Non-Corrigé
Uncorrected

CR 2001/4

International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 2001

Public sitting

held on Friday 29 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

ANNÉE 2001

Audience publique

tenue le vendredi 29 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

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

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

M. Couvreur, greffier

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.

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 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;

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.

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-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;

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.

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 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;

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.

Le Gouvernement de la Malaisie est representé 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 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 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,

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.

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 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.

Le PRESIDENT : Veuillez vous asseoir. La Cour est réunie ce matin pour entendre le second tour de plaidoiries de l'Indonésie et de la Malaisie et je donnerai d'abord la parole au représentant de l'Indonésie et à M. Rodman Bundy.

Mr. BUNDY: Merci M. le Président. Mr. President, Members of the Court, my task this morning is to deal with two aspects of the Philippine presentation we heard yesterday: *first*, I will comment on the question whether the Application has been filed in a timely fashion; and *second*, I will seek to clarify a number of misunderstandings which the Philippines appears to entertain with respect to the practical effect of the Application for purposes of the merits of the case.

First, to the question of timeliness.

1. The question of timeliness

Yesterday, I listened with interest to the distinguished Agent of the Philippines when he stated that, in bringing the Application, his Government had proceeded in a careful and deliberate fashion (CR 2001/3, p. 31). Nonetheless, after listening to Prof. Reisman, yesterday, on the issue of timeliness, Indonesia still considers that the Application does not comport with the letter or spirit of the Rules of Court and the Court's clear trend recently to encourage the expedition of proceedings.

Prof. Reisman argued that it is important to relate the Application to the Philippines request under Article 53 of the Rules for copies of the written pleadings in the case (CR 2001/3, p. 17, para. 17). Prof. Reisman asked: "When would Indonesia expect the request under Article 53 to come? Before the Parties had made their written submissions?" *(Ibid.)*

No, Mr. President, not before the Parties had made their written submissions. But at least in sufficient time so that the Court could have taken a decision on the matter before the Parties were due to file their final written pleadings, their replies in the case. This would have been in keeping with the Rules and would have permitted the Philippines to file a timely application.

In point of fact, the answer to Prof. Reisman's question lies in the past practice of parties in previous intervention cases.

In the *Tunisia/Libya* case, for example, Malta requested the written pleadings five months, five months before the parties were due to file their Counter-Memorials. Because the Court first had to ascertain the views of the parties before deciding whether to grant that request — and that took two months — nonetheless this still left Malta with ample time to file a timely application.

Now in the *Libya/Malta* case, Italy requested the pleadings four and a-half months before the parties were due to file their Counter-Memorials. And Italy too, had no problem in filing a timely request for permission to intervene.

Since both the Maltese and Italian requests for the documents were denied, I have a hard time understanding how Prof. Reisman can now maintain that this case that we are arguing here this week, is a case of first impression because the Philippines has been denied access to the pleadings. It's not a case of first impression (CR 2001/3, p. 17, para. 20).

In the *El Salvador/Honduras* case, Nicaragua requested the pleadings two years before the final written submissions were due. It had no problems meeting the timeliness deadline for filing an application. And neither, more recently, did Equatorial Guinea.

Yet the Philippines waited until a mere *eight* days, just *eight days* before the Parties' Replies were due to be filed. And given that the Court had first to ascertain the views of the Parties before deciding whether or not to grant that request, the fact that the request came a mere eight days before the final replies were due, made it, for all practical purposes, impossible for the Philippines to know whether it would be given access to the pleadings before the Parties had completed their final submissions.

Yesterday, both Prof. Reisman and the Philippines Agent referred to Article 85 of the Rules — specifically, to the provision in paragraph 1 of Article 85 that provides that a State whose intervention request is granted is then thereafter given access to the written pleadings in the case. It seems to me, Mr. President, that this provision alone would have been sufficient to put the Philippines on notice that it could not presume that it would have access to the written pleadings prior to the filing of its Application. So the question remains: why did the Philippines not act earlier?

Is it right for Indonesia and Malaysia to be placed in the position in which they find themselves today due to the Philippines delay in submitting its Application? After all, the recent

trend, which is evidenced by various amendments to the Court's Rules, is for the Court to make the proceedings more efficient. I referred on Tuesday to the 1978 amendment of the Rules which provided for tighter deadlines for the filing of applications to intervene. I might also refer in this respect to the Court's recent amendment of Article 79 of the Rules of Court, dealing with the time-limits for filing preliminary objections. Both of these amendments point to a trend — I would suggest — a trend by the Court to expedite its proceedings. The late filing of the Philippines Application, Indonesia would suggest, neither comports with this trend but it is one factor which Indonesia submits should be taken into account in assessing whether the Application should be granted.

2. The Philippines misrepresents the implications of its Application for the merits of the case

As for my second point, Mr. President, this concerns the use that the Philippines has tried to make of my remarks on Tuesday concerning the implications of the Application for the merits of the case.

I shall, in particular, deal with two points raised by Prof. Magallona.

First, the distinguished professor claimed that while Indonesia purports to adopt an attitude of disinterest on the merits of the Philippines claim to North Borneo, Indonesia has in fact invoked the merits of that claim in its case against Malaysia. In counsel's words:

> "Indonesia recognizes the positive merits of the Philippine claim to North Borneo that 'flow from the Philippines Application and Malaysia's reaction to it which have a fundamental bearing on the issue of sovereignty over the islands of Ligitan and Sipadan'" (CR 2001/3, p. 19, para. 3).

I will explain presently why the premise which underlies this argument is incorrect. But first, let me note that counsel went on to assert that what Indonesia was in effect saying was that the determination of sovereignty over Sipadan and Ligitan cannot fail but make a reference to "(1) pivotal aspects of the Philippine claim to North Borneo; and (2) the Philippine view that the legal status of North Borneo is necessarily implicated in the determination of . . . sovereignty . . . as between Indonesia and Malaysia" (CR 2001/3, pp. 19-20, para. 3).

I regret to say that the Philippines, perhaps due to my shortcomings, appears to have completely misunderstood the thrust of my intervention on Tuesday. First of all, there is no question of Indonesia having recognized "the positive merits of the Philippine claim to North

Borneo". Indonesia has not deemed it appropriate to take any position on the merits of that claim: and the claim, such as it is, is a matter between the Philippines and Malaysia. Indonesia is not involved.

Secondly, the determination of sovereignty over Sipadan and Ligitan as between Indonesia and Malaysia *in no way* depends on the Philippine claim to North Borneo.

When I spoke on Tuesday about the implications of the Philippine Application for the merits of the case, I was not referring to the Philippine claim to North Borneo. My point was a very simple one. It was, as the Court has repeatedly been told, that the Philippines has expressly disavowed any title or sovereignty to the islands of Sipadan and Ligitan: and it is this absence of any Philippine claim to the islands which, as I explained, has implications for the merits of the case. But that has nothing to do with the separate question of the legal status of North Borneo.

It is precisely because the Philippines does not lay claim to the islands of Sipadan and Ligitan that it cannot be said to have an interest of a legal nature which may be affected by a decision in the case. No implications for the Philippines claim to North Borneo will flow from a determination by this Court of the issue of sovereignty over the islands. Sipadan and Ligitan are simply not part of the Philippines claim.

That leads me to my second point. For, while in its Note Verbale and in its first round presentation the Philippines could not have been clearer as to its lack of interest in either of the two islands, I was concerned to hear in Prof. Magallona's intervention yesterday a hint of hesitation over this point. Let me just recall what the distinguished professor had to say:

> "Because, as the Philippines contends, the Sultan of Sulu enjoyed continuous, uninterrupted and internationally recognized *de jure* sovereignty over North Borneo during the whole period of 1878 and 1962, then it follows that the two islands in question [Sipadan and Ligitan] were acquired by the United Kingdom in 1930 for and on behalf of the Sultan of Sulu." (CR 2001/3, p. 22, para. 11.)

Counsel went on to say:

> "If at all there are other territories appertaining to the Sultanate not covered by the Sulu-Overbeck lease of 1878, the Philippines, as agent and attorney for the Sultanate, has reserved its position on these territories." (*Ibid.*, para. 12.)

