THE LEGAL IMPLICATIONS OF THE UNILATERAL DROPPING OF THE SABAH CLAIM

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I. PRELIMINARY STATEMENT

At the opening session of the ASEAN Summit at Kuala Lumpur on August 6, 1977, President Marcos made a dramatic announcement regarding the Philippine claim on Sabah that drew him "the loudest applause among ASEAN heads of states," but surprised the Filipino people. He said:

> Before ASEAN can look to the outside world for equity, for justice and fairness, we must establish order, fairness and justice among 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 Philippine Republic on Sabah. It is our hope that this will be a permanent contribution to the unity, the strength and prosperity of all of ASEAN.[1] (underscoring supplied)

The Philippine newspapers reported on August 30, 1977, that the Philippine claim of sovereignty and jurisdiction over Sabah has been genuinely renounced. However, the proprietary claim of the Kiram heirs (Heirs of the Sultan of Sulu) has not been withdrawn.[2] The Kiram heirs have pressed for their proprietary claim over Sabah in financial amount of $68 Million in exchange for withdrawing the claim. This has gained support of the Philippine government which urged them to "finalize it in writing."[3]

In announcing plans to formally withdraw the Philippines' sovereignty claims over Sabah, President Marcos stressed that the proprietary claim was a separate issue, that it is for the Malaysian government and the Kiram heirs to decide. In fact, Malaysian Prime Minister Hussein Onn said that it was up to the Sulu Sultan's heirs to discuss their claim with the Malaysian government. He also acknowledged that the claim is a question of proprietary rights legally and constitutionally a claim by the Sultan's descendants for monetary compensation.[4]

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[1] Ferdinand E. Marcos, Opening Statement at the ASEAN Kuala Lumpur Summit of 1977, *Digest of Philippine Foreign Policy*, 1972-1979, pp. 75-76.
[2] Bulletin Today, October 1, 1979, p. 9, col. 4.
[3] Bulletin Today, October 29, 1979, pp. 1 & 13, col. 5.
[4] Ibid. p. 13, col. 5.

The declaration by the President of the dropping was a complete turn-about from the government's previous position. Earlier, President Marcos had been persistently saying that the Philippines will pursue the claim. In an address in Dagupan City on September 26, 1968, he maintained that the Sabah territory is historically and legally an area and territory to which the Philippines has, from the beginning of the 18th century, laid claim and over which it maintains dominion and sovereignty. Further, he said that as a basic principle, claims to territories, claims to boundaries and borders, should be decided on their merits and on the International Court of Justice as a proper tribunal to decide on the case.[5] In his State of the Nation Address on January 22, 1969, the President again stated his position on the claim:

> If the Philippines were not convinced of the validity of its right to Sabah we would be the first to say "Drop the claim." But we feel that on legal, historical and moral grounds, the Philippine claim to Sabah is justified. We are bound to pursue it as a matter of principle and as a matter of justice.[6]

But eight years later, the President took a giant 180 degree stride by abandoning the claim. Since its declaration, nothing much of it has been heard in the papers until the ASEAN Foreign Ministers Conference held in Kuala Lumpur on June 25, 1980 when Minister of State for Foreign Affairs, Arturo Tolentino declared that the Philippines' claim to the East Malaysian state of Sabah is a closed affair as far as the Manila government is concerned. He said: "As far as we are concerned there is no more Sabah claim. It's closed. We are not raising it anymore."[7] Tolentino pointed out that the claim was raised by the Macapagal Administration. He also said that Sabah is not included in the Philippine map nor was it included in the Philippine territory.[8] Most recently, however, a major newspaper reported that the question of Sabah remains an irritant in Philippine-Malaysian relations causing newly installed Malaysian Prime Minister Mahathir Mohammad to skip the Philippines in his tour of ASEAN member countries. It reported that the reason is the Sabah claim of the Philippines which the Malaysian government wants withdrawn officially and legislatively.[9] This brings us to speculate on the issues of the dropping. In general, the writers are raising this problem: "What are the legal implications of the unilateral dropping of the Philippine claim of sovereignty on Sabah?" The answers to this question and other specific issues will be discussed by the writers on the later part of this paper.

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[5] Pres. Marcos, "Test of Our Independence," Speech at the Lion's Convention, Dagupan City, September 26, 1968.

[6] Pres. Marcos' Address to Congress on the State of the Nation, 27 January 1969. 2 FERDINAND E. MARCOS, PRESIDENTIAL SPEECHES 124 (1978).

[7] *Ask IBP to Drop Sabah Claim*, Bulletin Today, June 28, 1980, p. 40, col. 5.

[8] *Ibid.*

[9] Bulletin Today, September 18, 1981, p. 9, col. 5.

II. BACKGROUND OF THE CLAIM

A. *Historical and Legal Basis*

Sabah (earlier known as North Borneo) is a state of the Federation of Malaysia at the Northern part of Borneo. It has an area of 30,000 square miles, almost as big as Mindanao, and is only 18 miles away from the southernmost part of the Philippines. It is about 1,000 miles away from what was known as Malaya. Its capital was known as Jesselton, now Kota Kinabalu. Its principal products are timber, copra, oil and an abundant quantity of mineral resources. Its population is about 900,000 people, around 140,000 of which came from the Philippines.[10]

The Philippine claim to sovereignty over Sabah is based on historical-legal grounds. Historically, North Borneo was ceded to the Sultan of Sulu by the Sultan of Brunei in 1704, in return for suppressing the rebellion that broke out in Brunei.[11] Aware of this, the Austrian Consul-General of Hongkong, Baron von Overbeck, entered into negotiation with the Sultan of Sulu for the lease[12] of the territory of North Borneo, in January 22, 1878. He was accompanied by William H. Treacher, then acting British Consul-General of Labuan Island in North Borneo. Overbeck was representing for an English merchant, Alfred Dent. The Sultan and Overbeck agreed upon a rental of five thousand Malayan dollars (M$ 5,000.00 — about 570 pounds or 1,600 US$), a year. The contract was drafted and was written in Malaysian language in Arabic characters. After the signing of the 1878 document, Dent applied for a Royal Charter. In granting the Charter, the British government did not purport to grant to the company any public power necessary for the acquisition of sovereignty. On the contrary, it precluded the company from acquiring sovereignty, declaring that sovereignty would remain vested in the Sultan.[13]

When the Philippines came under American rule in 1898, the Sultan of Sulu remained the sovereign of Sabah. This was articulated in the Bates Treaty of 1899 which was later replaced by the Carpenter Agreement signed between the Sultan of Sulu and the American authorities. The agreement pointed out that the termination of the Sultan's temporal sovereignty over the Sulu Archipelago did not mean an end to his continued sovereignty over North Borneo. Thus, North Borneo was never

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[10] Salonga, *The Dropping of the Sabah Claim: Its Meaning and Consequences*, 56 FAR EAST. L. REV. 389 (1981).

[11] AGONCILLO & GUERRERO, HISTORY OF THE FILIPINO PEOPLE, 638-640 (1970).

[12] The contract of lease of 1878 used the Tausug word "padjak" which, according to Dutch, American and Spanish scholars, means "lease." The Spanish documents of the period called the transaction "arrendamiento" which means "lease". The British, quite naturally, translate the word to mean "cession." It is, however, surprising to note that the Company and the British Government paid the Sultan of Sulu an annual rental of 5,300 Malayan dollars up to 1963. If North Borneo had been ceded to the Company, why the payment of an annual rental? (*Ibid.*).

[13] THE PHILIPPINE CLAIM TO NORTH BORNEO, Bureau of Printing, Manila pp. 21-38 (1964). Hereinafter referred to as Philippine Claim.

transferred to the U.S. but always remained under the sovereignty of the Sultan of Sulu.[14]

In 1903, the British North Borneo Company, which succeeded to the rights of Dent and Overbeck, entered into another agreement with the Sultan and included certain islands lying north and northeast of Borneo with an additional rental of three hundred dollars ($300.00) annually.

