Cour internationale
de Justice

LA HAYE

ANNÉE 2001

Audience publique

tenue le lundi 25 juin 2001,
à 10 heures, au Palais de la Paix,

sous la présidence
de M. Guillaume, président

en l'affaire relative à la Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)

Requête à fin d'intervention déposée par la République des Philippines

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COMPTE RENDU

Présents :

M.	Guillaume, président	
MM.	Oda	
	Bedjaoui	
	Ranjeva	
	Fleischhauer	
	Koroma	
	Vereshchetin	
Mme	Higgins	
MM.	Parra-Aranguren	
	Kooijmans	
	Rezek	
	Al-Khasawneh	
	Buergenthal, juges	
MM.	Weeramantry	
	Franck, juges *ad hoc*	
M.	Couvreur, greffier	

International Court
of Justice

THE HAGUE

YEAR 2001

Public sitting

held on Monday 25 June 2001,
at 10 a.m., at the Peace Palace,

President Guillaume,
presiding

in the case concerning
Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)

Application for permission to intervene filed by the Republic of the Philippines

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VERBATIM RECORD

Present:

President	Guillaume
Judges	Oda
	Bedjaoui
	Ranjeva
	Fleischhauer
	Koroma
	Vereshchetin
	Higgins
	Parra-Aranguren
	Kooijmans
	Rezek
	Al-Khasawneh
	Buergenthal
Judges *ad hoc*	Weeramantry
	Franck
Registrar	Couvreur

Le Gouvernement de la République des Philippines est representé par :

S. Exc. M. Eloy R. Bello III, ambassadeur de la République des Philippines aux Pays-Bas,

comme agent;

M. Merlin M. Magallona, sous-secrétaire au ministère des affaires étrangères,

comme coagent et conseil;

M. W. Michael Reisman, professeur à la faculté de droit de Yale,

comme conseil et avocat;

M. Peter Payoyo, de l'Université des Philippines,

comme conseil;

M. Alberto A. Encomienda, secrétaire général du centre des affaires océaniques et maritimes du ministère des affaires étrangères,

M. Alejandro B. Mosquera, secrétaire adjoint au bureau des affaires juridiques du ministère des affaires étrangères,

M. George A. Eduvala, attaché à l'ambassade de la République des Philippines aux Pays-Bas,

M. Eduardo M.R. Meñez, deuxième secrétaire à l'ambassade de la République des Philippines aux Pays-Bas,

M. Igor G. Bailen, directeur par intérim du bureau des affaires juridiques du ministère des affaires étrangères,

comme conseillers.

The Government of the Republic of the Philippines is represented by:

H. E. Mr. Eloy R. Bello III, Ambassador of the Republic of the Philippines to the Kingdom of the Netherlands,

as Agent;

Mr. Merlin M. Magallona, Under-Secretary of Foreign Affairs, Government of the Republic of the Philippines,

as Co-Agent and Counsel;

Professor W. Michael Reisman, Yale Law School,

as Counsel and Advocate;

Dr. Peter Payoyo, University of the Philippines,

as Counsel;

Mr. Alberto A. Encomienda, Secretary-General, Maritime and Ocean Affairs Center, Department of Foreign Affairs,

Mr. Alejandro B. Mosquera, Assistant Secretary, Office of Legal Affairs, Department of Foreign Affairs,

Mr. George A. Eduvala, Attaché, Embassy of the Republic of the Philippines in the Netherlands,

Mr. Eduardo M. R. Meñez, Second Secretary, Embassy of the Republic of the Philippines in the Netherlands,

Mr. Igor G. Bailen, Acting Director, Office of Legal Affairs, Department of Foreign Affairs,

as Advisers.

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Le Gouvernement de la République d'Indonésie est representé par :

S. Exc. M. Hassan Wirajuda, directeur général des affaires politiques,

comme agent;

S. Exc. M. Abdul Irsan, ambassadeur d'Indonésie aux Pays-Bas,

comme coagent;

M. Alain Pellet, professeur à l'Université de Paris X-

The Government of the Republic of Indonesia is represented by:

H. E. Dr. N. Hassan Wirajuda, Director General for Political Affairs

as Agent;

H. E. Mr. Abdul Irsan, Ambassador of Indonesia to the Kingdom of the Netherlands

as Co-Agent;

Mr. Alain Pellet, Professor at the University of Paris

Nanterre, membre de la Commission du droit international,

M. Rodman R. Bundy, avocat à la cour d'appel de Paris, membre du barreau de New York, cabinet Frere Cholmeley/Eversheds, Paris,

comme conseils et avocats;

M. Alfred H. A. Soons, professeur de droit international public à l'Université d'Utrecht,

Mme Loretta Malintoppi, avocat à la cour d'appel de Paris, membre du barreau de Rome, cabinet Frere Cholmeley/Eversheds, Paris,

M. Charles Claypoole, *Solicitor* à la Cour suprême d'Angleterre et du Pays de Galles, cabinet Frere Cholmeley/Eversheds, Paris,

comme conseils;

M. Hasyim Saleh, chef adjoint de la mission à l'ambassade d'Indonésie à La Haye,

M. Donnilo Anwar, directeur des traités et des affaires juridiques au ministère des affaires étrangères,

Le général de division Djokomulono, assistant pour les questions de territoire auprès du chef d'état-major chargé des affaires territoriales, quartier général des forces armées indonésiennes,

Le contre-amiral Yoos F. Menko, assistant auprès du chef d'état-major pour les affaires générales (service de renseignements), quartier général des forces armées indonésiennes,

M. Kria Fahmi Pasaribu, ministre conseiller à l'ambassade d'Indonésie à La Haye,

M. Eddy Pratomo, chef de la sous-direction des traités territoriaux au ministère des affaires étrangères,

M. Abdul Kadir Jaelani, fonctionnaire à l'ambassade d'Indonésie à La Haye,

comme conseillers.

X-Nanterre, Member of the International Law Commission,

Mr. Rodman R. Bundy, Avocat à la Cour d'appel de Paris, Member of the New York Bar, Frere Cholmeley/Eversheds, Paris

as Counsel and Advocates;

Mr. Alfred H. A. Soons, Professor of Public International Law, Utrecht University,

Ms Loretta Malintoppi, Avocat à la Cour d'appel de Paris, Member of the Rome Bar, Frere Cholmeley/Eversheds, Paris,

Mr. Charles Claypoole, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley/Eversheds, Paris,

as Counsel;

Mr. Hasyim Saleh, Deputy Chief of Mission, Embassy of the Republic of Indonesia, The Hague,

Mr. Donnilo Anwar, Director for Treaties and Legal Affairs, Department of Foreign Affairs,

Mr. Major General Djokomulono, Territorial Assistant to Chief of Staff for Territorial Affairs, Indonesian Armed Forces Headquarters,

Mr. Rear-Admiral Yoos F. Menko, Intelligent Assistant to Chief of Staff for General Affairs, Indonesian Armed Forces Headquarters,

Mr. Kria Fahmi Pasaribu, Minister Counsellor, Embassy of the Republic of Indonesia, The Hague,

Mr. Eddy Pratomo, Head of Sub-Directorate for Territorial Treaties, Department of Foreign Affairs,

Mr. Abdul Kadir Jaelani, Officer, Embassy of the Republic of Indonesia, The Hague

as Advisers.

Le Gouvernement de la Malaisie est représenté par :

S. Exc. M. Tan Sri Abdul Kadir Mohamad, secrétaire général du ministère des affaires étrangères,

comme agent;

S. Exc. Mme Noor Farida Ariffin, ambassadeur de la

The Government of Malaysia is represented by:

H. E. Tan Sri Abdul Kadir Mohamad, Secretary General of the Ministry of Foreign Affairs,

as Agent

H. E. Ms Noor Farida Ariffin, Ambassador of

Malaisie aux Pays-Bas,

comme coagent;

Sir Elihu Lauterpacht, C.B.E., Q.C., professeur honoraire de droit international à l'Université de Cambridge, membre de l'Institut de droit international,

M. Jean-Pierre Cot, professeur émérite à l'Université de Paris 1, avocat aux barreaux de Paris et de Bruxelles,

M. James Crawford, S.C., F.B.A., professeur de droit international à l'Université de Cambridge, titulaire de la chaire Whewell, membre de la Commission du droit international,

M. Nico Shrijver, professeur de droit international à l'Université libre d'Amsterdam et à l'Institut d'études sociales de La Haye, membre de la Cour permanente d'arbitrage,

comme conseils et avocats;

Datuk Heliliah Yusof, *Solicitor General* de la Malaisie,

Mme Halima Hj. Nawab Khan, *Attorney General* par intérim de l'Etat du Sabah (Malaisie),

M. Athmat Hassan, juriste au cabinet de l'*Attorney General* de l'Etat du Sabah (Malaisie),

comme conseils;

S. Exc. M. Hussin Nayan, ambassadeur, sous-secrétaire au département des affaires territoriales et maritimes du ministère des affaires étrangères,

M. Muhamad bin Mustafa, directeur général adjoint du département de la sécurité nationale, cabinet du premier ministre,

comme conseillers;

M. Zulkifli Adnan, secrétaire adjoint principal au département des affaires territoriales et maritimes du ministère des affaires étrangères,

M. Raja Aznam Nazrin, conseiller de l'ambassade de la Malaisie aux Pays-Bas,

M. Nik Aziz Nik Yahya, premier secrétaire de l'ambassade de la Malaisie aux Philippines,

M. Tan Ah Bah, sous-directeur principal de la topographie du service des frontières, département de la topographie et de la cartographie de la

Malaysia to the Kingdom of the Netherlands,

as Co-Agent;

Professor Sir Elihu Lauterpacht C.B.E., Q.C., Honorary Professor of International Law, University of Cambridge, Member of the *Institut de Droit International*,

Professor Jean-Pierre Cot, Emeritus Professor, Université de Paris I, Advocate, Paris and Brussels Bars,

Professor James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, Member, International Law Commission,

Professor Nico Schrijver, Professor of International Law, Free University Amsterdam and Institute of Social Studies, The Hague; Member of the Permanent Court of Arbitration,

as Counsel and Advocates;

Datuk Heliliah Yusof, Solicitor-General of Malaysia,

Mrs. Halima Hj. Nawab Khan, Acting State Attorney-General of Sabah, Malaysia,

Mr. Athmat Hassan, Legal Officer, Sabah State Attorney-General's Chambers, Malaysia,

as Counsel;

H. E. Ambassador Hussin Nayan, Under-Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs, Malaysia,

Mr. Muhamad bin Mustafa, Deputy Director-General, National Security Division, Prime Minister's Department, Malaysia,

as Advisers;

Mr. Zulkifli Adnan, Principal Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs, Malaysia,

Mr. Raja Aznam Nazrin, Counsellor of the Embassy of Malaysia in the Netherlands,

Mr. Nik Aziz Nik Yahya, First Secretary of the Embassy of Malaysia in the Philippines,

Mr. Tan Ah Bah, Principal Assistant Director of Survey, Boundary Division, Department of Survey and Mapping, Malaysia,

Malaisie,

Mme Haznah Md. Hashim, secrétaire adjoint au département des affaires territoriales et maritimes du ministère des affaires étrangères,

M. Shaharuddin Onn, secrétaire adjoint au département des affaires territoriales et maritimes du ministère des affaires étrangères,

comme personnel administratif.

Malaysia,

Ms Haznah Md. Hashim, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs, Malaysia,

Mr. Shaharuddin Onn, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs, Malaysia,

as administrative staff.

Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte. La Cour se réunit aujourd'hui pour entendre, conformément au paragraphe 2 de l'article 84 de son Règlement, les plaidoiries de la République des Philippines et des Parties sur la question de savoir si dans l'affaire relative à la *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)*, la requête à fin d'intervention déposée le 13 mars 2001 par le Gouvernement des Philippines en vertu de l'article 62 du Statut, doit être admise.

