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Master's Thesis

馬來西亞與菲律賓對於沙巴領土之爭議

Malaysia-Philippines Territorial Dispute: The Sabah Case

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中華民國103年7月

July 2014

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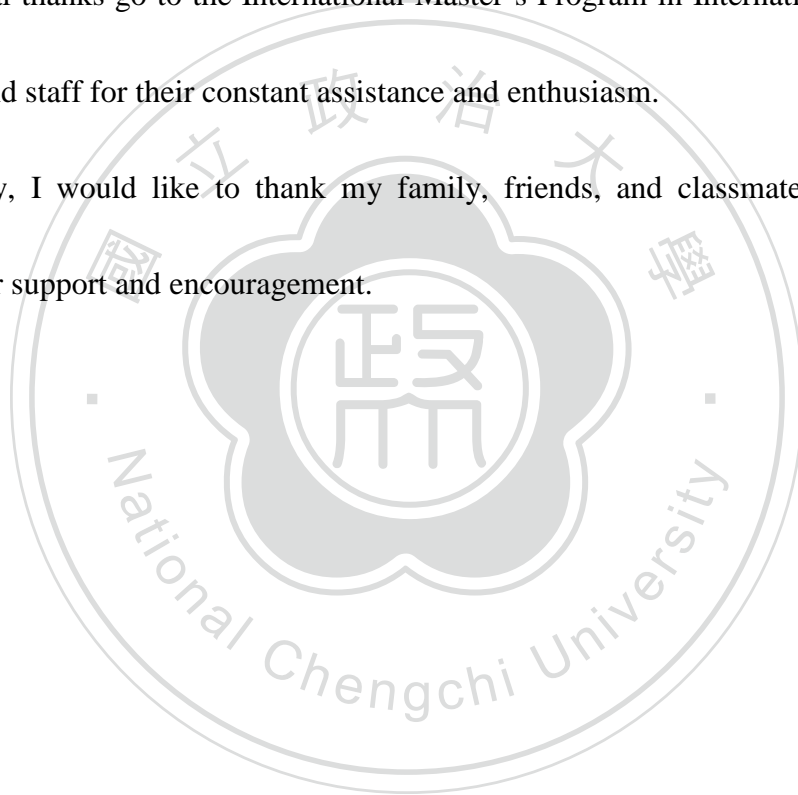
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Abstract

The recent incident where followers of Sultan Jamalul Kiram III landed in Lahad Datu Village in Sabah, Malaysia to assert the pending Philippine territorial claim has sparked one of the biggest security threats in the region. The dispute has disrupted the diplomatic relations between Malaysia and the Philippines, both being members of the Association of Southeast Asian Nations (ASEAN). This study argues that the settlement to the dispute depends on whether the Philippines has a legal and valid claim according to the principles of international law. Similarly, the issue can also be resolved with recourse to a regional agency like ASEAN. Additionally, it is essential that an unbiased analysis of Malaysia's argument be undertaken based on international law. Peaceful methods of settlement should be the goal for both states. Stability and security are a prerequisite for development; therefore, a peaceful environment will provide a proper setting for sustainable economic growth.

Keywords: Malaysia-Philippines Territorial Dispute, Philippine Claim to Sabah, North Borneo, Lahad Datu, Sulu Sultanate

Map of Southeast Asia showing Malaysia, Sabah, and the Philippines¹



¹ Amarjit Kaur. *Wage Labor in Southeast Asia since 1840: Globalization, the International Division of Labor and Labor Transformations*. (Basingstoke: Palgrave Macmillan, 2004), p. 4.

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Chapter 1 - Introduction

1.1 Background

On June 22, 1962, the Republic of the Philippines officially filed a claim of sovereignty and ownership over North Borneo to the British Ambassador to Manila. The following year, talks between the British and Philippine Governments were held in London. The discussion resulted in a Joint Final Communiqué² issued by both governments stating both their claims. It was agreed that further discussion be pursued through diplomatic channels.

During President Diosdado Macapagal's term (1961-1965), the reigning Sultan of Sulu, Sultan Mohammad Esmail Kiram, formally ceded all rights, proprietary, title, dominion and sovereignty of North Borneo to the Republic of the Philippines on September 12, 1962. The cession effectively gave the Philippine Government the full authority to pursue the claim in international court.

On September 16, 1963, the Federation of Malaya was reconstituted into Malaysia, with North Borneo, renamed as Sabah, as one of its states. The new sovereign state has become the successor of the British Crown's interest in Sabah. After consulting with the Congress and foreign policy advisers, President Diosdado

² See Appendix I.

Macapagal decided to withhold recognition of the Federation of Malaysia until Malaysia states its willingness to abide by the Manila Accord³. The Manila Accord was signed on July 31, 1963 by Indonesia, the Federation of Malaya, and the Philippines agreeing to peacefully resolve the issue of North Borneo.

The matter was overshadowed by other developments in the following years, such as the declaration of Martial Law in 1972 by President Ferdinand E. Marcos and the Muslim rebellion in the south.

After several years of neglect, the issue came up again when on February 11, 2013, over 200 followers of Jamalul Kiram III, one of the claimants to the throne of the Sultanate of Sulu, landed in Lahad Datu Village in Sabah. Their aim was to assert the pending territorial claim. The standoff between the Malaysian authorities and the sultan's followers has sparked one of the biggest security scares in Sabah leaving fifty-two Filipinos and eight Malaysian policemen dead. Once again, the territorial controversy emerged on the international scene.

To date, no settlement to the claim has been proposed yet. The dispute has disrupted the diplomatic relations between the Philippines and Malaysia, both being members of the Association of Southeast Asian Nations (ASEAN). Efforts to find a peaceful resolution to the situation are to be undertaken to ensure that human rights

³ See Appendix II.

will be respected and loss of lives will be prevented.

1.2 Significance of the Study

The claim over the Sabah territory has developed into a serious political disruption between the Philippines and Malaysia. It is a serious issue that requires a definite and viable solution. However, its settlement depends on whether the Philippines has a legal and valid claim to the Sabah territory. The basis must be justified according to the principles of international law.

Secondly, with both the Philippines and Malaysia as members of the Association of Southeast Asian Nations (ASEAN), there exists an implied agreement that the problem be dropped in the name of regional unity and harmony. Similarly, the issue can also be resolved with recourse to a regional agency like ASEAN. However, during its 46 years of establishment, the Sabah issue has never been a significant agenda in any of its related meetings. While ASEAN is seen as a panacea for existing intraregional conflicts and tensions, the Sabah claim seems to be considered as an impending catalyst for regional disintegration.

Additionally, in investigating the Philippine claim to Sabah, it is essential that the competing party's validity of arguments be studied. An unbiased analysis of Malaysia's argument is vital for the settlement of the dispute within the context of

international law.

Lastly, it is important to note that judicial settlement in the International Court of Justice (ICJ) might have an influential effect for both countries and the rest of Southeast Asia. Studying the validity of the rules of occupation, cession, grant or lease of colonial protectorate or other territories under international law may serve as a model for other decolonized countries having territorial disputes. Peaceful methods of settlement and recommended recourse should be the goal for a sovereign state. Stability and security are a prerequisite for development; therefore, a peaceful environment will provide a proper setting for sustainable economic growth.

1.3 Scope and Limitation

This study intends to look at the historical and legal bases of the Philippine and Malaysian claim to Sabah. The terms North Borneo and its present name Sabah are used interchangeably. This study will argue that proactive administrations can initiate peaceful negotiations to resolve the dispute. This study will not cover the maritime territorial dispute in the South China Sea between Malaysia and the Philippines.

1.4 Research Questions

The Sabah issue has been a major stumbling block between Malaysia-Philippines

relations for years. In light of the factors influencing the territorial dispute between Malaysia and the Philippines, this study aims to look at means to de-escalate the conflict. The questions to be investigated are as follows:

1. Does the Philippines have a valid claim to Sabah?
2. Is the Malaysian claim legal?
3. What are the workable solutions to settle this dispute peacefully and legitimately?

1.5 Methodology

This study will employ two methods to investigate possible solutions to the territorial dispute between Malaysia and the Philippines over Sabah. First, it will employ historical analysis of the region, highlighting the conditions that led to the dispute between the two countries. Second, it will look at the role of international law and international arbitration in resolving disputes through negotiations, rather than armed conflicts.

1.6 Structure of Thesis Chapters

This study is divided into six chapters. Chapter I gives a brief introduction of the issue.

Chapter II discusses an account of the history of Sabah, its dealings with the

West, and the origins of the British North Borneo Company.

Chapter III deals with the historical and legal basis of the Philippine claim.

Chapter IV discusses the validity of the competing claim of Malaysia.

Chapter V focuses on methods for settling the dispute based on international law.

Chapter VI ends with the summary and conclusion.



Chapter 2 - Brief History of Sabah

2.1 Geography

Sabah, formerly known as North Borneo, is located on the northeast tip of Borneo, third largest island in the world. It is one of the 13 member states of Malaysia, and is its easternmost state. It has an area of 73,631 square kilometres.⁴ Sabah's population numbered to 3,117,405 as of the last 2010 census. The population estimates based on ethnic groups are as follows:⁵

- Kadazan-Dusun: 17.82% (555,647)
- Bajau: 14% (436,672)
- Brunei Malay: 5.71% (178,029)
- Murut: 3.22% (100,631)
- Other Bumiputra:⁶ 20.56% (640,964) – which consists of Rungus, Iranun, Bisaya, Tatana, Lun Bawang/Lun Dayeh, Tindal, Tobilung, Kimaragang, Suluk, Ubian, Tagal, Timogun, Nabay, Kedayan, Orang Sungai, Makiang, Minokok, Mangka'ak, Lobu, Bonggi, Tidong, Bugis, Ida'an (Idahan), Begahak, Kagayan,

⁴ See Appendix V for map of Sabah.

⁵ Department of Statistics, Malaysia. "Total population by ethnic group, administrative district and state, Malaysia, 2010". *Preliminary Count Report 2010* (2010), 369. Malaysia. Retrieved October 4, 2013 from

http://www.statistics.gov.my/portal/download_Population/files/population/05Jadual_Mukim_negeri/Mukim_Sabah.pdf.

⁶ A Bumiputra is a Malaysian term describing a person with one of the parents as a Muslim Malay or indigenous native of Sabah as stated in Article 160A (6)(a) Federal Constitution of Malaysia.

Talantang, Tinagas, Banjar, Gana, Kuijau, Tombonuo, Dumpas, Peluan, Baukan,
Sino, Jawa

- Chinese (mainly Hakka): 9.11% (284,049)
- Other non-Bumiputra: 1.5% (47,052)
- Non-Malaysian citizens (Filipino, Indonesian): 27.81% (867,190)

Unlike the volcanic islands that partly encircle it, it belongs geologically to the old non-volcanic Sunda Platform, and was once, it appears, part of the mainland of Asia, from which it is now separated by the shallow Java Sea and China Sea.

The island is almost entirely covered by dense forest. The two major mountain ranges stretch approximately from north-east to south-west, and from east to west across the island.

Many species of Asiatic mammals thrive in the forest. These include the rhinoceros, several species of monkey, and two of the anthropoid ape, the gibbon and the orang-utan; the pig, the deer, the scaly anteater, and the small black bear. There are also seventy varieties of snake, and some 450 varieties of birds.⁷

2.2 History

Before the sixteenth century, little is known of Borneo beyond the fact that there

⁷ K.G. Tregonning. *A History of Modern Sabah 1881-1963*. (Kuala Lumpur: University of Malaya Press, 1967), p. 1.

was considerable intercourse with the Chinese Empire. In the Chinese Annals of the seventh century, mention is made of the Kingdom of Polo as an island south-east of Cambodia; it is possible that this is a reference to Brunei, just as Borni, which in the records of the Song dynasty (960-1279) is said to have been a town of ten thousand inhabitants, may well be a different translation of the same word.

In the fourteenth century, the Sultan of Brunei was the vassal of Majapahit of Java, but in 1370, he transferred his allegiance to China; in 1408, Maharaja Karna of Borneo paid a visit to Beijing with his family and died whilst there; his son Hiawang succeeded him and it was agreed that tribute should be sent to China once every three years.

From 1415 to 1425, tribute was sent from Brunei to the Court of the Son of Heaven (China) four times. These payments showed a falling off in later years, but trade with China increase as time went on. The treasures of Borneo were too tempting to remain neglected; every year the great Chinese junks came down with the north-east monsoon and returned in the south-west laden with precious cargoes of spices, edible birds'-nests, sharks' fins, camphor, rattans and pearls. These enterprises were not unattended with risks as, even before the period when piracy became rife, trading with Borneo was none too safe; many an adventurous Celestial was forced to make his home there as a slave, to the gain, both direct and indirect, of the Bruneis,

who by this means learnt the art of working silver and brass, in both of which crafts they excel to this day. Besides those who were forcibly detained, it was inevitable that many members of the trading expeditions should elect to settle in the country of their own free will, and there are records, both in Sulu and Brunei history, of a Chinese colony on the Kinabatangan River in the fifteenth century. A sister of Ong Sum Ping, the Chinese Governor of the settlement, married Sultan Mohammed, who first introduced the religion of Islam into Brunei, and from this pair sprang the present royal family of the native State.⁸

2.2.1 Borneo and the West

It was not until the sixteenth century that Borneo had any dealings with the white man, but a certain amount of doubt exists as to which European nation or to whom belongs the honour of having discovered the island. According to some accounts, the Portuguese Lorenzo de Gomez first set foot upon its shores in 1518, but it is to Pigafetta, the historian of the redoubtable Magellan, that we owe the first detailed description of Borneo.⁹ During his brief visit, Pigafetta learnt that the productions of Borneo were rice, sugar canes, camphor, ginger, gums and wax; fruit and vegetables

⁸ Owen Rutter. *British North Borneo: An Account of its History, Resources and Native Tribes*. (Kota Kinabalu: Opus Publications, 2008), pp. 84-86.

⁹ *Ibid.*, p. 86.

in great variety; and among animals were horses, buffaloes, and goats.¹⁰

After the departure of the Spaniards, no expedition touched at Brunei until the visit of Jorge de Menezes, the Portuguese, in 1526. Malacca, that golden apple for which every adventurer of old turned aside, had been captured by the famous Alfonso d'Albuquerque in 1511, and after the coming of de Menezes, by which time the Portuguese had got a firm footing in the Malay Archipelago, a regular intercourse was maintained between Malacca and Brunei, chiefly for the pepper trade, until the Portuguese were expelled from Malacca by the Dutch in 1641.¹¹

The Dutch had the strongest influence and so caused the greatest harm. They insisted that all produce intended for the Chinese market must be sent to one of their own depots and thence transhipped to China, thus putting a stop to direct trade by means of Chinese junks.¹²

The rapacious methods of the Dutch had other effects also upon North Borneo, indirect but equally far-reaching. The coast tribes, their means of earning an honest living being gone, turned to piracy, which being a fierce and warlike people, they doubtless found no less lucrative than trade and much more amusing. This state of affairs went from bad to worse until about 1650 it culminated in a rising of the aborigines, who were joined by such Chinese settlers as were still left in the country.

¹⁰ *Ibid.*, p. 89.

¹¹ *Ibid.*, p. 90.

¹² *Ibid.*, p. 92.

Matters became so critical that the forces of the Sultan of Brunei could not cope with the rebels and he was forced to call in his neighbour, the Sultan of Sulu to his aid. When the country again became settled, Brunei ceded that territory from the Kimanis River as far as Tapean-durian to Sulu in consideration of its help.

This transaction led to the first cession of Borneo territory to the British, for a century later when Sir William Draper captured Manila in 1762, he released Sultan Amir, who had been taken prisoner by the Spaniards; the Sultan was reinstated on the throne of Sulu and as a *quid pro quo*, he ceded the territory obtained from Brunei, together with the southern end of Palawan and the intermediate islands, to the East India Company, the Company agreeing to protect him from any attack by Spain.¹³ The flag was raised over Balambangan Island in 1763, but it was not until 1773 that a settlement was made there. It did not prosper and in 1775 it was destroyed by pirates. No attempt was made to re-establish the settlement until 1803; in 1804 it was finally closed.¹⁴

2.2.2 The Origins of the Chartered Company

The American Consul, Claude Lee Moses, ushers in a preposterous incident out

¹³ *Ibid.*, p.93.

¹⁴ M.H. Baker. *Sabah: The First Ten Years as a Colony 1946-1956*. (Singapore: Malaysia Printers Limited, 1965), p. 20.

of which was to emerge the British North Borneo Company. Within a few days of his arrival at Brunei he secured, on the promise of certain payments to the Sultan and the Pengeran Tumonggong, the heir to the throne, the cession for ten years of a large tract of Brunei territory to the north. Armed with the cession papers he left immediately for Hong Kong.

Swift to secure the concessions, Moses swiftly sold his holdings to two American merchants of Hong Kong, Joseph W. Torrey and Thomas B. Harris, and a Chinese partner, Wo Hang, who soon withdrew and was replaced by Lee Assing and Pong Ampong. The four agreed in October 1865 to take over the cessions, to form a company which they styled "The American Trading Company of Borneo", and, with \$7,000 as capital, to invest it in this newly acquired territory.

By December, 1865, a settlement named "Ellena" was established at the mouth of Kimanis River, some sixty miles away from Brunei. As president of the Company, Torrey was appointed Supreme Ruler and Governor, and given the titles of Rajah of Ambong and Marudu, and Sir Maharajah of North Borneo by the Brunei Sultan, who vested him with the power of life and death over the inhabitants, the right to coin money and make laws, and all other powers and rights exercised by a sovereign ruler.¹⁵

¹⁵ Tregonning, *Under Chartered Company Rule*, pp. 5-6.

In 1875 when his cessions were due to expire, Torrey met the Baron von Overbeck, the Austrian Consul General at Hongkong. Overbeck was forty-four years of age, a large man of both courage and ability. Having assisted the Austrian government in some matters, he had been awarded a barony and a consulate in return.¹⁶

Overbeck's interest in the cessions dated as early as 1870. In Hong Kong in January 1875, Overbeck purchased for \$15,000 all the rights possessed by Torrey in the American Trading Company of Borneo on the condition that within nine months a renewal of the lease could be obtained. Overbeck visualized a highly profitable re-sale to his government, as yet colony-less in a colony-grabbing era.¹⁷

Overbeck and Torrey journeyed to Brunei where they unsuccessfully tried to get the aged and stubborn Sultan of Brunei to renew the leases. They were more successful with the Sultan's heir, the penniless and avaricious Pengeran Tumonggong, but as the Sultan refused to affix his seal to the document, it was all but worthless.

At this time the Spaniards in the Philippines were engaged on one of their campaigns to conquer the Sulu Archipelago. One enterprising young man named William Clark Cowie, made money out of this campaign by running the Spanish blockade of Jolo, Sulu's principal island, and selling arms and other contraband to the

¹⁶ *Ibid.*, p. 9.

¹⁷ *Ibid.*, pp. 9-10.

Sulus.

When Cowie arrived at Hong Kong in 1876 with a cargo from Sandakan, he was charged a percentage of the profits, in lieu of export and import taxes, by Torrey. Cowie convinced Torrey that the cession as regards Sandakan were worthless, because they had already expired and also because the territory really belonged to the Sultan of Sulu.¹⁸

Overbeck by this time had spent nearly all his capital and had returned to London in an effort to secure additional funds from his backers. Near desperation, he turned to Alfred Dent, head of a business organization which formerly employed him at Hongkong. Dent agreed to put up ten thousand pounds on the condition that he would be given sole control of any North Borneo concession.¹⁹

Overbeck returned to the Far East and with the money secured from Dent he was able to secure grants of territory from the Sultan of Brunei.

The Sultan, in three grants of territory from Gaya Bay on the west coast to the Sibuco River on the east, and from the Pengeran Tumonggong, in a grant of his west coast possession, the rivers Kimanis and Benomi, ceded to Overbeck and Dent, with all the powers of sovereignty, some 28,000 square miles of territory, embracing 900 miles of North Bornean coastline for a total yearly payment of \$15,000. This meager

¹⁸ *Ibid.*, pp. 10-11.