Mr. President, at the appropriate time I have promised to my colleague and friend, Prof. Pellet, that I will attempt to unravel for him the mysteries of the doctrine of estoppel, but I

suspect that this is probably not the best time to do so. Nonetheless, whether one speaks of estoppel, or good faith, or the prohibition against a State blowing hot and cold at the same time, the position is the same.

The Philippines is on record as having expressly disclaimed any territorial interest in either Sipadan or Ligitan. If the famous Note Verbale is not enough, then let us recall the words of Prof. Reisman on Monday: he said "This is not a Philippine claim for the islands" (CR 2001/1, p. 27, para. 28). And he added: "Indonesia correctly observes that the Philippines is not interested in the outcome of Ligitan and Sipadan" (CR 2001/1, p. 30, para. 43). Does Prof. Magallona now purport to take issue with his Government's diplomatic Note or with the affirmations that Prof. Reisman made on Monday?

At the end of the day, Mr. President, the position is clear. The case between Indonesia and Malaysia concerns sovereignty over Sipadan and Ligitan. The Philippines has no claim in that matter. Their concern is over the status of North Borneo. But that is not the subject-matter of the dispute before the Court. Nor is the legal status of North Borneo in any way implicated by the question of sovereignty over the islands, or affected by the Philippines lack of interest in either of the two islands.

Mr. President, that concludes my brief remarks, and I would be grateful if you could now call on Professor Pellet to continue with Indonesia's presentation.

The PRESIDENT: Thank you very much, Mr. Bundy. Et j'appelle maintenant à la barre le professeur Alain Pellet.

M. PELLET : Merci beaucoup, Monsieur le président.

Monsieur le président, Madame et Messieurs les juges,

Tout à fait à la fin de son intervention d'hier matin, l'agent de la République des Philippines a attiré l'attention de la Cour «to the fact that the Philippine Application for permission to intervene arises out of the broad setting of unsettled territorial issues in our region which are a dim legacy of Western imperial and colonial rule» (CR 2001/3, 28 juin 2001, p. 31, par. 4).

Ceci est le reflet de la pure vérité. Mais cela pose avec acuité la question de savoir si tel peut être l'objet légitime d'une intervention au titre de l'article 62 de votre Statut. A cette question, l'Indonésie croit qu'il faut fermement répondre par la négative.

Il va de soi qu'en s'acquittant de sa mission, qui est «de régler conformément au droit international les différends qui lui sont soumis», la Cour contribue à éviter que certains litiges s'enveniment et empêche certainement que d'autres surviennent. Je me réfère, par exemple, à la très remarquable présentation de sir Robert Jennings lors du colloque qui a marqué le cinquantième anniversaire de la Cour, dans laquelle il a fait part de sa conviction selon laquelle :

> «Properly understood, the adjudicative process can serve, not only to resolve classical legal disputes, but it can also serve as an important tool of preventive diplomacy in more complex situations.» («Contribution of the Court to the Resolution of International Tensions» *in* Connie Peck and Roy S. Lee eds., *Increasing the Effectiveness of the International Court of Justice*, Nijhoff/UNITAR, 1997, p. 79.)

Mais l'ancien président de votre haute juridiction d'ajouter aussitôt que ceci doit s'entendre par rapport au différend précis qui lui est soumis, dont la Cour opère «the reduction, or refinement, or compression» (p. 80); et, en réponse à une question, sir Robert a précisé : «I would be somewhat frightened of litigants coming and expecting something different than the strict application of the law.» (P. 93.)

C'est que, et je cite l'arrêt rendu dans l'affaire du *Cameroun septentrional*, «[l]a fonction de la Cour est de dire le droit, mais elle ne peut rendre des arrêts qu'à l'occasion de cas concrets dans lesquels il existe, au moment du jugement, un litige réel impliquant un conflit d'intérêts juridiques entre les Parties» (*C.I.J. Recueil 1963,* p. 33-34; voir aussi les arrêts du 20 décembre 1974 dans les affaires des *Essais nucléaires*, *C.I.J. Recueil 1974*, p. 270, par. 55, et p. 476, par. 58). Et ce n'est qu'en s'acquittant de *cette* mission, de *jurisdictio*, dans les cas particuliers qui lui sont déférés, que la Cour peut jouer le rôle préventif que les Philippines voudraient la voir accepter de jouer à titre principal. Oui, Monsieur le président, par son arrêt, la Cour réglera le différend qui oppose l'Indonésie à la Malaisie et l'empêchera de s'envenimer — et elle contribuera ainsi à apaiser les tensions dans la région. Mais ceci ne saurait justifier que, par la même occasion, la Cour se penche sur un autre différend, dont le seul lien avec l'affaire que le compromis de 1997 vous appelle à trancher est qu'il est, lui aussi, un élément du legs colonial.

D'autant plus — et l'Indonésie tient à le redire avec force —, qu'elle n'est, décidément, nullement concernée par ce différend — si différend il y a. En écoutant les plaidoiries des représentants des Philippines hier matin, nous nous sentions dans la position de Rosencrantz et Guildenstern — vous savez, Monsieur le président, ce sont ces deux personnages très secondaires d'Hamlet autour desquels Tom Stoppard a construit une pièce de théâtre, intitulée *Rosencrantz et Guildenstern are Dead*, dans laquelle les deux comparses sont placés au centre de l'action et voient le Roi, la Reine, Hamlet, se débattre dans des problèmes terribles auxquels ils ne comprennent rien et qui leur sont tout à fait étrangers. Et c'est bien par-dessus nos têtes de Guildenstern et Rosencrantz que les avocats de l'Indonésie se sont adressés, hier, directement et exclusivement à nos collègues de la Malaisie pour exposer leurs thèses relatives à la souveraineté sur Sabah.

Monsieur le président, l'Indonésie l'a déjà dit, elle tient à le redire : elle n'entend prendre aucune position sur le fond de la querelle entre ses deux voisins; elle n'entend même pas se prononcer sur la question de savoir s'il existe entre eux un différend au sens juridique du terme puisque, apparemment, les Philippines le soutiennent alors que la Malaisie le conteste. Ce dont elle a, en revanche, la très ferme conviction, c'est que, *si* un tel différend existe, il est, en tout cas, totalement distinct, par les parties qu'il oppose, son objet et les thèses en présence, de celui faisant l'objet de votre saisine par le compromis de 1997.

Il n'est pas du tout impossible que, dans le cadre de ce différend — ou de ce non-différend, peu importe — l'interprétation de certains des instruments que l'Indonésie ou la Malaisie, ou les deux, invoquent soient pertinents. Mais ceci ne suffit pas pour fonder un intérêt d'ordre juridique dont les Philippines pourraient se prévaloir pour justifier leur intervention.

Monsieur le président, le professeur Reisman a dit quelque chose de très extraordinaire à cet égard. Il a affirmé : «We find nothing in the precedents about the permissible scope of an intervention being determined by the language of the submission, but rather by the possible consequence of the Court's decision.» (CR 2001/3, 28 juin 2001, p. 15, par. 10.) Je crains que le professeur Reisman n'ait pas très bien cherché.

Certes, il faut que l'intérêt d'ordre juridique invoqué par l'Etat qui cherche à intervenir soit susceptible d'être affecté par la décision de la Cour (*«may be affected by the decision in the case»* précise le texte anglais de l'article 62). Mais il faut *aussi* que cet intérêt soit «pour lui *en cause*»

dans la cause. Et comme je l'ai rappelé mardi dernier (CR 2001/2, 26 juin 2001, p. 20), la jurisprudence de la Cour combine soigneusement les deux versions de son Statut et tient compte *des deux* exigences.

Pour déterminer si un intérêt est effectivement en cause pour l'Etat auteur de la requête à fin d'intervention, il convient donc de confronter celle-ci aux demandes des Parties à l'instance principale. La Cour l'a dit avec une très grande clarté lorsqu'elle a écarté l'intervention de l'Italie dans l'affaire *Libye/Malte* : «Normalement, la portée des décisions de la Cour est définie par les prétentions ou conclusions des parties...» Et c'est par rapport à ces prétentions, éventuellement telles que la Cour les a «circonscrites» (cf. les arrêts du 20 décembre 1974 dans les affaires des *Essais nucléaires*, *C.I.J. Recueil 1974*, p. 262, par. 29 et p. 466, par. 30), que votre haute juridiction apprécie la portée de l'intervention en tenant compte de toutes les circonstances, en même temps —et c'est ce qui nous intéresse plus particulièrement ici—, «*que de la nature de l'objet de l'instance introduite*» par les Parties à l'affaire principale (arrêt du 21 mars 1984, requête de l'Italie à fin d'intervention dans l'affaire du *Plateau continental (Jamahiriya arabe libyenne/Malte)*, *C.I.J. Recueil 1984*, p. 19, par. 29).