Le vice-président Jiuyong Shi et le juge Géza Herczegh, pour des raisons dont ils m'ont dûment fait part, ne peuvent être présents aujourd'hui sur le siège.

En raison de son état de santé, le juge Thomas Buergenthal se voit provisoirement imposer l'usage d'un fauteuil roulant et a dû par suite prendre place sur le siège de la Cour de manière adaptée aux circonstances.

L'instance en l'affaire relative à la *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)* a été introduite par la notification à la Cour, le 2 novembre 1998, d'un compromis signé le 31 mai 1997 entre la République d'Indonésie et la Malaisie en vue de soumettre à la Cour un différend entre les deux Etats relatif à la souveraineté sur ces deux îles de la mer des Célèbes.

La Cour ne comptant pas sur le siège de juge de nationalité indonésienne ou malaisienne, les deux Parties ont exercé la faculté que leur confère l'article 31 du Statut de désigner un juge *ad hoc*. L'Indonésie avait désigné M. Mohamed Shahabuddeen. Celui-ci ayant démissionné de ses fonctions de juge *ad hoc* à la date du 20 mars 2001, elle a désigné M. Thomas Franck pour le remplacer. La Malaisie a pour sa part désigné M. Christopher Gregory Weeramantry.

L'article 20 du Statut de la Cour dispose que «Tout membre de la Cour doit, avant d'entrer en fonction, prendre l'engagement solennel d'exercer ses attributions en pleine impartialité et en toute conscience.» Cette disposition est applicable aux juges *ad hoc*, en vertu du paragraphe 6 de l'article 31 du Statut. Conformément à l'article 4 du Règlement, une telle déclaration doit être faite lors de la première séance publique à laquelle le juge concerné assiste. La présente audience étant la première en l'affaire, j'inviterai les juges Weeramantry et Franck, suivant l'ordre de préséance, à faire cette déclaration dans quelques minutes. Auparavant, je souhaiterais dire quelques mots de la carrière et des qualifications de ces deux juges.

M. Christopher Gregory Weeramantry, de nationalité sri-lankaise, est bien connu de ce prétoire. Pendant neuf années, il siégea à cette table en qualité de membre, puis de vice-président, de la Cour. Avant d'entrer en fonctions à la Cour en 1991, il avait déjà derrière lui une longue et brillante carrière frappée du sceau de la diversité. Après avoir consacré vingt-cinq années au service de la justice dans son pays d'origine en qualité d'avocat, puis de juge à la Cour suprême de Sri Lanka, M. Weeramantry avait rejoint le monde universitaire qu'il n'a jamais vraiment quitté depuis lors. En 1972, il fut nommé professeur de droit, titulaire de la chaire sir Hayden Starke, à la *Monash University* de Melbourne (Australie) et fut par la suite appelé à enseigner en qualité de professeur invité ou titulaire dans diverses universités. Après son départ de la Cour l'année dernière, M. Weeramantry est retourné au monde de l'enseignement et de la recherche. Il est l'auteur de très nombreuses publications dont d'importantes monographies. Il est en outre associé de l'Institut de droit international et

membre de nombreuses autres sociétés savantes.

M. Thomas Franck, de nationalité américaine, est professeur de droit à la faculté de droit de l'Université de New York depuis 1962 et directeur du *Center for International Studies* de cette même faculté depuis 1965. Il est également un habitué de cette grande salle de Justice, ayant notamment été conseil du Gouvernement du Tchad en l'affaire du *Différend territorial (Jamahiriya arabe libyenne/Tchad)* et conseil du Gouvernement de la Bosnie-Herzégovine en l'affaire relative à l'*Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie)*. Il a aussi exercé les fonctions de conseil ou de conseiller juridique d'un certain nombre d'autres gouvernements. Il est l'auteur d'un grand nombre de publications; je mentionnerai en particulier le cours général de droit international public qu'il a donné à l'Académie de droit international de La Haye en 1993. M. Franck a par ailleurs été rédacteur en chef de l'*American Journal of International Law* et est encore membre du conseil scientifique de plusieurs revues importantes. Il est également membre de nombreuses sociétés savantes dont l'Institut de droit international.

J'inviterai maintenant MM. Weeramantry et Franck à prendre l'engagement solennel prescrit par le Statut et je demanderai à toutes les personnes présentes à l'audience de bien vouloir se lever. Monsieur Weeramantry.

M. WEERAMANTRY: «I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.»

Le PRESIDENT: Je vous remercie. Monsieur Franck.

M. FRANCK: «I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.»

Le PRESIDENT: Je vous remercie. Veuillez vous asseoir. Je prends acte des déclarations solennelles faites par MM. Weeramantry et Franck, et je les déclare dûment installés en qualité de juges *ad hoc* en l'affaire relative à la *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)*.

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Je rappellerai maintenant que l'instance a été introduite le 2 novembre 1998 dans la notification par l'Indonésie et la Malaisie d'un compromis visant à soumettre à la Cour un différend entre les deux Etats relatif à la souveraineté sur ces deux îles. Par ordonnance en date du 10 novembre1998, la Cour a fixé au 2 novembre 1999 et au 2 mars 2000, respectivement, les dates d'expiration des délais pour le dépôt d'un mémoire et d'un contre-mémoire par chacune des Parties, compte tenu des souhaits exprimés par celles-ci dans le compromis. Les mémoires des Parties ont été déposés dans le délai ainsi fixé. Par lettre conjointe du 18 août 1999, les Parties ont demandé à la Cour de reporter au 2 juillet 2000 la date d'expiration du délai pour le dépôt de leurs contre-mémoires. Par ordonnance en date du 14 septembre 1999, la Cour a accédé à cette demande. Par lettre conjointe du 8 mai 2000, les Parties ont demandé à la Cour un nouveau report d'un mois de la date d'expiration du délai pour le dépôt de leurs contre-mémoires. Par ordonnance du 11 mai 2000, la Cour a également accédé à cette demande. Les contre-mémoires des Parties ont été déposés dans le délai ainsi prorogé. Aux termes du compromis, les deux Parties devaient présenter une réplique au plus tard quatre mois après la date à laquelle chacune aurait reçu la copie certifiée conforme du contre-mémoire de l'autre. Par lettre conjointe du 14 octobre 2000, les Parties ont prié la Cour de proroger ce délai de trois mois. Par ordonnance en date du 19 octobre 2000, le président de la Cour a fixé au 2 mars 2001 la date d'expiration du délai pour le dépôt d'une réplique par chacune des Parties. Les répliques des Parties ont été déposées dans le délai ainsi prescrit. Le compromis prévoyant la possibilité de dépôt d'une quatrième pièce de procédure par chacune des Parties, celles-ci ont, par lettre conjointe du 28 mars 2001, informé la Cour qu'elles ne souhaitaient pas produire de pièce supplémentaire. La Cour elle-même n'en a pas vu la nécessité.

Par lettre du 22 février 2001, le Gouvernement des Philippines, invoquant le paragraphe 1 de l'article 53 du Règlement, a adressé à la Cour une demande tendant à ce que lui soient communiqués des exemplaires des pièces de procédure et des documents annexés déposés par les Parties. Conformément à la disposition susmentionnée du Règlement, la Cour s'est renseignée auprès des Parties et a décidé qu'il n'était pas approprié d'accéder à la demande des Philippines dans les présentes circonstances. Cette décision a été communiquée aux

Philippines, à l'Indonésie et à la Malaisie par lettres en date du 15 mars 2001.

Le 13 mars 2001, les Philippines ont déposé au Greffe de la Cour une requête à fin d'intervention dans l'affaire, en invoquant l'article 62 du Statut. Cette disposition se lit comme suit :

> «Lorsqu'un Etat estime que, dans un différend, un intérêt d'ordre juridique est pour lui en cause, il peut adresser à la Cour une requête, à fin d'intervention.
>
> La Cour décide.»

Dans leur requête à fin d'intervention, les Philippines ont précisé que celle-ci constituait une démarche distincte de leur demande de communication des pièces de procédure. Selon les Philippines, l'intérêt d'ordre juridique qui est pour elles en cause dans la présente espèce «porte uniquement et exclusivement sur les traités, les accords et autres éléments de preuve fournis par les Parties et pris en compte par la Cour qui ont une incidence directe ou indirecte sur la question du statut juridique du Bornéo septentrional». Les Philippines ont par ailleurs indiqué que l'objet de l'intervention sollicitée était entre autres de

> «préserver et sauvegarder les droits d'ordre historique et juridique du Gouvernement ... des Philippines qui découlent de la revendication de possession et de souveraineté que ledit gouvernement formule sur le territoire du Bornéo septentrional dans la mesure où ces droits sont ou pourraient être mis en cause par une décision de la Cour relative à la question de la souveraineté sur Pulau Ligitan et Pulau Sipadan».

Les Philippines ont en outre spécifié, dans leur requête à fin d'intervention, que celle-ci «se fonde exclusivement sur l'article 62 du Statut, qui n'exige pas un titre de compétence distinct pour donner suite à cette requête».

Conformément au paragraphe 1 de l'article 83 du Règlement de la Cour, les deux Parties à l'affaire, l'Indonésie et la Malaisie, ont été invitées à présenter, le 2 mai 2001 au plus tard, des observations écrites sur la requête à fin d'intervention; chacune d'elles a présenté de telles observations dans le délai fixé à cet effet. Ces observations ont été échangées entre les Parties et transmises aux Philippines.

Dans leurs observations écrites, tant l'Indonésie que la Malaisie ont fait objection à la requête à fin d'intervention introduite par les Philippines. Le paragraphe 2 de l'article 84 du Règlement de la Cour dispose que, s'il est fait objection à une requête à fin d'intervention, la Cour doit entendre, avant de statuer, l'Etat désireux d'intervenir ainsi que les Parties. Les présentes audiences publiques sont tenues à cette fin.

Après s'être renseignée auprès des Parties, la Cour a décidé que les observations écrites des deux Parties sur la requête à fin d'intervention, ainsi que les documents annexés auxdites observations, seraient rendus accessibles au public à l'ouverture de la présente procédure orale. En outre, ces observations écrites seront placées aujourd'hui même sur le site *Internet* de la Cour, conformément à la pratique.

Je constate la présence à l'audience des agents, conseils et avocats des deux Parties, ainsi que la présence des agents, conseils et avocats des Philippines, l'Etat qui demande à intervenir. Conformément aux accords intervenus entre les Parties et les Philippines, sur l'ordre dans lequel elles prendraient la parole au cours de la présente procédure orale, les Philippines présenteront les premières leurs plaidoiries; elles seront suivies par l'Indonésie et la Malaisie. L'audience de ce matin sera consacrée aux plaidoiries des Philippines; celle de demain matin aux plaidoiries de l'Indonésie et de la Malaisie. Un second tour de plaidoiries assez bref a été prévu pour les 28 et 29 juin. Les Philippines présenteront leur réplique orale le jeudi 28 juin, tandis que l'Indonésie et la Malaisie présenteront les leurs le vendredi 29 juin.

Et je donne à présent la parole à S. Exc. M. Eloy R. Bello III, agent des Philippines. Monsieur l'agent, vous avez la parole.

Mr. BELLO:

1. Mr. President, Members of the Court: to address the Court is more than a privilege. It is a great honour.

2. To the representatives of the people of the Republic of Indonesia and Malaysia, I wish them well. Among the many things that we share is a common interest in the peaceful resolution of the few disputes that divide us.

3. On 28 April 1950, both Houses of the Congress of the Government of the Republic of the Philippines adopted a concurrent resolution: "that subject to the lease rights of the British Government, the territory known as British North Borneo belongs to the heirs of the Sultanate of Sulu and falls under the ultimate sovereignty of the Republic of the Philippines". On 24 April 1962, in a rare instance of unanimity, the House of Representatives resolved "urging the President of the Philippines to take all necessary steps, consistent with international law and procedure, for the recovery of a certain portion of North Borneo".

