INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN

(INDONESIA/MALAYSIA)

APPLICATION BY THE PHILIPPINES
FOR PERMISSION TO INTERVENE

JUDGMENT OF 23 OCTOBER 2001

2001

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE À LA SOUVERAINETÉ SUR PULAU LIGITAN ET PULAU SIPADAN

(INDONÉSIE/MALAISIE)

REQUÊTE DES PHILIPPINES
À FIN D'INTERVENTION

ARRÊT DU 23 OCTOBRE 2001

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CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN

(INDONESIA/MALAYSIA)

APPLICATION BY THE PHILIPPINES FOR PERMISSION TO INTERVENE

Intervention under Article 62 of the Statute.

Article 81, paragraph 1, of the Rules of Court — Obligation to file the Application for permission to intervene "as soon as possible, and not later than the closure of the written pleadings" — Application submitted after the filing of the Replies of the Parties but before the Parties had informed the Court of their agreement not to file Rejoinders, notwithstanding the possibility of so doing provided for in the Special Agreement — Whether Application for permission to intervene was submitted "as soon as possible" and "not later than the closure of the written proceedings".

Article 81, paragraph 3, of the Rules of Court — Absence of documents annexed in support of the Application for permission to intervene.

Article 62 of the Statute and Article 81, paragraph 2 (c), *of the Rules of Court — Jurisdictional link between the State seeking to intervene and the Parties to the case — Whether and in what circumstances such a jurisdictional link is required for intervention under Article 62.*

Article 62 of the Statute and Article 81, paragraph 2 (a), *of the Rules of Court — Existence of an interest of a legal nature which may be affected by a decision of the Court — Case concerning sovereignty over two islands — State seeking to intervene not claiming sovereignty over those islands but contending that certain reasoning in the Judgment of the Court may affect that State's claim to other territory — Whether the interest of a legal nature of the State seeking to intervene is limited to the* dispositif *alone of the judgment that the Court will give in the case or whether it includes also the reasoning in the judgment — Proof of the existence of an interest of a legal nature: burden and extent — Whether denial of access to the documents in the case to State seeking to intervene prevented it from identifying its legal interest — Legal instruments relied upon by the Parties to the main proceedings — Legal instruments relied*

upon by the State seeking to intervene — Effect on the claim of the State seeking to intervene of these instruments being taken into account by the Court — Whether in the circumstances the State seeking to intervene discharged its burden of demonstrating the existence of an interest of a legal nature that may be affected in relation to these instruments.

Article 81, paragraph 2 (b), *of the Rules of Court — "Precise object of the intervention" — Stated object of intervention (1) to preserve and safeguard the historical and legal rights of the State seeking to intervene that may be affected by the decision of the Court, (2) to inform the Court of the nature and extent of those rights, and (3) to appreciate more fully the indispensable role of the Court in comprehensive conflict prevention.*

JUDGMENT

Present: *President* GUILLAUME; *Vice-President* SHI; *Judges* ODA, RANJEVA, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL; *Judges* ad hoc WEERAMANTRY, FRANCK; *Registrar* COUVREUR.

In the case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan,

between

the Republic of Indonesia,

represented by

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

as Agent;

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

as Co-Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member of the International Law Commission,

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

as Counsel and Advocates;

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

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

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

as Counsel;

Mr. Hasyim Saleh, Deputy Chief of Mission, Embassy of the Republic of Indonesia in the Netherlands,
Mr. Donnilo Anwar, Director for Treaties and Legal Affairs, Department of Foreign Affairs,
Major-General Djokomulono, Territorial Assistant to Chief of Staff for Territorial Affairs, Indonesian Armed Forces Headquarters,

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

Mr. Kria Fahmi Pasaribu, Minister Counsellor, Embassy of the Republic of Indonesia in the Netherlands,
Mr. Eddy Pratomo, Head of Sub-Directorate for Territorial Treaties, Department of Foreign Affairs,
Mr. Abdul Kadir Jaelani, Officer, Embassy of the Republic of Indonesia in the Netherlands,

as Advisers,

and

Malaysia,

represented by

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

as Agent;

H.E. Ms Noor Farida Ariffin, Ambassador of Malaysia to the Kingdom of the Netherlands,

as Co-Agent;

Sir Elihu Lauterpacht C.B.E., Q.C., Honorary Professor of International Law, University of Cambridge, Member of the Institut de droit international,
Mr. Jean-Pierre Cot, Emeritus Professor, Université de Paris I, Advocate, Paris and Brussels Bars,
Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, Member of the International Law Commission,

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

as Counsel and Advocates;

Datuk Heliliah Yusof, Solicitor General of Malaysia,
Mrs. Halima Hj. Nawab Khan, Acting State Attorney-General of Sabah,

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

as Counsel;

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

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

as Advisers;

Mr. Zulkifli Adnan, Principal Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,
Mr. Raja Aznam Nazrin, Counsellor of the Embassy of Malaysia in the Netherlands,
Mr. Nik Aziz Nik Yahya, First Secretary of the Embassy of Malaysia in the Philippines,
Mr. Tan Ah Bah, Principal Assistant Director of Survey, Boundary Division, Department of Survey and Mapping,

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

as administrative staff;

on the Application for permission to intervene by the Republic of the Philippines,

represented by

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

as Agent;

Mr. Merlin M. Magallona, Under-Secretary of Foreign Affairs,

as Co-Agent and Counsel;

Mr. W. Michael Reisman, Myres S. McDougal Professor of International Law of Yale Law School, associé de l'Institut de droit international,

as Counsel and Advocate;

Mr. Peter Payoyo, University of the Philippines,

as Counsel;

Mr. Alberto A. Encomienda, Secretary-General, Maritime and Ocean Affairs Center, Department of Foreign Affairs,
Mr. Alejandro B. Mosquera, Assistant Secretary, Office of Legal Affairs, Department of Foreign Affairs,
Mr. George A. Eduvala, Attaché, Embassy of the Republic of the Philippines in the Netherlands,
Mr. Eduardo M. R. Meñez, Second Secretary, Embassy of the Republic of the Philippines in the Netherlands,
Mr. Igor G. Bailen, Acting Director, Office of Legal Affairs, Department of Foreign Affairs,

as Advisers,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. By joint letter dated 30 September 1998, filed in the Registry of the Court on 2 November 1998, the Ministers for Foreign Affairs of the Republic of Indonesia (hereinafter "Indonesia") and of Malaysia informed the Registrar of a Special Agreement between the two States, which was signed in Kuala Lumpur on 31 May 1997 and entered into force on 14 May 1998, the date of the exchange of instruments of ratification.