The British North Borneo Company paid five thousand dollars ($5,000.00) religiously until 1936 when the controversy as to who among the heirs are entitled to receive the said amount, resulted in court litigation.[15]

Six days after the Philippines gained independence from the U.S. on July 4, 1946, the British government, without notifying the Sultan of Sulu or the Government of the new Republic of the Philippines, annexed the territory of North Borneo. In 1957, the Sultan cancelled the lease to the British North Borneo Company and in 1962, after prolonged studies, the Philippines, through the House of Representatives, unanimously approved Resolution No. 32, urging the President of the Philippines to take the necessary steps to recover the territory.[16] In 1968, the heirs of the Sultan executed a power of attorney in favor of President Marcos to effect the "settlement of whatever proprietary rights and take up whatever matters necessary" in the claim.[17]

The legal aspect of the claim anchored on the construction of the nature of the agreement itself as what was entered into by the parties. The Philippines maintained the view that the Deed of 1878 was a contract of lease and not an act of cession as the British claimed having in its possession documents of the highest evidentiary value which supported its positions; that some of these documents were signed by Alfred Dent himself, written after the contract had been signed, referring to the contract of 1878 as lease and to the Sultan of Sulu as lessor; that the Philippine Government had the reports of Treacher, the British Consul who accompanied Overbeck to Sulu and who after the signing as witness to the contract characterized the same as lease and referred to the money payments as annual rentals. Certified translation of a Spanish text in the Madrid archives embodying the correspondences between Madrid and London, referred to the contract as one of "arrendamiento" which means *lease*.[18] The Royal Charter itself stated that what was given to the Sultan was an annual compensation of five thousand dollars ($5,000) and not

[14] Marcos, *op. cit. supra* note 5.
[15] Philippine Claim, *op. cit. supra* note 13 at 53.
[16] Salonga, *op. cit. supra* note 10 at 391.
[17] See *Senator Ambrosio Padilla Denounces the Corregidor Massacre and Discloses the Marcos Power of Attorney*, pp. 1-120 (1969), A Monograph.
[18] PHILIPPINE CLAIM, *op. cit. supra* note 13 at 23.

a purchase price. It was believed that "annual compensation" is consistent with a contract of purchase.[19]

The contract itself according to Senator Felixberto Serrano,[20] then Secretary of Foreign Affairs, was in Malay language and written in Arabic characters. The issue involved around one key word, *"padjak"* translated in English as *lease.* The United Kingdom and Malaysia maintained that the controversial term means *cession.* The Philippines maintained that it was lease. Authorities Maxwell and Gibson were consulted and they viewed padjak to mean cession. However, Professor Conklin of Yale University viewed it as lease.[21]

Serrano based his position that the terms meant lease in the Carpenter Agreement of 1915. This agreement is the Protectorate Agreement of 1888 under which the North Borneo Company placed the territory in dispute under the British protection. Serrano argued as a matter of international law, the Protectorate Agreement of 1888 did not operate to invest the United Kingdom with the right of sovereignty over North Borneo territory.[22] That it is fairly established in the law of nations that except for the conduct of external affairs and the protection of the external security of the protected state, unless the treaty otherwise so provides, the erection of a protectorate does not result in a divestiture of sovereignty in the protecting state. So that if applied to the territory in question, there was nothing in the protectorate agreement of 1888 which provided for an investiture of sovereignty in the protecting state. Finally, it was argued that the North Borneo Company was not a State. It operated only under the Charter of 1881 granted by the British Crown. It had therefore no sovereignty to cede to the United Kingdom, under the Protectorate Agreement of 1888. This is but stressed by the statement itself of the U.K. to the protests lodged by the Spanish and Dutch governments that the British Government categorically stated that under the Royal Charter, sovereignty remains with the Sultan of Sulu . . . and the company would merely be an administering authority.[23]

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19 *Ibid.*

20 Serrano, *Our Claim is Just, A Reply to Dissenting Opinions on Sabah Claim,* Reprinted in the PHILCONSA READER ON CONSTITUTIONAL ISSUES 654 (1979) from the DEFENDER, January-February, 1969, p. 14.

21 *Ibid.*

22 *Ibid.*, p. 655.

23 In a letter to Mr. Morier dated January 7, 1882, Lord Earl Graville, the then British Foreign Minister of State stated:

> "The British Charter therefore differs essentially from the previous charters granted by the Crown to the East India Company, and other associations of that character, in the fact that the Crown in the present case assumes no dominion or sovereignty over the territories occupied by the company any powers of government thereover; it merely confers upon the persons associated the status and incidents of a body corporate, and recognize the grants of territory and the powers of government made and delegated by the sultans in whom sovereignty remains vested." PHILIPPINE CLAIM, *op. cit. supra* note 13.

Under the universal principle of *res inter alios acta,* acts or statements of parties to an agreement can not operate to prejudice third parties. Therefore, since the Sultan was never made a party, the agreement did not operate to divest it of sovereignty.[24]

Salonga (Congressman during the controversy), then Chairman of the Legal Committee of the Philippine panel, maintained the view that on the terms of contract, Overbeck and Dent did not acquire sovereignty and dominion over North Borneo.[25] Numerous documents and pieces of evidence were presented by Salonga and Foreign Affairs Secretary, Eduardo Quintero, also a member of the Philippine panel in London talks, when they argued for the Philippines.[26]

B. *The Controversy*

On the other hand, the Malaysian government anchored its claim over Sabah on the fact that:[27]

1. Great Britain turned over Sabah to Malaysia in 1963, thereby making Malaysia the heir of the British to Sabah;

2. In a plebiscite conducted in 1963 under the auspices of the United Nations, the Sabahans voted to be a part of the Federation of Malaysia,[28] and in an election initiated by Indonesia and Malaysia in 1967, the Sabahans reaffirmed their desire in joining Malaysia;

3. The Philippine Constitution does not include Sabah in the delineation of the geographical limits of the Philippines.[29]

Attempts to resolve the ticklish issue proved futile; both parties refused to give in. The Philippines, in an attempt to resolve the issue peacefully in accordance with the rule of law, suggested that the question be elevated to the World Court for decision, but the Malaysian leaders who claimed that the Philippines had neither political nor legal title to stand on, adamantly refused to have the World Court decide the case.[30] In the face of Malaysia's refusal to submit the case to the World Court, the Philippines withdrew its embassy from Kuala Lumpur; a little later, Malaysia ordered its embassy in Manila to close shop. But the relations between the Philippines and Malaysia was normalized on June 3, 1966.[31]

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24 *Ibid.* p. 656.
25 *Ibid.* p. 657.
26 Salonga, *op. cit. supra* note 10 at 392.
27 AGONCILLO & GUERRERO, *op. cit. supra* note 11 at 640.
28 Sumulong, *Additional Observations on the Sabah Dispute,* Reprinted in PHILCONSA READER ON CONSTITUTIONAL ISSUES 641 (1979), from THE DEFENDER, January-February, 1969, p. 25.
29 AGONCILLO & GUERRERO, *op. cit. supra* note 11 at 640.
30 *Ibid.*
31 *The Facts About Sabah,* Public Information Office 28 (1968). See "Report and Recommendations of the Conference of the Foreign Ministries of the Federations of Malaya, the Republic of Indonesia, and the Republic of the Philippines", Annex of the Philippine Claim, *op. cit. supra* note 13 at 25.