4. In the Manila Accord of July 1963, Indonesia, Malaysia and the Philippines took note

> "of the Philippine claim and the right of the Philippines to continue to pursue it in accordance with international law and the principle of the pacific settlement of disputes. They agreed that the inclusion of North Borneo in the Federation of Malaysia would not prejudice the claim or any right thereunder."

Further, they agreed "to bring the claim to a just and expeditious solution by peaceful means, such as negotiation, conciliation, arbitration or judicial settlement as well as other peaceful means of the parties' own choice". There were other occasions on which the Philippines tried to assert its claim, prominent among which was the negotiation held in Bangkok in 1968.

5. After Malaysia and Indonesia notified this Court of their dispute concerning sovereignty over Pulau Sipadan and Pulau Ligitan on 2 November 1998, my Government began a study which looked into the question of how that dispute could affect the national interest of the Philippines. Specifically, my Government wished to find out whether the bilateral dispute between Indonesia and Malaysia over Pulau Sipadan and Pulau Ligitan could have any repercussions on the definition of Philippine national territory and its territorial integrity. From the results of our study, we concluded that the legal dispute over these two islands could affect our national interest, by producing possible interpretations of the treaties, agreements and other documentary evidence, on the basis of which, according to the Special Agreement between Indonesia and Malaysia, the issue of sovereignty over Pulau Ligitan and Pulau Sipadan would be determined.

6. When my Government registered its request on 22 February 2001, to be furnished pleadings and documents annexed, we were fully aware that the deadline for Indonesia and Malaysia to submit their Replies was set on 2 March 2001. Under paragraph 1 of Article 81 of the Rules of Court, an application for permission to intervene should be filed usually not later than the closure of written proceedings. Given the circumstances surrounding our request, my Government was conscious of the fact that *after* 2 March 2001, Indonesia and Malaysia might no longer consider the need to submit a final round of pleadings as contemplated in their Special Agreement. The Court then, sooner or later, would announce the formal closure of the written proceedings. Therefore, in view of what we perceived as the impending closure of the written proceedings, and without waiting for the Court's answer to our request to be furnished copies of pleadings, my Government filed the current Application for permission to intervene. I raise this technical point because Indonesia has made the argument in its observations that the Philippine Application should be dismissed as being "untimely".

7. After the Philippines filed its Application for permission to intervene on 13 March 2001, the Court on 15 March issued a response to our previously-filed letter, and denied our request, presumably on the ground that both Parties objected to the Philippine request. This denial could only strengthen my Government's hypothesis that Indonesia and Malaysia have made substantive arguments and submissions in their pleadings which, if accepted or taken for granted by the Court, could bring about grave prejudice to the outstanding territorial claim by the Philippines to territory in North Borneo, and the Philippines right and responsibility to pursue that claim by every peaceful means.

8. Earlier, I mentioned that the crux of this legal interest lies in the interpretation of certain treaties and agreements submitted by Indonesia and Malaysia to buttress their respective claims to sovereignty over the two islands, in the course of which the Philippine territorial claim to North Borneo could be prejudiced. Let me state clearly and unequivocally that unless my Government intervenes in the present proceedings between Indonesia and Malaysia, our right to assert, defend and peacefully settle the Philippines territorial claim to North Borneo could be unjustly affected.

9. Mr. President, Members of the Court, Professor Michael Reisman will follow with arguments that will refute the specific objections raised by Indonesia and Malaysia in their observations on the Philippine Application for permission to intervene. Professor Reisman will explain why it is imperative for the Court to grant the Philippine Application to intervene. Professor Merlin Magallona, who will follow Professor Reisman, will outline to the Court the particular treaties and other agreements that may have a direct bearing on the issue of sovereignty over Pulau Ligitan and Pulau Sipadan but also on the legal status of North Borneo - the interest of a legal nature which the Philippines believes may be affected by the present proceedings. The Philippines does not, however, intend in these proceedings to argue its cause, nor seek an endorsement of its cause, on the North Borneo issue.

10. For the convenience of the Bench, the judges' folders include only materials referred to in the Malaysian observations of 2 May 2001, to which our counsel will refer in the course of their presentations.

11. Thank you, Mr. President and Members of the Court. Now I request the Court to call on Professor Michael Reisman to address the Court.

The PRESIDENT: Thank you, Mr. Ambassador. I give the floor now to Mr. Michael Reisman.

Mr. REISMAN:

1. Thank you very much Mr. President. Mr. President, Members of the Court. I am honoured to appear before this distinguished Court on behalf of the Republic of the Philippines.

2. This is an unusual intervention case: the legal issue, or legal interest is not graphic or manifest on the face of the record, as in previous interventions, but contingent and speculative for the intervening State, because it has not been given the documents. As Ambassador Bello has said, our interest is not the islands that are in dispute before you, but interpretations of certain treaties and agreements and certain facts which one party may rely upon to establish its case, because those treaties may be central to the Philippine claim to territory in North Borneo. Though that claim is not before the Court and need not, indeed may not, in the absence of agreement by Malaysia, be decided in this procedure, we must explain enough of it so that the Court can appreciate the relation of the treaties, agreements and facts in the case before it to the claim of the Philippines and, as a result, our interest of a legal nature. But we must not explain "too much", for the Court, in the present procedure, is not seised with our claim and we do not wish to be accused of trying to present our case. Yet, because we have been denied access to the documents, we cannot say with any certainty whether and which treaties, agreements and facts are in issue. So we are compelled to present our position more generally than any jurist would like, lest matters of concern to the Philippines not be drawn to the Court's attention.

3. We think that this is a case of first impression for three reasons:

- first, because of the character of the *interest* of a legal nature that we consider is different from previous interventions;

- second, because of the character of the *case* in which this interest is engaged and that is different from the precedents; and

- third, because the Philippines has not been given access to the documents in the case and, as a result and in the special circumstances of the case, labours under a handicap that was not present in previous cases.

Philippine duties under Article 62

4. Article 62 is referred to as an aspect of "incidental jurisdiction". The adjective, "incidental", inevitably carries an implication that a procedure of this sort is, somehow or other marginal or peripheral and of incidental importance. On the contrary. Article 62 is as important a tool and protection for the Court in the discharge of its functions, as it is for a State that believes that a pending case between other States may affect its own interests. The international human rights movement has happily made many legal procedures into inalienable human rights. This important new conception of procedures - as guaranteed "rights" or "entitlements" - may obscure the other, much older and continuing function of procedural arrangements: they are the tried and tested means

for ensuring that a decision-maker arrives efficiently and economically at the truth. And Article 62, we believe, incorporates both of these conceptions and functions.

5. When two States refer a case to the International Court by special agreement, they can define the issues and delimit the parameters of their joint submission. They may even specify the rules of law to be applied. In the practice of "adjudication on an agreed basis", the parties may establish at the outset that the subject of dispute, let us say sovereignty over an island or a group of islands, shall belong to one or the other but not to any third State. They may structure their adjudications so that neither of them has to prove that it has met the international standard of effective occupation; title will be granted to whichever has the comparatively stronger of the two claims, even though it may not meet the international standard. When two States adjudicate on this basis, they may, in good faith, believe that the dispute is exclusive to them; and obviously international law and jurisdictional theory has to presume that. Yet their case may implicate - and possibly in important ways - the interests of another State.

6. If two States in a bilateral dispute had elected to submit to arbitration rather than to the Court, the rest of the world community would not have known about the procedure. In particular, a State which - if it had known of the arbitration - might have considered that some possible outcomes of this ostensibly "private" dispute could affect one of its own interests would have no recourse. But if two States had elected to submit their dispute to the International Court, a third State with a hypothetical interest would have the advantage of knowing of the submission, because applications to this great Court are public information. Ironically and in spite of this advantage, the dilemma of the third State will now be even more acute, thanks to the very stature of the Court. Theoretically of course, a judgment of the Court, like an arbitral award, has no binding force except between the parties and with respect to that particular case. But despite Article 59, the International Court, as the principal judicial organ of the United Nations, issues decisions which are, by their very provenance and nature, expressive of international law and have a profound influence on its development. And this is especially the case with treaties concerning title to territory. As the *Eritrea/Yemen* Tribunal said: "this special category of treaties also represents a legal reality which necessarily impinges upon third states, because they have effect *erga omnes*"[1].

7. The acute dilemma of the third State in the example described a moment ago is shared, paradoxically, by the Court itself. While parties in a case before the Court may argue the law incompletely or fecklessly, the Court is entitled, under the general principle of *curia novit lex*, to rely upon its own knowledge of the law and, if it deems appropriate, to apply rules and principles which the parties may not have argued. But, except for the most notorious facts, of which a court may take "judicial notice", the way the International Court gains *factual* information is through the parties: the facts are adduced by the parties and then tested in the crucible of the adversarial process. Thus, if a bilateral dispute before the Court contains the possibility of affecting or even prejudicing the interests of a third State, the Court is in danger - and I emphasize the word danger - of rendering a decision without knowing those interests. The Court's decision could be based on an incomplete version of the facts on only some of the issues, on only some of the possible legal interpretations of the instruments invoked and could adversely affect the interests of a legal nature of another State.

8. Article 62 of the Statute gives tools for an economic solution to this problem which is shared by the third party and the Court. It provides that should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. If the Court grants the application to intervene, the intervening State, according to Rule 85 is supplied with the written submissions of the parties and is itself entitled to submit a written statement to which the parties in the case before the Court may furnish their own written observations. The intervening State may also submit its observations in oral proceedings.

9. Thanks to this exceptional procedure, a party with an interest, which might be affected by a possible decision outcome, may bring it to the attention of the Court. This is important for the State, but it is at least as important for the Court. As Professor Damrosch has written:

> "the Court can only benefit from hearing the views of other parties with a stake in the outcome. No matter how careful the Court may think it is being about drafting an order to protect their interests, there is no substitute for hearing their views directly."[2]

10. Mr. President, Members of the Court: perfection is a property of divinity. No human creation is flawless

and Article 62, for all the genius of the Statute, is a human creation. It usually works well, but it can sometimes impose a very severe and potentially paralysing burden on a State that considers it has an interest which may be affected. This burden manifests itself in circumstances in which the third State has reason to believe, but cannot confirm that its interest of a legal nature may be affected by a possible decision.

11. In circumstances in which a case is initiated by special agreement, the third State is, at least, on notice that a matter in which it believes it has a legal interest could be before the Court. For some cases, the publication of that special agreement, in and of itself, is enough to convince the third State that its interest may be affected. Think of the generic maritime boundary dispute which has often raised Article 62 demands. States A and B, by special agreement, petition the Court to delimit a comprehensive boundary. Since the Court has elaborated the rules of maritime boundary delimitation under the rubric of "equitable principles," a third State's legal advisers can readily determine where prospective delimitations may affect the third State's interest of a legal nature. In the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court itself warned that a subsequent judgment could affect "rights and interests" of specified third States[3].

12. But when the possibility of a decision affecting an interest of a third State is not certain and not graphic and is contingent on further information and specifications, the mere publication of the special agreement may not provide sufficient information. And now the third State finds itself in that uneasy condition that Durkheim called "anomie". The third State wonders: an interest of a legal nature which is obviously important *may* be implicated in the pending case, but has it actually been raised? Do the submissions of the parties require the Court to consider, as one option, a decision that could affect the third State's interest? These questions cannot be answered by studying the special agreement or by looking at a maritime chart. The third State must see the written submissions and documents because only they will show whether one of its interests is actually implicated.

13. Under the régime of the Court, the documents of the written proceedings are treated as confidential until a case is terminated. This confidentiality may be important to the States submitting to the Court's jurisdiction and the Court takes this matter very seriously[4]. But there may be circumstances, for example arising under Article 62, when a third State will need access to the pleadings and documents to confirm that its interest may be implicated and to prepare itself to explain why. So, how then is the important policy of confidentiality of written pleadings to be accommodated with Article 62?