¹⁹ *Ibid.*, p. 12.

rental reflects the state of affairs. The territory had long ceased to be under Brunei control and failed to bring in any revenue. The Sultan received \$15,000 for nothing, and he was well pleased.²⁰

Having learned that a large portion of the ceded territory was in the hands of the Sultan of Sulu, Overbeck journeyed to Jolo where on January 22, 1878, he concluded an agreement with the Sultan of Sulu. The Sultan of Sulu granted Overbeck concessions in North Borneo in consideration of an annual rental of \$5,000.²¹

Dent, in London, soon found that he could not dispose of the concessions to a foreign power because of a provision in the agreement prohibiting any transfer of the territory without the consent of the British government. He, therefore, decided that the land should be developed by a British company. With the assistance Lord Salisbury, Foreign Secretary in the Conservative Government of Lord Beaconsfield, Dent applied for a Royal Charter. In his application Dent said that his proposed company would not seek to impose any monopoly of trade; nor would it permit any foreigner, whether European, Chinese or other, to own slaves; and it would abolish the system of slavery prevailing in the ceded territory. It would respect native rights and institutions, give equal treatment to all in the courts of justice and it would adopt the system of raising revenue by means of strictly controlled farms which was in force in the

²⁰ *Ibid.*, p. 14.

²¹ See Appendix IV for English translation of the Deed of 1878.

colonies of Labuan, Hong Kong, and the Straits Settlements.²²

In November, 1881 a Charter was granted to the British North Borneo Company by an Order in Council.

The Charter empowered the Company to acquire all the powers of the Provisional Association, and went on to stipulate that the Company must remain British in character; must not transfer any of its grants without the permission of the British government; must suppress slavery; must not interfere with the religious or other customs of the natives; and must take the advice of the British government if it disagreed with either the Company's treatment of the natives or its dealings with foreign powers. The appointment of its chief representative in Borneo was to be subject always to the approval of the British government, while the provision of facilities for the Royal Navy and a prohibition of a monopoly of trade were further stipulations.²³

The grant of the Charter did not go unheeded by other powers, particularly Spain and the Netherlands. Not long after he had ceded his Borneo territories to Overbeck, the Sultan of Sulu yielded to Spain, surrendering at the same time all his dominions to Spanish suzerainty. The Spanish interpreted this to include North Borneo; a Spanish gunboat actually entered Sandakan harbor, but retired to seek aid and did not return.

²² *Ibid.*, p. 21.

²³ *Ibid.*, p. 24.

The point was settled by a protocol of 1885 in which Spain renounced all claims of sovereignty over the territories of “the continent of Borneo” which had belonged, or did belong, to the Sultan of Sulu.

In return, the British government recognized the sovereignty of Spain over the archipelago of Sulu. There was to be freedom of navigation both in the archipelago and in North Borneo waters. The Dutch, who were established in Southern Borneo, were also concerned; a boundary was defined by a convention between Great Britain and the Netherlands in 1891.

The United States Government, also, conceived a mild dislike for the new arrangements in Borneo and in February 1880, protested to the Sultan of Brunei that it did not acknowledge his competency to cede or lease any of his dominions.

On May 12, 1888, the formal Protectorate Agreement was made between the State of North Borneo and Great Britain. Under its terms the State was to continue to be governed by the Company as an independent state, but under the protection of Great Britain. This protection was not to confer any right on the British Government to interfere with the internal administration of the State further than provided in the Protectorate Agreement and the Charter. The relations between the State and all foreign states, including Brunei and Sarawak, were to be conducted by the British Government. No cession of territory of the State was to be made to any foreign state

or individual without the British Government's consent.²⁴

2.2.3 World War II and the Twilight of the Chartered Company

Legally, the administration of the Chartered Company ended in 1946, but in fact it ceased to govern the territory after the Japanese invasion in January 1942.²⁵

When the war ended, North Borneo was in a terrible condition. Everything in material was lacking or in short supply. Sabah had slipped back to a bare starvation and subsistence economy.²⁶

Sir Neill Malcolm, the President, and the Court of Directors of the Chartered Company realised by the end of the war that their resources would be inadequate for the immense task of reconstruction to be faced in North Borneo.

Finally, in June, 1946, the Secretary of State for the Colonies announced in the House of Commons that an agreement had been reached between the Government and the Chartered Company for the transfer of the latter's territory to the Crown.²⁷

On 16 September 1963, as agreed to by the British, Sabah secured its independence and with Datu Mustapha as Head of State and Donald Stephens as Chief Minister became part of the new Federation of Malaysia.²⁸

²⁴ M.H. Baker. *Sabah: The First Ten Years as a Colony 1946-1956*. (Singapore: Malaysia Printers Limited, 1965), pp. 24-25.

²⁵ Tregonning, *A History of Modern Sabah 1881-1963*, p. 213.

²⁶ *Ibid.*, p. 223.

²⁷ Baker, *Sabah: The First Ten Years*, p. 33.

²⁸ Tregonning, *A History of Modern Sabah*, p. 247.

2.3 Economy

In terms of employment, Sabah's economic activities were predominantly in the primary sector, namely the timber industry. Although the role of the agriculture sector has declined in recent years, it continued to command an approximately 23% of total gross domestic product (GDP) in 2010. Palm oil, rubber and cocoa were the key crops grown on Sabah soil. The services sector, on the other hand, continues to gain importance with its share of GDP rising to 50.4% in 2010 from 47.9% in 2005. The tourism subsector is an important growth driver, given the many tourist attractions in Sabah.

The rising importance of the oil and gas sector is very much related to the commencement of oil production in the Kikeh oil field in 2007, leading to a spectacular growth of 85.4% in 2008 (2007: 18.3%). The outlook for this sector is promising, especially when a number of new oilfields were discovered, opening the doors for further commercialisation of the oilfields in the near term.²⁹

According to Wood Mackenzie, about 78% of Malaysia's initial 2P³⁰ commercial liquid (oil and condensates) reserves had been extracted and the bulk of the remaining liquids is contained in fields of under 100 million barrels field size with

²⁹ Mohd Afzanizam Abd Rashid, Nor Zahidi Alias, James Foo Kok Chye, "The State of Sabah," *Economic Research* (November 2012): 2. Retrieved December 12, 2013 from http://www.marc.com.my/home/userfiles/file/081211_The%20State%20of%20Sabah_Edited.pdf.

³⁰ 2P combines probable and proven reserves of oil and is a way to assess the amount of oil a field is likely to produce. Probable reserves have a 50% certainty of being produced under current market conditions while proven reserves are classified as having a 90% certainty of being produced at current prices, with current commercial terms and government consent.

around 20% of liquid reserves estimated to be in the form of condensates. Sabah has approximately half of the liquid reserves in the country.³¹

The state's finances have generally been favourable with a RM730.3 million surplus registered in 2010, higher than the RM186.6 million surplus recorded in the preceding year. Commodities such as crude palm oil (CPO) and crude petroleum were the main contributors to state government revenue in the form of sales tax and royalties.³²

2.4 Related Literature Review

The dispute between Malaysia and the Philippines over Sabah continue to be a contentious diplomatic concern. A limited quantity of literature tackling this complicated dispute exists. Nevertheless, the following resources written by Filipino, Malaysian and British authors and researchers help to shed light on this issue.

K. G. Tregonning, former Raffles Professor of History in the University of Singapore, wrote *A History of modern Sabah: 1881-1963* (1960). The author analyzed that the agreement in 1878 between the Sulu Sultans and Baron Van Overbeck was one of a cession not a lease; furthermore, several treaties and international

³¹ Eugene Thean Hock Lee, "Scope for improvement: Malaysia's oil and gas sector," *Scoping Report Malaysia* (July 2013): 9. Retrieved December 12, 2013 from <http://refsa.org/wp/wp-content/uploads/2013/07/OG-Scoping-Report-Malaysia-final-20130701.pdf>.

³² Mohd Afzanizam Abd Rashid, Nor Zahidi Alias, James Foo Kok Chye, *Economic Research*, p. 2.

conventions have excluded North Borneo from the territory of the Philippines.³³

Originally Michael H. Baker's MA thesis submitted to Stanford University *Sabah: the First Ten Years as a Colony, 1946-1956* (1965) should be read side by side with Tregonning's. Baker studied and assessed the ten-year postwar development in Sabah in terms of political governance, trade and industry, social services, agriculture and communications after devoting a chapter on Sabah's history from its earliest history to the advent of World War II.

At the goodwill shown by the United Kingdom in holding diplomatic communication in London in pursuance of the Philippine claim of sovereignty, jurisdiction and proprietary ownership over Sabah, the Philippine government published the proceedings of this meeting under the title *Philippine Claim to North Borneo Volume I* (1964). This book has four parts. The first part starts with excerpts from the president's State of the Nation Address with reference to the claim to North Borneo; followed by the second part, the Opening Statement of Vice President Pelaez in the British-Philippine Talks held in London. The third part "The Historical and Legal Bases of the Philippine Claim to North Borneo" lays the legal and historical arguments of the Philippine claim, which includes the statements made by Congressman Salonga before the London Ministerial Meeting and by Mr. Eduardo

³³ Tregonning, *A History of Modern Sabah.*, p. 68.

Quintero before the Legal Committee. The appendices, which constitute the last part of the book, contain 33 copies of the original documents. These form the basis of the Philippine claim over Sabah and the preceding diplomatic engagements between the Philippines and the United Kingdom.

After only three years, that the second volume of the *Philippine Claim to North Borneo Volume II* (1967) was published during the Marcos administration. This volume is divided into two parts excluding the appendices. Part one includes six sections namely: The Disputed Territory; The Sulu Sultanate Institution; Relations of the Sultan of Sulu with Foreign Powers; the British North Borneo Company; The Transfer of the North Borneo Territory from the Company to the British Crown; and The Transfer of the North Borneo Territory from the British Crown to Malaysia. Part two consists of the “Report on the Anglo-Philippine Talks held in London from January 28 to February 1, 1963 (Extract).”

There were a number of Filipino-or foreign-authored articles or pamphlets published on the claim. These included the articles of Lorenzo Sumulong, “*A Report on Malaysia and on the Greater Malayan Confederation in connection with the Philippine claim to Sovereignty to a portion of North Borneo*” (1962); Bernabe Africa, “*The Legal Status of the British Occupation of North Borneo*” (1963); Martin Meadows, “*The Philippine Claim to North Borneo*” (1962); Pacifico Ortiz, “*Legal*

Aspects of the North Borneo Question” (1963); and Leigh R. Wright, “*Historical Notes on the North Borneo Dispute*” (1966).

The period from 1968 to 1976 saw an upsurge on the number of publications on the Philippine claim to Sabah. One of the first foreign scholars to have extensively analyzed the Philippine claim to Sabah was Michael Leifer, author of the monograph *The Philippine claim to Sabah* (1968). It was a major departure from the documents published by the Philippines government because it was the first to put the Sabah issue in its proper historical context. The paper provides a good background of the Philippine claim to Sabah, although it relies heavily on a two-volume set of documents published by the Philippine government. Leifer also utilizes newspaper articles and books to place the Sabah issue in the context of Macapagal’s presidency. Meanwhile, the Philippine government also published a booklet *The Facts about Sabah* (1968) containing a question-and-answer narrative on the Philippine claim written for the enlightenment of the general public. On this same year, the government also published the *Memorandum on the Philippine claim to North Borneo* containing 61 points of clarification regarding issues surrounding the Sabah question with the last point arguing for “the return of North Borneo to the rightful sovereign and owner, the Republic of the Philippines as the best solution of this dispute.”³⁴ Narciso Ramos, the

³⁴ Republic of the Philippines. *Memorandum on the Philippine Claim to North Borneo*. (Manila: The Department, 1968), p. 63

Secretary of Foreign Affairs, in his *Philippines brings the Sabah dispute to the United Nations* (1968), the text of the statement he delivered before the UN General Assembly on October 15, 1968, specifically called for the Malaysia case to be submitted to the World Court in concurrence with the clamor of Arturo Tolentino, member of the Philippine delegation to the United Nations in his *The Philippines challenges Malaysia to bring the Sabah issue to the world court* (1969), a text of his reply to the Malaysian statements of October 15 & 16, 1968 delivered before the UN General Assembly on October 25, 1968. Tolentino first issued a succinct rebuttal to the points made by Mr. Radakrishna Ramani of Malaysia, and then, dared Malaysia to bring the dispute to the International Court of Justice. Constancio B. Maglana, a member of the House of Representatives published *Sabah is Philippines* (1969), a privilege speech delivered on March 27, 1968, which, besides laying the basis for the Philippine claim to Sabah, also advocated the prosecution of the claim.

In 1969, under the auspices of the National Historical Commission, a conference on Sabah was held and the proceedings were published in a book entitled *Symposium on Sabah*. One of the important chapters within the book is that of Prof. Rolando N. Quintos, who suggested alternatives for the solution of the Sabah dispute in his chapter, "*The Sabah Question: Prospects and Alternatives*." Quintos offers some provocative ideas and argues that the issue of Sabah should be seen in its two aspects:

first, the legal issue in regard to the proprietary rights of the heirs of the Sultanate; and second, the question of political jurisdiction over Sabah. Quintos proposed a compromise deal, arguing further that "the Philippines [shall] accept the justice of the Malaysian appeal to self-determination and accept as final the conclusion of the U.N. Secretary General the United Nation of September 1963, provided that the Malaysians are willing to submit the issue to the World Court or to a mutually acceptable mediating body."³⁵

The work of a Malaysian named Mohammed bin Dato Othman Ariff, *The Philippine Claim to Sabah: Its Historical, Legal and Political Implications (1970)*, extensively discusses the legal issues surrounding the claim. The main thesis of this book is to discredit the legal basis of the Philippine claim to Sabah. The author emphasizes the legal foundation of the British claim to Sabah based on possession and consolidation through peaceful and continuous display of State activities. Moreover, Ariff illuminates the basis for the integration of Sabah to Malaysia through the principle of self-determination, the Sabahans having already expressed their desire to remain in the Federation. Finally, Ariff argues that the peaceful settlement of the dispute would require the Philippines to drop the claim and concentrate all of its efforts in working closely and cooperating with Malaysia in the context of Association

³⁵ National Historical Commission. *Symposium on Sabah*. (Manila: National Historical Commission, 1969), pp. 82-86

of Southeast Asian Nation (ASEAN).³⁶ For the heirs of the Sultan of Sulu, given their established proprietary rights in 1931 through the North Borneo Court, this kind of suggestion is unacceptable.

Another non-Filipino scholar, S. Jayakumar, vice-dean of the Faculty of Law of the University of Singapore, in his article on *The Philippine claim to Sabah* (1969) also argues that the Philippine case is weak and tenuous. Like Ariff, Jayakumar also invokes the idea of effective occupation on the part of the United Kingdom in Sabah since 1878, which granted the British North Borneo Company a charter of corporate character. The author contends that the Philippine claim is abstract and vague, based only on historically derived rights of the heirs of the Sultan of Sulu. Jayakumar further argues that neither the Philippines nor the heirs of the Sultan have exercised sovereignty or been in effective occupation of Sabah since 1878. Also like Ariff, the author emphasizes the effective occupation of Sabah by the United Kingdom. Therefore, Malaysia, as the successor state, is now the legitimate sovereign of Sabah. Like Ariff, Jayakumar emphasizes the principle of self-determination.

Leigh R. Wright in her book entitled *The origins of British Borneo* (1970), explored British policy changes from 1860 to 1888 from having commercial interests on the island to eventually lording over it under a chartered company. Wright's study

³⁶ Mohammed Bin Dato Othman Ariff. *The Philippine Claim to Sabah: Its historical, Legal and Political Implications*. (Kuala Lumpur: Oxford University Press, 1970), p. 64.

reveals that the shift was mainly a reaction to the French presence in Indochina, also fueled by German interests on the area, which led Great Britain to sign an agreement with Germany and Spain to delineate and secure her colonial sphere in Borneo.

One of the scholars in the field political science who has done considerable work on the Sabah issue was Lela Garner Noble, author of the book *Philippine Policy Towards Sabah: Claim to Independence (1977)*. The author argues that the Philippine foreign policy on the Sabah issue during the time period from Macapagal through Marcos was evidence of Philippine's desire to be seen as independent from outside forces, most notably the United States.

In *Sulu and Sabah: A study of British policy toward the Philippines and North Borneo (1978)*, Nicholas Tarling, an 18th century historian and author of various books on Southeast Asia, postulates British policy going back as far as the 18th century and continuing until 1903 was the context for Sulu and Sabah. He acknowledges that the 1878 agreement between the Sultan of Sulu and Baron Van Overbeck was a lease rather than a cession. He does however agree with Quintos that a continuation of the lease in perpetuity could very well be the solution to the ongoing dispute.³⁷

Paridah Abd. Samad and Darussalam Abu Bakar in "*Malaysia-Philippine*

³⁷ Nicholas Tarling. *Sulu and Sabah: A Study of British Policy toward the Philippines and North Borneo from the Late Eighteenth Century*. (Kuala Lumpur: Oxford University Press, 1978), p. 349.

Relations: The Issue of Sabah,” published in 1992, emphasized the bilateral relations between the two countries. The paper presented sub-themes such as the political and security repercussions of the Sabah dispute with regard to the Moro secessionism in the south, the overlapping of territorial boundaries, Malaysian incursion into Philippine waters, and the issue of Filipino refugees and illegal immigrants in Sabah from the Macapagal to the Aquino administrations.

Arnold M. Azurin’s *Beyond the Cult of Dissidence in Southern Philippines and Wartorn Zones in the Global Village* (1996) devoted Part Two of the work to the Sabah issue. Azurin argues in favor of dropping the Philippine claim, except the proprietary rights of the heirs, in order to face realities and promote better ASEAN relations. The various treaties signed by the Sulu Sultan since the 18th century followed a historical pattern of ceding and leasing certain portions of the sultanate’s dominion to outside powers, depending on the rise and ebb of its own fortunes and powers relative to that of the contracting parties.

Another work that has a fresh interpretation of the issue is Asiri Abubakar’s “Bangsa Sug, Sabah and Sulus' quest for Peace and Autonomy in Southern Philippines” (2000). The author asserts that there exists a continuing sense of identification and affiliation among the Sulu people with Sabah. Because of the strong sense of connection and affiliation to Sabah among the people in Sulu, Abubakar

argues that settling the Sabah issue is vital to peace process in the southern Philippines, particularly in the quest for autonomy by the Sulu people. The identification, connection, and affiliation of the Sulu people with Sabah is through the defunct Sulu Sultanate; the influx of Filipino immigrants to Sabah further reinforces the connection.³⁸

Another factor that Abubakar pointed out is that the strategic location for trade of the Sulu-Sabah area since the height of the Sulu Sultanate will continue to be significant as part of the Brunei, Indonesia, Malaysia, Philippines-East Asian Growth Area (BIMP-EAGA). The author believes the Sabah issue is intertwined with the Moro problem in Mindanao.³⁹ He postulates that resolving the Sabah issue would indeed move Southern Philippines closer to a lasting peace.

Finally, one should also not exclude the hefty *The Philippine claim to a portion of North Borneo: materials and documents* (2003), an indispensable volume intended for the use of government officials, legislators, lawyers and researchers. It contains pertinent documents that in one way or another are related to the Philippine claim to Sabah. This volume, an updated and expanded edition of *Readings on the Sabah question* (1987) was necessary in the light of recent developments concerning the Philippine claim.

³⁸ Asiri Abubakar. *Bangsa Sug, Sabah and Sulus' Quest for Peace and Autonomy in Southern Philippines*. (Ph.D. Dissertation in Philippine Studies, University of the Philippines, 2000), p. 248.

³⁹ *Ibid.*, p. 265.

Chapter 3 - Historical and Legal Basis of the Philippine Claim to Sabah

3.1 Historical Basis

The Philippines and Sabah have had close historic links, dating as far back as the beginning of history. Authoritative Western Scientists have traced the land bridges which, during several geologic periods, connected Borneo with the Philippines. From time immemorial, the Sulu Archipelago in the Philippines and Sabah had constituted a single economic and cultural unit. Years of colonial rule and political isolation, however, have created a gap between the two peoples.

According to Professor Tregonning, a historian of the faculty of the University of Singapore, Sabah was ceded to the Sultan of Sulu by the Sultan of Brunei in 1704, in return for help in suppressing a rebellion.⁴⁰

Aware of this, the Austrian Consul-General at Hongkong, Baron von Overbeck, entered into negotiations with the Sultan of Sulu for the lease of the territory of Sabah. Accompanied by William H. Treacher, Acting British Consul-General at Labuan Island in Borneo, Overbeck, in representation of an English merchant, Alfred Dent, who had advanced 10,000 pounds for the venture, went to Sulu in January, 1878 to negotiate the lease of the territory of North Borneo. Authentic documents in the archives of Madrid show that at the time, the Spanish expeditionary forces under

⁴⁰ Rutter, *British North Borneo.*, p. 93.