On January 12, 1968, President Marcos and Prime Minister Rahman issued a joint communique in which it was agreed that talks on the level of officials would be "held as soon as feasible."[32] However, when the diplomatic talks between the Philippines and Malaysia on the peaceful settlement of the claim was held in Bangkok in 1968, the Malaysian government unilaterally rejected the claim. So President Marcos broke off diplomatic relations with Malaysia and he took a firm stand that the Philippines is ready to pursue the claim "peacefully — but resolutely."[33] In one of his speeches, he said:

> We shall insist on the prosecution of the claim. Our official position is first, that this being a justifiable issue, it being an issue that depends upon a legal interpretation of both the law and documents involved, this matter should be elevated to a judicial tribunal. And the judicial tribunal that should have jurisdiction over it is the World Court, the International Court of Justice.[34]

III. THE DROPPING: ITS POLITICAL BACKGROUND, PROBLEMS AND ISSUES

A. *The Political Imperatives*

It may be asked: If the Philippines has valid legal and historical claim on Sabah, why did President Marcos drop it? What were the reasons which triggered this decision?

The relinquishment of the claim was said to be caused by the need for hegemony in the ASEAN region and by an immediate resolution of conflict in the South. As can be recalled, as late as February 10, 1972, a Constitutional Convention delegate Jal Anni (from Sulu), made the following statement in sponsoring Article I of the 1973 Constitution:

> Our Government believes in the validity of the Sabah claim. For this, the Sultan of Sulu and his 500,000 subjects are grateful. Our claim to Sabah is factual, legal and historical, and therefore it is more than a right to be safeguarded by the Constitution.[35]

Because of this, Article I of the 1973 Constitution defining the National Territory, contains the words "and all the other territories belonging to the Philippines by historic right or legal title" which explicitly refers to Sabah.[36] As the Convention was about to finish its task, Martial Law was proclaimed on September 21, 1972. In a month's time,

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[32] *Ibid.*
[33] Salonga, *op. cit. supra* note 10 at 392.
[34] President Marcos, Address at Andrew Air Base, Zamboanga City, October 10, 1968.
[35] Salonga, *op. cit. supra* note 10 at 392.
[36] *Ibid.*

the Muslim rebellion fueled by the Jabidah massacre[37] of 1968, flared up throughout Muslim Mindanao, first in Marawi City, and later on, in Sulu, in Basilan, and in Cotabato. On this rebellion, President Marcos made the following public declaration:

> Reports about a connection between Sabah and the Muslim secessionist movement in Mindanao date as far as the start of the decade of the seventies when an initial dispute over lands in Mindanao resulted in the declaration of a number of armed groups to secede from the Philippine Republic. The conflict, contained at first in a relatively small area in our southern regions, began to spread through the whole of Muslim populated areas in Mindanao.
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> By 1971, there were disturbing reports that firearms in large quantity were being shipped into the country thru the Southern backdoor from foreign sources. Though there was no confirmation in terms of interception of shipments, weapons and ammunitions recovered from rebel hands tend to confirm the allegation that the rebels were receiving aid from foreign countries.[38]

It was reported that Malaysia has allowed the Moro National Liberation Front (MNLF) to establish a primary base in Jamperas, and two minor bases near Sempurma and Kota Kinabalu, in the State of Sabah. In the early stages of the trouble (1972-1974) Malaysia was involved only because the Chief of State of Sabah, Tun Mustapha wanted to carve out an independent Muslim Empire to include Sabah and some islands in the Southern Philippines that the MNLF sought to separate.[39] It was observed that the secret support that the Malaysian government extended to the MNLF clearly stemmed from its desire to pressure President Marcos into resolving the boundary dispute set off by the Philippine claim on Sabah.[40]

The announcement to drop the claim came at a time when unity among the ASEAN members was of utmost importance: the United States and Japan, Australia and New Zealand have already taken note of the validity of the 5-nation group. The ASEAN is a move towards regional Cooperation to achieve their common aspirations. It was felt that it was necessary for the members to settle any differences and remove any existing conflicts that may cause destruction of the regional grouping.[41] Thus knowledgeable sectors claim that giving up Sabah is not only a pragmatic gesture but also one which will help strengthen ties with our closest neighbor, enabling us to forge stronger border agreements, thus helping

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[37] See CANOY, THE COUNTERFEIT REVOLUTION: MARTIAL LAW IN THE PHILIPPINES, 27, 199-200 (1980), and Senator Ambrosio Padilla on the Corregidor Massacre, pp. pp. 1-101.

[38] See Pres. Marcos' article, "Towards a Resolution of the Sabah Question," Bulletin Today, Aug. 30, 1977, p. 10, col. 7.

[39] CANOY, *op. cit. supra* note 37 at 199.

[40] *Ibid.*

[41] "FM's Odyssey for Peace," *Expressweek*, Sept. 1, 1977, p. 5.

keep peace in the south, and develop more and stronger trade relations with Sabah.[42]

B. *The Constitutional and International Law Issues*

The dropping of the claim raises several issues both in constitutional and international law. Considering the importance of these issues, it is first necessary for us to examine whether the claim is valid at all. If not, then there is not even a need for the dropping.[43] Granting that the claim was valid, the next legal question that may be raised is: was the dropping legal and constitutional considering the following:

1. The unilateral act of the President was without the formalities required by the Constitution; or
2. The dropping was made by the President through the Batasang Pambansa but without amending the Constitution.

It is important to note, however, that when President Marcos declared the dropping, he said that the "formal withdrawal (will be) worked out, and the constitutional processes will have to be taken first." But because nothing has been done since the declaration, some observers understood the dropping or the unilateral act to be the final step and as said by the Minister of State for Foreign Affairs, there is no longer any Sabah claim. So these writers felt the necessity of raising the question whether the unilateral dropping *per se* is binding aside from the question of whether it runs counter to the provisions of the Constitution even if formalities shall have been worked out. It is advanced by some that considering the provision of the Philippine Constitution, the dropping would not be feasible unless the Constitution itself should be amended first.[44] This brings us further to a closer examination of the specific provision of the Constitution on National Territory.[44a] This will put to surface whether the Constitution really contemplated to integrate Sabah as part of the Philippine territory. If Sabah was deemed integrated, then what are the legal processes needed in dropping the claim as it definitely involves national interest.

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[42] *Ibid.* p. 5.

[43] Interview with former Senator Lorenzo Sumulong at Sumulong Law Office, Sampaloc, Manila, September 11, 1981. The same view was expressed by former Senator Ambrosio Padilla when he was interviewed at his law office at Strata 100, Ortigas Avenue, Pasig, Rizal, Metro Manila, October 3, 1981.

[44] Salonga, *op. cit. supra* note 10 at 396. The same view has been expressed by others who have been interviewed on this subject, Justice Jorge Coquia, Prof. Perfecto Fernandez, all from the College of Law, University of the Philippines, and also by former Sen. Ambrosio Padilla, *Supra* note 43. Only former Sen. Sumulong expressed a different view. Dean Froilan Bacungan of the UP College of Law, when interviewed at his office, suggested that what should be amended is "our understanding of the Constitution."

[44a] CONST. art. 1; Const. (1935), art. 1.

On the other hand, as regard the international issues, would the unilateral dropping sans the constitutional processes be binding to both parties in the claim and to their constituents? What are the possibilities of settling the issues? Can we bring the case to the International Court of Justice (ICJ) if we will pursue the claim notwithstanding the declaration? Can the ICJ decide *ex parte* if Malaysia refuses to submit to its jurisdiction? These are but a few of the many questions involved in the controversy.

IV. Analysis: The Legal Implications

Issue I. Does the Philippines Have a Valid Claim to Sabah?