14. The Statute is only implicit on this, but Article 53, paragraph 1, of the Rules which is an institutional decision of the Court does give us guidance: the Court decides, after ascertaining the views of the parties, that copies and pleadings and documents should be made available to a State entitled to appear before it, and requesting them. Now, I don't know on what basis the Court decides whether or not to accede to a request under Rule 53 because the Court doesn't publish judgments on this. Rosenne writes: "The Court has never made the material available to a State under paragraph 1 of Rule 53 if one of the parties has objected."[5]

15. So, consider, again, the situation of a third State that has read the special agreement by which two other States have submitted their dispute to the Court. Without written submissions, the third State cannot determine with probability - as it might in a maritime boundary delimitation - that an interest may be affected by a decision of the Court. The third State applies to the Court under Article 53 of the Rules. The Court ascertains the views of the parties. One (or both) objects and the Court decides not to make the material available to the third State.

16. Mr. President, Members of the Court, this scenario would put the third State in a very difficult situation. Rosenne writes:

> "This has worked particular hardship - possibly even amounting to a denial of justice - in the case of a State requesting copies of the written pleadings in order to be able to formulate and plead a request for permission to intervene in the case on the basis of Article 62 . . ., that it has an interest of a legal nature which may be affected by the decision in the case."[6]

The Court will recall that in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Application to Intervene)*, the Chamber spelled out the necessary criteria for permission to intervene. And they were essentially to identify and to show the legal interest: "to identify" and

"to show". But how can the State seeking to intervene identify the interest if it is prevented from seeing the documents? How can it demonstrate convincingly what it asserts if the other States do not allow it to see what they are arguing? A State concerned about the possible effect of a maritime boundary can look at a map. But a State with other types of interests raised by other types of cases cannot.

17. So, Rosenne is justified in using the very strong words "denial of justice". There is something offensive - even absurd - about a procedure in which a third State, seeking to exercise its option granted under the Statute, confronts one or both of the other litigants who say: "We have the documents. If you can guess what's in them, you can try to persuade the Court and then be permitted to intervene. If you guess wrong, you lose. And in oral argument, we will tell you whether or not you have guessed correctly."

18. That type of procedure is not due process. It would be a denial of justice. And in circumstances in which one interpretation of legal rules would work a denial of justice, courts try to avoid that interpretation or mitigate its effects by shifting burden of proof or adopting certain presumptions.

19. In the case before the Court, the Special Agreement of Indonesia and Malaysia requests the Court to decide "on the basis of treaties, agreements and any other evidence" to be furnished by the Parties. The Department of Foreign Affairs of the Government of the Philippines had to ask itself whether some or all of the treaties and agreements which were referred to in the Special Agreement might also be related to the claim to North Borneo, such that an interpretation by the Court could affect its interest. The Philippines could not usefully request access to the written submissions until most of them had been submitted to the Court. On 22 February, after two rounds of the written submissions had been completed but before the closure of that phase, the Philippines requested the Court to furnish it with the pleadings and documents that had been submitted, and reiterated its request on 9 March. Both Parties objected. So we are here, this morning, in a procedure in which Malaysia and Indonesia have the papers in the case and will be referring to them, while we do not. And we have the burden of proof to show that a Philippine interest of a legal nature may be affected by the Parties' submissions!

20. I should like, Mr. President, Members of the Court, to review briefly the objections that were expressed in the observations of Malaysia and Indonesia.

Malaysia's objections

The relevance of the 1885 Protocol

21. In paragraph 2, Malaysia acknowledges that the interpretation of Article III of the Protocol of 1885 is critical to the construction of the 1891 Anglo-Dutch Convention, which is, we surmise, central to Indonesia's claim. As Professor Magallona will show, the Philippines considers the interpretation of both of these instruments extremely important to its claim to North Borneo, in particular, the 1885 Protocol. We do not know what interpretations one or both of the Parties have put on these instruments because we have not seen the documents.

The Philippine claim to North Borneo

22. Section A of Malaysia's observations purports to be a refutation of the Philippines claim to North Borneo. We believe that this section is based on a number of misapprehensions both of the meaning of Article 62 and the reasons for and the bases and implications of the Philippines Application to intervene. Malaysia purports to engage in a detailed refutation of the Philippines claim to North Borneo. That is not the subject of an Article 62 application nor would it seem that the Court has personal or material jurisdiction over such an issue. The Philippines and Malaysia have not agreed to submit the issue of sovereignty over North Borneo to the Court (though it is worth mentioning that the Philippines proposed precisely that submission, first to the United Kingdom when it controlled North Borneo and then to Malaysia, after independence). Article 62 is not a mode of *forum prorogatum*, by which the intervening State forces other States already involved in an adjudication to accept jurisdiction over a matter they are not litigating because of the interest which the intervener considers to be incidentally implicated in the case. The contingency for the application of Article 62 is the subjective appreciation of the intervening State that it has an interest. "Should a State consider . . ." *«Lorsqu'un Etat estime . . .»* In the future, Malaysia and the Philippines could agree to submit the issue of sovereignty over North Borneo to the Court for a final decision. They have not now. The purpose of an Article 62 intervention in

this case is to ensure that the Court, not having been informed by the Parties to the Special Agreement of the Philippines interest, not interpret treaties relevant to that interest that have been invoked in the case in ways that could be prejudicial to the interest of the Philippines.

23. But having explained why we think the issue of jurisdiction precludes the kind of considerations that Malaysia is developing in its observations, I would like to comment briefly on those observations because we feel that they are profoundly incorrect. Paragraph 6 of Malaysia's observations raises the central issue in dispute between the Philippines and Malaysia with respect to the territories in North Borneo. Malaysia states that "the State of Sabah has been under effective control of Malaysia and its predecessors in title since the late nineteenth century"[7]. The words "effective control" here mix law and fact. The Philippines submits and the evidence it can adduce, if given the opportunity, will confirm, that from 1878 until 1946, the British North Borneo Company and its predecessors had a *lease* over a large area of North Borneo from the Sultan of Sulu. *During all of this period, the United Kingdom recognized and insisted on the* de jure *sovereignty of the Sultanate.* The Sultan's lease was not a "cession" to a private entity, which would not have been possible under international law of the time anyway. The character of the relationship was one of lease rather than ownership or "sovereignty", if one can even use that term in this context. Its character was confirmed in diplomatic correspondence and annual lease payments were made.

24. Now if Malaysia is using the words "effective control" to mean that a lessee has effective control of the property leased, then the Philippines has no argument on the point. But if Malaysia means that a lessee gains ownership or a concessionaire gains sovereignty because of the effective control the lease or concession allows, then Malaysia has in mind a legal system utterly different from any we know of. We do not contest that the lessee, the British North Borneo Company, did *purport* to transfer title to the United Kingdom in 1946, perhaps coincidentally days after the independence of the Philippines. Nor do we contest that, decades later, the United Kingdom *purported* to transfer its rights in North Borneo to the new State of Malaysia. But the British North Borneo Company could not grant more than it had and the United Kingdom could not receive more than it had, nor could the United Kingdom then increase by some legal alchemy what it had received and transfer something bigger to Malaysia. The *Digest* codified common sense when it decreed, almost 2,000 years ago: *Nemo plus juris ad alium transferre potest quam ipse habet*[8]. No one can transfer more rights to another than he himself has. In so far as any treaty or agreement that Malaysia is relying on in the present case to sustain its claim to Ligitan and Sipadan depends on the interpretation that lodges international title to North Borneo in the British North Borneo Company, that interpretation adversely affects an interest of a legal nature which the Philippines considers that it has.

25. Malaysia argues that the Philippines never presented its claim to the British North Borneo Company, which of course terminated in 1946. But why would either the Philippines or the United States, from 1898 to 1946, bring a claim if the lessee was in possession of the leasehold and making payments?

26. After 1946, Malaysia contends that the Philippines did not pursue its claim. That is a factual assertion, which is not correct, as Professor Magallona will demonstrate. As for the contention that the Philippines surrendered its claim, an understanding of the diplomatic history, the actual documents and the constitutional procedures of the Philippines will demonstrate that that is not correct. And as for the bald and unsupported claim that the cession by the heirs of the Sultan of Sulu to the Philippines in 1962 was "worthless," the Philippines rejects the contention. If any putative legal act in these events is "worthless," it is the effort to transfer a lease into property.

27. Malaysia, citing to details in its Memorial, which the Philippines has not seen, makes assertions about the status of Sulu under the period of the Spanish and then United States control of the Philippines, which appear, on the basis of the very brief glimpse we can gain through the observations, to be incorrect. Malaysia purports to interpret the 1885 Spanish Protocol as a renunciation over North Borneo. In our view, as Professor Magallona will explain, this is a serious misinterpretation of the scope of the Protocol with major impacts on the Philippine interests.

28. Malaysia states that the islands of Ligitan and Sipadan were not covered by the grant of 1878, so that "[s]omeone claiming a right of reversion to territory covered by that grant would not be entitled to the two islands". We do not take issue with that contention. This is not a Philippine claim for the islands, it is concerned with treaties whose interpretation in that dispute could prejudice our claim to North Borneo.

Malaysia's objections to the Philippines interest of a legal nature

29. In section B of Malaysia's objection, Malaysia confuses the question of the interest and the probative standard involved. Article 62 does not say that the intervening State must have a "legal interest" or "lawful interest" or "substantial interest". All of those determinations presuppose a jurisdiction *ratione materiae* and *ratione personae* which Article 62 does not require and the Court does not have. Even if the Court interpreted the actions of the intervening State as an invitation to *prorogatum* jurisdiction, the Court would not have jurisdiction, for Malaysia and Indonesia have not agreed to it. The threshold for the invocation of Article 62 is, as a result, a *subjective* standard: the State requesting permission to intervene must "consider" that it has an interest. As I will explain in a moment, the concern of the Court, in exercising its power here, is ultimately not to decide the validity or legality of the claim, which it cannot, but whether the intervention would assist the Court in understanding the implications for a third State of certain possible decisions it might take in the pending case. For the Court to decide this matter, the State requesting permission to intervene must identify the interest in question and relate it to the case at bar.

30. The language of Article 62 is carefully drafted and speaks of an "interest of a legal nature". The reference to legal nature, *ordre juridique*, relates to whether the Court is capable of entertaining the issue. Many interests that States may claim need not be "legal" and fall within Article 36, paragraph 2, of the Statute, within the material jurisdiction of the Court. So the words "of a legal nature" establish that the intervening State must demonstrate that these are interests of a legal nature that should prevail. Now, this does not require the intervening State to show that its legal interests are correct or that they will actually prevail in a legal encounter. Obviously, the State requesting permission to intervene believes that its interests will prevail and, obviously, the State that is objecting believes that those interests will not. We submit that all that the intervening State must demonstrate, at the threshold, is that the interest is one "of a legal nature". In the *Land, Island and Maritime Frontier Dispute* case which I referred to earlier, the Chamber said

> "What needs to be shown by a State seeking permission to intervene can only be judged *in concreto* and in relation to all the circumstances of a particular case. It is for the State seeking to intervene to identify the interest of a legal nature . . ., and to show in what way that interest may be affected . . ."

31. The criteria are not to *prove* a legal or lawful interest, but to "identify the interest of a legal nature" and "to show in what way [it] may be affected". The interest of a legal nature which the Philippines believes is implicated is the interpretation of treaties which may have to be interpreted by the Court.

32. Malaysia states that the Philippine Application "does not have any relation to the question of sovereignty over Sipadan and Ligitan" (paragraph 23). Indeed.

33. Malaysia criticizes the Philippines for not being more precise. But, if I may revert to the example, we are faced with the litigant who clutches all the documents and says "guess them, if you can", and then criticizes the other party for not being precise about them.