In accordance with the aforementioned Special Agreement, the Parties request the Court to

> "determine on the basis of the treaties, agreements and any other evidence furnished by the Parties, whether sovereignty over Pulau Ligitan and Pulau Sipadan belongs to the Republic of Indonesia or to Malaysia";

in paragraph 2 of Article 3 of the Special Agreement, the Parties agreed that the written pleadings should consist of the following documents:

> "*(a)* a Memorial presented simultaneously by each of the Parties not later than 12 months after the notification of this Special Agreement to the Registry of the Court;
> *(b)* a Counter-Memorial presented by each of the Parties not later than 4 months after the date on which each has received the certified copy of the Memorial of the other Party;
> *(c)* a Reply presented by each of the Parties not later than 4 months after the date on which each has received the certified copy of the Counter-Memorial of the other Party; and
> *(d)* a Rejoinder, if the Parties so agree or if the Court decides ex officio or at the request of one of the Parties that this part of the proceedings is necessary and the Court authorizes or prescribes the presentation of a Rejoinder".

2. Pursuant to Article 40, paragraph 3, of the Statute of the Court, copies of the joint notification and of the Special Agreement were transmitted by the Registrar to the Secretary-General of the United Nations, the Members of the United Nations and other States entitled to appear before the Court.

3. By an Order dated 10 November 1998, the Court, having regard to the provisions of the Special Agreement concerning the written pleadings, fixed 2 November 1999 and 2 March 2000 as the respective time-limits for the filing by each of the Parties of a Memorial and then a Counter-Memorial. The Memorials were filed within the prescribed time-limit. By joint letter of 18 August 1999, the Parties asked the Court to extend to 2 July 2000 the time-limit for the filing of their Counter-Memorials. By an Order dated 14 September 1999, the Court agreed to that request. By joint letter of 8 May 2000, the Parties requested the Court for a further extension of one month to the time-limit for the filing of their Counter-Memorials. By Order of 11 May 2000, the President of the Court also agreed to that request. The Parties' Counter-Memorials were filed within the time-limit as thus extended.

4. Under the terms of the Special Agreement, the two Parties were to file a Reply not later than four months after the date on which each had received the certified copy of the Counter-Memorial of the other Party. By joint letter dated 14 October 2000, the Parties asked the Court to extend this time-limit by three months. By an Order dated 19 October 2000, the President of the Court fixed

2 March 2001 as the time-limit for the filing by each of the Parties of a Reply. The Replies were filed within the prescribed time-limit. In view of the fact that the Special Agreement provided for the possible filing of a fourth pleading by each of the Parties, the latter informed the Court by joint letter of 28 March 2001 that they did not wish to produce any further pleadings. Nor did the Court itself ask for such pleadings.

5. Since the Court did not include upon the Bench a judge of Indonesian or Malaysian nationality, both Parties exercised their right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case: Indonesia chose Mr. Mohamed Shahabuddeen and Malaysia Mr. Christopher Gregory Weeramantry.

6. By letter of 22 February 2001, the Government of the Republic of the Philippines (hereinafter "the Philippines"), invoking Article 53, paragraph 1, of the Rules of Court, asked the Court to furnish it with copies of the pleadings and documents annexed which had been filed by the Parties. Pursuant to that provision, the Court, having ascertained the views of the Parties, decided that it was not appropriate, in the circumstances, to grant the Philippine request. The Registrar communicated that decision to the Philippines, Indonesia and Malaysia by letters dated 15 March 2001.

7. On 13 March 2001, the Philippines filed in the Registry of the Court an Application for permission to intervene in the case, invoking Article 62 of the Statute of the Court. In that Application, the Philippines explained that it considered its "request for copies of the pleadings and documents annexed as an act separate and distinct from [that] Application" and that the latter "does not affect, and is independent from, the earlier submissions made by the Philippine Government". According to the Application, the Philippine interest of a legal nature which may be affected by a decision in the present case "is solely and exclusively addressed to the treaties, agreements and other evidence furnished by Parties and appreciated by the Court which have a direct or indirect bearing on the matter of the legal status of North Borneo". The Philippines also indicated that the object of the intervention requested was,

> "*(a)* First, to preserve and safeguard the historical and legal rights of the Government of the Republic of the Philippines arising from its claim to dominion and sovereignty over the territory of North Borneo, to the extent that these rights are affected, or may be affected, by a determination of the Court of the question of sovereignty over Pulau Ligitan and Pulau Sipadan.
>
> *(b)* Second, to intervene in the proceedings in order to inform the Honourable Court of the nature and extent of the historical and legal rights of the Republic of the Philippines which may be affected by the Court's decision.
>
> *(c)* Third, to appreciate more fully the indispensable role of the Honourable Court in comprehensive conflict prevention and not merely for the resolution of legal disputes."

The Philippines further stated in its Application that it did not seek to become a party to the dispute before the Court concerning sovereignty over Pulau Ligitan and Pulau Sipadan, and that the Application "is based solely on Article 62

of the Statute, which does not require a separate title of jurisdiction as a requirement for this Application to prosper".

8. On 14 March 2001, pursuant to Article 83, paragraph 1, of the Rules of Court, the Registrar transmitted copies of the Application for permission to intervene to the two Parties in the case, Indonesia and Malaysia, as well as to the United Nations Secretary-General, the Members of the United Nations and other States entitled to appear before the Court. At the same time, both Parties to the case were invited to furnish, by 2 May 2001 at the latest, their written observations on the Application for permission to intervene; each of them submitted such observations within the time-limit fixed for that purpose. Those observations were exchanged between the Parties and transmitted to the Philippines. In their written observations, both Indonesia and Malaysia objected to the Application for permission to intervene submitted by the Philippines. Accordingly, by letters of 11 May 2001 the Parties and the Philippine Government were notified that the Court would hold public sittings pursuant to Article 84, paragraph 2, of the Rules of Court to hear the views of the Philippines, the State seeking to intervene, and those of the Parties in the case.