Or les Philippines ont formellement donné à l'Indonésie l'assurance qu'elles n'avaient aucune revendication à faire valoir sur Ligitan et Sipadan dans la note du 5 avril dernier annexée aux observations écrites de la République d'Indonésie et elles l'ont répété en plaidoirie (voir encore CR 2001/3, 28 juin 2001, p. 10, par. 2 (M. Reisman)). Ce faisant, elles reconnaissent que leur requête à fin d'intervention est dépourvue de tout lien avec l'objet de l'instance pendante devant la Cour. Or, je le répète, ceci est l'une des deux conditions indispensables que doit présenter une requête à fin d'intervention pour être admise.

Ceci étant, force est de constater que l'autre condition mise par l'article 62 du Statut à l'accueil d'une requête en intervention qui a seule retenue l'attention de nos amis philippins, n'est pas davantage remplie : quelle qu'elle soit, la décision de la Cour ne pourra être de nature à affecter un intérêt juridique de la République des Philippines.

Selon eux, l'interprétation des traités et accords sur lesquels les Parties s'appuient (ou pourraient s'appuyer) pour établir leurs droits sur Ligitan et Sipadan «will certainly affect the

Philippines interest» (CR 2001/3, 28 juin 2001, p. 14, par. 8 (Reisman)) Rien, Monsieur le président, n'est moins certain !

Que nous ont dit les professeurs Reisman et Magallona pour vous en convaincre ? Essentiellement que les revendications philippines sur le nord de Bornéo pouvaient dépendre de l'interprétation de certains traités sur lesquels l'Indonésie et la Malaisie se fondent. C'est très possible. Mais cela ne suffit certainement pas à justifier une intervention.

D'abord parce qu'il est loin d'être certain qu'une simple interprétation puisse être à l'origine d'un intérêt d'ordre juridique au sens de l'article 62. A cet égard, M. Reisman a insisté sur la différence qui existerait entre «a concern about rules and general principles of law», dont il concède que : «it does not constitute a sufficient interest under Article 62» (CR 2001/3, 28 juin 2001, p. 12, par. 5) d'une part et les préoccupations philippines au sujet des traités et accords applicables d'autre part. J'ai beaucoup de mal à suivre mon ami Michael Reisman sur ce terrain :

— la différence ne peut tenir, contrairement à ce qu'il suggère (*ibid.*), au fait que ces instruments ont un effet *erga omnes* puisque la mise en œuvre des principes et règles de délimitation aboutit exactement au même résultat, lui aussi opposable *erga omnes*;

— elle ne tient pas non plus au fait que les demandes des Philippines seraient plus spécifiques que celles de Malte dans *Tunisie/Libye* ou du Nicaragua dans *El Salvador/Honduras* par exemple; puisque, comme le rappelle à juste titre mon contradicteur (p. 16, par. 13), toute requête à fin d'intervention doit être examinée *in concreto*; et, dans ces deux affaires, la Cour a reconnu que les intérêts invoqués par les pays qui cherchaient à intervenir étaient spécifiques (cf. *C.I.J. Recueil 1981*, p. 17, par. 30 et 1990, p. 124, par. 76); mais, dans un cas comme dans l'autre, la Cour a estimé qu'ils n'étaient pas de nature à fonder une intervention (*C.I.J. Recueil 1981*, p. 19, par. 33 et 1990, *ibid.* et p. 126, par. 82).

En second lieu et surtout, il est impensable que les interprétations que la Cour pourrait être appelée à donner des traités en cause puissent avoir un effet quelconque sur l'intérêt d'ordre juridique que les Philippines prétendent avoir. Elles ne seront données, ces interprétations, qu'aux fins du différend opposant l'Indonésie à la Malaisie, qui porte, est-il nécessaire de le rappeler ?,

exclusivement sur la souveraineté sur Ligitan et Sipadan, problème par lequel les Philippines déclarent expressément n'être pas concernées.

Prenons l'exemple, si crucial, de la convention entre la Grande-Bretagne et les Pays-Bas de 1891. Le professeur Magallona en a assez longuement parlé lundi (cf. CR 2001/1, 25 juin 2001, p. 44-48).

Il est clair, Monsieur le président, que l'interprétation des Philippines, quels que soient ses mérites (ou ses faiblesses), n'a aucun lien avec l'objet du différend : elles ne prétendent pas que ce traité, central dans l'affaire qui oppose les Parties, n'est pas valide, ni ne contestent ses effets en ce qui concerne Ligitan et Sipadan. Elles estiment simplement qu'il a été conclu par le Royaume-Uni en tant que «protecteur de l'Etat du Bornéo septentrional» et non pas en son nom propre (CR 2001/1, p. 44-45 (M. Magallona)). Ce peut être ou non le cas; cela peut avoir de l'importance dans le cadre du différend entre les Philippines et la Malaisie sur la partie septentrionale de Bornéo; cela n'a aucune incidence dans le cadre du litige qui est pendant devant la Cour. Je n'ai pas le temps d'examiner un à un les instruments cités par MM. Magallona et Reisman, mais toutes leurs analyses appellent les mêmes remarques, elles n'ont aucune incidence en ce qui concerne la souveraineté sur nos deux îles.

Que résulte-t-il de ces savantes analyses ? Que, dans tous les cas, les Philippines ont des idées arrêtées sur la capacité dans laquelle les Parties à ces instruments les ont conclus et, par voie de conséquence, sur leurs effets quant à la souveraineté sur le nord *de Bornéo* — jamais sur la souveraineté sur Ligitan et Sipadan. Décidément, Madame et Messieurs de la Cour, l'intérêt des Philippines pour les traités et accords pertinents d'une part et l'objet même de l'affaire dont vous êtes saisis, d'autre part, ne coïncident pas et les positions que vous serez conduits à prendre dans votre arrêt ne peuvent aucunement affecter les droits ou intérêts des Philippines.

La ferme position de la Cour dans les remarques finales figurant dans son arrêt de 1981 relatif à la requête à fin d'intervention de Malte dans l'affaire *Tunisie/Libye* s'impose avec plus de force encore dans la présente procédure :

> «Les conclusions auxquelles elle [la Cour] arrivera et les motifs par lesquels elle y parviendra dans l'affaire entre la Tunisie et la Libye [traduisez : «entre l'Indonésie et la Malaisie»] porteront donc inéluctablement, et à titre exclusif, sur les questions dont elle a été saisie par le compromis entre ces deux Etats sur lequel sa compétence est fondée en l'espèce. Il s'ensuit qu'aucune inférence ni déduction ne saurait

légitimement être tirée de ces conclusions ni de ces motifs pour ce qui est des droits ou prétentions d'Etats qui ne sont pas parties à l'affaire» (*C.I.J. Recueil 1981*, p. 20, par. 35.)

Les Philippines, par la voix du professeur Reisman, interpellent les Parties : «pourquoi, nous demandent-elles, s'il n'y a pas de lien entre l'instance et l'affaire en cause, marquer tant de réticence à nous laisser consulter les documents qui dissiperaient nos doutes ?» (cf. CR 2001/3, 28 juin 2001, p. 13, par. 6). Eh bien, justement, Monsieur le président : parce que les Philippines ne démontrent l'existence d'aucun intérêt pour elles en cause susceptible d'être affecté par la décision de la Cour ! Et ce n'est que si elles apportaient la preuve d'un tel intérêt qu'elles auraient un droit à recevoir copie des pièces de procédure en vertu de l'article 85 du Règlement.

