentiments would lead one to expect.²² But with the British being the only European power active in the Archipelago from 1811 to 1816, it was apparently not felt necessary to tie the Malay sultans to exclusive contracts, as the East India Company lost its trading functions in the area and the profit to the state of Great Britain was, by the then current theory of trade, felt to flow from the successful trade of British nationals, who were to be protected and encouraged by

¹⁹Ibid. pp. 71 et seq. and Appendix at p. 17. See also, J. Bastin, 'Raffles and British policy in the Indian Archipelago, 1811-1816', 27(1) *JMBRAS* (1954) 84 at p. 92.

²⁰Marks, pp. 89, 94-5, 247. On the Atjeh treaty, see below. Raffles's indifference to British municipal law restrictions on his delegated authority plagued him throughout his later official career. See Wurtzburg, p. 535.

²¹'The true and vivifying spirit of commerce is one which tends as much to raise and excite the energies of the cultivator who sells, as to promote the interest of the merchant who buys, and it is directly opposed to that system of forced cultivation and undue monopoly, which while it destroys every motive to exertion, must eventually defeat the object of those by whom it is enforced ...[T]rade, ... and not territory, is our object...'. Raffles, *Memoir*, Appendix, p. 12. Part of this long essay on policy is reprinted in Harlow and Madden, pp. 73-6. The reference to 'undue' monopoly was surely intended to except the East India Company's activities from the general condemnation of trade restrictions embodied in the letter. The British had long since given up the spice trade as an object of rivalry with the Dutch, and could thus afford to be contemptuous of attempts to keep spice prices high by rigidly controlling production. See letter, Henry Dundas to W.W. Grenville dated 2 September 1787, Harlow and Madden, p. 14; Dundas to Grenville, 30 May 1790, Harlow and Madden, p. 15.

²²See, for example, the treaty which he concluded with Atjeh in April of 1819. John Anderson, *Acheen and the Ports on the North and East Coast of Sumatra...*, London, 1840, Appendix iv, pp. 218-21. Article 6 purports to deny residence in Atjeh to any non-British Europeans. This treaty was ratified by the London authorities. Ibid. p. 150.

the British Government as a class, but not necessarily as individuals.²³ In the sense that he wanted free access to trade for all British traders, Raffles was undoubtedly a strong advocate of free trade.

Raffles returned to England just before Java was handed back to the Netherlands, but returned to the East as Lieutenant-Governor of Benkulen in March 1818. In this office he was under the direct control of the Governor-General of India, and this caused a great deal of friction between himself and J.A. Bannerman, the Governor of Penang, who felt slighted by the existence of a junior command in the hands of a young man in his own area but not under his authority. There is little doubt that Raffles was being demoted in being given charge of Benkulen; the previous British chief official there had been a mere Resident and Raffles's Commission makes it clear that his successor was also to be merely a Resident. In Benkulen Raffles continued his policy of concluding treaties with the Sumatran sultans, as he feared Dutch expansion in the area would interfere with British trade. But none of his 1818 Sumatra treaties was ratified by higher authorities.²⁴

PIRACY, POLICY AND LAW

It may be remembered that at the end of the seventeenth century it was the Dutch view that 'piracy' increased remarkably in the Malay Archipelago, but it was noted that this conception involved assuming that politically organized groups, operating under orderly government or attempting to gain political ends rather than private ends, were rightly classified 'pirates' with the legal consequences that this would entail. It was also noted that in

²³Cf. Harlow and Madden, p. 67, letter of Lord Castlereagh to Lord Liverpool dated 19 April 1814. There is ample evidence in the actions of the British Government in the succeeding years to indicate the trend away from identifying all mercantile interests with the interest of government, which identification probably grew out of the East India Company's frankly commercial origins, toward the differentiation of governmental interest from the commercial. The drawing of this distinction had already begun in the Malay Archipelago, as the reason for British retention of Penang was explicitly shifted in the period 1786 to 1805 from Light's commercial argumentation to the governmental need to have a Navy shipyard and base on the eastern side of the Bay of Bengal. See the dispatch from London to the Governor of Penang dated 20 September 1805, Logan (ed.), 'Pinang', 6 *JIA* (1852), pp. 18 et seq.; *PP*, 1805 X 40.

The Act of Parliament of 1813, 53 Geo. III c. 155, ended all the East India Company's monopolies except in the China trade, and clearly stated the primary function of the Company to be to possess and govern the territorial acquisitions in Asia 'without Prejudice to the undoubted Sovereignty of the Crown...' (article I). Still, Raffles's political activities were, in January 1819, castigated by the London authorities of the Company who felt that his duties as Lieutenant-Governor of Benkulen were properly those of a 'commercial Resident' Wurtzburg, p. 476.

²⁴Wurtzburg, pp. 423, 425, 514, 516, 535 and chapters xx and xxi *passim*.

practice in the Peninsula until the end of the seventeenth century the label 'pirate' was not attached to any group with a political headquarters on land but only to the Sallates, who were not politically organized. The ultimate result of treating as piracy acts with political motivation and the backing of the politically organized Malay polities, was foreseeably the weakening of the sultans' powers. It was patent that the sultans themselves were deeply implicated in the 'piracies' round the Malay Peninsula but they denied this involvement in an attempt to avoid being hanged for their acts directed against European shipping. By the beginning of the nineteenth century this stand of the sultans had failed of its effect, as the Europeans in the area began to attach the label 'pirate' to the sultans themselves, thus retaining their original legal classification of events for the sake of its legal results, while materially altering the list of criteria which had been prerequisite to the attaching of the tag 'pirate'.

In 1811 Raffles wrote to Lord Minto, the Governor-General of India, about the problem of 'piracy' in the Malay area.

... [T]he Dutch have been altogether unable to oppose any effectual restraint to the ravages of the Lanuns [*Ilanuns*] and other pirates. ... They [*the pirates*] are privately encouraged by the Sultan of Lingen [*Lingga*] and almost openly by the Rajah Mudah of Rhio, and no Malay hesitates to admit that these chiefs ... are the real heads of the Lanuns ... It is unfortunately the practice in some of the Malay states rather to encourage the young nobles of high rank, especially those of the Rajah's own extraction [*i.e., the Raja Muda of Riau's Bugis kin*], whose maintenance would otherwise fall upon the Rajah himself, to subsist themselves by piratical practices than to discourage such proceedings. ...

Raffles's recommendation to end this situation involved active British steps to 'oblige every Rajah to refuse to every description of pirates and Lanuns any sort of assistance or protection in his own territories'. This he explicitly regarded as a means of laying the legal basis by which the British could exercise force to compel a radical change in Malay custom. 'To go a-roving ... implies no dishonour in the present state of the Malay morals. ...'. He envisaged a sort of British supervision of all the activities of the Malay sultans, involving active support of 'legitimate authority', recognition of rights to succession by the British to avoid dynastic squabbles in the area, forcible suppression of 'piracy' by making the native chiefs personally responsible for the acts of their followers, prohibiting slavery *in toto*, revising and codifying Malay law in general, especially its commercial provisions, and removing the Malay rulers from their interest in

monopoly trade.²⁵ There is every reason to believe that Raffles's picture of the political set-up in the area at this time was accurate. What is most interesting, however, is that the steps he considered necessary to make the local polities conform to the British idea of an acceptable order apparently involved at the same time treating with the sultans as heads of political societies, and asserting a control over the affairs of those societies which would seem to be so far reaching as to be inconsistent with their continued independence. The legal ramifications of his political plans were not considered by Raffles.

In 1813 some of the potential legal problems were posed by three killings in Perak perpetrated by two Malays who were caught and brought to trial for murder in Penang.²⁶ Some elements of the transaction were performed in Province Wellesley, and because they occurred within territory ceded to the East India Company, they were held to be within the Penang court's jurisdiction. As to the actual killings, however, the Chief of the Kurau district appeared as a witness at the trial to testify that his territory, in which the killings took place, was 'within the King of Pera's[Perak's] Territories'. The defendants were found guilty of robbery for the actions in Province Wellesley, and on appeal to higher British tribunals in Madras and Calcutta this verdict was upheld. However, it was also held that no jurisdiction could be asserted by the British over the killings in Perak as they occurred 'within the jurisdiction of a foreign State'. The Madras opinion was 3-0, but the ultimate appeal to Calcutta upheld this view only 2-1. The dissenting opinion is, unfortunately, not recorded in available documents. It may be noticed that the law courts held to a view of international order dependent upon a definition of statehood which seems to have precluded the British exercising judicial jurisdiction in the territory of a peninsular sultanate, regardless of that sultanate's own state of 'civilization' or the sophistication of its legal system.

British political officials, however, were not as fastidious as British judges in applying to Malay sultanates the rules of a legal order developed in Europe. The best documented application of the concept of piracy to Malay politics is the history of the transactions surrounding the break-up of the Atjeh territory into several petty sultanates from 1802 onwards.

²⁵Raffles, *Memoir*, pp. 39 et seq., esp. 45-6, 48, 77-82. Raffles's ideas of Malay law in 1811 were not entirely accurate. He seems to have confused local custom with Muslim religious law and local codes. H. Westra, 'Custom and Muslim Law in the Netherlands East Indies', 25 GS (1940) 151.

²⁶R.v. Lebbey Lundoo and Anor., Kyshe, Vol. II, p. 6

In 1808 the British Resident of Malacca seized an Atjeh ship, claiming it to be properly considered Danish, and condemned it as prize.²⁷ The remonstrances of the Atjeh Sultan's French agent in Penang were disregarded, much to the indignation of the Sultan, and to his loss of prestige in Atjeh. Atjeh's seizure of a Malay ship of Penang and later a British ship for breach of Atjehnese port regulations and as security against, or reprisal for, breach of contract (the report is not clear) respectively, were strongly protested by Penang, and it appears that the acts committed by Atjehnese officers in pursuance of the Sultan's orders were denominated 'piracies' by the Penang officials.²⁸

In 1813 the Sultan of Atjeh seized and sold a Coromandel (Indian) ship which had been trading in ports of Atjeh, the closure of which to foreign shipping had been proclaimed in Penang some time before by the Sultan's agents. This seizure was denominated 'piracy' by the Penang Government.²⁹

On 26 August 1813 the Governor of Penang recorded his opinion that it would be necessary to 'check' the 'piratical' conduct of the Government of Atjeh which was interfering with the trade of British subjects in its territory. A British naval vessel was despatched which seized the Coromandel ship and brought it into Penang, where it was presumably returned to its owners.³⁰ Whether the re-capturing ship received a share of the recovered valuables, and if so, on what theory of law, if any, is not clear.

The use of the term 'piracy' in this episode is particularly interesting since the full legal results which were, in the heat of indignation, felt to flow from this classification of events were not in fact asserted; the Sultan was not hunted down as a common enemy of mankind and his ships were not attacked. Instead, classifying the action of the Sultan of Atjeh as 'piracy' seems merely to have removed the Sultan and his supporters from the protection of the normal rules of international intercourse, and his power to make rules for the government of his own territory was in this instance impugned.

The Supreme Government formed a similar opinion, as the Governor-General in Council wrote to the Government of Penang on 10 September 1813 that:

²⁷The British were engaged in a war against Denmark at the time as part of the war against Napoleon. Anderson, *Acheen*, p. 34.

²⁸Ibid. pp. 35-6, 37 note.

²⁹Ibid. p. 47 note.

³⁰Low, 'Account', 4 *JIA* (1850), p. 17; Anderson, *Acheen*, p. 45; C.D. Cowan, 'Early Penang and the Rise of Singapore, 1805-1832', 23(2) *JMBRAS* (1945) 1 at pp. 49-50.

... the right of the King of Acheen to regulate the Trade of the Country actually under his authority cannot be disputed, but his pretensions ... with respect to Countries which are only nominally a part of his dominions cannot be admitted ... [T]he seizure by the King of Acheen of Vessels trading to those countries on the pretence of it being a violation of the laws of his Kingdom is little short of piracy.³¹

The recognition of a rebel government as *de jure* independent before such a situation of stability has arisen as will make such a recognition conform to the factual circumstances was in the early 1800s, as it is today, an intervention in internal affairs not warranted in normal relations between states.³² Furthermore, the use of blockade properly declared as a restriction of the freedom of the commerce of neutral third states with belligerent areas seems to have been beyond question at that time.³³ In these circumstances, classifying the Sultan's actions as 'little short of piracy' seems to have implied the application of a different yardstick to the behaviour of Atjeh than was applied by the British to themselves. In short, while in Europe state actions were considered able to modify the 'imperfect right' to freedom of commerce,³⁴ in the Eastern seas the concept of 'freedom of commerce' seems to have been used to imply a restriction on the action of Malay governments when that action would restrict external commerce beyond a certain point. Since in at least one of three incidents it was the breach of reasonable port regulations alone that seems to have been considered by the Penang Government as an undue restriction on trade, it is difficult to see any limit at all in what was felt locally to be unjustifiable behaviour of the Malay Sultan of Atjeh, and presumably other Malay sultans, in regulating the trade of his Sultanate with Penang-based merchants. It is not suggested that this extreme view was fully accepted by the Supreme Government, but it seems clear that there was a tendency in that

³¹Ibid. p. 51.

³²On premature recognition as an international wrong in the late eighteenth century, see J.B. Moore, *Digest of International Law*, Washington, 1906, Vol. I, p. 73, pointing out that France's recognition of the independence of the United States in 1778 was called by the British an 'intervention' in the domestic affairs of Great Britain. See also H. Lauterpacht, *Recognition in International Law*, Cambridge, 1947, pp. 11-12.

³³The British practice is unmistakable at least with regard to blockades of territory over which one has no conceivable right to legislate. The case of disputed territory would seem to be *a fortiori*. See *The Hurtig Hane* (1801) 3 C.Rob. 324, 165 Eng. Rep. 480; *The Fortune* (1800), 2 C.Rob. 92, 165 Eng. Rep. 250. These decisions by Lord Stowell (then Sir William Scott) are classic statements of the law of blockade, noteworthy also for their involving Muslim claimants operating out of Algiers in breach of the British blockade of Napoleon's France and its allies. The blockade, which was enforced against Algerian shippers, was apparently never properly proclaimed in Algiers.

³⁴Vattel, pp. 121-2.

direction on the part of that Government, and further, since the Government at Penang represented the sole European authority in immediate contact with the Straits at this time, the views that it held as to the justifiability of certain international behaviour must have been definitive at least in so far as actual practice was based on such views; practice does appear to have followed conviction in this instance.

Following these actions in 1813, the Sultan of Atjeh appealed to the Supreme Government in Bengal for satisfaction. A British officer was sent to Atjeh in 1814 to investigate. His visit to the rebel chieftains, who had been effectively blockaded by the Sultan, was taken by those chieftains as an encouragement to rebellion, and the Sultan was not entirely hospitable to the British officer when that officer eventually visited him. The result was that the British officer's report, although objective in indicating that some significant areas of Atjeh were effectively independent of the control of the Sultan, did not interpret the unstable nature of this political situation in a light favourable to the Sultan.³⁵ Thus encouraged, in 1815 a party of the chieftains wrote to Penang to ask permission to rebel against the Sultan, alleging as their aim the removal of a British adventurer who seems to have been the true genius behind the Sultan's attempts to regulate and order Atjeh's trade. The British had already found this man's presence in Atjeh so embarrassing that his continued residence in the Far East had been forbidden by Penang. That the Malay chiefs inferred a general British penchant to becoming involved in the internal affairs of Atjeh hardly seems surprising in the circumstances, but it seems more likely that this request for 'permission' was really intended as a political measure to attempt to induce the British to support the planned rebellion. Although the Government of Penang returned a non-committal answer to the chiefs, it permitted a key Arab figure in the Atjeh intrigues to fit out five ships in Penang for defence against 'pirates', and this fleet of ships seems to have conducted hostilities against the Sultan of Atjeh under British colours and with some British subjects taking part.³⁶

The Sultan of Atjeh attempted to lay his case before the Supreme Government in Bengal, which eventually decreed a strict policy of non-intervention. The hostility of the Penang Government to the Sultan, however, had already brought about a situation in which a very rich Arab Penang merchant had been able to set his son up as 'Sultan' of Atjeh, and

³⁵ Anderson, *Acheen*, pp. 49, 50-1.

³⁶ Low, 'Account', 4 *JIA* (1850), pp. 17-18; Kyshe, Vol. I., pp. xlv, xlvii; Anderson, *Acheen*, pp. 51-2, 56-8.

the ousted Sultan was compelled to pursue a course of hostility which may have been much more damaging to British trade than the advantages which had been expected to accrue from the pretending Sultan being a British subject by virtue of his birth in Penang. The ousted Sultan appears to have carefully avoided any action which might bring upon him the accusation of 'piracy'. But then the Penang Arab 'Sultan' seems to have seized some trading ships on the excuse of their belonging to his ousted enemy. For this action his father, the Penang merchant, was actually gaoled on a charge of 'piracy', being released apparently only after the application of considerable political pressure on the Governor by the Muslim community of Penang.

By the end of 1816 the ousted Sultan seems to have regained his place in Atjeh's capital, and in February 1817 the Governor of Penang proposed a treaty by which the British were to be given a favourable tariff rate and other concessions by him. The Supreme Government overruled the attempt to gain commercial concessions, but directed that should the Sultan be able to re-establish himself in Atjeh, an indemnity should be demanded of him for injuries which the Atjeh unrest had caused to British subjects (presumably including the pretender), and an acquiescence in the other terms of the treaty proposed by Penang should be obtained. Failing this, the Supreme Government agreed that 'ulterior measures must be taken', and contemplated sending troops into Atjeh to establish a permanent political connexion between the British and that territory.³⁷

At this point the real leader of the Atjeh rebellion, the Chief of Pedir, switched his allegiance back to the former Sultan, as the source of the pretender's money, his father's Penang business, ran into difficulties. When a British officer was sent to Atjeh by Penang in late 1817, he and his twenty sepoy were greeted by many as conquering forces. This officer concluded a secret treaty with the Arab pretender which the pretender acknowledged that he was powerless to carry out without help from Penang. The reports of the British officer, dated January and February 1818 were favourable to the claims of the pretender.³⁸

At this point Raffles entered the picture, and the result was British confirmation of the 'legitimate' Sultan in his old office and the forcible retirement of the pretender to Penang. But by this time it was too late to prevent the further deterioration of the situation in Atjeh, as the lack of any

³⁷Ibid. pp. 65, 75-83.

³⁸Ibid. pp. 84-6, 108-19, 126-7, 145.

effective leadership of the Atjeh Sultanate for the past two or three years had already brought about an unwillingness of the lesser chiefs to bow now to any higher authority. By 1820 Penang's trade with Atjeh was effectively ruined by the growing chaos. On 30 November 1820 the Government of Penang suggested direct intervention to the Supreme Government, but no active steps were taken.³⁹

It has been reported that an attempt to prosecute the pretender's father for piracy failed for lack of admiralty jurisdiction in Penang, despite the fact that a procedure for sending accused pirates to Calcutta for trial had been set up and utilized in the past.⁴⁰ It may be that what really occurred was a refusal of the judicial authorities in Penang to agree that the political activities of the defendant in Atjeh territory could legally be held to constitute piracy, but this is mere speculation.

The pretender ended his life in Penang, a stipendiary of the Atjeh Sultan. The restored Sultan died in 1824 still at odds with his chiefs who refused to elect his denominated heir to succeed him, but eventually selected a third claimant for Sultan in Atjeh from his immediate family.⁴¹

The use of the word 'piracy' to justify the British in Penang taking action in Malay political affairs in circumstances when action would not have been justified in Europe in similar situations was also evident in a transaction of 1816. In January of that year the Governor of Penang wrote the Sultan of Kedah that he had heard that the Sumatran territory of Siak was planning to attack Perak. '... [T]hough not bound by treaty to protect Perak from invasion by sea, as in the case with Quedah',⁴² he wrote, 'I shall treat as pirates any whom I find waging hostility so near to this island as any part of the Perak territory.' To the Sultan of Siak, however, he merely wrote that he would consider any who took part in hostilities

³⁹Ibid. pp. 131, 144; Wurtzburg, pp. 508-9, 518; Gibson-Hill, 'Raffles, Atjeh and the Order of the Golden Sword', 29(1) *JMBRAS* (1956), *passim*; Cowan, 'Early Penang', pp. 68-72, Minute dated 16 October 1817 by the Acting Governor of Penang, and pp. 110-11.

⁴⁰Anderson, *Acheen*, p. 150; R.v. Noquedah Allong and ors. (1811) Kyshe, Vol. II, p. 3 at p. 6. In 1828 the Governor reportedly did discharge two persons accused of piracy 'for want of Admiralty jurisdiction'. Kyshe, Vol. I, p. lxxv. The point is not that the Penang court had admiralty jurisdiction but that the British courts in India did, and could have been utilized had the Penang officials felt the evidence of 'piracy' and the magnitude of the problem were sufficient.

⁴¹Anderson, *Acheen*, pp. 150-1.

⁴²See above chapter V, The obligation to defend the Kedah coast seems to have been construed by the Government of Penang from Article II of the 1800 treaty, by which the British apparently undertook only to defend Province Wellesley. It would appear that, despite the effect of the treaty of 1800, which purported to abrogate earlier treaties, uneasiness over the irregularities of the Penang acquisition was already, in 1816, having an impact on British thinking.

against Perak 'as enemies to the British Government', and thus, impliedly, endowed with state authority.⁴³ It seems clear that, by the classical definitions of piracy, these two classifications of the same acts should be considered mutually exclusive unless the classification as 'pirates' is presumed to override other possible classifications to render the forces of Siak *hostes humani generis*.⁴⁴ Yet it can hardly be conceived that the British thought that Siak forces attacking Perak in pursuance of a course of political action would render themselves by that course alone liable to capture and punishment as pirates by third states; in his letter to Kedah, the Governor of Penang pinned his determination to attach the legal results of the classification of 'piracy' in this case only to the fact of 'hostility' being carried on so near to Penang. It therefore appears that this classification was considered to attach not as a legal deduction from facts, but as a political decision as to a proposed course of action sought to be justified by an appeal to legal words of art. Of course, in so far as the Penang Government felt it justifiable to treat Siak forces as pirates, this feeling may be said to have amounted to an *opinio juris* that such acts as were anticipated on the part of Siak would constitute acts of piracy. If so, however, the drawing of those legal results from acts reasonably to be anticipated would represent a considerable departure from the normal characterization of piracy. In so far as the label were to be applied consistently to political action, the British officials would be applying rules of international behaviour in the Malay Archipelago significantly different from the rules applied elsewhere in the world at this time.

It is further significant that Siak was, in this correspondence, treated as a political entity with very different rights and obligations than those attaching to the British Government. Although no documentation is available, it may be considered incredible that British formal military action in the Peninsula or Sumatra would have been considered by the British or any other European power as justifying the Malay sultans treating captured British personnel as pirates. Yet this reciprocity of rule has been stated to be a key to understanding which of the detailed rules of international law may be said to apply to non-European principals; that is, that a non-European power does not violate international law if a Euro-

⁴³Anderson, *Acheen*, p. 73.

⁴⁴Cf. Bynkershoek, p. 99, in which the classification of Barbary corsairs as 'pirates' is denied partly on the basis of their being in the service of 'an established government...with which...we are now at peace, now at war'; Gentili *De Iure Belli*, p. 15.

pean power acting in the identical way in the same place would not be considered as violating international law.⁴⁵

Thus, it may be concluded, during the second decade of the nineteenth century there is ample evidence of the growth of the idea that in relations between a European power and a Malay community political action could be justified by the European power on the basis of legal analysis that could not have been applied reciprocally, and would not have been in accordance with the customary international law of Europe before that time. The use of the concept of piracy to justify contemplated political action in transactions involving Atjeh and Siak finally freed the British from the previously felt necessity of basing their relations with the Malay sultanates on treaty where those relations were sought to be placed on some footing different from the normal relations obtaining between European states in Europe. As shall be seen, the European officials in the Peninsula had thus gained a powerful legal weapon, to use when treaty failed or when treaty seemed inappropriate, to claim a right to impose European order on Malay sultans.

The use of the word 'piracy' to justify political action itself represented a great change in the traditional characterization of this word of legal art; insofar as this change was not equally applied in Europe, or in transactions in which both parties were European states, it may be considered that by about 1820 a legal differentiation between Malay politics and European states was unambiguously clear. In so far as the Malay sultans were considered not legally justified in claiming in full the rights and obligations of sovereigns as particularized in international law concepts felt applicable to all European governments, it seems reasonable to assert that the international law of the community of states did not accept them as equal partners. This represented a significant change in theory from what went before, although the practice since the beginning of the eighteenth century had been tending in this direction.

SINGAPORE

It was not only the Malay sultans who felt the heavy hand of British influence in the late eighteenth and early nineteenth centuries. The Dutch on their return to South-East Asia were also forced to tack before the

⁴⁵Cf. A.D. McNair, *International Law Opinions*, Cambridge, 1956, Vol. I, p. 270, letter from J. Dodson to Lord Palmerston dated 27 February 1847 regarding the British lack of legal right to pursue Turkish 'pirates' haunting the rivers of Turkey.

squalls of British officials. In their relations with the Dutch, however, the British could not change the international law framework with quite the agility achieved by the combined Europeans gradually evolving legal rules advantageous to themselves in dealing with Malay governments. Since pirates were considered the common enemy of all (European) mankind, by the legal concepts of the time the Dutch as well as the British could deal summarily with Malay communities resorting to force to stem the tide of European political advance. Therefore, in dealing with their Dutch rivals in the Peninsula it was to Britain's advantage not to consider the Malay sultans to be pirate chiefs, but to consider them sovereigns of states, and conclude exclusive treaties with them: To conclude treaties legally excluding European rivals from some territory it was necessary to locate the sovereign, the individual or group having authority to conclude treaties binding the territory involved. In the key area of Riau-Lingga-Johore this legal need presented difficulties. It is therefore necessary to digress for a moment to examine whether Riau-Lingga-Johore was a dependency of Malacca, and if not, who the legal sovereign of that Sultanate was.

When the British occupied Malacca in 1795, as noted above they intended to take over Malacca's 'dependencies' as well. At that time the Dutch denied that Riau was such a dependency and the British abandoned Riau by 1798. The Dutch opposition having been eliminated, and the continued binding force of the treaty of 1787 being in doubt, the Bugis returned to Riau and resumed their old position as actual rulers through a Bugis Raja Muda issuing orders in the name of the Malay Sultan of Riau. The territory in the Peninsula regarded by all Malays as subject to the ultimate authority of the Sultan of Riau included both Pahang, which was in fact ruled by the Bendahara, who rendered the appropriate Malay law submission to his Sultan, and what is today Johore, which was in fact ruled by the Temenggong in much the same way as the Bendahara ruled Pahang.⁴⁶

By 1803 the Bugis Raja Muda had been formally reinstated by the Sultan, and a son of the Sultan, Abdu'r-Rahman, was entrusted to the Raja Muda's protection. The Sultan's eldest son, Husain, was married to the daughter of the Temenggong, and, in 1811, he was given as second wife the daughter of the Bendahara.⁴⁷

⁴⁶Linchan, 'A History of Pahang', pp. 29 et seq., 57; Winstedt, 'A History of Johore', pp. 66 et seq.

⁴⁷Husain's argument setting forth his claim to the Sultanate, submitted to the British in November 1827, J.R. Logan (ed.), 'Notices of Singapore', 9 *JIA* (1855), p. 477 at p. 479. Multiple marriages were not uncommon among the Muslim Malay nobles at this time.

The Malay law of succession did not depend upon primogeniture, but upon the selection of the dying chief as confirmed by his traditional chiefs and counsellors in conclave.⁴⁸ The obvious dynastic purpose of these matches was widely believed to indicate the old Sultan's desire that Husain succeed him. When the old Sultan, Mahmud Shah, died during the time Husain was in Pahang celebrating his marriage with the Bendahara's daughter, the Bendahara and Temenggong both had dynastic reasons as well as reasons of tradition to favour the claim of Husain to succeed to the Sultanate.

Upon the death of the Sultan, the Pahang nobles and the Bendahara elected Husain as the new Sultan, but this election, made without the consultation of the other Riau chiefs, was clearly *ultra vires* and could have been effective only in Pahang, if there. Meanwhile, the Raja Muda was able to have his protégé, Abdu'r-Rahman, invested in Riau without any conclave of chiefs, justifying his *ultra vires* action on the ground that Malay burial rites required the presence of the successor at the interment of a sultan. Upon Husain's return to Riau, the Raja Muda had already gathered effective power to himself, and refused to permit Husain to be formally installed as Sultan.⁴⁹

The British seem to have intervened at this point to prevent the Bendahara of Pahang espousing the cause of Husain and sending warships to Riau to oust Abdu'r-Rahman.⁵⁰ Abdu'r-Rahman, who had been styled Sultan of Lingga, having apparently received that island group as his partrimony some time before, ruled as Sultan of Riau, and matters remained calm as Husain appears to have reconciled himself to his subordinate position, and the Bendahara and Temenggong appear to have given up hope of installing Husain in Riau in the face of the Raja Muda's effective control there. But Abdu'r-Rahman seems to have been embarrassed by his position, and he himself regarded the Raja Muda as the true ruler of the Sultanate and Husain, apparently, as the better claimant to the empty title. From 1812 to 1819 the matter rested with Abdu'r-Rahman as reluctant Sultan of Lingga-Riau-Johore-Pahang never having been appropriately installed with the regalia of the Sultanate.⁵¹

⁴⁸Cf. Gullick, pp. 54-61. The counsellors had the ultimate say.

⁴⁹Husain's argument, Logan (ed.), 'Singapore', 9 *JIA* (1855), pp. 479-80.

⁵⁰Winstedt, 'A History of Johore', p. 77.

⁵¹Wurtzburg, pp. 451-2; letter, Temenggong to Raja Muda undated, but sometime in 1819. Logan (ed.), 'Singapore', 9 *JIA* (1855), p. 444; Linehan, 'Pahang', p. 57; Husain's argument, Logan (ed.), 'Singapore', 9 *JIA* (1855), pp. 480-1.

Elsewhere in the Peninsula, after the defeat of the Malay coalition and the death of the Sultan of Trengganu, Mansur Shah, in 1793, little of note appears to have been recorded. An attempt by the new Sultan of Trengganu, Zainal Abidin II, to acquire dynastic control of Kelantan was defeated as Long Yunus, the puppet ruler he set up in that state in 1794, was ousted and the old Kelantan line restored in 1800. Trengganu remained an important link in Malay politics, however, and Sultan Abdu'r-Rahman of Riau married the Sultan of Trengganu's sister in 1821.⁵²

A suggestion that the British might want to establish a trading factory in Patani was put forth in Penang in 1818, but came to nothing.⁵³

After the Dutch returned to Java, the relaxation of trade restrictions formerly applied there, and the efficiency of the Dutch blockade of Bangka, an important tin exporter, resulted in a sharp drop in the Penang tin trade. These factors, combined with the imminence of the Dutch return to Malacca, prompted the Penang Government to attempt to translate into treaty right the commercial advantages which they had been able to achieve in the Peninsula while the Dutch were absent.⁵⁴ That attempt will be discussed in chapters VII and VIII.

Another project which the British hoped to complete before the Dutch re-established themselves in their old position in the Peninsula was the establishment of a British port at the southern end of the Peninsula as a collecting point for the Pacific Ocean (particularly India-China) trade in competition to the great Dutch port of Batavia in Java.⁵⁵ In the achievement of these ends the British were unwilling for reasons of European policy to antagonize, or even to weaken the Dutch, and for reasons of eastern policy the British were unwilling also to antagonize or frighten Thailand.⁵⁶ Accordingly, the method chosen by the Government of

⁵²Sheppard, pp. 18, 23, 24.

⁵³C.D. Cowan, 'Governor Bannerman and the Penang Tin Scheme', 1818-1819, 23(1) *JMBRAS* (1945) 52, at pp. 61, 65-9. Bannerman's real aim appears to have been to increase British influence in Kedah.

⁵⁴Cowan, 'Early Penang', pp. 55-7.

⁵⁵Harlow and Madden, p. 15, letter, Dundas to Grenville, 30 May 1790. British neglect of this project during the days of Dutch absence from the area is inexplicable except on the assumption that the British policymakers either expected the Dutch absence to be permanent, which is not likely, or they were occupied with other things and local officials did not press these plans until it was too late. As noted above, the British had tried to establish a station in Riau as early as 1784. In 1790 the idea of exchanging Penang for Riau was approved in London (Harlow and Madden, pp. 16-17, letter, Dundas to Grenville, dated 1 July 1790) but nothing seems to have come of it.

⁵⁶Cf. letter from John Adams, Chief Secretary to the British Government of India, to Raffles dated 5 December 1818, *ibid.* pp. 71-2. The Supreme Government was at this time about to become involved in Burma, and complications with Thailand were to be avoided.

Penang to achieve its ends was that of sending an officer into the Peninsula to conclude treaties with Selangor and Perak (which will be discussed in chapter VII below) as well as with Riau, which would bind those territories to grant the British demands.

It seems clear that the underlying legal purpose of concluding those treaties was to exclude the Thai and the Dutch from rights which they might want to claim in those territories. It seems significant that the British had not felt it necessary to conclude treaties with these communities as a basis for their intercourse with them between 1795 and 1818. The use of treaty to establish rights which could be asserted against third powers, rather than to establish rights directly, might be taken to indicate an awareness on the part of the British of the failure of treaty as a means of binding Malay sultanates to action not otherwise felt to be obligatory. The European concept of the proper use of treaty in the area had thus changed from the time of the earliest European-Malay transactions, when a treaty had merely regulated the relations of the two parties as among juridical equals. In those days the effects on third parties were argued in Europe among the Portuguese, British and Dutch, while European third parties in general acted as if not bound to stop trading with a sultan breaching the exclusiveness term of his grant to another European power. By this time, it seems to have been admitted that the parties to a European-Malay treaty were not equal; that the Malays might not continue to observe the terms of exclusive grants, and so relations between the British and Malays were carried on in the main without treaty underpinnings. But treaties were concluded by the British specifically for the legal purpose of inhibiting Dutch trade in practice. Two hundred years after Grotius had been unable to persuade the British that Dutch treaties for exclusive concessions in the Indian Archipelago legally prevented third states trading there, the British adopted his view of law.

Hall, p. 514. Upon the outbreak of the first Anglo-Burmese War in 1824, following a long series of border incidents and some complex political manœuvring, an alliance was actually sought by the British in Thailand. This was one of the primary objects of Burney's mission. Burney, Vol. I, p. 73 (Burney's report to Governor Fullerton of Penang, Part II, dated Bangkok, 15 February 1826) at p. 83. In the instructions given to Crawford by the Supreme Government on 29 September 1821, trade with Thailand was apparently felt to be of great potential value, and there can be no doubt that the Supreme Government would not have wanted to risk losing the possibility of this extension of British trading rights by precipitate action in Malaya. See Crawford, *Journal*, Vol. II, Appendix B, especially p. 441.

These and other complications with Thailand will be analysed at some length in chapter VIII.

The British expedition to Riau was successful. On 19 August 1818 Major William Farquhar, the British Resident of Malacca, and the Bugis Raja Muda of Riau signed a treaty in which provisions were included against monopolies, providing for most favoured nation treatment of British traders in the territories of 'Johore, Pahang, Linga [*Lingga*], Rhio [*Riau*], and others subject to his said Majesty', and the undertaking of Riau not to renew 'obsolete and interrupted treaties'. It is significant that the 'Majesty' in whose name Riau bound itself was Sultan Abdu'r-Rahman, the Bugis puppet Sultan. He was styled, in the 1818 treaty, 'Sri Sultan Abdul Rachman Shaw, King of Johore, Pahang and Dependencies'.⁵⁷

At this time the British also concluded treaties with territories in Sumatra. Farquhar, during his trip to Riau, also stopped at Siak, where he concluded a treaty.⁵⁸ In Atjeh, the long and complicated tale of intrigue and 'piracy', outlined above, also involved a treaty, dated 22 April 1819 by which the British were obliged to remove the unsuccessful claimant to the Sultanate and retire him to Penang, while a British Resident was to be received by that territory to conduct 'the affairs of the Honourable Company' and state which foreigners should be permitted to reside in Atjeh territory.⁵⁹ All of the foregoing peninsular and Sumatran treaties had final articles in them providing for ratification by the Supreme Government. The Atjeh treaty was ratified,⁶⁰ but no explicit information is available whether the others were all in fact ratified. Unlike the treaties concluded by Raffles in Sumatra in 1818, all these treaties made under the authority of the Penang Government were in later correspondence regarded by the British as binding.⁶¹

⁵⁷Maxwell and Gibson, p. 115.

⁵⁸Dated 31 August 1818. 28 BFSP 1149 et seq., No. 1, enclosure 7; also in Anderson, *Acheen*, Appendix VIII, pp. 231-2. The treaty provides for the usual most favoured nation treatment for British traders, for Siak's not granting any monopolies or imposing undue burdens on trade, and it also included the clause about 'obsolete and interrupted' treaties. Farquhar's attempt to conclude similar treaties in Borneo was forestalled by the Dutch. Wurtzburg, p. 451.

⁵⁹23 BFSP 1143; Anderson, *Acheen*, Appendix IV, pp. 218-21. The Atjeh intrigues are explained in detail in Anderson, *Acheen*, Cowan, 'Early Penang', and C.A. Gibson-Hill, 'Raffles, Acheh and the Order of the Golden Sword', 29(1) *JMBRAS* (1956) 1. See also Wurtzburg, pp. 508-9, 518; T. Puvananarajah and R. Suntharalingam, 'The Acheh Treaty of 1819', 2(3) *JSEAH* (1961) 36 *passim*. Actually, no British Resident took office in Atjeh at this time. Anderson, *Acheen*, p. 146.