Captain-General Malcampo were closing in on the Sultan, and it was this circumstances which Overbeck utilized to make the Sultan of Sulu, Jamalul Alam, agree to the meager rental of 5,000 Malayan dollars a year (about 570 pounds or 1,600 US Dollars).

The contract dated January, 1878, and which was drafted by Overbeck as a result of his negotiations with the Sultan of Sulu, was written in the Malayan language and in Arabic script.⁴¹ Professor Harold Conklin of Yale University has translated this contract and his translation shows that what was entered into was a contract of lease, the word “padjak” used in the deed being the equivalent of the English word “lease.” At any rate, there is little dispute on this point since British and contemporaneous Spanish documents show that the deed of 1878 was nothing more than a lease. The Spanish documents expressly use the term *arrendamiento*, which means lease.

After the 1878 document, Alfred Dent organized the “British North Borneo Company,” and applied for a Royal Charter. The Statement and Application of Mr. Dent dated December 2, 1878 submitted to the Marquis of Salisbury, K.G., Secretary of State for Foreign Affairs, indicate the exact nature of the contract and the scope of the powers of the British North Borneo Company. The Company was awarded the charter. In answer to the Spanish and the Dutch protests to the awarding of the Royal

⁴¹ See Appendix IV for English translation of the contract.

Charter, Lord Earl Granville, the then British Foreign Minister, disclaimed any intention on the part of the British Crown to assume either dominion or sovereignty over North Borneo, and categorically state that “sovereignty remains vested in the Sultan.”⁴²

In 1888, the Company purportedly entered into an agreement with the British Government placing a so-called “State of North Borneo” under the protection of the Crown. In 1903, the British North Borneo Company entered into a confirmatory deed with the Sultan of Sulu, including new areas not covered under the original deed of 1878.

On March 22, 1915, the Sultan of Sulu signed the Carpenter Agreement whereby he recognized the sovereignty over the territory of Sabah.⁴³ This was pointed out by Governor Frank Carpenter in a communication to the Director of Non-Christian Tribes dated May 4, 1920:

The American Government recognized that “the Sultan of Sulu is the titular spiritual head of the Mohammedan Church in the Sulu Archipelago with all the Mohammedan rights and privileges which under government of the United States of America may be exercised by such an ecclesiastical authority.” But it was made “clearly of official record the fact that the termination of the temporal

⁴² M. F. Lindley. *The Acquisition and Government of Backward Territory in International Law*. (London: Longmans, Green and Co., Ltd., 1926), p. 106.

⁴³ *Ibid.*, pp. 127-128.

sovereignty of the Sultanate of Sulu within American territory is understood to be wholly without prejudice or effect as to the temporal sovereignty and ecclesiastical authority of the Sultanate beyond the territorial jurisdiction of the United State Government especially with reference to that portion of the Island of Borneo which as a dependency of the Sultanate of Sulu is understood to be held under lease by the chartered company which is known as the 'British North Borneo Government'."⁴⁴

The Macaskie Judgment which arose out of the interpleader suit filed by the Dayang Dayang Hadji Piandao and the other heirs before the High Court of North Borneo (Sabah) in order to determine who was entitled to receive the money coming from the British North Borneo Company was handed down in December 18, 1939. In his decision, Judge Macaskie adjudged the right of the heirs to receive the yearly "cession money." At the same time, however, Judge Macaskie went on to make a clear distinction between private heirs and successors in sovereignty. He said that in his view "the successors in sovereignty of the Sultan are the Government of the Philippines and the private heirs the plaintiffs" in the case before him.⁴⁵

On June 26, 1946, the British North Borneo Company entered into an agreement for the transfer of the Borneo Sovereign Rights and Assets from the company to the

⁴⁴ *Ibid.*, p. 126.

⁴⁵ Republic of the Philippines. *The Macaskie Judgment*. (Department of Foreign Affairs: Borneo Records, 1939), p. 11.

British Crown.⁴⁶ The latter transferred to the Crown all its rights “to the intent that the Crown shall, as from the day of transfer, have full sovereign rights over, and title, to the territory of the State of North Borneo and that the said territory shall thereupon become part of His Majesty’s dominions.”⁴⁷

Accordingly, on July 10, 1946, North Borneo was formally annexed as a colony by the British Crown effective July 15, 1946, by virtue of the North Borneo Cession Order in Council dated July 10, 1946.⁴⁸

In a letter dated February 27, 1947, former American Governor General Francis B. Harrison, then Special Adviser to the Philippine Government on Foreign Affairs, underscored in strong language the effect of the Cession Order upon the vital interests of the Philippines and described it as a unilateral act in violation of legal rights.⁴⁹

In 1950, after a careful study of the Philippine claim, Macapagal, then a congressman together with other colleagues filed a resolution for the pursuance of the claim to Sabah. A year later, the Philippine Congress enacted a statute, *ex abundante cautela*,⁵⁰ that the establishment of a consulate in Singapore should not be viewed as a waiver to the Philippine claim.⁵¹

⁴⁶ Republic of the Philippines. *Philippine Claim to North Borneo (Vol. 1)*, p. 129.

⁴⁷ Republic of the Philippines. *Philippine Claim to North Borneo (Vol. 1)*. (Manila: Bureau of Printing, 1964), pp. 22-24.

⁴⁸ *Ibid.*, pp. 141-143.

⁴⁹ Republic of the Philippines. *Letter of Governor Harrison to Vice President Quirino dated February 27, 1947*. (Department of Foreign Affairs: Borneo Records, 1947), p. 6.

⁵⁰ Latin phrase used in legal texts, which means out of excessive caution.

⁵¹ Republic of the Philippines. *Philippine Claim to North Borneo (Vol. 1)*, p. 14.

On January 22, 1958, Muhammad Esmail Kiram, the Sultan of Sulu, in behalf of the heirs of Sultan Mohammad Jamalul Alam and with the consent of the Ruma Bechara, the Sulu ruling oligarchy, issued a proclamation terminating the agreement of permanent lease in favor of Gustavus Baron de Overbeck and Alfred Dent. Copies of the document were sent the British North Borneo Company, the British Embassy in the Manila, the Ministry of Foreign Affairs in London, and the United Nations Assembly in New York.⁵²

On April 24, 1962, by virtue of the Ramos Resolution, the Congress of the Philippines unanimously pronounced the Philippine claim to North Borneo as being valid, and urged the President of the Philippines "to take the necessary steps consistent with international law and procedure for its recovery."⁵³

On May 25, 1962, the British Foreign Office transmitted an aide-memoire to the Secretary of Foreign Affairs of the Philippines which says in part:

Her Majesty's Government have noted with appreciation that the Government of the Philippine have not associated themselves publicly with the efforts being made on behalf of certain of the heirs of the Sultan of Sulu to dispute British sovereignty over North Borneo. Her Majesty's Government are convinced that the British Crown is entitled to and enjoys sovereignty over North

⁵² *Ibid.*, pp. 147-148.

⁵³ *Ibid.*, p. 149.

Borneo and that no valid claim to such sovereignty could lie from any other quarter, whether by inheritance of the rights of the Sultan of Sulu (the only right being to continue to receive their shares of the cession money) or by virtue of former Spanish and American sovereignty over the Sulu Archipelago in the Philippine Islands. In the interests of the people of British North Borneo, no less than because of their undoubted legal rights, Her Majesty's Government would be bound to resist any claim to part of North Borneo, whether advanced by the Philippine Government or by private persons in the Philippines.⁵⁴

On June 22, 1962, the Philippine Department of Foreign Affairs transmitted a note to the British Ambassador in Manila which formally requested the holding of meetings to clarify the matter of sovereignty, jurisdiction and proprietary ownership over Sabah.⁵⁵

A Philippine Delegation under the leadership of Mr. Emmanuel Pelaez, Vice President and Foreign Secretary, visited London from January 24, 1963 to February 1, 1963, for talks with British Delegation under the leadership of the Earl of Home, Foreign Secretary. Mr. Pelaez was accompanied by Mr. Macario Peralta, Jr., Secretary of National Defense, Mr. Salvador P. Lopez, Undersecretary of Foreign Affairs, Congressman Jovito R. Salonga, and Ambassador Eduardo Quintero. The

⁵⁴ *Ibid.*, pp. 150-151.

⁵⁵ *Ibid.*, pp. 151-153.

British Delegation included Mr. Peter Thoneycroft, Minister of Defense, Mr. Peter Thomas, Parliamentary Undersecretary of State for Foreign Affairs, Sir Robert Scott, Permanent Secretary of the Ministry of Defense, Lt. Gen. D.S.S. O'Connor, Deputy Chief of the Defense Staff. The Marquess of Landsdowne, Minister of State for Colonial Affairs, also took part in the meetings.⁵⁶ In this meeting, the Philippine panel outlined the historical and legal foundation of the Philippine claim vis-à-vis the arguments presented by the British delegation. While both sides presented their arguments on the dispute, the claim was not resolved.

On January 28, 1963, Philippine President Diosdado Macapagal stated in his State of the Union Address to the Congress of the Philippines that the filing of the Philippine claim to Sabah "was not a precipitate action," but the result of prolonged study over a period of years. He further stated that the situation is that the Philippines not only has a valid and historic claim to North Borneo but that its presentation was demanded by national interest.⁵⁷

President Macapagal was urged to pursue the claim because Sabah was being placed under the planned concept of Federation of Malaysia proposed by Prime Minister Tunku Abdul Rahman on May 27, 1961 in Singapore.

⁵⁶ *Ibid.*, pp. 3-10.

⁵⁷ *Ibid.*, pp. 5-7.

On July 31, 1963, the Conference of Ministers of Malaya, Indonesia, and the Philippines which was held in Manila adopted the Manila Accord which, among other things, states:

The Philippines made it clear that its position on the inclusion of North Borneo in the Federation of Malaysia is subject to the final outcome of the Philippine claim to North Borneo. The Ministers took note of the Philippine claim and the right of the Philippines to continue to pursue it in accordance with international law and the principle of 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.⁵⁸

On August 5, 1963, to carry out the report and recommendations mentioned in the Manila Accord, the three countries adopted a Joint Statement, where they agreed, among other things, on the following:

In accordance with paragraph 12 of the Manila Accord the three Heads of Government decided to seek a just and expeditious solution to the dispute between the British Government and the Philippine Government concerning Sabah (North Borneo) by means of negotiation, conciliation and arbitration, judicial settlement, or other peaceful means of the parties' own choice in

⁵⁸ Republic of the Philippines. *Philippine Claim to North Borneo (Vol. 2)*. (Manila: Bureau of Printing, 1967), pp. 97-100.

conformity with the Charter of the United Nations. The three Heads of Government take cognizance of the position regarding the Philippine claim to Sabah (North Borneo) after the establishment of the Federation of Malaysia as provided under paragraph 12 of the Manila Accord, that is, that the inclusion of Sabah (North Borneo) in the Federation of Malaysia does not prejudice either the claim or any right thereunder.⁵⁹

After the London talks, the United Kingdom agreed to surrender its sovereignty and jurisdiction over Singapore, Sarawak and North Borneo in favor of the creation of the Federation of Malaysia. North Borneo changed its name to Sabah. On September 16, 1963, instead of the scheduled August 31, 1963, after the conduct and results of the United Nations Malaysia Mission⁶⁰ were known, the Federation of Malaysia was established. Macapagal, with expressed reservation on the result of the UN Mission, refused to recognize the government of Malaysia in the belief that it would prejudice the Philippine claim to Sabah and recalled the Philippine Ambassador in Kuala Lumpur. The Philippines asked Malaysia to agree to judicial settlement of her claim to North Borneo. The Philippines said that Malaysian failure to reply to this proposal earlier was the reason why Philippine recognition of Malaysia was withheld.⁶¹ Only

⁵⁹ *Ibid.*, pp. 101-103.

⁶⁰ See Appendix III.

⁶¹ *New York Times*, September 16, 1963, p. 1.

in August 1964 were the consular relations between the two countries reestablished after Macapagal met Prime Minister Tunku Abdul Rahman in Phnom Penh.

When Marcos assumed the presidency, relations with Malaysia were still unstable and hostile. It was only in June 1966 that both governments, with the plan of raising their own consulates to embassies, issued a communiqué. Only later would the Marcos administration face the critical point of the Philippine claim and the possible breakdown of Philippine-Malaysia relations when the Jabidah Massacre⁶² controversy in March 1968 was exposed. This led to the Bangkok Talks from June 17-July 15, 1968 between the representatives of the Philippines and Malaysia, in an effort to settle the dispute. However, the talks ended in failure and further worsened the diplomatic relations between the two countries. In September 1968, the Philippine Congress passed a law known as Republic Act No. 5446, which categorically stated that “this act is without prejudice to the delineation of the baselines of the territorial sea around the territory of Sabah, situated in North Borneo over which the Republic of the Philippines has acquired dominion and sovereignty”.⁶³ In November of the same year, diplomatic ties between the two countries were severed over the Sabah issue. In March 1968, the Jabidah Massacre exposed that a special force of Muslim

⁶² Jabidah Massacre of March 1968, Moros had been recruited for a plan to stage a rebellion and eventual occupation of Sabah under the codename Project *Merdeka*.

⁶³ Lela Garner Noble. *Philippine Policy toward Sabah: Claim to Independence*. (Tucson: University of Arizona Press, 1977), p. 181.

recruits of the Philippines were supposedly being trained to infiltrate Sabah. Only a year later in December did the Philippines and Malaysia resume diplomatic relations.⁶⁴

In a radio-television interview on July 21, 1968, a transcript of which was published as *Our stand on North Borneo issue*, Marcos, one day after the withdrawal of Philippine diplomatic corps in Kuala Lumpur, reiterated the Philippine government pacific policy in its efforts to pursue the claim and advocated the recourse to filing the case at the International Court of Justice (ICJ).⁶⁵ In another television interview on September 22, 1968, Marcos issued another policy statement published as *Pursue Sabah claim by peaceful means*, in which he maintained his stand on the legality of the Philippine claim and that his administration will pursue it peacefully.⁶⁶

3.2 Legal Basis

As of August 4, 2009, the Permanent Mission of the Republic of the Philippines to the United Nations, with reference to the Joint Submission by Malaysia and the Socialist Republic of Vietnam dated 06 May 2009 to the Commission on the Limits of the Continental Shelf, maintains its territorial claims in the area including North

⁶⁴ Jayaratnam Saravanamuttu. *Malaysia's Foreign Policy: the First Fifty Years*. (Singapore: Institute of Southeast Asian Studies, 2010), p. 337.

⁶⁵ Ferdinand E. Marcos. *Our Stand on North Borneo Issue*. (Manila: Office of the President, 1968), 52

⁶⁶ *Ibid.*, p. 78.

Borneo (Sabah).⁶⁷ The following are the Philippines' arguments to strengthen this claim:

3.2.1 Brunei's Cession of Sabah to Sulu

The sovereignty of the Sultan of Sulu over Sabah is based on the cession of the territory to him by the Sultan of Brunei in 1704 as a prize for military assistance. There is no document stating the grant of North Borneo from the Sultan of Brunei to the Sultan of Sulu, but it is accepted by all sides.⁶⁸ The Philippine government has not produced a document by which Brunei granted North Borneo to Sulu. It is only the weight of Sulu tradition which sustains the Sulu claim to ownership of the area. Historians dealing with Sulu, of which probably the most reliable is Najeeb Saleeby but including Jose Montero y Vidal and Juan de la Concepcion, and recent articles by Pacifico A. Ortiz, S.J., Horacio de la Costa, S.J. and Cesar Adib Majul assume that Brunei ceded North Borneo to Sulu. Majul puts the date of transfer as late in the seventeenth century, while Saleeby pinpoints it as 1704. Europeans visiting Sulu in the eighteenth and nineteenth centuries, such as Alexander Dalrymple in 1760s, Thomas Forrest in 1770s and Raja James Brooke in 1849, note that Sulu claimed sovereignty

⁶⁷ Permanent Mission of the Republic of the Philippines to the United Nations. *Note Verbale No. 000819 dated 4 August 2009*. 000819. (Philippine Mission to the United Nations, New York, 2009).

⁶⁸ Cesar Adib Majul. *Muslims in the Philippines*. (Quezon City, University of the Philippines Press, 1999), p. 29.

over North Borneo.⁶⁹

Sir Hugh Low, writing in the *Journal of the Straits Branch of the Royal Asiatic Society (JSBRAS)* published on 5 June 1880 entitled *Selesilah (Book of Descent) of the Rajas of Bruni*, wrote that "by the assistance of a force from the Sultan of Soolok, the forts on the island (Pulau Cermin) were captured".

Earlier Sir Hugh Low described the negotiation between Sulu and Brunei: "the Bataraa of Soolok went up to Bruni and met the Sultan Muaddin and having feasted and drank, the Sultan asked the Bataraa for his assistance to destroy the enemies at the island, promising that if the island should be conquered, the land from the North as far as westward as Kimani should belong to Soolook".⁷⁰

HR Hughes-Hallett writing in the *Journal of the Malayan Branch of the Royal Asiatic Society* published in August 1940 entitled *A Sketch of the History of Brunei* wrote: "by the beginning of the 18th century, the kingdom (Brunei) had been territorially diminished by the cession to the Sultan of Sulu in the north".⁷¹

CA Majul in his book *Muslims in the Philippines (1999)* referred to a letter from Sultan Jamalul Alam of Sulu to the Governor General of Spain on 17 September 1879 that the coast area from Kimanis to Balikpapan was to pay tribute to the Sultan which

⁶⁹ Leigh R. Wright. Historical notes on the Borneo dispute. *The Journal of Asian Studies*, 25(3), (May 1966), p. 479.

⁷⁰ Hugh Low. "Selesilah (Book of the Descent) of the Rajas of Bruni." *Journal of the Straits Branch of the Royal Asiatic Society* 5 (1880), pp. 3-10.

⁷¹ H.R. Hughes-Hallett. "A Sketch of the History of Brunei." *Journal of the Malayan Branch of the Royal Asiatic Society*, 18(2) (August 1940), p. 23.

he said proved that the Brunei territory facing Suluk was ceded to Suluk.⁷²

The title of the Sultanate of Sulu over Sabah had been recognized by Spain, Great Britain and other European powers through a series of treaties of peace, friendship and commerce.⁷³ The cession in this case is not only a historical fact but was made valid by its conformity to the rules of international law that cession can only be made by states.



The observation of the contemporary British officer will give us more insight of the territory ceded:

The first material alteration in the sovereignty of the territorial possession took place in the kingdom of Borneo Proper, when his Raja was obliged to call in the aid of the Sulus to defend him against an insurrection of the Maruts and Chinese. In consideration of this important aid, the Raja of Borneo Proper ceded to the Sultan of Sulu all that portion of Borneo then belonging to him, from Kimanis in latitude 5° 30' north to Tapean-durian, in the straits of Macassar, which include the whole north of Borneo.⁷⁴

3.2.2 Deed of Permanent Lease of 1878

The Philippines argues that the deed of 1878 executed by the Sultan of Sulu in

⁷² Cesar Adib Majul. *Muslims in the Philippines*, p. 29.

⁷³ Republic of the Philippines. *Philippine Claim to North Borneo (Vol. 1)*, p. 22.

⁷⁴ J. Hunt. "Sketch of Borneo, or Pulo Kalimantan." *The Expedition to Borneo of HMS Dido II*, p. 386.

favor of Baron von Overbeck and Alfred Dent was a contract of permanent lease and not of cession, neither transfer of ownership nor sovereignty. These are sought to be proven by the following points:

3.2.2.1 Annual rentals

Consul Treacher, who was present at the signing of the contract and as witness, characterized the contract as a lease and referred to the money payment as annual rentals.⁷⁵ The Macaskie Judgment recognizes the obligation of the British North Borneo Company to make annual payments to the heirs of the Sultan of Sulu. These facts should prove that the deed of 1878 was one of permanent lease and not of cession. A cession is described by George Schwarzenberger as "the most unequivocal way in which a state expressed its relinquishment of all territorial claims to a territory."⁷⁶ The conditional nature of the agreement is apparent from the continued payment of annual sums of money. Thus, the agreement could not be one of cession but of permanent lease.

⁷⁵ Republic of the Philippines. *Philippine Claim to North Borneo (Vol. 1)*, p. 33.