Il faut bien dire que, plus les débats progressent, plus les Philippines restreignent l'objet de leur démarche. Au départ, elles affirmaient chercher, d'une manière générale, à «préserver et sauvegarder les droits d'ordre historique et juridique» qu'elles prétendent avoir sur le nord de Bornéo — tel était l'objet premier de l'intervention, décrit au paragraphe 5 de leur requête. Lundi, cet objectif ambitieux disparaissait largement derrière celui, nettement plus limité, d'informer la Cour sur leur interprétation des traités et accords éventuellement pertinents. Hier, les Philippines ont encore restreint leurs ambitions et semblent, dorénavant, n'assigner à leur intervention qu'un seul objectif : obtenir communication des pièces de procédure dans l'affaire principale :

— «we have not received the documents and do not know their contents. As petitioners for the right to intervene, that is one thing that we are asking for» a dit M. Reisman (CR 2001/3, 28 juin 2001, p. 11, par. 3); ou encore :

— et, en guise de conclusions, Monsieur l'ambassadeur Bello lui-même, réitérant les «remèdes» que son gouvernement cherche à obtenir de la Cour par le biais de cette intervention s'est borné à se référer à deux demandes fondées l'une et l'autre sur l'article 85 du Règlement et, en premier lieu, la communication des pièces et documents (*ibid.*, p. 31).

Monsieur le président, je ne peux m'empêcher de penser au poker — ce jeu que, je tiens à le préciser, je ne pratique pas, mais où, je crois, on «paie pour voir». L'avocat des Philippines nous a dit hier que le prix à payer pour une intervention était élevé (CR 2001/3, 28 juin 2001, p. 13, par. 6 (M. Reisman)). L'Etat qui voudrait intervenir n'a pas pu vous démontrer l'existence d'un intérêt pour lui en cause; du coup, il inverse les facteurs et se déclare prêt à payer ce prix élevé pour

déterminer si, sur la base des documents qui lui seraient communiqués, cet intérêt ne finirait pas par apparaître, quitte à, finalement, ne pas intervenir le cas échéant.

Cette curieuse présentation des choses appelle deux observations :

En premier lieu, la nouvelle description de l'objectif poursuivi par les Philippines à travers l'intervention qu'elle voudrait voir admise ne me paraît pas crédible. Elle est contredite par la chronologie des initiatives prises par le Gouvernement philippin :

— il a formulé sa demande de communication des pièces le 22 février de cette année;

— sans attendre la décision de la Cour, il a déposé sa requête à fin d'intervention le 13 mars; et

— ce n'est que le 15, *après* la requête donc, que la Cour lui a notifié sa décision de ne pas accueillir sa demande de communication.

Autrement dit, il est assez apparent que le lien, présenté avec de plus en plus d'insistance, entre la non-communication des pièces et la requête en intervention est une construction artificielle, forgée *ex post facto* pour, «apitoyer» la Cour pourrait-on dire.

La seconde remarque que je voudrais faire est la suivante : bien que les Philippines s'en défendent (cf. CR 2001/3, 28 juin 2001, p. 13, par. 7), ce n'en est pas moins en un appel contre la décision de leur refuser l'accès aux pièces que, progressivement, elles ont transformé leur requête à fin d'intervention. Lundi, M. Reisman avait parlé de «déni de justice» (CR 2001/1, p. 22, par. 16 et p. 23, par. 17 et 18); hier, c'est de «caricature of law» qu'il s'est plaint (CR 2001/3, 28 juin 2001, p. 14, par. 7). Ce sont bien des arguments en appel — et de fort sévères...

La Cour ne me paraît pas mériter de tels reproches. Elle s'est bornée à appliquer son Statut et son Règlement, qui impliquent qu'un Etat doit *d'abord* établir qu'il remplit bien les conditions de l'article 62 et qu'il a *ensuite* la possibilité de se prévaloir des droits prévus à l'article 85 du Règlement. *Dura lex*, peut-être, *sed lex*...

J'ajoute une chose : contrairement à ce que semblent penser les Philippines, l'article 62 n'est pas conçu comme une sorte de «joker» que des tiers par rapport à un différent pourraient utiliser pour renforcer leur main dans un litige avec l'une ou l'autre des Parties ou les deux. Et, en tout cas, la question du «lien juridictionnel» et celle de la possibilité d'intervenir en tant que «non-partie» se trouveraient alors posées avec une particulière acuité.

J'ai indiqué mardi que l'Indonésie ne contestait pas que l'information de la Cour pouvait constituer l'objet légitime d'une intervention, et le professeur Reisman a eu la bonté de m'en remercier (CR 2001/3, 26 juin 2001, p. 16, par. 13). Encore faudrait-il que ce mode d'intervention correspondît à un besoin réel, «chevillé» sur l'instance principale. Ce n'est pas le cas en la présente espèce : l'objectif des Philippines n'est pas d'informer votre Haute juridiction sur ses intérêts en cause dans l'instance dont vous êtes appelés à connaître, mais de vous sensibiliser à un autre différend en spéculant que ceci pourrait, peut-être, avoir un intérêt. Au mieux, elles pourraient apparaître comme un *amicus curiae* — mais cela, vous ne l'avez jamais admis, même en matière consultative. Le permettre aujourd'hui serait, je le crains, ouvrir la voie à toutes les dérives : tout finirait par être dans le tout; par contagion, d'autres Etats voisins vous demanderaient à intervenir car tel traité pourrait revêtir une certaine importance pour la solution de tel ou tel différend relatif à une autre île ou à un autre archipel — et l'on ne peut ignorer combien les mers qui baignent l'Indonésie, la Malaisie et les Philippines sont riches de situations qui pourraient s'y prêter... Je préfère ne pas donner d'exemples pour, surtout, ne pas donner de mauvaises idées à d'autres voisins !

Monsieur le président, avec votre permission, je souhaiterais, pour terminer, résumer l'essentiel des positions juridiques de l'Indonésie.

Nous pensons que la demande en intervention des Philippines est intempestive au sens propre du mot — elle n'arrive pas à son heure —, et qu'elle ne respecte pas la lettre ni, sûrement, l'esprit de l'article 81 du Règlement.

Plus grave, elle ne remplit pas les conditions posées à l'article 62 du Statut :

1) l'intérêt qu'invoquent les Philippines n'est pas pour elles en cause dans l'affaire entre l'Indonésie et la Malaisie;
2) si intérêt il y a, c'est dans un autre différend que les Philippines disent avoir avec la seule Malaisie, ce que celle-ci nie, étant entendu que l'Indonésie n'entend prendre aucune position sur ce point, ni, *a fortiori*, sur le fond du litige;
3) accepter l'intervention reviendrait à greffer sur l'instance principale cet autre différend auquel l'Indonésie n'est nullement partie mais sur lequel elle devrait alors se prononcer, ce qu'elle ne

souhaite pas faire — avec le résultat paradoxal qu'elle serait liée par l'arrêt à intervenir alors que les Philippines ne le seraient pas;

4) en tout état de cause, cet arrêt ne saurait avoir une incidence quelconque sur les intérêts que les Philippines disent vouloir sauvegarder;

5) l'information que celles-ci voudraient, par ce biais, donner à la Cour ne constitue donc pas, dans les circonstances de l'affaire, un objet légitime de l'intervention demandée;

6) il en va *a fortiori* de même de l'objectif avoué des Philippines d'obtenir de cette manière communication des pièces et documents, qui leur a été refusée par la décision de la Cour du 15 mars dernier;

7) plus largement, l'intervention des Philippines constituerait un précédent dangereux et mal venu, qui ferait peser une menace grave sur la confidentialité des affaires à laquelle les Etats qui se présentent devant la Cour peuvent légitiment tenir et sur le système même de l'intervention.

Enfin et en tout état de cause, Monsieur le président, l'Indonésie considère que la tenue même de ces audiences, donne plus que largement satisfaction aux Philippines puisqu'elles ont pu exposer à loisir à la Cour (et, au-delà, à l'opinion publique) leur façon de voir sur les traités ou accords qui leur paraissent pertinents à l'appui de leurs positions sur leur litige concernant la souveraineté sur la partie septentrionale de Bornéo — instruments que, par hypothèse, elles connaissent puisqu'ils constituent le fondement de leur revendication.

Il semble à l'Indonésie qu'il convient, à l'avenir, de recentrer les débats sur l'affaire qu'elle vous a soumise d'accord commun avec la Malaisie : la souveraineté sur Ligitan et Sipadan.

Il me reste, Madame et Messieurs les juges, à vous remercier de votre patience — et à vous prier, Monsieur le président, de bien vouloir autoriser l'agent de l'Indonésie à présenter quelques très brèves remarques conclusives. Merci beaucoup.

Le PRESIDENT : Merci Monsieur le professeur. I now give the floor to His Excellency Mr. Hassan Wirajuda, Agent for Indonesia.