⁶⁰*Ibid.* p. 150.

⁶¹See, Baker, p. 66, for a minute by Fullerton in 1827 which points out that the political aspects of the Selangor, Riau and Perak treaties were beyond the powers of the Government of Penang to conclude, but he does not mention a lack of ratification and seems to regard the treaties as binding.

On 21 September 1818 Malacca was handed back to the Dutch, who placed J.S. Timmerman Thyssen in charge of the government there.⁶² The Dutch sent a mission to Riau almost immediately upon recovering possession of Malacca, and a new treaty was entered into by which the treaty of 1787 was renewed and the treaty made with the British three months before was apparently annulled. The new treaty was signed by the Raja Muda and Sultan Abdu'r-Rahman representing Riau.⁶³

Threatened, thus, with the resurgence of Dutch political influence in Riau, bringing with it the fear of Dutch monopoly and other trade restrictions,⁶⁴ Raffles was determined to attempt to establish a British base in Singapore Island, at the southern tip of the Malay Peninsula. He landed at Singapore on 29 January 1819, where he was greeted by the Temenggong of Johore.⁶⁵ On 30 January the Temenggong, in the name of Husain, who was styled 'Rajah of Johore', conceded to the East India Company the right to 'establish a factory situated at Singapore or other place in the Government of Singapore-Johore'.⁶⁶ On 1 February Husain arrived, and when Major Farquhar returned from Riau with the news that the Dutch had the Raja Muda firmly under their control, a treaty, dated 6 February 1819, was concluded in which Husain and the Temenggong both joined in confirming the treaty of 30 January. This treaty provided that the 'Company may . . . maintain a factory or factories on any part of His Highness' hereditary dominions'.⁶⁷

⁶²Wurtzburg, at pp. 353, 450. Timmerman Thyssen was very friendly on a personal basis with many British officials. Ibid. p. 275.

⁶³Wurtzburg, pp. 489, 507; Baker, pp. 36-40, Minute by Governor Fullerton of Penang dated 25 April 1825. It has not been possible to find a copy of this treaty.

⁶⁴This fear was extremely important as an influence on British expansion in the area. See Raffles, *Memoir*, pp. 305 et seq., letter from Raffles to an unknown recipient dated 14 April 1818. Raffles himself was a passionate foe of the Dutch, and they returned his animosity fully. Much of Raffles's time at Benkulen was spent in seeking a British base his political superiors would accept against Dutch protests. In this he was uniformly unsuccessful until the foundation of Singapore. See J.S. Tay, 'The Attempts of Raffles to Establish a British Base in South-East Asia, 1818-1819', 1(2) *JSEAH* (1960) 30 *passim*. British colonial officials apparently found it impossible to document with convincing specifics their allegations of Dutch aggressions or inhospitality. See Marks, pp. 101, 138-40, 217-20.

⁶⁵Wurtzburg, pp. 484-5.

⁶⁶Maxwell and Gibson, p. 116.

⁶⁷Wurtzburg, pp. 487, 489-90. The treaty is in Maxwell and Gibson, p. 117. See chapter VIII.

The Departure of The Dutch

INTERLUDE: THE RETURN OF THE DUTCH TO MALACCA AND JAVA

WHILE the British occupied Malacca an increased British concern with the affairs of the Malay Peninsula was probably inevitable. Although the British seemed content to view the 'dependencies' of Malacca as few in order to limit their governmental responsibilities to those that were profitable, it was impossible to disregard Malacca's neighbour, Naning.

In 1801 the British Governor of Malacca, Lieutenant-Colonel Taylor, attempted to define his relations with Naning by treaty. Gathering the principal Naning chiefs together he obtained a written agreement, which they all sealed. This agreement shows strong evidence of an attempt to substitute legally the East India Company for the Dutch in what must have been felt to be Dutch 'rights' in Naning, and was probably drawn up with the help of Dutch residents in Malacca. The Naning tithe was stated to be due as homage to the Company, but was reduced 'in consideration of their [*Naning's*] indigent circumstances'; all tin entering Naning was to be sold to the Company at a fixed rate; a rate was fixed for pepper deliveries 'when any great quantity is to be had'; and other provisions allowed for the Governor of Malacca to appoint the chief rulers of Naning as vacancies occurred, regardless of the recommendations of the other chiefs, and set up various arrangements for the return of runaway slaves to Malacca and the emancipation of slaves running away from Naning. But the most significant provisions seem to be those requiring Malacca passes of all persons wishing to leave Naning, specifying the complete submission of the Naning people to the British authority, and forbidding Naning any contacts with 'any inland nation'.¹

It is clear that the treaty, if it had the legal effect it purported to have, completely ended the legal capacity of Naning as a political group to deal with any non-Naning people but the British. However, as has been seen,

¹Maxwell and Gibson, p. 57.

not only was such an effect completely beyond the conceptual grasp of the Naning people, but it is highly doubtful that any gathering of Naning chiefs could have had the constitutional power to bind the entire community of Naning to such terms. It does not appear that this treaty was ever observed. When the power of inflicting capital punishment was sought to be taken away from the Naning chiefs in 1807, it appears that a new, formal treaty was felt desirable by the British.² It is not known whether this treaty was ever considered binding by the Naning people.

When the Dutch returned to Malacca in August 1818 they appear to have been content to ignore the status of Naning, and the British were in no position to attempt to enforce their possible rights there. But when the British did return later and tried to control events in that dependency of Malacca they faced the same difficulties—political, military and legal, that the Dutch had faced there.³

Elsewhere in the Peninsula the British were confronted with problems arising out of a struggle between the Bugis in Selangor and the Thai acting through Kedah for control of the tin trade of Perak. Since the relations between Thailand, Kedah and Perak form a key part of the background to events to be discussed in chapter VIII the detailed analysis of those relations will be found there. Furthermore, it should be remembered that in 1818 the British were ignorant of the Bugis occupation of Perak from 1804 to 1806 and the terms of the 1804 treaty between Selangor and Perak giving ultimate authority over Perak to the Bugis Sultan of Selangor.⁴ But by 1818 British involvement in peninsular affairs had advanced to the point that attempts were apparently felt necessary to prevent Dutch claims to monopoly rights based on treaty from being reasserted. It is also possible that the British authorities felt that concluding treaties with Selangor and Perak would inhibit the activities of the Thai there, as shall be seen.

Whatever the immediate motivation, Governor Bannerman of Penang sent W.S. Cracroft into the Peninsula to conclude treaties with Selangor and Perak in 1818. On 30 July of that year a treaty was agreed to between Cracroft and the Sultan of Perak, Abdul Malik Mansur Shah. It may be borne in mind that at this time the Sultan had little effective power

²T. Braddell, 'Notes on Naning', 1 *JLA (NS)* (1856) 194 at pp. 199 et seq.

³See Begbie, pp. 152 et seq.; C.O. Blagden, 'Malay Documents Relating to the Naning War', 3(2) *JMBRAS* (1925) 294. Today, in an independent Malaysia, Naning is included in the territory of the State of Malacca but preserves its own local government in accordance with the *adat perpateh Naning*.

⁴See chapter VI, note 14.

in most of his territory.⁵ The treaty provided for free access on the basis of the most favoured nation to British traders seeking Perak trade. The Sultan undertook not to grant monopolies of trade or commodities to any person or party. In order to avoid the effects of the Dutch treaties with Perak which had ordered Dutch relations there during the seventeenth and eighteenth centuries, article 4 of the Cracroft treaty provided:

His Majesty of Perak agrees that he will not renew any obsolete and interrupted Treaties with other nations . . . which may . . . tend to exclude or obstruct the trade of British subjects, who further shall not be burthened with any impositions or Duties not levied on the subjects of other States.⁶

Since competition can itself be an obstruction to the trade of a single party the wording of this provision leaves much unclear; it was certainly not expected that the British would attempt to exclude Dutch trade from Perak entirely, nor does that interpretation seem to have been put forward in later correspondence. It was likely that only the monopoly terms of the Dutch treaties with Perak were sought to be avoided, not the terms which might be construed as merely granting the Dutch access to Perak's trade. Still, it was hardly to be expected that the Dutch would agree that their pre-1795 treaties with Perak were 'obsolete', as in 1818 the restoration of the old system, in so far as practicable, must have been an aim of Dutch policy. Even if free trade doctrines were increasingly accepted by the Dutch, as by the British, on economic grounds, it is not likely that the Dutch would agree to any loss of their treaty-based privileges by any means other than their own conscious choice.⁷

Following his success in Perak, Cracroft went on to Selangor, where he was able very quickly to conclude an identical treaty.⁸ The reasons for the Sultan of Selangor's eagerness to enter into treaty relations with the British are not clearly evidenced, but it may be that the principal motives were fear of the Dutch returning and anxiety over the extension of Thai power as far as Perak. The Selangor Bugis had no desire at all to renew the 1786 treaty with the Dutch, and they may have hoped that entering into a treaty

⁵Aside from the treaty with Selangor, which preserved the Sultan of Perak's authority subject to the superior authority of Selangor in the usual Bugis indirect rule system, fighting between Kedah and Perak was going on. Cracroft tried to end the fighting by trying to persuade the Sultan of Perak to send the *bunga emas* to Thailand, but the Sultan refused. Cowan, 'Governor Bannerman and the Penang Tin Scheme', p. 57; see below chapter VIII.

⁶Maxwell and Gibson, p. 20; cf. Baker, 'Anglo-Dutch Relations...', p. 66, Minute by Governor Fullerton dated 27 November 1827.

⁷Vlekke, p. 281; Miller, pp. 204-5.

⁸Cowan, 'Tin', p. 58; Maxwell and Gibson, pp. 30-1.

INTERLUDE: THE RETURN OF THE DUTCH TO MALACCA AND JAVA

with the British which legally forbade such a renewal would bring the British on to their side should the Dutch insist, with force, on the re-establishment of the old relations.

When the Dutch returned to Malacca the Governor, Timmerman Thyssen, moved quickly to re-establish the Dutch dominance over those areas which had been more or less subservient to Dutch interests in 1795. The results of the Dutch reappearance in Riau, including the foundation of Singapore by Raffles, have already been mentioned. In Selangor the Dutch represented to the Sultan that their treaty of 29 July 1786 revived with the return of Dutch authority to Malacca, and that the Cracroft treaty with the British was null and void. Selangor appealed to the British for help which was not forthcoming and, unable to withstand Dutch argument and the threat of blockade, the Sultan agreed to restore to effect the 1786 treaty.⁹ In Perak, it seems that Thai power was great enough to prevent the Dutch re-establishing their old relations reaffirming their old treaties; so Perak continued under the direct control of Kedah, and Thai influence in Kedah was dominant.¹⁰ In the Menangkabau states the Dutch concluded a new engagement with Rembau. This engagement purported to renew the Dutch-Rembau treaty of 1759, and in addition contained several new terms by which Dutch political support of the then incumbent Menangkabau chiefs in Rembau was promised, although 'leaving . . . the laws and customs of the country in their full force . . .'. It is interesting to note that monetary rewards were put into the treaty to induce the Menangkabau to perform the acts required of them, in place of the earlier reliance upon coercion of the leaders of that territory to implement Dutch rights. Batavia, however, refused to ratify this new treaty, and Dutch relations with Rembau remained undefined.¹¹ The reason for Batavia's refusal to ratify the treaty is not clear, but it may be supposed that this was to avoid the implicit undertaking to support the incumbent chiefs by the exercise of force, which might be read into the terms of the treaty.¹²

The Dutch moved with military force in 1818 to reoccupy the tin-rich island of Billiton, near Bangka off the Sumatra coast, and ousted a British garrison from Palembang.¹³ The British were concerned that a Dutch

⁹Winstedt, 'Selangor', pp. 11-12; Cowan, 'Tin', p. 74.

¹⁰Winstedt, 'Perak', pp. 63-5; cf. L.A. Mills, 'British Malaya, 1824-1867', 3(2) *JMBRAS* (1925) 1 at p. 76; see below chapter VIII.

¹¹Newbold, Vol. II, pp. 439-44.

¹²See Mills, p. 78. Mills thinks the Dutch retained 'a sort of paramount power' over Rembau, but this appears to be a vague classification of relations and there is no evidence for it.

¹³Marks, p. 67; Wurtzburg, pp. 443-4, 446-7.

force would nip the infant Singapore in the bud in the early months of 1819, but the Dutch, apparently confident of the justice of their legal claim, determined to argue the case of Singapore in Europe. It seemed preferable to the Dutch for British authorities to rebuke Raffles once again than to precipitate a possible battle for Singapore at a time when the Dutch and British governments were on friendly terms with each other at home.¹⁴

The legal argument of the Dutch, on which so much depended, rested on the contention that Singapore Island was part of the territory of the polity of Riau; that Sultan Abdu'r-Rahman and the Raja Muda of Riau were the legal rulers of that polity; that the British, not having a cession of Singapore from those magnates, their seizure of the island taken by itself could give no legal title unless as an acquisition by occupation or by conquest; and that such an occupation or conquest would be a violation of the British obligation to return Malacca 'and its dependencies' to the Dutch according to the Kew Letters and the treaty of 1814. The British view was that the affair was one between the British and the territory of Riau in which the Dutch appeared as an officious third party that had no legal right to complain; that in any event, the Temenggong had effective control of Singapore and was able to cede what he had to the British; that, further, Husain was the 'legitimate' Sultan of Riau, and the cession of rights in Singapore by him was a valid legal cession by the *de jure* authority, and therefore, since the *de jure* and *de facto* authorities, the Sultan and Temenggong, had joined in ceding rights in Singapore to the British, these rights were well based in law.¹⁵

The arguments based on the capacity of Husain and the Temenggong to cede Singapore may be quickly disposed of by observing that whatever the British view of the legality of the proceedings of 1811, Abdu'r-Rahman had been effective Sultan since that time despite irregularities in his elevation, and the British themselves had recognized his status when Farquhar concluded his treaty with Riau in 1818 with Abdu'r-Rahman as Sultan and the Raja Muda. To set up a rival claimant to the throne, thus disturbing a situation of stability which had been, in effect, recognized by all the parties concerned, would certainly seem to be an interference in the

¹⁴Marks, pp. 2-3, 43-50; Wurtzburg, p. 506.

¹⁵This summary of British and Dutch arguments is based on many sources and represents a considerable distillation of exchanges that were not phrased in the form of clear legal argument. See Wurtzburg, pp. 503 et seq.; Baker, pp. 36 et seq.; Raffles, *Memoir*, pp. 397 et seq.; Miller, pp. 192 et seq.; Logan (ed.), 'Singapore', 7 *JIA* (1853), pp. 325 et seq.; 9 *JIA* (1855), pp. 53 et seq., 442 et seq.; 2 *JIA* (NS) (1858), pp. 46* et seq.; Marks, pp. 43 et seq.

domestic affairs of the Riau Sultanate for which it is hard to find justification in international law. Even the Temenggong and 'Sultan' Husain clearly felt their claims to final authority to be weak. As soon as their treaty with Raffles was signed in February 1819 the Temenggong sent a letter to the Raja Muda of Riau alleging all his acts in Singapore to have been performed under British compulsion. At the same time, Husain wrote a similar letter to his brother, Sultan Abdu'r-Rahman, disclaiming any intent to 'do anything that will cause future ill or animosity'. In context this ambiguous disclaimer can best be read as an indication of Husain's acknowledging that Abdu'r-Rahman had at least a claim to authority in Singapore with which Husain's action was incompatible.¹⁶ The Temenggong and Husain were no doubt delighted at the turn of events which appeared to promise them a great increase in power by freeing them of the supervision of the Raja Muda. They seem to have failed to grasp the true extent of British aims and policy in the area. Nevertheless, they clearly felt that the Raja Muda and the Sultan would feel aggrieved by these events and would seek to redress their grievances, perhaps in blood. It is hard to see how the British interpretation of the Malay law of succession could have been valid when all the Malays involved appear to have taken a different view. This vice in the British position remains even if we disregard as equally ignorant and unpersuasive Farquhar's treating with Abdu'r-Rahman and the Raja Muda as the 'sovereign' of Riau. There was no question to any of the participants that Singapore Island was within the dominion of the 'sovereign' of Riau.

One Dutch observer noted that had the British contented themselves with a claim to acquisition by conquest or occupation this claim would have been difficult to assail on legal grounds.¹⁷ This view, however, rested not on the law of war, but on the classification of the Temenggong as the chief of 'sea-scum, . . . head of the pirates' living in Singapore Island. In effect, it involved regarding all Malay political organization not under the immediate control of European authority as completely outside the international community; not only not protected by the rules of international law, but subject to repression without excuse being necessary. This extreme extension of the development of the concept of 'piracy' does not appear to have found favour in either the British or Dutch official correspondence.

¹⁶Logan (ed.), 'Singapore', 9 *JIA* (1855), pp. 44*-6*; cf. Buckley, Vol. I, pp. 51 et seq.

¹⁷Miller, pp. 192, 195, quoting a letter dated 10 June 1824 from Colonel Nahujs to the Dutch Governor-General in Batavia.

The legal problem of greatest substance seems to have centered round the legal effect that should be given the transactions of 1818: The resumption by the Dutch of their legal control over the Sultanate of Riau by 'renewing' a treaty of 1790¹⁸ in spite of the terms of the treaty concluded by Farquhar with rulers of Riau some three months before which purported to exclude such a legal development. The normal international law rule was that prior treaties legally limit the right of a sovereign to conclude later treaties which contradict the terms of the earlier.¹⁹ It was the British view that the Dutch denial in 1795 that Riau was in any way legally tied to Malacca should have been sufficient to terminate the 1790 treaty and the legal implications of dependency which might be inferred from the earlier transactions. Therefore, in the British view the Farquhar treaty of 1818 precluded the rulers of Riau from dealing away to the Dutch any powers which might 'tend to exclude or obstruct the trade of British subjects'.²⁰ It was apparently the British position that any arrangement between Riau and Batavia which would prevent the establishment of a British factory in Singapore would violate the terms of the Farquhar treaty.

This position was weakened by the fact that after the Dutch returned to Riau in late 1818, the British seem to have considered themselves precluded from establishing a factory in that island.²¹ Riau and Singapore were always conceived by the British (and all others at this time) as equally subject to the sovereignty of the Riau dynasty. By distinguishing between the legal status of the two islands the British seem to have acquiesced in the Dutch view that the Malay sultanates were not to be considered as states within the ordinary framework of international law, for the assumption was clear that it was effective control of the government of a non-European community by a European power alone which could preclude later European dealings there and that treaties between European powers and a Malay 'sovereign' were binding only in so far as they were enforced. That the British established no effective control over Riau seems to have been regarded by the Dutch as leaving Riau open to Dutch re-occupation; the establishment of Dutch effective authority in Riau seems to have been

¹⁸This treaty was apparently the same as that negotiated in 1787. No text appears to have survived.

¹⁹Vattel, p. 375.

²⁰Article IV. See Baker, pp. 36-40, Minute by Governor Fullerton of Penang dated 25 April 1825.

²¹Raffles, *Memoir*, p. 371, letter from Raffles to Marsden dated 14 November 1818.

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regarded by the British as precluding them establishing their factory there but not in Singapore.

It is also noteworthy that in the legal discussions surrounding the Singapore affair, the extent to which the Malay Sultans themselves may have been considered as breaching international law or entitled to the protection of international law seems to have played no part. It is thus apparent that the treaties of this time were used not primarily to secure to the European party an advantage or bargain with the Malay party, but to exclude other European parties from taking action to prevent the Malay party from carrying out its treaty obligations to the first. This seems to have been the practical result of the inability of the Malay sultans to withstand the importunities of European adventurers and government agents seeking concessions by means of treaty which the Malay governments did not regard as binding on themselves after they ceased to be mutually advantageous. In order to stabilize what they regarded as their treaty rights, the European powers had thus been forced to keep a close watch on the continued observance of their rights in the Malay territories, and a practice which had grown up during the 200 years preceeding seems thus to have been accepted by the Dutch and some British officials as law by 1820.

POSTLUDE: THE ANGLO-DUTCH TREATY OF 1824

By 1819 negotiations had begun between the Dutch and the British in Europe with a view to dividing their respective holdings in the Malay Archipelago.²² No consultations were held with any of the Malay rulers involved. From 1820 to 1824 no incidents in the area were permitted to influence the treaty negotiations.²³

Finally, on 17 March 1824, a treaty was concluded in London by which the Netherlands gave up to the British all their remaining privileges in India; ceded 'the Town and Fort of Malacca, and its Dependencies'; withdrew all objections 'to the occupation of the Island of Singapore' by the British; and agreed to pay £100,000 to the British. In return, the British ceded Benkulen 'and all the English Possessions on the Island of Sumatra' to the Dutch, undertaking 'that no British Settlement shall be formed on

²²Marks, pp. 64 et seq.

²³In 1823, for example, the Dutch tried to raise their flag in mainland Johore, and the Temenggong sought to counter this move by raising the British flag there. The Singapore authorities had the British flag removed. Logan (ed.), 'Singapore', 7 *JIA* (1853), pp. 348 et seq.; 9 *JIA* (1855), pp. 459-60. The incident seems to have had no effect whatever on the London negotiations. It is not mentioned in Marks's exhaustive analysis of the negotiations leading up to the conclusion of the Treaty of 1824.

that Island, nor any treaty concluded by British Authority, with any Native Prince . . . therein'; withdrew all objections to Dutch 'occupation of the Island of Billiton'; and undertook that 'no British Establishment shall be made . . . South of the Straights of Singapore, nor any Treaty concluded by British Authority with the Chiefs of those Islands'. In an exchange of notes attached to the treaty the British undertook to modify the treaty of 1819 with Atjeh to eliminate those provisions which might be construed into a legal obstacle to the Dutch enjoying full commercial and other rights there. In return, the Dutch Government undertook 'to regulate its relations with Acheen, in such a manner, that that State, without losing anything of its independence, may offer . . . that constant security which can only be established by the moderate exercise of European influence'. Since the line separating British and Dutch interests was drawn through the 'Straights of Singapore' with the British excluded from the islands south of those 'Straights', Riau and Lingga were excluded from the phrase 'Malacca, and its Dependencies'. The line of separation thus ran through the Straits of Malacca, separating the Peninsula from Sumatra, and through the Straits of Singapore, dividing the Sultanate of Riau-Lingga-Johore there, but terminated just east of those Straits, leaving rivalries over Borneo (which lies north of Singapore but south of the main shipping route from Europe or India to China) to be resolved by a later generation.²⁴

²⁴The treaty may be found in 11 *BFSP* 194; Marks, p. 252. The agreement concerning the line of separation terminating at the eastern end of the Singapore Straits is in documents abstracted in Marks, at pp. 234 and 237. The later struggle for control in Borneo between the British and Dutch is the subject of Graham Irwin, *Nineteenth Century Borneo*, *passim*. Various subsidiary legal questions, such as doubts over the constitutional powers of the British and Dutch Crowns to cede land without the consent of their respective parliaments, and Dutch problems in getting Sultan Abdu'r-Rahman and the Raja Muda of Riau to agree to abandon their own rights in Singapore are mentioned in Marks, and will not be dealt with in this place. The constitutional problems are beyond the scope of this study; making effective in Malay law the break-up of the Sultanate of Riau-Lingga-Johore will be the subject of chapter IX.

CHAPTER VIII

The Removal of The Thai

KEDAH, PERAK AND SELANGOR TO 1825

FROM the last decades of the eighteenth century, as the British spread their influence and interests in the Malay Peninsula, they encountered in some areas opposing influences and interests, both European and non-European. The conflicts with the Dutch were handled through European negotiations in which European interests were dominant, and the relative positions of the antagonists in the East were mere pawns in what was perceived as a larger game to be played closer to home. The non-European interests and influences were, in a sense, more difficult to handle. The only major non-European foreign interest in the Peninsula of which the British had any direct knowledge was the undoubted influence of Thailand in Kedah. Despite this direct knowledge, the British took possession of Penang without first consulting the Thai.

The Thai, for their part, after their unsuccessful attempt to assert authority over the British in Penang in 1792, apparently decided to strengthen their hold in the Peninsula without clashing directly with the British over Penang. The Sultan of Kedah, Ahmad Taju'd-din Shah, who had been confirmed in his authority by the Thai in 1802 and who apparently owed his position at least in part to Thai approval, lost no opportunity to attempt to entangle the British in his attempts to rid himself of Thai supervision. In 1810 he complained to the British of alleged increases in Thai interference in the affairs of Kedah.¹ In 1813 the complaints were renewed; Kedah, acting under Thai orders, invaded Perak, then withdrew shortly after.² But the Supreme Government was wary of peninsular involvements and determined to withhold judgment on the merits of Thai claims to authority in Kedah until information could be gained of the precise extent of the Thai claims and the extent of Thai power in the Peninsula.³

¹Swettenham, pp. 47-52.

²Low, 'Account', 4 *JIA* (1850), p. 18.

³Crawford, *Journal*, Vol. II, p. 450.

In 1816 Thailand appears to have been the moving power behind another invasion of Perak by Kedah. In July 1819 the Sultan of Kedah wrote:

It is true I conquered Perak. The King, Raja Muda and Bendahara transferred the government to me. . . Perak and its dependencies were placed under the Raja Muda and Bendahara jointly, subject to my superintendence and control. The Raja Muda exercises over Perak, Pangkor and adjacent dependencies the functions of a sovereign tributary to Siam.⁴

While it is impossible to tell to what extent the legal words of art have been read into this letter by the translator,⁵ it seems clear that some of the normal rights of the sovereign were felt to remain in a territorial 'ruler' who was effectively controlled by a second, and under a further undefined authority of a third. The Raja Muda was apparently regarded as the 'sovereign' in Perak, although he shared power with his Bendahara, obeyed the commands of the Sultan of Kedah, and paid tribute to Thailand. Significantly, this assertion of the location of the seat of 'sovereignty' was not made by the Raja Muda but by the Sultan of Kedah, from whose own claims to right in Perak this explanation would most derogate.

Thus it appears that to the Malays of the west coast at this time very complex legal relations were entered into, although the legal terminology used to describe them seems to have been at best vague and at worst self-contradictory. The extent to which this lack of preciseness may have been due to the lack of understanding among Europeans as to the precise meaning of the Malay words of legal art is not clear.

It is certain that the role of custom in the Malay appreciation of the content of these relations was very great. It is noteworthy that the changing patterns of political control among Malays and Bugis in the Peninsula at this time seem to have had no effect in bringing about any permanent changes in dynasty or claims to rightful authority. On the contrary, the sources of political friction seem to have lain in immediate attempts at economic or political extensions of power, while conflicting claims of theoretical right seem to have arisen out of the conflicts of imperfect claims to dynastic succession and the continuance of ancient claims to authority in the face of more recent changes in fact. Since the evidence for these

⁴Winstedt, 'Perak', pp. 64-5.

⁵R.O. Winstedt. Winstedt's perception of legal relations is not reliable. See, e.g., *Malaya and its History* (2nd rev'd ed.), London, 1951, p. 56, where Naning is regarded as 'at least a semi-independent tributary State' of Malacca after the treaty of 1801. In so far as the legal phrase 'semi-independent tributary State' makes any sense it is at least confusing and probably wrong in every word.

assertions has been put forth in discussing transactions involving the entire west coast,⁶ it is possible to generalize further and say that in the entire Peninsula during the early nineteenth century, custom was consciously the most important source of Malay concepts of justifiable public behaviour, and that such a source seems clearly to have sprung from a traditional view of law which, in its international aspect, regarded treaties as evidence only of an immediate bargain, and as losing binding force with the passage of time. In Johore's repeated donation of 'sovereignty' over the Menangkabau areas of the Peninsula to the Dutch it is possible to see examples of cases in which treaty had no effect at all in the legal concepts of the people principally affected. But with the emphasis put in maintaining tradition, and the effect of treaties being considered of little long-term importance, it would have been surprising had the Malay rulers hesitated before using force to secure their political ends in the Peninsula, since treaty would not serve. Treaties apparently could serve to supplement customary matters, but could not change the basic customary rules.⁷ The only treaty concluded during this period between Malay powers in the Peninsula appears to have been the 1804 treaty between Selangor and Perak, and, as mentioned above, when the political balance which underlay that treaty was changed, the treaty was apparently regarded as no longer binding.

It is not clear whether the attacks of 1813 and 1816 were undertaken in a belief that Thailand had an enforceable right to authority in Perak derived, perhaps, from the submission symbolized by the passing of *bunga emas* from ancient times, or whether it was an attempt to gain control of Perak's tin revenue by the establishment of a control for which no traditional precedent existed.⁸ It appears, however, that British merchants in Penang

⁶*I.e.*, the Riau-Johore succession; the Bugis position in Riau; the Bugis conquest of Perak; the Kedah conquest of Perak; the Johore relations with the Menangkabau territories; and the Thai authority in Kedah. The last dynastic changes of significance appear to have been incidental to the Bugis ascendancy two generations earlier.

⁷It is interesting to compare this position with the modern situation in some Muslim countries, where legislation is of lesser theoretical importance than the customary Quranic law. See, e.g., J.N.D. Anderson, 'The Shari'a Today', 31 *Journal of the Society of Comparative Legislation and International Law* (3rd Ser.) (1949) 18 at pp. 19 et seq.

⁸Information as to the precise legal ties between Thailand and the Malay sultanates has never been available generally and, as it was, of course, to the British advantage to minimize Thai authority in the area, Thai pretensions were always discountenanced by the British in the absence of evidence of voluntary Malay submission. Sultans rarely acknowledged their submission to outside authority when they fancied they could gain from appearing to be completely independent. Although the earlier Kedah transactions might have been supposed to indicate to the British authorities that the Malay sultans might well consider themselves as totally subservient to Thailand, but not averse to trying to exercise an independent role in their own territories, or trying to use the threat of British intervention to enable them

had supplied the Sultan of Kedah with muskets and gunpowder prior to the first invasion of Perak; and an offer by the Sultan of Perak to cede the Dindings to the British and to rent out rights to exploit all tin and rattan in Perak for the sum of \$2000 per annum in return for two warships and 2000 British soldiers was ignored, rather to the dismay in later years of an anti-Thai faction in Penang.⁹

In June 1818 the Penang Government sent an agent into Perak to counsel the Sultan of Perak to send the *bunga emas* to Thailand, but this counsel was rejected. In September 1818 Kedah was in effective control of all of Perak's territory; the Sultan of Kedah assumed full authority there. He placed the Raja Muda in control of day to day affairs, and the *bunga emas* was sent to Thailand from Perak via Kedah.¹⁰

It is likely that the British in Penang saw the struggle over Perak as an attempt by Selangor and Kedah, who were antagonistic to each other, to gain control of Perak's tin trade. Kedah was clearly believed to be a pawn of Thailand in this struggle, and the entry of an economic competitor of unknown strength for the resources of the Peninsula was regarded with disquiet. But in January 1819 a letter from a responsible Bangkok official invited the British to trade in Thailand and Ligor, and British concern over the potential role of Thailand in the Peninsula seems not to have reached a serious degree at this time.¹¹

After the setting up of a subservient government in Perak by Kedah, relations between Thailand and Kedah seem to have deteriorated. Apparently, in an attempt to wean Kedah away from the British in Penang, whose precise relations with Kedah were not fully understood by the Thai Government any more than Thai relations with Kedah were understood

to attempt to pry themselves loose from Thai domination, these lessons do not seem to have been drawn. It may be significant that minimizing Thai claims to authority greatly favoured British commercial interests, although no doubt of the sincerity of British views can be maintained in the face of the piles of documents and risked careers of Penang officials of what might be called the 'anti-Thai faction'. The opinions of the Supreme Government, Captain Burney, and the 'pro-Thai faction' in Penang, which seem to have been more balanced and which can be interpreted as reflecting a desire to apply the legal principles of European intercourse to British relations with Thailand, would have had an adverse effect on trade and profits in Penang. It may be significant that Low, originally an 'anti-Thai', who felt compelled by the facts to support Thai assertions of right in Kedah (Low, 'Account', 3 *JIA* (1849) pp. 609-10; see Logan's note on p. 617), reported the invasion of 1813 to have been 'unprincipled and unprovoked aggression'. Low, 'Account', 4 *JIA* (1850), p. 18.

⁹Ibid. pp. 18-19.

¹⁰The Raja Muda of Perak, 'Abdu'llah (later Sultan 'Abdu'llah Mu'azzam Shah), was, in fact, the son of the old Sultan, 'Abdu'l-Malik Mansur Shah, and thus had a claim of sorts to dynastic authority. Anderson, 'Political and Commercial Considerations', 1 *JIA(NS)* (1856), p. 302; Winstedt, 'Perak', 12(1) *JMBRAS* (1934) 65.

¹¹Cowan, 'Early Penang', p. 88.

by the British themselves, the Thai ordered Kedah to stop sending rice to Penang as Kedah was obliged to do under the 1800 treaty.¹² The Sultan of Kedah chose to honour his treaty commitment with the British.¹³

The loss to Penang trade following the disturbances in Atjeh and the retrocession of Java and Malacca to the Dutch influenced the Government of Penang to consider attempting to establish old-style tin-monopoly factories in Patani, Selangor and Perak. Encouraged by Cracroft's relative success, on 19 September 1818 Governor Bannerman sent John Anderson into the Peninsula to achieve this end. Anderson was unable to secure a treaty in Perak because of the Perak-Kedah war; he seems never to have reached Patani; but he was able to obtain a tin contract in Selangor. Since Patani tin was normally exported to Penang via Kedah, and since Kedah was now more or less in control of Perak, a plan was advanced by which the British would occupy the Perak island of Pangkor, to serve as a tin-collecting station. Occupying Pangkor was conceived as a means of controlling the tin trade of the Peninsula without direct involvement with Patani or Perak. In January 1819 Bannerman asked the Supreme Government for permission to annex Pangkor, stressing its utility as a tin depot and as a base from which 'piracy' in the Straits of Malacca could be fought.¹⁴

Before instructions could be received from India, the Dutch had secured their (unratified) treaty with Selangor. The Sultan of Selangor appealed in vain to the British for help in keeping the Dutch out of his territory citing the terms of the Cracroft treaty of the year before.¹⁵ All this left the status of Pangkor in confusion. After their conquest of Perak in 1804, although they evacuated the rest of Perak in 1806 Selangor seems to have retained possession of Pangkor. The Dutch seem to have been interested in re-establishing their own base on Pangkor, and if they were permitted to establish an authority over the Sultan of Selangor it was expected that a British attempt to ignore the Selangor position in Pangkor or to treat with the Sultan of Selangor directly would offend the Dutch at a time when the Dutch and British governments in Europe were attempting to establish and maintain friendly relations. Furthermore, the Sultan of Kedah claimed full sovereignty in Perak by virtue of his conquest of that territory and, since Pangkor was agreed by all to have been originally part of Perak's

¹²Winstedt, 'A History of Malaya', 13 (1) *JMBRAS* (1935) 1 pp. 181-2.

¹³Ibid. p. 182. It has not been possible to confirm Winstedt's recitation of this episode. Precisely when it occurred is also not clear. The events described appear to have been likely, however, in the self-interest of the parties whose actions are discussed.

¹⁴Cowan, 'Tin', pp. 55-63, 72-3; Cowan, 'Early Penang', pp. 58-9.

¹⁵Cowan, 'Tin', pp. 73-5; Cowan, 'Early Penang', pp. 93-4.

territory, it seemed that a clear title to Pangkor could not be obtained without Kedah's acquiescence. But Kedah would not cede Pangkor to the British on the grounds that Thailand would not permit it. In his letter of 20 July 1819 to Bannerman, the Sultan of Kedah called himself a 'tributary of Siam', and mentioned Thai displeasure over his predecessor's sale of Province Wellesley to the British in 1800. He agreed that a British base at Pangkor would help curb 'piracy', although he did not define the word. Finally, he invited the British to come to Kedah and talk with him in an attempt to find some mutually agreeable means of keeping the Dutch out of Perak.¹⁶

The interest of both Kedah and Penang in keeping the Dutch out of the rich tin-producing area of Perak was clear. The Perak Sultan and chiefs, at this time without effective power in Perak, were quite willing to cede Pangkor to the British at an appropriate price. In these circumstances, when the British Government in India gave permission to annex Pangkor it must have been highly frustrating for Governor Bannerman to realize that it could not be done without four or five separate negotiations (depending on whether direct negotiation with Thailand would prove necessary, in addition to negotiations with Kedah, the Dutch, Selangor, and the remnants of Perak) unless he were prepared to undertake the risk of political complications. The British agent who was sent to the area to try to annex Pangkor contented himself with collecting tin in Selangor.¹⁷

Bannerman died of cholera on 8 August 1819. His successor to the Penang government passed the Pangkor question back to the home authorities, recommending that Ujong Salang might be annexed more easily than Pangkor, and an entry into Thai tin trade might prove more fruitful than concentration on the Malay sultanates.¹⁸

British relations with Kedah were complicated still further by a dispute over duties. On 21 October 1818, Governor Bannerman wrote to the Sultan of Kedah that he objected to paying duties to Kedah's Penang-resident Chinese tax-farmers¹⁹ on the ground that their taxing the Penang

¹⁶Cowan, 'Tin', pp. 73, 75-7; Cowan, 'Early Penang', pp. 97-8.

¹⁷Cowan, 'Tin', pp. 76-7.

¹⁸Cowan, 'Early Penang', pp. 102-3, letter dated 6 January 1820.