9. Mr. Shahabuddeen, judge *ad hoc*, having resigned his duties on 20 March 2001, Indonesia informed the Court, by letter received in the Registry on 17 May 2001, that its Government had chosen Mr. Thomas Franck to replace him.

10. The Court, after ascertaining the views of the Parties, decided that the written observations of both Parties on the Application for permission to intervene, and the documents annexed thereto, would be made accessible to the public on the opening of the oral proceedings.

11. At the public sittings held on 25, 26, 28 and 29 June 2001, the Court heard oral statements and replies from the following in regard to the question whether the Philippine Application for permission to intervene should be granted:

For the Philippines: H.E. Mr. Eloy R. Bello III,
Mr. Michael Reisman,
Mr. Merlin M. Magallona.

For Indonesia: H.E. Mr. Hassan Wirajuda,
Mr. Alain Pellet,
Mr. Rodman R. Bundy.

For Malaysia: H.E. Mr. Tan Sri Abdul Kadir Mohamad,
Mr. Jean-Pierre Cot,
Sir Elihu Lauterpacht,
Mr. James Crawford.

*

12. In its Application for permission to intervene, the Government of the Philippines stated in conclusion that it

> "requests the Honourable Court to recognize the propriety and validity of this Application for permission to intervene in the proceedings between the Government of the Republic of Indonesia and the Government of Malaysia, to grant the same, and to participate in those proceedings in accordance with Article 85 of the Rules of Court" (para. 8).

In its written observations on the Application by the Philippines for permission to intervene, Indonesia concluded that "the Philippines ha[d] not demonstrated that it has an interest of a legal nature which may be affected by a decision in the case and that the Application should, accordingly, be denied" (para. 17).

In its written observations on the Application by the Philippines for permission to intervene, Malaysia concluded as follows: "not merely has the Philippines no right to intervene, it has no claim to make. Malaysia urges the Court to reject the request." (Para. 50.)

13. At the oral proceedings, it was stated by way of conclusion that:

On behalf of the Government of the Philippines,

at the hearing of 28 June 2001:

> "The Government of the Republic of the Philippines seeks the remedies provided for in Article 85 of the Rules of Court, namely,
>
> — paragraph 1: 'the intervening State shall be supplied with copies of the pleadings and documents annexed and shall be entitled to submit a written statement within a time-limit to be fixed by the Court'; and
> — paragraph 3: 'the intervening State shall be entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention'."

On behalf of the Government of Indonesia,

at the hearing of 29 June 2001:

> "The Republic of Indonesia respectfully submits that the Republic of the Philippines should not be granted the right to intervene in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*."

On behalf of the Government of Malaysia,

at the hearing of 29 June 2001: "[Malaysia requests] that the Court should reject the Philippines Application".

* * *

14. The Philippine Application for permission to intervene relates to the case, brought to the Court by notification of the Special Agreement concluded on 31 May 1997 between Indonesia and Malaysia, concerning sovereignty over two islands, Pulau Ligitan and Pulau Sipadan (see paragraph 1 above). The intervention which the Philippines seeks to make is linked to its claim of sovereignty in North Borneo (see paragraph 7 above).

15. In its Application, the Philippines invokes Article 62 of the Statute of the Court, which provides:

> "1. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.
>
> 2. It shall be for the Court to decide upon this request."

16. Paragraph 1 of Article 81 of the Rules of Court provides that the

application for permission to intervene shall "be filed as soon as possible, and not later than the closure of the written proceedings" and that "[i]n exceptional circumstances, an application submitted at a later stage may however be admitted".

Article 81, paragraph 2, also provides that the State seeking to intervene must specify the case to which its application relates, and set out:

> "*(a)* the interest of a legal nature which the State applying to intervene considers may be affected by the decision in that case;
> *(b)* the precise object of the intervention;
> *(c)* any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case".

Paragraph 3 of Article 81 further provides that an application for permission to intervene "shall contain a list of the documents in support, which documents shall be attached".

17. The Philippines maintains that its Application to intervene satisfies both the requirements of Article 62 of the Statute of the Court and those of Article 81 of the Rules of Court. On the other hand, both Indonesia and Malaysia oppose the Application by the Philippines on the grounds that the various requirements have not been met.

* * *

18. The Court will initially consider the contention that the Application to intervene should not be granted, first, because of its late submission by the Philippines, and secondly, because of the failure of the Philippines to annex documentary or other evidence in support of the Application.

* *

19. Both Indonesia and Malaysia argue that the Philippine Application should not be granted because of its "untimely nature".

Indonesia maintains that:

> "[i]n view of the fact that the Parties do not consider that there is any need for further written submissions on the merits of the case and that the Philippines' Application was filed after the final submissions of the Parties, the Application should be dismissed as untimely pursuant to Article 81 (1) of the Rules of Court".

It considers that the Philippines "has failed to demonstrate that any . . . exceptional circumstances exist justifying the filing of its Application at such a late stage of the proceedings", and concludes that:

> "[t]o admit the Application at this stage of the proceedings would inevitably entail a significant delay in the case being heard by the

> Court to the prejudice of the Parties. In these circumstances, Indonesia submits that the Philippines' Application should be dismissed as untimely."

At the hearings, Malaysia associated itself in the following terms with the objection in regard to the alleged procedural delay raised by Indonesia: "That issue has been fully dealt with by Indonesia. We agree with what they have said; we simply feel no need to add to it."

For its part, the Philippines argues that "the fact is that not only is the Philippines within all the time-limits, it could not, as a logical and practical matter, have submitted its request any sooner". The Philippines emphasizes that:

> "[i]n the nature of the case, the Philippines could hardly have requested permission to intervene under Article 62 before it tried to secure the documents. And it was only when it became apparent that the request for the documents was not going to be granted, that the Philippines requested permission to intervene."

20. The Court will consider this objection *ratione temporis* by applying the relevant requirements of its Rules dealing with the intervention procedure to the factual circumstances of the case.

Article 81, paragraph 1, of the Rules of Court, referred to above (see paragraph 16), stipulates that:

> "[a]n application for permission to intervene under the terms of Article 62 of the Statute, . . . shall be filed as soon as possible, and not later than the closure of the written proceedings. In exceptional circumstances, an application submitted at a later stage may however be admitted."