Mr. WIRAJUDA: Mr. President, Members of the Court, I wish to thank the Court for this final opportunity to address you on the issue of the Philippines Application and to conclude Indonesia's oral presentations.

As counsel have explained the case between Indonesia and Malaysia concerning the issue of sovereignty over the islands of Ligitan and Sipadan is a separate and entirely distinct dispute from the issue of the Philippines claim to parts of Sabah. In bringing their dispute before you by Special Agreement, Mr. President, Indonesia, and I believe Malaysia also, intended the Court to decide the question of sovereignty over the two islands, and this question alone. That is the very limited subject-matter of the Special Agreement, nothing else.

Indonesia has stated before, and reaffirms its position now, that it does not consider it appropriate to express any views with regard to the Philippine historic claims since we are not dealing with the merit of it. This is simply not a matter which concerns Indonesia, and it is not a matter which will be affected or prejudiced by any decision that the Court reaches over the questions of ownership of Ligitan and Sipadan. However Indonesia feels it is obliged to set the record straight on its position which the Philippines referred to as "judicious stands".

Our colleagues from the Philippines in their oral presentation have made repeated references to the 1963 Manila Accord signed by Indonesia, Malaysia and the Philippines. Let me simply recall that that Accord in no way prejudged the merits of the Philippines claim. If I may be permitted to cite the key passage of the 1963 Accord, it provides as follows:

> "The Ministers took note of the Philippines' claim and the right of the Philippines to continue to pursue it in accordance with international law and the principle of 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."

However, in a different but related context, Indonesia and Malaysia recognized in their 1966 Agreement that the people of Sabah and Sarawak would be afforded an opportunity to reaffirm, in a full and democratic manner, their previous decision about their status in Malaysia. This position has been strengthened by Indonesia's subsequent diplomatic practices.

The current proceedings between Indonesia and Malaysia are not the place to pursue these matters, or for the Philippines to justify its claims against Malaysia. As I understand the Court's precedents on the question of intervention, there has never been an intervention request which has

been directed at safeguarding the applicant State's legal interests vis-à-vis only one of the parties to the main proceedings. Yet this is the situation we are confronted with here.

That being so, my Government does not understand why the present, purely bilateral, proceedings between Indonesia and Malaysia should now be opened up to bring into question a claim which concerns matters between the Philippines and Malaysia, but not Indonesia.

For this reason, as well as on the legal grounds presented by counsel, the Republic of Indonesia respectfully submits that the Republic of the Philippines should not be granted the right to intervene, the effect of which would be to tack on to the proceedings a new case which neither concerns Indonesia, nor relates to the specific dispute jointly submitted to the Court by Special Agreement. This being said, in accordance with Article 62, paragraph 2, of the Court's Statute, Indonesia of course recognizes that it is for the Court to decide upon the Philippines request.

It only remains for me, Mr. President, to thank the Court for the kind attention which they have accorded to me and to the members of the Indonesian delegation. I would also like to express my gratitude to the Agents of Malaysia and the Philippines, as well as to their counsel for the courtesies which they have shown us during these hearings.

Finally, Mr. President, I would like to thank the Registrar and his staff, and the interpreters, for the assistance they have rendered during these proceedings.

That concludes my remarks, Mr. President. Thank you very much.

The PRESIDENT: Thank you very much, Mr. Wirajuda. Ceci conclut le deuxième tour de plaidoiries pour l'Indonésie. La Court prend acte des conclusions finales dont vous avez donné lecture au nom de la République d'Indonésie. Et nous allons maintenant passer la parole à la Malaisie pour le deuxième tour de plaidoirie et je donnerai donc la parole au Professeur James Crawford. Mr. Crawford, you have the floor.

Mr. CRAWFORD: Merci, Monsieur le President. Mr. President, Members of the Court, it is a great pleasure to speak before you again. One preliminary remark: Malaysia will not address the question of procedural delay in respect of this Application. That issue has been fully dealt with by Indonesia. We agree with what they have said; we simply feel no need to add to it. We would only hope that if the Court decides to reject this Application on the ground of procedural delay that,

in the words of the President in a recent case, this should not be regarded as having any *a contrario* implication.

1. The Court will have noted that the Philippines request of 13 March 2001 completely failed to specify how a Philippines legal interest could be affected in this case. The request refers to the claim to Sabah but offers no further precision at all. Malaysia had to assume that the Philippines claim was the claim that had been presented in the discussions of the 1960s. In those discussions the Philippines had simply referred to a claim to Sabah. It had claimed if not the whole then a very large part of Sabah and certainly the whole of the east coast. There was never any previous suggestion, for example, that Tawau or Cowie Bay or the entirety of the Semporna peninsula were not part of the claim.

2. Moreover if the claim was a coherent one, then Tawau and Cowie Bay and the entirety of the Semporna peninsula *should* have been included in it. The Philippines claim is as successor not to the United States, not to Spain, but specifically to the Sultan of Sulu. You heard Prof. Magallona on that (CR 2001/3, p. 25). Spain and the United States were obliged to respect the boundaries to which they had agreed in 1885 and 1930, respectively. But the Sultan was not, because he retained sovereign capacity in respect of Borneo even though he had lost it in respect of Sulu. That is the Philippines case.

Now the Sultan's original grant of 1878 covered the whole east coast down to the Sibuko River. The graphic, I might say, is graphic 1 in your folder. The claim went down as far as the red line approximately. The Philippines showed this in one of the graphics on Monday, which is back on the screen — I am grateful to my colleagues from the Philippines for lending us their graphics. The grant is shown as the red line on the east coast; you see how far down it extends. Moreover, the Sultan's confirmation of 1903 purported to cover offshore islands beyond 9 nautical miles along that coast, including several islands by name which the Philippines now does not claim. It was logical to think that if the Philippines was successor to the Sultan of Sulu then its rights would be the same as the Sultan's had been.

3. It was only when we read Indonesia's written statement that we discovered that the Philippines does not claim the two islands. It was only when we saw the Philippines letter of 5 April 2001. On Monday we saw for the first time the actual extent of the Philippines claim, now

seen in yellow on the screen. It is perhaps the first egg-shaped territorial claim in international legal history, but apparently this is a case of first impression (CR 2001/1, p. 18). You see on the screen, this claim shown by Prof. Magallona, and you can see it does not cover the same area as the Sulu grant. It falls short precisely in the area of the islands. How convenient!

4. Prof. Pellet emphasized on Tuesday that the Philippines declaration that it does not claim the two islands is legally binding on it (CR 2001/2, p. 25). Professor Pellet is right. I pause only to note that he is right for the wrong reasons. The reason is not estoppel. The reason is that this is a binding unilateral act under the *Eastern Greenland* and *Nuclear Tests* principle. There is no estoppel because Malaysia has not relied on the Philippines declaration. How could we have? We didn't know anything about it until Indonesia gave it to the Court on 2 May. We appreciate Indonesia's candour in doing so; it's not clear that it was intended for circulation.

5. Now the Philippines statement that it does not claim the two islands transforms the situation from the point of view of intervention under Article 62. If it had claimed them, it was arguably entitled to intervene because it would have asserted a legal interest in the subject-matter of the dispute. That was the basis on which Nicaragua and Equatorial Guinea were allowed to intervene — they claimed part of the area which was in dispute in the case, respectively the Gulf of Fonseca and the areas around the Zafiro oil field.

6. By contrast, when a State does not claim particular territory it has not been allowed to intervene, even though it said that the Court's decision on the territory might impact on it in some way. That was the position of Nicaragua in respect of the islands in the Gulf — it did not claim them and it was not allowed to intervene as to them.

7. Mr. President, when we thought — quite reasonably — that the Philippines claimed the east coast and all its islands down to the Sibuko River, we had a problem in resisting its intervention. We had to show that its claim was nonsense. That is not difficult to do, since the claim depends — among many other things — on the proposition that the private law heirs of the last Sultan retained his sovereignty over territory which they could cede to the Philippines in a private law deed. They carried that sovereignty around with them, apparently, in their collective pockets. Now that is a wholly untenable proposition, but I can understand the Court not wanting to go into it at all. After all it has not been submitted to you.