¹⁹The system of farming sources of governmental revenue was the norm in the Peninsula at this time. The 'farmer' would buy the right to collect a specific type of duty, impose a tax on some class of transactions, or open a monopoly business, e.g., a gambling den or opium shop. He would then, under government regulation (when government or sultan cared to regulate), collect as much money as he could as a governmental 'Agent'. The farms seem to have been sold annually by private treaty or by auction. The farmers were normally Chinese or Indian merchants. Crawford, *History of the Indian Archipelago*, Vol. III, pp. 72-4.

Government's tin trade in Kedah was inconsistent with their continued residence in Penang. He suggested that the Sultan of Kedah buy back the farm.²⁰ It has been suggested that Governor Bannerman's position does not seem to be morally sound, for he well knew of the tax farms before he began to plan his Pangkor entrepôt. At any rate the Sultan of Kedah refused to take the action desired of him by Bannerman.²¹ His reason for this refusal was that he feared that an over-sensitivity on his part to the requests of the Penang Government would result in Thai action against him. In an effort to force him to act, the Government of Penang stopped the payment of his \$10,000 annuity. Since this annuity rested on the treaty of 1800, and was to be paid explicitly during occupation of Penang and Province Wellesley, it is difficult to imagine what legal justification could have been put forth by the Governor of Penang (whose sole doing the stopping of the annuity was) for this action. Bannerman's successor restored the annuity.²²

During the complicated manoeuvres over taxes and tin the Sultan of Kedah conducted apparently independent correspondence with the British authorities in Penang. However, at one point, when Governor Bannerman proposed to him that he cede an additional plot of land adjacent to Province Wellesley to the British he responded that he had no power to cede Kedah territory because Kedah was a province of Thailand. This response clearly drew to British attention once again that their present occupation of Province Wellesley, if not, indeed, Penang itself, might involve serious complications with Thailand. In contact with the as yet unknown strength of Thailand the British were anxious to appear in all things fair and to give no cause for offence. Yet, as has been seen, the British were themselves unsatisfied about the legal bases of their occupation

²⁰Cowan, 'Early Penang', pp. 82-4.

²¹Cowan, 'Tin', pp. 66-9. It is difficult to see why possession of a tax farm should be considered to be inconsistent with residence in Penang. The Singapore government auctioned off liquor, opium and gunpowder-making licenses in July and August 1823. Logan (ed.), 'Singapore', 8 *JIA* (1854), pp. 339-40, 345. Gaming was an object of some controversy in the early days of Singapore, Raffles being opposed to it on 'moral' grounds. Ibid. pp. 329-30, 336-8. But it appears that a gaming farm was part of the Singapore Government's revenue from 1820 onwards. Ibid. p. 417. It would be surprising to learn that none of the farmers were Singapore residents and these farms did not operate against the interests of the Government and did not involve 'taxation' in the normal sense. Since the farming of revenues was a widespread practice, and the acts which the farmer could control as agent of a sovereign were in all cases acts which occurred in the territory of that sovereign, it is difficult to see why residence, taken alone, should alter the picture. Government could always cancel the farm in its own territory if it chose, or forbid its own residents holding a farm in another's territory.

²²Cowan, 'Tin', p. 69.

of Penang prior to the conclusion of the treaty of 1800, and it now appeared that this treaty could be regarded by the Thai as legally meaningless, since it had been concluded by a Sultan of Kedah who they could claim had no power to cede Thai territory. Of course, legal argument based upon prescription could still be made by the British, but the fancied reputation for fairness was jeopardized, and it is certain that a measure of anxiety was felt.²³

Matters were brought to a head on 12 November 1821 when the Thai invaded Kedah. The Bendahara and the Laxamana were killed, the Temenggong captured, and the Sultan made his escape to Province Wellesley and thence to Penang.²⁴

It appears that the British, considering their payment of \$10,000 per annum as a payment to the state of Kedah rather than to the Sultan, considered that with his loss of authority in Kedah their obligation to pay the Sultan this sum ceased. Instead, he was granted an allowance of \$6,000 per annum as 'adequate to maintain himself and numerous family'.²⁵ Since the British in India certainly did not consider themselves legally bound to contribute any support to the Sultan of Kedah,²⁶ it is difficult to explain the Supreme Government's acquiescence on this payment except on the grounds of political expediency.²⁷ But decisions on such matters are rarely taken precipitately, and the timing of events makes it appear likely that the Penang Government felt itself bound to contribute to the support of the Sultan. This feeling of the Penang Government is more directly evidenced in the extremely anti-Thailand tract, written by a member of the Penang Government at the instance of the then Governor, Robert Fullerton, in 1824, in which it is bluntly stated that Light's 'promises of

²³Low, 'Account', 4 *JIA* (1850), pp. 24-5; Cf. Raffles, *Memoir*, p. 39 (letter to Lord Minto dated 1811) at pp. 49-50, 55.

²⁴Anderson, 'Considerations', 8 *JIA* (1854), pp. 135 et seq.; Newbold, Vol. II, pp. 8-16 note (an eyewitness account).

²⁵Anderson, 'Considerations', 8 *JIA* (1854) p. 137; Burney, Vol. I, Part III, p. 438, Minute by Governor Fullerton of Penang, 18 September 1826, at p. 441.

²⁶Burney, Vol. III, Part II, p. 385 (Report of Murchison to Prinseps dated 25 June 1836) at p. 386. In the British view the \$10,000 annuity lapsed with the treaty of 1800, 'which was declared by the Supreme Government to have become null and void when the Siamese took possession of Quedah'. The \$6,000 pension was later withheld from the Sultan from time to time, also for political reasons.

²⁷*Ibid.* at p. 393, in which it was suggested in official correspondence that the pension be used as a lever to influence the Sultan to comport himself so as not to cause trouble between the British and the Thai. See also *ibid.* Vol. IV, Part I, p. 92, Minute by Governor Fullerton of Penang dated 27 December 1827, in which it is asserted that: 'The Pension... is entirely a political one, granted in consequence of former political connections...'. Just how the sense of 'consequence' arose is not explained.

assistance' were *quid pro quo* for the 'cession' of Penang to the British in 1786.²⁸ While this interpretation of the earlier transactions seems to have been unsound there is no doubt that similar interpretations had a large impact on the policy of the Penang Government in later years.²⁹

The logical difficulties the British found themselves in when attempting to uphold their contractual right to possession of Penang while denying the existence of any British military commitment to Kedah to flow from the transactions of 1786 are illustrated by occasional incidents, such as the expressed view of the Penang Government in 1826 that their \$6,000 payment to the Sultan, Ahmad Taju'd-din, should be charged off the \$10,000 Penang 'quit-rent', not being paid at this time but concededly owed to the rulers of Kedah (*i.e.*, the Thai), leaving only \$4,000 as the annual quit-rent.³⁰ Governor Fullerton proposed that this additional \$4,000 be paid to the Sultan as an inducement to him to agree to abandon his claims against the Thai to sovereignty in Kedah,³¹ but the Sultan would not agree to this condition.³² The matter does not seem to have been finally settled until 1869, when a new treaty defined the Province Wellesley borders with Kedah and stipulated the full \$10,000 annuity as due to the Sultan's successor, who was at that time once again in effective control of his hereditary demesne subordinate to Thailand.³³ The persistent efforts of the British to find an opportunity to raise the stipend back to \$10,000 (neither more nor less) are noteworthy, as are the clear statements of this payment

²⁸Anderson's 'Considerations'. See 8 *JIA* (1854), pp. 134-5.

²⁹Cf. Burney, Vol. I, Part III, pp. 438 et seq., Minute by Governor Fullerton of Penang dated 18 September 1826. 'It has been our policy never to interfere in the disputes between Kedah and Siam. We have pursued that policy...more steadily perhaps than consistent with the virtual obligation incurred when we accepted the Island [of Penang]'. Ibid. pp. 439-40. The use of the word 'virtual' seems to have been a mere nod in the direction of accuracy. Governor Fullerton treats the 'obligation' as binding throughout.

³⁰Ibid. p. 441.

³¹Fullerton denied the Thai any right at all to any part of the money. Ibid. p. 441. The Thai claimed the whole \$10,000 annuity as their right in 1822, but the British rejected this claim. Crawford, *Journal*, Vol. I, p. 246. In July 1825 the British authorities promised the Thai the sum of \$4,000 as annual quit-rent for Penang and Province Wellesley if they would permit the Sultan of Kedah to return to the Peninsula. Burney, Vol. I, Part IV, p. 704 (article 6 of the 'Basis of a Treaty' between the Thai representative in Ligor and Captain Burney dated 31 July 1825). These negotiations later fell through. See below.

³²Offers to increase his stipend by the \$4,000 were made in 1827 (Burney, Vol. III, Part I, p. 87), 1829 (Ibid. p. 180), 1830 (ibid. p. 191) and 1832 (ibid. p. 315). The annuity seems to have been restored to its \$10,000 value in 1841 or 1842, when the Sultan of Kedah was restored to his seat by Thailand at the instance of the Government of Penang after long negotiations and some opportune changes of personnel. Ibid. Vol. IV, Part II, pp. 28, 39 et seq.

³³The Treaty of 1869 is in Maxwell and Gibson, p. 82; 59 *BFSP* 1147.

being *ex gratia*,³⁴ which seem to have been forgotten as by 1846 the payments were once again traced to the treaty of 1800.³⁵

The original illegality of the British acquisition of Penang seems to have been reflected again in British attitudes, and a new illegality must be concluded to have lain in the failure of the British to observe their commitment of 1800 or to secure a new written instrument of cession. Under the treaty of 1800 the British were obliged to pay the full \$10,000 annuity either to the recognized Sultan of Kedah or to the possessors of *de facto* authority in Kedah. The British did neither. Under normal rules of treaty construction the obligation would have been regarded as a British debt to the state of Kedah regardless of who was its sovereign. Yet, when in 1822 the Thai demanded the annuity be paid to the Sultan of Kedah they supported, and who, as a Thai puppet, actually exercised the prerogatives of Sultan in Kedah, the demand was immediately rejected. Thai requests that the ousted Sultan be handed over to them for disposition were also rejected.³⁶

PARAMOUNTCY AND THE MISSIONS TO BANGKOK

Despite the British rejection of the notion that the Thai had had rights in Kedah prior to the invasion in 1821 the view was expressed by the British

³⁴E.g., Burney, Vol. III, Part I, pp. 123-4, Report of the Advocate General of the Government of India dated 9 May 1829: 'I conceive that the Treaty made between the United Company and the King of Quedah... is at an end, so far at least as it relates to the Ex-King or Rajah himself.... The stipend of 10,000 dollars is granted for considerations which he is no longer able to fulfil, and it would not be consistent either with the Law of Nations or with common reason that the Treaty should be obligatory upon one party and wholly without influence on the other...'. This reasoning itself seems odd, since there are many treaties entered into by the British Government that contain one-sided obligations, which are nonetheless regarded as binding. Moreover, the British in fact continued to occupy Penang and Province Wellesley! The Supreme Government authorized the payment of an annuity on political grounds to the Sultan in 1823, approving the earlier action of Penang in arranging these payments. Ibid. Vol. I, Part IV, pp. 571-2. Small payments were also made to the families of some of the Kedah magnates who had fled to Penang for refuge from the Thai. Ibid. p. 580.

³⁵Ibid. Vol. IV, Part II, p. 195, Letter from Penang to the Government of India dated 26 August 1846.

³⁶See above note 31. Crawford, *Journal*, Vol I, pp. 246, 255; Low, 'Account', 4 *JIA* (1850), pp. 107-8. The Thai set up as Sultan in Kedah the Uncle (Za'yuddin) of Ahmad Taju'd-din, the British supported Sultan. The Thai claim for the \$10,000 annuity was made through this dignitary. The Uncle had, in fact, been the Sultan with whom the British had made the Treaty of 1800. See Burney, Vol. II, Part II, pp. 170-1, letter, Burney to the Supreme Government dated 3 May 1825. The fact of the restored Sultan of Kedah being not only a legitimatist claimant to the Sultanate, but being the very one with whom the original engagement for the occupation of Province Wellesley and Penang had been concluded makes it very difficult to understand the rationale on which the British denied continued payment of the full annuity to Thailand.

outside of Penang that the Thai occupation of Kedah was not 'aggressive'.³⁷ It is possible that there may have been implied in this British attitude a willingness to treat with Thailand on the same terms they would have treated with a European power expanding its authority in proximity to British holdings in Asia, regarding action against any Malay territory as not aggressive merely because it was not directed against a state with rights to independence at international law. However, it is more likely that British views on the rightful place of Thailand in the international legal order were not decided by 1822, and that the judgment that Thailand was not an aggressor in its actions in Kedah represented merely a judgment that British possession of Penang and Province Wellesley was not threatened by the Thai actions.

In fact, in occupying the territory of Kedah Thai troops violated the borders of Province Wellesley. A Malay Sergeant and a dozen Sepoys, acting on British orders, took prisoner a Thai officer and thirty men, who were disarmed and sent back to their Commander, the Chief of Ligor, who punished them. This punishment was apparently administered by the Chief of Ligor to indicate to the British that he did not wish to make enemies of them and that his conquest of Kedah offered no threat to Province Wellesley or Penang.³⁸ Although it could have been inferred from this action that the Thai did not consider Province Wellesley or Penang as part of their Kedah dominions the British remained very suspicious of Thai intentions, perhaps regarding the Thai punishment as an attempt at duplicity. Fearful of Thai intentions, the Dutch Governor of Malacca sent word to Penang that he would be prepared to render the British every aid necessary to combat Thai expansion.³⁹

Fear of Thai power and apprehension over the extent of Thai claims to Penang itself bred in the small community of British officials in Penang a most vigorous reaction. Not only did the Penang Government deny any Thai right to any form of authority over Penang and Province Wellesley, with the anomalous legal results discussed above, but they also projected their desire to destroy the unknown strength of Thailand back into history. These officials in Penang condemned the Thai invasion of Kedah as 'an act of the most unjustifiable usurpation and unprovoked hostility', and pleaded for armed force from India on the grounds that the Thai action

³⁷Crawfurd, *Journal*, Vol. I, p. 256.

³⁸*Ibid.* pp. 20-1.

³⁹Low, 'Account', 4 *JIA* (1850), p. 108.

justified 'the interference of a powerful Government like the British'.⁴⁰ Even if the Penang officials had been right in denying Thai claims to authority in Kedah prior to 1821, it is difficult to see the 'justification' that Thai aggression would give to the British unless the British believed themselves to be rightfully the protectors of Kedah. The treaty of 1800 and the history of the British acquisition of Penang and Province Wellesley certainly gives no ground for that belief. Rather, in this new conception apparently growing out of the inexhaustible search for security were the seeds of illimitable expansion, to be justified as the obligation of the strongest European power in the Peninsula.

These implications were perceived and the immediate arguments of the expansionists were rejected by the Supreme Government and those other British officials whose futures were not so intimately tied to the security of the British settlements in Penang and Province Wellesley. This group regarded the Thai invasion of Kedah as entirely beyond the concern of the British because it was an internal affair of Thailand. In their reconstruction of history, Kedah had been under the complete sovereignty of Thailand from ancient times.⁴¹

The disagreements over history were far less important than the disagreements about present policy. The 'anti-Thai' group favoured large-scale British intervention in the Peninsula. The 'pro-Thai' faction supported the announced policies of the Supreme Government and the London authorities to avoid peninsular entanglements. The battle between these two factions was fought during the years 1822 to 1827 and, although the victory appeared to go to the Supreme Government and the adherents of non-intervention, in the long run the Government of Penang was in fact successful.

The implications of this drawing up of policy sides in British government circles were also far-reaching legally. The erosion of the principle of non-interference was partly, at least, based upon the conviction that it was the legal 'right' of British authority to take a hand in the ordering of peninsular affairs; this conviction of righteousness in interference, masquerading at first as an opposition to a policy of non-interference, was coming to be an accepted part of the British conception of their legal position in the area. The legal idea which included the concept of a right to interfere

⁴⁰Anderson, 'Considerations', 1 *JIA* (NS) (1857), p. 304.

⁴¹Crawford, *Journal*, Vol. I, pp. 21 et seq.; James Low, 'A Retrospect of British Policy in the Straits of Malacca...', reproduced in Burney, Vol. I, pp. 1 et seq. at pp. 1-9. Low's 'Retrospect' is dated 22 June 1842 but was apparently written in 1837.

in the internal affairs of non-European communities was, as in India at this time, called 'paramountcy'. But where in India the concept was later considered by some to be an exercise by the British of the legal rights of the Mogul Empire,⁴² in Malaya, where no such precedent was available,⁴³ the use of the concept of 'paramountcy' was just as widespread.⁴⁴

On 22 March 1822, John Crawfurd arrived with his party at the entrance of the Menam River en route to Bangkok.⁴⁵ His instructions, dated 29 September 1821 (thus before the invasion of Kedah by Thailand), were to allay the fear and distrust of Europeans which was felt to have grown in Thailand, as in many of 'the various states of further Asia', from the 'violence, imprudence, and disregard of national rights, which occasionally characterized the conduct of all European nations in the earlier periods of their intercourse', and to open the path for the East India Company to begin 'a renewed connection solely for purposes of trade'. The Governor-General in Council instructed Crawfurd further that he was 'solicitous to avoid mixing anything of a political nature with your negotiations at Siam', but suggested that, at Crawfurd's discretion, Thai intentions in

⁴²The earliest official use of the word, as far as it has been possible to discover it, was by Sir John Malcolm, one of the leading officers of the Supreme Government in the early nineteenth century (Smith and Spear, p. 572), in 1823. See W.S. Holdsworth, 'The Indian States and India', 46 *LQR* (1936) 407 at p. 416. The idea of legal rights in excess of those granted by treaty flowing solely from political position and difference in culture was applied as a legal principle only in relations with non-European rulers who retained some degree of autonomy and would probably have been considered independent had they been European. Smith and Spear, pp. 629-30; cf. Sir Henry Maine's *Kathiawar Minute* of 22 March 1864, quoted *in extenso* in M.S. Grant Duff, *Sir Henry Maine...*, London, 1892, p. 320 at p. 324.

⁴³Raffles envisaged such an extension in his plan to substitute British 'overlordship' for the 'suzerainty' once allegedly exercised by 'Majapahit' in the area. Raffles, *Memoirs*, p. 60, Letter, Raffles to Lord Minto, 10 June 1811, at p. 71. Raffles's conception of the legal position of Majapahit seems to have been based upon highly disputable evidence.

⁴⁴A full discussion of the precise legal content of 'paramountcy' apparently did not take place with regard to India until 1928-9. *PP*, Cmd. 3302, Report of the Indian States Committee, 1928-9, when the factual background of this legal concept was traced back to 1800. *Ibid.* pp. 14, 21. It is not proposed to discuss the development of the legal theory of paramountcy in India in this place. Recommended readings, in addition to the works cited above, include Sir W. Lee-Warner, *The Protected Princes of India*, London, 1894; Sir W. Lee-Warner, *The Native States of India*, London, 1910; John Westlake, 'The Native States of India' in *The Collected Papers of John Westlake on Public International Law*, Cambridge, 1914, pp. 620-32, also in 26 *LQR* (1910) 312. Westlake finds the principles on which the legal doctrine of paramountcy was based took form in 1817 as a policy decision; reached the dignity of a legal principle by 1826, when the British felt justified in going to war in Burma over the issue of a threat to British 'rightful' supremacy; and was fully fledged by 1858, when the ex-Mogul was put to trial as a 'traitor', implying that he owed a legally binding allegiance to the British authority in India.

⁴⁵Crawfurd, *Journal*, Vol. I, p. 107.

Perak and Kedah should be ascertained, if possible, 'by a friendly and unostentatious representation to the Court of Siam'.⁴⁶

In Bangkok, Crawford found the Thai harder to bargain with than he had expected. In an interview with the Thai official in charge of the negotiations on 7 April 1822 he was pointedly asked whether the Governor-General of India would permit Thai vessels to purchase arms freely at British ports if the suggested opening of Thailand to British trade were accomplished. Crawford replied that this would be permitted, but only if the Thai were at peace with 'the friends and neighbours of the British nation'. His intention of denying Thailand the right to buy arms with which to fight against Burma was so clear that his interpreter was hesitant to translate this answer.⁴⁷

This interpretation of British obligations of neutrality, while perhaps stricter than the circumstances might warrant, was perfectly consistent with the then current and growing European practice.⁴⁸ Nevertheless, since fire-arms appeared to be the principle item of Western manufacture sought by the Thai government, it seemed clear to Crawford that his bargaining position was severely hampered. He felt further hampered by the activities of Chinese merchants in 'misrepresenting' the objects of his mission. 'They were stated to say, that the English came now with smooth words, pretending to want trade only—that in a little time they would ask for a factory—then for leave to build a wall around it—that on this wall they would soon plant cannon; and finally, that they would seize upon the country, as they had done upon many similar occasions.' 'It is not to be denied,' wrote Crawford, 'but that the strange history of our Indian aggrandizement must always afford a subject of jealousy to the neighbouring nations, and ground to misrepresent even our most laudable views and enterprises'.⁴⁹

Thai opinions as to British practice in the East were not formed solely on the report of Chinese merchants. According to Crawford, 'Our power

⁴⁶Ibid. Vol. II, Appendix B, pp. 442–53. The quotations are from pp. 443–4 and 451. The mention of 'renewed connexion' implies that the India authorities were familiar with the history of British intercourse with Thailand in the seventeenth century. The reasons assigned for Thai suspicion of European contacts are, to say the least, ingenuous.

⁴⁷Ibid. Vol. I, p. 137.

⁴⁸Ibid. p. 138; Butler and Maccoby, p. 246. This practice reached its classic statement in the Alabama Claims Arbitration of 1872, see J.B. Scott, *Cases on International Law*, St. Paul, 1922, pp. 842 et seq. It may be noted, however, that the Washington Rules by which the Alabama Claims were decided were resisted by the British as not being declaratory of existing international law. Ibid. p. 848 note 8; L.C. Green, p. 693.

⁴⁹Crawford, *Journal*, Vol. I, pp. 138–9.

and our conquests in the East, of whatever description, never fail to excite the alarm and jealousy of the nations of India. . . In several conversations which we held with the Siamese chiefs, they displayed a degree of knowledge and acuteness on the subject of our Indian power, which were scarcely to be looked for in their situation. . . .'⁵⁰ It may be supposed that the arrogant presumption that the Thai were ignorant which persists throughout his *Journal* despite the evidence which Crawford appears constantly surprised to find of Thai perception and intelligence, might also have been a burden which hampered his negotiations.

On the other hand, the Thai seemed willing to permit foreign trade in their country in 1822,⁵¹ and negotiations foundered on specific terms of that trade and on the unwillingness of the Thai to enter into a treaty making openness to trade an international obligation which might justly be enforced by the British. Crawford also asked that all import and export

⁵⁰Ibid. p. 190. Crawford found the same thing true in his discussions some time later with the local authorities of Cochin China in Saigon. The Cambodian official with whom he spoke on 10 August 1823 asked 'whether it was probable there would be war between the English and Siamese, on account of the protection which the former gave to the King of Queda, under pretence that he was their ally, while in fact, he was a subject and a tributary of Siam'. 'I replied', wrote Crawford, 'that the English were too powerful a people for the Siamese to attempt any thing against them. His Excellency said, that he supposed the English had an eye on... Quedah, and Perak; which would render Penang the centre of a large trade, and that the Malay Peninsula was now necessary to support Penang, as she had lost the trade of the Eastern Countries through means of Malacca'. Ibid. Vol. II, p. 421. This was before the British-Dutch settlement gave Malacca to the British and made Singapore secure. This report is also printed in Burney, Vol. II, Part II, p. 6.

⁵¹Chinese and Indian traders had frequented Thai ports throughout the period. Prince Damrong Rajanubhab, 'The Introduction of Western Culture in Siam' 20 *JSS* (1927) 89 at pp. 92-3. In 1809 the Burmese invaded Ujong Salang (T. Masao, p. 72) and fighting between Thailand and Burma went on for the next three years (ibid. pp. 72-82). With the end of actual warfare in 1812, Burma continued to try to influence Thailand's tributaries in the Malay Peninsula to help detach Ujong Salang from Thai control, and it has been suggested that it was fear of a Malay revolt which might spread to that rich tin-producing island that prompted the Thai invasion of Kedah in 1821. Ibid. p. 82; Wood, p. 276. Continuing fear of Burma also lay behind the Thai desire to import arms, and this desire led to the sending of Thai missions to Portuguese Macao and apparently to Singapore later. Rajanubhab, p. 93; Crawford, *Journal*, Vol. II, p. 388. In 1818 the Portuguese sent an emissary to Bangkok from Macao, and a year or two later a trade treaty was concluded between Thailand and the Portuguese. Crawford, *Journal*, Vol. I, pp. 187, 205; Wood, p. 276. While Crawford was in Bangkok, an American ship arrived with a load of arms, which was sold to the Thai Government. Crawford, *Journal*, Vol. I, p. 243. The willingness of Americans to offer to trade on any terms without fuss was greatly appreciated by the Thai and the result was a vast American intercourse there, without a stabilizing treaty. Ibid. Vol. II, pp. 372-3. There is no doubt that the Thai would have been happy to have the British trade in Thailand on similar terms. Ibid. Vol. I, pp. 186, 243. Some British ships in fact did call at Bangkok to trade while Crawford was there. Ibid. Vol. I, pp. 251, 256, 466-7.

duties be done away with in Thailand, and that the persons of British subjects resorting to Thailand be kept secure.⁵² In reply, the Thai negotiators refused to exempt foreigners from the normal operation of Thai law, and Crawford seems to have agreed that national treatment was indeed the most the British could justly demand in Thailand. He wrote:

If the subjects of a free and civilized government resort to a barbarous and despotic country, there is no remedy but submission to its laws, however absurd or arbitrary, so impossible is it in all respects to reconcile the fair and equal commerce of nations in opposite states of civilization with the freedom of conduct which must be supposed vested in every independent government, whatever its nature.⁵³

Eventually, an agreement was reached by which the Thai undertook not to raise the existing duties nor interpose any other governmental obstacle to trade. The British regarded the Thai word as untrustworthy, and felt the Crawford mission to have been, in the main, a failure in its primary commercial objects. Nonetheless, shortly afterwards Robert Hunter, a British merchant, took up residence in Bangkok and a permanent British connexion with Thailand was begun.⁵⁴

Crawford also raised the question of the position of the Sultan of Kedah during the negotiations, and a long series of discussions took place in Bangkok about it. The Thai remained completely unmoved by the British desire that the old Sultan be returned to power, and Crawford's proposal that he mediate between the Thai and the Kedah chief was rebuffed, although it was indicated that if the Sultan should come to Bangkok and make an appropriate submission to Thai authority he might be allowed to return.⁵⁵ Crawford stated that the British would not hinder him if he wished to go to Bangkok, but that while he remained under British 'hospitality', no force would be used against him. Every suggestion that involved returning the Sultan to Kedah without an actual trip to Bangkok first was rejected by the Thai without hesitation. The key role

⁵²Ibid. Vol. I, p. 205. Singapore was maintained a completely free port from the first. Cf. Proclamation by Raffles, 21 November 1822, Logan (ed.), 'Singapore', 7 *JIA* (1853), p. 335.

⁵³Crawford, *Journal*, Vol. I, p. 205.

⁵⁴Ibid. p. 267; Wood, p. 276; Rajanubhab, p. 94; R.A. Moore, 'An Early British Merchant in Bangkok', 11(2) *JSS* (1914) 21.

⁵⁵Crawford, *Journal*, Vol. I, pp. 244-5.

of Ligor was clearly demonstrated in the discussions, as the chief of Ligor, who was a Thai appointee, appeared in the role of intermediary between the Bangkok Government and most of the Malay territories forwarding the *bunga emas* to Bangkok. It was this Raja who had demanded that the Sultan be handed over to him by the British Government in Penang, but who went to some lengths to assure that the contact between British and Thai troops did not lead to hostilities. Eventually, Crawford abandoned his efforts to have the Thai Government restore the Sultan of Kedah.⁵⁶

With regard to the question of the legal basis for British authority in Penang and Province Wellesley, Crawford was surprised that no question was raised about this in the Bangkok negotiations. He attributed this silence not to any Thai feeling that they had no right to object and interpose a claim, but to Thai fear of the loss of prestige involved in putting forward a claim which they could not enforce. Crawford regarded British title to these territories to be 'defective', and he felt that the Sultan of Kedah had acted beyond his powers in purporting to cede any portion of his territory. It is not clear, however, whether Crawford felt the same principles to govern the British occupation of Penang as those governing the acquisition of Province Wellesley; the grounds of the 'defect' of title were indicated to be further than the incapacity of the Sultan, but the further defects are not specified. Crawford felt that the continued occupation of Penang for thirty-six years 'undisputed', should give the British a strong 'prescriptive claim'.⁵⁷

The Penang authorities on reviewing Crawford's report apparently regarded the failure of the Thai to mention the terms of British occupation of Penang and Province Wellesley to constitute 'a recognition of the prescriptive right' of the British to at least Penang.⁵⁸ In all other political respects the Penang officials regarded the Crawford mission as having been unsuccessful.⁵⁹

⁵⁶Ibid. pp. 245, 252-6. The son of the Raja of Ligor was appointed Governor of Kedah in 1825 and the Raja himself was rumoured to be connected with the Thai royal family. Burney, Vol. I, Part II, p. 217; Vol. II, Part I, p. 77. The Raja was half Chinese with a Thai mother. Ibid. Vol. III, Part I, p. 216. The Malay sultanates forwarding *bunga emas* to Thailand at this time were Kelantan (via Ligor) and Trengganu (via Singora), in addition to Kedah and the sultanates further north, e.g., Patani. Ibid., Vol. II, Part V, pp. 8, 9, 173-4; Crawford, *Journal*, Vol. II, p. 217.

⁵⁷Ibid. p. 246. Crawford was apparently unfamiliar with events between 1786 and 1810.

⁵⁸Burney, Vol. I, Part IV, p. 567, letter from the Governor of Penang and Council to the Court of Directors, 31 March 1823.

⁵⁹Ibid.

Although the British seem to have regarded their position in Penang as bolstered by the Crawford negotiations it is not at all clear that the Thai shared that belief. The British analyses do not mention the Thai demands for the Kedah annuity or any other signs that the Thai were unhappy with the British occupation of Penang or Province Wellesley from 1786 to 1823. Prescription as a means of territorial acquisition rests on silence implying assent to an adverse possession; but despite their silence during the Crawford negotiations the Thai had not been silent at all in other contexts.

While the negotiation did not result in the British achieving any of the concessions they sought, it did serve the purpose of making the British realize that in Thailand they had met informed, intelligent and able antagonists despite their non-European customs. Furthermore, the negotiations had educated the Thai to several aspects of British policy and style. The Thai experienced at first hand British sensitivities regarding Kedah and Penang. They also knew that the British viewed relations with Thailand in the context of British commercial and political relations with India, and would not treat with Thai demands for free trade as the reciprocal of British demands for trading rights in Thailand. Most important, perhaps, the Thai gained first-hand experience of the intelligence, forcefulness and probably arrogance of a first-line British negotiator. They had said 'no' to him with impunity.

The next step was for the Thai to discover the true extent to which the British were willing and able to use force to achieve what they could not convince the Thai to grant. The spectacle of British advance in India was watched closely by the Thai, who apparently determined to test British willingness to act more subtly than by simply forcing a confrontation. The arena chosen by the Thai to test British reactions was the Peninsula, where Thai movements into Kedah had already succeeded. But the prize in the Peninsula was not Kedah, it was the Perak tin trade and ultimately all the territory of the Peninsula over which Thailand had some claim to authority based on the passage of *bunga emas* from ancient times and perhaps other customary rights. After Kedah was subdued Thai troops replaced the Kedah men in Perak.⁶⁰

At this juncture, Ibrahim, the Sultan of Selangor, began to reassert his claims in Perak based upon conquest and the treaty of 1804. In 1821-2 Selangor re-invaded Perak, acquiring effective control of that territory up

⁶⁰Low, 'Account', 4 *JIA* (1851), p. 108.

to the Kurau river.⁶¹ In the course of the invasion, some Thai ships were apparently destroyed by Selangor in Perak.⁶²

The full extent of Thai pretensions in Perak was apparently not realized by the British in Penang, who, of course, regarded their interests as best served by limiting Thai authority in the Peninsula as much as possible. The Selangor Sultan, having driven the Thai from Perak, set the old Sultan back on his throne and renewed the agreement of 1804 giving Selangor half the duty on tin exported from Perak, then withdrew, leaving a Selangor Raja (Hassan) to act as the agent of the Sultan of Perak in collecting the tin duty. The Sultan of Perak, although admitting the presence of Hassan in his territories to be rightful, found Selangor's claim to a portion of the tin duty an onerous burden to carry, and was as anxious to rid himself of the Selangor incubus as he had earlier been anxious to rid himself of Thai domination. He offered the British the right to establish a 'superintending control' over his entire country in return for an annuity and security for himself, but there seems little reason to think that this position would have satisfied him more than Thai or Selangor domination did.⁶³

The Sultan of Selangor appeared to be interested only in the collection of his half of the tin export duty in Perak. He demanded the payment by Perak of a sizeable sum of money alleged to be owing on account of the failure of Perak in the past to pay the full half of the tin duty under the terms of the 1804 treaty.⁶⁴

⁶¹Winstedt, 'A History of Malaya', p. 197. The Selangor invasion had stopped at the Kurau River in the 1804-6 Selangor occupation of Perak also. A letter from the Sultan of Selangor in 1806, in which he notified the Government of Penang of the extent of his dominion in Perak, cited the Kurau as Perak's northern limit. Burney, Vol. II, Part VI, p. 166. It seems, however, that Kedah did not attempt to assert authority south of the Krian River, some miles to the north of the Kurau, either at this time or for some fifteen years thereafter. Ibid., Vol. II, Part IV, pp. 249, 269. The Supreme Government on being apprised of all the facts in 1827, felt the boundary to be a doubtful one and suggested that unless Kedah could prove a right to the more southerly Kurau River boundary, the Krian should be considered the correct boundary between Kedah and Perak. There were political reasons for this position; the British had a significant voice in the affairs of Perak in 1827, but no voice at all in the Government of Kedah, which was under Thai domination. See *ibid.*, Vol. II, Part VI, p. 277, letter from the Governor-General of India in Council to Governor Fullerton of Penang, 16 November 1827, at p. 279. The possibility that the few Malay settlements in the area between the two rivers might be considered independent was not considered. See below.

⁶²Burney, Vol. II, Part III, p. 27, John Anderson's Report on Selangor, 26 August 1825, at p. 31.

⁶³Ibid. p. 35; Report of 15 September 1825, *ibid.* p. 71 at pp. 72, 77, 79, 82-3.

⁶⁴When pressed by the British into agreeing to remove Hassan from Perak in 1825 (see below), the Sultan's sole demand of significance was that the British fulfill the obligation he appeared to feel they had undertaken as *quid pro quo* for the removal of Hassan: The supervision of the collection of his cut of the Perak tin duty. Burney, Vol. II, Part III, p. 70, letter

The Raja of Ligor considered himself as a creditor of Selangor due to the destruction of Thai property in Perak in 1822.⁶⁵ But this claim for money was a pretext, apparently given to avoid alarming the British about Thai military intentions in the Peninsula, and concealed the true Thai legal claim, based upon the conquest of 1818, to ultimate authority and control of the territory of Perak.⁶⁶ In order to achieve this control over Perak, Ligor was able and eager to engage in a war with Selangor.⁶⁷

The anti-Thai faction in the Penang Government refused to grant the Thai their legal premises, asserting both Perak and Selangor to be dependencies of Malacca, and therefore legally tied to the British by virtue of the British succession to the Dutch possession of that city. But the legal basis of this British claim seems to have been recognized to be weak, as Governor Fullerton of Penang advised his Council on 18 May 1825 that the necessary legal base for British interference in the political affairs of the Peninsula should be laid by the conclusion of treaties of offensive and defensive alliance with the Sultanates of Perak, Selangor, Johore, Pahang, Trengganu and Kelantan.⁶⁸

The Supreme Government disagreed with Penang's proposals. When Governor Fullerton outlined his view of what ought to be British aims in negotiations with Thailand in 1824, including the obtaining of 'the disavowal by the Siamese Government of all claims of superiority over any of the Malay States . . . South of Patani', the Supreme Government 'withheld its acquiescence'.⁶⁹

A further development influencing British-Thai relations at this time was the attempt of Burma to establish an influence in the northern Peninsula at the expense of Thailand, and the consequent threat to British interests which made a settlement of the legal status of the Malay sultanates a matter of some urgency for both the British and the Thai. Emissaries of

of the Sultan of Selangor to John Anderson, 10 September 1825. See also *ibid.* p. 170, letter from the Sultan of Selangor to Governor Fullerton, 15 December 1825; *ibid.*, Vol. I, Part IV, p. 609, Minutes of Penang Council Meeting of 24 October 1825, at p. 612 (letter from the Sultan of Selangor).

⁶⁵*Ibid.* Vol. I, Part IV, p. 687, Burney's Report to Fullerton, 1 August 1825, at pp. 699-700.

⁶⁶The Raja of Ligor was explicit about this claim on one occasion, backing down grudgingly only before the threat of British intervention in the Peninsula. *Ibid.* at pp. 689-91.

⁶⁷*Ibid.* Vol. II, Part I, p. 48, Governor of Penang to the Governor-General of India, 28 February 1825.

⁶⁸*Ibid.* pp. 81-2, Minute by Governor Fullerton of Penang dated 29 April 1825; *ibid.* p. 121, Minute by Governor Fullerton of Penang, 18 May 1825, at p. 127.