The Court recalls that the Special Agreement between Indonesia and Malaysia was registered with the United Nations on 29 July 1998 and notified to the Court on 2 November 1998. Pursuant to Article 40, paragraph 3, of the Statute of the Court and Article 42 of the Rules of Court, copies of the notification and of the Special Agreement were transmitted to all the Members of the United Nations and other States entitled to appear before the Court (see paragraph 2 above). Thus, the Philippines had been aware that the Court had been seised of the dispute between Indonesia and Malaysia for more than two years before it filed its Application to intervene in the proceedings under Article 62 of the Statute. By the time of the filing of the Application, 13 March 2001, the Parties had already completed three rounds of written pleadings as provided for as mandatory in the Special Agreement — Memorials, Counter-Memorials and Replies — their time-limits being a matter of public knowledge. Moreover, the Agent for the Philippines stated during the hearings that his Government "was conscious of the fact that *after* 2 March 2001, Indonesia and Malaysia might no longer consider

the need to submit a final round of pleadings as contemplated in their Special Agreement".

21. Given these circumstances, the time chosen for the filing of the Application by the Philippines can hardly be seen as meeting the requirement that it be filed "as soon as possible" as contemplated in Article 81, paragraph 1, of the Rules of Court. This requirement which, although when taken on its own might be regarded as not sufficiently specific, is nevertheless essential for an orderly and expeditious progress of the procedure before the Court. In view of the incidental character of intervention proceedings, it emphasizes the need to intervene before the principal proceedings have reached too advanced a stage. In one of the recent cases, dealing with another type of incidental proceeding the Court observed that: "the sound administration of justice requires that a request for the indication of provisional measures . . . be submitted in good time" (*LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (1)*, p. 14, para. 19). The same applies to an application for permission to intervene, and indeed even more so, given that an express provision to that effect is included in Article 81, paragraph 1, of the Rules of Court.

22. As to the argument of the Philippines that the delay in the filing of its Application for permission to intervene was caused by its wish first to secure access to the pleadings of the Parties, the Court does not find anything in its Rules or practice to support the view that there exists an inextricable link between the two procedures or, for that matter, that the requirement of the timeliness of the Application for permission to intervene may be made conditional on whether or not the State seeking to intervene is granted access to the pleadings. Furthermore, the Philippine argument is undermined by the fact that the Philippines asked the Court to furnish it with copies of the pleadings and other documents of the Parties only on 22 February 2001, that is less than ten days before the completion of the last compulsory round of written pleadings. It is not unusual in the practice of the Court that in reliance on Article 53, paragraph 1, of its Rules, States entitled to appear before the Court ask to be furnished with copies of the pleadings of the Parties at an early stage of the written proceedings (see, for example, case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 5, para. 4; case concerning *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 5, para. 4).

23. The Court notes, however, that despite the filing of the Application at a late stage in the proceedings, which does not accord with the stipulation of a general character contained in Article 81, paragraph 1, of the Rules requiring that "[a]n application for permission to intervene . . . shall be filed as soon as possible", the Philippines cannot be held to be in violation of the requirement of the same Article, which establishes a

specific deadline for an application for permission to intervene, namely "not later than the closure of the written proceedings".

24. It will be recalled that the Special Agreement provided for the possibility of one more round of written pleadings — the exchange of Rejoinders — "if the Parties so agree or if the Court decides so ex officio or at the request of one of the Parties". It was only on 28 March 2001 that the Parties notified the Court by joint letter "that [their] Governments . . . ha[d] agreed that it is not necessary to exchange Rejoinders".

Thus, although the third round of written pleadings terminated on 2 March 2001, neither the Court nor third States could know on the date of the filing of the Philippine Application whether the written proceedings had indeed come to an end. In any case, the Court could not have "closed" them before it had been notified of the views of the Parties concerning a fourth round of pleadings contemplated by Article 3, paragraph 2 *(d)*, of the Special Agreement. Even after 28 March 2001, in conformity with the same provision of the Special Agreement, the Court itself could ex officio "authoriz[e] or prescrib[e] the presentation of a Rejoinder", which the Court did not do.

25. For these reasons, the filing of the Philippine Application on 13 March 2001 cannot be viewed as made after the closure of the written proceedings and remained within the specific time-limit prescribed by Article 81, paragraph 1, of the Rules of Court.

In somewhat similar circumstances, dealing with the Nicaraguan Application for permission to intervene in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, a Chamber of the Court found that, since the Special Agreement included a provision for a possible further exchange of pleadings, even when the Replies of the Parties had been filed, "the date of the closure of the written proceedings, within the meaning of Article 81, paragraph 1, of the Rules of Court, would remain still to be finally determined" (*I.C.J. Reports 1990*, p. 98, para. 12). The Court had pronounced itself in similar terms some ten years earlier in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment* (*I.C.J. Reports 1981*, p. 6, para. 5), although in the latter proceedings the question of timeliness was not in issue.

26. The Court therefore concludes that it cannot uphold the objection raised by Indonesia and Malaysia based on the alleged untimely filing of the Philippine Application.

* *

27. Article 81, paragraph 3, of the Rules of Court provides that an application for permission to intervene "shall contain a list of documents in support, which documents shall be attached". In relation to this requirement, Indonesia argues in its written observations that

"[i]n so far as it is claimed that the Philippines' request is directed to safeguarding its historical and legal rights over the territory of North Borneo, such an alleged interest is unsupported by any documentary or other evidence contrary to the requirements of Article 81 (3) of the Rules of Court".

For its part, Malaysia submitted no argument on this point.

28. The Philippines states that the fact that it has not annexed a list of documents in support of its Application does not concern the question of the admissibility of the Application, but rather that of evidence. It maintains that it was left with only two options: either "to try to document and argue [its] entire case for North Borneo, which would be impermissible and would be an affront to the Court, and would, [it] believe[s], properly be rejected by the Court" or "to decide not to attach documents, since [it] could not know which ones would be relevant to the pending case", with the risk that, in the latter case, one of the Parties would then complain about the failure to annex documents.