34. Even on its own terms, however, Malaysia's objection is not well founded, for Article 62 clearly allows the subjective appreciation of the intervening State to be the contingency and it allows that appreciation to be in the realm of possibility rather than certainty: "an interest . . . which *may* be affected . . .". Nor is Malaysia correct in asserting, in paragraph 30, that the Philippines "is trying, by way of Article 62 to put before the Court a completely different dispute, which raises against Malaysia the issue of sovereignty over the whole of Sabah and its people". Not only is the Philippines not trying to put its territorial claim to North Borneo before the Court, it is trying to ensure that Malaysia does not surreptitiously do so!

35. Malaysia avers "If [the Philippines] has a legal interest, it must be to support Malaysia's claim. Yet its intervention is obviously hostile to Malaysia." With respect, we do not understand what Malaysia means here. Earlier in its objection Malaysia had said that the treaties and agreements that are of concern to the Philippines do not concern Sipadan and Ligitan. If that is so, then how can the request to intervene be viewed as hostile to Malaysia?

36. The Philippines also admits to confusion as to Malaysia's assertion that "a third State should not be permitted to intervene, when its own legal interest can be to support the legal position of a party which rejects

its intervention". Since we have not seen the documents, we just do not understand what Malaysia is talking about.

The PRESIDENT: Professor Reisman, may I interrupt you one moment to ask you to speak a little more slowly.

Mr. REISMAN: Je m'excuse, Monsieur le Président, of course. Advocates tend, Mr. President, to become more and more passionate as they argue their case. I apologise.

Since the Philippines has not been given access to the documents, we simply do not understand what the criticism of Malaysia is here.

37. Malaysia also argues that "to accept the intervention will be seen as lending credibility to a much broader (and indefensible) claim to the State of Sabah". This is, again, a misunderstanding of Article 62. When a State intervenes, it does not put into issue and subject to the jurisdiction of the Court its interest of a legal nature. Rather, it informs the Court of that interest and its possible implication in the Court's treatment of the case, such that the Court may be aware of the matter and may take it into account in its own decision.

38. Malaysia also alleges that "if the Republic of the Philippines wishes to inform the Court, the mere fact of its Application sufficiently does so". We are grateful to the Court for this opportunity to explain the reasons for our request to intervene. But as the Court will appreciate, as long as we do not have access to the submissions of the Parties and don't know their contents, we can not really explain what our interest is. This is, as I said earlier, not a maritime boundary case where we look at a map, project an equidistant line and see that there are consequences for a third State. When we have the information, we will be able to make an assessment of what our interests are and then our response may be very short, depending on the interests or more extensive.

Indonesian objections

39. I should briefly like to comment on Indonesia's objections.

Objection with respect to timeliness

40. Indonesia's first objection has to do with timeliness. The short answer is that we are not out of time; we did not violate a deadline in the submission. And Indonesia, I think, understands this, which is why it does not use the word "deadline" but rather the softer and vaguer concept of "timeliness".

41. Timeliness involves a prudential judgment that relates the moment when a legal actor elects to exercise an option and the costs of that particular moment to the process of justice. Certainly, if a State voluntarily withheld its application for permission to intervene until a moment when its request would disrupt the proceedings or reduce the efficiency with which they would otherwise have been conducted, there would be good grounds for objection; and certainly, the burden would shift to the other State. In the *El Salvador/Honduras* case, for example, Nicaragua requested permission to intervene in 1989 and acknowledged that " . . . a favourable response would require the reformation of the Chamber and a re-ordering of the written proceedings". That was two years after the initial Order by the Chamber. The Philippines asks for no such radical adjustments, but only for the opportunity to see the written submissions and, if necessary, to inform the Court of its own interests of a legal nature.

42. As a practical matter, Mr. President, Members of the Court, the Philippines procedure for requesting initially the documents and then the right to intervene could not have been done other than it was. It was necessary to wait until the documents had been submitted by the Parties. There is no point to asking for documents before they are in. When it was clear that that was rejected, the Philippines only at that point asked for right of intervention.

The objection based on the lack of Philippine concern over the islands in dispute

43. The principal substantive objection of the Indonesian observation has to do with the question of whether the Philippines interest of a legal nature is one which may be affected by a decision of the Court in the instant case. Indonesia correctly observes that the Philippines is not interested in the outcome of Ligitan and Sipadan, and

indeed quote a diplomatic note from the Philippines to Indonesia on 5 April 2001. But the inference that Indonesia draws from this note, we believe, is incorrect. Indonesia says: "It therefore follows that the Philippines has expressly disavowed any interest of a legal nature in the actual subject-matter of the dispute currently pending between Indonesia and Malaysia."[9] The purpose of an intervention under Article 62 is not to involve oneself in that case, but to insure that interpretations of legal instruments in that case do not compromise a legal interest which may be implicated.

44. Indonesia states that "the desire of the Philippines to submit its views on various unspecified 'treaties, agreements and other evidence furnished by the Parties' is abstract and vague"[10]. The words "treaties, agreements and other evidence" of course come directly from the Special Agreement of which Indonesia is one of the authors and it's quite clear that this is all that the Philippines has to deal with since it has not been permitted to see the documents in the case. We fail to see how Indonesia can seriously contend that we should be denied permission to intervene because we have not specified or focused upon or discussed documents that have been denied us.

Objections with respect to supporting documents

45. Finally, Indonesia objects to the fact that the Philippines did not attach a list of supporting documents. A number of comments: first, that does not go to the question of the admissibility of the Application, but rather to the proof.

46. And here, the Court will, I hope, appreciate, the "catch 22" situation that the Philippines found itself in. Without knowing the documents, having been denied by both Parties access to them, we had two options:

- one was to try to document and argue the entire case for North Borneo, which would be impermissible and would be an affront to the Court, and would, we believe, properly be rejected by the Court; or

- to decide not to attach documents, since we could not know which ones would be relevant to the pending case. And we knew that if we elected to do this, one of the Parties, as Indonesia did, would then complain that we had not attached documents.

47. Mr. President, Members of the Court, the Philippine request for permission to intervene in this case is unique and one of first impression because of the nature of the case, the interests of a legal nature and because of the indispensability of the documents which were denied. Accordingly, we ask for the remedy in Article 85, paragraph 1, that "the intervening State shall be supplied with copies of the pleadings and documents annexed and shall be entitled to submit a written statement within a time-limit to be fixed by the Court"; and the remedy of paragraph 3: that "[t]he intervening State shall be entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention". If our examination of the documents dispels the concerns that have been raised by the Special Agreement and several paragraphs in the Malaysian observations, the Philippines will inform the Court of that fact and will not exercise either of the remedies made available to it.

48. Mr. President, Members of the Court, I thank you for your attention. Unless the Court now wishes to recess, I would ask, Mr. President, that the Court call upon my colleague, Professor Merlin Magallona, to address it.

The PRESIDENT: Thank you very much, Prof. Reisman. La Cour va suspendre sa séance pour un quart d'heure. Je vous remercie.

L'audience est suspendue de 11 h 10 à 11 h 30

Le PRESIDENT : Veuillez vous asseoir. La séance est reprise, et je donne maintenant la parole au nom de la République des Philippines au professeur Merlin M. Magallona, coagent et conseil. Monsieur le professeur, vous avez la parole.

Mr. MAGALLONA:

1. Mr. President, Members of the Court: some years ago in the case concerning *Legality of the Threat or Use of Nuclear Weapons*, I had the rare privilege of representing the Republic of the Philippines in the landmark advisory proceedings in the history of this great tribunal. Indeed, I count that experience among the most memorable professional events in my career. I am deeply honoured to have been given the opportunity by my Government to have returned to this Great Hall of Justice, this time on a matter of utmost concern and anxiety to my country from the time it regained independence in 1946. I refer to the claim of Philippine sovereignty to territories in North Borneo.

2. As Ambassador Bello, our Agent has explained, my Government has requested permission to intervene in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan* between Indonesia and Malaysia because my Government considers that it has an interest of a legal nature which may be affected by the decision in the case. Professor Reisman has presented our understanding of the specific requirements of Article 62 of the Statute of this Court. He and Ambassador Bello have explained the difficulties we have encountered in focusing on the issues raised by Indonesia and Malaysia with precision, owing to the fact that we have not given access to the written submissions in this court proceeding. My task is to explain the background and history of the interest that has brought us to this Court today and to relate it, as best I can, to what we infer, with considerably more confidence in the light of the observations of Malaysia of 2 May 2001.

3. I shall focus on the relevant treaties, agreements and other documents which, we have strong reason to believe, are being applied to the determination of the issue of sovereignty over Pulau Ligitan and Pulau Sipadan and which also relate to the Philippine territorial claim to North Borneo.

4. Before I embark on this task, however, I must describe very briefly the Philippine claim to certain territory in North Borneo. May I state outright that my purpose in doing so is NOT to present the Philippine claim as such. My purpose is simply to inform the Court that there is a territorial and historical claim in North Borneo for which the Philippines considers that it has prima facie a valid and well-founded legal argument. Establishing this argument prima facie should then allow the Court to appreciate the Philippines "interest of a legal nature" which could be affected by the Court's decision in the case between Malaysia and Indonesia. This brief preliminary exposition is called for as Malaysia, in its observations, has contended that the Philippines should be denied the right to intervene because its territorial claim to Borneo is indefensible and unfounded. May I outline some points on the Philippine claim to North Borneo?

The Philippine claim to North Borneo

5. The definition of Philippine territory, or what is comprised in the Philippine national territory, has always been embodied in the Philippine Constitution. The Constitution of 1973, promulgated during the presidency of Ferdinand Marcos, includes in the Philippine territory, "all the other territories over which the Philippines has a historic right or legal title"[11]. The proviso on "historic right or legal title" has a clear and well-established meaning within the Philippine polity. By this proviso, the framers of the Constitution envisaged the historic rights or legal title of the Philippines to, among others, a portion of the territory of North Borneo.

6. The present Constitution, adopted in 1987 during the administration of President Corazon Aquino, defines national territory as including, "all other territories over which the Philippines has sovereignty or jurisdiction". It has been settled that this constitutional provision is to be read in relation to Republic Act No. 5446, which amends the Baseline Law of 1961. Section 3 of Republic Act 5446[12], reads:

> "The definition of the baselines of the territorial sea of the Philippine Archipelago . . . is without prejudice to the delineation of the baselines of the territorial sea around the territory of Sabah situated in North Borneo over which the Philippines has acquired dominion and sovereignty."

This law, it must be noted, came in the wake of bilateral talks between Malaysia and the Philippines in June-July 1968 in Bangkok. The purpose of those bilateral talks, as the historical record will confirm, was for the two countries to settle once and for all their dispute involving territories in North Borneo. Unfortunately, those bilateral talks did not succeed in producing a solution to the dispute. Parenthetically, I should add that it is was during these 1968 talks when the Philippines formally offered to Malaysia to bring the North Borneo dispute to the International Court of Justice for final resolution. But Malaysia refused the offer.

7. The 1968 Malaysia-Philippine discussions on North Borneo were set against the background of normalized official relations between the two countries which were established in 1966. In the Exchange of Notes between Malaysia and the Philippines on the subject of North Borneo which was effected on 7 February 1966, the day normal bilateral relations between the two countries were formalized, the Malaysian Ministry of External Affairs clearly and unequivocally acknowledged the Philippine claim to North Borneo[13] in the following language:

> "In view of their mutual desire to strengthen brotherly relations and to establish closer regional cooperation, the Government of Malaysia hereby puts on record that it has never moved away from the Manila Accord of July 31, 1963 and the Joint Statement accompanying it and reiterates its assurance that it will abide by these agreements, particularly paragraph 12 of said Manila Accord and paragraph 8 of the Joint Statement."