⁶⁹*Ibid.* Vol. II, Part II, p. 115, Letter from Governor Fullerton to the Supreme Government dated 19 October 1824, at pp. 115-19; *ibid.* p. 165, Burney's memorandum of 3 May 1825, at p. 167.

the exiled Sultan of Kedah visited Ava, the capital of the Burma, in December 1823. One result of this visit was the formation of a plan by which the Sultan of Kedah was to organize a Malay alliance to attack Thailand in return for Burmese protection of his position as tributary to Burma while enjoying dominion in the territory of Kedah.⁷⁰ Upon learning of this, the Governor of Penang immediately wrote to the Thai officials in Ligor, offering to help Ligor to restore the Sultan of Kedah to his dominions in pursuit of what was fancied to be the mutual interest of the British and the Thai in 'precluding the interference of other States' from peninsular affairs.⁷¹ There is no evidence available to indicate why the British felt that Ligor might prefer the interference of the powerful British in Malay affairs to that of Burma. A Ligor mission to Penang in early April 1824 to discuss the Kedah situation apparently produced no significant results.⁷²

The overly sanguine analysis of the Penang Government on the prospect of the Sultan of Kedah being restored was greeted with approval by the Supreme Government, despite that Government's view that 'the conduct of the Raja of Queda in opening a clandestine correspondence with the Court of Ava' was 'highly culpable'. This 'culpability', implying a legal transgression, was felt to flow from the Sultan's attempt to correspond with a foreign state while 'living under British protection'. The view that 'protection' *ex jure* involves isolation from external political contacts is one which was also expressed at about this time in relation to events in Singapore, and although at this time it applied only in the cases of Malay sultans physically present in territory under direct British rule, it seems to be significant for future developments.⁷³

The British Government of India declared war on Burma on 5 March 1824. Immediately, a British officer was sent to Ligor to attempt to form a military alliance by which Ligor would attack Burma as an ally of the

⁷⁰Ibid. p. 15, letter from the Ava Government to the Sultan of Kedah, n.d.; ibid. p. 18, letter from the Burmese Governor of Tavoy to the Governor of Penang (Phillips), 18 December 1823; p. 20, letter from the Raja of Tavoy to the Sultan of Kedah, n.d.

⁷¹Ibid. p. 23. Most of the correspondence relating to Kedah-Burma intrigues of this time is undated, but it is clear from the dates of translation and some incidental evidence that it all took place in December 1823 and January 1824. The precise sequence of events is not entirely clear.

⁷²Ibid. p. 27, letter from the Raja of Ligor to Governor Phillips, 1 April 1824; ibid. p. 35, letter from the Raja of Ligor to Governor Phillips, 2 April 1824; Vol. I, Part IV, p. 574, letter from the Governor of Penang and Council to the Court of Directors, 31 July 1824. See also Low, 'Account', 4 *JIA* (1850), pp. 111-12.

⁷³Burney Vol. II, Part II, p. 57, letter from the Supreme Government to Governor Phillips of Penang, 11 June 1824. See below about the Singapore incident.

British, but the negotiations were fruitless. In June 1824, the British emissary reported that Ligor was wholly subservient to Thailand, and any attempt to get Ligor's help against Burma would have to be made via Bangkok.⁷⁴ As the British lost the prospect of help from Ligor, relations between the Raja of Ligor and the Government of Penang worsened. On 9 July 1824 the Raja of Ligor wrote to complain about British assertions of authority in territory beyond the ceded boundaries of Province Wellesley.⁷⁵ In November 1824 Ligor sent 200 men into Perak; they withdrew to Kedah in March 1825.⁷⁶ Their activities in Perak seem not to have been reported, but it is likely that they asserted a right to control inconsistent with the continued independence of Perak. In April 1825, Ligor was clearly building up its forces for an attack on Selangor. Ligor also declared an embargo on Kedah exports of needed food to Penang, and Thai vessels reportedly attacked some Malay prahus out of Penang.⁷⁷ On 28 April 1825 Governor Fullerton wrote to the Raja of Ligor:

... I am forced once more to caution your Highness not to attack Salangor. . . Should your Highness disregard this caution, possibly a very serious misunderstanding between the Siamese and English may take place. . . [T]his Government cannot permit a fleet such as your Highness's is reported to be, to approach this Island [*Penang*], or pass through the Straits. . .⁷⁸

Although the references to 'approach' and to the 'Straits' are ambiguous, 'Straits' might have referred to the narrow strait between Penang and Province Wellesley rather than the Straits of Malacca, outside of Penang,⁷⁹ there is every likelihood that these ambiguities were deliberate, and Fuller-

⁷⁴Burney, Vol. I, Part IV, pp. 577-8; Vol. II, Part II, pp. 64-71, Low's Reports of 21 June and 25 June 1824; Low, 'Account', 4 *JIA* (1850), p. 112.

⁷⁵Burney, Vol. II, Part II, p. 75, letter from the Raja of Ligor to Governor Phillips of Penang.

⁷⁶*Ibid.*, Vol. II, Part IV, p. 12, Low's Report of 27 October 1826.

⁷⁷*Ibid.*, Vol. I, Part IV, p. 595; Vol. II, Part I, p. 77, letter from Governor Fullerton of Penang to the Ligor-appointed Governor of Kedah dated 20 April 1825; *ibid.* p. 79, letter of 22 April 1825 from Fullerton to the Raja of Ligor. It is not clear whether the addressee of the letter to Kedah was the old figurehead Sultan Za'yuddin, or the son of the Raja of Ligor.

⁷⁸*Ibid.*, Vol II, Part I, p. 187, letter from Governor Fullerton of Penang to the Raja of Ligor.

⁷⁹Burney, writing on 8 October 1825, expressed the view that the British 'possessed no right to obstruct' Ligor's passage through the Straits of Malacca to the west (outside) of Penang or overland in the Peninsula. *Ibid.*, Vol. II, Part V, p. 10. It is not clear on what ground the straits between Penang and Province Wellesley were considered closed to Ligor as a matter of law. Normally straits are open to all ships, even warships, merely passing through and not threatening the peace or order of the littoral state(s). For a definitive modern statement of the law, see *The Corfu Channel Case (Merits)*, *ICJ Reports* 1949, p. 4.

THE PRELIMINARY TREATY OF 1825

ton's intention of frightening the Thai away from peninsular expansion by threatening war was unmistakable.

In May and June 1825, the appearance of Thai troops on the Kedah coast, ostensibly with designs on Selangor, caused a near panic in Penang as it was suspected that Ligor was aiming at British interests more vital than Selangor.⁸⁰

In an attempt to settle the situation, the Supreme Government decided, on 13 May 1825, to send Captain Henry Burney to Bangkok as an 'experiment'. It was contemplated that the Provinces of Mergui and Tavoy, captured from Burma in the Anglo-Burmese war, might be ceded to Thailand in exchange for the restoration of the Sultan of Kedah to his territories as a means of limiting the area of direct contact between British and Thai interests. The Thai had carried off some people from Mergui, Tavoy and Martaban after the British had assumed control there, and the British, while still undecided about the relations which ought to be established between themselves and Thailand, determined that Thai aid in the Burmese war was not desirable. It is interesting to note also that, although undoubtedly considering themselves legally entitled to cede the captured provinces to Thailand, the Supreme Government felt that it could undertake no commitment to do so 'until we shall have acquired some clear and correct notion of their value, and of the degree of moral obligation attaching to us to protect their inhabitants from a Power which they dread'.⁸¹ The coupling of considerations of moral obligation to considerations of economic advantage seems significant in this context.

Meanwhile the ambiguous but threatening posture of the Penang Government had continued and, on 25 July 1825, the Raja of Ligor asked Burney to come to Kedah for consultations.⁸²

THE PRELIMINARY TREATY OF 1825

Burney and the Raja of Ligor discussed matters for three days. On 31 July a document was signed by Burney and the Raja in which certain prelimi-

⁸⁰Burney, Vol. I, Part V, p. 4, letter of 4 September 1825 from the Governor-General of India in Council to the Secret Committee of the Court of Directors in London; cf. Minute by W.A. Clubley dated 19 May 1825, *ibid.*, Vol. II, Part I, pp. 143-4. An attack on Penang to kidnap the Sultan of Kedah was but one of the suggested aims of Ligor. *Ibid.* p. 100, Report of the Superintendent of Province Wellesley to John Anderson, 1 May 1825.

⁸¹Burney, Vol. I, Part IV, p. 659, letter from the Governor-General of India in Council to the Governor of Penang in Council, 13 May 1825 at pp. 659-61. See also p. 681, Proclamation by Major W. Frith, British Commander of Mergui, 5 April 1825.

⁸²Burney, Vol. I, Part IV, p. 684, memorandum from Governor Fullerton to Burney, 25 July 1825; Vol. II, Part III, p. 3, letter from the Raja of Ligor to Captain Burney, 25 July 1825.

nary points of agreement were stated.⁸³ The agreement was titled 'Preliminary Treaty' although the Thai words (the treaty was negotiated and originally written in the Thai language) can equally well be translated 'Basis of a Treaty'.⁸⁴ The reason for its being so styled was to make it clear that its provisions would give way before those of any treaty which might be negotiated between the Supreme Government and Thailand. Since it was realized that the Raja of Ligor was an officer subordinate to Bangkok, it was agreed that only those points which were within his own powers to be fulfilled should be performed immediately. The treaty was to be examined with a view to ratifying by Bangkok and by the Supreme Government.⁸⁵

In the negotiations, the Raja of Ligor asserted his rightful authority in Perak. As conditions for withholding his attack on Perak he demanded reparations from Selangor for the Selangor invasion of Perak in 1821-2 and the withdrawal of Hassan from Perak.⁸⁶ On these points, Burney realized that the British possessed no clear legal right to compel Selangor to act, nor would it accord with British interests to recognize permanent Thai authority in Perak. In the terms of the Preliminary Treaty as eventually agreed to by Ligor, therefore, Burney tried to restrict British obligations to negotiating with Selangor.⁸⁷ But it was found necessary to go much further in some significant respects. The British were, by the treaty, obliged to 'effect the removal of Raja Hassein [*Hassan*] of Selangore from Perak' and to 'prevent' Selangor from disturbing the peace of Perak. They also obliged themselves to ensure that the Sultan of Kedah, if he were restored to his Sultanate, would send an annual tribute and the triennial *bunga emas* to Ligor.⁸⁸ In return for the ambiguous statements that the British entertain 'no desire to occupy Perak or to interfere with its Government', and that the British entertain 'no desire to interfere with the Government of Queda', Ligor was induced to engage that no Thai force should 'proceed to Perak or settle in that country', and that the Raja of Ligor should 'report' to the King of Thailand the British undertaking to

⁸³Ibid., Vol. I, Part IV, pp. 687 et seq., contains Burney's Report of 1 August 1825. The Preliminary Agreement itself appears on pp. 703-5.

⁸⁴Ibid. p. 695.

⁸⁵Ibid. pp. 695-6. See Article 11 on p. 705 for terms of ratification.

⁸⁶Ibid. pp. 689-91.

⁸⁷The British were partially successful in this, e.g., article, 4: 'The Government of Prince of Wales' Island [*Penang*] will negotiate with the Rajah of Salangore to obtain payment from him to the Governor of Ligor of a sum... for the Boats and other property... which the Rajah of Salangore seized at Perak...'

⁸⁸Articles 1, 4 and 6.

oversee the performance of Kedah's tribute obligations to Thailand, and, if the Bangkok authorities approved, to remove the Ligor forces from Kedah.⁸⁹ Since the British clearly envisaged the possibility of their being bound to Thailand to interfere directly in the affairs of Selangor, no British obligation with regard to the political independence of Selangor was undertaken in return for the Ligor commitment that no Thai force should proceed to that Malay territory. Burney successfully resisted an attempt by Ligor to put an article in the treaty which would have obliged Perak to send tribute to Thailand.⁹⁰

The British had no rights based on treaty with Selangor to justify the direct interference in Selangor's affairs which the Preliminary Treaty required them to undertake. Burney felt that Selangor had fallen under British authority merely by virtue of the British having restrained the Thai. He wrote to Governor Fullerton, '[O]ur affording protection to Salangore against the Siamese gives us some right to dictate to it'. It is difficult to see what 'protection' the British had given Selangor in purporting to negotiate away Selangor's rights in Perak that were at the centre of the dispute between Selangor and Thailand. Once Selangor no longer claimed part of Perak's tin duties it is unlikely that Thailand would have wanted to risk an adventure in Selangor. Burney also sought legal authority for British action against Selangor in classifying Hassan as 'nothing more than a Pirate'. This legal label he felt flowed inevitably and solely from the undeniable fact that Hassan's tax-collecting activities interrupted 'the course of trade between Perak and Penang'.⁹¹

It may be seen that by Burney's analysis the effect of the Preliminary Treaty, in so far as it expressed legal relations among the Thai, British and Malay sultans, was to assert British rights against a Malay sultan in the Peninsula on the basis of the special definition of piracy that had grown up outside Europe, and on the basis of 'protection'—which was less any real protection of the Malays' interests than an assumption of a right, based merely on British interest, to compel the Malays to forego their own rights. The legal basis for assuming the role of a 'protector' appears to have been merely propinquity, power and interest, and it may be suggested that this, possibly coupled with notions of ethnic superiority, lay at the roots of the legal relations to be labelled 'paramountcy'.

⁸⁹Articles 1, 2, 6 and 7.

⁹⁰Article 5; Burney, Vol. I, Part IV, p. 689.

⁹¹*Ibid.* p. 697.

Another range of legal and political implications growing out of the Preliminary Treaty was the link between the British and the Thai at the expense of the Malays in the Peninsula. By hard bargaining, the Thai had persuaded the British to act against the Sultan of Selangor in circumstances that were clearly expected to result in Thai domination of Perak. Furthermore, the British were to assure that a restored Sultan of Kedah was appropriately subservient to the Thai thus permitting a viable compromise between British and Thai interests in Kedah. The Thai presumably expected to be able to use the British fear of a common border with Thailand to have the British police Kedah (and Kedah's rights in Perak) for them.

From the British point of view, the Preliminary Treaty envisaged British interference directly in the political affairs of the Peninsula and therefore could be expected to set the stage for British commercial and political dominance there. The Thai had in effect agreed to withhold their hand from peninsular adventures, and the British had impliedly received Thai acquiescence in the use of British force there. The presence of British force in the Peninsula would keep the Thai from propinquity with Penang and could assure the British some share of Perak's trade. The terms of the treaty were ambiguous enough, as will be seen, for it to form the basis for political and legal manœuvring to allow British influence in the Peninsula to force a Thai retreat unless the Thai wished to resort to force themselves—in which case the treaty established a legal basis for the use of British force against them.

As may be expected, the Preliminary Treaty was greeted in Penang with great approval. Governor Fullerton felt that the treaty 'justified' British action to remove Hassan from Perak, although his reasoning seems difficult to follow. He seems to have felt that the threat of Thai intervention in Perak had been the sole legal obstacle to British action to remove Hassan! He also considered Hassan a 'pirate'. As to British authority over Selangor, Governor Fullerton was more guarded. He felt that the Cracroft treaty of 1818 might be construed to give the British some legal authority over the affairs of Selangor,⁹² but he felt that Selangor would have to 'evince a readiness to renew' the Cracroft treaty in order for its terms to be

⁹²His reasoning is unclear. The Cracroft treaties with Perak and Selangor did not subject either of those polities to British authority, but related only to their granting full rights of trade to the British on a most favoured nation basis. The British had denied any involvement in peninsular affairs growing out of the Selangor treaty when the Dutch returned to Malacca in 1818.

rightly considered to be binding. He appears to have relied primarily on the gratitude he expected Selangor to have for the British prevention of the expected Thai attack to motivate Selangor in withdrawing Hassan and giving up its claims in Perak.⁹³

John Anderson, Governor Fullerton's amanuensis in Penang, was sent to Perak and Selangor on 6 August 1825 to obtain a settlement in Perak and Selangor in conformity with the plan envisaged by the Preliminary Treaty.⁹⁴ In taking this action, it seems likely that the Government of Penang was violating its instructions from India, which required Penang 'to abstain from any further steps, beyond the remonstrance which they properly addressed to the Rajah of Ligor on the subject of his hostile movements against Salangore, and the declaration of their intention to refuse a passage to his armament through the straits of Penang'.⁹⁵ Although the negotiation of the Preliminary Treaty would also appear to have breached these instructions, the outcome was so favourable to the British political interest of separating its economic interests from Thai territorial authority that the Supreme Government notified Penang on 16 September 1825 of its intention to ratify the treaty.⁹⁶

Anderson first went to Selangor, where the Sultan informed him that Hassan was an agent of Selangor, stationed to collect tin duties in Perak in accordance with the Perak-Selangor agreement of 1804. He produced a letter from the Sultan of Perak dated 24 May 1825 in which the validity of that engagement and the right of Selangor to exercise authority in Perak directly were acknowledged. Under argument from Anderson, the Sultan of Selangor agreed, however, to withdraw Hassan from Perak. On the question of Ligor's claim to reparations, the Sultan was adamant, and Anderson felt it inadvisable to press this point too hard. Fearing that an uncertainty on the part of the British as to the proper location of the boundary between Selangor and Perak reflected a boundary dispute which might be used by Selangor as a legal basis for attempting to expand territorial control into Perak proper, Anderson pressed for a definition of the Selangor-Perak border. The Sultan of Selangor maintained that although prior to his conquest of Perak in 1804 the Bernam river had been the proper

⁹³Burney, Vol. I, Part IV, pp. 709 et seq., minute by Governor Fullerton, 3 August 1825.

⁹⁴Ibid. p. 717, Governor Fullerton of Penang to John Anderson, letter of 6 August 1825. Vol. II, Part III, p. 7, note from Governor Fullerton to John Anderson, 10 August 1825.

⁹⁵Ibid., Vol. II, Part V, p. 4, Governor-General of India in Council to the Secret Committee, 4 September 1825, at p. 6.

⁹⁶Ibid., Vol. I, Part IV, pp. 624-7.

boundary, since that time Selangor was possessed of certain rights throughout the territory of Perak. He cited provisions of the Selangor-Perak treaty of 1804 to support this contention. Once again, Anderson overbore him, insisting that Selangor refrain from the assertion of any rights in the territory of Perak. After some argument the Sultan of Selangor finally agreed.⁹⁷ The treaty itself confirmed the Cracroft treaty of 1818, bound Selangor to observe the Bernam river as the territorial boundary between Selangor and Perak, bound the Sultan of Selangor to recall Hassan from Perak, and bound the Sultan 'not to permit Pirates to resort to any part of his territory'. Except for a similar undertaking with regard to pirates, and provision for the mutual exchange of each other's subjects in some circumstances, no obligations appear to have been undertaken by Penang in this treaty.

In the treaty no mention was made of Selangor's right to a portion of the Perak tin duty, but it is likely that Anderson made some sort of oral commitment to the Sultan about this, perhaps guaranteeing the Sultan his profits, for on 26 August 1825, the Sultan wrote to Governor Fullerton that he, the Sultan of Selangor, was the true power in Perak, that he had placed the Sultan of Perak on his throne, that no boundary dispute existed, and that he had a right, under the treaty of 1804, to half of the Perak tin duty. He added that he hoped the agreement he committed to writing on 20 August, which was signed also by Anderson as Fullerton's agent in the name of the East India Company, would be honoured.⁹⁸ On 10 September 1825 the Sultan of Selangor wrote a letter to Anderson instructing him to collect the arrears of duty and to check on the present implementation of the equal division of the tin duty.⁹⁹

After finishing his work in Selangor, Anderson proceeded to Perak, where he discovered that the Sultan of Perak indeed acknowledged the legality of Hassan's presence and his obligation to pay Selangor a half of the duty collected on Perak tin exports. As told to Anderson, Selangor came to the aid of Perak¹⁰⁰ to rid that tin-rich country of Thai oppression.

⁹⁷*Ibid.*, Vol. II, Part III, p. 27, Anderson's Report, 26 August 1825, at pp. 36-40; the letter from the Sultan of Perak of 24 May 1825 is at pp. 46-7.

⁹⁸*Ibid.* pp. 49-50. The treaty is in Maxwell and Gibson, p. 32.

⁹⁹Burney, Vol II, Part IV, p. 70.

¹⁰⁰It is not clear from Anderson's account whether this assertion relates to the events of 1804 or 1821. The former is believed more likely in view of the documents at issue; Anderson's interest was, of course, to make Selangor's authority in Perak appear as recent and unjustifiable as possible. Therefore the confusion in dates might have been introduced deliberately into this account by Anderson.

In Perak, the Sultan of Selangor had invested the Sultan of Perak with authority, extracting a commitment to give him half the duty on Perak tin in return. But the Sultan of Perak found Selangor no better a master than he had found the Thai, and wanted to rid himself of both of them. This attitude seemed to Anderson to reflect badly not on the Sultan of Perak, but on all the non-European political powers in the area. In his words, 'The Malays as well as the Siamese . . . do not comprehend the principles which should actuate a protecting power. The right of protective interference is too often made a plea for oppression'. He did not, however, define the conditions under which the 'right of protective interference' might be said to arise, nor did he define 'oppression'. Anderson clearly felt the British entitled to 'interfere protectively' in Perak, and suggested that Pangkor Island be acquired as a post from which to patrol the Straits of Malacca in order to suppress 'piracy', as a trading point for Perak tin, and as a place from which affairs in Perak could be supervised and Thai activities surveyed. To implement this revival of Governor Bannerman's scheme would be easy, Anderson pointed out, since the Supreme Government had already given permission to annex Pangkor and sovereignty over that island must now be considered to lie wholly in the Sultan of Perak. Since the British had taken over Malacca from the Dutch, had forced Selangor to withdraw from Perak and by denying the validity of the 1804 treaty had denied any legal right to authority in Perak territory to lie in Selangor, and could construe the Preliminary Treaty to involve the relinquishment by Thailand of any rights that that Kingdom might otherwise claim in Perak, it seems to have been Anderson's opinion that no conflicting claims to sovereignty over Pangkor any longer existed which might hinder the British taking full title to that island by virtue of a cession from Perak alone.¹⁰¹

Ligor clearly did not agree that the effect of the Preliminary Treaty was to end Thai claims on Perak. On 2 August 1825, immediately after the conclusion of that treaty, Ligor sent a letter to the Sultan and two officials of Perak cautioning them to expect a visit from John Anderson and instructing them to keep a discrete silence on any topics of interest to Anderson. Even after the Anderson visit and its results, which will be discussed below, on 14 October 1825, the Ligor authorities wrote to Perak

¹⁰¹Burney, Vol. II, Part III, p. 71. Anderson's Report, 15 September 1825, at pp. 77, 83, 93-4.

that the British had agreed that Perak was 'dependent' on Thailand.¹⁰² Continuing a legal classification of 'dependency' in spite of the Preliminary Treaty's terms restricting Ligor's right to send military force into Perak seems consistent with the other terms of that treaty providing for the affairs of Perak.¹⁰³ It seems difficult to determine precisely what legal relations are involved in a classification of 'dependency' with nothing more. Ligor apparently interpreted it to mean that the Thai had full ultimate authority in Perak, while the British anti-Thai faction in Penang interpreted it to mean that the Thai had nothing beyond an empty form in Perak. The Thai demand that the Preliminary Treaty specify Perak's obligation to send the *bunga emas* to Ligor was successfully resisted by Captain Burney, but no denial of the Perak obligation was included in the treaty, and it may be supposed that the Thai felt their rights in Perak, in so far as not altered by the treaty stipulations, continued. It would certainly seem unsound to construe the ambiguous terms of the Preliminary Treaty into a Thai renunciation of rights in Perak when such a renunciation cannot be clearly read into the terms of the treaty themselves. A complete renunciation of Thai authority in Perak would involve the imputation of a complete reversal of policy on the part of the Thai, would seem to be a substantially unmotivated action on the part of Ligor, and would certainly have been beyond the authority of the Raja of Ligor to promise even in a treaty subject to review by his political superiors.

¹⁰²Burney, Vol. II, Part VI, pp. 30-1, 32. While this may indeed have been a reasonable interpretation of the vague provisions of the Preliminary Treaty, which seemed only to forbid Ligor actually to invest Perak with military forces, and it is likely that Burney encouraged Ligor in this interpretation (for it is highly unlikely that Ligor would have agreed to any more restrictive view of its rights in Perak), Penang had scope for manoeuvre in the vagueness of the actual terms to attempt to construe Thai obligations to refrain from sending troops into Perak into an acknowledgement of Perak's right to hold international intercourse free of Thai pressures of any kind. See below.

¹⁰³Article 3 of the Preliminary Treaty provided that 'the Inhabitants of the Malayan, Siamese and British Territories shall have free trade... with Perak and with every Country subject to the Siamese and English Nations...'. In the duplicate copy of this treaty (both copies are translations from the Thai) the word 'other' appears between the words 'with every' and 'Country subject'. It may well be that Perak was indeed acknowledged to be subject to the Thai (subjection to the 'English' would have been a grotesque interpretation in the circumstances). The reference to 'Country' apparently was intended to refer to the sultanates of the Malay Peninsula, since the Raja of Ligor cannot have intended opening Thailand to British trade on these terms, as the British well knew. If the Thai original in fact contained an implication of British recognition of Thai authority in Perak, the willingness of Ligor to undertake to abandon his designs on Selangor would be more easily comprehended. It must be remembered that the British were, at this time, hotly engaged with Burma, and, as analysed above, it may be doubted that fear of British military power in the Peninsula was the sole factor motivating Ligor's apparent concessions.

Anticipating that Ligor would not accept the British interpretation of the Preliminary Treaty, although feeling that this would indicate perfidy on the part of Ligor, Anderson doubted that 'stability' would come to the Peninsula unless Ligor were intimidated and rendered powerless.¹⁰⁴ Governor Fullerton considered the use of British influence and naval power to isolate the Malay sultanates from each other and from Ligor to be the next step in carrying out 'the object and intention of the British Government to uphold and support the independence of [Perak and Selangor] . . . and to prevent all encroachment or interference on either side to avoid disputes'.¹⁰⁵ Since, in fact, it appears that relations between Perak on the one hand, and Ligor and Selangor on the other, were not the relations of mutually independent communities, to carry out this British policy involved changing legal relations in the Peninsula. Since the rights of Selangor in Perak were secured by the treaty of 1804 and the rights of Thailand in Perak depended ultimately upon tradition, pursuit of the British policy clearly involved a denial of the legal validity of those rights, and thus a denial of the power of the Malay sultanates to engage in international relations *inter se* with effects binding on the British. From Anderson's accounts of things told him in Perak and Selangor, it is clear that the British anti-Thai faction in Penang was not acting in ignorance. Not only did the provisions of the Preliminary Treaty which obligated the British to act against Selangor represent an assumption of authority to act in the Peninsula which could not be based on treaty or custom within the normal operation of European concepts of international behaviour as applied amongst European states themselves, but in the actual negotiations in the Peninsula, the representative of the Penang Government felt it within his right to ignore the legal effects of treaty relations which he well knew existed, acknowledged by both sides, between the two Malay sultanates whose affairs he sought to regulate.

On 6 September 1825 the Anderson-Perak treaty was signed.¹⁰⁶ In it, Perak agreed to abide by the Bernam river boundary between itself and Selangor and to abstain from any interference in the governance of Selangor. Perak also agreed to permit the British and Selangor to remove Hassan from Perak territory permanently. With regard to the export of tin, Perak agreed to levy a mere \$6 duty per unit instead of the \$12 which

¹⁰⁴Burney, Vol. II, Part III, p. 92.

¹⁰⁵Ibid. p. 159, letter from Governor Fullerton to the Sultan of Perak, 21 September 1825, at p. 160.

¹⁰⁶It appears in Maxwell and Gibson, p. 22.

was the specified total levy under the Perak-Selangor treaty of 1804.¹⁰⁷ This reduction by half in the Perak tin duty is strong circumstantial evidence of the likelihood, already indicated, that Anderson had orally agreed with the Sultan of Selangor to ensure that Selangor's moiety should be guaranteed by the British authorities as the price of Selangor's agreeing to remove Hassan from Perak. Aside from these circumstances, probabilities and the early letters of the Sultan of Selangor demanding that Anderson forward him his share of Perak's tin revenues, no evidence of this suspected agreement seems to be available, nor can it be determined what the eventual disposition of the Selangor claim was. The claim does not appear to have been pressed by Selangor in later years.

On 21 September 1825, Governor Fullerton acted to remove Hassan from Perak. To the Sultan of Perak he sent a note saying, '... I will now send two Cruizers to expedite the departure of Rajah Hassan, to afford protection to the Ryots [*common people*] and to bring me a report of the evacuation'.¹⁰⁸ To the Sultan of Selangor he sent a similar note saying that the warships would stay off the Perak coast until Hassan was removed and that in view of the services of the British in forestalling Ligor's attack on his territories, the Sultan of Selangor should pay \$2000 to Penang.¹⁰⁹ Discussion of Selangor's claim against Perak for the arrears of tin duty was put off pending the removal of Hassan. As to the Selangor-Perak boundary the legal result of the British signing the Anderson treaties by which both Perak and Selangor undertook to respect the Bernam river as the border of their respective territories was interpreted to give the British a right to enforce the observance of those terms. '[T]hese engagements', wrote Fullerton to the Sultan of Selangor,

have been made under the sanction of the British Government, and it is my determination to cause the same to be enforced, and to prevent interference of the Siamese . . . and to secure to each Chief the free and full possession of his sovereign rights. . . [;] it will be incumbent on my friend to observe the conditions of the agreement, for no deviation can be permitted.¹¹⁰

Thus was the concept of 'freedom' used to restrict the international competence of the Malay sultanates and to overcome the legal validity of

¹⁰⁷Burney, Vol. II, Part III, p. 70, letter from the Raja of Selangor to Anderson, 10 September 1825, specifies the tin-duty terms of the 1804 treaty.

¹⁰⁸Ibid. pp. 159-60.

¹⁰⁹\$2000 represented the sum which Ligor claimed from Selangor as reparations for the affair of 1821-2. See article 4 of the Preliminary treaty, note 87 above.

¹¹⁰Burney, Vol. II, Part III, pp. 161-2.

rights resting on tradition, conquest and treaty. Thus also was British competence assumed to order peninsular affairs without warrant in tradition or treaty.

The attitude of the Supreme Government was expressed in a letter dated 2 September 1825, informing Penang of the line to be followed in peninsular affairs. This letter was written before the news of the conclusion of the Preliminary Treaty had reached India, and apparently did not reach Penang until 11 November 1825. In it, British interference in the affairs of the Peninsula was disapproved in no uncertain terms as 'inconsistent with a policy of conciliation' as well as 'inexpedient' politically. British interference in Perak was regarded as not justifiable, as the British recognition of Kedah's conquest of that territory in 1818 was construed to imply a virtual recognition of 'the Supremacy of Siam over that portion of the Peninsula'.¹¹¹

By 8 October 1825 the effects of Anderson's mission were felt by Burney. The Raja of Ligor was apparently upset by Anderson's accomplishments in Perak, and felt that that the British had either violated the Preliminary Treaty themselves or been guilty of some very sharp practice. Despite the construction put upon that treaty by Governor Fullerton and the anti-Thai faction in Penang, Burney was explicit in pointing out that nothing in the Preliminary Treaty was intended by Ligor to indicate any slackening of Thai claims to Perak. The right given the British in the treaty to prevent the introduction of Thai troops into Perak and Selangor was never intended to end Thai traditional rights in those places or other Thai legal claims there. The Thai had partly been motivated in relinquishing their right to send troops into Perak and Selangor by the British undertaking to negotiate on their behalf to accomplish the withdrawal of Selangor from Perak, and to secure the removal of Hassan from that territory for them. They had thus hoped to gain their primary objects without committing force to peninsular adventures.¹¹²

The Anderson treaties appear never to have been commented on by the Supreme Government; perhaps the directions of 2 September were felt to be a sufficient indication of its disapproval.

On 1 October 1825, envoys from Ligor discussed peninsular affairs in Penang. Their remonstrances were discountenanced, as Governor Fullerton stated his interpretation of the Preliminary Treaty and informed them

¹¹¹*Ibid.*, Vol. I, Part IV, pp. 620 et seq.

¹¹²*Ibid.*, Vol. II, Part V, pp. 9 et seq., letter from Burney to the Supreme Government.

that 'no further interference on the part of the Siamese with Perak or Selangor would be permitted'. While the Preliminary Treaty was felt to give a legal base for denying Thai rights in Perak and Selangor, the British right to act in those territories was asserted to rest upon British occupation of Malacca as successors to the Dutch there, and the precedent of interference created by the British expulsion of Hassan from Perak and British action in settling the supposed boundary dispute between Perak and Selangor. The specific rights over the peninsular sultanates which Governor Fullerton felt automatically passed to the possessor of Malacca were not made explicit.¹¹³

In the short run, Perak was the obvious gainer by accepting British-asserted rights to intervene in peninsular affairs. Ligor and Selangor clearly felt that the British possessed no authority in the Peninsula beyond the authority granted by treaty. In correspondence addressed to Governor Fullerton by the rulers of each of these territories and laid before the Penang Council on 24 October 1825, the Perak Sultan was most humble, offering to obey Fullerton in all matters, while the Sultan of Selangor addressed Fullerton as an equal, asserting that he was observing all his engagements with the British, and requesting British action to settle his claim against Perak. The Raja of Ligor, in his letter to Fullerton, also addressed Fullerton as an equal, and seemed to stand a good deal on dignity.¹¹⁴

Governor Fullerton apparently did not consider himself to be acting beyond his instructions in taking a hand in peninsular affairs at this time. By the time the Supreme Government's strict injunction to abstain from peninsular entanglements arrived, Anderson's missions had been completed and the Selangor and Perak treaties signed. Ligor had already been rebuffed. In a minute dated 30 November 1825, Governor Fullerton denied any intention of intervening militarily in the Peninsula, but declared his policy to deter Thailand from extending influence in the Peninsula pending a definite decision in Europe on the proper attitude to take towards Thai expansion. He did not consider the possibility that Thailand's assertions of authority might have rested on customary grounds, nor did he consider his assumption of a right to supervise penin-

¹¹³Ibid., Vol. I, Part IV, pp. 602 et seq., minutes of the Penang Council, 7 October 1825. The British had taken physical possession of Malacca in March 1825. Low, 'Account', 4 *JIA* (1850), p. 113.

¹¹⁴Burney, Vol. I, Part IV, pp. 608 et seq. The Perak letter begins on p. 609; the Selangor letter on p. 611.

sular relations to violate the instructions of the Supreme Government as long as it did not lead directly to a military commitment. He did not consider the possibility that his assumption of a legal right to supervise affairs in the Peninsula might lead to a situation in which the use of military force might become necessary in order to keep the Malay sultans politically 'independent' of each other, and that his policy of guaranteeing the 'independence' of Perak necessarily involved the destruction of rights held by Selangor and Ligor in that territory. In short, in asserting rights in the Peninsula based upon British possession of Malacca, he neglected to investigate the extent to which the asserted rights were actually founded in treaty and practice, and he seems to have felt it within his authority to determine unilaterally the extent of legal right to authority possessed by each interested party in the economically important, politically weak area of Perak. Despite instructions from India and abundant evidence that his actions and interpretations were radically contrary to the views of right held by the peninsular officials involved, and despite the likelihood that those views of right were based upon custom and treaty which, had the transactions in question occurred in Europe, would have been adequate to support at least some of the claims put forth, Governor Fullerton and the anti-Thai faction in Penang seemed to feel that no doubt of their right to interpret peninsular legal relations need be entertained. He and his Council felt that any action short of the actual use of force, including the sending of armed ships with the obvious intent of threatening force, was justified in attempting to control peninsular politics.¹¹⁵

It was not to be expected that the Malay Sultans or the Thai whose economic interests and legal rights were jeopardized by this assertion of British right would concur. Following the Anderson expedition and the rebuff which his emissaries received in Penang on 1 October 1825, the Raja of Ligor acted to protect his interests in Perak, and in November 1825 he sent 300 men under a Thai officer into that territory.¹¹⁶

On 15 December 1825 the Sultan of Selangor pressed Fullerton again for a settlement of his claim in Perak, asserting his treaty-based and customary right to half of the tin duty. He also reported that Ligor was active in Perak.¹¹⁷ On 16 December 1825, Governor Fullerton wrote a letter to Ligor in which he condemned this sending of troops into Perak as contrary to the Preliminary Treaty. Although Bangkok had not ratified it,

¹¹⁵Ibid., Vol. II, Part III, pp. 168-9.

¹¹⁶Ibid., Vol. II, Part VI, p. 1, Low's Report of 27 October 1826, at p. 12.

¹¹⁷Ibid., Vol. II, Part III, pp. 170-1.

Fullerton wrote that the ratification of the Preliminary Treaty by the Supreme Government was sufficient to give it binding force. 'I must now therefore', wrote Fullerton, 'require my friend to give immediate directions for the return of the parties from Perak and to abstain from future interference in the Government of the country. . . . In this I expect there will be no delay'.¹¹⁸ Ligor appears to have ignored this peremptory letter.¹¹⁹

Meanwhile, Captain Burney had left for Bangkok, accompanied by his six-year old son, arriving before the King on 16 December 1825.¹²⁰

THE BURNEY TREATY OF 1826

Captain Burney's mission's instructions as originally recommended by Governor Fullerton on 19 October 1824 included five points: 1) The Sultan of Kedah to be restored to his territory free of any ties to Thailand, payment of up to \$4,000 annually was to be made and the triennial *bunga emas* was to be guaranteed by the British as formal Kedah tribute to Thailand; 2) Thailand to renounce all claims over Malay communities south of Patani; 3) access to tin-producing areas in Patani, Ligor, Singora and Malay territories south of them to be granted to British interests; 4) access to west coast ports near Penang to be guaranteed to the British (*i.e.*, Ujong Salang, Kedah, Perlis, etc.); 5) Ujong Salang to be ceded to the British. Since the British had no concessions to offer except what might come into British possession through the Anglo-Burmese War, it is difficult to imagine that the second and fifth points, at least, could have been expected to be gained through mere dis-

¹¹⁸Ibid., Vol. II, Part III, pp. 172-3. There is little doubt that sending such a force into Perak violated article 2 of the Preliminary Treaty, which forbade the entry of Thai forces into Perak, although it may have been felt by Ligor that 300 men did not constitute a proper military force as contemplated by the Preliminary Treaty. It is likely that Ligor felt British perfidy or sharp practice had justified their own counter-action either in disregard of the Preliminary Treaty, or under some distorted reading of it equivalent to what were certainly felt to be British distortions of it with regard to Perak.