⁷⁶ George Schwarzenberger. *International Law as Applied by International Courts and Tribunals*. (London: Stevens and Sons, 1986), p. 213.

3.2.2.2 Translation of the Deed of 1878

The contract dated January 1878 was worded in the Malayan language and written in Arabic script. The photostatic copy of the document in the hands of the Philippine Government was found in the National Archives of the United States Government and obtained in 1940 by the United States Department of State from the British Government. This has been translated by Professor Harold Conklin, assistant to Professor Otley Beyer in the University of the Philippines.⁷⁷ The document as translated bears the heading: Grant by the Sultan of Sulu of a Permanent Lease Covering His Lands and Territories on the Island of Borneo: Dated January 22nd, 1878. The first three paragraphs of the deed are as follows:

We, Sri Paduka Maulana Al Sultan MOHAMMED JAMALUL ALAM, Son of Sri Paduka Marhum Al Sultan MOHAMMED PULALUN, Sultan of Sulu and all dependencies thereof, on behalf of ourselves and for our heirs and successors, and with the expressed desire of all Datus in common agreement, do hereby desire to *lease*, of our own free will and satisfaction, to Gustavus Baron de Overbeck of Hongkong, and to Alfred Dent, Esquire, of London, who act as representatives of a British Company, together with their heirs, associates,

⁷⁷ Republic of the Philippines. *Letter of Governor Harrison to Vice President Quirino dated February 27, 1947*, p. 1.

successors, and assigns, forever and until the end of time, all rights and powers which we possess over all territories and lands tributary to us on the mainland of the Island of Borneo, commencing from the Pandassan River on the east, and thence along the whole east coast as far as the Sibuku River on the south, and including all territories, on the Pandassan River and in the coastal area, known as Paitan, Sugut, Banggai, Labuk, Sandakan, Chinabatangan, Mumiang, and all other territories and coastal lands to the south, bordering on the Darvel Bay, and as far as the Sibuku River, together with all the islands which lie within nine miles from the coast.

In consideration of this (territorial) lease, the honorable Gustavus Baron de Overbeck and Alfred Dent, Esquire, promise to pay to His Highness Maulana Sultan Mohammed Jamalul Alam, and to his heirs and successors, the sum of five thousand dollars annually, to be paid each and every year.

The above-mentioned territories are from today truly *leased* to Mr. Gustavus Baron de Overbeck and to Alfred Dent, Esquire, as already said, together with their heirs, their associates (company), and their successors or assigns, for as long as they choose or desire to use them; but the rights and powers hereby *leased* shall not be transferred to another nation, or company of

other nationality, without the consent of Their Majesties Government.⁷⁸

3.2.2.3 Reports of Consul Treacher

The report written by Consul Treacher dated January 22, 1878, addressed to the British Foreign Office on the very day the Deed of 1878 was signed stated that the Sultan of Sulu considered as rental the 5,000 Malayan dollars that Overbeck and Dent obligated themselves to pay annually.⁷⁹

In another report of Consul Treacher dated April 25, 1879, he wrote a letter to the Sultan of Sulu informing him that the British Government was objecting to attempts on the part of the Spanish officials “to hoist a Spanish flag in Your Highness’ possessions in Borneo” and to ask for an audience.⁸⁰ If the Sultan had sold Sabah in 1878, why should the said properties still be referred to in 1879 as the possession of the Sultan?

3.2.2.4 Memorandum submitted by the Spanish Government

In a memorandum dated November 5, 1878, submitted by the Spanish Government on the activities of Overbeck and Dent in Sandakan references

⁷⁸ *Ibid.*, pp. 2-3.

⁷⁹ Republic of the Philippines. *Philippine Claim to North Borneo (Vol. 1)*, p. 33.

⁸⁰ *Ibid.*, p. 34.

were made on page 1 to a "contract for the *lease* of Sandakan;" on page 2 to "lands which belong to the dominion of the Sultan" which have been granted to Baron von Overbeck and Alfred Dent "*for their administration*;" on page 3 the word "*lease*;" on page 4, the phrase "*lease Sandakan*;" on page 5, "*contract of lease*;" on page 6, the word "*lease*;" on page 7, the word "*rent*;" on page 8, the phrase "*contract of lease*;" and on page 9, the same phrase "*contract of lease*."

3.2.2.5 Letters of the Sultan of Sulu to the Captain General of the Philippines

A letter of the Sultan of Sulu to the Captain General of the Philippines dated July 4, 1878, contained a reference made by the Sultan to the Malayan dollars as "rent."

Another letter of the Sultan of Sulu dated July 22, 1878, mentioned his desire "to cancel the contract for lease of Sandakan."

3.2.2.6 Letter of the Governor of Sulu, Carlos Martinez

The letter of the Spanish Governor of Sulu to Baron von Overbeck dated July 22, 1878, mentioned a "*lease of Sandakan and its dependencies*."

The Governor of Sulu wrote a second letter to Baron de Overbeck dated

July 24, 1878, where he spoke of a "*contract of lease*."

3.2.2.7 Letter of Consul Treacher to the British Foreign Office

In a letter dated October 15, 1879, Consul Treacher informed the British Foreign Office of "Sandakan and other possessions of Sulu in Borneo." In the same letter he mentions "His Highness' possessions in Borneo."⁸¹ If the Sultan of Sulu had sold his "North Borneo territories" on January 22, 1878, why should Consul Treacher, in the year 1879, still describe the said properties as "His Highness' possessions in Borneo"?

3.2.3 Madrid Protocol of 1885

The Philippines contends that Spain did not surrender sovereign rights over Sabah to Great Britain. What the Spanish Government gave up were merely pretensions to sovereignty over Sabah. The Spanish Government never acquired a de facto control of Sulu and its dependencies. Whatever treaty rights Spain might have had to sovereignty over Sulu and its dependencies, such rights lapsed because of the failure of Spain to obtain control of those territories. Great Britain had not recognized Spanish sovereignty until 1885 when these two powers entered into an agreement

⁸¹ *Ibid.*, pp. 34-35.

(Madrid Protocol of 1885) by which Great Britain and Germany recognized Spanish sovereignty over Sulu in return for which Spain relinquished her claim to Sabah. This agreement which appears to be a case of horse trading between Spain and Great Britain for the protection of their mutual interests, did not affect the Sultan's sovereign rights over Sabah for Spain had never acquired dominion over the territory in question. The truth was that British recognition of the sovereign rights of the Sultan of Sulu over Sabah did not in effect confer sovereign rights upon the British Crown by virtue of the Madrid Protocol of 1885.⁸²

3.2.4 Lease agreement in International Law

A lease of territory under international law is an agreement by which a subject (Subjects of International Law), ordinarily a State, grants another subject of international law, also ordinarily a State, the right to use and exercise control over part of the former's territory. When territory is leased, sovereignty over it remains with the lessor and is divorced from jurisdiction, which is granted to the lessee. Lease of territory is usually granted in return for an annual fee.⁸³

In other words, a lease of territory does not result in the transfer of

⁸² Bernabe Africa. "The Legal Status of the British Occupation of North Borneo." *Philippine International Law Journal*, 2 (1963), p. 396.

⁸³ Yael Ronen. *Max Planck Encyclopedia of Public International Law*. (London: Stevens and Sons, 2008), p. 703.

sovereignty. Such a lease agreement, of course, should be one between states. The deed of 1878 took place between a sovereign ruler and two individuals acting in a private capacity. Overbeck and Dent, not being sovereign entities nor representing sovereign entities, could not and did not acquire dominion and sovereignty over Sabah. Not having acquired any sovereign rights they could not transfer such rights to anyone. Therefore, the Philippines claims the British North Borneo Company did not succeed to any such sovereign rights. Thus, the acts proceeding from the Cession Order of 1946 did not transfer any sovereign rights to the British Crown.

3.2.5 Republic Act No. 9522 demarcating the Maritime Baselines of the Philippines

On 16 July 2011, the Supreme Court of the Philippines ruled that the claim over Sabah is retained and may be pursued in the future.

The statutory claim over Sabah under RA 5446 retained:

Petitioners' argument for the invalidity of RA 9522 for its failure to textualize the Philippines' claim over Sabah in North Borneo is also untenable.

Section 2 of RA 5446, which RA 9522 did not repeal, keeps open the door for drawing the baselines of Sabah:

Section 2. The definition of the baselines of the territorial sea of the Philippine Archipelago as provided in this Act **is without prejudice to the delineation of the baselines of the territorial sea around the territory of Sabah, situated in North Borneo, over which the Republic of the Philippines has acquired dominion and sovereignty.** (Emphasis supplied)⁸⁴



⁸⁴ Supreme Court of the Philippines. *G.R No. 187167* (Prof. Merlin M. Magallona, et al. Vs. Eduardo Ermita, et al.) July 16, 2011.

Chapter 4 - Validity of the Malaysian Claim to Sabah

It is necessary that the principles and precedents on which Malaysia regards Sabah as an integral part of its territory be made clear. Sabah, before joining Malaysia in 1963, was a dependency of Britain, which first established a Protectorate and later a Crown Colony over the area.⁸⁵

Malaysia's claim to sovereignty over Sabah is based on its inclusion in the formation of the Federation of Malaysia. It is a claim of derivative title, based on whatever interests the British Government had in Sabah, which were derived from whatever interests the British North Borneo Company had in Sabah, which were derived from whatever interests Overbeck and Dent derived from their 1878 agreement with the Sultan of Sulu.

Prior to the Philippine decision to claim Sabah, much of the British reaction to the possibility of such a move was designed to brush aside the issue as unworthy of comment. For instance, the Governor of North Borneo, Sir William Goode, stated that the claim has "no substance to it." Donald Stephens, leader of a North Borneo political party, described the claim as "extremely silly and without any legal backing." And a commonly expressed British view is that the matter is simply a manifestation of

⁸⁵ K.G. Tregonning. "The Philippine Claim to Sabah." *Journal of the Malaysian Branch*, 43 (1970), p. 161.

Filipino nationalism.⁸⁶

The competing Malaysian claim is supported by the following arguments:

4.1 Brunei did not cede Sabah to Sulu.

As attested by early modern accounts of written history in Brunei, it is noted that the Sulus were given possession of Sabah or parts of Sabah for help rendered to Sultan Muhydin, the 14th Sultan of Brunei who fought a civil war against the 13th Sultan of Brunei, Sultan Abdul Mubin. However, there are other sources which dispute this and claim that Sabah had always belonged to Brunei.

Sultan Abdul Mubin usurped the throne after killing Sultan Muhammad Ali when the latter tried to stop Sultan Abdul Mubin from taking his revenge for the death of his son killed by the son of Sultan Muhammad Ali. Sultan Abdul Mubin appointed Sultan Muhydin as Bendahara but eventually Sultan Muhydin tricked Sultan Abdul Mubin into leaving Brunei for Pulau Cermin and appointed himself as the new Sultan of Brunei. The two Sultans fought against each other and Sultan Muhyidin finally triumphed, said to be due to the assistance provided by the Sulu Sultanate.⁸⁷

Interestingly enough, Jamil Umar writing in his book, *Tarsilah Brunei II: Period*

⁸⁶ Martin Meadows. "Philippine Claim to North Borneo," *Political Science Quarterly*, 77. (September 1962), p. 331.

⁸⁷ K.G. Tregonning. "The Philippine Claim to Sabah." p. 163.

of *Splendour and Fame* (2007), countered all of the above. Umar did not deny the fact that the Sulus were invited and promised the northern Brunei territory by Sultan Muhydin if they helped him win the civil war against Sultan Abdul Mubin. However, during the battle for Pulau Cermin, the Sulu forces who were supposed to attack the island from Pulau Keingaran and from the sea, did not do so. They were terrified by the resistance of Sultan Abdul Mubin's forces in Pulau Cermin. It was only after Sultan Muhydin had won the battle did the Sulu forces land and took the opportunity to seize a number of war booties.⁸⁸

According to Jamil Umar, Sultan Muhydin refused to cede the territories claimed by Sulu. Umar noted that the area was only *claimed* and not *ceded*, as Sir Stamford Raffles, in his book *History of Java* (1830), had noted "on the north-east of Borneo proper (Brunei) lies a very considerable territory (Sabah), the sovereignty of which has long been claimed by Sulu Government".⁸⁹

Umar further noted that according to the oral tradition, Sulu continued to press their claim. In 1775, one of their chiefs came to Brunei pretending to seek fresh water. What they really wanted was to seek an audience with the Sultan regarding Sabah. However, the Sultan ordered one of the chief wazirs (minister) to see them and he threatened that if they wanted to pursue their intention, he will kill them all.

⁸⁸ Jamil Umar. *Tarsilah Brunei II: Period of Splendour and Fame*. (Bandar Seri Begawan: Brunei History Centre, Ministry of Culture, Youth and Sports, 2010), p. 78.

⁸⁹ Thomas Raffles. *The History of Java*. (London: Gilbert and Rivington Printers, 1830), p. 267.

The Sulus immediately left. Despite that setback, the Sulus continue to maintain their claims.⁹⁰

The argument that Brunei has not ceded Sabah to Sulu is also supported by Leigh Wright in her book *The Origins of British Borneo* (1970). She wrote: "indeed, the legitimacy of the Sulu claim to the territory (Sabah) is in considerable doubt partly because of the unreliability of tarsilas such as 'Selesilah', which in many cases are nothing more than written-down legends to enhance the status of the royal house which produced them. Succeeding Sultans of Brunei have denied that northern Borneo was given to Sulu, and only the weight of Sulu tradition supports the claim. The weight of Brunei tradition challenges it".⁹¹

4.2 Deed of 1878 was one of cession.

The basis of the competing Malaysian claim is that the deed of 1878 between the Sultan of Sulu, and Alfred Dent and Baron von Overbeck as representatives of a British company was one of cession and not a lease agreement, whereby the Sultan of Sulu granted and ceded to the latter all of his rights and powers over the mainland of the island of Borneo

The British translation of the deed of 1878 was cited by the High Court of North

⁹⁰ Jamil Umar. *Tarsilah Brunei II: Period of Splendour and Fame*, p. 85.

⁹¹ Leigh Wright. *The Origins of British Borneo*. (Hong Kong: Hong Kong University Press, 1970), p. 237.

Borneo in the Macaskie Judgment of 1939. It reads:

We Sri Paduka Maulan Al Sultan Mohamet Jamal Al Alam Bin Sri Paduka Al Marhom Al Sultan Mohamet Fathlon of Sulu and the dependencies thereof on behalf of ourselves our heirs and successors and with the consent and advice of the Datoos in council assembled hereby *grant and cede* of our own free and sovereign will to Gustavus Baron de Overbeck of Hongkong and Alfred Dent Esquire of London as representatives of a British Company co-jointly their heirs, associates, successors and assigns forever and in perpetuity all the rights and powers belonging to us over all the territories and lands being tributary to us on the mainland of the island of Borneo commencing from the Pandassan river on the northwest coast and extending along the whole east coast as far as the Sibuco River in the South and comprising amongst others the States of Paitan, Sugu, Bangaya, Labuk, Sandakan, Kina Batangan, Muniang, and all the other territories and states to the southward thereof bordering on Darvel Bay and as far as the Sibuco River with all the islands within three marine leagues of the coast.

In consequence of this grant the said Baron de Overbeck and Alfred Dent promise to pay us compensation to His Highness the Sultan Sri Paduka Maulana Al Sultan Mohamet Jamal Al Alan his heirs or succesors the sum of five

thousand dollars per annum.

The said territories are hereby declared vested in the said Baron de Overbeck and Alfred Dent co-jointly, their heirs, associates, successors or assigns for as long as they choose or desire to hold them. Provided however that the rights and privileges conferred by this grant shall never be transferred to any other nation or company of foreign nationality without the sanction of Her Britannic Majesty's Government first being obtained.

In case any dispute shall arise between His Highness the Sultan, his heirs or successors and the said Baron de Overbeck or his Company it is hereby agreed that the matter shall be submitted to Her Britannic Majesty's Consul General for Borneo.

“The said Baron de Overbeck on behalf of himself and his Company further promises to assist His Highness the Sultan, his heirs or successors with his best counsel and advice wherever His Highness may stand in need of same.

Written in Lipuk in Sulu at the Palace of His Highness Mohamet Jamal Al Alan on the 19th Moharam A..H. I 295, answering to 22 January 1878.⁹²

The claim for Sabah, based on this Sulu Agreement, is focused almost entirely

⁹² United Kingdom. Records created or inherited by the Foreign Office: General Correspondence before 1906. 1879. *Dent and Overbeck Concession*. FO 12/54. The National Archives, Kew.

upon one word in the 1878 Overbeck Agreement. This in the English version says the Sultan of Sulu shall *cede*. This is now denied, although the original participant, the Sultan himself, quite obviously accepted it. The word used was *padjak*. It is maintained that he meant not to cede but to *lease these rivers*.

We are all aware that the Malay and Indonesian tongues are developing rapidly. Obsolete words are being discarded, new words are being accepted and adopted, and new meanings are being given to others. The language of Malaysia today is not the language of Sulu 100 years ago, and certainly when attempting to assess what was the meaning of *padjak* a hundred years ago, it is basic to seek for the intent. What did the Sultan intend to do, when he signed the Agreement? How else can one interpret his subsequent actions than that he saw his Agreement as a cession? The evidence cannot be denied. It is clear and irrevocable.⁹³

The word *padjak*, a Malay term, was translated by Spanish linguists in 1878 and by American anthropologists H. Otley Beyer and Harold Conklin in 1946 as "arrendamiento" or "lease".⁹⁴ However, the British used the interpretation of historian Najeeb Mitry Saleeby in 1908 and William George Maxwell and William Summer Gibson in 1924, which translated *padjak* as "grant and cede".⁹⁵ It can be argued

⁹³ K.G. Tregonning. "The Philippine Claim to Sabah," p. 168.

⁹⁴ Republic of the Philippines. *Philippine Claim to North Borneo (Vol. 1)*, p. 23.

⁹⁵ William George Maxwell, William Summer Gibson. *Treaties and Engagements Affecting the Malay States of Borneo*. (London: J. Truscott & Son, Ltd., 1924), p. 205.

however, that "pajak" means "mortgage" or "pawn" or even "wholesale", as per the contemporary meaning of "pajak" in Sulu.⁹⁶

That the Deed of 1878 is considered a cession is supported by the following:

4.2.1 1903 Confirmation of Cession of Certain Islands

On April 22, 1903, Sultan Jamalul Kiram of the Sulu Sultanate signed a document known as “*Confirmation of Cession of Certain Islands*”, under which he has “*ceded*” additional islands in the neighbourhood of the mainland of North Borneo from Banggi Island to Sibuku Bay, to British North Borneo Company. The sum 5,000 dollars a year payable every year increased to 5,300 dollars a year payable every year. Note that this Agreement further clarifies the treaty of 1878, where it further affirms that the original word *pajak* clearly means *cession*, and not *lease*.

Part of the official English translation of the Agreement says:

We, the Sultan of Sulu, state with truth and clearness that we have *ceded* to the Government of British North Borneo of our own pleasure all the islands that are near the territory of North Borneo from Banguay Island as far as Sibuco

⁹⁶ Mohammed Bin Dato Othman Ariff. *The Philippine Claim to Sabah: Its Historical, Legal and Political Implications*, p. 30.

Bay.⁹⁷

4.2.2 Macaskie Judgment

The 1939 Macaskie Judgment acknowledged the British version of the Treaties. The two major differences are the word *ceded* versus *leased*, and the right to transfer. In the English version, the words *ceded* and *grants* were used, and the right to transfer was subjected to *Her Majesty's Government*. On the other hand, the Sulu version used the word, *leased* and accorded the right to transfer, to the Sulu Sultanate.

An excerpt of the English version of the 1878 Treaty is as follows:

In consideration of this grant the said Baron de Overbeck and Alfred Dent promise to pay as compensation to His Highness the Sultan Sri Paduka Maulana Al Sultan Mohamed Jamal Al Alam *his heirs or successors* the sum of five thousand dollars per annum.

The said territories are hereby declared vested in the said Baron de Overbeck and Alfred Dent Esquire co-jointly their heirs associates, successors or assigns *for as long as they choose or desire* to hold them. Provided however that the rights and privileges conferred by this grant shall never be transferred to any other nation or company of foreign nationality *without the sanction of Her Britannic Majesty's Government first being obtained*.