29. The Court confines itself to observing in this regard that, while Article 81, paragraph 3, of the Rules of Court indeed provides that the application shall contain a list of any documents in support, there is no requirement that the State seeking to intervene necessarily attach any documents to its application in support. It is only where such documents have in fact been attached to the said application that a list thereof must be included. A Chamber of the Court took care to emphasize, "it is for a State seeking to intervene to demonstrate convincingly what it asserts, and thus to bear the burden of proof" (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 117, para. 61). The Court considers, however, that the choice of the means whereby the State wishing to intervene seeks to prove its assertions lies in the latter's sole discretion. In the Court's view, paragraph 3 of Article 81 of its Rules has the same purpose, *mutatis mutandis*, as paragraph 3 of Article 50 of the said Rules, which provides that "[a] list of all documents annexed to a pleading shall be furnished at the time the pleading is filed". It follows that the Philippine Application for permission to intervene cannot be rejected on the basis of Article 81, paragraph 3, of the Rules of Court.

* *

30. The Court therefore concludes that the Philippine Application was not filed out of time and contains no formal defect which would prevent it from being granted.

* * *

31. The Court will now consider the objections based on the absence of a jurisdictional link.

32. In this regard, Malaysia contends that:

> "in the present case the jurisdictional link is . . . twice lacking.
>
> First, there is no conventional instrument or unilateral declaration giving the Court jurisdiction to adjudicate upon the territorial dispute between the Philippines and either one of the Parties to the case;
>
> Second, both Parties in the present case oppose a request for intervention by the Philippines."

Accordingly, it argues that the Philippine Application cannot be accepted by the Court.

Indonesia presented no argument in this respect.

33. For its part, the Philippines has made it clear that it does not seek to become a party to the dispute submitted to the Court by Indonesia and Malaysia. It further states that its Application for permission to intervene "is based solely on Article 62 of the Statute, which does not require a separate title of jurisdiction as a requirement for this Application to prosper", and that accordingly it should be granted.

34. The Court recalls that, under the terms of Article 62 of the Statute:

> "1. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.
>
> 2. It shall be for the Court to decide upon this request."

35. As a Chamber of the Court has already had occasion to observe:

> "Intervention under Article 62 of the Statute is for the purpose of protecting a State's 'interest of a legal nature' that might be affected by a decision in an existing case already established between other States, namely the parties to the case. It is not intended to enable a third State to tack on a new case . . . An incidental proceeding cannot be one which transforms [a] case into a different case with different parties." (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, pp. 133-134, paras. 97-98.)

Moreover, as that same Chamber pointed out, and as the Court itself has recalled:

> "It . . . follows . . . from the juridical nature and from the purposes of intervention that the existence of a valid link of jurisdiction between the would-be intervener and the parties is not a requirement for the success of the application. On the contrary, the procedure of intervention is to ensure that a State with possibly affected interests may be permitted to intervene even though there is no jurisdictional link and it therefore cannot become a party." (*Ibid.*, p. 135, para. 100; *Land and Maritime Boundary between Cameroon and Nigeria, Appli-*

cation to Intervene, Order of 21 October 1999, I.C.J. Reports 1999 (II), pp. 1034-1035, para. 15.)

Thus, such a jurisdictional link between the intervening State and the Parties to the case is required only if the State seeking to intervene is desirous of "itself becoming a party to the case" (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 135, para. 99).

36. That is not the situation here. The Philippines is seeking to intervene in the case as a non-party. Hence the absence of a jurisdictional link between the Philippines and the Parties to the main proceedings does not present a bar to the Philippine intervention.

* * *

37. The Court will now consider the arguments that the Application to intervene cannot be granted for the reasons, first, that the Philippines has not established the existence of an "interest of a legal nature" justifying the intervention sought, and, secondly, that the object of the intervention would be inappropriate.

* *

38. In relation to the existence of an "interest of a legal nature" justifying the intervention, the Philippines contends that:

> "Under Article 2 of the Special Agreement between the Government of the Republic of Indonesia and the Government of Malaysia, the Court has been requested to determine the issue of sovereignty over Pulau Ligitan and Pulau Sipadan 'on the basis of treaties, agreements and any other evidence' to be furnished by the Parties. The interest of the Republic of the Philippines is solely and exclusively addressed to the treaties, agreements and other evidence furnished by Parties and appreciated by the Court which have a direct or indirect bearing on the matter of the legal status of North Borneo. The legal status of North Borneo is a matter that the Government of the Republic of the Philippines considers as its legitimate concern."

The Philippines adds that

> "[a] decision by the Court, or that incidental part of a decision by the Court, which lays down an appreciation of specific treaties, agreements and other evidence bearing on the legal status of North Borneo will inevitably and most assuredly affect the outstanding territorial claim of the Republic of the Philippines to North Borneo, as well as the direct legal right and interest of the Philippines to settle that claim by peaceful means".

In outlining its claim, the Philippines has referred *inter alia* to Section 3 of the Republic Act 5446 (which makes an implicit allusion to a claim to title in North Borneo) and to the Manila Accord of 31 July 1963, between Indonesia, the Federation of Malaya and the Philippines, in which specific reference is made to the Philippine claim to North Borneo and "cognizance of the position regarding the Philippine claim to Sabah (North Borneo)" is taken by the Heads of Government of these three States.

39. The Philippines refers to the fact that access to the pleadings and to the annexed documents filed by the Parties was denied to it by the Court and indicates that it thereby suffered from a handicap not encountered by intervening States in previous cases of intervention brought before the Court; it contends that it therefore could not "say with any certainty whether and which treaties, agreements and facts are in issue". The Philippines argues that "[f]or some cases, the publication of [a] special agreement, in and of itself, is enough to convince the third State that its interest may be affected" and offers as an example a special agreement between two States requesting the Court to delimit a comprehensive maritime boundary; in such a case a third State can easily determine on the basis of the special agreement whether the prospective delimitation may potentially affect an interest of a legal nature of that third State. The Philippines argues that, on the other hand, "when the possibility of a decision affecting an interest of a third State is not certain and not graphic and is contingent on further information and specifications, the mere publication of the special agreement may not provide sufficient information". According to the Philippines, a procedure whereby an intervening State must define and establish the interest of a legal nature in question without being authorized to have notice of the written briefs submitted by the parties to the case would be equivalent to a denial of justice.

The Philippines asserts that as long as it does not have access to the documents filed by the Parties and does not know their content, it will not be able to explain really what its interest is.