8. But now the Court is in a different position. It does not have to face the problem of a request to intervene based on a State's claim to disputed territory where the claim is wildly implausible. There is no dispute about these two islands between Malaysia and the Philippines. There is no dispute over them between Indonesia and the Philippines. There is only a dispute between Malaysia and Indonesia, and it is this dispute which you are asked to resolve, not some other dispute.

9. So how does the Philippines make out its claim that it has a legal interest in the decision in this case? Note that Article 62 says "decision". A State can only intervene if it has a legal interest in the very thing to be decided in the case — here, sovereignty over the two islands. An interest in the development of the law is not enough. Global dispute settlement is not enough. Giving the Court more information is not enough. The Court may well feel it has enough information about these two islands!

10. In particular a State cannot intervene under Article 62 just because it feels or fears that in the course of its reasoning in a case, the Court may say something which has implications for that State's own separate claim. Article 62 is not intended to cover such a case. If it did, then we would have to enlarge this court room, because in virtually every boundary dispute there will be other States who fear that they may be affected, applying Prof. Reisman's "test of consequentiality" (CR 2001/3, p. 15). There will be queues of States seeking to intervene. Far from facilitating dispute settlement that will make it more difficult.

11. Now the Philippines tries to get around this in two ways.

12. **First**, it says that the Sipadan and Ligitan case involves the interpretation of treaties and agreements on which the Philippines bases its — separate — claim to part of Sabah (see, for example, CR 2001/1, pp. 17, 28). But it entirely fails to make precise what propositions it draws from those treaties that the Court may need to consider in order to decide this case. It complains — no less than 33 times[1] — that the Court did not give it access to the pleadings so it does not know what Malaysia said. The highest ratio of complaints to time spent, I think, in the history of the Court, but this is a case of first impression. Incidentally, the Philippines never wrote to ask us

[1] CR 2001/1, paras. 6, 7 (Ambassador Bello); paras. 2, 3, 12, 13, 14, 15, 16, 17, 18, 19, 21, 27, 33, 36, 38, 42, 44, 46, 47 (Prof. Reisman); CR 2001/3, paras. 2, 3, 6, 7, 12, 13, 16, 17, 18, 20 (Prof. Reisman); paras. 2, 3 (Ambassador Bello).

directly for the pleadings, or to ask us to summarize our case, which would have been a normal first step.

13. But the Philippines knows what is in the treaties and agreements. It could have specified what propositions in those treaties, what provisions, what points of interpretation, are vital to its claim. It has never done so. Had it intervened under Article 63, no question of legal interest would have arisen. But it would still have had to specify the point of construction of the treaty which was in question. Of course under Article 63 it would then have been bound by the Court's interpretation on the question of construction. Despite its protestations that is the last thing the Philippines wants, to be bound by your decision. Rather it simply wants to come, like a loose canon, and interfere in a territorial dispute in which it professes to have no direct interest at all, in order to protect its own alleged separate interest in different territories. That is not the purpose of Article 62.

14. Anyway the Philippines claim to Sabah is not based on any treaties. It is not based on the 1885 Protocol, or on the 1930 Convention. It is based on a private law cession by the private law heirs of the Sultan of Sulu dating from 1962. Prof. Magallona was quite clear about it (see, for example, CR 2001/1, p. 36; CR 2001/3, pp. 22, 25).

15. The **second** way the Philippines tries to deal with this point is by the argument that the Court's reasons will, or may, affect the separate claim of the Philippines to parts of Sabah. Prof. Reisman put it very clearly in the following words:

> "if [Malaysia's] theory of the case imports a claim of title that is inconsistent with the claim of title upon which the Philippines bases its claim to territories in North Borneo, that interpretation will affect interests of a legal nature" (CR 2001/3, p. 15).

Yet again Prof. Reisman rewrites Article 62 of the Statute. On Monday he paraphrased Article 62 approximately as follows: "if a third State subjectively feels it has a stake in some proceedings which may be affected it should be allowed to intervene, to see the pleadings and it will tell us all later whether it wants to take the matter any further" (CR 2001/1, pp. 27-28, 32). The word "stake" I thought was particularly telling. That is so obviously not what Article 62 says that he tries again. This is his second round interpretation:

> "If the theory of a party's case involves points for interpretation that might be inconsistent with the theory of a territorial claim made by a third State, then even though that claim affects different territory, the third State should be allowed to intervene to protect its own theory." (CR 2001/1, p. 15.)

Actually, it's a bit like the mythical Chapter 6-and-a-half of the Charter: we might call this Article 62-and-a-half of the Statute. It is all about theories and interpretation and contingency and subjectivity and interdependence. It bears no relation to the written words, and this Court has recently reminded us of the importance of what the words of a treaty actually say (*LaGrand*, Judgment of 27 June 2001, para. 77). The crucial word in Article 62 is "decision".

16. But anyway let us assume for the sake of argument that Prof. Reisman's consequentiality test is right and that an intervening State has a legal interest in a case if a party's theory of the case might be inconsistent with the intervenor's theory in some other case. According to this test, there is legal interest as between two separate claims if the theory of one is or may be inconsistent with the theory of another. Well let's accept it for the sake of testing it *Even so, it is still necessary to point to the inconsistency.* What are the propositions that form part of the Philippines theory of its claim to Sabah which the Court might have to decide in this case? The Philippines must be able to articulate what those propositions are, irrespective of what the Parties may have argued. It must — presumably — be aware of the legal theory on which this so-called long-standing claim is based. So where is the potential inconsistency? The Philippines has not bothered to tell the Court.

17. Let me however take Prof. Magallona's presentation and try to identify those Philippine propositions which form the theory of its claim and ask whether they are raised by the present case. Let me take five of them. In respect of each of these, when I use the phrase "parts of North Borneo" I mean the egg-shaped claim you see on the screen, which excludes the two islands and the other islands in the Ligitan Group and Cowie Bay and the northern part of Sebatik Island. On that understanding let us look at Prof. Magallona's propositions:

Proposition No. 1. The Philippines fundamental proposition is that the private law heirs of the Sultan of Sulu collectively retained sovereignty over parts of North Borneo in 1962, which sovereignty they could, notwithstanding the treaty obligations of the Philippines, cede to the Philippines (CR 2001/1, pp. 36-37). The Court does not have to decide that. Nothing that happened in Manila in 1962 is relevant to the question whether Sipadan and Ligitan belong to Indonesia or Malaysia. So the so-called cession of 1962 cannot affect this case.

Proposition No. 2. The Philippines argues that the 1878 grant of the Sultan of Sulu was valid (CR 2001/1, pp. 22, 39-40). Malaysia's case does not depend upon whether it was valid or not.

The validity of that grant is not an issue between Malaysia and Indonesia. Spain and the United Kingdom expressly left that point to one side in concluding the 1885 Protocol. This was the reason for the phrase "territories on the continent of Borneo, which belong, or which have belonged in the past, to the Sultan of Sulu", in Article III (Memorial of Malaysia, Vol. 2, Ann. MM 15, p. 65). They did not agree on the point, they did not have to resolve their disagreement, neither does the Court.

Proposition No. 3. Then the Philippines argues that the 1885 Protocol left the Sultan's rights over parts of North Borneo unaffected (CR 2001/1, pp. 41-42). That is not an issue in this case. Malaysia's title to the islands does not depend upon the 1885 Protocol, which only concerned islands beyond 9 miles of the coast. It was unaffected by it.

Proposition No. 4. Then the Philippines argues that the Convention of 1930 left the Sultan's rights over parts of North Borneo unaffected (CR 2001/1, p. 46; CR 2003/3, pp. 21-22). That too is not an issue in this case. The Court may perhaps have to say something about the territorial scope of the 1930 Convention as concerns the two islands — although that is a subsidiary point. But the territorial scope of the Convention as concerns the area claimed by the Philippines is perfectly clear and is not an issue in this case. Anyway the Philippines claim to certain parts of Sabah does not depend on the territorial scope of the 1930 Convention. Neither Malaysia nor Indonesia has said anything in the pleadings about the effect of the 1930 Convention on the Sultan of Sulu. To repeat, that is simply not an issue.