8. The Manila Accord of 31 July 1963 is an historic agreement among Indonesia, Malaysia and the Philippines, signed by the Presidents of Indonesia and the Philippines and the Prime Minister of the Federation of Malaya. Paragraph 12 of the Manila Accord and paragraph 8 of the Joint Statement accompanying the Manila Accord acknowledged (1) the Philippine claim to North Borneo, and (2) the dispute between Malaysia and the Philippines that has been occasioned by this claim. The Manila Accord provides:

> "The Philippines made it clear that its position on the inclusion of North Borneo in the Federation of Malaysia is subject to the final outcome of the Philippine claim to North Borneo. The Ministers took note of the Philippine claim and the right of the Philippines to continue to pursue it in accordance with international law and the principle of the pacific settlement of disputes. They agreed that the inclusion of North Borneo in the Federation of Malaysia would not prejudice either the claim or any right thereunder. Moreover, in the context of their close association, the three countries agreed to exert their best endeavours to bring the claim to a just and expeditious resolution by peaceful means, such as negotiation, conciliation, arbitration, or judicial settlement as well as other peaceful means of the parties' own choice in conformity with the Charter of the United Nations and the Bandung Declaration."

In a similar vein, the relevant part of the Joint Statement reads:

> "The three Heads of Government take cognizance of the position regarding the Philippine claim to Sabah (North Borneo) after the establishment of the Federation of Malaysia as provided under paragraph 12 of the Manila Accord, that is, the inclusion of Sabah (North Borneo) in the Federation of Malaysia does not prejudice either claim or any right thereunder."

9. Thus, Indonesia, Malaysia and the Philippines have acknowledged that there is a Philippine claim to North Borneo. The three countries further acknowledged that there are also rights proceeding from, or arising out of, this claim. To the extent that this Philippine claim to North Borneo and any right thereunder inform and define the Philippine "interest of a legal nature" which my Government seeks to advance in these intervention proceedings, we submit that Indonesia and Malaysia cannot now assert nor argue that the Philippines has no claim to North Borneo and/or procedural right whatsoever flowing from that claim. This is not to say that Indonesia and Malaysia have acknowledged that we are correct, but that we have a claim at the international level.

The origins of the current international dispute

10. Mr. President, Members of the Court, may I now outline the origins of the current international dispute. I now turn to the emergence of the Philippine "claim" to North Borneo, and what it consists of by way of legal propositions and arguments.

11. The Philippine claim to North Borneo, if I may invite the Court's attention further back in history, was officially invoked against Great Britain in 1962[14], in response to a Note addressed to the Philippine Government dated 25 May 1962. In this British Note, it was stated that:

> "Her Majesty's Government are convinced that the Crown is entitled to and enjoys sovereignty

over North Borneo and that no valid claim to such sovereignty could lie from any other quarter . . . Her Majesty's Government would be bound to resist any claim to part of North Borneo, whether advanced by the Philippine Government or by private persons in the Philippines."

12. In reply, the Philippine Government expressed its view that there was now, in the light of this opinion expressed by the British Government, "a dispute between the Sultanate of Sulu and the Philippine Government on the one side and Her Majesty's Government on the other regarding the ownership and sovereignty over North Borneo".

13. The reason why the British Government issued its Note of 25 May 1962 may be surmised from a turn of events that took place in the Philippines in the period immediately prior to this date. One month before this Note was issued, on 24 April 1962, the Heirs of the Sultan of Sulu issued an official declaration entitled "Recognition and Authority in Favour of the Republic of the Philippines", which by its terms ceded and transferred sovereignty over territories in North Borneo to the Philippines. This declaration was a follow-up on a petition dated 5 February 1962 by the heirs of the Sultan of Sulu addressed to the Philippine Department of Foreign Affairs, wherein the heirs expressed their desire to see a portion of North Borneo, to which they had succeeded in title, included in the national territory of the Philippines. Also on 24 April 1962, the Philippine Congress in a rare demonstration of unanimity, adopted a "Resolution urging the President of the Philippines to take the necessary steps for the recovery of a certain portion of the Island of Borneo and adjacent islands which belong to the Philippines". This Congressional Resolution was the result of years of study and deliberation, and reiterates a similar concern on the North Borneo claim expressed by the Philippine Congress in April 1950, when it adopted a "Concurrent Resolution expressing the sense of the Philippines that North Borneo Belongs to the Heirs of the Sultan of Sulu and the ultimate sovereignty of the Republic of the Philippines, and authorizing the President to conduct negotiations for the restoration of such ownership and sovereign jurisdiction over said territory". The British Government must have seen these developments as serious and alarming enough to warrant the issuance of its pre-emptive Note of 25 May 1962.

14. Mr. President, Members of the Court, I have established that the Philippines has an internationally recognized claim, one that has been acknowledged by the other pertinent States. That should suffice for purposes of Article 62. But in the view of the substantive objections of Malaysia, let me briefly review the legal basis of our claim, simply to inform the Court. I will not argue these points at length but would hope that our Application for permission to intervene is accepted and that we will be able to examine the submissions of the Parties, and to thoroughly and briefly present detailed views on these matters that affect our interest, at an appropriate opportunity which the Court may wish to avail us.

The basis of the claim

15. On the basis of the Philippines claim: the Philippine territorial claim in North Borneo is based on a two-fold argument: (1) that dominion and sovereignty over a portion of North Borneo was validly and effectively transferred to the Philippine Government by the way of cession, and (2) that Great Britain's arrogation of sovereignty over that portion of North Borneo was illegal and improper under international law.

16. The first part of this argument - that sovereignty over North Borneo was validly and effectively ceded or transferred to the Philippines - is quite simple in its essentials. It presupposes that sovereignty over a portion of North Borneo was vested in the Sultan of Sulu, until this territory was ceded by the Sultanate to the Philippines in 1962. I will not go any further into the details of this argument, except to say that the Philippines can corroborate and defend these views and the particulars of this argument in any forum or court of law. The second part of the argument - that Great Britain did not legally and validly acquire sovereignty over North Borneo - is more complicated. This segment of the argument must, however, be fully elaborated because it is this part which is directly involved in the substance of the Philippine intervention in the present proceeding.

17. To prove that Great Britain, and therefore its successor-in-interest, Malaysia, did not validly acquire title to and sovereignty over North Borneo, it is necessary to enquire into the legal status of North Borneo over time. What must be determined is not only the legal status of North Borneo at that point when Great Britain purportedly assumed sovereignty over this territory, but also the legal status of North Borneo prior to British assumption of sovereignty. To determine the legal status of North Borneo, please allow me to go further back in my historical narrative and refer to certain treaties, agreements and other documents which relate to North Borneo. The identification of these treaties, agreements and other documents is, of course, not exhaustive but

merely illustrative of the overall point which the Philippines wishes to make: namely, that the legal status of North Borneo, as defined in several historically interlinked documents, prevented Great Britain from acquiring sovereignty over a part of North Borneo.

18. As you can see on the chart that is now displayed, the relevant region was the target of early and very intense exploitation by the European imperial powers. By the end of the nineteenth century, the Dutch Empire controlled what is now Indonesia and, in particular, two thirds of the island of Borneo. Great Britain extended its power from India to Burma or Myanmar in 1868, and then to Malaya, Sarawak and Brunei, in Northern Borneo by the end of the century. My country, the Philippines, conquered by the Spanish Empire in 1571, was ceded to the United States by Spain under the Treaty of Paris in the settlement of the Spanish-American war of 1898. But during the period, the Sultanate of Sulu in North Borneo remained independent and acknowledged to be so by European powers. Let me now go to the agreement between the Sultanate of Sulu and Mr. Overbeck.

The Sulu-Overbeck Agreement, January 1878

19. The story behind the "grants and commissions" in North Borneo starts with an Austrian named Overbeck and an Englishman named Dent, both businessmen-adventurers in search of enterprise in the Far East. The natural riches of North Borneo beckoned, and they reckoned that if they could obtain territorial grants and sell these later at a profit, they would be the richer. On 29 December 1877, Overbeck and Dent were able to obtain from the Sultan of Brunei three grants or leases to several territories in North Borneo. Being informed that the north-eastern part of Borneo was under the potentate of the Sultan of Sulu, Overbeck and Dent also obtained from the Sulu Sultan on 22 January 1878 a lease or grant to that part of North Borneo. All these territories, it must be pointed out, had already been the subject of similar leases or grants from Brunei and Sulu in the past[15].

20. Overbeck later sold all his rights and interests in the North Borneo grants obtained from the Sultan of Brunei and the Sultan of Sulu to Dent, who then proceeded to form a British North Borneo Provisional Association which in turn bought Dent's titles in the Sulu and Brunei grants. This Provisional Association was reconstituted and became the British North Borneo Company, or BNBC for short, in 1881. At that time, the BNBC as well as the British Government believed that the territories covered by the leases obtained from the Sultans of Sulu and Brunei covered the entire area of North Borneo, as you will see in the red-coloured map, officially used by the British North Borneo Company in 1881[16]. The Philippine-claimed territory is illustrated very roughly by the highlighted area on this map. This is perforce impressionistic, as the actual boundaries of the lease are not clear and remain to be adjudicated.

21. Please allow me to focus on the Sulu-Overbeck agreement of January 1878, inasmuch as this is the primal source of the Philippine historic claim to a portion of territory in North Borneo. This agreement consists of two parts: (1) the grant proper ("grant" being the term used in British official documents), whereby the Sultan of Sulu granted to Overbeck and Dent certain "territories and lands on the mainland of the island of Borneo . . . together with all the islands included therein within nine miles off the coast", and (2) a Commission, which appointed Overbeck as *Dato Bendahara and Raja of Sandakan*, and proclaiming all the powers and privileges accruing to him as such. Under the Sulu-Overbeck agreement, the Sultan leased (and the word is "*Padjak*" in Malaysian) to Overbeck and Dent, "together with their heirs, associates, successors and representatives forever all the rights and powers belonging to us over all the territories and lands which are tributary to us". The agreement provides for the payment to the Sultan of Sulu, his heirs or successors of $5,000 every year. The agreement also provides for a restriction clause, not found in the Brunei-Overbeck treaties, which states that "the rights and power conferred by this grant shall never be transferred to any other nation or company of foreign nationality without the sanction of Her Britannic Majesty's Government first being obtained". The idea behind this restriction clause originated from Mr. W. Treacher, British Consul-General based in Labuan, who was himself present when the agreement was concluded and signed as a sole witness to the Sulu-Overbeck grant.

22. Notwithstanding the designation of the agreement as a "grant" in some English translation documents, a majority of historians, scholars and other authorities concur that the agreement, in its authentic language, was in fact and in intent a lease, and not a cession[17]. To be sure, it was a peculiar lease because, on its face, it had a perpetual duration[18]. But what should be of much more interest to us is the question of whether sovereignty or sovereign title to the territory defined in this agreement was ceded or transferred to Overbeck and Dent. Obviously, the answer is in the negative, because sovereignty cannot be assumed by private individuals as such.

23. But there is a more cogent reason to believe that the Sultan of Sulu was never deprived or divested of sovereignty over the territories mentioned in the lease to Overbeck and Dent. The British Government, as well as the major colonial powers for that matter, continuously acknowledged the sovereignty and dominion of the Sultan of Sulu over these territories in North Borneo.