¹¹⁹Ibid., Vol. II, Part VI, p. 12. The 300 men stayed in Perak until September 1826. See below.

¹²⁰Ibid., Vol. I, Part I, pp. 22, 42, 46, Burney's Report of 22 December 1825. The King of Thailand had died on 20 July 1824 and been succeeded in an orderly fashion by his legal heir. Ibid., Vol. II, Part II, pp. 121-2, letter by Crawford to the Government of India, 30 October 1824. Crawford, at this time Resident of Singapore, apparently had retained contact with Thailand after his mission of 1821-2. He had received word of Thai affairs via Singora in November 1823. See Buckley, Vol. I, pp. 146-7. The new King of Thailand had been a leading minister when Crawford had been in Bangkok, and had then demonstrated a knowledge of British affairs and an intelligence which, like every other sign of Thai competence, surprised Crawford. Crawford, *Journal*, Vol. I, pp. 189 et seq. Burney believed the new King (Rama III) to be very intelligent. Burney Vol. I, Part I, p. 50.

cussions if the Thai had had the least discretion in international dealings. Fullerton felt that the first two points were dictated by justice as well as interest, although he is silent about why he thought the Thai might consider them fit subject matter for negotiations with the British.¹²¹

The Supreme Government disapproved out of hand the second and fifth points as a matter of policy, to avoid British involvements in territorial adventures in the area.¹²² On 13 May 1825 the Supreme Government issued its detailed instructions to Captain Burney. The character of the mission was declared to be 'complimentary and conciliatory', as it was decided not to offer yet any cessions of captured Burmese territory to the Thai. Therefore Burney was to have no bargaining offers to make:

Should circumstances prove favourable, the Envoy will of course be empowered to . . . endeavour to effect the desired improvement in our Commercial relation with Siam . . . , as also the restoration of the King of Kedah to his territories. . . . We have so little to offer . . . in the way of equivalent, that we consider it vain to hope that any advantages beyond those above specified can be gained by negotiation. Indeed, we do not very clearly perceive how the Government of Siam and the Rajah [*of Ligor*], will ever be persuaded to forego the profit which it seems they derive from the direct occupation of Kedah. . . .

Fullerton was given discretion to alter or modify Burney's instructions.¹²³ but Fullerton's changes were regarded by Burney as insignificant.¹²⁴

Burney regarded his objects to be: 1) restoring the Sultan of Kedah to his territories; 2) achieving an agreement to the withdrawal of Thailand from Perak; 3) excluding Thailand from direct contact with British territory, and halting the Thai drive to consolidate control in the Peninsula south of their undoubted holdings; and 4) acquiring a right for British traders to have free access to trade and passage in the Peninsula. But Burney regarded the achievement of these ends as subordinate to the primary purpose of his mission as seen by the Governor-General of India in Council: 'the maintenance of harmony between two States which had suddenly come into contact. . . '. After an excellent review of the history of the relations of the Malay territories with Thailand, Burney pointed out in his report that although it is doubtful that Thailand had

¹²¹Ibid., Vol. II, Part II, pp. 105 et seq.

¹²²Ibid. p. 165, memorandum by Burney, 3 May 1825, at p. 167.

¹²³Ibid., Vol. I, Part IV, pp. 659 et seq., 664 et seq.

¹²⁴Ibid., Vol. II, Part IV, p. 12, Burney's report, 2 December 1826, at p. 30.

ever been able to exercise a sufficient degree of control over the territories south of Patani and Ligor to justify the assertion that a traditional sovereignty over those territories rested in Thailand, and the *bunga emas* being of uncertain legal effect but not of itself clear evidence of a loss of international personality on the part of the sending community,¹²⁵ it could be seen that Thai activities in the Peninsula represented the continuation of an old struggle between Thailand and the Malay territories. It would distort the legal perspective to regard the sending of the *bunga emas* as a meaningless formality, however, and Governor Fullerton's view of Thai 'expansion' was not based on a full appreciation of traditional relations between Thailand and the peninsular powers. To continue to base policy on such a misinterpretation of legal relations, Burney felt, meant in reality pressing for a change in the constitutions of Thailand and the sultanates and offending Thailand by interfering in what it no doubt conceived to be its internal affairs. However, Burney noted that there had never been any submission by the Selangor Bugis to Thai authority in any way and that the Thai derived their claims in Perak from a voluntary submission rather than from ancient title. Since the claim that the Sultan of Perak had voluntarily submitted to the Thai was 'manifestly false'¹²⁶ Burney seems to have felt that Thai authority on the west coast of the Peninsula might properly be regarded as legally limited to Kedah, with the status of Perak in doubt. Although the restoration of the Sultan of Kedah to his territories would advance British policy by separating British from immediate Thai territory, Burney felt that this object was less important than the overriding aim of improving and stabilizing British-Thai relations.

On the British title to Penang and Province Wellesley, Burney rested his view of British right primarily on the history of (by 1826) forty years of 'undisturbed occupation'. In addition to this major derivation of title, he raised the nice point that regardless of other aspects of his duty to Thailand, the Sultan of Kedah apparently had authority, whether by delegation or constitutional structure, to cede territory.¹²⁷ Since, as has been seen, the British occupation of Penang was not at all 'undisturbed' for forty years,

¹²⁵He pointed out that Thailand had sent *bunga emas* to China until shortly before his mission, and even in 1826 some sort of tribute was sent by Thailand to China. Ibid. pp. 124-33.

¹²⁶But the Sultan had requested Ligor's help in his attempt to remove the Selangor treaty burden, and it was this request which seems to have been the basis of Thai assertions of right. The Sultan of Perak appears to have requested the help of all his neighbours against all his other neighbours at one time or another. The British certainly construed themselves into as broad rights in Perak on as thin a basis as the Thai.

¹²⁷Burney, Vol. II, Part IV, pp. 12 et seq., especially pp. 30-1, 124-46, 159, 163 et seq., 187.

and since the imputation of a power to cede territory to the Sultan of Kedah is totally unsupported by any of the facts and was directly contradicted by the Sultan himself many times, this argument cannot be regarded as very convincing. Still, after the Burney mission the failure of the Thai to raise the issue was regarded by the British as sufficient to confirm the prescriptive title which Crawford had suggested, four years earlier, was an adequate legal base for British rights to Penang and, on the same reasoning applied to a somewhat shorter period, Province Wellesley.

Burney may have been helped in Bangkok by his clear understanding of the Thai point of view and was certainly not burdened, as Crawford may have been, by an underestimation of Thai ability. '[No] . . . officer who has ever seen the Rajah of Ligor,' he wrote, 'can adopt the sentiments entertained against him by the Government of Prince of Wales' Island'.¹²⁸ The Raja of Ligor arrived in Bangkok on 3 February 1826 and took an active part in all subsequent negotiations, bargaining on the Thai side, particularly in respect of Thai unwillingness to yield on the Kedah issue, but being an active and useful liaison between Burney and the Thai officials on all other matters. His activities on behalf of British interests were restricted by the suspicion of the Thai court as to his loyalty.¹²⁹

Early in the negotiations in Bangkok, Captain Burney secured a concession from Thailand. The Thai released the people who had been captured by Thai forces in Burma's border provinces (Tavoy and Mergui) after the British had defeated the Burmese there.¹³⁰

The end of the Anglo-Burmese War was known in Bangkok as soon as it happened. In the treaty ending the war, an article (article 10) was inserted by the British saying: 'The good and faithful Ally of the British Government, His Majesty the King of Siam, having taken a part in the present War, will, to the fullest extent, as far as regards His Majesty and his subjects, be included in the above Treaty'. When Burney told the Thai of this provision, they did not appear to be impressed by it.¹³¹

¹²⁸Ibid., Vol. II, Part IV, p. 206.

¹²⁹Ibid., Vol. I, Part I, pp. 110, 117, Burney's Report; Vol. I, Part II, p. 217, Burney's report to Fullerton, 1 May 1826.

¹³⁰Ibid., Vol. I, Part I, p. 64, Burney's report to Fullerton, 15 February 1826, at pp. 110, 124.

¹³¹The peace treaty of Yandabo was signed on 24 February 1826. C.U. Aitchison, *A Collection of Treaties, Engagements and Sanads*..., 5th ed., Calcutta, 1929-31, Vol. XII, p. 230. It was ratified by the Governor-General in Council on 11 April 1826. News of the ending of the hostilities reached Bangkok on 31 January 1826. Burney, Vol. I, Part I, p. 108. The terms of the peace treaty were known in Bangkok on 10 February 1826, before the treaty had been signed. Ibid. p. 119. See also *ibid.* pp. 153 et seq., Appendix 17 to Burney's Report, and *ibid.*, Vol. I, Part III, p. 326, Burney's Report.

Information coming to Burney in Bangkok convinced him that Kelantan and Trengganu had 'already submitted so much to Siamese pretensions' that he 'conceived it prudent to yield the point of the Boonga Mass with respect to them'.¹³²

As Burney pressed harder and harder for concessions with regard to Kedah and Perak, the Thai assumed a more and more rigid stand that they would yield no concessions to the British but that they would welcome a treaty drawing inviolable lines between British and Thai authority, on a territorial basis, in the Peninsula. After negotiations had become deadlocked over the Kedah issue, the position of the Penang Government being that a treaty that did not involve Thai withdrawal from Kedah would be worthless, Burney wrote to the Penang authorities that he would withdraw the Kedah demand only if he were convinced by 'unequivocal proof' that perseverance on this issue would 'defeat all other objects'.¹³³ In response to this hint that Burney might withdraw on the Kedah issue, the Governor in Council of Penang sent him a Declaration, dated 19 June 1826, which he was instructed to present to the Thai authorities as part of breaking off negotiations unless contrary instructions were received from India or the chances of reaching an agreement favourable to British interests improved. This Declaration asserted a British right to 'protect' all the peninsular states 'South of Quedah and Patani', including a right to expel Thai troops there. Blame for the failure of the Bangkok negotiations was laid to the Thai refusal to ratify the Preliminary Treaty, and the legal situation as it was before the conclusion of that agreement was asserted to obtain still, with the express corollary that the Malay sultanates in the Peninsula were of right independent of Thailand.¹³⁴

Before this Declaration reached Bangkok, Burney spent several additional sessions attempting to soften the Thai position on Kedah, even attempting to discredit the Raja of Ligor by citing his supposed obligation under the Preliminary Treaty to 'assist' the British to effect 'the restoration' of the Sultan of Kedah. Burney's view that Thai ratification of the Preliminary Treaty was some sort of an obligation on Thailand was implied in his long condemnation of Ligor, when he said that '[t]he English do not engage in Treaties for nothing'. Finding the Thai adamant on the Kedah

¹³²*Ibid.*, Vol. I, Part I, Burney's Report, p. 177.

¹³³*Ibid.*, Vol. I, Part II, pp. 259-64, Burney's Report; p. 267, letter of 4 May 1826, Burney to Cracroft; Vol. I, Part I, p. 191, letter of 8 April 1826 from the Governor in Council of Penang to Burney.

¹³⁴*Ibid.*, Vol. I, Part II, pp. 272-3.

question, despite agreement on several other points, on 26 May 1826 Burney gave up attempting to negotiate on Kedah. 'My own belief', he wrote,

was, that if I had broken up the conference and prepared to quit the country, the Court would have yielded the point rather than have permitted me to depart. But in this belief I might have been wrong, and unless my instructions had expressly authorized me to risk so much, I conceived I should not be saved from the very great responsibility and censure, which would attend any issue contrary to the one which I might believe would occur.¹³⁵

Upon Burney's dropping the Kedah issue the air apparently lightened, for painstaking negotiations on many points followed, and on 20 June 1826 the new treaty was signed. It was drawn up in the Thai language and translated literally by Burney into English. Both the English and Thai versions of the treaty are authoritative, as is also a Malay version. The English copy was regarded by Burney as 'verbose and quaint', a thing which he attributed to the 'peculiar character of this people, their jealousy . . . , and their profound ignorance of international law, and the form even of drawing up a Treaty'.¹³⁶

Article 1 of the treaty provided that each side, British and Thai, would have exclusive authority in its own territory, both sides undertaking not to 'molest, attack, disturb, seize, or take any place, territory or boundary belonging to' the other. The second article reiterated in more direct terms the introduction of the first, and obliged each side to police its own territory if the other side complained of the conduct of any people in that territory. Each side was given a right to ask the purpose of any assembly of force in the territory of the other. The third provided that any doubt as to boundary demarcation should be settled by joint committees appointed *ad hoc* at the request of either side. The fourth provided that territory, and not personal subjection or nationality, should govern the extent of the direct authority of each side. Articles 5 to 9 concerned matters of trade not pertinent at this point. Article 10 obliged both sides to permit unrestricted trade between the British possessions of Singapore, Malacca and

¹³⁵Ibid. pp. 282-6, 300-1; Part III, pp. 322-3. The Preliminary Treaty contains no express promise by Ligor to assist the British in the Kedah issue, but it may be that the word 'report' in the Preliminary Treaty had been meant by Burney to mean something like 'report favourably'. After a close examination of the Preliminary Treaty and the events reported to precede and succeed its conclusion, it is very difficult to agree that the Raja of Ligor violated his undertakings in any way save the sending of 300 men into Perak.

¹³⁶Aitchison, Vol. XIV, p. 115; Burney, Vol. I, Part III, pp. 353-4.

Penang on the one hand, and all Thai territories, including Ligor, Patani, Ujong Salang and Kedah on the other. Article 11 provided that mail communication in both directions between the British and Thai territories should be inviolate. Article 12 said:

Siam shall not go and obstruct commerce in the States of Tringano and Calantan. English merchants, and subjects shall have trade and intercourse in future with the same facility and freedom as they have heretofore had, and the English shall not go and molest, attack, or disturb those States upon any pretence whatever.

Article 13 contained the Kedah settlement:

The Siamese engage to the English, that the Siamese shall remain in Quedah and take proper care of that country, and of its people; the inhabitants of Prince of Wales' Island shall have trade and intercourse as heretofore; the Siamese shall levy no duty upon stock and provisions . . . and the Siamese shall not farm the mouths of rivers . . . in Quedah, but shall levy fair and proper Import and Export Duties. The Siamese further engage, that when Chao Phya [*Raja*] of Ligor returns from Bangkok, he shall release the slaves, . . . and kindred belonging to the former Governor of Quedah [*i.e., the Sultan*] The English engage to the Siamese, that the English do not desire to take possession of Quedah, that they will not attack or disturb it, nor permit the former Governor of Quedah, or any of his followers, to attack, disturb, or injure in any manner the territory of Quedah, or any other territory subject to Siam. The English engage that they will make arrangements for the former Governor of Quedah to go and live in some other country, and not in Prince of Wales' Island or Prye, or in Perak, Salengore, or any Burmese country. If the English do not let the former Governor of Quedah go and live in some other country as here engaged, the Siamese may continue to levy an Export Duty upon paddy and rice in Quedah. The English will not prevent any . . . Asiatics at Prince of Wales' Island from going to reside in Quedah if they desire it.

Article 14 contained the Perak settlement:

The Siamese and English mutually engage that the Rajah of Perak shall govern his country according to his own will. Should he desire to send the gold and silver flowers to Siam as heretofore, the English will not prevent his doing as he may desire. If Chao Phya of Ligor desire to send down to Perak, with friendly intentions forty (40) or fifty (50) men, whether Siamese, Chinese, or other Asiatic subjects of Siam; or if the Rajah of Perak desire to send any of his ministers or officers to seek Chao Phya of Ligor, the English shall not forbid them. The Siamese or English shall not send any force to go and molest, attack or disturb Perak. The English will not allow the State of Salengore to attack or disturb Perak, and the Siamese shall not go and attack or disturb Salengore. . . .

THE BURNEY TREATY OF 1826

On 10 July 1826 the Thai affixed their great seal to the treaty,¹³⁷ and on 18 July¹³⁸ Burney sailed down the Menam River from Bangkok.

On 10 August, Burney reached 'Trengganu Roadstead' (Kuala Trengganu?) where he delivered a copy of part of the new treaty to the Sultan. At this time he interpreted article 12 of the treaty for the Sultan in the following manner:

... the British Government had not liberated him from Siamese supremacy, nor pledged itself in any manner to protect his country against Siam, to which therefore he must still pay such respect and attention as he has hitherto been accustomed to pay but ... if the Siamese interrupt trade and commercial intercourse with Tringano, his Highness should send immediate notice to the Hon'ble. the Governor of Prince of Wales' Island, who will determine what degree of interference the British Government may consistently use in favour of His Highness.¹³⁹

Burney reported his doings to the government at Penang, and left on 17 October 1826 for India. His final report is dated 2 December 1826 from Bengal.¹⁴⁰ A condensation of this exhaustive report was made by Burney in Calcutta on 9 March 1827,¹⁴¹ and a digest of the parts of this report relating to the interpretation of the treaty was made, apparently by a government official superior to Burney, in Calcutta.¹⁴² This digest, which is undated, fully approves all of Burney's actions.

From these documents it is clear that the terms of article 1 of the treaty were deliberately left vague to permit the British to determine for themselves the degree of subordination of the peninsular communities to Thai authority.¹⁴³ Since the British determination could not clearly bind Thailand, this article appears to have been too vague to be useful.

Article 2 was inserted by Thai negotiators to secure Ligor from what it felt to be a danger of attack from Penang. The British agreed to it as a means of avoiding a repetition of the Penang panics of 1825.¹⁴⁴

Article 3 was agreed to in order to limit the possibility of a clash over the new British holdings of Burmese territory, particularly in Tenasserim

¹³⁷Burney, Vol. I, Part III, p. 356, Burney's report to Fullerton.

¹³⁸Ibid. p. 363 reports the date as 18 June, but the timing of other events in Burney's journal makes the date 18 July obviously correct.

¹³⁹Ibid. p. 367, Burney's Report.

¹⁴⁰Ibid., Vol. II, Part IV, pp. 12 et seq.

¹⁴¹Ibid., Vol. II, Part V, pp. 106 et seq.

¹⁴²Ibid. pp. 161 et seq.

¹⁴³Ibid. p. 168.

¹⁴⁴Ibid.

where the border between Thailand and Burma was wild and uninhabited.¹⁴⁵ There is no trace at this time of any conflict over borders between peninsular interests of the British and the Thai in the area bordering Tenasserim.

There were no problems raised by the interpretation of articles 4 to 11 that require interpretation here.

Article 12 was clearly felt by the British to be a recognition of Thai sovereignty in Trengganu and Kelantan, as Burney felt that the preservation of British trade with those places was the only ground on which the British could consider it in their interest to interfere between those territories and Thailand. In the negotiations over this article, Burney felt that the final wording was more advantageous to British interests than the wording he himself had proposed, and he noted his agreement with the Thai interpretation of this article as allowing Thailand a free hand in the Sultanates of Trengganu and Kelantan, as long as British trade was not systematically obstructed.¹⁴⁶

Article 13, Burney felt, involved a recognition of the fact that the Thai were not only in actual control of Kedah, but that the Thai legal claim to a right to control Kedah was, if not unassailable, at least convincing. He cited the facts already adverted to in evidence of Kedah's traditional subordination to Thailand and added the information, already noted above, that the victory of the British-recognized Sultan of Kedah, Ahmad Tajud-din Halim Shah, over his rival uncle in 1800 was achieved by the Sultan placing himself under Ligor's protection and his being invested with 'authority' over Kedah in a ceremony of delegation conducted in Bangkok.¹⁴⁷ The implication that the 1800 treaty may have been invalid because it was entered into on Kedah's behalf by a 'Sultan' not competent to act for Kedah seems not to have been thought important, as British title to Penang and Province Wellesley was, by 1826, asserted by the British to rest on prescription as regards Thailand, and the treaty of 1800 was no longer regarded as valid.¹⁴⁸ Burney strongly recommended that Ahmad Tajud-din Halim, be removed from proximity to territory controlled by the Thai, but did not suggest any legal ground upon which this removal could be based.¹⁴⁹ In later correspondence, Burney observed that the re-

¹⁴⁵Ibid.

¹⁴⁶Ibid. pp. 173-4. Cf. Vol. I, Part III, p. 329, Burney's report to Fullerton.

¹⁴⁷Burney, Vol. I, Part I, p. 176; *ibid.*, Vol. II, Part IV, pp. 128-32, 163-203; *ibid.*, Vol. II, Part V, p. 172.

¹⁴⁸See above note 34.

¹⁴⁹Burney, Vol. II, Part V, p. 172.

moval of the Sultan which the British promised to permit to happen in article 13 of the Treaty of Bangkok was *quid pro quo* for the Thai promise to permit Penang and Province Wellesley to buy provisions in Kedah without duty, and that failure of the British to act would legally entitle the Thai to impose duties otherwise forbidden by the treaty.¹⁵⁰ Although the words of the Bangkok treaty are not entirely clear in this regard, it may be believed that this was in fact the intention of the parties.

With respect to article 14, Burney felt that the British interest lay in keeping Thailand out of Perak, for a strengthening of Thai control there would be likely to bring about a clash between Selangor and Thailand in which British merchants would be the losers. He felt, therefore, that the British aim should be to provide for Perak to be independent, and this was what he felt article 14 to do. But, while the Thai may have been willing to abandon their military position in Perak, as Ligor had already agreed to do in the Preliminary Treaty, it remained the belief of the Thai Government that Perak's submission to the authority of Ligor was voluntary. The compromise of article 14 provided that Perak's status was either to involve some undefined subordination to Thailand, symbolized by the passage of the *bunga emas* and Perak's right to consult with Thai officials, or to be that of a completely independent entity, equally free of British and Thai pressures. In any event, the British were to restrain Selangor from any interference in Perak. Thus, according to the Treaty of Bangkok, the British could have no greater right in Perak than the Thai, and might have much less if Perak chose to follow Thai direction. The possibility that Perak might voluntarily choose to submit itself to British control was not considered at the negotiations, but political pressure could not be brought by the British to achieve authority in Perak without the treaty being broken. Burney felt that Perak would not voluntarily continue its token subordination to Thailand, and that therefore the independence of Perak was assured. The Thai undoubtedly felt that as long as the British and Selangor did not interfere in Perak, the pro-Thai party of Perak nobles would assure Perak's subordination to Ligor.¹⁵¹

The reaction of Governor Fullerton to Burney's treaty was recorded in a minute dated 18 September 1826. Articles 1 and 2 he declared to be

¹⁵⁰Ibid., Vol. III, Part I, p. 173, memorandum dated 9 January 1830, at pp. 180-1. The Supreme Government agreed with this interpretation of article 13. Ibid. p. 190, letter of 30 April 1830 to the Government of Penang, at p. 192. Cf. Burney's report on these negotiations in *ibid.*, Vol. I, Part III, p. 335.

¹⁵¹Ibid., Vol. II, Part III, p. 175; Vol. I, Part III, pp. 331-2, 338. See below.

'too general to be of any use'. '[T]he direct specification of the Countries dependent or independent of the contracting Parties should have been stated', he said. Articles 3 to 11, he wrote, 'are all proper in themselves. . .'. Article 12 provoked the observation that if the ambiguity of the article in specifying the circumstances in which the British would be justified in intervening in the affairs of Kelantan and Trengganu to oust Thai authority meant that the British would gain 'the right of interposition in the event of the Siamese intermeddling in their affairs, assuming a paramount control, in short protecting them in their independence, all is gained that we can require, and, under that construction, but not otherwise, I would recommend the ratification of this article. . .'.¹⁵² Since Governor Fullerton's proposed interpretation of article 12 differed fundamentally from the interpretation of both Burney and the Thai negotiators, and since Fullerton recommended a refusal to ratify this article unless his interpretation were accepted by the Supreme Government, it must be concluded that Fullerton's comments amounted to a recommendation that this article not be accepted.

With regard to article 13, Governor Fullerton found the relations between Penang and the Sultan of Kedah to be a great stumbling block. '[W]e surely have no right to stipulate for him the renunciation and abandonment of every attempt to recover his lost Kingdom', he wrote. He accused the British authorities of having violated 'the virtual obligation incurred when we accepted the Island [*of Penang*]' in not actively defending the Sultan from the Thai in 1821. To 'guarantee' Kedah to the Thai was more than Fullerton could bring himself to accept. Although the Sultan might be restrained while he was within British territory, as had happened when he had entered into communication with Burma over peninsular affairs, Fullerton felt that the British Government would be acting against its own interests in restraining the Sultan when he was outside British territory; in so far as Burney's treaty provided for the British to step between Kedah and its ex-Sultan, Governor Fullerton felt it to be unpalatable. If the article were accepted, however, Fullerton proposed that the Sultan be encouraged to move to Malacca, and recommended that his stipend be raised from \$6,000 to \$10,000, 'the sum originally stipulated [*f*]or compensation for the Island'. He felt the extra \$4,000 might be an 'inducement' to the Sultan to agree to the British desire that he move to Malacca. Should the Sultan refuse to move from Penang or refuse to undertake not to

¹⁵²*Ibid.*, Vol. I, Part III, pp. 438 et seq., especially pp. 438-9.

attempt to regain Kedah, Fullerton felt that ratification of Burney's treaty 'would amount to a violation of rights and breach of hospitality where we are peculiarly bound to observe them'.¹⁵³ It is difficult to say what rights Fullerton considered the Sultan to have that would be violated by a British-Thai agreement to defend the *status quo* (with Thai dominance) in Kedah. But it is clear that such an undertaking would necessarily involve British interference in peninsular affairs.

Article 14 was accepted by Fullerton on condition that the Penang Government be allowed to determine for itself the real sentiments of the Sultan of Perak towards continued Thai presence in his territories and that the British retained the right to supply the Sultan with appropriate means to protect himself against 'Siamese aggression'. The stipulations about British interference in peninsular affairs necessarily included in the undertakings relative to Selangor, and the conditions which Fullerton hoped would be allowed with regard to British support of the 'independence' of the Sultan of Perak, were considered by Governor Fullerton to be 'unobjectionable'.¹⁵⁴

Viewing the treaty as a whole, Fullerton found it of dubious value in all matters in which the Raja of Ligor might be involved, except where it gave to the British a right to use 'more decisive means than negotiation'. 'Intimidation', he wrote, would be 'justifiable only on [*in?*] resistance to unauthorized and unjust encroachments on the interests of others', but in so far as the treaty gave the British a right to 'protect' the interests of any parties against the Thai he seems to have felt that it was a good thing. On 25 September 1826, the Council at Penang adopted a resolution endorsing Governor Fullerton's views as expressed in the minute of the 18th.¹⁵⁵

At the time Fullerton's minute was written, Burney was still in Penang. On 3 October 1826 he answered the objections raised. With regard to article 12, he observed that 'it will be impossible for the Siamese to oppress those States [*Kelantan and Trengganu*]... without interrupting our Commerce', and that, therefore, the article gave to the British a right, although not a duty, to interfere in those Sultanates should there be any commercial reason to do so. Although both territories sent the *bunga emas* to Thailand Burney pointed out that complete Thai supremacy there was not included in the terms of the treaty, as a limitation on Thai authority

¹⁵³Ibid. especially pp. 440-2. Governor Fullerton's history was, of course, incorrect.

¹⁵⁴Ibid. especially pp. 443-4.

¹⁵⁵Ibid. especially pp. 445, 446; p. 451.

was implied by the very fact of the inclusion of article 12 in the treaty.¹⁵⁶ A British right of intervention was provided for in the only circumstances in which a peninsular involvement ought to be contemplated, and then in such general terms as to permit the British full freedom of action (or inaction). With regard to article 13, Burney pointed out that he had had no alternative and that Crawford, four years before, had admitted Kedah's *de facto* subjection to Thailand.¹⁵⁷

On 5 October 1826, Fullerton and his Council wrote to the Governor-General of India in Council that although 'article 12th and 13th appear to us of an objectionable nature, we are nevertheless of an opinion that. . . the most advisable course will be to ratify the Treaty, such being the speediest and least objectionable mode of putting an end to all further negotiation . . .'.¹⁵⁸

¹⁵⁶This argument seems very weak. Why should Thailand not have granted a concession to the British in a territory over which full control was in fact exercised in return for a British undertaking not to interfere with that authority? The Thai certainly had reasonable grounds for believing that the British would not feel inhibited from interfering in peninsular affairs and, despite their experience under the Preliminary Treaty, they could probably feel that the British would not lightly violate their pledged word.

¹⁵⁷Burney, Vol. I, Part III, pp. 494 et seq., especially pp. 497-9. To prove Crawford's admission Burney cited a letter from Crawford to the Supreme Government dated 2 July 1812 [1822?]. This 'recognition' does not seem to be mentioned in Crawford's account published in 1830. It has not been possible to locate the letter cited by Burney.

¹⁵⁸Burney, Vol. I, Part III, p. 526.

CHAPTER IX

The Consolidation of British Control

THE WEST COAST

THE Government of Penang took immediate action to implement what it fancied to be the desirable interpretation of Burney's treaty. On 15 September 1826, even before his first minute commenting on the treaty was written, Governor Fullerton wrote to the Sultan of Perak that 'he [*the Sultan*] may rely on the assistance of the British in expelling any Siamese who may proceed to Perak, and resisting any interference with the government . . . ' of Perak.¹ On 20 September, the Sultan of Perak answered, asking instructions from Fullerton as to what he should do in the face of Thai threats and demands for the *bunga emas*. He also stated that he was being pressed by Selangor to settle his long-standing debt there, but asserted that Selangor's invasion of Perak in 1822 had resulted in a Perak claim against Selangor to the extent of \$2787!²

The reason for the Sultan not taking a stronger anti-Thai line in his letter to Governor Fullerton is clear: The British in Penang had been grievously misinformed about Thai actions in Perak. As mentioned above, Ligor had sent about 300 men into Perak in November 1825. In May 1826 Fullerton recorded in a minute his information that 300 more Thai troops moved into Perak.³ In fact, 163 of the original 300 men had been withdrawn from Perak in May 1826 and had not been replaced; and the remaining Thai troops left Perak on 7 September 1826, a week before Fullerton's letter referring to 'expelling' them.⁴ Fullerton also appeared

¹Burney, Vol. I, Part III, p. 464 at p. 465. Of course, the Supreme Government had not authorized this action, and probably did not yet even know of the conclusion of the negotiations in Bangkok.

²Burney, pp. 480-1; *sed quaere*, was this claim of Perak identical with the claim Ligor was putting forth against Selangor?

³Burney, p. 531, minute by Governor Fullerton dated 22 May 1826. Perhaps Fullerton had misconstrued a report of Thai withdrawal!

⁴*Ibid.*, Vol. II, Part VI, p. 1, Low's Report, 27 October 1826, at p. 12. The withdrawal had occurred at about the time Burney had yielded in Bangkok on the Kedah issue. Burney hints at a possible connexion between the two events in a letter dated 29 December 1826. *Ibid.* pp. 59 et seq. at p. 65. The Raja of Ligor was, of course, in Bangkok at the time.

to believe that the Thai had acted overbearingly and rather badly in Perak, living off the land and collecting taxes without proper authorization. Leaving aside the possibility that he was ignorant of the local practice relating to quartering forces, it is clear that there was some arrangement between the Thai and the Sultan of Perak on the subject since it was reported that on leaving Perak the Thai actually paid the Sultan \$1,720, apparently to compensate for requisitions.⁵ As shall be seen, the strength of the pro-Thai faction of Perak nobles was considerable, and it is incredible that the 'excesses' of Ligor described by Fullerton could actually have occurred; if they had, Perak would surely have been as united in welcoming deliverance as Fullerton expected it to be. It may be supposed that the Sultan of Perak was playing a rather sophisticated game to use what he believed to be British humanitarian sympathies to achieve an independent control of Perak that had no precedent in Thai-Perak relations. It did not seem to occur to the British in Penang that the Malays of Perak had learned something of diplomatic cunning during the many centuries of their political life and the 300 years of their contact with Europeans.

About the beginning of October (the date is uncertain), Fullerton sent Captain Low into Perak with an escort of forty Sepoys and a warship 'to free Perak from Siamese interference'.⁶ In Perak, Low apparently found no Ligor or Thai troops, but the strength of the pro-Thai faction of Perak nobles was such that '[i]t was . . . thought best that the Mission should wait at Perak until the Rajah [Sultan] had got matters arranged to his perfect satisfaction'. The head of the faction proved to be the Raja Muda, heir to the Sultanate of Perak. Since the Sultan proved to have no effective power Low directed him in all the steps necessary to reassert his authority. These steps included, among others, replacing the Raja Muda as heir apparent, shuffling the entire Perak nobility into a new order, placing 'Royalist' chiefs in authority at the expense of pro-Thais, and extracting oaths of allegiance.⁷ It seems unbelievable that such far-reaching changes can have been effected without resistance, and in the circumstances it must be supposed that the presence of a representative of the British Govern-

⁵Ibid. Low's Report, at p. 13. Low says that the Sultan rated Thai-wrought damage at \$20,000. This figure seems excessive. When pressed to it the Sultan of Perak was able to support his claim against Ligor only in the amount of \$2,530.20. See *ibid.* p. 29, itemized list forwarded to Penang by the Sultan of Perak via Captain Low in October 1826.

⁶Low, 'Account', 4 *JIA* (1850), at p. 116; Burney, Vol. II, Part VI, p. 205, letter from the Governor-General of India in Council to Governor Fullerton, 23 July 1827, at p. 212.

⁷Burney, Vol. II, Part VI, p. 1, Low's Report, at pp. 3-6.

ment with his force of Sepoys and his gunboat was in fact the decisive element in this re-ordering of the Perak constitution.⁸

Before he left Perak, Low concluded three engagements with the Sultan and his principal chiefs, including a new Raja Muda. The first, dated 18 October 1826, confirmed the Anderson treaty of 1825 and provided that the Sultan of Perak

... engages that he will not hold any communication or intercourse with the Raja of Siam, or with any of his Chiefs, or vassals, or with the Raja of Salangore, or any of his Chiefs or vassals which may or can have reference to political subjects, or to the administration of his government, and the management of the country of Perak. His Majesty will not countenance any of his subjects who may connect themselves with or league or intrigue with the Siamese. . . .

The second article of the new treaty provided that the Sultan of Perak '... will not give or present the *Bunga Mas* or any other species of tribute whatever to the Rajah or King of Siam . . . or . . . Salangore or to any other Siamese or Malayan people . . . Moreover, His Majesty will not receive. . . ' any political missions at all, or any party of more than thirty men for any purpose from Thailand or Selangor. It was further provided that Perak should '... rely, as he now relies, . . . on the friendly aid and protection of the Hon'ble. the East India Company . . . to be manifested in such a manner and by such means as may to them seem most expedient'. The last article said that if the Sultan performs his promises, then the British would help him keep his country free of Thai and Selangor interests, but if the Sultan should falter, then the 'obligation on the British to protect him . . . will cease. . . '.⁹

In a second engagement entered into on the same day, the Sultan and his principal chiefs ceded to the East India Company 'the Pulo Dinding and the Islands of Pangkor, together with all and every one of the Islands which belonged of old and until this period to the Kings of Perak'. The ostensible reason for this cession was to give the British the necessary bases from which to combat 'pirates and robbers'.¹⁰ From Low's report it is clear that no mainland territory of Perak was intended to be included in this cession. Low was explicit in citing the Perak fear of Thai anger as a prime motivation in the Sultan's offer to cede his islands to the British.¹¹

⁸Ibid. pp. 211-12 indicates that the Supreme Government thought that this was the case. See below.

⁹Maxwell and Gibson, p. 24.

¹⁰Ibid. p. 23.

¹¹Burney, Vol. II, Part VI, Low's Report, p. 11.

The Sultan of Perak readily acceded to Low's other suggestion that steps should be taken to strengthen ties between Perak and Penang. Together, they fixed on a new site for the Sultan's *Kraton*, nearer to Penang. On 25 October 1826 the Sultan sent Low a letter in which still further promises were made. These promises included an undertaking to build a residence near his own new *Kraton* 'for the temporary accommodation of any British officer who may be sent to visit him', and undertakings to stabilize taxation, police his territory, 'coerce' by 'harsh measures' the payment by Perak people of their debts to visiting traders, encourage rice-growing, etc. The Sultan further agreed with Low's suggestion that his children be sent to Penang for their education. He even asked the British to appoint an officer to collect his export duties for him in Perak.¹² In short, in return for British support, without which he should never have had more than titular dignity as Sultan of Perak, the Sultan had offered to give to the British effective control of his Sultanate. His benefit was to be peace and security, his loss, nil. The real parties who stood to lose by the new arrangements were the old Perak nobility and the Thai, through their officer, the Raja of Ligor, the real possessors *de facto* and probably *de jure* of the powers the Sultan found imputed to himself by the British and which he now offered to give away. Fearful of what would happen when the British gunboat left, on 20 October the Sultan of Perak sent a letter to Governor Fullerton asking for 400 muskets, ammunition, and a loan of \$10,000.¹³

A few days after the departure of Low and his supporting force, the Raja of Ligor was reported to have begun to build up a fleet of prahus.¹⁴ He reportedly sent forty men into Perak from Kedah. In response to this move, Governor Fullerton sent a note to the Sultan of Kedah advising him to behave civilly, to request the mission to leave, and to report to Penang if they refused.¹⁵ He also sent a letter to the Raja of Ligor, reminding him that Burney's treaty forbade him to send any force to molest Perak, stating that the Sultan of Perak had a complete right to refuse to send the *bunga emas* or to receive visitors, and stating that it was his, Fullerton's,

¹²*Ibid.* pp. 8-9, 24-6. The letter of 25 October 1826 is printed also in Maxwell and Gibson, at p. 26 as a boundary agreement!