We submit that the Philippines has a valid claim to Sabah. Historical facts will bear out that in 1704, the Sultan of Sulu, by virtue of a cession from the Sultan of Brunei became the ruler of North Borneo.[45] The transaction entered into between the Sultan of Sulu and Overbeck was a lease and not a cession. Numerous documents presented by Ambassador Quintero[46] to the London Talks indisputably pointed out official references to the deed as lease and not a cession.[46a] It is important for us to present here very briefly how these documents proved that the contract was a *lease*:

1. *English Translation of Deed of 1878* — The legal experts translated the first paragraph as: "We ... do hereby desire to lease" and the third paragraph: "The above mentioned territories are ... *leased* to Mr. Overbeck ..."[47]
2. *Treacher's Report* — Treacher, negotiator of the transaction, referred to such deed as lease when he made a report to the 'Britanic Majesty' on the very day when the deed was signed. He stated that the Sultan considered as "rental" the 5,000 Malayan Dollars the obligation of Overbeck.[48]
3. *Treacher's Letter to the Sultan* — Treacher, on report that the Spanish Government attempted to hoist the Spanish Flag over North Borneo, wrote after his visit to the sultan via "Krestrel" for Jolo objecting to such attempts "to hoist the Spanish Flag in *your Highness'* possessions in Borneo.[49]
4. *Spanish Government Memorandum* — This memorandum states: "Contract for the *lease* of Sandakan" (p. 1) and "lands which belong to the dominion of the Sultan." (p. 2); "for their *administration*" (p. 3),

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[45] Philippine Claim, *op. cit. supra* note 13 at p. 11.

[46] See E.E. Fernandez, "The Philippine Claim to Sabah: Legal Aspects," *Symposium on Sabah.* National Historical Commission (1969) Unpaged.

[46a] Philippine Claim, *Supra* note 13 at 31. See also P.A. Serrano on the same title. A Thesis in National Defense College, 1965, pp. 21-26.

[47] Document No. 1. All the documents were originally cited by Ambassador Quintero and quoted in Philippine Claim, *op. cit. supra* note 13 at pp. 32-35.

[48] Document No. 2, *Ibid.* p. 32.

[49] Document No. 3, *Ibid.* p. 33. This recognizes the Sultan's sovereignty.

word "lease" (pp. 4, 5, 6 and 7), word "rent" (p. 8) and contract of *lease* (p. 9).[50]

5. *Sultan's Letters to Philippine Islands Captain General* — The Sultan's letter to the Captain General dated July 4, 1879 stated that the payment of 5,000 Malayan Dollars was "rent." In his second letter on July 22 of that year, he mentioned about his desire to "cancel the contract of lease of Sandakan." The word lease was repeated in same letter.[51]
6. *Sultan's Letter to Jolo Governor* — The letter dated July 22, 1878 stated to the Governor that he (the Sultan) wishes "to cancel the contract for lease of Sandakan."[52]
7. *Sulu Governor's Letters to Overbeck* — Sulu's Governor Carlos Martinez wrote Overbeck on July 22, 1878 and made reference to a "lease of Sandakan and its dependencies."[53] In his second letter dated July 24, 1878, the Governor again stated a "contract of lease."[53a]
8. *Treacher's Letter to British Office* — On October 15, 1879, Treacher wrote to the British Foreign Office in which he mentioned of "Sandakan and other possessions of the Sultan in Borneo."[54]

Proceeding from the fact that the nature of the contract between the parties discussed above was that of lease, other arguments that the Philippines has no legal claim on Sabah are invalid. The allegation of Malaysia to her by the British Crown under cession Order 46 is not valid. Great Britain could not have acquired sovereignty over Sabah because the British North Borneo Company which was organized by Dent after the said deed was only accorded the status of an "administrator," and thus it exercised rights of control over Sabah only by delegation of power from the Sultan of Sulu. Such being the case, the British North Borneo Company could not possibly transfer any rights to the Crown. In the law of nations as in municipal laws, a transferee cannot acquire more rights than the transferor and in international law, sovereignty can be ceded only to sovereign entities or to individual acting for a sovereign."[55]

ISSUE II. WAS SABAH INCORPORATED AS PART OF THE PHILIPPINE TERRITORY?

The answer to this question will determine to a large extent the action that may be taken by the Philippine Government which would either formalize the unilateral dropping or revive the claim.

The most common modes of acquiring territory are by discovery, occupation and cession as a result of either the use of force or peaceful

50 Document No. 4, *Ibid.* p. 34.
51 Document No. 5, *Ibid.* p. 34.
52 Document No. 6, *Ibid.* p. 34.
53 Document No. 7, *Ibid.* p. 34.
53a Document No. 9, *Ibid.* p. 35.
54 Document No. 10, *Ibid.* p. 35.
55 Sovereignty means freedom from outside control in the conduct of internal and external affairs. See SALONGA & YAP, PUBLIC INTERNATIONAL LAW 74 (4th Ed. 1974).

negotiations with or without consideration in both cases, conquest, prescription and accretion.[56] Unfortunately, the Philippines has not effectively availed of any of these modes in its Islands or Sabah.[57]

In the case of Las Palmas, the United States (as the colonial master of the Philippines) submitted for arbitration its claim of sovereignty over said Island which was also claimed by the Netherlands (Holland). The island lies about half-way between Cape San Agustin in Mindanao, Philippines, and the most northerly islands of the Nanusa group then of the Netherlands East Indies. The United States, as successor to the rights of Spain over the Philippines under the Treaty of Paris of December 10, 1898, based its title on discovery and also in virtue of the principle of contiguity. On the other hand, the Netherlands claimed over the island from 1677, or probably from a date prior even to 1648, to the date of arbitration.

The claim of the United States to sovereignty over the Island of Las Palmas is derived from Spain by way of cession under the Treaty of Paris. The latter Treaty, though it comprises the island in dispute within the limits of cession, and in spite of the absence of any reserves or protest by the Netherlands as to these limits, has not created in favor of the United States any title of sovereignty such as was not already vested in Spain. The essential point is therefore to decide whether Spain had sovereignty over Las Palmas Islands (or Miangas) at the time of the coming into force of the Treaty of Paris.

The United States based its claim on the title of discovery, a recognition by treaty and of contiguity, i.e., titles relating to acts or circumstances leading to the acquisition of sovereignty. It was not, however, able to establish the fact that it had effectively exercised its sovereignty over the Islands.

The Netherlands on the other hand based its claim of sovereignty essentially on the title of peaceful and continuous display of State authority over the land. This title would, in international law, prevail over a title of acquisition of sovereignty not accompanied by actual display of State authority.[58]

From the time the Spaniards, in withdrawing from the Moluccas in 1866, made express reservation as to the maintenance of their sovereign

[56] See ABAD SANTOS, CASES AND MATERIALS IN INTERNATIONAL LAW on "Territorial Domain and Its Acquisition." 144 (1974).

[57] Interview with Justice Jorge Coquia of the Court of Appeals, at the UP College of Law, September 14, 1981.

[58] It is not necessary that the display of sovereignty should be established as having begun at a precise epoch; it suffices that it had existed at the critical period preceding the year 1898. It is quite natural that the establishment of sovereignty may be the outcome of a slow evolution, of a progressive intensification of State control. This is particularly the case, if sovereignty is acquired by the establishment of the suzerainty of a colonial power over a native State, and in regard to outlying possessions of such a vassal State. (ABAD SANTOS, *op. cit. supra* pp. 184-85).

rights up to the contestation made by the United States in 1906, no contestation or other action whatever or protest against the exercise of territorial rights by the Netherlands over the Talantse (Sangi) Isles and their dependencies (Miangas included) has been recorded. The peaceful character of the display of Netherlands sovereignty for the entire period to which the evidence concerning acts of display relates (1700-1906), was admitted.[59] And since the title of contiguity is not recognized in international law, and because of lack of effective occupation after discovery, the Islands of Las Palmas was awarded to Holland in the said arbitration of 1928.

The case of Sabah is different however. It was *ceded* to the Sultan of Sulu by the Bornean Chief. And sovereignty was not surrendered by the Sultan when it leased it to Overbeck, so by the said cession the Sultan gained sovereignty over Sabah. By the Deed of 1962 from the Kiram heirs to the Philippine government, the Philippines has obtained sovereignty over the said territory.