24. Thus, the British Minister of Foreign Affairs, Earl Granville, responding to the Dutch and Spanish protest against the grant of a charter to the BNBC, constantly stressed that the BNBC Charter "recognizes the grants of territory and powers of government made and delegated by the Sultans in whom the sovereignty remains vested"[19]. He declared further:

> "The territories ceded to Mr. Dent will be administered by the Company under the suzerainty of the Sultans of Brunei and Sulu, to whom they have agreed to pay a yearly tribute. The British Government assumes no sovereign rights whatever in Borneo; and indeed, the [BNBC] Charter contemplates the appointment of British Consuls in the territories of the Company."[20]

This echoes the position taken by Lord Salisbury, predecessor of Granville, describing the grants to Overbeck and Dent, as "all but an alienation of the territory. The government of the territory will practically be with them, under the suzerainty of the Sultan . . ." The legal and administrative authorities in Great Britain shared the consensus that the Sultan of Sulu was the suzerain. The British Colonial Office officer commented that "the Sultan purports to delegate his sovereign rights in consideration of an annual payment, and not to cede them absolutely, and I conclude that this has been considered to prevent the full sovereignty from vesting in a British subject"[21]. The British Foreign Office's Assistant Permanent Under-Secretary Julian Pauncefote wrote:

> "It was clearly explained to the Law Officers . . . that the territory was to be administered by the company 'under the suzerainty of the Sultans of Sulu and Brunei' for whom they hold it as Lessees paying rent or tribute, as in the case of the Raja of Sarawak. No question arises, therefore, of the territory vesting in the crown, as is the case when British Subjects take possession of a territory not claimed by any Government and to which the Crown may desire to assert a title . . ."[22]

25. At this point, we can briefly refer to the 1885 Protocol between Great Britain, Germany and Spain, which was an attempt to settle the festering "Sulu issue", or the problem of delineation of spheres of interest in the territories under the dominion of the Sultan of Sulu. In the context of the discussions leading to the conclusion of the Protocol of 1885, the British Government once again emphasized *not* the Crown's sovereignty but the sovereignty of the Sultans over North Borneo, and that the BNBC administered North Borneo in the name of the Sultan of Sulu. When the Spanish Ambassador asked if Britain wished Spain to recognize British claims to sovereignty in Borneo, Granville said that this was not desired, pointing out that "The sovereignty in our view vested in the Sultans[,] and was merely delegated by them to the company by their concessions."[23] Permanent Under Secretary Pauncefote reinforced his Government's position: "We must be careful . . . to preserve the Sultan's status as a Sovereign in regard to the east coast of Borneo."[24] He declared "the sovereignty of North Borneo is vested in the Sultan of Sulu, and added that any stipulation Britain might make in an agreed Protocol" "respecting that territory must have the previous assent of the Sultan signified by him through the Company, who administer the Country as the mandatories"[25]. After the conclusion of the 1885 Protocol, Pauncefote insisted that North Borneo was "part of the State of Sulu" in matters of extradition, and that the BNBC was "merely the administrators of a Foreign State, namely Sulu"[26]. Therefore, the British position on the legal status of North Borneo was clear and unequivocal: Britain did not purport to acquire sovereignty over North Borneo when the 1885 Protocol was concluded[27]. The Sultan of Sulu continued to have sovereignty over that territory.

The 1903 Agreement between the BNBC and the Sultan of Sulu:
Confirmation of Cession of Certain Islands, 22 April 1903

26. After the Sulu-Overbeck and Brunei-Overbeck agreements were concluded, the BNBC continued acquiring more grants or leases from the native rulers in Borneo. The last of these Company acquisitions seems to have been made in 1903, when the BNBC acquired from the Sultan of Sulu another grant over certain islands not included in the 1878 Sulu-Overbeck Agreement. As of the end of 1903, the BNBC had acquired leases for the entirety of the territory of North Borneo covered by over 20 grants and/or leases[28].

27. The English translation of the 1903 Agreement, namely, "Confirmation of Cession of Certain Islands", states that the Sultan of Sulu was "pleased to cede . . . all the islands in the neighbourhood of the mainland of North Borneo from the island of Banggi to Sibuko Bay", and proceeds to identify these islands by name and includes "other islands lying near or round, or lying between the said islands named". The Agreement further states that "the reason why the names of these islands were not mentioned in the [1878 Sulu-Overbeck Agreement] is because it was known and mutually understood that these islands were included in the grant of the countries and islands mentioned in the [1878 Sulu-Overbeek] agreement. This "understanding" may not have been entirely accurate. It will be recalled that the 1878 grant included only islands "within nine miles of the coast". The more probable reason why the BNBC sought to acquire from the Sultan of Sulu the islands named therein was to gain more islands which were not within the ambit of the 1878 Agreement and which lay more than nine miles off the coast of mainland Borneo.

28. It is of course on record that as a consequence of this overreach by BNBC for more territory, the intended acquisitions under the 1903 Agreement unravelled. It is told that the ingenuous Sultan, after he had signed the 1903 Agreement, "said in the presence of an American interpreter that the Islands are American territory and that it may not be agreeable to the American authorities to learn that His Highness has now signed the agreement"[29]. And so when the American authorities in the Philippines were informed of the transaction, they immediately sought to recover the islands, utilizing the framework of the 1885 Protocol, which recognized in its Article 1 the sovereignty of Spain over the entire Sulu archipelago as defined in Article 2. The discussions on this matter led to the 1907 Exchange of Notes between the United States and Great Britain, as a result of which many of these islands, which were to be called "Turtle Islands" and "Mangsee Islands" in the 1930 United States-United Kingdom Exchange of Notes, were deemed to pertain to the United States.

29. The 1903 Agreement proves once again that the Sultan of Sulu was recognized as having continuing and uninterrupted sovereignty over the mainland of North Borneo as well as over islands lying off the coast of mainland Borneo. For assuming that the 1903 Agreement means what it literally says, the Sultan was in effect being asked to confirm the extent of his dominion over which the BNBC had authority to administer and govern. And since Great Britain gave agreement to the 1903 Agreement[30], it also recognized the unchanged status of the Sultan with respect to the Borneo dominion. All this goes to show that the legal situation since 1878 remained unaltered. The sovereignty of the Sultan over all these territories and islands was upheld. And the record is rich with examples showing how scrupulous Her Majesty's Government was in ensuring that the Company remains "administrator" and not "sovereign"[31].

30. It is therefore quite erroneous for Malaysia, in the present intervention proceedings, to argue that the Sultan of Sulu, as an international legal entity, "disappeared in September 1878 when Spain at last succeeded in conquering the Sultanate" and as of that date no longer - to quote the observation - no longer had "any capacity to hold or cede sovereignty or sovereign rights"[32]. As an international legal entity, the Sultan of Sulu was quite extant in 1903 and was still exercising his sovereignty over North Borneo by concluding an agreement with respect thereto.

The 1891 Agreement Between Great Britain and the Netherlands defining Boundaries in Borneo in relation to *(a)* the 1888 Agreement between Her Majesty's Government and the British North Borneo Company and *(b)* the 1881 Charter granted to the BNBC by the British Crown

31. In the 1891 Agreement between Britain and the Netherlands defining the boundaries in North Borneo, it will be seen that the boundaries defined therein are between, on the one hand, the "the Netherlands possessions" - as it is called in the Agreement - in the Island of Borneo, and, on the other hand, "British protected States" - as the Agreement says - in the same island. We will note that while the boundary sets apart, with respect to the Netherlands Government, so-called "Netherlands possessions", the boundary agreement, with respect to Great Britain does not refer to the equivalent "Great Britain possessions" or "British Crown possessions". Instead, the boundary defined segregates what belongs to entities referred to as "British Protected States". The British Protected States refer to the States of North Borneo, Sarawak and Brunei. I now wish to draw the attention of the Court to the "State of North Borneo" which is one of the "British Protected States" under the boundary agreement, and the only State implicated in the text of the 1891 Agreement by virtue of the explicit references made to "British North Borneo Company" in the Agreement.

32. The so-called "State of North Borneo" is an entity that was created and placed under British "protection" by virtue of an agreement between the British Government, on the one hand, and the British Company on the other, or BNBC. The "protection agreement"[33] was entered into by the two parties on 12 May 1888. Under this 1888 Protection Agreement, the State of North Borneo was characterized "as an independent State" and defined as the territories which are, to quote the agreement, "governed and administered" by the BNBC. It was the British Government, rather than the "State of North Borneo" or the BNBC, which negotiated and entered into the 1891 Agreement with the Netherlands Government on boundaries in Borneo because under Article III of the 1888 Protection Agreement, the relations between the State of Borneo and all foreign States were to be conducted by Her Majesty's Government. The boundary drawn in the 1891 Anglo-Dutch Agreement therefore delineated, among others, the boundary between the "Netherlands possessions", on the one hand, and the "independent State of Sabah", on the other, the latter being then under the administration of the British North Borneo Company.

33. The underlying purpose of the 1891 Anglo-Dutch Boundary Agreement, which delineated or allocated the respective political "spheres of interest" of Great Britain and the Netherlands in the whole island of Borneo, was clearly stated by the Dutch Foreign Minister. It was "to leave no room for any third Power to step in at any time in North Borneo and claim territory there as being *res nullius*"[34]. Vis-à-vis the Netherlands and other Western Powers, North Borneo was, therefore, put in a British sphere. It was not placed under British sovereignty. With respect to Great Britain, the 1891 Agreement did not purport to vest, and was not intended to vest, title or sovereignty over North Borneo in favour of the British Crown. When the boundary agreement was concluded, it was taken for granted by both Great Britain and the Netherlands that North Borneo was an independent State, although under the protection of Great Britain.

34. The status of North Borneo in 1891 - as an independent State under the protection of Great Britain - remained intact in 1930, when the United States and the United Kingdom concluded in January 1930 the Convention regarding the Boundary between the Philippine Archipelago and North Borneo. Similar to the Anglo-Dutch Boundary Agreement of 1891, this treaty refers to territories that, to quote the Agreement, "belong to the State of North Borneo", or "the State of North Borneo" being "under British protection".

35. And now the question arises: if it was not the intention of the British Crown to establish sovereignty over North Borneo when the 1891 Agreement was concluded, who then had the sovereign power over the "independent" State of North Borneo at that time? Was it the BNBC, the entity which then administered North Borneo?

36. The historical evidence shows that the BNBC was not the sovereign authority in North Borneo when the 1891 Anglo-Dutch Boundary Agreement was concluded. A close look at the 1888 Protection Agreement between the British Crown and the BNBC will immediately demonstrate why this is so. Through the 1888 Protection Agreement between the British Crown and the BNBC, Great Britain was able to consolidate its political control over North Borneo[35]. And while the Protection Agreement recognized that North Borneo was administered by the BNBC, it did not state nor suggest that sovereignty over North Borneo appertained to, or was vested in, the BNBC.

37. There is no reason to believe that the BNBC held sovereignty over North Borneo at that time. Firstly, as a private entity incorporated under the laws of Great Britain, it could not have possessed sovereign powers on its own under international law. True, it enjoyed extensive powers, recognized in the 1888 Protection Agreement, to administer the territory of North Borneo, but this in no way meant that it was sovereign. Thus, in 1907 the BNBC, represented by the British Government, agreed that certain islands in North Borneo under its administration fell under the sovereignty of the United States. In the July 1907 British-United States Exchange of Notes reflecting this agreement, it was expressly provided that: "the privilege of administration shall not carry with its territorial rights, such as those of making grants or concessions in the islands in question to extend beyond the temporary occupation of the company". The understanding that this privilege of administration enjoyed by the BNBC did not carry with it sovereign rights was reiterated in 1930 when the United States and the United Kingdom, through the Exchange of Notes accompanying the United States-United Kingdom Boundary Agreement, which I earlier referred to, spelled out the details of the 1907 Agreement.

38. In the second place, as we shall find out very shortly when we examine the BNBC Charter and the circumstances surrounding the grant of the BNBC Charter, the BNBC was not authorized to assume sovereign title over the territory of North Borneo for and on behalf of the British Crown.