¹³Burney, Vol. II, Part VI, Low's Report, at p. 39. This letter is not printed in Maxwell and Gibson.

¹⁴Burney, Vol. II, Part V, p. 90, report of the Superintendent of Police, Province Wellesley, 31 October 1826.

¹⁵*Ibid.*, Vol. II, Part VI, p. 43, letter from Fullerton to the Sultan of Kedah, 3 November 1826.

'duty', under Burney's treaty, to satisfy himself whether the Sultan was willing to send the *bunga emas* or not; he was now satisfied that Perak wished to be entirely independent. The fact that the treaty authorized Ligor to send 'forty or fifty' men to Perak, and that forty men was exactly the number that had accompanied Low in his mission to Perak, Fullerton did not mention.¹⁶

With regard to the war fleet, Fullerton and the Council in Penang instructed a Penang official to proceed to Ligor and investigate.¹⁷ The legal authority to send such an investigating officer was purportedly derived not from article 2 of Burney's treaty, which would have given a right to enquire but not to investigate in person, but from a letter which the 'Young Chief' of Ligor¹⁸ had sent Penang sometime earlier offering the British free navigation on the river in which the reported fleet was supposedly assembling.¹⁹ The British officer was welcomed in Ligor, and apparently found the reputed war-fleet to be non-existent.²⁰

Ligor ignored Fullerton's letter demanding the withdrawal of the forty-man mission, and on 7 November Fullerton sent a letter directly to Bangkok complaining of the actions of Ligor. He wrote that Ligor's sending men into Perak constituted a violation of the Provisional Treaty of 1825, and interpreted Burney's treaty to mean that neither Thailand nor the British would be justified in sending any mission to Perak which might interfere with the independence of that Sultanate. '[T]reaties', he wrote, 'must be adhered to'!²¹ He apparently regarded the Low mission not as an interference with the independence of Perak, but as a vindication of that independence. On 20 November, while expressing the 'satisfaction' of the Government of Penang that an inspection was permitted of the river in which the war-fleet had been rumoured to be assembling, the Young Chief of Ligor was again told to remove his party from Perak.²²

On 27 November the Sultan of Perak acknowledged Fullerton's letter of advice, and stated that the thirty [*sic*!] Thai people had refused to leave his territory.²³ In response to this letter, on 1 December 1826 Fullerton

¹⁶Ibid. p. 41.

¹⁷Ibid., Vol. II, Part V, p. 93.

¹⁸This was the son of the Raja of Ligor, who had been appointed Thai Governor of Kedah in his father's absence during the Bangkok negotiations. Ibid., Vol. I, Part II, p. 217.

¹⁹Ibid., Vol. II, Part V, p. 93. The letter is not more closely identified and it has been impossible to locate it.

²⁰Ibid., Vol. II, Part VI, p. 51, letter from the Government of Penang to the Young Chief of Ligor dated 20 November 1826.

²¹Ibid., Vol. II, Part V, pp. 98-99.

²²Ibid., Vol. II, Part VI, p. 51.

²³Ibid. p. 53.

advised the Sultan to avoid antagonizing Ligor, saying that Britain did not want war, and that were he to supply arms and ammunition to the Sultan of Perak, this would be construed by Thailand as a violation of Burney's treaty.²⁴ A few days later, Governor Fullerton received a letter from the Young Chief of Ligor saying that the mission was composed of only five men, who had now been ordered to return to Kedah.²⁵ In response to this news, on 7 December the Government of Penang advised the Young Chief that it had no objection to the visit as long as the Sultan of Perak did not object.²⁶ On 11 December the Sultan of Perak wrote to Penang that he was receiving the mission kindly, but not giving them any political concessions.²⁷

The Low treaties with Perak were far too wide a departure from British commitments under Burney's treaty and from British policy as laid down by the Supreme Government for even Governor Fullerton to accept them. On 7 November 1826, he wrote a minute in which he analysed the legal position of his Government. Surprisingly, he did not refer to British obligations to Thailand at all beyond noting that the 'voluntary' donation of concessions by the Sultan of Perak to the British was 'open to the imputation of contravening the spirit of Captain Burney's treaty at Bangkok. . .'. On the other hand, the treaty of 1824 between the British and the Netherlands was felt to forbid the British accepting the cession of the islands purportedly ceded by Perak. In his minute, Governor Fullerton seems to say that Low took only the single island of Pangkor from Perak, but it is not known how this restrictive interpretation can be put on the plain words of the treaty of cession; no such limited intention is hinted at in Low's report. The article of the Anglo-Dutch treaty whose violation was feared is not specified (there is a blank space for the number in the minute) and a reading of the terms of the 1824 engagement gives no clue to identifying the restriction on British activities in the Peninsula north of the Equator on which this interpretation could have been based. Beyond this mysterious legal argument against accepting a cession of territory from Perak, and his reluctance to violate the 'spirit' of Bangkok, Fullerton felt himself obliged to consult the Court of Directors of the East India Company in London before taking any further action, 'unless the future perseverance of the Chief of Ligor in his views against Perak should

²⁴Ibid. p. 55.

²⁵Ibid. p. 57.

²⁶Ibid. p. 58.

²⁷Ibid. p. 54.

render that measure indispensable'. Whether 'that measure' refers to accepting the cession of Pangkor alone, the commitment of military force to the Peninsula, or the acceptance of the two other Low engagements is not clear from the context.²⁸ In view of the limitations on the powers of the East India Company and its subordinate officers discussed above, the conclusion that Fullerton vastly over-estimated his delegated powers cannot be avoided.

The view that Captain Burney took of the Low incidents was vastly different from the view of the Penang Government. In a secret note dated Calcutta, 29 December 1826, Burney severely condemned the acts of the Penang Government and Captain Low to the Supreme Government. Not only did he regard the conclusion of the Low treaties as beyond the powers of the Penang Government under Pitt's Act, but he also pointed out the breach of faith which Thailand would be justified in imputing to the British. The possible excuse that British actions might have been justified under the Preliminary Treaty, which Fullerton had asserted in his note to Bangkok, Burney denied, pointing out that the Preliminary Treaty, from its inception, was intended to be superseded by the result of Bangkok negotiations, and that it 'merged' in the Bangkok treaty. The actions of the Penang Government in Perak he felt to be a violation of the equal position of Thailand and Great Britain in that territory as envisaged by the Bangkok treaty and he asked rhetorically what would Penang have thought had Ligor sent a Captain Low with a gunboat and party of Sepoys into Perak. For the same inducements, security and a large loan, the Sultan of Perak, he averred, would have agreed to identical concessions in favour of Thailand. The actions of Ligor in Perak from the time of the signing of the Preliminary Treaty to the present he found to be perfectly reasonable and proper, and he cast doubt on the assertion of informants that 300 Thai troops had ever been in the country, saying that this was the largest estimate of many received, the smallest having been eighty. Since one object of the Bangkok treaty was to eliminate direct contact between the British and the Thai, Burney felt that the assumption by Penang of a protecting position between Perak and Ligor was a violation of policy, and, in view of the Thai desire that firm territorial lines be drawn between the local authorities of the two powers, continued action on the part of Penang in its current vein would undermine the settlement and lead to trouble. He felt the British had no legal right to send the mission to inspect the area in which the warfleet

²⁸*Ibid.* pp. 46 et seq., especially pp. 47 and 49.

had been rumoured to be assembling, but did not seem familiar with the terms of 'permission' which the Young Chief had previously granted.²⁹

While the Supreme Government was considering these events, the Government of Penang went ahead in further attempts to settle affairs in Perak to its satisfaction. It may be remembered that the location of the boundary between Kedah and Perak, whether at the Kurau or Krian River, was a matter of some doubt. While the possibility that the watershed between the two rivers might be the best boundary seems not to have been considered, it appears that during the first two decades of the nineteenth century neither Kedah nor Perak exercised any authority in the area and each appeared inclined to consider its own territory as limited to the control of the one of the two rivers nearest its capital. The Krian River was further north than the Kurau by about twenty miles at the point in which the events to be related took place.³⁰

Sometime between 1813 and 1821 the Malay Sultan of Kedah appointed one of his nobles, Nakhoda Udin, Chief of the Kurau district.³¹ In 1822, after he had taken over control of Kedah, the Raja of Ligor may have considered the Krian to be his southern boundary, but in July 1822 he is reported to have written a letter accusing Udin of 'piracy' near the Kurau. The circumstances in which this letter was written and its precise contents are not known, and it is doubted that any Ligor intention to draw a boundary line, or in any other way to allow that it had less than full authority in both Kedah and Perak at that time could have been intended.³²

²⁹Burney, Vol. II, Part VI, pp. 59 et seq., especially pp. 59-60, 64-5, 68-71, 73. Despite Burney's assertion, it is possible that the Preliminary Treaty was intended to continue where not overridden by some clause of the Bangkok treaty. The original note is ambiguous. In any event, since Thailand refused to ratify the Preliminary Treaty, and as the legal inability of the Raja of Ligor to bind Thailand to its terms was well known by the British at all times, the propriety of Fullerton's argument may be questioned. Furthermore, the interpretation placed by the Penang Government on the article of the Preliminary Treaty dealing with Perak was, as has been seen, not consistent with the interpretations of Burney, Ligor or the Supreme Government.

³⁰Burney, Vol. II, Part VI, p. 91, minute by Governor Fullerton, 1 February 1827.

³¹Ibid. p. 160, letter from Burney to the Resident Counsellor of Penang, 29 May 1827, at p. 166.

³²Ligor's letter is referred to in a letter from the Penang Government to the Supreme Government dated 27 August 1827. Ibid. p. 245 at p. 249. It has not been possible to find Ligor's letter. It is also referred to in Low, 'Account', 4 *JIA* (1850) at p. 117, from which it appears that the Raja of Ligor had requested the Penang authorities to apprehend Udin. It may be that Udin was in Province Wellesley at this time, for it is doubtful, to say the least, that Ligor can have meant to imply British authority to extend to Perak. Udin's activities could have been termed 'piracy' even if occurring in territory claimed by Ligor since, as has been seen, the label 'piracy' was attached in the Peninsula at this time to the activities of even *de jure* Malay chiefs. This is the only known instance, however, of a peninsular, non-European authority using the term without European prompting at this time.

At any rate, soon after it appears that Udin was confirmed in authority in Kurau by the Raja of Ligor.³³

Basing himself at the Kurau River, Udin embarked on a course of depredation not stopping short of acts of violence committed in British territory.³⁴ In late January 1827, Fullerton sent Captain Low to the Kurau,³⁵ where an engagement took place. In his report, Captain Low apparently did not consider that boundaries were very important, although he noted that Udin openly disavowed any allegiance to Perak, and confessed himself subject to the Raja of Ligor. Low anticipated that Ligor would be upset by the 'pirate-hunting' expedition into a river in the Malay Peninsula.³⁶ The expedition was apparently believed justified under the terms of Low's Perak treaty of 18 October 1826 and the undertaking of the Sultan of 25 October by which the Sultan had ceded to the British island bases to combat 'pirates', and had promised to police his own territory. It does not appear that any further agreement was made which would justify Low's attack on the Kurau. It is difficult to construe even in the existing agreements any warrant for such action without special permission from the Sultan. In a minute dated 1 February 1827, Governor Fullerton located the Kurau as well within Perak territory, and suggested that Udin was an agent of the Raja of Ligor sent to establish Thai authority in Perak.³⁷

Udin apparently returned to the Kurau after Low's expedition had left. On 10 March 1827 the Sultan of Perak wrote to Governor Fullerton suggesting a joint attack on Udin's base. This suggestion apparently came in response to a notice by Fullerton addressed to Perak that Captain Low had been given 'full powers' to 'destroy the pirates in the several rivers in the Perak Country'. 'I am extremely pleased to learn my friend's determination,' wrote the Sultan to Fullerton, 'for it is my desire that this Country of Perak should be under the protection of the Hon'ble. English Company'.³⁸ In April and May 1827 the Penang Government conducted large-scale military operations in the Kurau, as a result of which Nakhoda Udin was driven away and his houses destroyed. Rumours apparently were again circulated in Penang at this time of an assemblage of war-prahus in

³³Burney, Vol. II, Part VI, p. 166.

³⁴Ibid. p. 225, letter from Captain Low to the Government of Penang, 17 August 1827, at pp. 233-5; p. 277, letter from the Governor-General of India in Council to Governor Fullerton, 16 November 1827.

³⁵Ibid. p. 261, minute by Governor Fullerton, 4 September 1827, at p. 266; p. 245, letter from the Government of Penang to the Supreme Government, 27 August 1827, at p. 249.

³⁶Ibid. pp. 82 et seq., Low's Report, 30 January 1827.

³⁷Ibid. pp. 91-2.

³⁸Ibid. p. 130, letter from the Sultan of Perak to Governor Fullerton, 10 March 1827.

Ligor-controlled territory, and anxiety was apparently increased by the refusal of the Raja of Ligor to permit another inspection by Penang officials.³⁹

At this point Captain Burney returned to the Peninsula area to exchange ratifications in Ligor of the Bangkok treaty he had negotiated. In a letter to the Resident Counsellor of Penang dated 29 May 1827, he reported that a visit to the area, inspection of which by Penang officials had earlier been refused by Ligor, had revealed absolutely no sign of a war fleet ever having been there. The Raja of Ligor represented that he had refused permission to Penang officials to inspect this area for fear of it being a ruse by Penang to discover his strength. Penang's suspicion of Ligor was blamed by Ligor on agents of the Sultan of Kedah, but this imputation may have been tactfully made to absolve the British of the otherwise unavoidable imputation that they were not prepared to accept Thailand as worthy of open international correspondence. Burney advised the Raja to permit British inspections as his son had done, as a means of allaying the fears of the Penang authorities.⁴⁰

The Raja of Ligor broached the subject of Captain Low's expeditions to the Kurau. The Kurau, he asserted, was in Kedah territory, and he cited some evidence to the effect that the Kurau was the traditional Kedah-Perak boundary. Burney pointed out that a chart of 1786 showed the Krian, twenty miles north of the Kurau, was the traditional boundary. Udin himself came to argue his rightful subjection to Kedah, *i.e.*, Ligor, authorities for the past many years of his control of the Kurau, and Burney suggested that he draw up a statement and submit it to the Penang Government.⁴¹ In a letter to the Supreme Government a few days later Burney reported that the Raja of Ligor had agreed to submit the question of the Kedah-Perak boundary to the decision of Penang. On the point of policy, however, he observed that even if the territory in question was rightfully in Perak, the course of the Penang Government in meddling in peninsular affairs must lead to complications; it was certain that whatever the merits of the Thai claim, the Kurau was far beyond British territorial jurisdiction. Burney therefore recommended that the British abstain from further involvement in the affairs of Perak.⁴²

³⁹*Ibid.* pp. 162-3; Low, 'Account', 4 *JIA* (1850), pp. 116-17.

⁴⁰*Ibid.* pp. 160 et seq., especially pp. 161-5.

⁴¹*Ibid.* pp. 166-7.

⁴²*Ibid.* p. 171, letter of 31 May 1827, at pp. 172-3: '... the more we interfere in the internal Government of Perak the more shall we be involved in unprofitable, expensive or embarrassing political relations.' (p. 172).

The boundary question was then in fact submitted by Ligor to Penang for settlement, and on 12 July 1827 Governor Fullerton wrote to the Raja of Ligor fixing the boundary at the Krian, enclosing in the letter a copy of a map drawn up by Burney in 1825 in which that boundary had been indicated as correct. He indicated to Ligor that Low's expedition had been confined to destroying a known pirates' nest, and that no exception could be taken by Ligor to such a British expedition in the territory of Perak.⁴³ The Thai never again pretended to authority of any sort in Perak.

Before commenting on the legal implications of the actions of the Government of Penang in the transactions leading to the final expulsion of Thai authority from Perak, it may be helpful to look at the opinions of the Supreme Government on the conformity of the acts of Governor Fullerton and his subordinates to the norms of conduct which higher British authorities felt to be compelled by considerations of international morality. In despatching Burney to Thailand, the expectations of the Supreme Government were not optimistic, as has been seen. Burney had not been empowered to offer any substantial concessions to Thailand, and in the early months of 1826, after Burma had formally ceded the Provinces of Mergui and Tavoy to the British, the revelation of Thai cruelty and oppression in those Burmese territories made British officials extremely reluctant to consider using them as bargaining counters with which to attempt to buy Thai concessions in the relatively unknown and distant, strategically less important, Malay Peninsula. '... [I]t would be impossible on moral grounds to suggest a transfer [*either to Ava or to Bangkok*] ... of those who have sought ... asylum from persecution within the limits of our new acquisitions', wrote one official. Such a cession would, he felt, violate '[t]he obligation which we have virtually contracted towards the inhabitants of those conquered Provinces'.⁴⁴ Another official considered that '... we are in some measure pledged to protect the inhabitants of the Martaban and Tenasserim Provinces'.⁴⁵ Such a transfer, wrote a third would be 'irreconcilable with the paramount considerations of justice and humanity'.⁴⁶

When the news of Burney's treaty reached India, therefore, with its completely equal-appearing terms concealing the achievement of an

⁴³Ibid. pp. 189-90.

⁴⁴Ibid., Vol. II, Part V, p. 47, secret minute by J.H. Harrington, 25 April 1826.

⁴⁵Ibid. p. 50, secret minute by the Secretary to the Supreme Government, 26 April 1822 [1826?].

⁴⁶Ibid. p. 53, minute by W.B. Bayley, 6 May 1826, at p. 54.

equilibrium with Thai pretensions to control in the Peninsula limited to Kedah and possibly Perak on the west coast, and no further south than Trengganu on the east, and with British commercial interests secured in all areas, the Supreme Government felt most satisfied indeed. Good relations had been established on a ground that promised stability, and if Perak fell to Thailand, so much the worse for Perak. No direct loss could accrue to major British interests, and no greater British right in Perak could be asserted without political complications which the Supreme Government was anxious to avoid. Burma was the prize, and perhaps even Thailand itself; if a petty sultanate on the Malay Peninsula, in which the relative claims of various parties to a right to control were unclear and in which too vigorous action might precipitate a premature war with Thailand, had to be acknowledged to be wholly under Thai authority, so be it. In January 1827, the Governor-General of India approved the Burney treaty informally. The treaty, he felt, 'has . . . secured every advantage which could have been expected under the instructions furnished . . . by the Supreme Government . . .'.⁴⁷ On 2 April, the Council of the Supreme Government informed the Secret Committee of the East India Company⁴⁸ of its entire approval of Burney's methods and achievements in Bangkok.⁴⁹

In its communications with Penang, the Supreme Government seems neither to have approved nor disapproved of Governor Fullerton's comments regarding the treaty. Therefore when Burney arrived in the area to exchange ratifications with Thai officials in Ligor in May 1827, Fullerton may have regarded it as an approval of his interpretation of the effects of the treaty, for he may have attributed to his own advice the action of the Supreme Government in deciding to ratify. But the point is moot, since by the time of Burney's visit to Ligor to exchange ratifications, Low's missions to Perak had already taken place, and the Thai had already, to all appearances, been frightened out of attempting to support their claims in Perak by the menacing posture of Penang. The Raja of Ligor limited his actions to complaining to Burney of the actions of the Penang Government, and, as has been noted, he even demonstrated his desire to live at peace with the British by submitting his claims to the Kurau boundary

⁴⁷Ibid., Vol. II, Part VI, p. 80, letter from the Deputy Secretary to Government to the Secretary dated Agra, 17 January 1827.

⁴⁸See Pitt's Act, article 16, and chapter V, note 16. The Secret Committee had full powers, under the Board of Control, to supervise the affairs of the Supreme Government.

⁴⁹Burney, Vol. II, Part V, p. 192.

to the decision of Governor Fullerton. The ratifications of the Treaty of Bangkok were duly exchanged.⁵⁰

But Burney's constant reiteration of his view that the acts of the Raja of Ligor were justified by treaty and tradition, and his constant condemnation of the acts of Penang, from the time of Anderson's mission in 1825 to the time of the Nakhoda Udin incident, as being contrary to the terms of his treaties and the dictates of policy, Fullerton seems to have found increasingly annoying. Governor Fullerton was convinced of the perfidy of Ligor, and no contrary argument could shake his conviction, which seems to have been fully shared by the mercantile community and other influential inhabitants of Penang. The psychological roots of this sentiment may have varied from person to person, but it may be suggested that it was the act of Ligor in invading Kedah, forcing the British in Penang to realize that their relations with Kedah had not been entirely free from taint, which resulted, somehow, in the British feeling that Ligor was a villain. Fullerton felt Captain Burney to be a friend of Ligor, and therefore a partaker in villainy. On 14 July 1827 he wrote a scathing minute in which all the acts of Burney and Ligor are set out in such a fashion that it appears that Fullerton felt all of Ligor's claims to be unfounded except in ambition, and Burney to be very unperceptive.⁵¹

His anger cannot have been abated by the receipt of a communication dated 23 July 1827 from the Governor-General of India to the Governor in Council of Penang in which, at long last, the views of the Supreme Government were made unmistakably explicit. '... I see no reason whatever to doubt the disposition of the Siamese to adhere to the terms of that [*Burney's*] engagement', wrote Lord Amherst.

I hold, therefore, that ... our only rational object of policy ... should be to endeavour to allay their jealousy of our ultimate views, and to derive from our connection with them every attainable degree of commercial advantage by practicing in our intercourse with them the most forbearance, temper and moderation ... ; by striving to cultivate a friendly understanding with the Court and its Provincial Governors in our neighbourhood; and above all by faithfully and scrupulously observing the conditions of the Treaty which fixes our future relations ... [I observe] with regret the tone which pervades all the correspondence of your President [*i.e.*, Fullerton] with the Rajah of Ligor. . .⁵²

⁵⁰*Ibid.*, Vol. II, Part VI, p. 171, letter from Burney to the Supreme Government, 31 May 1827, at p. 172.

⁵¹*Ibid.* pp. 194 et seq.

⁵²The titles 'President' and 'Governor' were used interchangeably at this time with regard to the chief British officer of Penang.

With regard to affairs in Perak, the Governor-General was no less direct. The actions of the Government of Penang and its servants were neither justifiable under article 14 of Burney's treaty, nor within the competence of the 'subordinate Government' of which Fullerton was President. Any future decisions on any British action in Perak, he wrote, would be taken by the Supreme Government. Pledging aid to the Sultan was beyond the competence of the Government of Penang to delegate to Captain Low, whose actions in Perak were felt to 'furnish just ground of offence and remonstrance to the Rajah of Ligore and the Siamese'. Article 14 of Burney's treaty was felt to establish in Perak a reign of equality at best, and where unequal rights were envisaged, the Thai were to have greater rights than the British. The nobles placed in power in Perak by the intervention of Low, whose escort was felt to be at least as formidable an intimidation as 300 Thai troops, must have appeared to the Thai to be an 'English faction', just as the group dominant in Perak until Low's intervention had seemed to the Penang Government to be a 'Siamese faction'. Low's treaties could not be approved by the Supreme Government. Lord Amherst found it ironic that the Thai had not complained of British acts in Perak, while the British, in depriving the Thai of their rights there, complained constantly of the actions of Ligor. In fact, wrote Amherst, Ligor had not acted badly in Perak in seeking to maintain its authority there, but had given way before the British interference.

Low's expedition to Kurau was bluntly condemned. Although Kurau may indeed have been traditionally part of Perak, there was some evidence to the contrary, and therefore the attack was felt to constitute a plain infringement of article 2 of Burney's treaty, which obliged each side to refrain from enforcing any coercive measures in the territory of the other, and obliged each to police its own territory. Nakhoda Udin had openly acknowledged his subordination to Ligor.

Upon what information, or what conception of his powers and the nature of the service in which he was employed, Captain Low acted, in venturing to proceed far inland to attack a place acknowledging the authority of the Raja Ligore, nowhere appears. . . ,

wrote Lord Amherst.

. . . [U]nder the second Article of the Treaty, and indeed according to the laws of all civilized nations, his conduct [*Udin's*] should have formed the subject of representation and remonstrance to his own Government. If that Government refused redress, the question of the proper course to be pursued would then have

naturally attracted the grave and deliberate consideration of your Board and of the Supreme Government.

The Penang government was then ordered to take three steps immediately: 1) to cut to the bone the military expenses of the Presidency, making it incapable of peninsular adventures; 2) to suspend Captain Low from all political employment whatever; and 3) to institute a full hearing to the complaint of Nakhoda Udin, and a full and formal enquiry into the actions of Captain Low. Fullerton was ordered to abstain from any political missions to the Peninsula without the previous concurrence of the Supreme Government.⁵³ It is clear that Lord Amherst fully agreed with Captain Burney's analysis of 29 December 1826.

Low's statement in defence of his actions was sent to the Government of Penang on 17 August 1827. Of his actions in reestablishing the Sultan of Perak in power in that territory, he seems to have felt himself justified on two grounds: 1) the Sultan wanted it so; and 2) his (Low's) instructions dictated his actions. In considering the first point he merely assumed that the wishes of the Sultan were sufficient to determine the rightful constitution of Perak and cited no supporting evidence to bear out this black and white view of the Sultan's legal powers in Perak. The object of his instructions he conceived to be those of freeing Perak from the 'thralldom' of a faction, reinstating the 'Sovereign' to his rights free from Thai oppressions, and blocking Thai authority south of Kedah. He felt that nothing short of his actions could achieve these ends, and that therefore his instructions permitted his actions. He seems to have thought that Burney had concurred in the 1825 Anderson expedition, and that this was a precedent for interference in the affairs of Perak which deprived Burney of the propriety of complaining of a subsequent act of a similar sort. With regard to the Kurau incident, Low asserted that the territory was unquestionably in Perak, and that Udin was unquestionably a pirate. In more detail, his right to act he felt to be based upon instructions from Penang 'to root out the pirates', under which authority, apparently, the January raid took place; permission from Perak, under which the combined Perak-Low operation of April-May took place; and a customary right, which he asserted belonged to all, to suppress piracy wherever found, regardless of the 'pirates' political organization or subordination. Low believed that the actions of European states in attempting to suppress Algerian 'piracy' was evidence that a 'neighbouring state . . . whose subjects suffered from the cruel depreda-

⁵³Burney, Vol. II, Part VI, pp. 205 et seq., especially pp. 207, 209-15.

tions of the pirates. . . , had a just right to adopt any means for their destruction'. He felt that this right could be maintained even should the pirates be found in the territory of Thailand.⁵⁴

It would be tedious to discuss these points here since they did not form a part of official correspondence on the subject but represented only the views of a subordinate officer. It is sufficient to point out that the attribution to Burney of complicity in Anderson's mission is totally unsupported by other evidence⁵⁵ and that the assumption that the achievement of the political ends of government will justify, in law, any action taken which might reasonably conduce to that goal is an assumption not commonly expressed so bluntly when the actions in question occur in Europe. It is, however, only fair to Captain Low to point out that in view of the similar disregard of facts and customary relations exhibited at this time by European states acting in North Africa, his assumption of the propriety of equating interest with law in considering actions directed against subjects of a 'friendly' non-European community within the territory of a friendly foreign ruler was consistent with the thinking of some other officials of his generation.⁵⁶

The full official reply to Lord Amherst's letter was sent in two parts. The first, on 27 August 1827, sent by Governor Fullerton and the Resident Counsellor of Penang to the Vice-President in Council of Fort William in Bengal contained a detailed answer to Burney's letters of 29 December 1826, and 29 and 31 May 1827.⁵⁷ This part is mostly concerned with vilifying Captain Burney, who, it was implied, was the moving force behind Ligor's complaints.⁵⁸ The ancillary legal arguments seem interest-

⁵⁴Ibid. pp. 225 et seq., especially pp. 227-8, 231-5.

⁵⁵Low's statement contains a great deal of calumny directed against Captain Burney which seems well off the subject.

⁵⁶Fisher, pp. 303-6. Of course, the actions against Algiers by various European powers were not undertaken in violation of subsisting treaty commitments, and the Algerians were not consistently treated as pirates at this time. J.T. Abdy, *Kent's Commentary on International Law*, Cambridge, 1866, pp. 435-6.

⁵⁷Burney, Vol. II, Part VI, pp. 245 et seq. Fort William at Bengal was the seat of the Governor-General. See Pitt's Act, article 36.

⁵⁸These charges, set out in great detail in the letter, are not important for present purposes. None of them seems very weighty, the principal object of complaint being Burney's conversing with the Raja of Ligor without first accepting the views of the Penang Council in all matters. Burney's earlier ideas, dating from before he met the Raja of Ligor to negotiate the Preliminary Treaty, in which he approved moves to stop the extension of Thai authority in the Peninsula, were felt to be inconsistent with the views expressed in his later letters. Since Burney's letters, as have been seen, concerned themselves with outlining facts and discussing the propriety of certain *means* of limiting Thai influence in the Peninsula, it is difficult to see just where the supposed inconsistencies lay. The personal abuse of Captain Burney seems irrelevant; none of it would be very damaging even if all facts alleged were true.

ing, however. With regard to Nakhoda Udin, the letter asserts the Krian boundary to be unquestionable,⁵⁹ and, since Nakhoda Udin was a known 'pirate', the suppressive action was felt to be justified. There was no mention of any possibility of a violation of Perak's rights, apparently because it was the view of the Penang officials that they were bound by international law to 'destroy' a 'noted pirate, one of the common enemies of mankind'.⁶⁰ Furthermore, the Anglo-Dutch treaty of 1824, by Article 5 of which the British had bound themselves to co-operate with the Netherlands in the suppression of piracy, was asserted to compel the British action in attacking Nakhoda Udin. 'The regular course', wrote Penang, '... is to require the State protecting pirates to disperse them. If unwilling, or as in the case of Perak, unable, it is our duty to assist them and do it ourselves'. The reason advanced for not having given Nakhoda Udin a judicial hearing and a chance to defend himself against the charge of piracy was that the court at Penang had no jurisdiction over pirates.⁶¹ Thus it appears that the Penang government felt that its lack of jurisdiction in its own territory was an adequate legal ground for asserting jurisdiction in somebody else's territory! Had the crown granted sufficient jurisdiction to the courts of Penang the proper procedure would have been for the British courts in Penang to have found Nakhoda Udin within their jurisdiction, to have tried him and convicted him of some crime, perhaps 'piracy', and to have authorized the appropriate British officials to punish him. Had he escaped from British territory the officers of the court could not have seized or punished him without some permission by the local sovereign for them to act in their official capacities in his territory.

The growth of the concept of political competence supplementing a lack of judicial competence on the part of Penang officials was noted earlier. International law had long been felt by European text-writers to permit states to destroy pirates on the high seas or try them in municipal courts.⁶²

⁵⁹Principal reliance was stated to have been placed in a map drawn by Captain Burney some time before. Burney, Vol. II, Part VI, p. 248. Burney was apparently felt to have championed the Raja of Ligor's claim to a Kurau boundary—but, after perusing the correspondence and Burney's role in getting the Raja of Ligor to submit the question to Penang for decision, it is difficult to discern why.

⁶⁰Burney, Vol. II, Part VI, pp. 249–50.

⁶¹Ibid. pp. 249–50; see chapter VI note 40. It is not clear why a lack of jurisdiction to try 'pirates' should have been felt to limit *in personam* jurisdiction over individuals accused of crimes committed in Penang waters. See R.v. Lebby Lundoo and anor. (1813), Kyshe, Vol. II, p. 6, at p. 12.

⁶²Vattel is silent on piracy as such. But see G.F. de Martens, *Précis du Droit des Gens Moderne de l'Europe* (notes by M.S. Pinheiro-Ferriera), Paris, 1831, Vol. II, Book 8, chapter 4 sec. 289 at p. 215; Abdy, pp. 427–8, 432.

International law was now interpreted by Penang to require British colonial officials to seek out and destroy as 'pirates' those deriving political authority for their acts from Malay sultans, and who based themselves within the territory of the sultanates of the Peninsula. Of course, where permission was sought for such authority to act in the Peninsula from the sultans involved, it may be supposed that some recognition of an exclusive right in the Malay sultan to exercise authority over his territory may have been implied; but no evidence that Penang conceived such a right to exist at this time is apparent in the available documents.⁶³ At this time, however, depredations by Malay chiefs were universally believed to be seriously hampering the course of trade. It was an article of faith to the British administrators in Penang that only ruthless suppression could make the Straits of Malacca safe for the merchant traffic of all nations.⁶⁴ Still, Nakho-da Udin was not caught *in flagrante delicto*, nor was there any immediate occasion for the raids against him; documentary proof of his complicity in the depredations in Penang waters was discovered only after the April-May raid, at which his private papers were captured. In the same papers was found documentary evidence of Udin's subordination to Ligor.⁶⁵

But, although the Penang authorities felt that interference in the Peninsula was justified at international law to suppress 'piracy', and required by the 1824 Anglo-Dutch treaty, they apparently did not feel that it was advisable as a matter of policy! Burney was asserted to have had no authority from Penang the previous year when he negotiated the Preliminary Treaty with the Raja of Ligor and, had permission been requested, said Fullerton and the Resident Counsellor of Penang, it would have been denied. The making of this treaty, it was asserted, was an interference in the affairs of the Peninsula which violated the policy, adhered to until then, of acting *ad hoc* in peninsular matters. The Penang authorities averred that they felt forced to acquiesce in the terms of the Preliminary Treaty as their only alternative to permitting Ligor to march southwards down the

⁶³The co-operation between Perak and Penang in the expedition of April-May 1827 seems to have resulted from the Sultan's initiative. Fullerton had merely given him notice of the British determination to send out pirate-hunting expeditions to act forcibly in his peninsular territory. There is no evidence of explicit Perak agreement before March 1827. It is doubted that Governor Fullerton's notice can be rightly construed to be a recognition of Malay rights to limit British activities in the Peninsula.

⁶⁴Cf. Buckley, Vol. I, pp. 195, 206, 276-82.

⁶⁵Burney, Vol. II, Part VI, p. 225, letter by Low, 17 August 1827, at p. 234; Low, 'Account', 4 *JIA* (1850), p. 117.

Peninsula. Thus, reasoned Penang, all peninsular involvement grew out of Burney's initial, unauthorized interference in peninsular affairs.⁶⁶

It is believed that many of the central facts and views alleged in this connexion are amply contradicted by the earlier correspondence and the probabilities.

The second part responded directly to Lord Amherst's letter of 23 July. In it, all the acts of the Penang Government are asserted to have rested on the assumption that Ligor was attempting to expand its influence, and that British policy, acquiesced in by Burney, was to restrict that expansion. Regarding the reprimand about the tone of Governor Fullerton's letters to Ligor the response is sarcastic in pointing out that the 'error' of putting public duty above amity was regretted. With regard to the Kurau incidents, the Government of Penang assumed full responsibility for the acts of Captain Low, noting that if the suppression of piracy in the Peninsula when the chiefs either refused or were unable to do so was objectionable to the Supreme Government, then Penang would have to find another way of making the Straits of Malacca safe for merchant shipping. Low's expeditions were denied to have had any political intent, and the political effect of freeing the Sultan of Perak from the adverse claim to his authority in the Kurau area was not mentioned. It was asserted that Udin's subordination to Ligor was not known at the time of the Low expeditions, and that had it been known, Ligor would have been consulted. Ligor's failure to control Udin's 'piracies' was asserted to make Ligor a 'conniver' at his depredations, and Ligor's acts were seen as the establishment of a clandestine agent in Perak territory which should not be considered to be evidence of any legal right in Ligor to control that territory. Since Udin was now provably a depredator on Penang territory, most of the letter was concerned with outlining his enormities. The earlier Low mission to Perak was given much less space, as it was asserted merely that the Preliminary Treaty and article 14 of the Bangkok treaty obliged Thailand to withdraw from Perak if that withdrawal were desired by the Sultan, and in any event not to send troops there. It was, therefore, felt to be in carrying out the policy achieved by Burney, and by Burney alone, that the Penang Government acted in sending Low into Perak. Governor Fullerton wrote:

It will . . . appear that no Mission has ever been deputed during my Government except such as immediately arose out of a course of proceeding adopted by Captain Burney and subsequently sanctioned by the Supreme Authority and to

⁶⁶Burney, Vol. II, Part VI, pp. 256-7.

my conception required for the advancement of public interest. The objects of such Missions no longer exist, and I gladly revert and with full confidence of their strict propriety to the principles on which I set out: That the less political discussion or intercourse we have with the neighbouring states the better!⁶⁷

In reply to this, on 16 November 1827 the Governor-General in Council closed the correspondence concerning the proceedings which had resulted in the expulsion of the last shreds of Thai authority from Perak, and fixed British policy. Bowing to the weight of evidence as to Udin's bad character, the Supreme Government mildly rebuked Penang for not having passed this information on to India before the Governor-General's letter of 23 July was written, apparently acquiescing in the view that Udin's 'piratical' character altered the legal question of the justifiability of Low's incursion into Perak territory. 'But for the still unsettled question of . . . jurisdiction [*between Kedah and Perak*], the example which was made of that nest of pirates would have been entirely satisfactory'. Although Burney's map showed Penang not to be an 'intentional aggressor', it was still felt that if Ligor could prove its right to authority over the Kurau, the British would be answerable to the Raja for the 'error'. No mention was made of British responsibility to Perak, whose Sultan would if given the chance have welcomed still greater British assumptions of control in his territories.⁶⁸

On the international law problems, two statements were made: first, that Udin, in claiming compensation from the British in Penang for their raid on his headquarters, would have to bear the burden of proof to show that he was not a criminal by the law of Penang; and second, that Ligor should be instructed that there is in law a 'right which all nations possess to seize and punish pirates wherever they may be found'.⁶⁹ The purport of the first of these two statements seems to have been that henceforth raids against suspected pirate strongholds could legally be carried out by the Penang Government without first acquiring that quantum of evidence necessary to establish a reasonable probability that the victim of the raid was in fact a depredator, and that when the issues were presented for judicial review by a claim being made against the British Government of Penang, the defence of 'act of state' would not suffice to absolve the govern-

⁶⁷This response took the form of a minute by Governor Fullerton dated 4 September 1827, and sent to India on 6 September 1827. Burney, pp. 261 et seq., especially pp. 264-9, 272-4.