⁹⁷ Republic of the Philippines. *Philippine Claim to North Borneo (Vol. 1)*, p. 125.

In case *any dispute* shall arise between His Highness the Sultan his heirs or successors and the said Gustavus Baron de Overbeck or his Company, it is hereby agreed that the matter shall be submitted to *Her Britannic Majesty's Consul-General for Borneo*.⁹⁸

Furthermore, the Macaskie Judgment states:

The deed of Cession was a complete and irrevocable grant of territory and the right reserved was only the right to an annual payment, a right which is in the nature of movable property.⁹⁹

By virtue that the late Sultan's adopted daughter, Dayang-Dayang Hadji Piandao Kiram went to the North Borneo High Court to obtain a judgment, asserted the Sulu Sultanate's acceptance of the English version.

In his book entitled *The Acquisition and Government of Backward Territory in International Law*, Dr. M.F. Lindley supported the characterization of the deed of 1878 as one of cession by his statement that "the cession of sovereign powers to the Company by the Sultans was in an exceptionally complete form."¹⁰⁰

That this was the case, Lindley illustrates through the establishment of the British Protectorate in North Borneo in 1888.

⁹⁸ Republic of the Philippines. *The Macaskie Judgment*, p. 7.

⁹⁹ *Ibid.*, p. 72.

¹⁰⁰ M.F. Lindley. *The Acquisition and Government of Backward Territory in International Law*. (London: Longmans, Green and Co., Ltd., 1926), p. 108.

When, however, a British Protectorate was formally established over the Company's territories, the Agreement of the 12th May, 1888, between the British Government and the Company recited that 'all rights of sovereignty are vested in the British North Borneo Company,' and that the territories 'are now governed and administered by the Company as an independent State, hereinafter referred to as "the State of North Borneo."' Any sovereign rights which may have been left in the Sultans at the time of the grant of the Company's charter are disregarded— although it is difficult to see how any such rights could remain after the very full transfer of sovereignty by the Sultans to the founders of the Company— . . .¹⁰¹

Lindley also holds the view that according to English Constitutional Law any acquisition of territory by British subjects is made for the benefit of the Crown.¹⁰² Since Dent's citizenship was English, his acquisition of North Borneo was for the British Crown.

With reference to the British North Borneo Company, Lindley states:

When, in addition to the foregoing considerations, we remember that the cession of sovereign powers to the Company was in exceptionally complete form; that, according to English Constitutional Law, any acquisition of territory by

¹⁰¹ *Ibid.*, p. 107.

¹⁰² *Ibid.*, p. 108.

British subjects is made for the benefit of the Crown; and that the English Crown or Parliament always had the right to withdraw or modify the charter, we are forced to the conclusion that, after the grant of the charter, the British Government represented the Company and its territories to foreign Powers, and that the powers of external sovereignty rested not with the Sultans or the Company, but with the British Government.¹⁰³

Finally, Lindley holds that "so long as a corporation is working under a charter granted by a State, it can acquire sovereignty in the international sense only for the benefit of that State."¹⁰⁴

4.3 Madrid Protocol of 1885

Another reasoned argument against the Philippine claim states that Spain surrendered all claim to North Borneo in the 1885 agreement with Britain. It is the contention of the British Government that the Sultan of Sulu had previously lost his sovereign rights or dominion to North Borneo by virtue of the Treaty of Capitulation with Spain on July 22, 1878. Thus, when Spain signed the Protocol of March 7, 1885, renouncing all claims of sovereignty over North Borneo territory, Great Britain acquired sovereign rights to North Borneo.

¹⁰³ *Ibid.*, p. 104.

¹⁰⁴ *Ibid.*, p. 113.

The Madrid Protocol of 1885 is an agreement between Great Britain, Germany and Spain to recognize the sovereignty of Spain over the Sulu Archipelago as well as the limit of Spanish influence in the region.

Article I

The Governments of Great Britain and of Germany recognize the sovereignty of Spain over the places effectively occupied, as well as over those places not yet occupied, of the Archipelago of Sulu, of which the limits are laid down in Article II.

Article II

The Archipelago of Sulu, conformably to the definition contained in Article I of the treaty signed September 23rd, 1836, between the Spanish Government and the Sultan of Sulu, comprises all the islands which are found between the western extremity of the island of Mindanao on the one side, and the continent of Borneo and the Island of Paragua on the other side, with the exception of those which are indicated in Article III.¹⁰⁵

Under the agreement, Spain as the colonial power ruling the Philippine islands, including the Mindanao and Sulu areas, clearly relinquishes all claims to Borneo as

¹⁰⁵ Republic of the Philippines. *Philippine Claim to North Borneo (Vol. 1)*, p. 119.

can be seen in the following section:

Article III

The Spanish Government *renounces*, as far as regards the British Government, all claims of sovereignty over the territories of the continent of Borneo, which belong, or which have belonged in the past to the Sultan of Sulu, and which comprise the neighbouring islands of Balambangan, Banguey, and Malawali, as well as all those comprised within a zone of three maritime leagues from the coast, and which form part of the territories administered by the Company styled the “British North Borneo Company.”¹⁰⁶

Leigh R. Wright in the journal article “Historical Notes on the North Borneo Dispute” published in *The Journal of Asian Studies*, Vol. 24, No 3 (May, 1966) made some rather interesting and salient points to the discussion. She notes that while the Sulu claim of sovereignty over North Borneo prior to the 1878 treaty with Baron Overbeck is open to dispute¹⁰⁷, there is ample oral and written documentation which proves that Brunei held sway over North Borneo before it was even ceded to the British North Borneo Company. In fact, after the signing of treaties, “*few people*

¹⁰⁶ *Ibid.*, p. 119.

¹⁰⁷ Leigh Wright. “Historical Notes on the North Borneo Dispute.” *The Journal of Asian Studies*, 25 (3) (May 1966), p. 479.

seriously questioned the British North Borneo Company's rights of sovereignty until the Philippines pressed their claim in 1962. Most observers of the last and present century refer to the cession as complete."¹⁰⁸ In any case, she says, the effect of the Madrid Protocol of 1885 signed by Spain and Britain effectively demonstrates that Spain as the colonial power of the Philippines Islands had abandoned all claims that it may have over North Borneo.¹⁰⁹

Thus, she concludes her paper as follows:

North Borneo became British because of the success of British diplomacy in the nineteenth century. It is clear that Britain did not, after the grant to von Overbeck and Dent in January 1878, consider North Borneo a dependency of Sulu, if indeed it had ever been one, as Spain claimed in her treaty with Sulu of July 1878. If confirmation of the von Overbeck-Dent grant were needed *as far as Spain is concerned it was inherent in the abandonment of her claim in the 1885 protocol*. Thus if North Borneo had been under Sulu as late as 1885 the protocol would have the effect of partitioning Sulu territory between Spain and the British North Borneo Company. This would have been technically possible because Spain as of July 1878, and not the Sultan, held the sovereignty of Sulu and its

¹⁰⁸ *Ibid.*, p. 483.

¹⁰⁹ *Ibid.*, p. 483.

dependencies. In theory Spain could dispose of any part of Sulu as she wished or as British and German diplomatic pressure indicated.

Whether the correct term for the Sulu grant of North Borneo is lease as the Philippines contend, or cession, is not the central issue of the North Borneo question. Indeed, the question of sovereignty is not the real issue. The fact is that a British sponsored company legally acquired and effectively ruled the territory, and that Sulu and Spain acquiesced in the scheme. An explanation by the British Foreign Office to the government opposition in Parliament that the company held the territory under the suzerainty of the Sultans of Brunei and Sulu quieted opposition to the granting of a royal charter to the British North Borneo Company, but does not negate the contention that sovereignty was effectively held by the company. That was decided in 1885 and confirmed in 1888, in 1930 and in 1946.¹¹⁰

4.4 Treaty of Paris

On the basis of the Treaty of Paris of 1898, Spain ceded to the United States the Philippine Archipelago. This treaty does not mention North Borneo as part of the Philippine archipelago.

¹¹⁰ *Ibid.*, p. 484.

In the Treaty of Paris (1898) whereby the Spanish surrendered their territory, the boundary was stipulated (as it had been in the Madrid Protocol of 1885) to be nine miles off the coast of North Borneo.¹¹¹

Only one portion of the boundary delimited by this treaty is relevant to the common border between Malaysia and the Philippines. The relevant stretch lies between the Philippine island of Palawan and the northern tip of the Malaysian state of Sabah between turning points 7° 40' N 116° 0' E and 7° 40' N 117° 0' E.

Under Article III of the Treaty of Paris, the territorial limits of the Philippine Islands were delineated as such:

A line running from west to east along or near the twentieth parallel of north latitude, and through the middle of the navigable channel of Bachi...thence along the parallel of latitude of seven degrees and forty minutes (7° 40') north to its intersection with the one hundred and sixteenth (116th) degree meridian of longitude east of Greenwich...¹¹²

In the disorder of the hand-over, the North Borneo Government attempted to secure by purchase from the Sultan of Sulu the two islands that lay on the horizon from Sandakan. He accepted \$3,200 from the Company representative, but then told the U.S. agent who was present at the discussions that although North Borneo had

¹¹¹ K.G. Tregonning. "The Philippine Claim to Sabah." p. 167.

¹¹² Lowell Bautista. "The Historical Context and Legal Basis of the Philippine Treaty Limits." *Asian-Pacific Law and Policy Journal*, 10 (2008), pp. 17-18.

been ceded, the islands belonged to the U.S.A. Its reaction was swift; a U.S. warship visited all the islands in the Sulu Sea more than nine miles from the Borneo coast and planted on them the U.S. flag. By an agreement of 1907, the U.S. waived its right to administer the two islands lying off Sandakan; but by the Boundary Convention of 1930, they were included within the U.S. territory.

The Treaty of Paris merely confirmed the Overbeck cession and the Madrid Protocol of 1885. It established the boundary of the Philippines nine miles out from the Borneo coast. It is the legally recognized, internationally accepted boundary of the present day successor to the Spanish and American Governments, the Republic of the Philippines.¹¹³

4.5 Cobbold Commission

The Cobbold Commission was a Commission of Inquiry set up on August 1, 1962 to determine whether the people of North Borneo (now Sabah) and Sarawak supports the proposal to create the entity Malaysia consisting of Malaya, Brunei, Singapore, North Borneo, and Sarawak.

History has borne witness to the fact that both Sabah and Sarawak eventually agreed to join the Federation of Malaysia as follows:

¹¹³ K.G. Tregonning. "The Philippine Claim to Sabah," p. 167-168.

Article I

The Colonies of North Borneo and Sarawak and the State of Singapore shall be federated with the existing States of the Federation of Malaya as the States of Sabah, Sarawak and Singapore in accordance with the constitutional instruments annexed to this Agreement and the Federation shall thereafter be called “Malaysia”.¹¹⁴

Since then, Sabahans have continuously participated in every general election and freely expressed their willingness to remain as part of Malaysia, and not the Philippines. This has been subsequently reaffirmed by the International Court of Justice (ICJ) in its 2001 judgment concerning the sovereignty of Sipadan and Ligitan islands, both of which are part of Sabah.

However, Filipino academics disputed the context of the 1962 referendum claiming that only a sampling survey of less than four percent of the Sabah population participated in the so-called commission. United Borneo Front (UBF) chairman

¹¹⁴ Malaysia. Agreement concluded between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore, Cmnd 2094 (1963).

Jeffrey Katingan effectively re-affirmed that the veracity of the said referendum is questionable.¹¹⁵

Appendix B of the Cobbold Commission shows the Census Abstract for North Borneo and Sarawak in 1960. In North Borneo, the population in 1960 was 454,421. They had 304 graduates, which was about 0.07% of their population. In Sarawak, the population in 1960 was 744,529. They had 548 graduates, which was also about 0.07% of their population.

The Cobbold Commission sent out open invitations to the people of North Borneo and Sarawak to give their views both orally and in written form. Of a combined total population of 1,198,950 people in North Borneo and Sarawak, the Cobbold Commission received 2,200 written letters and memoranda (0.183% of the population) and 4000 or so people appeared to give their views orally (0.334% of the population).¹¹⁶

In 1962, the Cobbold Commission that heard 0.5% of the total population of North Borneo and Sarawak decided that this represented an affirmative decision to proceed with the signing of the Malaysia Agreement, even though a significant

¹¹⁵ *Free Malaysia Today*. "There was no Sabah Referendum." March 8, 2013.

¹¹⁶ United Kingdom. Records of the Colonial Office: Records of Constitutional and other Commissions. 1962. *Commission of Enquiry in North Borneo and Sarawak Regarding Malaysian Federation (Cobbold Commission)*. 1962. CO 947. The National Archives, Kew.

proportion of the 0.5% who bothered to respond to the Cobbold Commission had expressed reservations to the idea of forming Malaysia and requested more time.

With only 852 graduates in total, it is unclear how many of these graduates bothered to give their views. In any event, North Borneo and Sarawak did not have the intellectual capacity to form a pool of educated leaders to decide their political destiny in 1962.

4.6 International Court of Justice's (ICJ) ruling concerning the sovereignty over

Ligitan and Sipadan

In 2002, in a case concerning sovereignty over Ligitan and Sipadan islands between Indonesia and Malaysia, the International Court of Justice (ICJ) ruled in favor of Malaysia. The two islands are located in the Celebes Sea off the northeast coast of Borneo. The case was decided based on Malaysia's effectivités (evidence of possession and use by a particular state that is effective to claim title) on the two islands as both Indonesia and Malaysia did not possess treaty-based titles on Ligitan and Sipadan.¹¹⁷

The Philippines applied to intervene in the case based on its territorial claim to Sabah. The following is quoted from "*Case Concerning Sovereignty over Pulau*

¹¹⁷ International Court of Justice. 2002. *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, Judgment.

Ligitan and Pulau Sipadan (Indonesia v. Malaysia) Application by the Philippines for Permission to Intervene Judgment of 23 October 2001" by the International Court of Justice at The Hague:

13. The independence of North Borneo *was brought about as the result of the expressed wish of the majority of the people of the territory in a 1963 election.*

The Secretary-General of the United Nations was entrusted under the Manila Accord of 31 July 1963 with the task of ascertaining the wishes of the people of North Borneo, and reported that the majority of the peoples of North Borneo had given serious and thoughtful consideration to their future and: "[had] concluded that they wish to bring their dependent status to an end and to realize their independence through freely chosen association with other peoples in their region with whom they feel ties of ethnic association, heritage, language, religion, culture, economic relationship, and ideals and objectives." (Quoted by the Representative of Malaysia to the General Assembly, 1219th meeting, 27 September 1963, Official Records of the General Assembly, 18th Session, UN Doc. No. A/PV.1219.)

14. In 1963, Britain filed its last report to the United Nations on North Borneo as an Article 73 (e) Non-Self-Governing Territory (Note by the Secretary-General, Political and Constitutional Information on Asian Territories under United

Kingdom Administration, UN Doc. No. A/5402/Add.4 (4 April 1963)).

Thereafter, the United Nations removed North Borneo from the list of colonial territories under its decolonization jurisdiction (see *Yearbook of the United Nations*, 1964, pp. 411-435, which omits North Borneo from the Committee's list of territories), thereby *accepting that the process of decolonization had been completed by a valid exercise of self-determination*.

15. Accordingly, in light of the clear exercise by the people of North Borneo of their right to self-determination, it cannot matter whether this Court, in any interpretation it might give to any historic instrument or efficacy, sustains or not the Philippines claim to historic title. *Modern international law does not recognize the survival of a right of sovereignty based solely on historic title*; not, in any event, after an exercise of self-determination conducted in accordance with the requisites of international law, the bona fides of which has received international recognition by the political organs of the United Nations. Against this, historic claims and feudal pre-colonial titles are mere relics of another international legal era, one that ended with the setting of the sun on the age of colonial imperium.

16. The lands and people claimed by the Philippines formerly constituted most of an integral British dependency. In accordance with the law pertaining to

decolonization, its population exercised their right of self-determination. What remains is no mere boundary dispute. It is an attempt to keep alive a right to reverse *the free and fair decision taken almost 40 years ago by the people of North Borneo* in the exercise of their legal right to self-determination. The Court cannot be a witting party to that.¹¹⁸

4.7 The Permanent Mission of Malaysia to the United Nations' reference to the Sabah Claim

The Permanent Mission of Malaysia to the United Nations, with reference to the Note Verbale No. 000819 dated 4 August 2009 from the Permanent Mission of the Republic of the Philippines to the United Nations, stated the position of the Government of Malaysia as follows:

With respect to the assertion of the Philippines to "...territorial claims on some of the islands in the area including North Borneo.", as stated in the second paragraph of its Noth Verbale, the Permanent Mission wishes to inform the Secretary-General that Malaysia has never recognized the Philippines' claim to the Malaysian state of Sabah, formerly known as North Borneo.

In this respect, the Permanent Mission of Malaysia wishes to draw the

¹¹⁸ International Court of Justice. 2001. *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia) (Permission to intervene by the Philippines)*, Judgment.

attention of the Secretary-General to the Judgment of the International Court of Justice dated 23 October 2001 in the Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan and the Application by the Philippines for permission to Intervene. On the issue of the Philippine claim to North Borneo, Judge Ad-hoc Franck, in a Separate Opinion stated that “in light of the clear exercise by the people of North Borneo of their right to self-determination, it cannot matter whether this Court, in any interpretation it might give to any historic instrument or efficacy, sustains or not the Philippines claim to historic title. Modern international law does not recognize the survival of a right of sovereignty based solely on historic title: not in any event, after an exercise of self-determination conducted in accordance with the requisites of international law, the bona fides of which has received international recognition by the political organs of the United Nations. Against this, historic claims and feudal pre-colonial titles are mere relics of another international legal era, one that ended with the setting of the sun on the age of colonial imperium”.

In light of the above, the Philippine’s claim to Sabah clearly, has no basis under international law.¹¹⁹

¹¹⁹ Permanent Mission of Malaysia to the United Nations. 2009. *Reference to the Note Verbale No. 000819 dated 4 August 2009 from the Permanent Mission of the Republic of the Philippines to the United Nations*. HA 41/09. August 21, 2009, New York.

4.8 Issue of Sovereignty

Whether the correct term for the Sulu grant of North Borneo is lease as the Philippines contend, or cession, is not the central issue of the North Borneo question. Indeed, the question of sovereignty is not the real issue. The fact is that a British sponsored company legally acquired and effectively ruled the territory, and that Sulu and Spain acquiesced in the scheme. An explanation by the British Foreign Office to the government opposition in Parliament that the company held the territory under the suzerainty of the Sultans of Brunei and Sulu quieted opposition to the granting of a royal charter to the British North Borneo Company, but does not negate the contention that sovereignty was effectively held by the company. That was decided in 1885 and confirmed in 1888, in 1930 and in 1946.¹²⁰

In its initiative to solve the problem of Sabah, Malaysia has always insisted that sovereignty and proprietary rights over Sabah are two separate questions. Malaysia avers that it has consistently honored its financial obligations to the Sulu heirs for the lease of Sabah and is prepared to negotiate with them directly, without Philippine government intervention, emphasizing that the matter solely concerns itself and the heirs of the Sultan of Sulu. The current descendant of the Sultan still receives

¹²⁰ Leigh Wright. "Historical Notes on the North Borneo Dispute." *The Journal of Asian Studies*, 25 (3) May (1966), p. 484.

M\$5,000 (US\$2,008) a year as part of the cession of 71,110 square kilometers leased in perpetuity to the British company in the nineteenth century.¹²¹



¹²¹ Parida Abd. Samad, & Darusalam Abu Bakar. "Malaysia- Philippine Relations: The Issue of Sabah." *Asian Survey* 32, no. 6 (1992), p. 567.

Chapter 5 - Peaceful Settlement of the Dispute

The Sabah issue appears to be the main irritant to Malaysia-Philippine relations and it has functioned as an important source of deterioration on other even minor issues of dispute. As a result, political relations have been stunted, marked by sensitivity, mutual suspicion and distrust. For Malaysia, these relations are in deep contrast to those with other neighbors, where periodic consultations between the heads of government, ministers and senior officials have been an institutionalized practice and exchanged visits encourage greater understanding and friendship. Equally absent are any kinds of formal and informal arrangements in almost all areas of cooperation.

The Manila Accord of July 31, 1963, recognized the right of the Philippines to resort to the methods of negotiation, conciliation, arbitration, judicial settlement or other peaceful means of the parties' own choice in the settlement of its claim to Sabah.