Article 1, Section 1 of the 1935 Constitution provides:

> The Philippines comprises all the territory ceded to the United States by the Treaty of Paris concluded between the United States and Spain on the tenth day of December, eighteen hundred and ninety-eight, the limits of which are set forth in Article III of said treaty, together with all the islands embraced in the treaty concluded at Washington between the United States and Spain on the seventh day of November, nineteen hundred, and in the treaty concluded between the United States and Great Britain on the second day of January, nineteen hundred and thirty, and all territory over which the present Government of the Philippine Islands exercises Jurisdiction.

It appears that the 1935 Constitution did not incorporate or embrace Sabah as part of the Philippine territory. However, Salonga said that Article I has no applicability to the claim because when the Philippine Constitution was adopted in 1935 by the Filipino people, the Philippines was not an independent state but "a mere dependency and that therefore, the restrictive provision of Article I could not possibly tie the hands of the Republic after independence became a reality."[60] Salonga further said that despite the lack of proper definition of a territory by metes and bounds, international law does not require an exact and rigid definition of a territory; that rigidly fixed boundaries are not indispensable and that boundaries of territory may be indicated by natural signs as rivers, mountains, deserts, etc. He maintained that the contract of lease of 1878 had defined the specific boundaries of the disputed area.[61]

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[59] *Ibid.* p. 185.

[60] Salonga, *op. cit. supra* note 10 at 392.

[61] *Cf.* Serrano, *op. cit. supra* note 46a at 21-26, citing Salonga. Bernas stated that the definition of national territory under the 1935 Constitution is to prevent the Americans from dismembering the Philippines. No such reason exists in 1973 but only for preservation of national wealth, for national security, and for manifestation of solidarity. BERNAS, THE 1973 PHILIPPINE CONSTITUTION A REVIEWER-PRIMER 6-7 (1981).

The provision of Article I of the 1935 Constitution did not prohibit the Philippines from acquiring additional territories under international law. There was a proviso stating that the generally accepted principles of international law has been adopted as part of the law of the land,[62] and the Philippines may acquire additional territory not defined in the Constitution provided it is through any of the modes recognized under the international law. The Philippines has acquired Sabah by a series of acts, agreements, documents and transactions including the instrument dated September 12, 1962 by which the Sultan of Sulu ceded North Borneo to the Philippine government.[63]

The Philippine Government by pasing Republic Act No. 3046 defined the baselines of the Philippines in compliance with the requirement of the United Nations that the member countries of the U.N. submit a definition of their baselines. Though this Act did not physically incorporate Sabah,[64] it is provided in Section 2 that the definition of the baselines "is without prejudice to the deliberation of the baselines of the territorial sea around the territory of Sabah, situated in North Borneo, over which the Republic of the Philippines has acquired dominion and sovereignty.[65] Because of this, the records of the Constitutional Convention show that it was the intention of the delegates that Sabah be included in the definition of the National Territory.[66] Thus Article I, Section 1 of the 1973 Constitution provides:

> The National Territory comprises the Philippine Archipelago, with all the islands and waters embraced therein, and *all the other territories belonging to the Philippines by historic right or legal title,* including the territorial sea, the air space, the subsoil, the seabed, the insular shelves, and the other submarine areas over which the Philippines has sovereignty or jurisdiction. The waters around, between, and connecting the islands of the archipelago, irrespective of their breadth and dimensions, form part of the internal waters of the Philippines. (Underscoring supplied)

Special attention is drawn to the clause "all other territories belonging to the Philippines by historic right or legal title." This clause includes any territory which presently belongs to the Philippines through any of the internationally accepted modes of acquiring a territory. Former Senator Felixberto Serrano, a delegate to the 1971 Constitutional Convention said: "We have added the phrase 'including that over which it may hereafter establish its right' (in the proposed text) to refer to our pending

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62 CONST. (1935), art. II, sec. 3.

63 Facts About Sabah, *op. cit. supra* note 31 at 22.

64 Then Senator Tolentino himself, after the passage of the Sabah Act, admitted the following: The law does not change the territorial boundaries of the Philippines as provided in the Constitution, and hence, does not "annex" Sabah into the national territory of the Philippines. *Ibid.*

65 *Ibid.*

66 Salonga, *op. cit. supra* note 10 at 392. See also Serrano, *Comments on the National Territory Text of the New Constitution,* THE TORTURED JOURNEY 130-131 (1973).

claim to Sabah."[67] Foremost among these territories are what are referred to by the 1935 Constitution as "all territory over which the present (1935) Government of the Philippine Islands exercises jurisdiction." This had reference to the Batanes Island which, although undisputedly belonging to the Philippines, apparently lay outside the lines drawn by the Treaty of Paris. The clause also refers to other territories which, depending on available evidence, might belong to the Philippines, e.g., Sabah, the Marianas, Freedomland,[68] Spratley Islands and Marianas Islands.[69]

It is clear therefore that under the present Constitution, it is contemplated that the Philippine National Territory stretches to Sabah.

ISSUE III. WAS THE UNILATERAL DROPPING OF THE SABAH CLAIM LEGAL?

The treaty-making power is lodged normally in the Head of the State as may be determined by the municipal law. Under the Philippine Constitution, however, this power is restricted because it requires the concurrence of the legislative body. Under the 1935 Philippine Constitution, the President has to be concurred in by a vote of two-thirds of all the members of the Senate.[70] Under the 1973 Constitution, as amended, a treaty must be concurred in by a majority of all the Members of the Batasang Pambansa.[71]

As to the treaty-making process, it is quite clear that the present Constitution is much more generous in its grant of power than the 1935 Charter. While the concurrence of the majority of the members of the Batasang Pambansa is required as a general rule under Art. VIII, Sec. 14 of the Constitution, there is, as noted, this exception that the President may enter into any treaty or agreement as the national welfare and interest may require. Article XIV, Sec. 16 of the new Constitution provides:

> Any provision of paragraph one, Section fourteen, Article eight and of this Article notwithstanding, the President may enter into international treaties or agreements as the national welfare and interest may require.[72]

In *Commissioner of Customs v. Eastern Sea Trading*,[73] treaties are referred to as "formal documents which require ratification," then with the concurrence of the Senate, now the Batasang Pambansa. The Batasang Pambansa may propose amendments or concur with reservations. Its

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[67] See SERRANO, *op. cit. supra* note 65 at pp. 130-131.
[68] BERNAS, *op. cit. supra* note 61 at p. 8.
[69] *Ibid.*
[70] CONST. (1935), art. VII, sec. 10 (7).
[71] CONST. (1973), art. VIII, sec. 14 (1).
[72] This power was vested with the Prime Minister under the Original Provisions of the 1973 Constitution. The Amendment vesting the power to the President was made on April 7, 1981.
[73] G.R. No. 14279, Oct. 31, 1961, 3 SCRA 351 (1961).

role could be much less as the President now possesses authority to enter into international treaties to promote national welfare and interest. There is more, the very same provision speaks of agreement. There is thus a constitutional sanction for executive agreements which may take the place of a treaty. The distinction between the two was set forth in *Eastern Sea Trading* case, with this quotation from the scholarly study of former High Commissioner Francis B. Sayre.[74]

"International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreement embodying adjustments of detail carrying out well-established policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements."[75] This is assailed however by the legislature when the said act is not constitutionally authorized. In an earlier case, *USAFFE Veterans Association v. Treasury of the Philippines*,[76] the validity of the Romulo-Snyden Agreement which was not submitted to the Senate for ratification was assailed. The petition was dismissed, but the question raised was not passed upon squarely because there was no express provision by which the agreement shall be passed. However, with the present explicit provision in the Constitution, there can be no doubt about the power of the President to enter into Executive Agreements.[77]

But why equate the Presidential pronouncement with the treaty provision of our organic law? A treaty has been defined by the Vienna Convention on the Law of Treaties as an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[78] However, international law has not prescribed any form for treaties. Treaties are normally reduced to writing; but the fact that an agreement is made orally does not affect its binding force.[79]

Referring now to the issue presented, the dropping of the claim if constitutionally authorized, legally binds the Filipino people. Article VIII, Section 14(1) of the present Constitution provides: "Except as otherwise provided in this Constitution, no treaty shall be valid and effective unless concurred in by a majority of all the Members of the Batasang Pambansa." The proviso refers to Section 16 of Article XIV under which the President

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[74] Sayre, *The Constitutionality of Trade Agreements Act*, 39 COLUM. L. REV. 751-770 (1939) as quoted in Commissioner of Customs v. Eastern Sea Trading, *Supra* at 356.