40. The Philippines emphasizes that "Article 62 does not say that the intervening State must have a 'legal interest' or 'lawful interest' or 'substantial interest'", and that the "threshold for the invocation of Article 62 is, as a result, a *subjective* standard: the State requesting permission to intervene must 'consider' that it has an interest". The Philippines asserts that "[t]he criteria are not to *prove* a legal or lawful interest, but to 'identify the interest of a legal nature' and 'to show in what way [it] may be affected'". In this regard, the Philippines maintains that

> "In so far as any treaty or agreement that Malaysia is relying on in the present case to sustain its claim to Ligitan and Sipadan depends on the interpretation that lodges international title to North Borneo in the British North Borneo Company, that interpretation

> adversely affects an interest of a legal nature which the Philippines considers that it has."

The Philippines states that it agrees

> "entirely with the jurisprudence of the Court in *Tunisia/Libya* and *Nicaragua* that a concern about rules and general principles of law does not constitute sufficient interest under Article 62",

but argues that, in the case in hand, it is not a question of general principles of law but of specific treaties relating to a territory, which have an effect on the Philippines.

41. The Philippines further indicates that the statements made by Indonesia and Malaysia during the public hearing "provide evidence that the Court will be presented with many of the treaties and agreements upon which the Philippines claim is based and will be pressed to adopt interpretations that will certainly affect the Philippine interest". It states that it

> "find[s] nothing in the precedents about the permissible scope of an intervention being determined by the language of the submission, but rather by the possible consequence of the Court's decision. The test is not *connective*, but *consequential*; not whether there is a 'connection' to the submission — whatever that means — but whether the decision of the Court could affect the interest of a legal nature of a third State."

The Philippines submits that, on the basis of that part of the record to which it has been allowed access, "the probability of consequences for the interests of the Philippines meets the 'may' requirements of Article 62 and justifies Philippine intervention". It adds that

> "Evidently, the chain of title which Malaysia asserts to defend its territorial claim to Sipadan and Ligitan, based as it is on its own interpretations of, and representations on, specific treaties, agreements and other documents, is linked to the chain of title which the Philippines relies on to defend its territorial claim to North Borneo."

The Philippines also argues that it has cited three of the four legal instruments, which have been relied upon by one or both of the Parties to prove their case, in the context of the overall argument that it wanted to make.

The Philippines points out that it "has a direct legal interest in the interpretation of the 1930 United States-United Kingdom boundary, being the successor-in-interest of one party to that agreement, the United States", that "the 1930 Agreement cannot be construed in any way as an

instrument of cession", and that "Britain could not have acquired sovereignty over Pulau Sipadan and Pulau Ligitan by virtue of the interpretation placed by Malaysia on the 1930 United States-United Kingdom Agreement"; it follows from this that "the two islands in question were acquired by the United Kingdom in 1930 for and on behalf of the Sultan of Sulu".

The Philippines further states that "the territory ceded by the Sultan to the Philippines in 1962 covered only those territories which were included and described in the 1878 Sulu-Overbeck lease agreement", that its "Application for permission to intervene is based solely on the rights of the Government of the Republic of the Philippines transferred by and acquired from the Sulu Sultanate", and that "If at all there are other territories appertaining to the Sultanate not covered by the Sulu-Overbeck lease of 1878, the Philippines, as agent and attorney for the Sultanate, has reserved its position on these territories".

The Philippines concludes that:

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

42. For its part, Indonesia denies that the Philippines has an "interest of a legal nature". It states that

> "the subject-matter of the dispute currently pending before the Court is limited to the question whether sovereignty over the islands of Ligitan and Sipadan belongs to Indonesia or Malaysia. In its Application for permission to intervene, the Philippines expressly states that it is not its intention to change the scope of the dispute submitted by Indonesia and Malaysia to the Court."

It recalls that on 5 April 2001, the Government of the Philippines sent a diplomatic Note to the Government of Indonesia in which, referring to the ongoing case between Indonesia and Malaysia, it wished to reassure the Government of Indonesia that the Philippines does not have "any territorial interest on Sipadan and Ligitan islands".

Indonesia then contends that

> "It is evident from this [note] that the Philippines raises no claim with respect to Pulau Ligitan and Pulau Sipadan. It therefore fol-

lows that the Philippines has expressly disavowed any interest of a legal nature in the actual subject-matter of the dispute currently pending between Indonesia and Malaysia. In its Application, the Philippines asserts instead that its interest 'is solely and exclusively addressed to the treaties, agreements and other evidence furnished by the Parties and appreciated by the Court which have a direct or indirect bearing on the matter of the legal status of North Borneo'."

It maintains that

"The legal status of North Borneo is not a matter on which the Court has been asked to rule. Moreover, the desire of the Philippines to submit its view on various unspecified 'treaties, agreements and other evidence furnished by the Parties' is abstract and vague."

Indonesia adds that:

"The reply to the question submitted to the Court in the Special Agreement will rest entirely 'on the interpretation of the Convention of 20 June 1891, concluded by Great Britain and the Netherlands. Spain was not a party to the Convention. The Convention is *res inter alios acta* as far as the Philippines is concerned' . . . The Philippines is therefore doubly 'protected' . . . by Article 59 of the Statute of the Court, on the one hand, and by the fundamental principle that treaties bind the contracting States only, on the other. It may even be triply protected, since the interpretation of the Convention which . . . Members of the Court are called upon to give concerns only its application to Ligitan and Sipadan — there is no dispute between Indonesia and Malaysia with regard to its application to the island of Borneo. Since the Philippines limits its interest to the island of Borneo, expressly excluding Ligitan and Sipadan, it is in a sense also protected by the *petitum* as defined in the Special Agreement.

In any event, it is apparent from the clear, amply founded jurisprudence of the Court that the 'interest' claimed by the Philippines in the treaties, agreements and other evidence furnished by the Parties is not such as might justify an intervention pursuant to Article 62 of the Statute."

43. With reference to the question of the Philippine interest of a legal nature which may be affected by the decision in the case, Malaysia argues that

"[t]hat legal interest must be precisely identified, then compared with [the Court's] mandate as it appears from the document of seisin, in the present instance the Special Agreement"

and that

> "[i]t is thus not a matter of citing some general legal interest, but of proving it in relation to 'each of the different issues which might fall to be determined', to quote the words used by [the] Chamber [in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene*]".