39. The BNBC was incorporated as a British subject by virtue of a Royal Grant dated 1 November 1881[36]. If we peruse the BNBC Charter closely, nowhere can we find a provision or language which grants the BNBC authority to acquire and hold territory for and on behalf of the British Crown. Under the British legal system, the position of the BNBC was, according to Granville, therefore, totally very different from the position of the British East India Company, or the Hudson's Bay Company, or the New Zealand Company, which was empowered to perform acts of sovereignty for and on behalf of the British Crown[37]. Moreover, the British Government's representations and assurances to foreign governments at the time are replete with testimonials showing that the grant of a Royal Charter to the BNBC did not have a political object and was never intended to invest the BNBC with a sovereign character. For instance, Granville, in response to insistent objections from the Dutch Minister Count de Bylant to the granting of the Charter, repeatedly stressed that the BNBC was a purely private commercial undertaking. Thus

> "Her Majesty's Government have already explained to the Government of the Netherlands that the grant of the Charter did not in any way imply the assumption of sovereign rights in North Borneo. It is therefore unnecessary to pursue this discussion further."[38]

Granville also assured the Spanish Government: "In granting the Charter to the North Borneo Company, we had laid no claim to sovereignty, either on behalf of Her Majesty's Government or of the company."[39] Once again, he stressed:

> "The Crown in the present case assumes no dominion or sovereignty over the territories occupied by the Company, nor does it purport to grant to the Company any powers of government thereover; it merely confers upon the persons associated the status and incidents of a body corporate."[40]

North Borneo Cession Order, 1946

40. The so-called "North Borneo Cession Order in Council" of 10 July 1946 purported to annex North Borneo to Great Britain as part of His Majesty's dominion, and to transform it into the Colony of North Borneo. The basis of this annexation, or colonization of North Borneo by Great Britain was an Agreement dated 26 June 1946 entered into between the British Crown, on the one hand, and the British North Borneo Company, on the other. In this Agreement, the BNBC purportedly ceded and transferred all its rights, powers and interests in North Borneo to the British Crown in this language: "to the intent that the Crown should have full sovereign rights, and title to, the territory of the State of North Borneo".

41. If we believe for a moment what this Cession Order literally says[41], it tells us that Great Britain certainly did NOT have sovereignty over, or title to, North Borneo before 15 July 1946. It also tells us that the BNBC had ceded all its "rights, powers and interests" to Great Britain effective 15 July 1946. The inference is that the BNBC transferred or ceded sovereignty and dominion over North Borneo to Great Britain. But then, it must be pointed out, the Cession Order did not expressly state that the BNBC had sovereignty or dominion over North Borneo before 15 July 1946. The question that then arises logically is this: was the BNBC in a legal position to transfer or cede a sovereign title over North Borneo to Great Britain?

42. The position of the Philippine Government is that the Cession Order in Council of 1946 did not and could not have transferred sovereignty over North Borneo to the British Crown for the simple reason that the BNBC did not acquire, and was never authorized to acquire, sovereignty over North Borneo. The British Government, therefore, assumed something that could not possibly have been ceded to it by the BNBC, and which was beyond the latter to transfer by way of right or power. The principle follows an ancient precept: the transferee cannot obtain more rights than the transferor. This highly irregular transaction between the BNBC, on the one hand, and the British Crown, on the other, prompted an American adviser to the Philippine President, the former Governor-General to the Philippines Francis Harrison, to assert that the unilateral act of Great Britain in annexing North Borneo as a colony by way of the 1946 Cession Order was, and I quote him, "an act of political aggression" which should be repudiated by the Philippines, as, in fact, it did.

Conclusion

43. Let me conclude Mr. President, Members of the Court, with a few propositions. The foregoing examination of some of the treaties, agreements and documents which illuminate the legal status of North Borneo,

specifically from 1878 up to 1946, shows that the Sultan of Sulu enjoyed *de jure* continuous and uninterrupted sovereignty over those territories in North Borneo which the Sultan leased to the BNBC and were under the latter's administration. Great Britain and the BNBC who, by their conduct and legal commitments, have upheld the independence and sovereignty of the Sultan over North Borneo, within the framework of the British legal system as well as before the international community, are now estopped from asserting otherwise.

44. Great Britain recognized the Sultanate's sovereignty over North Borneo from 1878 up to 15 July 1946, when the Sultanate as an international legal personality was sought to be abolished by Great Britain through the 1946 Cession Order. The annexation of Sulu's dominion in North Borneo effected through this Cession Order was thus wholly illegal.

45. It is our submission that any claim or title to territory in or islands near North Borneo that assumes or posits or purports to rest a critical link on the legitimate sovereign title of Great Britain from 1878 up to the present is unfounded. Similarly, the interpretation of any treaty, agreement or document concerning the legal status of North Borneo as well as islands off the coast of North Borneo which would presume or take for granted the existence of British sovereignty and dominion over these territories has no basis at all in history as well as in law and, if upheld by the Court, it would adversely affect an interest of a legal nature on the part of the Republic of the Philippines.

46. Mr. President, Members of the Court, this completes my Government's presentation in this phase. I must, as I do now, thank you for this opportunity to be heard on behalf of the Republic of the Philippines. May I now withdraw.

The PRESIDENT: Thank you very much, Prof. Magallona. Je vous remercie. Ceci conclut le premier tour de plaidoiries des Philippines. La Cour se réunira demain matin mardi 26 juin à 10 heures pour le premier tour de plaidoiries de l'Indonésie et de la Malaisie. La séance est levée.

L'audience est levée à 12 h 30.

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1 The Government of the State of Eritrea and the Government of the Republic of Yemen, Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute) at para. 153.

2 Damrosch, *Multilateral Disputes* in "The International Court of Justice at a Crossroads" (Damrosch, ed.) at pp. 376, 387.

3 Judgment of 11 June 1998. para. 116.

4 Indeed, in *Corfu Channel* and *Gulf of Maine*, the Court insisted that even experts it appointed had to treat the documents made available to them as strictly confidential.

5 III Rosenne, p. 1289. "Whenever one of the parties withheld its consent," Rosenne adds, "the Court has refrained from making the pleadings available to a requesting State." *Ibid*.

6 *Ibid.*

7 Malaysian observations, para. 6.

8 *Digest*, 50, 17, 54.

9 Indonesian observations at para. 14.

10 *Ibid*.

11 See Article I, Philippine Constitution, 1973 and 1987.

12 Entitled *An Act to Amend Section One of Republic Act 3046, Entitled "An Act to Define the Baselines of the Territorial Sea of the Philippines"*, 1968.

13 Malaysia Note No. BY 6/66, 7 February 1966.

14 See Great Britain Note of 25 May 1962, Philippine Note of 22 June 1962, Great Britain Note of 7 August 1962, and Philippine Note of 12 September 1962.

15 See the so-called Dalrymple treaties and Moses-Torrey agreements, all reprinted in Allen, Stockwell & Wright (Eds.), *A Collection of Treaties and Other Documents Affecting the States of Malaysia 1761-1963*, Vol. II (NY: Oceana, 1981), pp. 371 *et seq*.

16 "Map showing the Lands ceded by the Sultans of Brunei and Sulu to the BNBC", App. No. 11, in *Papers Relating to the Affairs of Sulu and Borneo, Part I, Presented to both Houses of Parliament by Command of Her Majesty* (London: 1882).

17 See, for example, the Application of Mr. A. Dent for a Royal Charter addressed to the Marquis of Salisbury, 2 Dec. 1878, in *Papers Relating to the Affairs of Sulu and Borneo, supra* note 6; contemporaneous translation by Spanish authorities, 22 July 1878, in App. 8, *ibid*.; British official documents, *infra*, para. 24; Professor Conklin's authoritative translation, in *Philippine Claim to North Borneo*, Vol. I (Manila: Bureau of Printing, 1963); and N. Tarling, *Sulu and Sabah: A Study of British policy towards the Philippines and North Borneo from the late eighteenth century* (Kuala Lumpur: Oxford University Press, 1978), Chaps. 4 and 5.

18 Unlike the Overbeck-Brunei leases, there was no express provision for reversion/retrocession.

19 Granville to Morier, Foreign Office Doc. [FO] 197, 7 Jan. 1882, in *Papers Relating to the Affairs of Sulu and Borneo, supra*. note 6.

20 Granville to Bylandt, FO 23, 21 Nov. 1881, in *Papers Relating to the Affairs of Sulu and Borneo, Part II* (London, 1882).

21 British Colonial Office Doc. [CO] 144/55 (9177), 24 May 1881; also FO 12/56, 2 June 1881.

22 Foreign Office Memorandum, n.d., 12/56.

23 Granville to Morier, No. 23 A, 17 Feb. 1882, FO 71/16.

24 See Memorandum, n.d., PRO 30/29/187.

25 Memorandum, 10 Sept. 1884, FO 71/17.

26 See numerous documents quoted and cited in Tarling, *supra* note 7, at 256.

27 What the 1885 Protocol accomplished, under its Article 3, was the renunciation of Spanish sovereignty claims over the territories administered by the BNBC, in exchange for which Spain's sovereignty over the Sulu Archipelago, defined in Article 2 of the 1885 Protocol, was recognized.

28 See the two-page "Index of Documents", in CO 874 listing the various grants (as well as territories covered by these grants) to the BNBC from local rulers.

29 Birch to Martin, April 1903, CO 874/272 & 1001.

30 The English-translated text of the 1903 Agreement states "Subject to H.E. Approval" below the signature of the BNBC representative, Mr. Alexander Cook.

31 In the 1903 Agreement, the BNBC representative, Alexander Cook, signed "For Government", which meant "For the BNBC government". The question of what title the chief of the BNBC Government would assume became subject of a long running debate between, on the one hand, the BNBC and, on the other, the Foreign Office and Colonial Office of the British Government. Upon the suggestion that the title be "Governor" the Foreign Office insisted that since the BNBC Charter used "Principal Representative" of the BNBC, then that official designation should be used. See FO 12/113, 3 August 1900, and documents cited in Tarling, *supra* note 7, at 336-338. "To employ the word [Governor] suggesting that the administrator is a servant of the Crown and that the territory is not independent would be quite wrong from every point of view". See CO 874/8, 30 June 1914. Moreover, the protection agreement referred to "the State of North Borneo" and not "British North Borneo". In 1931, the British Government corrected a French Note about the civil procedure convention which referred to British North Borneo and Sarawak as English colonies. *Note in Tyrrell to Anderson, No. 74*, FO 372/261045, 21 Jan. 1931. Passports were to be "issued in the name of the British North Borneo (Chartered) Company". *Elphinstone to Amery*, CO 874/1003, 15 June 1923.

32 Para. 9 *(a)* and *(d)*, Malaysian observations.

33 The 1888 Agreement was never referred to as a "protectorate agreement", and the British Government has consistently stressed that North Borneo was an "independent State" and not a "protectorate State". See Tarling, *supra* note 7, at 338.

34 Rumbold to Salisbury, 19 November 1888, No. 138, FO 12/79.

35 It was able to achieve this through the mandate given it to exercise certain pivotal rights, namely, (1) to direct the foreign relations of the State of North Borneo, (2) to establish consular offices in this foreign State, and (3) to consent to the cession or alienation of any part of the territory of North Borneo made by the BNBC to any foreign State or any subject or citizen thereof.

36 Granville to Morier, 7 January 1882, FO 197, *supra* note 9:

> "The 'British North Borneo Company' are in fact established under three Charters:
>
> 1. The Charter and territorial Concession from the Sultan of Sulu.
>
> 2. The Charter and the territorial Concession from the Sultan of Brunei.
>
> 3. The British Charter of Incorporation.
>
> The first two Charters, from the Sultans of Sulu and Brunei, are those under which the Company derive their title to the possession of the territories in question, and their authority to administer the government of those territories by delegation from the Sultans."

37 *Ibid.*

38 Granville to Bylant, 7 Jan. 1882, *supra* note 7.

39 Granville to Morier, 17 Feb. 1882, *supra* note 13.

40 Granville to Morier, 7 Jan. 1882, *supra* note 7.

41 The policy basis for the annexation of North Borneo is articulated in the *Secret "Draft Directives for Further Planning in South-East Asia: War Cabinet Paper, 18 May 1944"*, where it is stated that: "This jurisdiction will render unnecessary any further dependence on Treaties with Rulers in any future revision of the constitutional arrangements." Text in Porter & Stockwell, *British Imperial Policy and Decolonization 1938-64*, Vol. 1, 1938-51 (Macmillan Press, 1987), pp. 195, 198.