Proposition No. 5. Then the Philippines argues that the 1946 proclamation of North Borneo as a British colony was unlawful vis-à-vis the Sultan of Sulu and could not have affected his rights (CR 2001/1, pp. 48-49). That too is not an issue in this case. If Sipadan and Ligitan were not part of North Borneo in 1945, the proclamation of North Borneo as a British colony did not change that situation. The proclamation of North Borneo as a British colony made no territorial difference. No question of the legality of the 1946 proclamation vis-à-vis the Philippines could possibly be relevant to the two islands.

18. Mr. President, Members of the Court, that makes five propositions which are part of Prof. Magallona's theory of the case. They may not be the only ones but they are the essential ones. *Not one of them is an issue in this case.* No argument has been addressed to the Court by

either of the Parties on any of these issues. If the Court were to decide them it would be acting *ultra petita*. I suppose it is possible that the Court might say things in passing which might indirectly reflect upon one or other of them — though the Court is normally very careful about what it says. In any event a State cannot intervene under Article 62 out of a fear of possible *obiter dicta*. And I am sure that after this week of argument the Court will be careful to limit itself to what is necessary in this case.

19. Mr. President, Members of the Court, intervention is, as Prof. Reisman says, a necessary weapon in the Court's procedural armoury. It is one of the things that distinguishes this Court from an *ad hoc* arbitral tribunal. But the Court's function is still to decide cases brought to it by consenting States on the basis of respect for international law as between those two States. It is not to engage in a free-ranging discussion about the disputes of the region. A State which seeks to intervene under Article 62 has to comply with its requirements. The Philippines having applied under Article 62 has *first* to identify with precision its own legal interests and, *secondly*, to say how they may be affected. In the absence of access to the pleadings, I suppose it may be marginally more difficult to do the second of these things. But the Philippines could certainly have done the first, and anyway there is no particular mystery about these two islands, which have been discussed in some detail in the published literature. The Philippines completely failed to do either of those two things: first, to identify with precision its own legal interest in relation to the dispute, now that it does not claim the islands; secondly, to clarify how those legal interests may be affected by the decision in this case. In those circumstances, its request can and should be rejected without any prejudice to the valuable incidental role that Article 62 can perform in appropriate cases. As you can see from the map on the screen and the egg-shaped claim, this is not such a case.

Mr. President, Members of the Court, thank you for your attention. May I ask you, Sir, to call upon Sir Elihu Lauterpacht.

Le PRESIDENT : Merci beaucoup, Monsieur le professeur. I now call Professor Sir Elihu Lauterpacht.

Sir Elihu LAUTERPACHT:

1. Mr President and Members of the Court, I will be relatively brief. I will not spend time in replying to certain remarks made on behalf of Indonesia on 26 June regarding references by Malaysia to the Indonesian claim to Pulau Ligitan and Pulau Sipadan (CR 2001/2, p. 12). This is a matter relevant only to the proceedings on the substance of the case and can be left until then. The same goes for the implications that Indonesia sought to draw from the Philippines letter addressed to Indonesia renouncing any territorial interest in the two islands (CR 2001/2, pp. 37-38). As regards these matters, I merely reserve Malaysia's position.

2. I go straight away to the main point that requires consideration. The Court will recall that on Tuesday I identified the concern expressed by the Philippines in its statement of the first and second objects of its Application as being focused on the preservation of what it called its "historical and legal rights" to dominion and sovereignty over North Borneo. I submitted that these so-called "rights" were so insubstantially supported that they could not properly be treated by the Court as validly justifying the Application for intervention.

3. In particular, I referred to certain acts of Philippine recognition of, and acquiescence in, British sovereignty over North Borneo (CR 2001/2, pp. 56-57). To my references to four treaties between the Philippines and Britain in which reference was made to British North Borneo, the only reply given by distinguished counsel for the Philippines, Prof. Magallona, was that

> "The Philippines does not see how specialized bilateral agreements with respect to air services or labour employment, or a proposal on the maintenance of a lighthouse, . . . can possibly be invoked against the Philippines as recognition of, or acquiescence to, British title over North Borneo." (CR 2001/3, p. 24, para. 16.)

The answer is quite simple: When a treaty between two States refers to a certain territory as belonging to one of them, the other cannot subsequently be heard to deny that that is the fact. It is a form of recognition or estoppel or preclusion. But no matter what name one may give to the legal process, and it will depend to some extent on the circumstances, the legal effect is undeniable. It could only have been avoided if the Philippines had made some express reservation. So far as I am aware, they never did this.

4. Likewise, counsel for the Philippines completely evaded the instances that were given of acquiescence by the Philippines in conduct related to British title over North Borneo. The Court

will recall that it was Prof. Magallona himself who first referred to the advice given by Governor Harrison in 1947, to the then President of the Philippines. He spoke of the British North Borneo Cession Order as an act of "political aggression" and he advised the President to repudiate it. Prof. Magallona said that the act had been repudiated (CR 2001/1, p. 49, para. 42). I replied that I had found no evidence of such repudiation and suggested that Prof. Magallona might provide further information when next he spoke. But when he spoke yesterday he did not respond to that suggestion. The only reference that was made to the episode was that it had taken place before 1962 (CR 2001/3, p. 25, para. 18).

5. Why does that year matter? Because that is the date which the Philippines now identifies quite firmly as being the date on which it acquired title to North Borneo. As Prof. Magallona put it:

> "[T]he title of the Philippines to North Borneo is based on the cession effected by the Sultanate of Sulu in favour of the Philippines of certain territory in North Borneo. Legally and logically, the Philippines can only be in a position to question British pretensions to sovereignty over North Borneo *after* that cession has taken place in 1962."

And in the text of Prof. Magallona's statement the word "after" in the phrase "after that cession has taken place" has been emphasized (CR 2001/3, pp. 24-25, para. 16).

6. Mr. President and Members of the Court, before I came into this courtroom at the beginning of this week, I evidently did not clearly understand the nature of the Philippines claim to North Borneo. I had been relying on two Philippines documents relating to the matter.

7. The first was the Philippines Application to intervene in the case. The expressions in it relevant to the Philippines claim were, first: "The Constitution of the Republic of the Philippines, as well as its legislation, have laid claim to dominion and sovereignty over North Borneo." No dates were attached to the Constitution or the legislation. And, second, reference was made "to the historical and legal rights of the Government of the Republic of the Philippines". No reference that led me to believe that we were dealing with a claim of some antiquity. Nowhere was any reference made to what is now said by the Philippines to be the controlling element — the so-called cession by the Sultanate of Sulu as late as 1962.

8. The other document by which I was guided is the one that I hold in my hands now. It is a copy of an official publication of the Government of the Philippines. It is entitled: "Philippine

Claim to North Borneo; Volume 1". The book was printed by the Bureau of Printing, Manila, in 1963. It is referred to in the Malaysian observations at page 2, footnote 2, and was deposited with the Court when those observations were filed on 2 May this year.

9. The opening document in it is an excerpt from President Macapagal's State of the Nation message to the Congress of the Philippines on 28 January 1963. It appears in your blue folder as tab 3. It begins by saying:

> "The most important action taken in the field of foreign relations in the past year was the official filing on June 22, 1962, with the United Kingdom of the Philippines claim of sovereignty, jurisdiction and proprietary ownership over North Borneo as successor in interest of the Sultan of Sulu."

10. But as the President's statement proceeds to make clear, the claim did not really rest upon the 1962 cession by Sulu. President Macapagal continued (and this is important):

> "Contrary to allegations in some political quarters, this was not a precipitate action. We have personally studied this claim over a period of years. While serving in the Department of Foreign Affairs in 1946, upon a study of this claim in connection with our successful negotiation for the reacquisition of the Turtle Islands, we advocated the filing of this claim."

I interject, that was 16 years before the Sulu cession was advanced as the basis of the Philippine claim. I continue with the President's statement:

> "In 1948, while serving in the Philippines Embassy in Washington DC we went over the claim with an American expert in Anglo-Saxon law in George Washington University who sustained the view that this is a valid claim."

This was in 1948.

> "When we served in the Congress of the Philippines, we successfully authored and sponsored in 1950, a resolution for the filing of this claim. Upon becoming President of the Philippines, acting on the conviction that this was not only a valid claim but that its presentation was demanded by the national interest, it became our inescapable duty to act on the bipartisan resolution of the House of Representatives of April 24, 1962 that the claim be filed now or never."

I emphasize "or never". And the 1950 resolution to which I have just referred is tab 13 in the Philippine folder handed to the Court on 25 June.