[75] Commissioner of Customs v. Eastern Sea Trading, *Supra*.

[76] 105 Phil. 1030 (1959).

[77] FERNANDO, THE PHILIPPINE CONSTITUTION (1977).

[78] VIENNA CONVENTION ON THE LAW OF TREATIES. Article 2 (May 23, 1969).

[79] SALONGA & YAP, *op. cit. supra* note 55 at 311-312.

may enter into a treaty or agreement as the national welfare and interest may require.

It is still important to note the effect of constitutional restrictions on the exercise of the treaty-making power. It is favored by a preponderance of the authority that treaties made on behalf of a State by organs which are not constitutionally competent to conclude them are not binding internationally upon the State.[80]

What constitutes "national welfare and interest" within the meaning of Section 16, Article XIV which would justify the President to unilaterally bind the country in an international treaty or agreement? The phrase "public interest" includes most anything though of minor importance, but affecting the public such as the establishment and maintenance of barrio roads, electric lights and ice plants, parks, markets, etc.[81]

As the Constitution neither defines nor provides under what specific instances or conditions the national welfare and interest may require, it may rightly be presumed that the determination of the national welfare and interest requirements is left to the Chief Executive.

Granting that the dropping of the claim was a matter of national or public interest, it seems that reasons for asserting claim are even "more public" or have heavier weight because the claim involves the question of national integrity. And national integrity can not be derogated or compromised by the President without the express force of the law.[82] It may be argued however that the President during the period of martial law was exercising legislative power as granted to him in the Transitory Provision of the Constitution and also under Amendment No. 5 which states that the incumbent President "shall continue to exercise powers until martial law shall have been lifted."[83] In fact the President had sole power over foreign policy when he announced the dropping of the Sabah claim in 1977 because during that time, the Interim Batasang Pambansa was not yet constituted and said interim legislature did not have the power to give its concurrence to treaties.[84] Legislative power was jointly exercised by the President and the Interim Batasang Pambansa since 1978 to 1981. And the President continues to hold reserve power indefinitely under certain emergency conditions, as provided in Amendment No. 6, of the 1976 amendments to the Constitution.[85]

Granting however, that the President was exercising both executive and legislative functions when he declared the dropping, it is still arguable

[80] *Ibid.*, at 309.
[81] In Re: Parazo, 82 Phil. 241.
[82] Interview with Ambrosio Padilla. *Supra* note 43.
[83] 1976 Amendments No. 5.
[84] 1976 Amendments, No. 2.
[85] Amendment No. 6, in relation to art. VII, sec. 16.

that the said act was not binding because the declaration was wanting of the formalities that he announced to be made concomitantly with the withdrawal of the claim.

ISSUE IV: WILL THE DROPPING REQUIRE AN AMENDMENT OF THE CONSTITUTION

The declared intention of President Marcos to work out constitutionally the dropping of the claim may be construed to mean that the provision of the constitution on the National Territory shall be taken into consideration. It is our view that the Constitution will have to be amended first before the formalities should be undertaken to finalize the dropping. As discussed earlier, the Constitutional Convention records show that Sabah was included in the introduction of the new definition of National Territory.[86] That is why Article I, contains the words: "and all other territories belonging to the Philippines by historic right or legal title," which explicitly refers—according to Ambassador Quintero, Chairman of the Committee on National Territory—to Sabah.[87]

Salonga viewed the statement by President Marcos that Article I of the New Constitution shall be amended according to the necessary legal process, and therefore a plebiscite must be called by the President for the purpose.[88] The reason is that Malaysia and Sabah are publicly and officially charged with the knowledge that the Presidential dropping is subject to the approval of the Filipino people.[89] Salonga said:

> My specific suggestion is that martial law be lifted and dismantled permanently,[90] and that Filipinos of all shades of opinion — including our Muslim brothers from Sulu and other places — be allowed to express their opinions freely, without threat of imprisonment, in all instruments of mass media, including the daily newspapers, radio and television stations, so that all the facts surrounding the claim and its withdrawal may be known to our people and that after ninety (90) days of free debate, all qualified citizens be allowed to vote freely by means of secret ballot on a simple, non-suggestive question, such as this: "Are you in favor of or against the withdrawal of the Philippine claim to Sabah?

Whatever the result of such a free plebiscite, everyone—from the President and the Opposition leaders down to the lowliest citizen—was urged to forget their *amor propio* and accept the decision of the people.[91]

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[86] Salonga, *op. cit. supra* note 10 at 392. See also BERNAS, *op. cit. supra* note 61 at 7; and PACIS, A FAMILY DIALOGUE ON PHILIPPINE CONSTITUTION, 159 (1967).

[87] Salonga, *op. cit. supra* note 10 at 395. SERRANO, *op. cit. supra* note 65, pp. 130-131.

[88] Salonga, *op. cit. supra* note 10 at 392.

[89] *Ibid.* p. 395.

[90] Martial Law was declared lifted by Pres. Marcos on January 17, 1981. Proc. No. 2045 (1981).

[91] Salonga, *op. cit. supra* note 10 at 395.

The importance of consultation should not be underemphasized. Since the issue is seriously concerned with national integrity, this requires a thorough public discussion. Salonga further commented:

> It is apparently only the misguided and benighted among us who believe that consultation does not necessarily mean automatic approbation and who still cherish the Old Society notion that amending the Constitution is a serious process — one which requires thorough public discussion, deliberation and free choice, properly tabulated at the polls, under the supervision of an independent electoral body — that cannot see the logic and the necessity of dropping the Sabah claim without any consideration whatsoever.[92]

An amendment envisages an alteration of one or a few specific provisions of the Constitution, and its guiding original intention is to improve specific parts or to add new provisions to existing ones accordingly as might be demanded by existing conditions.[93] Therefore in the case of dropping the Sabah claim, the amendment of the Constitution, through a plebiscite is appropriate. Besides, the presence of a special article on the amendments in the Constitution indicates that the Philippines has adopted a rigid type of Constitution, that is, one that can not be changed by ordinary legislation but only by a more cumbersome process of change. It also identifies the legal sovereignty as residing in the people, since only a direct act of the people can finally effect a change in the Constitution.[94]

ISSUE V. CAN THE CLAIM BE REVIVED? CAN IT BE BROUGHT TO THE INTERNATIONAL COURT OF JUSTICE AND CAN IT DECIDE IF MALAYSIA REFUSES TO SUBMIT TO ITS JURISDICTION?

Although, even the top exponent of the Sabah Claim resigned by saying "we have irretrivably lost Sabah,"[95] and the case could be considered *moot and academic*,[96] there is no absolute certainty, however that the claim can not be revived. This will be the implication if ever a plebiscite will be held and the results will be against the withdrawal of the

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92 *Ibid.* p. 391.

93 BERNAS, *op. cit. supra* note 61 at 200. Article XVI of the 1973 Constitution specifically provides:

> "Section 1. (1) Any amendment to, or revision of, this Constitution may be proposed by the Batasang Pambansa upon a vote of three-fourths of all its Members, or by a constitutional convention.
>
> (2) The Batasang Pambansa may, by a vote of two-thirds of all its Members, call a constitutional convention or, by a majority vote of all its Members, submit the question of calling such a convention to the electorate in an election.
>
> Section 2. Any amendment to, or revision of, this Constitution shall be valid when ratified by a majority of the votes cast in a plebiscite which shall be held not later than three months after the approval of such amendment or revision."