Malaysia then contends that:

> "the Philippines does not indicate how the *decision* . . . that the Court is asked to take on the issue of sovereignty over Ligitan and Sipadan might *affect* any specific legal interest. It is content to refer vaguely to the 'treaties, agreements and other evidence' on which the Court might 'lay down an appreciation'. But . . . the interest of a legal nature must, if affected, be so affected by the *decision* of the Court and not just by its *reasoning*. Such appreciation as the Court may be led to make of the effect of a particular legal instrument, or of the consequences of a particular material fact, as grounds for its decision cannot, in itself, serve to establish an interest of a legal nature in its decision in the case.
>
> It is another provision of the Statute, Article 59, that protects the general legal interests of non-party States by specifying the limits on the authority of the Court's decision. By stating that 'the decision of the Court has no binding force except between the parties and in respect of that particular case', Article 59 ensures full legal protection of third parties, including in regard to any appreciation of treaties, agreements or evidence relied upon by the parties to the case." (Emphasis in the original.)

Malaysia further contends that "the issue of sovereignty over Ligitan and Sipadan is completely independent of that of the status of North Borneo", and that "[t]he territorial titles are different in the two cases". Malaysia therefore "does not accept that the Philippines possess any 'historical and legal rights' of a kind that could be affected by any decision of the Court relating to sovereignty over the disputed islands".

Malaysia finally emphasizes that, in its view, "the Government of the Philippines itself agrees that it has no legal interest"; it refers in this regard to the diplomatic note of 5 April 2001 sent by the Embassy of the Philippines in Jakarta to the Ministry of Foreign Affairs of the Republic of Indonesia, in which the Government of the Philippines stated that it did not have "any territorial interest on Sipadan and Ligitan islands". It concludes from this that

> "[The Court] must therefore dismiss this request for intervention *in limine litis*, since [its] decision can address only the issue of sovereignty over Ligitan and Sipadan and affect only legal interests with respect to these two islands. To grant this request for intervention by

> the Philippines would be to allow extension of the judicial debate to another issue altogether, namely that of sovereignty over Northern Borneo."

In this regard, Malaysia also contends that in the previous practice of the Court, States have been allowed to intervene where they claimed part of the area which was in dispute in the case, but that, by contrast, when a State does not claim particular territory it has not been allowed to intervene, even though it said that the Court's decision on the territory might impact on it in some way.

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44. The Philippines has informed the Court that it has a claim of sovereignty in North Borneo. It stated that, prior to the arrival in Borneo of the European Powers, title, at least to part of Sabah lay with the Sultanate of Sulu. A grant was made by the Sultan to Messrs. Overbeck and Dent on 22 January 1878 in that part (which grant the Philippines acknowledges not to have included Pulau Ligitan and Pulau Sipadan). The Philippines has described this instrument as the "primary source" of its historic title and takes the view that it provided for a lease of territory but not a cession. The Philippines claims the Sultanate and its heirs retained title to that part of North Borneo throughout the period 1878 to 1962, notwithstanding the assignment of powers of administration to the British North Borneo Company (hereinafter "BNBC"). In 1962, according to the Philippines, it acquired title to this territory through cession by the heirs of the Sultan of Sulu.

45. The Court recalls that, on 5 April 2001, the Philippines sought, in a Diplomatic Note sent to Indonesia, "to reassure the Government of the Republic of Indonesia that it does not have any territorial interest on Sipadan and Ligitan islands" (see paragraphs 42-43 above). This position was confirmed by the Philippines before this Court. The Philippines states that its claim of sovereignty in North Borneo is not affected by whether the Court affirms sovereignty over the islands as lying with Indonesia, or alternatively with Malaysia. However, the Philippines has informed the Court that its claim of sovereignty in North Borneo might be affected by any reasoning of the Court, whether in interpreting treaties in issue between Indonesia and Malaysia or otherwise, that would affirm that the BNBC had had sovereignty in North Borneo.

46. Indonesia and Malaysia contend that the existence of an interest of a legal nature in the very subject-matter of the case is a condition precedent for the Court to allow an intervention under Article 62.

In that regard, the Court will at the outset consider whether a third State may intervene under Article 62 of the Statute in a dispute brought

to the Court under a special agreement, when the State seeking to intervene has no interest in the subject-matter of that dispute as such, but rather asserts an interest of a legal nature in such findings and reasonings that the Court might make on certain specific treaties that the State seeking to intervene claims to be in issue in a different dispute between itself and one of the two Parties to the pending case before the Court.

47. The Court must first consider whether the terms of Article 62 of the Statute preclude, in any event, an "interest of a legal nature" of the State seeking to intervene in anything other than the operative decision of the Court in the existing case in which the intervention is sought. The English text of Article 62 refers in paragraph 1 to "an interest of a legal nature which may be affected by the decision in the case". The French text for its part refers to *"un intérêt d'ordre juridique . . . en cause"* for the State seeking to intervene. The word "decision" in the English version of this provision could be read in a narrower or a broader sense. However, the French version clearly has a broader meaning. Given that a broader reading is the one which would be consistent with both language versions and bearing in mind that this Article of the Statute of the Court was originally drafted in French, the Court concludes that this is the interpretation to be given to this provision. Accordingly, the interest of a legal nature to be shown by a State seeking to intervene under Article 62 is not limited to the *dispositif* alone of a judgment. It may also relate to the reasons which constitute the necessary steps to the *dispositif*.

48. Having reached this conclusion, the Court must now consider the nature of the interest capable of justifying an intervention. In particular, it must consider whether the interest of the State seeking to intervene must be in the subject-matter of the existing case itself, or whether it may be different and, if so, within what limits.

49. In the majority of the applications for permission to intervene that have come before the Court, the applicant has claimed to have an interest in the very subject-matter of the dispute or the territory in which a delimitation is to be effected. Further, in the two cases where a request for intervention under Article 62 has been authorized by the Court, that authorization was in respect of an interest related to the subject-matter of the dispute (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 121, para. 72: Nicaragua's rights in the Gulf of Fonseca necessarily being affected by the definition of a condominium; *Land and Maritime Boundary between Cameroon and Nigeria, Application to Intervene, Order of 21 October 1999, I.C.J. Reports 1999 (II)*, p. 1029: Equatorial Guinea's maritime rights could be affected by the determination by the Court of the maritime boundary between Cameroon and Nigeria).