⁶⁸Ibid. pp. 277 et seq., especially pp. 277-9.

⁶⁹Ibid. p. 279.

ment or its servants of civil liability for the damages wrought if the victim could successfully establish his innocence of the charge of piracy. Governor Fullerton did not believe that the judicial competence of the courts of Penang at this time included admiralty matters. After the courts received Admiralty Jurisdiction in 1837, accused 'pirates' were tried directly.

There is no record of any successful claim against the Penang Government or its successors under this instruction from India. However, the view that the burden of proof lay with the victim in a case of British action on the assumption that the victim was a 'pirate', seems to have implied that the public policy of ridding the Straits of depredators overrode the considerations of law, applied in transactions between European states at this time, that '[t]he right of visitation [*on the high seas*] . . . [w]herever it has existed, it has existed upon the ground of repelling injury, and as a measure of self-defence. No practice that exists in the world carries it further'.⁷⁰ It might be thought that the right actually to destroy a suspected pirate stronghold should have required even greater grounds of justification than the right of visitation. The raid on Nakhoda Udin's headquarters not having been made as a defensive measure or in immediate pursuit, but rather as a planned attack, it may be considered that this raid, now apparently approved retroactively by the Supreme Government, did not take place in conformity with the principles of international behaviour accepted by European states as normal in their transactions *inter se*.

The second statement of law made by the Supreme Government bears out this interpretation of the trend of legal thinking illustrated by the events and correspondence cited. There is no restriction in the Supreme Government's statements of the law regarding the territory in which 'pirates' may be apprehended. Taken at its obvious value, were this statement correct, a French 'pirate-hunting' expedition would appear to have been considered justified in mounting a raid on Dover in search of 'pirates' without first asking permission of the British Government. It seems difficult to reconcile this view with that expressed by the Supreme Government under Lord Amherst in July 1827 in which remonstrance to Udin's own government, be it Ligor or Perak, was pointed out to the Penang officials as the proper action to take in connexion with Udin's piracies. In short, it appears that sometime between July and November 1827, the Supreme Government reversed its views of internationally acceptable behaviour

⁷⁰Sir William Scott (Lord Stowell) in *The Le Louis* (1817) 2 Dods. 210, L.C. Green, p. 399 at p. 401.

with regard to the territory of the Malay Peninsula, and determined that British interference in the affairs of the Peninsula would be justifiable in attempting to suppress 'piracy' regardless of the political organization of the Malays there. Since the Treaty of Bangkok expressly forbade British interference in Thai territory, the question of whether this British view as to rights to mount raids upon 'pirate' centres without regard to territorial claims to authority on the part of local political leaders conformed to customary international law did not arise in respect of Kedah, Ligor, or other parts of the acknowledged Kingdom of Thailand. To recapitulate: The British authorities in India had severe doubts that the actions of the Penang Government were justifiable under the international law practiced in Europe among European states; the negotiators for both sides felt that Penang had ignored rights secured to Thailand under the treaties cited by Penang to justify British military ventures into the Peninsula; the Government of Penang had exceeded its authority and acted directly contrary to the wishes expressed by its constitutional superior in India; the Supreme Government had felt it wise in policy to reduce the garrison available to the apparently irresponsible Penang Government and to forbid it undertaking further political forays in the Peninsula. Despite all this, the principle that the territory of the Malay Peninsula was subject to British policing was adopted as justified in law and wise in policy by the British authorities in India. It does not appear to have been realized at this time that such an assumption of authority derogated from the authority of the Malay chiefs involved.

It may be asserted that such a policing of what, in Europe, would have been considered to be territorial waters and even state territory, was not necessary in Europe for the establishment and maintenance of a flow of commerce, and that therefore a difference in the actions of a state in the Malay Archipelago should not be regarded as a difference in its conception of applicable law but merely a ramification of the law already known. It is not believed that this view can be considered sound in view of the undoubted feeling on the part of the actors in the Malay Peninsula that the rules of behaviour they were restricted to (or compelled to) differed from the rules applicable in Europe solely because the area in which they were operating was not Europe. There had never been a rule of international law in Europe permitting one state to force another to respect commerce within the territorial boundaries of the second state.⁷¹ Furthermore, it was

⁷¹Cf. Vattel, pp. 121-2, 144.

undoubtedly the feeling of European actors that it was a difference in levels of 'civilization' which justified the use of force by European states to gain the benefit of the treaties which they contracted with the Malay sultans:

But a civilized nation and a less advanced one can never compact on equal terms. The scale of advantage always preponderates in favour of the latter, unless force be resorted to by the former. The Indo-Chinese people are perfectly aware what is meant by a treaty—but they have no Vattels to guide them. International law here is that the weakest must obey the strongest and treaties are considered by them as useful only where most if not all of the advantages are derived to one of the contracting parties and where they can be safely broken or set aside when they are otherwise, where the means exist for doing so.⁷²

This feeling, growing up in the frontiers of European political control over territory far removed from Europe and surrounded by a people with whom, despite some 300 years of more or less continuous contact, relatively little was known, first began to be reflected in the writings of European theorists in the mid-nineteenth century. Here it is necessary merely to point out that the feeling had already arisen, and had served as a basis of policy by the mid-1820s, as a triumph of commercial and political interest which, in the Malay Archipelago, could be seen struggling to achieve the position of 'law' since the first British acquisition of territory in 1786. By 1827 this notion of 'law' was already strong enough at the British frontier to be thought to justify raids against territory known to be claimed by Thailand. The implied direction of the Supreme Government to treat Thailand as if entitled to the intercourse normal among European powers was felt to be less peremptory than the 'law', which was felt to compel the suppression of 'piracy'. The definition of 'piracy' at law was felt to include the acts of political leaders holding the commission of foreign sovereigns. No such 'law' or definition of 'piracy' was applied against the interests of European or American states at this time.

SINGAPORE

THE treaty of 6 February 1819 was signed by Raffles for the Governor-General of India and the East India Company and by the British-supported pretender to the Sultanate of Riau-Lingga-Johore and the Temenggong. The pertinent terms were as follows:

⁷²The words are those of Captain James Low. Low, 'Account', 4 *JIA* (1850), p. 115.

THE CONSOLIDATION OF BRITISH CONTROL

Article 2nd . . . the Honourable English East India Company agree and engage to pay to [Sultan Husain] . . . the sum of Spanish Dollars five thousand annually, for, and during the time that the said Company may, by virtue of this Treaty, maintain a factory or factories on any part of His Highness's hereditary dominions, and the said Company further agree to afford their protection to His Highness . . . as long as he may continue to reside in the immediate vicinity of the places subject to their authority: It is however clearly explained to, and understood by His Highness, that the English Government, in entering into this Alliance, and in thus engaging to afford protection to His Highness, is to be considered in no way bound to interfere with the internal politics of his States, or engaged to assert or maintain the authority of His Highness by force of arms.

Article 3rd . . . the said Company having . . . settled on His Highness [the Temenggong] the yearly sum of Spanish Dollars three thousand, and having received His Highness into their alliance and protection. . . [*the Temenggong renews the permission granted in the preliminary treaty of 30 January to allow the British to establish a factory in Singapore*].

. . . Article 5th . . . [The Sultan and Temenggong] agree, promise, and bind themselves, their heirs and successors, that for as long time as the Honourable the English . . . Company shall continue to hold a factory or factories on any part of the dominions subject to the authority of their Highnesses aforesaid and shall continue to afford to their Highnesses support and protection, they, their said Highnesses will not enter into any Treaty with any other nation, and will not admit or consent to the settlement in any part of their dominions of any other power, European or American.

Article 6th. All persons belonging to the English factory or factories, or who shall hereafter desire to place themselves under the protection of its flag, shall be duly registered and considered as subject to the British authority.

Article 7th. The mode of administering justice to the native population shall be subject to future discussion and arrangement between the contracting parties. . . .

Article 8th. The Port of Singapore is to be considered under the immediate protection and subject to the regulations of the British authorities.

Article 9th. [The Temenggong] . . . is to be entitled to a moiety or full half of all the amount collected [*in duties*] from native vessels.

The expenses of the port and of the collection of Duties is to be defrayed by the British Government.⁷³

⁷³Maxwell and Gibson, p. 117; Buckley, pp. 52 et seq.; Wurtzburg, pp. 493-4. The texts differ slightly.

Although the Supreme Government at first considered the British outpost at Singapore to be 'a military post rather than a fixed settlement', and directed that 'artificial encouragement' was not to be given to the immigration of 'natives'⁷⁴ a broad interest in peninsular affairs was from the first evinced by the British in Singapore. A Bugis revolt at Riau had been harshly put down by the Dutch in 1819, and the remnants of the Bugis force sought refuge in Singapore. The Dutch authorities at Malacca demanded that the British in Singapore render up the person of the leader, and on 2 November 1819, the Resident, Major William Farquhar, refused. This refusal was approved by the Supreme Government.⁷⁵ Although the treaty of 6 February had purported to place 'the Port of Singapore' under the 'immediate protection' of, and 'subject to the regulations' of the British authorities, no word giving the British a right or duty to interpose between the Dutch and Malay chiefs other than Husain and the Temenggong was contained in that document.

The Malay leaders themselves apparently wanted British interposition for, as has been seen, the liberal trade policies of the British and their apparent reluctance at this time to interfere directly in Malay politics made them far preferable as friends to the imperious Dutch with their tradition in the Archipelago of the use of force and the imposition of an oppressive economic regime.⁷⁶ A rumour that the British were to abandon Singapore elicited a petition from the Sultan and Temenggong on 9 September 1820 pleading against being left to the mercies of the Dutch.⁷⁷ Since the Sultan owed his elevation to dignity to the British, at least his reluctance to return to his lesser state can be easily understood.

What seems most significant here is the assumption of the Malay officials that the British factory in Singapore made a Dutch assertion of authority in the Island outside the factory legally impossible. Of course, article 5 of

⁷⁴Logan (ed.), 'Singapore', 9 *JIA* (1855), p. 444, letter from the Governor-General of India in Council to the British Resident of Singapore, 11 January 1820; also in Buckley, Vol. I, pp. 59-60.

⁷⁵Logan (ed.), 'Singapore', 9 *JIA* (1855), p. 443.

⁷⁶The British reputation was only comparative; acting at the same time and in similar circumstances the British were in fact as oppressive as the Dutch. Dutch policies in the area reflected European economic, humanitarian and political thinking just as closely as did the British. Cf. J.S. Furnivall, *Colonial Policy and Practice* (1948), New York, 1956, pp. 217 et seq. An example of what would today be considered the more sordid side of British colonial thinking of this time might be the proposal, debated in 1804-6, to plant Chinese settlers as cheap labour in the West Indies to help control the increasing turbulence of negro slaves by increasing their economic dependence on British interests. Correspondence on this idea may be found in Logan (ed.), 'Pinang', 6 *JIA* (1852), pp. 143-72.

⁷⁷Logan (ed.), 'Singapore', 9 *JIA* (1855), p. 448.

the Treaty of February 1819 forbade the Temenggong and the Sultan granting permission to the Dutch to establish a factory anywhere in their domains but it can hardly be supposed that the Malay magnates felt it within their power to stop the Dutch had the Dutch forced their way into Singapore or Johore. It may be borne in mind that the Dutch did not regard Husain as a legally competent authority in the Sultanate of Riau-Lingga-Johore, and felt fully justified in disregarding any commitments made by him concerning Johore. Thus, since article 5 cannot have been felt by the Dutch to limit their right to enter into Singapore Island, and since the opposition of the chiefs would have been ineffective to stop such a step, it is clear that it was only British presence which was felt to hinder the Dutch. Yet this hindrance was apparently felt to be not merely political but legal as well, as it seems from this and subsequent events that the Malay chiefs felt the Dutch to be legally bound not to enter Johore's dominions while the British remained in Singapore. The British did not share this view at first and there is evidence that an early Dutch attempt to occupy Singapore and oust the British garrison would have been felt in Penang, India and London to be within Dutch legal rights.⁷⁸

But the British doubt of rights to exclude the Dutch soon lost practical effect. In early times, factories of friendly European powers had been maintained side by side in the Malay Peninsula. But the European rivalries for trade, the European enforcement of monopoly treaties of commerce, and the weakening of the ability of Malay sultanates to resist European demands had resulted in the evolution of a system in which the establishment of the trading outpost of one European power seems to have implied the exclusion of trading outposts of others from the neighbourhood.⁷⁹ It is apparent from the Dutch request of November 1819 and the British response to it that by that time both the Dutch and British already assumed the same rule to be true for Singapore.

A year later, on 17 November 1820, the Dutch Governor-General of Java complained directly to the British authorities in India of the action of the Temenggong of Johore in sending a letter to a Malay sultan in what

⁷⁸Cf. Wurtzburg, p. 506.

⁷⁹It was, in the main, European rivalries that made the presence of one country's factory inconsistent with the neighbourhood of another's. It was the European interest rather than Malay initiative that encouraged the treaties of exclusive trade, and it was European power, not the power of the local sultans, which enforced those treaties. As has been seen, by 1822, when Crawford made his trip to Bangkok, trade on a normal competitive basis, without special privileges for European traders in this area, was not even seriously considered as an object of British economic policy.

the Dutch regarded as their sphere of influence. The Dutch felt that the Temenggong must have acted with the sanction of British authority in Singapore, although Major William Farquhar, the British Resident, denied it. It is interesting to note that the British authorities seem to have agreed that some sort of restraint should have been imposed on the acts of the Temenggong while he resided in the neighbourhood of the British factory, although at this time nothing was expressly said to that effect. The Governor-General of India replied to the Dutch letter that he was anxious to avoid any complications with the Dutch that might prejudice the preliminary talks then taking place in Europe.⁸⁰

Apparently the terms of article 5 of the treaty of February 1819 were not felt by any interested party—Dutch, British or Malay—to restrict the powers of the Malay chiefs to hold correspondence with other Malays. The Dutch appeal and British response of November 1820 were couched in terms of customary law rather than in terms of treaty obligations of the Malays and British; no mention was made of the Dutch being third party beneficiaries of the treaty of February 1819, nor was there any mention of British treaty rights over the Malays in Singapore. Yet the assertion was made that the British had an obligation to the Dutch to control the Temenggong to some extent while he resided in Singapore.

While happy to have the British protect them from Dutch pretensions, the Malay chiefs were in some doubt as to their own status in Singapore. Pursuant to article 7 of the treaty of February 1819, on 26 June 1819 the two Malay officials concluded an agreement with Raffles and Farquhar by which the internal government of the new British settlement was arranged. In this agreement, bounds were set to the British territorial holdings in Singapore Island, and the British Resident's authority was stated to extend over all persons 'as reside within the aforesaid boundary, and not within the campongs of the Sultan and Tumungong'. The Resident and the two chiefs or their delegates were to meet weekly to attend to any private persons' grievances or complaints, and in addition to confer from time to time and decide on matters requiring general legislation. Except for a provision that no customs duties were to be exacted by any authority without the concurrence of all three, no specification of voting procedure in the 'Council' of British Resident and two chiefs was mentioned.⁸¹ It is likely

⁸⁰Logan (ed.), 'Singapore', 9 *JLA* (1855), p. 448; Buckley, p. 60. These talks eventually resulted in the Anglo-Dutch treaty of 1824. See Marks, chapter III.

⁸¹Maxwell and Gibson, p. 120; Wurtzburg, pp. 523-4.

that Raffles had in mind some sort of co-operative government which would avoid the necessity for an outright cession of Singapore to the British; however, it is not entirely clear to what extent he intended each of the three to retain some measure of exclusive legislative authority over his own people or territory in Singapore Island. This arrangement was probably felt by Raffles to be as far as he could go in accepting a measure of sovereignty over part of the territory of Singapore Island without exceeding his authority as delegated by the Governor-General of India in accordance with Pitt's Act.⁸² He had not technically acquired a British sovereignty over the territory of the factory at Singapore, but he had acquired a complete governmental competence subject only to concurrence, which may not have even been necessary in fact, of two manageable Malay chiefs.

This move in the direction of making the powers of the British Resident appear to be a delegation of authority from the two sources, British and Malay, soon evolved into an outright British assertion of a right to control the British compound in Singapore Island. Within the British compound, without specific delegation of authority from the Crown no jurisdiction was felt to rest in the British authorities over Europeans in civil matters, and the only jurisdiction which was felt to be proper in criminal matters was merely that sufficient to permit Europeans accused of criminal actions to be sent to Calcutta for trial.⁸³ But with regard to non-European persons, at least those who were not native-born subjects of the Malay chiefs, the British asserted wide jurisdictional rights. When the first Chinese junk arrived from Amoy to trade at the new port of Singapore in February 1821, the Sultan's people imprisoned the Captain on the ground that he had not conformed to the custom prevailing in purely Malay ports of bearing some sort of gift to the local ruler prior to commencing commerce with local traders. The European merchants already established in Singapore under the British flag protested vigorously to Farquhar, who wrote to Raffles that the interference of British merchants in the government of Singapore was 'improper, premature and very unnecessary'. It was made clear in the correspondence surrounding this transaction that there was also a basic difference of view between Raffles and Farquhar. Raffles was impatient of anything which he conceived would stand in the way of

⁸²Cf. Buckley, p. 67.

⁸³Ibid. p. 155, Report of Crawford, 7 January 1824. Cf. M.B. Hooker (ed.), 'Raffles' Singapore Regulations—1823', 10(2) *Malaya Law Review* 248 (1968).

Singapore becoming a free port attractive to British merchants. Major Farquhar was acutely conscious of the legal limitations he felt to restrict his authority in dealing with the Malay magnates. In the event, Farquhar intervened and obtained the release of the unhappy Chinese Captain from the Sultan by pointing out his obligation under the arrangement of June 1819 not to levy customs duties.⁸⁴

The question of defining British authority in Singapore was raised again in 1822, when Bugis traders brought fifty slaves to the Island and sold them. Farquhar, who seems to have had some personal interest in the matter, was tolerant of the trade while Raffles viewed it with horror.⁸⁵

These and other personal quarrels between Raffles and Farquhar resulted in Farquhar being relieved of his duties in Singapore by Raffles on 1 May 1823.⁸⁶ On the same day Raffles issued a regulation which abolished slavery in Singapore. This regulation merely stated that the Parliamentary legislation prohibiting the slave trade from being carried on 'with any British Colony or Settlement, or by any British Subject', was 'considered to be in force' in Singapore and to 'apply to all persons who may have a *fixed residence*' [sic] there. All slaves imported into Singapore or transferred there since 26 February 1819 were declared entitled to claim their freedom. 'Fixed residence' for the purposes of the regulation was defined as a continued residence of twelve months. The personal attendants of the Sultan and Temenggong were not considered to be slaves because they were not subject to be bought and sold. No other limits were fixed in the regulation

⁸⁴Logan (ed.), 'Singapore', 9 *JIA* (1855), pp. 448-9; Buckley, pp. 67-8. Singapore was subordinate to Benkulen as Raffles, in establishing the Singapore factory, had acted as Lieutenant-Governor of Benkulen under the direction of the Governor-General of India. Farquhar was thus immediately under Raffles. Cf. Wurtzburg, p. 495; Logan (ed.), 'Singapore', 7 *JIA* (1853), p. 325, Proclamation of 6 February 1819. Wurtzburg attributes this incident to protests regarding the action of the Temenggong, rather than the Sultan, and regards Farquhar as a rather tactless martinet. Wurtzburg, p. 593. If the Temenggong was the actor, it may have been that he felt it within his powers under article 9 of the treaty of February 1819, or his residual powers under the arrangement of June 1819. It is not clear where the arrest of the Chinese Captain took place, and it is possible that the incident occurred in the Temenggong's (or the Sultan's) kampong.

⁸⁵Wurtzburg, pp. 613-14; Buckley, p. 73. British subjects had been forbidden to engage in the slave trade in 1807. Coupland, *The British Anti-Slavery Movement*, London, 1933, p. 110. Slavery itself was not forbidden in all British colonies until 1833 and not completely eradicated by law until 1838. Ibid. pp. 142, 144 et seq. The abolition of slavery in England had been accomplished by application of the common law in 1772, but the common law of England prohibiting slavery was not applied in all British colonies. Ibid. pp. 36-56. The case holding slavery to be illegal in England was *Somerset v. Stewart* (1772) Lofft. 1.

⁸⁶Logan (ed.), 'Singapore', 9 *JIA* (1855), p. 456; Buckley, pp. 104-5; Wurtzburg, pp. 605-43. The account in Wurtzburg is exhaustive.

regarding the territorial operation of the emancipation of slaves in 'Singapore'.⁸⁷ It may be borne in mind that the British tenure in Singapore did not involve any cessions of 'sovereignty'; that no right to legislate contrary to the established Malay law in the Sultan's and Temenggong's kampongs (which were enclaves within the British settlement), or, indeed, in any part of Singapore Island outside the British factory, was included in any of the engagements upon which British occupation of the harbour area rested.

While the general British power to pass regulations binding upon British subjects or within the area of the British factory was unquestioned, the Sultan and Temenggong protested strongly at the assumption of authority implicit in the abolition of slavery in Singapore generally. This protest was firmly rejected by the new British Resident, John Crawfurd, who was the same officer who had made the mission to Bangkok in 1822. On 10 January 1824 Crawfurd reported to the Supreme Government on this claim of the two chiefs. 'Singapore', he wrote, 'however anomalous its situation in some respects, exists only through British protection, and is therefore virtually a British possession for the time.' The British law regarding slavery was therefore felt to be applicable to the entire area within the defined area of the British establishment. Crawfurd refers to his factory as being located on land 'made over to the British Government' and under 'the British flag'. He clearly considered the Sultan and Temenggong to be living subject to British law there. Crawfurd was troubled by the pretension of the Temenggong that all of his followers were 'slaves', as the absolute power of disposal of his followers rested in the Malay chief, and the Malay retainers were, by Malay law, unable to divest themselves of this burden, which Crawfurd saw as analagous to 'allegiance'. It seems, in fact, that 'slavery', as defined by the British and as understood by the Malay chiefs in Singapore, included the status of a Malay subject under his Sultan and Temenggong. But the analogy to allegiance seems very well taken, since the legal power of the sovereign (the King in Parliament to nineteenth century British constitutional lawyers) was as great as the theoretical powers of the Malay chiefs over their followers, and for essentially the same reasons.⁸⁸ Nonetheless, Crawfurd could not bring himself to view

⁸⁷Raffles, *Memoir*, pp. 46-47. A useful compendium of all the Singapore Regulations of 1823 including this one is in Hooker, pp. 251 et seq.

⁸⁸See e.g., A.V. Dicey, *The Law of the Constitution* (1885), London, 1945, Introduction by E.C.S. Wade, pp. xxxvi et seq.; John Austin, *The Province of Jurisprudence Determined* (1832), London, 1954, pp. 194, 228.

the Malay chiefs as equivalent to European sovereigns and regarded them instead as equivalent to European slave-holders. After all, he reasoned,

The present Sultan, when he connected himself with us, was not only destitute of all authority but living in a state of complete indigence. . . . The condition of the Temenggong has not been ameliorated to the same extent, but I am not aware of any honest emolument which he has forfeited by his change of circumstances, and it may be added, although he is perhaps not entirely convinced of the beneficial nature of the change, that he has been rescued from a course of life of not the most respectable description.

He recommended that the system of government set up by Raffles in June 1819 be abrogated, and a complete cession of authority over Singapore Island be obtained from the two chiefs.

To the two Malay chiefs, the agreement of June 1819 must by then have seemed intolerable. Under it, their followers, even if they remained subject to the Malay magnates in their respective kampongs, seemed to acquire the right to withdraw their allegiance by the action of British law the instant they left the chiefs' enclosures. But the chiefs wanted to retain their voice in the governance of Singapore, already a valuable and growing commercial port. Crawford predicted that the East India Company would have to pay dearly for the full sovereignty he felt to be desirable.⁸⁹

Permission was not granted by the Supreme Government to accept a cession of Singapore in full sovereignty until after the Anglo-Dutch treaty of 1824 came into force.⁹⁰ In the meantime the arrangements of February and June 1819, giving the British the ostensible authority to establish themselves in the territory of Riau-Lingga-Johore, and setting up a make-shift government in Singapore, remained in force. But every restriction on the full powers of the British Resident in Singapore which could not be

⁸⁹Logan (ed.), 'Singapore', 9 *JIA* (1855), pp. 459 et seq., especially pp. 461, 465-8. Crawford's assumption that the 'Sultan' was the initiator of his connexion with the British was clearly unwarranted. Crawford's moral judgments, and the right he assumed he had to make them, are as indicative of his personality as of the license he felt the energetic British to have to assume authority over the less active Malay rulers.

⁹⁰The treaty was signed on 17 March 1824 and permission to accept a cession of Singapore from the Malay chiefs reached Singapore on 16 August of that year. Buckley, pp. 167. Crawford seems to have acted on the expected permission before it actually came. Letter, Crawford to the Supreme Government, 3 August 1824, in Logan (ed.), 'Singapore', 7 *JIA* (1853), p. 350. It appears that the treaty giving the British sovereignty over Singapore Island was signed by the Malay chiefs on 2 August 1824. 23 *BFSP* 1146; Maxwell and Gibson, pp. 122 et seq.

overcome by a new British interpretation of the 1819 arrangements increased the feeling that new arrangements were desirable.⁹¹

While pursuing their course at the negotiating table in Europe, the Dutch attempted to limit the British claim in Johore by establishing an outpost in Johore territory on the mainland. In response to a reported Dutch action there, on Raffles's authority a British flag was hoisted in mainland Johore in February 1823. In August the Supreme Government ordered Crawford to have the flag taken down. It is not clear whether Raffles intended the British flag in Johore to indicate British sovereignty there, which would defeat Dutch claims on legal grounds, or merely a British interest there which would involve the Dutch in political complications if they pressed further. The Dutch apparently felt that the first alternative was the more significant, for they lost no time in bolstering the position of their *'de jure'* Sultan of Johore, Abdu'r-Rahman, by having him belatedly invested with the appropriate regalia in Riau at about the end of October 1823. Abdu'r-Rahman had married the sister of the Sultan of Trengganu in 1821, and had resided in Trengganu since then, but the Dutch persuaded him to return to Riau at this, to them critical, juncture.⁹²

At the same time, while the British flag was in fact still flying in Johore, Raffles attempted to bolster the British legal position by entering into another engagement with the Temenggong and 'Sultan' Husain. In this engagement, dated 7 June 1823, the two Malay chiefs were relieved of their obligation under the arrangement of June 1819 to attend judicial proceedings weekly, although they retained their right to attend; Malay 'laws and customs' were promised to be 'respected' in 'all cases regarding . . . religion, and marriages, and . . . inheritance . . . , where they shall not be contrary to reason, justice, or humanity. In all other cases the laws of the British authority will be enforced with due consideration to the usages and habits of the people'. The chiefs' monthly stipends were increased. The

⁹¹Raffles had in fact deliberately concluded the two agreements of 1819 in vague terms 'from political considerations'. Logan (ed.), 'Singapore', 7 *JIA* (1853), p. 344, letter, Raffles to the Supreme Government, 7 June 1823. The scope of the authority the British felt they could assert on the basis of those arrangements was certainly not clear in the language of the arrangements themselves. In the circumstances, it may be suspected that Raffles came close to admitting that he had been dealing with the Malay chiefs in bad faith in 1819, since he seemed to feel that the British had acquired a right to 'protect' much more than the factory area in Singapore Island. He certainly felt British rights to be sufficient to exclude the Dutch from all of Johore. See below.

⁹²Wurtzburg, p. 623; Buckley, p. 146; Logan (ed.), 'Singapore', 7 *JIA* (1853), p. 348, letter, Crawford to the Supreme Government, 18 November 1823, at p. 349.

most significant part of the new engagement, however, was article 7: 'The British Government do not interfere at present in the local arrangement of the countries and islands subject to their Highnesses' authority, beyond Singapore and its adjacent islets, further than to afford them general protection as heretofore'.⁹³ This article, by referring to a British obligation to afford 'as heretofore' a general protection to the countries under the authority of Husain, reputed by Raffles to be the *de jure* Sultan of Johore-Lingga-Riau, seems to imply that the 1819 arrangements included such an obligation. Yet it is difficult to understand what particular undertaking can have been in Raffles's mind, and it may well be that the formula of this engagement was calculated by him to allow for any action (or inaction) the British might find it in their interest to pursue as circumstances warranted later.

The first test of British intentions came on 17 November 1823, when a message was received in Singapore from Husain and the Temenggong that a party of Riau Malays and Dutch had arrived in Johore to take possession. The assistance of the British was demanded, but Crawford refused help, recommending to the Malay chiefs that they 'rest satisfied . . . with the ample allowance which they derive from the bounty of the British Government'.⁹⁴ In spite of this advice, it appears that the Temenggong and Husain again raised the British flag in Johore, and when the most peremptory orders were given by Crawford to the Malay chiefs to strike the British colours, those orders were disobeyed. When the Malays refused to lower the British flag in mainland Johore Crawford threatened to send troops to do the job, at which threat, finally, the British colours were struck by the chiefs. They then wrote to the Governor-General in India alleging that British protection, which had been promised them, had been

⁹³Buckley, pp. 106-7. In Maxwell and Gibson, p. 121, the engagement is set out as a 'Memorandum' by Raffles. Hooker, pp. 262 et seq., contains the regulation and detailed rules Raffles composed for the Resident's court and the Magistrate's court to exercise the judicial authority delegated to the British under the arrangement of 7 June 1823. It is interesting to note that the regulation and the appended rules were issued on 6 June 1823, the day before the formal declaration was made by the Sultan and Temenggong. In the circumstance it is not understood how Hooker reaches the conclusion that Raffles drew up a regulation 'prompted' by an Advocate-General's opinion interpreting the engagement of 7 June—unless, perhaps, the engagement had been seen and commented on in India before Raffles presented it to the Malay magnates. The only authority Hooker cites for his reconstruction of these events is Mills, 'British Malaya, 1824-1867', 3(2) *JMBRAS* (1925) 1. Without meaning to detract from the usefulness of Hooker's compilation or the enormous value of Mills's work in other areas Mills's analyses of legal relations are not the analyses a lawyer would make.

⁹⁴Logan (ed.), 'Singapore', 7 *JLA* (1853), p. 349.

unjustly withdrawn, and alleging that some engagement or promise of British protection in mainland Johore had been given.⁹⁵

It is not known what promises in addition to those recorded may have been given Husain and the Temenggong by Raffles, but Crawford was certain that no terms of any written engagement obliged the British to defend Malay authority against the Dutch outside of Singapore Island. Nevertheless, it is interesting to note that, although the British authority over their factory in Singapore was defined in June 1819 in territorial terms, the extension of the British interest to include the entire island of Singapore, of which the territory of the factory was but a very small part, seems to have been made by Crawford without written warrant. Crawford, in reporting to India his construction of the engagements of February and June 1819 and June 1823, rested his argument against the asserted obligation to protect the chiefs' interests primarily on the written terms of article 2 of the February treaty, which released the British from any obligation to interfere in the internal politics of Johore or to assert the authority of the Sultan by force of arms.⁹⁶ Since the force of British arms was not requested, but only permission to fly the British flag, this provision seems irrelevant to the circumstances. Whether the affair could properly be construed to be an internal affair must also be considered questionable; not only was the authority of Husain being impugned, but the questions went to the root of British title to Singapore, for Abdu'r-Rahman's authority was apparently inconsistent with Husain's in 1819 as well as in 1823. Husain had never been invested with the regalia of Johore-Lingga-Riau, so if Abdu'r-Rahman's claim to authority were considered to have arisen only in October 1823, Husain's authority, by the same reasoning, would appear never to have been legally vested in him.

The claim to British protection made by the Malay chiefs, if it did not rest on an oral commitment undertaken by Raffles, must have rested on article 5 of the February treaty which provided for the British to afford 'support and protection' to them, on article 2 by which protection was offered to Husain in general terms 'as long as he may continue to reside in the immediate vicinity' of Singapore, and on the terms of the engagement of June 1823 by which it was provided that the British Government was 'to afford them general protection as heretofore'.

⁹⁵Ibid., 9 *JIA* (1855), p. 460.

⁹⁶Ibid. p. 459, letter, Crawford to the Supreme Government, 10 January 1824, at pp. 459-60.

Although the situation of the Dutch attempting to form a settlement elsewhere in Johore must have been contemplated by the parties to those agreements, these terms are ambiguous enough to permit the charitable inference that each side had felt its interpretation to be accepted by the other. The dominions subject to Husain's authority were undefined in the 1819 agreements and the 1823 engagement. It is likely that Riau was never intended to be included, for Husain's authority never extended there in practice. It may be that Johore and Singapore were actually intended, since 'Their Highnesses', Husain and the Temenggong, both had actual authority in that area. It might thus be concluded that the Malay chiefs had a legal basis for asserting that the British were obliged to take some measures to 'protect' them against Dutch-sponsored moves in Johore proper, but that the British, unless the ambiguity in the agreements of 1819 and 1823 were a conscious deception, could interpret those arrangements equally well as not requiring them to act.

There is no record in available documents of the British reply to the protest of Husain and the Temenggong, but it is evident that no British aid was sent them and the British flag remained struck in mainland Johore. On 21 May 1824 the Supreme Government disapproved Raffles's act in permitting the British flag to be raised in Johore the year before, but denied that the Dutch had any right to complain of this irregularity since the Dutch attempt to establish a settlement there was 'high handed', as was the tone of the Dutch complaints. No apology was sent to the Netherlands.⁹⁷ Thus the British took a position both asserting and denying authority over Johore.

On 18 November 1823 Crawford wrote a long report to the Supreme Government outlining Dutch activities following the British occupation of Singapore. In this report it was made very clear that the Dutch were trying desperately to establish themselves quickly in as wide an area of Malay territory as possible.⁹⁸ Seen in this context, Raffles's attempt to have the British flag planted in Johore was very likely an attempt to forestall Dutch occupation of that territory. Why the Dutch activities in trying to establish a settlement in Johore should have been considered 'high handed' is unclear, although it may have been that the negotiations for the

⁹⁷Buckley, p. 100.

⁹⁸Ibid. pp. 146 et seq. The Dutch had, during 1822 and 1823, established monopoly trade treaties and political control over Lingga and its nearby islands, Billiton, the Kerimun Islands, and many other places of interest to the British. Logan (ed.), 'Singapore', 7 *JIA* (1853), p. 349.

Anglo-Dutch treaty of 17 March 1824 were felt to impose a moral obligation on the Dutch to leave the *status quo* in the Malay Peninsula unaltered until agreement had been reached or the negotiations otherwise terminated.

Where Raffles had been an expander, Crawfurd was a consolidator. Where Raffles had been generous in his treatment of the Malay chiefs as long as he achieved his own ends, Crawfurd sought to limit the commitments of the British authorities. Raffles left Singapore for the last time in June 1823,⁹⁹ and it was Crawfurd alone who negotiated the treaty which accomplished the final cession of Singapore by Husain and the Temenggong to the British.

Indicative of Crawfurd's attitudes towards the Malay chiefs and the Dutch at this time was his handling of a request for a copy of the Johore genealogies made by the Dutch Resident at Riau to the Temenggong shortly after the signing of the Anglo-Dutch Treaty of 17 March 1824. On 10 May 1824 Crawfurd wrote a report to his superiors saying that:

the circumstance of carrying on a secret correspondence with a stipendiary of the British Government, living under its immediate protection, appearing to be a breach of that rule of forbearance with respect to the mutual claims of both governments in the Eastern Archipelago, the Resident [*Crawfurd himself*] recommended that Tumungong not to reply to the Dutch Resident's letter¹⁰⁰

The Dutch letter to the Temenggong seems to have been 'secret' only in the sense that it was not sent through the British authorities. The 'stipend' was, of course, the stipend promised to the Temenggong under the arrangement of June 1823, which increased the stipend of February 1819 and was admitted by Raffles to have been merely a *quid* for the *quo* of giving the British a legal basis to establish their factory in Singapore.¹⁰¹

In entering into the negotiations for the Anglo-Johore treaty of 2 August 1824, as noted above it was felt by Crawfurd that Singapore was already 'virtually a British possession'. This view, whatever its legal meaning, was concurred in by the Advocate-General of Bengal.¹⁰² It was, therefore, to be expected that Crawfurd would not feel obliged to grant much in the way of fresh concessions to the Malay chiefs in return for the explicit cession he sought.