At this stage, the achievements in resolving the Sabah issues are minimal and the opportunities lost, considerable. Political cooperation and interaction on matters of mutual interests have been almost non-existent and overall relations sadly devoid of substance. These two governments seldom consult each other on bilateral matters that would normally have benefited both, and thirty years of the unsettled Sabah dispute

reflect the absence of any specific formula for resolution that would not jeopardize the national integrity of both parties. The Philippines's national interests, the rights and the requirement of its claim, its dilemma over Sabah, the possibilities of steps towards resolution of the dispute all should be well understood. Understanding is the only sound basis for a consensus even though this could put Malaysia in both an advantageous and disadvantageous position.

One of the major purposes of law at any level is to deal with disputes: either to prevent them altogether or to settle them. This is certainly true of international law, and throughout its long history it has been concerned with disputes between states.¹²²

5.1 The Nature of International Law

International Law is a body of principles, customs, and rules that are recognized as effectively binding obligations by sovereign states and other international persons in their mutual relations.¹²³

This definition of the subject corresponds closely to the current opinion of most writers on international law but represents by no means the only acceptable definition.

The following definitions are offered:

¹²² Gerhard von Glahn. *Law Among Nations*. (New York: Macmillan Publishing, 1981), p. 514.

¹²³ *Ibid.*, p. 3.

- a. The Law of Nations or International Law may be defined as the body of rules and principles of action which are binding upon civilized states in their relations with one another.¹²⁴
- b. International Law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the law of this country, and which they also regard as being enforceable by appropriate means in case of infringement.¹²⁵
- c. The Law of Nations is the science of rights which exist between Nations or States, and of the obligations corresponding to these rights.¹²⁶
- d. International law consists of a body of rules governing the relations between states.¹²⁷

5.2 Workable Solutions to Settle the Dispute

One approach to the whole problem recommended by a number of authorities is to leave the determinations of the nature of the dispute to the appropriate United Nations organ or specialized agency for referral to the International Court of Justice.

¹²⁴ J.L. Brierly. *The Law of Nations* (London: Oxford University Press, 1963), p. 1.

¹²⁵ W.E. Hall. *A Treatise on International Law*. (New York: Oxford University Press, 1924), p. 1.

¹²⁶ E. de Vattel. *Le Droit des Gens*. (Washington, D. C.: United States Government Printing Office, 1916), p. 3.

¹²⁷ Green H. Hackworth. *Digest of International Law* (Washington, D. C.: United States Government Printing Office, 1944), p. 1.

Then, if the question of the nature of the dispute is raised again before the court, the court can itself make a final decision on the matter, utilizing objective criteria.¹²⁸

Methods to settle the dispute, of which some were implemented or are being proposed, are as follows:

5.2.1 Diplomatic Negotiations

The oldest and most common method of settling disputes and the least encumbered with procedural details is that of diplomatic negotiation. Classical antiquity already recognized a legal obligation to negotiate before resorting to the use of force.

In later centuries, negotiation has been deemed to constitute one of the prior conditions necessary to grant any designation of justice to the use of force. Resort to force without negotiation, attack without warning, continued to be condemned. Negotiation had one highly desirable feature: it was an inexpensive means by which a state might conceivably achieve its aims without going into the risks and expenses of a war. Hence it would have been foolish to resort to force at once before utilizing negotiation first.

¹²⁸ Gerhard von Glahn. *Law Among Nations*, p. 515.

Because most diplomatic negotiations are conducted on the old basis of secrecy or at least relative privacy, the general public is not likely to realize the extent of current diplomatic negotiations.

The United Nations, the international depository of treaties, has published since 1946 several hundred volumes containing thousands of international agreements. And in addition, many disputes are settled each year by negotiations that do not lead to a formal treaty. No one can tell how great this aspect of negotiation is today, but each major state settles annually scores or even hundreds of moot points with other states through letters and memoranda as part of its continuing diplomatic negotiations.

The Permanent Court of International Justice admitted that it would have to decide in each case whether sufficient negotiation had preceded the submission of a dispute, but that it would not overlook the views of the states concerned “who are in the best position to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiation.”¹²⁹

The Philippines upon the initiative of President Diosdado Macapagal has resorted to diplomatic negotiation and has urged judicial settlement of the dispute. The Manila Accord¹³⁰ of July 31, 1963, enforced by the ministers of the Federation of Malaya (later Malaysia), the Republic of Indonesia and the Republic of the

¹²⁹ *Ibid.*, pp. 515-516.

¹³⁰ See Appendix II.

Philippines was aimed to have a general exchange of views on current problems regarding stability, security, economic development and social progress.

The following is quoted from the section named "*Malaysia and North Borneo*" in the Manila Accord:

10. The Ministers reaffirmed their countries' adherence to the principle of self-determination for the peoples of non-self-governing territories. In this context, Indonesia and the Philippines stated that they would welcome the formation of Malaysia provided the support of the people of the Borneo territories is ascertained by an independent and impartial authority, the Secretary-General of the United Nations or his representative.

11. The Federation of Malaya expressed appreciation for this attitude of Indonesia and the Philippines and undertook to consult the British Government and the Governments of the Borneo territories with a view to inviting the Secretary-General of the United Nations or his representative to take the necessary steps in order to ascertain the wishes of the people of those territories.

12. The Philippines made it clear that its position on the inclusion of North Borneo in the Federation of Malaysia is subject to the final outcome of the Philippine claim to North Borneo. The Ministers took note of the Philippine claim and the right of the Philippines to continue to pursue it in accordance with

international law and the principle of the pacific settlement of disputes. They agreed that the inclusion of North Borneo in the Federation of Malaysia would not prejudice either the claim or any right thereunder. Moreover, in the context of their close association, the three countries agreed to exert their best endeavors to bring the claim to a just and expeditious solution by peaceful means, such as negotiation, conciliation, arbitration, or judicial settlement as well as other peaceful means of the parties' own choice, in conformity with the Charter of the United Nations and the Bandung Declaration.

13. In particular, considering the close historical ties between the peoples of the Philippines and North Borneo as well as their geographical propinquity, the Ministers agreed that in the event of North Borneo joining the proposed Federation of Malaysia the Government of the latter and the Government of the Philippines should maintain and promote the harmony and the friendly relations subsisting in their region to ensure the security and stability of the area.

5.2.2 Good Offices

When the parties to a dispute find that it cannot be settled by diplomatic negotiation but that the conflict of rights or claims appears to be of sufficient importance, the technique of *good offices* may be invoked.

The normal meaning of good offices is more adequately represented by *intercession* (the act of interceding—by a third state, a group of states, or even an individual of such standing as the Secretary-General of the United Nations—in an effort to bring the disputants together and to induce them to start or resume negotiations).

Good offices may be exercised only with the agreement of both parties to a dispute. The third party, in other words, is then allowed to attempt to bring the parties together so as to make it possible for them to reach an adequate solution between themselves. Normally the provider of good offices meets separately with each of the disputing parties; seldom, if ever, does the third party attend a joint meeting.

The good offices normally terminate as soon as the disputing parties have been persuaded or assisted to resume negotiations.¹³¹

5.2.3 Mediation

Often confused with good offices, mediation as a procedure to achieve the peaceful settlement of a dispute goes further than the utilization of good offices: the mediator actively participates in the settlement himself. This procedure is usually

¹³¹ Gerhard von Glahn. *Law Among Nations*, pp. 516-517.

undertaken by a third state, or by a group of states, by an individual, or by an agency of an international organization.

Regardless of the nature of the mediator, he is expected to offer concrete proposals for the settlement of the substantive questions instead of contenting himself with making negotiation possible. He therefore assists the parties directly. The mediator may meet with the parties either jointly or separately. His functions come to an end when the dispute is settled or when one of the parties (or the mediator) decides that the proposals made by him are not acceptable. It should be noted that the proposals submitted by a mediator represent nothing more than advice; under no condition can they be taken to possess any binding force on either party to the dispute.

As with good offices, either or both parties to a dispute are free to reject an offer to mediate.¹³²

Abraham Idjirani, spokesman for the Sulu Sultan Jamalul Kiram III, expressed that parties seeking a resolution to the conflict between Sulu royalists and Malaysia are seeking the participation of Brunei to help end the debacle. The participation of Brunei in the resolution of the issue is crucial since historic records show that the Sabah territory had been ceded by the Sultan of Brunei to the Sultan of Sulu in 1704. However, observers said that Malaysia's refusal to engage in talks has been expected

¹³² *Ibid.*, pp. 517-518.

as engaging the Sultan of Brunei or the Philippine government would give semblance of legitimacy to the Philippine claim to Sabah.¹³³

5.2.4 Commissions of Inquiry

Since a number of international disputes involve an inability or unwillingness of the parties concerned to agree on points of fact, fact-finding commissions are appointed to report to the parties in question on the disputed facts.

On December 18, 1967, the General Assembly of the United Nations adopted unanimously a resolution urging member states to make more effective use of the existing methods of fact finding in accordance with Article 33 of the Charter. The General Assembly also requested the Secretary-General to prepare a register of experts whose services might be utilized for fact-finding purposes.¹³⁴

The Cobbold Commission was a Commission of Inquiry set up on August 1, 1962 to determine whether the people of North Borneo (now Sabah) and Sarawak supports the proposal to create the entity Malaysia consisting of Malaya, Brunei, Singapore, North Borneo, and Sarawak.

¹³³ *Gulf News*. "Brunei's help sought to resolve Sabah-Sulu debacle." March 17, 2013.

¹³⁴ Gerhard von Glahn. *Law Among Nations*, pp. 518-521.

However, Filipino academics disputed the context of the 1962 referendum claiming that only a sampling survey of less than four percent of the Sabah population participated in the so-called commission.¹³⁵

5.2.5 Commissions of Conciliation

The procedure of peaceful settlement of disputes through conciliation means the submission of a given dispute to an already established commission or a single conciliator for the purpose of examining all facets of the dispute and suggesting a solution to the parties concerned. A feature of this procedure is that either or both parties are free to accept or reject proposals of the conciliators. The conciliators like in mediation may meet with the parties jointly or separately.

It has been suggested, with sound logic, that other procedures for the settlement of disputes (arbitration, adjudication) are preferred because they provide for the issuance of a binding award or judgment, rather than leaving each party free to reject mere recommendation, as in the case of conciliation.¹³⁶

¹³⁵ See Chapter 4, section 4.5 – Cobbold Commission for more details.

¹³⁶ Gerhard von Glahn. *Law Among Nations*, p. 522.

5.2.6 Arbitration

The first characteristic of arbitration is the free selection of arbitrators—quite different from judicial settlement by a permanently established true court.

Second, arbitration treaties generally specify that the arbitrators must respect the rule of international law and must attempt to come as close as possible in their award to what would normally be regarded as a legal decision.

Third, the procedure of arbitration assumes, explicitly or implicitly, an agreement by both parties to accept the award of the arbitration tribunal and to carry out its provisions.

There has now been in force since June 7, 1959 a U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

An obvious difficulty inherent in the final nature of an arbitral award relates to the unwillingness of states to submit questions of fundamental importance to a body on which they are not represented by a majority and whose decision they agree in advance to accept.¹³⁷

¹³⁷ *Ibid.*, pp. 523-525.

5.2.7 Adjudication

The International Court of Justice consists of fifteen judges qualified to hold the highest judicial offices in their own countries or recognized as experts in international law.

Under Article 34 (1) of the Statute of the International Court of Justice "only States may be parties before the Court." This includes, first, all United Nations Members, and second, all non-United Nations Members who desire a permanent association with the Court.

The jurisdiction of the Court rests on the consent of the parties. Jurisdiction may be accepted under Article 36 (2) of the Statute, the "Optional Clause" whereby:

The state that are parties to the Statute may at any time declare that they recognize as compulsory, ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: (1) the interpretation of a treaty; (2) any question of international law; (3) the existence of any fact which, if established, would constitute a breach of an international obligation; (4) the nature of extent of the reparation to be made for that breach of an international obligation.¹³⁸

¹³⁸ *Ibid.*, pp. 528-531.

The major procedural questions meriting brief mention in connection with the International Court of Justice are these:

The court has the power to indicate, if it considers that conditions warrant it, any provisional measures that ought to be taken to preserve the respective rights of either party.

A decision by the court has no binding force except between the parties and in respect of the particular case in question. (Art. 59). A judgment of the court is final and without appeal. An application for the revision of a judgment can be made only when it is based on the discovery of a fact of such a nature as to be a decisive factor, which fact must have been unknown to the court and to the party claiming revision at the time when the judgment was given.

Finally, if both parties to a dispute agree, the court can also decide a case *ex aequo et bono*, meaning the Court can use its own judgment, even if this means a disregard of existing rules of law, in order to arrive at a fair decision.¹³⁹

Although not a direct ruling to the Sabah dispute, the International Court of Justice's judgment concerning the sovereignty over Ligitan and Sipadan reaffirmed

¹³⁹ *Ibid.*, pp. 534-535.

the Sabahans' right to exercise their legal right to self-determination. This was when the Philippines applied to intervene in the case based on its claim to Sabah.

The following is quoted from "*Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia) Application by the Philippines for Permission to Intervene Judgment of 23 October 2001*" by the International Court of Justice at The Hague:¹⁴⁰

13. The independence of North Borneo was brought about as the result of the expressed wish of the majority of the people of the territory in a 1963 election.

14. In 1963, Britain filed its last report to the United Nations on North Borneo as an Article 73 (e) Non-Self-Governing Territory. Thereafter, the United Nations removed North Borneo from the list of colonial territories under its decolonization jurisdiction, thereby *accepting that the process of decolonization had been completed by a valid exercise of self-determination.*

15. Accordingly, in light of the clear exercise by the people of North Borneo of their right to self-determination, it cannot matter whether this Court, in any interpretation it might give to any historic instrument or efficacy, sustains or not the Philippines claim to historic title.

16. The lands and people claimed by the Philippines formerly constituted most of

¹⁴⁰ See Chapter 4, section 4.6 – ICJ's ruling concerning the sovereignty over Ligitan and Sipadan for more details.

an integral British dependency. In accordance with the law pertaining to decolonization, its population exercised their right of self-determination.¹⁴¹

5.7.8 International Organizations

Although it cannot be maintained seriously that international organization per se can be treated as “methods” for the settlement of international disputes, a number of such agencies have developed procedures for the achievement of such settlements.

The United Nations has been active in providing such procedures, usually combining the functions of investigation and conciliation. The United Nations has also appointed numerous special commissions to deal with specific disputes and situations.

The Charter of the United Nations imposes on all members of the organization a duty to “settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered” (Art. 2, par. 6). It appears that the *members* have an unconditional obligation to settle their disputes peacefully, whereas the *organization* has an obligation limited to the settlement of disputes or situations “which might lead to a breach of the peace.”

¹⁴¹ International Court of Justice. 2001. *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia) (Permission to intervene by the Philippines)*, Judgment.

If a given dispute falls within the proper competence of an organ of the United Nations, that organ is not to deal with the merits involved but is to decide which method of procedure or of settlement is best adapted to the dispute (Art. 33).

Still another avenue of reaching a peaceful settlement of a dispute through the United Nations is the adoption by the Security Council of a recommendation to refer a dispute to the International Court of Justice or to request an advisory opinion on a dispute or question.¹⁴²

5.2.8 Peaceful Settlement of Disputes through Regional Organizations

The peaceful solution of international disputes has been achieved not only through the employment of traditional procedures and through the utilization of “universal” international organizations, but also through a multitude of regional arrangements frequently cast in the form of permanent institutional frameworks.

The U.N. Charter itself places considerable emphasis on a resort to regional arrangements before a dispute is ultimately submitted to the United Nations. Article 33 (1) of the Charter states that “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of

¹⁴² Gerhard von Glahn. *Law Among Nations*, pp. 538-541.

all, seek a solution by...resort to regional agencies or arrangements, or other peaceful means of their own choice.¹⁴³

5.2.9.1 Association of Southeast Asian Nations

With the inception of the five-member Association of Southeast Asian Nations (ASEAN), there was a tacit agreement between Malaysia and the Philippines that the issue be shelved in the interest of regional solidarity, and they agreed that it should be finally resolved through ASEAN. However, in the more than 25 years since ASEAN's formation, the Sabah dispute has never been an important agenda item at any ASEAN conference or meeting. While its leaders have depicted the organization as a panacea for existing intraregional tensions and disputes, they have been disinclined to consider the Sabah matter as a potential catalyst for ASEAN disintegration. As a result of other dimensions of regional cooperation through this organization, which the two countries cannot simply ignore, ASEAN has been able to contribute to softening the political tension.¹⁴⁴

The 1976 Treaty of Amity and Cooperation in Southeast Asia (TAC) was signed in conjunction with the 1976 Declaration of ASEAN Concord. It is a landmark agreement as it sets out peaceful settlement of disputes as a fundamental principle of

¹⁴³ *Ibid.*, pp. 541-542.

¹⁴⁴ Parida Abd. Samad, & Darusalam Abu Bakar. "Malaysia- Philippine Relations: The Issue of Sabah." *Asian Survey* 32, no. 6 (1992), pp. 554-555.

ASEAN, commits member states to “refrain from the threat or use of force” and settle any disputes through “friendly negotiations”. To address unresolved disputes in the region, the TAC establishes a High Council comprising ministerial representatives of all contracting parties. Provided that all parties to the dispute agree to apply the TAC to their case, the High Council’s role is to recommend appropriate means of dispute settlement to the disputing parties, which could include the High Council offering its good offices, or constituting a committee of mediation, inquiry or conciliation.

There seems to be consensus that the Sabah conflict has become another flashpoint that has broader regional security implications for members of ASEAN. Yet while the regional organization has trumpeted its ‘central role’ in maintaining peace, security and stability in a region which has experienced both internal and intra-member conflicts since post-independence, it has so far been ‘silent’ on the Sabah crisis.

There are two ways to interpret ASEAN’s lack of visibility in the Sabah crisis. One is that there is no willingness among member countries to ‘regionalize’ the conflict and a preference for treating it purely as an internal security matter primarily for Malaysia. In this way, the principle of non-interference on sovereignty is maintained. The fact however that the conflict involves cross-border actions and

personalities from Malaysia and the Philippines belies its characterization as an ‘internal’ matter.

But while these previous events showed member countries actually expressing their divergent positions, the Sabah crisis suggests that there is actually an agreement to be ‘invisible’ and ‘silent’. This is partly explained by the second reason: the involvement or appearance of a group of ‘non-state’ combatants in this state of affairs that caught ASEAN by surprise or at least off-guard – given that ASEAN has precisely excluded such actors from its architecture. Either way, it means that ASEAN does not have a regional mechanism in place to address issues involving non-state actors, particularly when they are embedded in inter-state security issues. ASEAN explicitly declares itself to be an ‘intergovernmental organization’ and its dispute settlement mechanisms have no place for private individuals or groups, except when they involve investors. In this sense, there is no way for the Sultan of Sulu to be recognized as a ‘proper party’ to the dispute under ASEAN mechanisms, and hence the hesitation by ASEAN to recognize the crisis as this may lead to indirect recognition of the Sultan. On the other hand, the Sultanate of Sulu could not invoke ASEAN assistance or mediation, particularly when they have authorized the Philippine government to negotiate their claims with the Malaysian government.

The question remains however whether ASEAN has responsibility to take on the Sabah crisis. The *raison d'être* for ASEAN in 1967 was precisely to foster peace and security in a troubled region, the context of which is the existence of disputes among member countries brought about by arbitrary settlement among the colonial powers of their former colonies' territorial boundaries. The Sabah crisis has its roots in post-independence settlement, and even long before that – and this is a reality that has not been altered by the formation of the Malaysian or Philippine states.

People in Sabah and Sulu have close historical and ethnic affinity, and have long enjoyed freedom of movement across the borders. That will soon change as both governments begin to tighten their border security. This will have serious repercussions for people who depend on the porous borders for their livelihood and enjoyment of family connections, as well as the hundreds of thousands of migrant workers working in the mines and plantations in Sabah. Economic development and migrant workers are high on the agenda of ASEAN integration and the failure to resolve the Sabah conflict could only exacerbate existing unrest and provide a catalyst for further violence and instability.¹⁴⁵

¹⁴⁵ Imelda Deinla. "ASEAN Non-Interference and the Sabah Conflict," *The Malaysian Insider* (March 22, 2013). Retrieved July 7, 2014 from <http://www.themalaysianinsider.com/sideviews/article/asean-non-interference-and-the-sabah-conflict-imelda-deinla>.