94 Salonga, *op. cit. supra* note 10 at 395.

95 *Ibid.* p. 394.

96 Interview with Sumulong. See S. ARANETA, *Solution with Honor to the Sabah Problem*, PHILCONSA READER IN CONSTITUTIONAL LAW, 627-637 (1979).

claim. Or hypothetically, if the President dies and his successor wants to revive the claim, a revival of the claim is not a remote possibility. And if so, can we bring the case to the International Court of Justice as the only forum available considering that several attempts at conciliatory talks and negotiations with interested countries had failed?

Actually, the Philippines had made two attempts to submit the Sabah case to the International Court. In the midst of the London talks in 1963 the Philippines made its initial proposal to submit its claim to Sabah before the International Court of Justice. This proposal was rejected by the British government. It was again broached in February 1964, in a meeting between President Macapagal and Prime Minister Tunku in Phnom Penh, Cambodia, wherein the Malaysian leader stated in a press statement that his country would welcome a memorandum on the Philippine claim and agreed to discuss the best way of settling the claim including, or not precluding, reference to the International Court of Justice.[97] Pursuant to this commitment, negotiations followed for the holding of exemplary talks but the negotiations reached an impasse when Malaysia refused to agree to two Philippine proposals, namely: that a definite agenda be agreed upon by the two countries and that they both agree, in the event of an inability to reach agreement on the points of clarification desired by Malaysia, to refer the dispute to the International Court of Justice as a token of their adherence to the rule of law and the United Nations Charter.[98] The Philippine aide memoire of Nov. 19, 1964 reflected its attitude to Malaysia's continued refusal to go to the World Court. The aide memoire reads in part: "if . . . the Malaysian government is persuaded that the rights it acquired from the British Crown over North Borneo can stand critical scrutiny, it should welcome as it did in Phnom Penh, the Philippine proposal in order to set at rest all questions regarding its possession and purported title."[99] The declaration by President Marcos at the ASEAN summit conference indicated a change of the Philippines' official position. But if for some other compelling reasons the Philippines decides to shift its position on the abandoned claim and pursue a resolution of the issue by going to the World Court, what would be its chances?

To gain an insight of the Court's view on matters of similar legal import as the Sabah claim, it would be well to investigate controversial and relevant cases decided by the International Court of Justice (ICJ) and view the Philippine case in the light of these decided cases.

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97 Press Statement issued by Salvador P. Lopez, Philippine Secretary of Foreign Affairs, in Phnom Penh. February 12, 1964, A DFA File.

98 2 PHILIPPINE CLAIM, *op. cit. Supra* note 13 at 73.

99 *Ibid.*

The similarity of the Philippine-Sabah case to the *Nuclear Test Cases*[100] lie in the fact that in both conflicts unilateral declarations were made by French authorities in the *Nuclear Test Cases* and by Philippine officials in the Sabah case which were invoked or can be invoked against, the State concerned.

The Nuclear Test Cases

The ICJ in 1974 decided two cases concerning the French nuclear testing in the South Pacific Ocean, one brought by Australia against France and another by New Zealand also against France. Australia and New Zealand disputed the right of France to conduct nuclear tests on international waters causing deposit of radioactive fallouts in their respective territories. The matter was brought by the two countries before the ICJ and asked the Court to adjudge and declare that the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law and to order that the French Republic shall not carry out any further such tests. The French government refused to recognize the Court's competence and jurisdiction over the issue and requested the removal of the case from the Court's list. However, high government officials of France made public statements to the effect that it would *cease to conduct atmospheric nuclear tests* in the South Pacific Ocean.[101] The Court took note of the French statement and ruled that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Nothing in the nature of a *quid pro quo,* nor any subsequent acceptance, nor even any reaction from other states is required for each declaration to take effect. Neither is the question of form decisive. *The intention of being bound is to be ascertained by an interpretation of the act.* The binding character of the undertaking results from the terms of the act and is based on good faith. Interested states are entitled to require that the obligation be respected.[102] At this point, a distinction may be made between the French statement and President Marcos' 1977 announcement on the Sabah claim. In the former, there was a commitment made by French officials when they said that French atmospheric nuclear testing in the South

[100] Australia v. France, [1974] I.C.J. Rep. 253 and New Zealand v. France, [1974] I.C.J. Rep. 457.

[101] The first of these statements was contained in a communiqué which was issued by the Office of the President of the French Republic on June 8, 1974 and transmitted in particular to Australia and New Zealand: "...in view of the stage reached in carrying out the French nuclear defence programme France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed." Further statements were contained in a Note from the French Embassy in Wellington (10 June), a press conference given by the President of Franch (25 July), a speech made by the Minister for Foreign Affairs in the United Nations General Assembly (25 September) and a television interview and press conference by the Minister for Defence (16 August and 11 October). [1974-75] I.C.J.Y.B. 110, 114.

[102] [1974-75] I.C.J.Y.B. 110-111, 114-115.

Pacific Ocean would *cease;* in the latter, there was a commitment *to take definite steps.*

It can be easily observed that the International Court of Justice in the Nuclear Test Cases did not hesitate to declare the French unilateral declaration to stop the testing as binding and therefore creating legal obligation on the French government to perform such act because the Court was able to satisfactorily ascertain the intention of the French government to be bound thereby. In the case of Pres. Marcos' statement, it is difficult to ascertain as to what definite steps would be taken. Another distinction which may be cited is that in the French case, the unilateral declaration by high ranking French officials was in accordance with their government policy, while in the Philippine case, certain formal constitutional requirements have to be satisfied in order to bind the Filipino people.

Australia and New Zealand expressed fears that even after the French statement mentioned above the possibility of further atmospheric tests by Franch cannot be excluded. The Court replied that it must form its own view of the meaning and scope intended to be given to these unilateral declarations. Having regard to their intention and to the circumstances in which they were made, they must be held to constitute an engagement of the French State. France has conveyed to the world at large, including the applicant, its intention effectively to terminate its atmospheric tests. It was bound to assume that other states might take note of these statements and rely on their being effective. It is true that France has not recognized that it is bound by any rule of international law to terminate its tests, but this does not affect the legal consequences of the statements in question; the unilateral undertaking resulting from them cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration.[102a]

The Court concluded by saying that as a court of law, it is called upon to resolve existing disputes between States: these disputes must continue to exist at the time when the Court makes its decision. In the present cases, Australia and New Zealand has sought an assurance from France that the tests would cease and France, on its own initiative, has made a series of statements to the effect that they will cease. The dispute having disappeared, the claim no longer has any object and there is nothing on which to base a judgment.

The Anglo-Iranian Oil Case

In another case, *United Kingdom v. Iran,*[103] the ICJ's jurisdiction was questioned because the right of sovereignty was not the issue. The facts are as follows:

[102a] [1974-75] I.C.J.Y.B. 110-111, 115.

[103] ICJ Judgment of July 22, 1952, in 1952 INTERNATIONAL LAW REPORTS, 507-509, (1957).

On April 29, 1933, an agreement was concluded between the Imperial Government of Persia (now the Imperial Government of Iran) and the Anglo-Persian Oil Company, Limited (later the Anglo-Iranian Oil Company, Limited) a company incorporated in the United Kingdom. This agreement was ratified by the Iranian Majlis on May 28, 1933, and came into force on the following day after having received the Imperial assent.

The Iranian Majlis and Senate, on March 15 and 20, 1951, respectively, passed a law enunciating the principle of nationalization of the oil industry in Iran. On April 28 and 30, 1951, they passed another law concerning the nationalization of the oil industry throughout the country. These two laws received the Imperial assent on May 1, 1951.

As a consequence of these laws, a dispute arose between the Government of Iran and the Anglo-Iranian Oil Company, Limited. The Government of the United Kingdom adopted the cause of this British Company and submitted, in virtue of the right of diplomatic protection, an Application to the Court on May 26, 1951, instituting proceedings in the name of the Government of the United Kingdom of Great Britain and Northern Ireland against the Imperial Government of Iran.