11. I must ask to be forgiven, Mr. President, for having taken this statement, as well as the material accompanying it in the official Philippines volume, as evidence of a firm Philippine conviction prior to the so-called cession of 1962 that it had a claim to North Borneo. What is more, for all the importance now given by the Philippines to the so-called 1962 cession, we have yet to

see a copy of this document. It has not been printed in the many official documents accompanying the Philippines publication.

12. Mr. President, if any apology is needed for touching again upon the merits of the Philippine claim at this late stage of the hearing, I respectfully tender it. But the Court will fully understand why I do so. It is to back up to the hilt my contention that the Philippines claim is manifestly unsustainable and fraught with inconsistency. The Court should, I respectfully submit, be most cautious lest it be seen to be accepting as a valid object of the Philippines Application the preservation of "so-called historical and legal rights" that have, for all practical purposes, no identifiable basis whatsoever.

13. And this consideration is the more compelling because once one has disposed of the pretence that the Philippines did not believe that it had a claim until 1962, one comes back to the fact that between 1946 and 1962 the Philippines could have asserted its position in this Court but it did not do so. Counsel for the Philippines has made no reference to this aspect of the matter. Nor, I may add in passing, is the major uncertainty regarding the dates at which the Philippines claim came into existence the only example of serious inconsistency by which the Philippine approach to the question of North Borneo is flawed. On 4 August 1977, the then President of the Philippines, at a meeting of ASEAN Heads of State, solemnly affirmed with all the authority attaching to his high office, that the Philippines would be taking definite steps to eliminate the claim of the Philippines to Sabah. Permit me to read the following relevant passage from the statement which appears in your blue folder at tab 4:

> "As a last observation and as the last point of faith may I further state that perhaps it is time to remember that like any cooperative endeavour, ASEAN requires sacrifice for every gain and advantage and that each and every nation must contribute to that pool of sacrifice to make ASEAN a success. Before ASEAN can look to the outside world for equity, for justice and fairness we must establish order, fairness and justice amongst ourselves. As a contribution, therefore, I say in earnest to the future of ASEAN, I wish to announce that the Government of the Republic of the Philippines is therefore taking definite steps to eliminate one of the burdens of ASEAN — the claim of the Philippines Republic to Sabah. It is our hope that this will be a permanent contribution to the unity, strength and prosperity of all of ASEAN."

14. Well, regrettably, this pledge appears not to have been fulfilled. What was promised on 4 August 1977 has been reversed by the Application filed on 13 March 2001. I cannot conclude without referring to the cavalier manner in which the Philippines has sought to dispose of the

important fact that when North Borneo joined the Federation of Malaysia this was a specific and deliberate exercise of the right of self-determination by the people of that country. The act of the Secretary-General of the United Nations in confirming that act of self-determination cannot be dismissed (as the Philippines is seeking to do) by calling it simply a "confirmation by the international community of Malaysia's political identity". It was the international seal of approval put upon the solution of the specific problem of the future government of the people of North Borneo. It excluded the sovereignty of any other country. It cannot be regarded as something "irrelevant". Self-determination is a fact which determines sovereignty — whether or not it is something to which the original sovereign consents. It is the fact out of which the new sovereignty arises and even my late father (to whom Prof. Magallona was good enough to refer) would not have said otherwise. It is inconceivable that any weight should be attached to the ambitions of the absent heirs of an ancient ruler in contradiction of the clearly expressed and long-established and recognized will of the people.

15. As I approach my conclusion, I am bound to ask: what are the limits to intervention if the Court accepts the present Application of the Philippines? There is a real danger that if the Court were to accept the Philippines thesis, the scope of Article 62 would have been construed so widely that it could embrace even matters that fall within Article 63, and recourse to the latter Article would become unnecessary. In so far as allegedly relevant treaties are concerned, a State could present its views under Article 62 without the need to become a party. Why then should it resort to Article 63 and become bound by the substantive judgment that would follow?

16. Generally speaking, the basic condition of consent that underlies the exercise of jurisdiction by the Court would be significantly eroded. Parties to special agreements would fear that their careful identification of the question dividing them, and their willingness to see that question, and no other, settled as between them, could be frustrated by some unforeseen intervention relating to a marginal and possibly irrelevant issue. Apprehensive about such a risk, States would be bound to assess carefully whether their interests would be better served by recourse to the Court with a generously construed possibility of intervention; or by *ad hoc* arbitration with no risk of intervention.

17. On that brief note of concerned enquiry I bring my response to an end. Mr. President, I would be grateful if you would now call upon H.E. Tan Sri Abdul Kadir Mohamad, Agent of the Government of Malaysia, briefly to conclude Malaysia's case.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. I now give the floor to H.E. Tan Sri Abdul Kadir Mohamad, Agent of Malaysia.

Mr. MOHAMAD: Mr. President, distinguished Members of the Court,

1. In my opening remarks on Tuesday, I had respectfully requested the Court to deny the Philippines request to intervene in order to enable the Court to deal with, in due course, the merits of the bilateral dispute between Malaysia and Indonesia without any distraction by a third party making a claim which is separate and distinct from the question of sovereignty over Ligitan and Sipadan.

2. We have all heard this week the pleadings of the Agent and counsel for the Philippines which were, for a great part, an undisguised attempt to distract the Court from the real issue at hand. The Court had asked the Parties to appear before it this week in order that the Court could hear the arguments for and against the Philippine Application for permission to intervene in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, not to listen to an exposition of the Philippine claim to Sabah.

3. If this week's performance of the Philippine team were any guide, I venture to predict that there will be a repeat performance of more of the same if the Court were to allow the Philippines request to intervene at the stage of the examination of the merits of the case between Malaysia and Indonesia that is before the Court. That, I believe, the Court wishes to avoid.

4. May I therefore respectfully urge the Court to deny the Philippines the undeserved privilege of any further participation in this matter, and reject its request to intervene in this case. After all, by its own admission, the Philippines does not have any territorial interest on the islands of Ligitan and Sipadan, which, I might repeat, are the only subject-matter of the present case.

5. Mr. President, before ending my remarks, allow me to point out very briefly to one disturbing distortion of my statement on Tuesday. Referring to Malaysia, Prof. Reisman accused its Agent of "even announcing in open court that its own position was non-negotiable" (CR 2001/3,

p. 12, para. 4). But as you have heard me saying and as recorded in the verbatim record (CR 2001/2, p. 44, para. 20) Malaysia stated "The future of the people of Sabah is non-negotiable."

6. Mr. President, distinguished Members of the Court, the delegation of Malaysia has valued greatly the opportunity to appear before the Court to explain Malaysia's opposition to the Philippines Application for permission to intervene in the case between Malaysia and Indonesia. I would like to thank the Court for having so patiently heard our pleadings. I conclude by formally making our submission that the Court should reject the Philippine Application. Thank you very much.

The PRESIDENT: Thank you very much. Je vous remercie, Monsieur Kadir. Ceci met un terme à la deuxième série de plaidoiries pour la Malaisie. La Cour prend acte des conclusions finales dont vous avez donné lecture au nom de la Malaisie, comme elle l'a fait ce matin pour les conclusions finales présentées par M. Wirajuda, agent de l'Indonésie, et hier pour celles des Philippines présentées par M. Bello.

Ceci nous amène à la fin de cette série d'audiences consacrées à la requête à fin d'intervention présentée par la République des Philippines en l'affaire relative à la *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)*. Je tiens à adresser mes remerciements aux agents, conseils et avocats pour la précieuse assistance qu'ils ont bien voulu fournir à la Cour et ce, très heureusement, dans le temps qui leur avait été assigné. Je les remercie également pour l'esprit de courtoisie et de respect mutuel dont ils ont fait preuve tout au long de ces audiences.

Conformément à la pratique, je prierai les agents de rester à la disposition de la Cour pour tous renseignements complémentaires dont elle pourrait avoir besoin. Sous cette réserve, je déclare maintenant close la procédure orale consacrée à la requête à fin d'intervention des Philippines en l'affaire relative à la *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)*.

La Cour va maintenant se retirer pour délibérer. Les agents des Parties, ainsi que celui des Philippines, seront avisés en temps utile de la date à laquelle la Cour rendra sa décision.

La Cour n'étant saisie d'aucune autre question aujourd'hui, l'audience est levée.

La séance est levée à 11 h 35.