ASEAN's ability to resolve disputes in the region has increasingly been questioned – ever more so, its claim to 'centrality'. Not only is its credibility being eroded by its repeated failure to adopt a common position on sensitive security issues such as the Sabah crisis but it is also creating a precedence of a policy of avoidance. This does not bode well for its much-touted ASEAN Community and its ability to address critical security issues affecting the region.



Chapter 5 - Conclusion

The aim of this study was to show the legal and historical bases of the Philippine claim to Sabah, to present the validity of the competing Malaysian claim, and to explore workable solutions to settle the dispute peacefully.

The following table is a summary of the arguments submitted by both countries:

Philippines	Malaysia
1. Sabah was ceded to the Sultan of Sulu by the Sultan of Brunei in 1704. Thus, the Sultan of Sulu became the sovereign ruler of Sabah.	1. Succeeding Sultans of Brunei have denied that Sabah was given to the Sulu Sultanate.
2. The deed of 1878 executed by the Sultan of Sulu in favor of Baron von Overbeck and Alfred Dent was a contract of permanent lease and not of cession, neither transfer of ownership nor sovereignty.	2. The Deed of 1878 is considered a cession as supported by the 1903 Confirmation of Cession of Certain Islands and the Macaskie Judgment.
3. The continued payment of the cession money by the Malaysian government to the Sulu Sultanate lends credibility to the claim of the Philippines that the Deed of 1878 was a contract of lease and not one of cession.	3. The Madrid Protocol of 1885 and the Treaty of Paris in 1898 both define the boundaries of the Philippine Islands. Both place the boundary off the coast of Sabah and not one of them advances a claim to Sabah.
4. The Philippines contends that Spain did not surrender sovereign rights over Sabah to Great Britain. The Spanish Government never acquired a de facto control of Sulu and its dependencies.	4. Both Sabah and Sarawak eventually agreed to join into the Federation of Malaya (later Malaysia) by virtue of the Cobbold Commission.

<p>5. The deed of 1878 took place between a sovereign ruler and two individuals acting in a private capacity. Overbeck and Dent, not being sovereign entities nor representing sovereign entities, could not and did not acquire dominion and sovereignty over Sabah. Thus, the acts proceeding from the Cession Order of 1946 did not transfer any sovereign rights to the British Crown.</p>	<p>5. Sabahans have freely expressed their willingness to remain as part of Malaysia as reaffirmed by the Separate Opinion of International Court of Justice (ICJ) in its 2001 judgment concerning the sovereignty of Sipadan and Ligitan islands, both of which are part of Sabah.</p>
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Some workable solutions to settle the dispute peacefully include: diplomatic negotiations, good offices, mediation, commissions of inquiry, commissions of conciliation, arbitration, adjudication, and resort to international organizations or regional agencies. The following table presents the measures implemented and proposed so far:

<p>1. Diplomatic Negotiations</p>	<p>The Manila Accord of July 31, 1963, enforced by the ministers of Malaysia, Indonesia, and the Philippines reaffirmed their countries' adherence to the principle of self-determination for the peoples of non-self-governing territories. The Philippines made it clear that its position on the inclusion of North Borneo in the Federation of Malaysia is subject to the final outcome of the Philippine claim to North Borneo.</p>
<p>2. Mediation</p>	<p>Parties seeking a resolution to the conflict between Sulu royalists and Malaysia are seeking the participation of Brunei to help end the dispute. The participation of Brunei in the resolution of the issue is crucial since historic records show that the Sabah territory had been ceded by the Sultan of Brunei to the Sultan of Sulu in 1704.</p>

3. Commissions of Inquiry	The Cobbold Commission was a Commission of Inquiry set up on August 1, 1962 to determine whether the people of Sabah and Sarawak support the proposal to join the Federation of Malaysia.
4. Adjudication	Although not a direct ruling to the Sabah dispute, the Separate Opinion of the International Court of Justice's judgment concerning the sovereignty over Ligitan and Sipadan reaffirmed the Sabahans' right to exercise their legal right to self-determination.
5. ASEAN	There seems to be consensus that the Sabah conflict has become another flashpoint that has broader regional security implications for members of ASEAN. Although the 1976 Treaty of Amity and Cooperation in Southeast Asia (TAC) established a High Council to address unresolved disputes in the region, member states have always relied on the ICJ. The member states reserve the rights to reject ASEAN's initiations if they deem them infringing on their sovereignty. Through the clause of non-interference, ASEAN cannot get involved in the Sabah case.

These means of settling the dispute can only be used when the parties voluntarily consent to resort to these methods. It is, therefore, difficult to settle an international dispute unless the parties voluntarily give their consent to submit their case for settlement through any of these means for the pacific settlement of disputes.

The Philippines has resorted to diplomatic negotiation and has urged judicial settlement of this dispute. The Manila Accord of July 31, 1963, enforced by the governments of the Malaysia, Indonesia, and the Philippines, was aimed to have a general exchange of views on current problems regarding stability, security, economic development and social progress. The Philippines made it clear that its position on the

inclusion of Sabah in the Federation of Malaysia is subject to the final outcome of the Philippine claim to Sabah. Furthermore, the three countries recognized the right of the Philippines to continue to pursue the claim in accordance with international law and the principle of the pacific settlement of disputes.

Though it has been said that the Philippines does not stand to gain or lose anything from the preservation of the status quo in Sabah, the kind of inaction being adopted by the Philippine government over the issue may, in fact, entail the loss of a number of opportunities.

Abraham Idjirani, spokesman for the Sulu Sultan Jamalul Kiram III, expressed that parties seeking a resolution to the conflict between Sulu royalists and Malaysia are seeking the participation of Brunei to help end the dispute. The participation of Brunei in the resolution of the issue is crucial since historic records show that the Sabah territory had been ceded by the Sultan of Brunei to the Sultan of Sulu in 1704. However, observers said that Malaysia's refusal to engage in talks has been expected as engaging the Sultan of Brunei or the Philippine government would give semblance of legitimacy to the Philippine claim to Sabah.

For the Philippines to drop its claim to Sabah without concessions would mean outright recognition of Malaysia's sovereignty over Sabah. Taking this position might also jeopardize the proprietary rights of the Sultan of Sulu. In general, choosing this

option appears to be damaging to national integrity.

Indeed, whatever efforts might have been exerted to pursue the Philippine claim to Sabah may have been compromised by the country's military and economic incapacity. It cannot afford to go to war when the country is hindered by problems of poverty, corruption in the government and secessionist movements in the south.

In the meantime, while the status quo remains, Malaysia will continue to benefit exclusively from the bounties of Sabah and the surrounding waters. More importantly, while the cost of the maintenance of the status quo is minimal, non-resolution of the claim would continue to be a hindrance to wider intra-ASEAN cooperation.

The Malaysian United Borneo Front (UBF) chairman Jeffrey Kitingan has disputed the context of the 1962 Cobbold Commission which the Malaysian government confirmed Sabahans' desire to be part of Malaysia. The so-called referendum was actually only a sampling survey of less than four percent of the then Sabah population. The UBF chairman stated that the Sabah claim, whether valid or not, must be resolved once and for all by bringing all the relevant parties to the table with the support of the United Kingdom and the United Nations to find a peaceful solution.

At best the Malaysian administration is at the moment indulging in a wait and see attitude, and will respond accordingly when the Philippines is more ready either to

pursue the claim more seriously or abandon it. The Malaysian government considers the Sabah dispute as a creation of the Philippine side and hence any effort towards its resolution obviously would have to be initiated by the Philippines.

ASEAN is creating a regional community by 2015 with a pillar in security and politics. This incident serves as a reminder that what seems old historical baggage can suddenly turn into flashpoints such as the recent incursion into Sabah. Yet while the regional organization has trumpeted its central role in maintaining peace, security and stability in a region which has experienced both internal and intra-member conflicts since post-independence, it has so far been 'silent' on the Sabah crisis.

There are two ways to interpret ASEAN's lack of visibility in the Sabah crisis. One is that there is no willingness among member countries to 'regionalize' the conflict and a preference for treating it purely as an internal security matter primarily for Malaysia. In this way, the principle of non-interference on sovereignty is maintained. But while these previous events showed member countries actually expressing their divergent positions, the Sabah crisis suggests that there is actually an agreement to be 'invisible' and 'silent'. This is partly explained by the second reason: the involvement or appearance of a group of 'non-state' combatants in this state of affairs that caught ASEAN by surprise or at least off-guard – given that ASEAN has precisely excluded such actors from its architecture. Either way, it means that ASEAN

does not have a regional mechanism in place to address issues involving non-state actors, particularly when they are embedded in inter-state security issues. Otherwise, ASEAN lacks specialized tools and personnel to broker peace and prevent conflicts from escalating. ASEAN explicitly declares itself to be an ‘intergovernmental organization’ and its dispute settlement mechanisms have no place for private individuals or groups, except when they involve investors.

In the situation facing both parties, Malaysia must state its position clearly that the sovereignty claim to the state of Sabah must be finally resolved. The prolongation of the Sabah claim would be self-serving and in no way contributes to the long-term interests of both countries. To date, Malaysia maintains that the Sabah claim has no basis under international law, thereby rejecting any calls from the Philippines to resolve the matter in the International Court of Justice.

On 16 July 2011, the Supreme Court of the Philippines ruled that the claim to Sabah is retained and may be pursued in the future. Since no law has yet been passed on the dropping of the Sabah claim, the Philippines still has the option to actively pursue the claim through internationally accepted norms that include adjudication by the International Court of Justice and bilateral negotiations. Through this method, definitive steps can be taken to find ways and means to resolve the dispute once and for all.

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Appendix I

Joint Final Communiqué*

1. A Philippine Delegation under the leadership of Mr. Emmanuel Pelaez, Vice President and Foreign Secretary, visited London from January 24 to February 1, for talks with British Delegation under the leadership of the Earl of Home, Foreign Secretary. Mr. Pelaez was accompanied by Mr. Macario Peralta, Jr., Secretary of National Defense, Mr. Salvador P. Lopez, Undersecretary of Foreign Affairs, Congressman Jovito R. Salonga, and Ambassador Eduardo Quintero. The British Delegation included Mr. Peter Thoneycroft, Minister of Defense, Mr. Peter Thomas, Parliamentary Undersecretary of State for Foreign Affairs, Sir Robert Scott, Permanent Secretary of the Ministry of Defense, Lt. Gen. D.S.S. O'Connor, Deputy Chief of the Defense Staff. The Marquess of Landsdowne, Minister of State for Colonial Affairs, also took part in the meetings.

2. There was an extensive exchange of views on the problems of stability, security and defense in Southeast Asia and on the policies by which the two Governments pursue their common objectives in accordance with their obligation as Members of the United Nations and as allies under the Manila Treaty (SEATO).

3. The talks also dealt with matters affecting the Borneo Territories of North Borneo, Sarawak and Brunei. It was agreed that the futures political stability and progress of these territories was a matter of great importance to both Governments, although there were differences between them on the best means of securing these objectives. The British Delegation described the political advances already in progress in the territories and explained the reasons for the proposed establishment of the Federation of Malaysia. The Philippine Delegation expressed their view on the proposal and in particular their opposition to the inclusion of North Borneo in the Federation. The Philippine Delegation also explained the proposal of President Macapagal for a Confederation of Malay States.

4. The Philippine Delegation made a detailed statement of their Government's claim to parts of North Borneo and the British Delegation explained why this claim could not be accepted by Her Majesty's Government. For a clarification of issues the question was referred to the Legal Committee which reported back and on the Committee's recommendation it was agreed to exchange copies of certain documents for the purpose of further clarification.

5. Without prejudice to the Philippine claim, a number of questions concerning local Philippine interests in North Borneo and Anglo-Philippine cooperation in that region were also discussed and agreement was reached for the improvement of cooperation between the two Governments in the prevention of piracy and armed raids and on the problems of smuggling and illegal immigration in the region.

6. The talks took place in a most frank and friendly atmosphere and both Delegations agreed that they had achieved their purpose in promoting closer understanding between the two Governments. It was agreed further discussions should be pursued through the diplomatic channel and that in due course another meeting between ministers might be desirable.

(SIGNED) EARL OF HOME London, February 1 st , 1963.	(SIGNED) EMMANUEL PELAEZ
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Footnote:

* Mimeograph release, Department of Foreign Affairs.

Source: The Philippine Claim to a Portion of North Borneo



Appendix II

Manila Accord*

Signed at Manila, July 31, 1963

1. The governments of the Federation of Malaya, the Republic of Indonesia and the Republic of the Philippines, prompted by their keen and common desire to have a general exchange of views on current problems concerning stability, security, economic development and social progress of the three countries and of the region and upon the initiative of President Diosdado Macapagal, agreed that a Conference of Ministers of the three countries be held in Manila on 7th June 1963 for the purpose of achieving common understanding and close fraternal cooperation among themselves. Accordingly, Tun Abdul Razak, Deputy Prime Minister of the Federation of Malaya; Dr. Subandrio, Deputy First Minister/Minister of Foreign Affairs of the Republic of Indonesia; and Hon. Emmanuel Pelaez, Vice President of the Philippines and concurrently Secretary of Foreign Affairs, met in Manila from 7 to 11 June 1963.

2. The deliberations were held in a frank manner and in a most cordial atmosphere in keeping with the spirit of friendship prevailing in the various meetings held between President Sukarno of the Republic of Indonesia, and Prime Minister Tunku Abdul Rahman Putra of the Federation of Malaya, and President Diosdado Macapagal. This Ministerial Conference was a manifestation of the determination of the nations in this region to achieve closer cooperation in their endeavor to chart their common future.

3. The Ministers were of one mind that the three countries share a primary responsibility for the maintenance of the stability and security of the area from subversion in any form or manifestation in order to preserve their respective national identities, and to ensure the peaceful development of their respective countries and of their region, in accordance with the ideals and aspirations of their peoples.

4. In the same spirit of common and constructive endeavor, they exchange views on the proposed Confederation of nations of Malay origin, the proposed Federation of Malaysia, the Philippine claim to North Borneo and related problems.

THE MACAPAGAL PLAN

5. Recognising that it is in the common interest of their countries to maintain fraternal relations and to strengthen cooperation among their peoples who are bound together by ties, race and culture, the three Ministers agreed to intensify the joint and individual efforts of their countries to secure lasting peace, progress and prosperity for themselves and for their neighbours.

6. In this context, the three Ministers supported President Macapagal's plan envisaging the grouping of the three nations of Malay origin working together in closest harmony but without surrendering any portion of their sovereignty. This calls for the establishment of the necessary common organs.

7. The three Ministers agreed to take the initial steps towards this ultimate aim by establishing machinery for frequent and regular consultations. The details of such machinery will be further defined. This machinery will enable the three governments to hold regular consultations at all levels to deal with matters of mutual interest and concern consistent with the national, regional and international responsibilities or obligations of each country without prejudice to its sovereignty and independence. The Ministers agreed that their countries will endeavor to achieve close understanding and cooperation in dealing with common problems relating to security, stability, economic, social and cultural development.

8. In order to accelerate the process of growth towards the ultimate establishment of President Macapagal's plan, the Ministers agreed that each country shall set up its own National Secretariat. Pending the establishment of a Central Secretariat for the consultative machinery, the National Secretaries should coordinate and cooperate with each other in the fulfillment of their tasks.

9. The Ministers further agreed to recommend that Heads of Government and Foreign Ministers meet at least once a year for the purpose of consultations on matters of importance and common concern.

MALAYSIA AND NORTH BORNEO

10. The Ministers reaffirmed their countries' adherence to the principle of self-determination for the peoples of non-self-governing territories. In this context, Indonesia and the Philippines stated that they would welcome the formation of Malaysia provided the support of the people of the Borneo territories is ascertained by an independent and impartial authority, the Secretary-General of the United Nations or his representative.

11. The Federation of Malaya expressed appreciation for this attitude of Indonesia and the Philippines and undertook to consult the British Government and the Governments of the Borneo territories with a view to inviting the Secretary-General of the United Nations or his representative to take the necessary steps in order to ascertain the wishes of the people of those territories.

12. The Philippines made it clear that its position on the inclusion of North Borneo in the Federation of Malaysia is subject to the final outcome of the Philippine claim to North Borneo. The Ministers took note of the Philippine claim and the right of the Philippines to continue to pursue it in accordance with international law and the principle of the pacific settlement of disputes. They agreed that the inclusion of North Borneo in the Federation of Malaysia would not prejudice either the claim or any right thereunder. Moreover, in the context of their close association, the three countries agreed to exert their

best endeavors to bring the claim to a just and expeditious solution by peaceful means, such as negotiation, conciliation, arbitration, or judicial settlement as well as other peaceful means of the parties' own choice, in conformity with the Charter of the United Nations and the Bandung Declaration.

13. In particular, considering the close historical ties between the peoples of the Philippines and North Borneo as well as their geographical propinquity, the Ministers agreed that in the event of North Borneo joining the proposed Federation of Malaysia the Government of the latter and the Government of the Philippines should maintain and promote the harmony and the friendly relations subsisting in their region to ensure the security and stability of the area.

MEETING OF HEADS OF GOVERNMENT

14. The Ministers agreed to recommend that a Meeting of their respective Heads of Government be held in Manila not later than the end of July 1963.

15. The Ministers expressed satisfaction over the atmosphere of brotherliness and cordiality which pervaded their Meeting and considered it as a confirmation of their close fraternal ties and as a happy augury for the success of future consultations among their leaders.

16. The Ministers agreed to place on record their profound appreciation of and gratitude for the statesmanlike efforts of President Macapagal whose courage, vision and inspiration not only facilitated the holding of this historic Meeting but also contributed towards the achievement for the first time of a unity of purpose and a sense of common dedication among the peoples of Malaya, Indonesia and the Philippines.

APPROVED AND ACCEPTED.

Manila, July 13, 1963



<p>SOEKARNO <i>President of the Republic of Indonesia</i></p>	<p>DIOSDADO MACAPAGAL <i>President of the Philippines</i></p>
<p>TUNKU ABDUL RAHMAN PUTRA AL-HAJ <i>Prime Minister of the Federation of Malaya</i></p>	

Note:

Source: IV PTS 779.

Footnote:

* Philippine Claim to North Borneo, Vol. II, at 97-100.

Source: The Philippine Claim to a Portion of North Borneo



Appendix III

United Nations Malaysia Mission Report, “Final Conclusions of the Secretary-General,” 14 September 1963

UNITED NATIONS MALAYSIA MISSION REPORT

Final Conclusions of the Secretary-General

In response to the request made by the Governments of the Federation of Malaya, the Republic of Indonesia, and the Republic of the Philippines, on 5 August 1963, I agreed to ascertain, prior to the establishment of the Federation of Malaysia, the wishes of the people of Sabah (North Borneo) and Sarawak. As foreseen in my communication of 8 August 1963, a Mission was established, comprising two teams, one for Sarawak and the other for Sabah (North Borneo), working under the supervision of my personal representative. The mission has now completed the inquiry assigned to it, and has reported to me.

I wish, first of all, to express my gratitude to the three Governments for the confidence they placed in me by requesting that I should undertake the task of ascertaining the wishes of the population of Sarawak and North Borneo (Sabah) prior to the establishment of Malaysia. I also wish to express my appreciation to the Government of the United Kingdom and to the authorities of the two territories for having given their agreement to the inquiry and their full co-operation to the Mission.

It was always understood that the ascertainment would be completed within a limited period of time, and my communication of 8 August noted that every effort would be made to complete the task as quickly as possible. I later informed the Governments concerned that I would endeavour to report my conclusions to them by 14 September. During the course of the inquiry, the date of 16 September 1963 was announced by the Government of the Federation of Malaya with the concurrence of the British Government, the Singapore Government and the Governments of Sabah and Sarawak, for the establishment of the Federation of Malaysia. This has led to misunderstanding, confusion, and even resentment among other parties to the Manila agreement, which could have been avoided if the date could have been fixed after my conclusions had been reached and made known.

There was no reference to a referendum or plebiscite in the request which was addressed to me. I was asked to ascertain the wishes of the people “within the context of General Assembly resolution 1541 (XV), Principle IX of the Annex, by a fresh approach” which in my opinion was necessary “to ensure complete compliance with the principle of self-determination within the requirements embodied in Principle IX,” taking into consideration certain questions relating to the recent elections. The Mission accordingly arranged for consultations with the population through the elected representatives of the people, leaders of political parties and other groups and organizations, and with all persons who were

willing to express their views, and every effort was made to ascertain the wishes of the special groups (political detainees and absentees) mentioned in the Manila Joint Statement. The Mission gathered and studied all available documents, reports and other material on the governmental institutions, political organization, electoral processes in the two territories, and other matters relevant to its terms of reference.