On June 22, 1951, the Government of the United Kingdom submitted in accordance with the Article 41 of the Statute and Article 61 of the Rules of Court, a request that the Court should indicate provisional measures in order to preserve the rights of that Government. In view of the urgent nature of such a request, the Court, by Order of July 5, 1951, indicated certain provisional measures by virtue of the power conferred on it by Article 41 of the Statute. The court stated expressly that the indication of such measures in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case and leaves unaffected the right of the respondent to submit arguments against such jurisdiction. It stated:[104]

> While the Court derived its power to indicate these provisional measures from the special provisions contained in Article 41 of the Statute, it must now derive its jurisdiction to deal with the merits of the case from the general rules laid down in Article 36 of the Statute. These general rules, which are entirely different from the general provisions of Article 41, are based on the principle that the jurisdiction of the Court to deal with and decide a case on the merits depends on the will of the Parties. Unless the Parties have conferred jurisdiction on the Court in accordance with Article 36, the Court lacks such jurisdiction.

The Court said that its jurisdiction depends on the Declaration made by the Parties under Article 36, paragraph 2, on the conditions of reciprocity, which were, in the case of the United Kingdom, signed on February 28, 1940, and, in the case of Iran, signed on October 2, 1930, and ratified

[104] *Ibid.* p. 508.

on September 19, 1932. By these Declarations, jurisdiction is conferred on the Court only to the extent to which the two Declarations coincide in conferring it. As the Iranian Declaration is more limited in scope than the United Kingdom Declaration, it is the Iranian Declaration on which the Court must base its decision. This is a common ground between the Parties. In this view, the Court by a vote of 9 to 5, said it had no jurisdiction.

In the case of the Sabah claim, the issue of whether the pronouncement of the President is legal and binding is still subject to his later decisions and pronouncements. Therefore it does not mean that any policy statement by the legislative or by the executive could no longer be revoked.[105] Because those who temporarily speak for the Filipino people in their capacity as representative body are saying this but does not forever commit those who are coming after them.[106]

We also believe the case can be brought to the ICJ despite the lack of submission by Malaysia to its jurisdiction. The Court in the *Nuclear Test Cases* passed upon the issue even when France refused to recognize the Court's competence and jurisdiction. The *Iranian-Oil Case* however, does not apply to the Sabah claim because what is precisely put in issue in the latter case is the sovereignty of the Philippines over such territory. Because there is still the dispute and, above all, because in the Manila Accord of August 5, 1963, Malaysia formally agreed to a just solution of the Philippine claim —

> . . . by peaceful means, such as negotiations, 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.

And this was reiterated by Malaysia on June 3, 1966, when it agreed to "abide by the Manila Accord and the Joint Statement accompanying it, for the peaceful settlement of the Philippine claim to Sabah."[107]

Recent Developments

President Marcos' caution to the Members of the Batasang Pambansa to refrain from "discussing publicly the Sabah issue because it might prejudice agreements between him and the Prime Minister of Malaysia"[108] created quite a stir among the intellectual genre. In another press release, the President was likewise quoted to have said that public discussion on the issue "might cause complications which might abort all these efforts."[109] In addition, Defense Minister Juan Ponce Enrile would be asked to immediately notify all assemblymen on the gravity of the matter and the

105 Interview with Dean Bacungan, *Supra* note 44.
106 *Ibid.*
107 Salonga, *op. cit. supra* note 10 at pp. 394-395.
108 Bulletin Today, Sept. 18, 1981, p. 9, col. 2-7.
109 *Ibid.*

need for prudence."[110] As a form of concession, however, the President said that "if any assemblyman wants a private and confidential briefing."[111] it could be given to him provided that "he does not say anything about it." What should be kept secret regarding the Sabah matter? Is it not a legal right and duty of the Legislature to discuss matters of public interest as fitting representatives of their constituents, the Filipino people, who are directly interested in the Sabah claim by virtue of a valid historic right. Is the exercise of this duty to determine, by public discussion, subject to secrets held by a co-equal and coordinate body, the executive department? And who should not know the secret . . . the Filipino people?

Minister of State Arturo M. Tolentino in defending the President's stand on the matter expressed his view that it cannot be disputed "that the President is the sole spokesman of the government in foreign relations" and that the Batasan "may contribute to the formulation of foreign relations policies and positions."[112] Even President Marcos himself in answer to Assemblyman Francisco Tatad's claim that the President has no right to ask the Batasang Pambansa to shut up said that "in matters of foreign policy and security," he has the last word. And referring specifically to the Sabah issue, he said that "this involves lives and it involves the destiny of your country."[113] However, on the same matter, Tolentino said that the President would not have attempted "to order or command"[114] the Batasang Pambansa on matters which should be the subject of free expression. He interpreted the President's warning as "a mere suggestion"[115] to stop for the time being and if the Members heed the President's request or suggestion, "it should be understood as a matter of prudence and not a matter of law or parliamentary practice."[116]

On the other hand, Malaysia's recent poundings on the issue cannot escape the attention of an ordinary man on the street. The bypassing of Manila by the Malaysian Prime Minister in one of his recent visits to the region, for instance, and the various press releases made by Malaysian officials on the matter contributed greatly to such awareness. In Kota Kinabalu, Sabah Chief Minister Datuk Harris Saleh said that he would urge the Malaysian government "to sever diplomatic relations with the Philippine government if the question of Filipino claim on the state is not resolved immediately."[117] Expressing an opinion, the Indonesian Ambassador to the Philippines said that "a formal resolution approved by the law-making body of the Philippines which is the Batasang Pambansa" is needed to make official the dropping of the Philippine claim to Sabah.[118]

110 *Ibid.*
111 *Ibid.*
112 Bulletin Today, Dec. 5, 1981, p. 12, col. 7-9.
113 Bulletin Today, Dec. 4, 1981, p. 1, col. 4.
114 Bulletin Today, Dec. 5, 1981, p. 12, col. 7-9.
115 *Ibid.*
116 *Ibid.*
117 We forum, Dec. 9-11, 1981, p. 1, col. 1.
118 Bulletin Today, Jan. 8, 1982, p. 24, col. 7.

Sabah State Assemblyman, Baharum Datuk Titingan, however, takes a different stance. Referring to the claim, he said that there is nothing to be worried about for they have never recognized the claim.[119]

V. CONCLUSION

There is no question that the Philippines has a valid claim of sovereignty over Sabah as shown by historical right and legal title. It is for this reason that Sabah was deemed incorporated as part of the National Territory as provided in the 1973 Constitution. And because the claim is valid, it could not just be dropped unilaterally by the President without undertaking some necessary constitutional processes.

Despite this observation, however, the reasons for the dropping as cited by the government authorities appear to be more *political* than legal. President Marcos may have realized that there is more to the Sabah issue: the worsening condition of the Philippine economy, labor unrest, poverty, graft and corruption, and the problem of political instability.

It is our view that to drop the claim requires an amendment of the constitutional provision on national territory and the Sabah issue should be submitted to the Filipino people. If they approve of the dropping, then let it be. But in so doing, there must be a striking of a happy balance or medium as a form of settlement. Both countries can forge a security agreement and make other arrangements favorable to both of them such as in the form of trade, investments, etc., aside from proprietary considerations.

If the constitutional processes will not be undertaken immediately, the claim will still remain as an irritant in the RP-Malaysian relations. Chances are, the claim might be reopened if the next generation would be more assertive and vigilant. The Philippines could bring the case to the International Court of Justice. And if Malaysia refuses once more to submit the dispute to arbitral or judicial settlement, then the wisest course would be to keep the claim alive and pending. Both countries however, should be prepared to take whatever the consequences are.

The possibility of reopening the claim under the present regime is remote. But certainly, the case is not yet closed.

[119] Bulletin Today, Dec. 4, 1981, p. 10, col. 6.