⁹⁹Buckley, p. 140. His final instructions to Crawfurd, the Resident, are in Logan (ed.), 'Singapore', 7 *JIA* (1853), pp. 337 et seq.

¹⁰⁰Logan (ed.), 'Singapore', 9 *JIA* (1855), pp. 469-70.

¹⁰¹*Ibid.*, 7 *JIA* (1853), p. 342, letter, Raffles to the Supreme Government, 7 June 1823, at p. 345.

¹⁰²Buckley, p. 167, letter received in Singapore on 16 August 1824, therefore after the conclusion of the treaty of 2 August.

Parliament, in enacting legislation settling the administration of Singapore in British constitutional law after the Anglo-Dutch treaty of 17 March 1824 but before the Anglo-Johore treaty was negotiated,¹⁰³ had already apparently assumed British authority to be complete in Singapore by virtue of the Dutch concession of British rights, although the Act awkwardly, and therefore probably deliberately, avoids making this assumption explicit. In it, Singapore was purportedly 'transferred' to the East India Company for administrative purposes by the Crown, but the Crown's title to Singapore is asserted to have grown from a British 'occupation' of that island.¹⁰⁴ The effect of the Act was to transfer to the Company such powers as the Crown, through the agency of the Company, had acquired in Singapore by virtue of the facts. The Raffles treaties were, of course, invalid in British municipal law because they were contracted beyond Raffles's powers under Pitt's Act in so far as they purported to transfer territorial dominion to British authorities, and because they were never ratified.

The significant terms of the Anglo-Johore treaty of 2 August 1824 included article 2, by which the two Malay chiefs did 'cede . . . the Island of Singapore . . . together with the adjacent seas, straits and islets, to the extent of 10 geographical miles from the coast of . . . Singapore' to the British; article 3, which obliged the British to pay a total sum of \$60,000 to the two chiefs at once¹⁰⁵ and monthly stipends for each 'during his natural life';

¹⁰³The Act is dated 24 June 1824: 5 Geo. IV c. 108.

¹⁰⁴In so far as the engagements of 1819 and 1823 were ignored it might be thought that the British at home felt Malays to be incapable of entering into international transactions, but this interpretation is belied by the number and complexity of transactions between British authorities and some Malay chiefs which were ratified in London both before and after 1824. The better explanation is, therefore, that the British in Europe did not want to revive the quarrel with the Dutch over Husain's right to cede Singapore in derogation of the right of the Dutch-sponsored Sultan, Abdu'r-Rahman. The Act itself was necessitated in British law by the terms of the treaty, which gave Dutch rights, whatever they were, to the British Government, and the Act of 21 July 1813, 53 Geo. III c. 155, by which the 'undoubted Sovereignty of the Crown' was asserted to lie over all territory in 'Possession' of the East India Company. See Preamble and article xcv. The Act of 1824 was thus necessary in order to delegate to the Company part of the authority over Singapore which had been acquired by the Crown through the acts of the Company.

¹⁰⁵Crawfurd considered that as the treaties of February and June 1819 and June 1823 had not been ratified by the home authorities, sums already paid to the chiefs under those treaties should be included in the reckoning of the lump sums stipulated in this treaty. Thus he felt the amount due to them immediately to be only about \$40,000. Logan (ed.), 'Singapore', 7 *JIA* (1853), p. 350, letter, Crawfurd to the Supreme Government, 3 August 1824, at p. 351. It is not clear that the two chiefs were made privy to this view when they agreed upon the sum of \$60,000 in 1824. It is difficult to understand what the British municipal law requirement for ratification has to do with the international law question of the intent of the treaty of 1824, unless the Malay magnates were considered somehow to be subject to British municipal law to some extent.

articles 6 and 7, which provided that should either chief or his heir choose to quit his kampong in Singapore a stipulated sum of money would be paid by the British authorities to him or his heir in final and complete purchase of his reserved territory in the Island;¹⁰⁶ article 8, in which it was provided that:

Their Highnesses . . . hereby engage, that as long as they shall continue to reside within the Island of Singapore or to draw their respective monthly stipends from the Honourable the East India Company . . . they shall enter into no alliance, and maintain no correspondence with any foreign power or potentate whatsoever, without the knowledge and consent of the said . . . Company;

article 10:

The contracting parties hereby stipulate . . . that neither party shall be bound to interfere in the internal concerns of the other's government . . . nor to support each other by force of arms against any third party whatever;

article 11, which bound the two Malay chiefs to co-operate in the destruction of 'piracy'; article 12, which secured to the British the right to trade in mainland Johore on terms at least as favourable as those granted to any other nation;¹⁰⁷ and article 13, which, considering that article 2 extended the territorial scope of British law to the compounds of the two chiefs as part of the cession of sovereignty over the entire island, promised not to allow Malay deserters to remain in Singapore. Crawford envisaged according a personal immunity to the chiefs and their families analagous to the immunity granted the persons of Ambassadors and their families in England.¹⁰⁸ Article 14 annulled all earlier treaties and engagements between the British and the two chiefs saving only the permission given in the earlier documents to the initial British occupation of Singapore Island, which was preserved out of prudence should some question later arise as to the legality of that occupation under the Anglo-Dutch treaty of 1824 if it were not clearly related back to some time before the ratification of that European treaty.¹⁰⁹

¹⁰⁶Crawford considered it highly desirable that the chiefs be induced to leave, but they seemed reluctant to do so. Logan (ed.), 'Singapore', 7 *JIA* (1853), p. 352.

¹⁰⁷Crawford regarded this as giving the British a right in the area to 'unrestricted trade'! *Ibid.* p. 353.

¹⁰⁸*Ibid.* The extent of those privileges and immunities at that time is set out in The Diplomatic Privileges Act, 1708, 7 Anne c. 12.

¹⁰⁹Logan, (ed.), 'Singapore', 7 *JIA* (1853), p. 354. The treaty is reprinted in Maxwell and Gibson, pp. 122 et seq.; 23 *BFSP* 1146.

The terms of the cession in article 2, extending to the sea as well as the land, were felt by Crawford to give the British full control over the Straits of Singapore and the main channel through the Straits of Malacca at its southern end. He apparently felt that the British had the legal power to acquire sovereignty over these waterways at such a distance from the land, although little base for this belief in the practice of England at this time seems to be available.¹¹⁰ Crawford felt this stipulation of an extent to British dominion around Singapore would be 'necessary . . . towards our safety from the piratical hordes that surround us . . .' and it may be that he thought this specification would be helpful in denying to the Temenggong and Husain any claim to protect, on the basis of their being within Johore territorial waters, any Malay prahu which the British might want to consider 'piratical'.

With regard to the monthly stipends, although the earlier engagements had included promises by the British to pay the sums to the chiefs, the chiefs apparently regarded them as hereditary, and seem to have felt that the stipends would continue to be paid to their descendents. That there was any convincing basis for this view was strongly denied by Crawford, who, after long argument which threatened to disrupt the negotiations, finally won acceptance of the British terms explicitly restricting the stipends to the respective lives of the contracting chiefs.

Article 8 forbidding direct diplomatic correspondence by the Malays was not resisted by the Malay chiefs, who, in fact, were eager to submit their interests entirely to British protection in return for the security of an alliance with a power strong enough to support them in their claims to authority.

The reluctance of the British to enter into the chiefs' quarrels was the reason for the stipulations of article 10, which Crawford regarded as necessary to avoid being entangled in the peninsular, if not European, complications which might result from rash actions on the part of the chiefs. Crawford's idea of British obligations under the treaty in this regard was that the British obligation was merely to provide, in Singapore, a haven for the Sultan and Temenggong, who would be permitted to rule their own territories how they wished, but who should have no external contacts at all, either with Malays, Thai or with Europeans, while the British haven remained available to them.

¹¹⁰See Lord Stowell's decision in *The Anna* (1805), 5 C. Rob. 373 at p. 385, where it is observed that the 'usually recognized' limit of territorial waters is 'about three miles from shore'.

Since British sovereignty was to be conceived to extend to the entire area of Singapore Island, and the chiefs to have some immunities, but no general exemption from the operation of British law Crawford felt that the status of Malays not part of the household of Husain or the Temenggong would necessarily be that of free men when they were in Singapore. But the wording of article 13 he considered to involve a 'concession' to the urgent demands of the Malay chiefs which permitted them to hold their retainers in allegiance. In so far as this might have been interpreted as permitting the status of 'slavery' to continue in Singapore Island, Crawford hoped that he was not violating his powers or the provisions of British municipal law. No question seems to have arisen later about the interpretation of this article.

The treaty was ratified by the Supreme Government on 19 December 1824.¹¹¹

The Anglo-Dutch Treaty of 1824 settled the conflict between British and Dutch claims to Singapore. While some British authorities conceived the British possession of Singapore to rest solely on this Dutch donation,¹¹² apparently disregarding the claims of the British-nominated Sultan to authority in Singapore as of February 1819, others felt British authority to come from an earlier 'possession'¹¹³ whose origin or rationale was not important.

Relations between the British and the Dutch were significantly altered by the implementation of the Anglo-Dutch Treaty, and in the ordering of relations between these two European states, the interests and legal claims to right of the Malay sultanates involved were, in the main, ignored. When, for example, the moribund British factory of Benkulen in Sumatra was transferred to Dutch control in 1825, the following scene occurred which is worth reporting in full:

At a meeting of chiefs held at Government House at which English and Dutch authorities were both present for the purpose of completing the transfer, the senior rajah rose to address the assembly and spoke to the following effect. 'Against this transfer of my country I must protest. Who is there possessed of authority to hand me and my countrymen, like so many cattle, over to the

¹¹¹Crawford's Report on the negotiations is in Logan (ed.), 'Singapore', 7 *JIA* (1853) beginning on p. 350. The Ratification is reported in *ibid.*, 9 *JIA* (1855), p. 471.

¹¹²Cf. the remarks of the Secretary for Foreign Affairs, George Canning, in the parliamentary debate on the East India Possessions Bill (which became the Act 5 Geo. IV c. 108) in 11 *Hansard* (New Series) col. 1443, 17 June 1824.

¹¹³Cf. the remarks of Mr. Hume, *ibid.* col. 1446.

Dutch or to any other power. If the English are tired of us, let them go away, but I deny their right to hand us over to the Dutch. When the English first came here they asked for and got a piece of land to build warehouses and dwelling houses upon. That piece of ground is still defined by its original stone wall and is all the English have ever got from us. We were never conquered, and now I tell the English and Dutch gentlemen here assembled that, had I the power as I have the will, I would resist this transfer to the knife. I am however a poor man, have no soldiers to cope with yours and must submit. God's Will be done! ¹¹⁴

The morality of this assumption of a right in the two European powers to 'give' each to the other an authority over Malay sultanates which neither possessed was strongly criticised by some European officials even at the time,¹¹⁵ but the basic assumption seems to have triumphed that somehow the European states were in possession of a legal authority or property right in territory which was unquestionably under the immediate control of Malay sultans who were not completely bound by treaty or custom to European wishes.

In commenting on the effect of the Anglo-Dutch Treaty on 1 October 1824, Crawford noted that the terms referring to the cession to the British of 'Malacca and its Dependencies' should, by the arguments of the Dutch in 1818 and 1819, include a cession of Riau. Yet the British agreement to withdraw from all contacts south of the Straits of Singapore would seem to have precluded this interpretation. It was clearly foreseen by Crawford that the assumption by the British and Dutch of some sort of legal superiority to the Malay sultanates in their respective areas as defined by the Anglo-Dutch Treaty was inconsistent with the continued existence as a single political unit of the old Sultanate of Riau-Lingga-Johore, the descendant of the old Malacca Sultanate. In addition to Singapore, the Temenggong seems to have been the effective authority over at least the islands of the

¹¹⁴D.M. Campbell, *Java: Past and Present*, London, 1915, quoted in R.J. Wilkinson, 'More on Bencoolen', 19(1) *JMBRAS* (1941) 101 at p. 103. Cf. Buckley, p. 175. The history recited by the old chief was not accurate. The British had for many decades asserted the powers of a sovereign in Benkulen. It is not proposed to discuss here the British acquisition of Benkulen in detail. The Padang and Benkulen Malays did in fact rebel against Dutch authority almost immediately. D. Woodman, *The Republic of Indonesia*, New York, 1955, p. 58.

¹¹⁵E.g., Captain James Low, Low, 'Account', 4 *JIA* (1850), p. 111: 'But it may truly be asked in this nineteenth century—when international justice is not confined at least in theory, to the mere area of Europe, but is ostensibly held out to the whole world—what right any nation can possibly have to thus barter away extensive countries, with their independent populations. The answer unfortunately seems to be that might and right are still convertible terms in the civilized world—as well as in the savage wilderness'.

Kerimun group, and Crawford stated that his claim to authority there was freely acknowledged by the local Malay chiefs. It was clear that the provisions of the Anglo-Johore Treaty of 1824 forbidding the Temenggong and Husain any correspondence with any 'potentate' during the continuance of their stipends or residence in Singapore Island, would, according to Crawford, legally prevent those chiefs maintaining their control over the Kerimuns, and any co-operation on the part of the British with the Temenggong's attempts to retain control would be construed by the Dutch as a breach of the Anglo-Dutch Treaty, which forbade the conclusion of 'any Treaty' with the chiefs of islands south of the Straits of Singapore by 'British Authority'.¹¹⁶ In practice, Crawford was diligent in assuring that the Temenggong was completely removed from correspondence with the Dutch during his residence in Singapore.

As has been seen, Crawford had denied the right of the Temenggong to communicate with the Dutch even before the conclusion of the August treaty, but the effects of the Anglo-Dutch Treaty on the constitution of Riau-Lingga-Johore were even more far-reaching than might be imagined, as the British and Dutch both chose to regard the Riau-Lingga-Johore chiefs in each other's territory as in fact under the entire control of the European power closest to them. On 14 September 1827 the Dutch informed the Singapore authorities that the Anglo-Dutch Treaty of 1824 had the legal effect of splitting in two the Sultanate of Riau-Lingga-Johore, with the Dutch-protected Sultan in Lingga, henceforward styled merely the 'Sultan of Lingga', remaining the *de jure* authority of his patrimonial territories south of the Straits of Singapore, and Husain, the British-supported Sultan, now considered to be the *de jure* authority in all of the ancestral territory of the Sultanate north of the Straits, including Singapore Island, Pahang and Johore. Acting on this interpretation of the legal effect of the Anglo-Dutch treaty, the Dutch induced their Sultan to occupy the Kerimuns and grant the usual concessions there to the Dutch authorities.¹¹⁷

There is a possibility that this action of the Dutch violated the Anglo-Dutch Treaty's provisions against further restrictions on trade in this area, but the point does not seem to have been pressed by the British at this time

¹¹⁶Logan (ed.), 'Singapore', 7 *JIA* (1853), pp. 356, 357.

¹¹⁷Baker, 'Anglo-Dutch Relations...', 64 *JSBRAS* (1913) 1 at p. 43, letter from the Dutch Resident of Riau to the British Resident of Singapore, 14 September 1827.

though arguments did arise later.¹¹⁸ Husain, making out a claim to sovereignty over the Kerimuns by virtue of his position, supported by the British authorities since 1819, as Sultan of Riau-Lingga-Johore, wrote two letters to Governor Fullerton of Penang¹¹⁹ asking for help, even if only a loan with which to buy arms. In response, Fullerton instructed the British Resident of Singapore that article 12 of the Anglo-Dutch Treaty¹²⁰ forbade the British acting, and that the Singapore authorities should 'abstain from giving any support or assistance to any Native State with which we are connected . . . or interfere with the arrangements of the Netherlands Government in respect to Treaties made by them . . .'. The British Resident of Singapore was further instructed to prevent Husain from attacking the Kerimuns 'by every possible argument'.¹²¹ It is interesting to note that in the reply which the Government of Penang instructed the Resident of Singapore to give to Husain, Husain's asserted obligation to refrain from any intercourse with any political authorities without British permission, and thus, *a fortiori*, to abstain from any military expeditions, was claimed to be based on the terms of the Raffles Treaty of February 1819.¹²² Further grounds on which Husain's proposed expedition to the

¹¹⁸Article 3 of the Anglo-Dutch treaty of 1824 said: '... no Treaty hereafter made by Either [Party] with any Native Power in the Eastern Seas, shall contain any Articles tending to exclude the Trade of the other Party from the Ports of such Native Power...'.
 The Spice Islands at the Eastern reaches of the Indonesian Archipelago were excluded from the operation of this undertaking by article 7. The Dutch undoubtedly felt that the restrictions they imposed in the Kerimuns were extensions of the pre-existing obligations of the Riau Sultanate to territory always under the *de jure* rule of Riau although temporarily *de facto* controlled illegally by the Temenggong in Singapore. Thus the restrictions were not 'hereafter', but the application of pre-existing provisions to territory already legally bound by them. A second, and interesting, argument advanced by the Dutch was that ultimate 'sovereignty' in all the sultanates in the 'Dutch' area under the treaty of 1824 lay in the Dutch and not in the 'Native Powers' at all. Thus, they argued, the exclusion of the British merchants from those parts was no violation of article 3 because no 'Native Power' was involved. Logan (ed.), 'Singapore', 9 *JIA* (1855), p. 472, Crawford's Report of 25 June 1825. This latter Dutch argument appears to rest bluntly on an underlying implication that the Malay sultans were not the sovereign equals of the Europeans active in the area, but one may wonder if the British negotiators of article 3 shared the Dutch view of these legal relations. If not, and if the Dutch had not made their views clear in the negotiations, then the Dutch argument would seem to be weak as a matter of treaty interpretation. The question was not one of abstract law, but of determining what the parties had agreed to.

¹¹⁹Baker, pp. 57-9. For Fullerton's relations with the Resident of Singapore at this time, see below.

¹²⁰This article said: '... His Britannick Majesty... engages that no British Establishment shall be made... on any of the other Islands South of the Strait of Singapore, nor any Treaty concluded by British Authority with the Chiefs of those Islands'.

¹²¹Baker, pp. 59-60, letter of 15 November 1827.

¹²²*Ibid.* pp. 60-1, letter of 27 November 1827; cf. *ibid.* p. 54. The reason why the earlier treaty, which was, of course, superseded in 1824, was cited is not known. Perhaps news of the Supreme Government ratifying the later one had not yet arrived in Penang. On the other hand, the treaty of 1819 was never ratified.

Kerimuns was supposed to be forbidden appear to have been found in the assertion that he had 'been suspected of some concern in piracy', and 'piracy' was to be suppressed. It is not clear whether an expedition to get control of the Kerimuns, unauthorized by British officials, was to be considered to be itself piratical, but it seems that the followers of Husain in the struggle over control over those islands were in fact classified 'pirates'. It may be noted that although Husain was apparently exempted from this classification, as Fullerton declared that aside from his treaty obligations to the British, he must be considered 'to be an independent Sovereign', no distinction was made between those of his followers acting under his direct orders in support of his political pretensions and those who had withdrawn their allegiance and acted for mere personal profit.¹²³ Thus, although the British construed themselves to have the right in customary international law to strip Husain's supporters from him, leaving him powerless to exercise his authority south of the Straits of Singapore, the shell of a classification as *de jure* leader of the entire Riau-Lingga-Johore Sultanate was maintained.

As to the actions of Husain himself, Fullerton was less than clear. He considered Husain to be precluded from conducting hostilities against the Dutch (for so he considered the authority in the Kerimuns to be, apparently *de jure*, although the statement was left unsupported by reference to facts or the legal effects of the Anglo-Dutch Treaty or any other engagement), while he, Husain, continued to 'reside' in Singapore (although 'residence' was left undefined in the minute). This preclusion Fullerton considered to be based on general principles of 'the Law of Nations'. Nonetheless, Fullerton felt the right of Husain to continue to be in a state of belligerency with the authorities of the Kerimuns to be undeniable. Fullerton considered that British responsibility for Husain's activities stopped only when and if Husain gave up his residence in British territory. But he saw that the Dutch interpretation of the Anglo-Dutch Treaty did involve sundering the polity of Riau-Lingga-Johore into two parts, each with its European-supported Sultan, and he conceived that the existence of a Malay authority which crossed the lines of the European division of areas of European action was, even if legally possible, in practice impossible because of the Dutch interpretation of their powers under the Anglo-Dutch agreement of 1824.¹²⁴

¹²³Baker, pp. 61 et seq., minute by Fullerton dated 27 November 1827, at p. 61.

¹²⁴Fullerton did not mention the British contribution to this idea, but apparently felt compelled by the treaty to hinder Husain's attempts to assert any authority in the Dutch area.

Fullerton believed that the Dutch would attempt to expand their control to the whole of the Malay Archipelago south of Singapore, and, since the British seemed to feel bound by the treaty of 1824 to abstain from any interference in this activity, the Dutch would be successful. He urged that the British course be that of large-scale intervention in the affairs of the Malay Peninsula to secure for British interests there the same advantages the Dutch forward policy in the Archipelago seemed to promise to secure for Dutch interests.¹²⁵

On 11 April 1827 the Court of Directors in London wrote to Fullerton that Riau had not been in the contemplation of the negotiators of the Anglo-Dutch Treaty of 1824 as part of the 'dependencies of Malacca' to be considered as ceded to the British with that town, and some time later declined to accept Fullerton's recommendation that the British adopt the Dutch practice within 'their' area by interfering in the internal affairs of the peninsular polities.¹²⁶ Husain was defeated by the Dutch in the Kerimuns; it does not appear that the British in fact either helped or hindered either party.¹²⁷ Thus it appears that the old Sultanate of Riau-Lingga-Johore was to be split into two by the action of the Dutch and the inaction of the British, each behaving in accordance with his interpretation of his rights and obligations to the other under the Anglo-Dutch Treaty of 1824.

The principal effect of these developments within the Malay sultanates themselves was noted in Pahang, where the Bendahara of the old Riau-Lingga-Johore Sultanate had effective control. When it became apparent to the Bendahara that he could, by denying Husain's legal position as Sultan of Riau-Lingga-Johore, regard himself as subordinate to no higher authority, he did so. The Bendahara of Pahang had never been subordinate to the Temenggong of Johore, nor had he ever acknowledged Husain to be the rightful Sultan of Riau-Lingga-Johore after his initial attempt to have Husain installed in 1811. To free himself of the title of the Dutch-supported Sultan of Lingga, he seems to have construed to his own benefit the terms of an engagement between that ruler and the Dutch by which the

¹²⁵Baker, pp. 62, 64, 66. This whole minute has many obscure points of legal assertion which seem to rest on no known authority and no explicit line of reasoning. The practical point was clear: Husain, while he remained in Singapore, was to be kept harmless. Once he left Singapore he was not to be interfered with unless he took to 'piracy', in which case his followers might be put down. The word 'piracy' was, of course, left undefined.

¹²⁶P.N. Tarling, 'British Policy towards the Dutch and the Native Princes in the Malay Archipelago, 1824-1871', Ph. D. Dissertation 2914, Cambridge University Library, 1956, pp. 21, 23.

¹²⁷Logan (ed.), 'Singapore', 2 *JLA* (NS) (1858), pp. 55-60.

Sultan of Lingga agreed to abdicate his authority north of the Straits of Singapore.¹²⁸

The situation in the Menangkabau territories, which had from ancient times paid some sort of acknowledgment to the authority of the rulers of the Malacca, and then Riau-Lingga-Johore, Sultanates, but which had never allowed that acknowledgment to carry any significant degree of actual control to the Sultan in Menangkabau territory, and which had never permitted the sultans to cede the supposed control which this acknowledgment of 'authority' was occasionally argued to evidence, was unclear at this time.

In Johore, although in the treaties of 1819, 1823 and 1824 the Temenggong accepted a subordinate rank and lesser stipend than Husain it seems that the Temenggong in fact retained full control of Johore.¹²⁹ He died in Singapore in 1825, and was soon succeeded by his second son, Ibrahim, an exceptionally able competitor in this harsh world of commercial and political intrigue. Ibrahim retained full control over Johore to the exclusion of Husain.¹³⁰

In the Kerimun intrigues, Ibrahim did not support Husain, but, in September 1827, attempted to get support from the Sultan of Lingga for his own claims to authority there.¹³¹ In the absence of evidence to the contrary, it appears that Ibrahim did not take an active part in the later Kerimun troubles, and it may be that he felt it the wiser course to acquiesce in Dutch authority there growing out of their arrangements with the Sultan of Lingga than to take common cause with Husain who, if he were successful, would most likely have asserted authority in Johore as well as in the Kerimuns to the detriment of what Ibrahim must have felt to be both his right and his interest.

Thus, the effect of the Anglo-Dutch treaty of 1824 and the events immediately following seems indeed to have been to split the old Riau-Lingga-Johore Sultanate in two parts. That part south of the Straits of Singapore was taken over by the Dutch by virtue of their control over the Sultan of Lingga, whom they considered the rightful *de jure* authority

¹²⁸Burney, Vol. II, Part V. p. 7. report of the British Resident of Malacca, 4 October 1825. Cf. Marks, p. 230. The text, if any exists, of the arrangement between the Dutch and Abdu'r-Rahman, the Sultan of Lingga, seems to be unavailable in normal sources.

¹²⁹Logan (ed.), 'Singapore', 2 *JIA* (NS) (1858), pp. 61-62.

¹³⁰Swettenham, pp. 86-7; Winstedt, 'Johore', p. 89. The Temenggong had originally been succeeded by his eldest son, who appears to have been unstable. Ibrahim was firmly in control by the end of 1826. Tarling, p. 16 note 4.

¹³¹*Ibid.* p. 17 note 1.

there under themselves despite the evidence that in the Kerimuns at least he had had no effective authority for many years, and that part to the north of the Straits of Singapore was fragmented.

The actual resolution of the problems raised by the relations between Husain and Ibrahim belongs to a later period, and here it is necessary merely to note the conflicting claims arising from the British interposition of a '*de jure*' Sultan of Singapore-Johore whose right to that title seems to have had little base in Malay law. It is clear that Raffles's 'recognition' of Husain's 'rights' was part of his attempt to undercut Dutch claims to legal authority in Singapore and Johore which they asserted through their control of the Sultan of Lingga. Having achieved the benefit of this recognition in the Anglo-Dutch negotiations which culminated in the treaty of 1824, it was the British expectation that the embarrassing factor would disappear and Husain's family would sink to the level of other minor Malay claimants to authority in the Malay world and that the termination of the British obligation to pay Husain his life pension would end British responsibility in his dynastic affairs.¹³² When the Temenggong had died in 1825, the British had continued paying a portion of his 'life' pension to his children, probably finding it expedient to remain on good terms with the *de facto* ruler of Johore and to avoid the troubles that might ensue should Husain have found himself able to press his claims in Johore against well-established authority solely because of the inability of that authority to arm itself.¹³³

¹³²Cf. *ibid.* pp. 81-3.

¹³³Logan (ed.), 'Singapore', 2 *JIA* (NS) (1858), p. 61. The significance of this British flexibility in terminating one pension while continuing the other was great in later events, but for present purposes it is interesting merely as an indication of the intermixing in the political affairs of the Peninsula to which the British were fated, despite frequent disclaimers, as a result of the activities of the 'Empire Builders' in the earliest days of British territorial advance in the Malay area. British ideas of international law as applicable in the Malay area have been indicated already with sufficient comment to make it unnecessary to dwell on the point further.

CHAPTER X

Conclusions

TYING UP THE LOOSE ENDS

THE constitutional relation of Singapore to the Government of Penang was finally clarified in 1826. It may be remembered that Penang was denominated a fourth Presidency of India in 1805. It may also be remembered that Raffles had acted in his capacity as the chief British authority in Benkulen when founding Singapore, and the first British administrative subordination of Singapore was to the authority in Benkulen. But the subordination of Singapore to Benkulen had been the source of considerable ill-will between Singapore officials and those of Penang, who naturally felt that their authority was being circumvented in their own area by the activities of Raffles.¹ The relation between the Resident of Singapore, an appointee of the Governor-General of India, and Raffles, as Lieutenant-Governor of Benkulen, was the subject of some dispute in 1823. The result was the replacement of the first Resident, William Farquhar, by Raffles himself, and the dispatching of John Crawfurd to succeed him. Shortly after Crawfurd's arrival Raffles and his party left Singapore for the last time. On 11 June 1823 Raffles wrote that he had resigned all charge of Singapore to Crawfurd, and in Singapore's later correspondence, Raffles's name does not appear as Crawfurd apparently corresponded directly with the Indian authorities at Bengal from his first arrival.²

¹Although Raffles held the title of 'Lieutenant-Governor', and was directly subordinate to the Governor-General of India in his capacity as Governor of the Presidency of Bengal, Benkulen's 'normal' status was that of a mere Factory under a mere Resident. See the Act of Parliament of 24 March 1802, 42 Geo. III c. 29. Raffles's appointment as Lieutenant-Governor was exceptional and was made only because of his previous post having been that of Lieutenant-Governor of Java (1811-16) and no other post of equivalent rank being open to him in 1818. Wurtzburg, p. 423. On the jealousy of Penang, see *ibid.* pp. 505 et seq.

²*Ibid.* pp. 639, 641, 657. Logan writes that Singapore was placed directly under Bengal with the arrival of Crawfurd on 1 May 1823. Logan (ed.), 'Singapore', 9 *JIA* (1855), p. 456. Since Raffles continued to exercise authority by promulgating regulations in Singapore without Crawfurd's approval until just before his departure, this is in fact doubtful. See Raffles, *Memoir*, Appendix, pp. 39-73, especially the letter on p. 62 dated 6 June 1823, in which Raffles states that Singapore is, for the time being, still a dependency of Benkulen. See also paragraph 23 on p. 65. When Crawfurd altered some of the regulations later that year,

After the Anglo-Dutch treaty of 17 March 1824, Singapore and Malacca were placed under the control of the East India Company;³ in effect the constitutional relations of Singapore were not altered. Malacca came under an interim administration in April 1825.⁴ On 5 July 1825 a new Act of Parliament allowed for re-ordering the entire administration of the three Settlements of Penang, Malacca and Singapore by authorizing the East India Company to place all three under a single government.⁵ In 1826 the three Settlements were united under the Penang Government, and Fullerton was appointed the first Governor of 'The Incorporated Settlements of Prince of Wales's Island, Singapore and Malacca'.⁶ On 30 June 1830, the Incorporated Settlements were reduced in rank from a Presidency of India to a mere Residency, and the administrative staff cut to the bone. The Residency was made subordinate to the Presidency of Bengal of which the Governor-General of India was also President.⁷ Under the new arrangement, the name of the 'Incorporated Settlements' was changed to the 'Straits Settlements'.⁸ In 1832 the seat of government was shifted from Penang to Singapore.⁹

The lack of formal admiralty jurisdiction in Penang, which Governor Fullerton had found both hampering and liberating in making it both difficult for him to extend the operation of the British municipal law of piracy to events within his area of interest and rendering him a justification

however, Raffles wrote and protested on 1 December 1823, to the Governor-General in India and did not seem to feel that his authority still extended to Singapore directly. Logan (ed.), 'Singapore', 9 *JLA* (1855), p. 457.

³Act of 24 June 1824, 5 Geo. IV c. 108.

⁴Low, 'Account', 4 *JLA* (1850), p. 113.

⁵6 Geo. IV c. 85, paragraph xxi.

⁶Buckley, p. 194.

⁷Pitt's Act, paragraphs 19, 22; Independent Powers of Governors Act, 1793, 33 Geo. III c. 32, paragraph 10.

⁸Kyshe, Vol. I, p. lxix. The 'Governor' of Penang became a 'Resident' or 'Commissioner', and the chief local officers in Penang and Malacca became 'Deputy Residents'. In Singapore, the chief officer was called 'First Assistant Resident'. Fullerton, upon being reduced to Resident from Governor interpreted the instructions in what appears to have been an unnecessarily legalistic manner, holding that with the changes in title the power delegated to the principal officers of government under the Charter of Justice issued to the Incorporated Settlements on 27 November 1826 ceased to have legal effect. Ibid. pp. lxi-lxii, lxix. The London authorities told Fullerton of his error in interpretation and the law courts of the three settlements began once again to operate after Fullerton was relieved of his duties on 9 June 1832, having been closed for nearly two years. The old titles were in any case revived in 1832, apparently to avoid confusion in future. Ibid. p. lxxii; Yeap Cheah Neo and ors. v. Ong Cheng Neo (1873), ibid. 326, appealed ibid. 337, L.R. 6 P.C. 381, especially pp. 392 et seq. See also R. St. J. Braddell, *The Law of the Straits Settlements: A Commentary*, Singapore, 1915, pp. 25-7. A layman's account of this affair is Mills, 'British Malaya 1824-1867', at p. 88.

⁹PP, Reports from Committees: East India Company's Affairs I-Public, No. 735-I, Appendix (o.) of 1832, 1831-2 LX 776 et seq. at p. 780, Public Letter from the Government to Bengal, 25 May 1830, approved by the Court of Directors, 23 February 1831.

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acceptable to his superiors for engaging in military action in the Peninsula, was ended a few years later.¹⁰ As might have been expected, British judges did not take the same liberties in interpreting the law of piracy that the British administrators had. A claimant to the Kedah Sultanate was acquitted of the charge in 1840 in Penang in circumstances similar to those in the affair of Nakhoda Udin, much to the displeasure of the Governor, but that too is a different story.¹¹

CONCLUDING OBSERVATIONS

THERE are opinions expressed and indeed facts brought to light in this book which are certain to surprise many people. But an understanding of how we interpret facts to our own satisfaction deepens our understanding of ourselves as well as our understanding of history. Nobody should be offended by having his ancestors' weaknesses revealed as human and universal; we are all in the same position in that regard. The Malay rulers' lack of foresight and lack of flexibility are more than matched by the European penchant for using the words and concepts of international law to justify in a multitude of legalistic generalities acts that could not be reconciled with the rules of international law that were held to apply in Europe. Whether the vice of pettiness is more or less reprehensible than the vice of hypocrisy I leave to others to argue. Neither vice, nor any other vice revealed in these pages, is restricted in time, nationality or place; all are part of the human condition.

By 1830 the international law of piracy had been so perverted that the confusions introduced by political officers of government applying that law to cases outside its traditional narrow legal limits have still not been fully resolved. The political use of the concept of piracy has still not fully disappeared.

By 1830 the concept of paramountcy had reached the dignity of a legal principle in action. Not until the Malayan Union of 1946 abolished the distinction between the Federated and Unfederated Malay States did the concept become irrelevant to affairs in Malaya, and not until India became independent did the concept of paramountcy expire as an express justifica-

¹⁰An Act of Parliament was necessary, 6 & 7 Wm. 4 c. 53 of 1836, followed by Letters Patent dated 25 February 1837 proclaimed in the Court on 23 October of that year. See Kyshe, Vol. I, p. lxxix; R. St.J. Braddell, p. 32.

¹¹R. v. Tunkoo Mohamed Saad and ors., Kyshe, Vol. II, pp. 18 et seq. See Burney, Vol. III. Part II, pp. 444 et seq., and Vol. V, *passim*, especially p. 11.

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tion for asserting rights over 'independent' sovereigns who neither expressly nor impliedly conceded those rights.

By 1830 the political future of the Malay Peninsula was clear. Thailand had withdrawn its claims to authority over the sultanates south of Kedah on the west coast and Kelantan on the east. No European power threatened British assertions of right over the sultanates from the Thai satrapies to Singapore. Assuming continued aggressive traders and proud officials in the three British enclaves of Penang, Malacca and Singapore eventual British dominion over the entire Peninsula was foreseeable. Assuming continued adaptation of the Temenggong of Johore, his rise in prestige and power among the Malays of the Peninsula was clear. Assuming continued concentration on internal disputes and the pride and willingness to appeal for outside help of the other Malay rulers, the course of British conquest and its difficulties and battles had already begun to emerge.

By 1830 even the possibility that Thailand would be able to maintain its independence against European pressures could have been suspected. The speed with which the Thai learned to negotiate with the British and Portuguese was astounding. The world of the nineteenth century into which Thailand emerged after a retreat of over a hundred years was vastly different from the world of 1688. But the challenge was already being met by the intelligence and perceptiveness of the Thai rulers, the unity of Thai political organization, the relative remoteness of Thailand itself, and, above all, the willingness of the Thai to abandon those claims of right which, however valid the Thai may have felt them, were impossible to defend against the strong emotions and stronger military forces of their European neighbours. These advantages, coupled with a great sense of when a strong resistance was possible, as shown in the case of commercial concessions and Kedah, led the British in India and London to treat Thailand as if it were in the same legal position as a European country. Thai military force was just strong enough to inhibit British frontier officials forcing a direct confrontation. All these factors were demonstrated by 1830.

There is no room in the story for condemnations. It was pointed out that British violations of international law as propounded in Europe were rare. In the most egregious instance, the British acquisition of Penang, taking British actions in context it is possible to conclude, as was done, that the Sultan of Kedah had taken a calculated risk and lost. He was apparently not surprised by British perfidy, nor can it be expected that he

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would have acted otherwise himself had the positions been reversed. The ruse was a respected part of statecraft in Malay culture.

It is probably fortunate that alternative histories cannot be known. Had Light been a man of more probity, had Raffles been less energetic, or, to broaden the perspective, had affairs in Europe not been such as to make it seem desirable for the British first to take possession of Dutch administrations in South-East Asia and then to give them back, or had Stadtholder William been less complaisant in 1795 or 1819 or 1824, the history of the Malay Peninsula might have been far different. But intellectual history, the history of the ideas that shape events rather than the history of events and their material causes, does not depend upon personality. Thus there is no cause to recite here the normal balanced conclusion that in the long run British dominance was probably beneficial for the people of the Malay Peninsula. As an arena for the interplay of ideas in action the Peninsula existed on a different plane.

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