The Governments of the Federation of Malaya, the Republic of Indonesia and the Republic of the Philippines deemed it desirable to send observers to witness the carrying out of the task, and the Government of the United Kingdom decided that it also wished the same facility. Although I did not consider the arrangements for observers to be part of the Secretary-General's responsibility, I endeavoured to help the Governments concerned to reach agreement, and I am pleased that an understanding was finally arrived at so that observers of all the Governments concerned could be present during at least part of the inquiry. It is a matter for regret that this understanding could not have been reached earlier, so that all observers could have been present in the territories for the entire period of the inquiries and that questions of detail pertaining to the status of the observers unnecessarily delayed even further their arrival. A more congenial atmosphere would have been achieved if the necessary facilities had been granted more promptly by the Administering Authority. The Mission, however, made its records, including tape recordings of all its hearings, available for the use of the observer teams to enable them to inform themselves as fully as possible of what had occurred before their arrival.

The basic assessment which I was asked to make has broader implications than the specific questions enumerated in the request addressed to me by the three Governments. As mentioned previously, I was asked to "ascertain, prior to the establishment of the Federation of Malaysia, the wishes of the people of Sabah (North Borneo) and Sarawak within the context of General Assembly resolution 1541 (XV), Principle IX of the Annex, by a fresh approach, which in the opinion of the Secretary-General is necessary to ensure complete compliance with the principle of self-determination within the requirements embodied in Principle IX."

Concerning the integration of a non-self-governing territory with an already independent state, Principle IX provides:

"Integration should have come about in the following circumstances:

- (a) The integrating territory should have attained an advanced stage of self-government with free political institutions, so that its peoples would have the capacity to make a responsible choice through informed and democratic processes;
- (b) The integration should be the result of the freely expressed -wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed

and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes.”

I have given consideration to the circumstances in which the proposals for the Federation of Malaysia have been developed and discussed, and the possibility that people progressing through the stages of self-government may be less able to consider in an entirely free context the implications of such changes in their status, than a society which has already experienced full self-government and the determination of its own affairs. I have also been aware that the peoples of the territories are still striving for a more adequate level of educational development.

Having reflected fully on these considerations, and taking into account the framework within which the Mission’s task was performed, I have come to the conclusion that the majority of the peoples of Sabah (North Borneo) and of Sarawak, have given serious and thoughtful consideration to their future, and to the implications for them of participation in a Federation of Malaysia. I believe that the majority of them have concluded that they wish to bring their dependent status to an end and to realize their independence through freely chosen association with other peoples in their region with whom they feel ties of ethnic association with other peoples in their region with whom they feel ties of ethnic association, heritage, language, religion, culture, economic relationship, and ideals and objectives. Not all of these considerations are present in equal weight in all minds, but it is my conclusion that the majority of the peoples of the two territories, having taken them into account, wish to engage, with the peoples of the Federation of Malaya and Singapore, in an enlarged Federation of Malaysia through which they can strive together to realize the fulfilment of their destiny.

With regard to the more specific questions referred to me, my conclusions after the examination and verification reported by the Mission, are:

- (a) Malaysia has been the subject of wide-spread and intensive public debate, and was a major issue in the recent elections in the two territories;
- (b) Electoral registers were properly compiled;
- (c) The elections took place in an atmosphere free enough to enable the candidates and political parties to put their case before the electorate, and the people were able to express themselves freely by casting their votes in a polling system which provided the basic safeguards for secret balloting, and measures for the prevention and correction of abuses;
- (d) The votes were properly polled and counted;
- (e) Persons otherwise eligible to vote but who were unable to do so because of detention for political activities, or imprisonment for political offenses numbered somewhat less than 100 in Sarawak, and

even less in Sabah (North Borneo) at the time of the elections. Testimony given by this group, especially in Sarawak, indicated that they would have opposed the Federation of Malaysia if they had participated in the election. The actual votes of this group would not have been sufficient to have had a material effect on the result. The Mission has given much attention to the possible effect which the absence of these persons, some of whom were officials of the anti-Malaysia party, might have had on the campaign. The Mission considered the similar question concerning some 164 persons whose activity was restricted to some extent, but who retained the right to vote. Noting that the anti-Malaysia party scored convincing electoral victories in many of the areas to which those persons belonged, I accept the Mission's conclusion that a substantial limitation of the campaigning potential of the group opposed to the Federation of Malaysia has not occurred, so as seriously and significantly to have affected the result of the election.

(f) The Mission made special efforts to obtain reliable information regarding persons who were absent from the territories at the time of the election, particularly as a result of possible political or other intimidation. The evidence available indicated that the number of such persons, otherwise qualified to vote, did not exceed a few hundred, and that their number could not have affected the results of the election. I note that the principal officials of the party in Sarawak opposed to the Federation of Malaysia, agree with this assessment, and I accept it.

Bearing in mind the fundamental agreement of the three participating Governments in the Manila meetings, and the statement by the Republic of Indonesia and the Republic of the Philippine that they would welcome the formation of Malaysia provided that the support of the people of the territories was ascertained by me and that, in my opinion, complete compliance with the principal of self-determination within the requirements of General Assembly resolution 1541 (XV), Principal IX of the Annex, was ensured, my conclusion, based on the findings of the Mission, is that on both of these counts there is no doubt about the wishes of a sizeable majority of the peoples of these territories to join in the Federation of Malaysia.

In reaching my conclusions, I have taken account of the concern expressed with regard to the political factors resulting from the constitutional status of the territories and about influence from outside the area on the promotion of the proposed Federation. Giving these considerations their due weight, in relation to the responsibilities and obligations established in Article 73 in General Assembly resolution 1514 (XV) in respect of the territories, I am satisfied that the conclusions set forth above take cognizance of the requirements set forth in the request addressed to me on 5 August 1963 by the Foreign Ministers of the Republic of Indonesia, the Federation of Malaya and the Republic of the Philippines.

Before concluding, I would like to pay a tribute to my Personal Representative, Mr. I. Michelmore, my Deputy Representative, Mr. G. Jacenek, and to all the members of the United Nations Malaysia

Mission who accomplished a sensitive and difficult task in a relatively short period, but at the same time in a thorough and wholly adequate manner. In a sense, it was a pie that the work of the Mission had to be accomplished within certain deadlines. But I do feel that while more time might have enabled the Mission to obtain more copious documentation and other evidence, it would not have affected the conclusions to any significant extent.

From the beginning of this year I have been observing the rising tension in South East Asia on account of the differences of opinion among the countries most directly interested in the Malaysia issue. It was in the hope that some form of United Nations involvement might help to reduce tension that I agreed to respond positively to the request made by the three Manila powers. I would hope that the exercise in which my colleagues and I have been involved in this regard will have this effect, and that the coming into being of Malaysia will not prove to be a continuing source of friction and tension in the area.

The emergence of dependent territories by a process of self-determination to the status of self-government, either as independent sovereign States or as autonomous components of larger units, has always been one of the purposes of the Charter and the objectives of the United Nations. Whatever the origins of the proposal of Malaysia may have been, it seems to me in the light actual events, including the present exercise, that we have witnessed in Sarawak and North Borneo the same process leading to self-government. I fervently hope that the people of these territories will achieve progress and prosperity, and find their fulfilment as component States of Malaysia.

Source: The Philippine Claim to a Portion of North Borneo



Appendix IV

Letter of Francis B. Harrison to Vice President and Secretary of Foreign Affairs Elpidio Quirino*

Office of the President of the Philippines

Manila, February 27, 1947

Honorable Elpidio Quirino
Vice-President and concurrently
Secretary of Foreign Affairs

My dear Mr. Secretary;

I have the honor to submit herewith the portfolio of papers prepared under your direction, concerning the present status of those territories in North Borneo over which, since 1714, the Sultanate of Sulu has held sovereignty.

In an earlier memorandum dated September 26, 1946, and now in this file, I advised the Philippine Government to protest to the Government of Great Britain against the latter's announcement of July 16, 1946, that the State of North Borneo had become a Crown Colony of the British Monarchy. This Annexation took place just twelve days after the Inauguration of the Republic of the Philippines, and was done in derogation of the rights of the Sultanate of Sulu.

Meanwhile, further important evidence has come to us from the Philippine Embassy in Washington, where Mr. Eduardo Quintero, searching in the National Archives, found a photostatic copy of the document dated January 22, 1878, upon which the British Government bases their claim to all the lands tributary to the Sultanate of Sulu. This was obtained in 1940 by the United States Department of State from the British Government, and is hereto annexed. The second copy of this document had been held by the Sultan of Sulu, and, as is alleged, was stolen from him during a visit he made to Singapore many years ago. This story is to be found in the newspaper article in the Chicago Daily Tribune of October 14, 1945, written by Mr. Aleko Lilius in an authenticated interview with the late Sultan of Sulu.

The photostatic copy of this document, furnished by the British Government has been translated at my request by Mr. Harold Conklin, assistant to Professor H. Otley Beyer in the University of the Philippines. Mr. Conklin is a qualified scholar in the Malay language and in the Arabic script in which language and writing this document was written. This translation now follows:

“Signature of Sultan

Mohammed Jamalul Alam

Official seal of the
Sultan of Sulu

GRANT BY THE SULTAN OF SULU OF A PERMANENT LEASE COVERING HIS
LANDS AND TERRITORIES ON THE ISLAND OF BORNEO:

Dated January 22nd, 1878.

We, Sri Paduka Maulana Al Sultan MOHAMMED JAMALUL ALAM, Son of Sri Paduka Marhum Al Sultan MUHAMMED PULALUN, Sultan of Sulu and all dependencies thereof, on behalf of ourselves and for our heirs and successors, and with the expressed desire of all Datus in common agreement, do hereby desire to lease, of our own free will and satisfaction, to Gustavus Baron de Overbeck of Hongkong, and to Alfred Dent, Esquire, of London, who act as representatives of a British Company, together with their heirs, associates, successors, and assigns, forever and until the end of time, all rights and powers which we possess over all territories and lands tributary to us on the mainland of the Island of Borneo, commencing from the Pandassan River on the west, and thence along the whole east coast as far as the Sibuku River on the south, and including all territories, on the Pandassan River and in the coastal area, known as Paitan, Sugut, Banggai, Labuk, Sandakan, China-batangan, Mumiang, and all other territories and coastal lands to the south, bordering on Darvel Bay, and as far as the Sibuku River, together with all the islands which lie within nine miles from the coast.

In consideration of this (territorial) lease, the honorable Gustavus Baron de Overbeck and Alfred Dent, Esquire, promise to pay to His Highness Maulana Sultan Mohammed Jamalul Alam, and to his heirs and successors, the sum of five thousand dollars annually, to be paid each and every year.

The above-mentioned territories are from today truly leased to Mr. Gustavus Baron de Overbeck and to Alfred Dent, Esquire, as already said, together with their heirs, their associates (company), and their successors or assigns, for as long as they choose or desire to use them; but the rights and powers hereby leased shall not be transferred to another nation, or a company of other nationality, without the consent of Their Majesties' Government.

Should there be any dispute, or reviving of old grievances of any kind, between us, and our heirs and successors, with Mr. Gustavus Baron de Overbeck or his Company, then the matter will be brought for consideration or judgement to their Majesties' Consul-General in Brunei.

Moreover, if His Highness Maulana Al Sultan Mohammed Jamalul Alam, and his heirs and successors, become involved in any trouble or difficulties hereafter, the said honorable Mr. Gustavus Baron de Overbeck and his Company promise to give aid and advice to us within the extent of their ability.

This treaty is written in Sulu, at the Palace of the Sultan Mohammed Jamalul Alam, on the 19th day of the month of Muharam, A.H. 1295; that is on the 22nd day of the month of January, year 1878.

Seal of the Sultan

Jamalul Alam

Witness to seal and signature:

(Sgd.) **W.H. Treacher,**

H. B. M. Acting Consul General in Borneo

A true translation of the attached original document written in Malay language in Arabic characters.

(Sgd.) **Harold C. Conklin**

In my opinion, the most important features of the above document are:

(1) This is distinctly a lease, and not a cession of sovereignty as is claimed by the latter-day British officials;

(2) It is a permanent lease on annual rental of five thousand (Mexican) dollars, and was not limited in duration as was maintained by many of the present day Joloano Moros. The rental has not been paid since the year 1939. A similar lease of his territories was made by the Sultan of Brunei in 1865 to American Consul Charles Lee Moses, but that was limited to a fixed period, though in terms was renewable. Consul Moses always referred to his title deed as a lease, which, failing support by the Department of State, was later transferred to Baron Overbeck and Mr. Dent. If we could secure a copy of the original document by which the Sultan of Borneo in 1841 established Mr. (later Sir James) Brooke as the Rajah of Sarawak we should probably find this also was a lease and was the prototype of this whole series of transactions;

(3) The Sultan of Sulu, in the above photostat of his lease of 1878 to Baron Overbeck and Alfred Dent professes explicitly that he is acting "on behalf of ourselves and for our heirs and successors and with the expressed desire of all Datus in Common Agreement." But we note that none of the Datus is mentioned by name in this instrument, nor does the signature of any of the Datus or of any members of the Council of State appear on the document. This is a most significant omission, for one of the other of these courses was required by their customary law.

For the full implication of this significant omission, please see the annexed "Brief Memorandum on the Government of the Sultanate of Sulu and Powers of the Sultan, During the 19th Century,"* dated

December 8, 1946, and prepared at my request by Professor H. Otley Beyer of the University of the Philippines.

Professor Beyer there states that: "In Sulu the government is an oligarchy-vested in the Sultan and datus, in the Ruma Bechara assembled."

We have thus no evidence that the members of the Ruma Bechara were present or consented to the signing by the Sultan of the lease of January 22, 1878, to Overbeck and Dent. This fact utterly impugns the validity of this transaction and raises serious doubts as to the whole matter.

My opinion then, upon the document offered us in photostatic reproduction by the British Government as a basis of a present claim to sovereignty over the territories in question, is that this title is of an obscure and doubtful origin and is without vigor because it is not in compliance with Moro law.

It should be noted that the translation of the above given document is in quite different language from the copy furnished by Mr. Justice Mackaskie of the High Court of North Borneo on December 18, 1939, and upon which this Judge bases his decision. I quote his language from a photostatic copy of the decision which is attached to these papers:

"The translation of the main deed of *Cession* of 1878 as given in 'Treaties and Engagement affecting the MalayStates and Borneo', by Maxwell and Gibson is as follows:

"Grant by Sultan of Sulu of Territories and Lands on the mainland of the Island of Borneo, Dated 22nd January, 1878.

"We Sri Paduka Maulana Al Sultan Mohammed Jamal Al Alam Bin Sri Paduka Al Marhom Al Sultan Mohamet Fathlon Sultan of Sulu and the dependencies thereof on behalf of ourselves our heirs and successors and with the consent and advice of the Datoos in Council assembled hereby grant and cede of our own free and sovereign will to Gustavus Baron de Overbeck of Hongkong and Alfred Dent, Esquire of London as representative of a British Company x x x x."

Upon examination of our own translation of the original document (in photostat) it will be seen that Maxwell and Gibson, the English authors on whose text the decision of Mr. Justice Mackaskie was based, have changed the language so as to make the document a grant cession instead of lease, as it really was, and as the word "padjak" in the original really means. In view of this vital divergence from the original text, I do not find myself able to give full faith and credit to the opinion of Mr. Justice Mackaskie in the famous case in 1939 in Sandakan.

A second agreement was signed by the same Sultan of Sulu on the same date, January 22, 1878, of which we have not the original text but have received from the Department of State in Washington a

photostat of a typewritten document in English, entitled: "Commission from the Sultan of Sulu appointing Baron de Overbeck Datu Bandahara and Rajah of Sandakan." The appointment is said to be in almost identical language with the commission of Rajah or Governor of the Brunei lands by the Sultan thereof in 1865 to Consul Charles Lee Moses. The delegation of powers to the Rajah or Governor of Sandakan is very complete, and all persons are called upon "to respect his authority therein *as our own*."

This second agreement was evidently an appointment as Governor or Rajah under the feudal system which then still prevailed in the Mohammedan Malay sovereignty.

(4) The very special pleading of Mr. Justice Mackaskie in his decision in the High Court of Sandakan on December 18, 1939, has been, no doubt, the basis upon which the British government acted in absorbing these territories as a Crown Colony on July 16, 1946. This decision is discussed at some length in my previous memorandum of September 26, 1946. I shall take up again one point made in that paper, namely the argument of Justice Mackaskie that upon death in 1936 of Sultan Jamalul Kiram II, President Quezon did not "recognize" any new Sultan of Sulu in response to enquiries from the North Borneo Government. I wish to reiterate my previous statement that so far as the Sultanate of Sulu was concerned, President Quezon had no legal power to abolish the Sultanate—that could have been done only by the Moros themselves, either by positive action of their own, or by neglect to elect a new Sultan—but promptly thereafter two Sultans of Sulu were chosen by rival factions. The only other way in which an ancient State like the Sultanate of Sulu could have been abolished would have been by force, as, for example by armed conquest, and that determination of the question was, of course, lacking in the premises.

As to the question as to what should now be done by the Government of the Republic of the Philippines in this matter, I wish to enter here the opinion expressed by Dr. Beyer on page 10 of his memorandum of December 8, 1946 (hereto annexed) as follows:

"The question as to whether the present Government of the Republic of the Philippines should take any definite action in the way of officially recognizing the existing Sultan of Sulu is a matter of public policy on which I have no desire to make specific recommendation. In the interest of the peace and welfare of the numerous Mohammedan citizens of the Sulu Archipelago, however, I believe that it is a matter that should sooner or later receive serious consideration from the President and his Cabinet with a view to arriving at some just solution of this vexatious question."

Your Government has honored me with a request for an opinion on these matters, and I recommend that the Sultanate of Sulu be advised to eliminate the existing anomaly of having two rival Sultans, and that they elect only one legal Sultan, and that the latter, whoever he may be, should, as promptly as may be, request the Government of the Republic of the Philippines on behalf of the Sultanate to protest

the absorption of their sovereign rights in North Borneo territories into a British Crown Colony, and if met with a refusal, on the part of the British Government, to reconsider this action, that the whole matter be laid before the United Nations Organization for adjustment.

In conclusion, I draw attention to the parallel situation in the adjoining States of Sarawak which was taken by the British Government as a Crown Colony a few weeks before similar action on British North Borneo. The negotiations for Sarawak were made by its recent Rajah, the grand nephew of the first Brooke who had been commissioned as Rajah or Governor of Sarawak by the Sultan of Brunei in 1841. In 1888, Sarawak was "recognized" by the British Government as an independent country under the protection of Great Britain, still under a Rajah Brooke. The Third Rajah Brooke, for certain compensation, recently ceded his country to England as a Crown Colony. The nephew of Rajah Brooke, his successor in line, Mr. Anthony Brooke, has made protest against the destruction of the independence of his country; has recently (in December 1946) been refused admission to the new Crown Colony of Sarawak; has aroused support both in Sarawak and in the British Parliament, and he now proposes to lay the whole matter before the United Nations Organization.

In reviewing the subject of the claims of the Sultanate of Sulu to their ancient patrimony in North Borneo, one must come to the conclusion that the action of the British Government in announcing on the sixteenth of July, just twelve days after the inauguration of the Republic of the Philippines, a step taken by the British Government unilaterally, and without any special notice to the Sultanate of Sulu, nor consideration of their legal rights, was an act of political aggression which should promptly be repudiated by the Government of the Republic of the Philippines.

The proposal to lay this case before the United Nations should bring the whole matter before the bar of world opinion. Never, in history, has there been given any people such an opportunity as exists today, to secure justice by an appeal to the enlightened conscience of mankind.

(Signed) FRANCIS B. HARRISON

Adviser to the President

*Borneo Records, Department of Foreign Affairs, Manila. Mr. Harrison was a former United States Governor-General of the Philippine Islands. He served as Special Adviser on Foreign Affairs to President Manuel A. Roxas.

**Source: Letter of Governor Harrison to Vice President Quirino dated February 27, 1947,
Department of Foreign Affairs, Republic of the Philippines**