50. In 1981 Malta, seeking to intervene, invoked an interest of a legal nature which:

> "does not relate to any legal interest of its own directly in issue as between Tunisia and Libya in the present proceedings or as between itself and either one of those countries. It concerns rather the potential implications of reasons which the Court may give in its decision in the present case on matters in issue as between Tunisia and Libya . . ." (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application to Intervene, Judgment, I.C.J. Reports 1981*, p. 12, para. 19.)

51. The Court specified that Malta thought that any pronouncements on special circumstances or on equitable principles in that particular region would be certain, or very likely, to affect Malta's own rights on the continental shelf:

> "what Malta fears is that in its decision in the present case the reasoning of the Court . . . may afterwards have a prejudicial effect on Malta's own legal interests in future settlement of its own continental shelf boundaries with Libya and Tunisia" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application to Intervene, Judgment, I.C.J. Reports 1981*, p. 17, para. 29).

52. The Court did not, however, find this a pertinent factor in deciding whether or not to allow Malta to intervene. The Court noted that a State could not hope to intervene "simply on an interest in the Court's pronouncements in the case regarding the applicable general principles and rules of international law" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application to Intervene, Judgment, I.C.J. Reports 1981*, p. 17, para. 30). But the interest in the Court's findings and pronouncements was not in that case such a generalized interest. The Court thus turned to an examination of the interests that Malta had specified, notwithstanding that they did not lie in the very outcome of the case.

53. Malta's Application was rejected, but not on the grounds that its expressed intention did not fall within the scope of the dispute as defined in the Special Agreement. Malta's Application to intervene was not granted because the Court felt it was in effect being asked to prejudge the merits of Malta's claim against Tunisia in a different dispute, which Malta had nonetheless not put before the Court.

54. The situation is different in the present case. Indeed, the Court considers that the request of the Philippines to intervene does not require the Court to prejudge the merits of any dispute that may exist between the Philippines and Malaysia, and which is not before the Court.

55. Whether a stated interest in the reasoning of the Court and any interpretations it might give is an interest of a legal nature for purposes of Article 62 of the Statute can only be examined by testing whether the legal claims which the State seeking to intervene has outlined might be thus affected. Whatever the nature of the claimed "interest of a legal nature" that a State seeking to intervene considers itself to have (and pro-

vided that it is not simply general in nature) the Court can only judge it "*in concreto* and in relation to all the circumstances of a particular case" (Chamber of the Court in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 118, para. 61).

56. Thus, the Court will now proceed to examine whether the Philippine claim of sovereignty in North Borneo could or could not be affected by the Court's reasoning or interpretation of treaties in the case concerning Pulau Ligitan and Pulau Sipadan.

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57. It is recalled that the Philippines contended that "[t]he threshold for the invocation of Article 62 is . . . a *subjective* standard: the State requesting permission to intervene must 'consider' that it has an interest" of a legal nature (see paragraph 40 above). The Philippines acknowledged that, having thus invoked Article 62, "the State requesting permission to intervene must identify the interest in question and relate it to the case at Bar".

58. As the Chamber said in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, "it is for a State seeking to intervene to demonstrate convincingly what it asserts". Further, "[i]t is for the State seeking to intervene to identify the interest of a legal nature which it considers may be affected by the decision in the case, and to show in what way that interest may be affected" (*I.C.J. Reports 1990*, pp. 117-118, para. 61).

59. The Court would add that a State which, as in this case, relies on an interest of a legal nature other than in the subject-matter of the case itself necessarily bears the burden of showing with a particular clarity the existence of the interest of a legal nature which it claims to have.

60. In order to make concrete its submission that it has an interest of a legal nature which might be harmed by the reasoning of the Court in the forthcoming Judgment as to sovereignty over Pulau Ligitan and Pulau Sipadan, the Philippines may not introduce a new case before the Court nor make comprehensive pleadings thereon, but must explain with sufficient clarity its own claim of sovereignty in North Borneo and the legal instruments on which it is said to rest, and must show with adequate specificity how particular reasoning or interpretation of identified treaties by the Court might affect its claim of sovereignty in North Borneo.

61. Basing itself on Article 53, paragraph 1, of the Rules of the Court, the Philippines submitted to the Court on 22 February 2001 a request to be provided with the pleadings and documents annexed by Indonesia and Malaysia in their written pleadings. After ascertaining the views of the

Parties, the Court decided that it was not appropriate to accede to the Philippine request. This decision was communicated to the Philippines, Indonesia and Malaysia by letters dated 15 March 2001 (see paragraph 6 above).

62. The Philippines has strongly protested that it is severely and unfairly hampered in "identifying" and "showing" its legal interest in the absence of access to the documents in the case between Indonesia and Malaysia (see paragraph 39 above). Indeed, it has stated to the Court that "as long as we do not have access to the submissions of the Parties and don't know their contents, we can not really explain what our interest is". The Philippines observes that since the written pleadings in the case between Indonesia and Malaysia have not yet been made accessible to the public, it was not until the oral phase of the present proceedings that the two Parties publicly stated which treaties they considered to be in issue in their respective claims to Pulau Ligitan and Pulau Sipadan. Its request for access to the pleadings not having been granted by the Court, the Philippines maintains that it does not know (save in so far as it has emerged through these proceedings) the precise reliance that either Malaysia or Indonesia places on any one of these instruments. The Philippines also observed, during the oral phase of these proceedings, that not only do Malaysia and Indonesia seem to have different views on certain of these treaties, but that they do not have identical views as to whether some treaties that the Philippines regards as relevant to its own different claim do indeed have legal significance for the disposition of Pulau Ligitan and Pulau Sipadan.

63. The Court observes, however, that the Philippines must have full knowledge of the documentary sources relevant to its claim of sovereignty in North Borneo. While the Court acknowledges that the Philippines did not have access to the detailed arguments of the Parties as contained in their written pleadings, this did not prevent the Philippines from explaining its own claim, and from explaining in what respect any interpretation of particular instruments might affect that claim.

64. In outlining that claim, for purposes of showing an interest of a legal nature that might be affected by the reasoning or interpretation of the Court in the dispute over Pulau Ligitan and Pulau Sipadan, the Philippines has emphasized the importance of the instrument entitled, in English translation, "Grant by Sultan of Sulu of territories and lands on the mainland of the island of Borneo", dated 22 January 1878 (hereinafter the "Sulu-Overbeck grant of 1878").

65. This instrument which bears the official seal of the Sultan of Sulu is said by the Philippines to be its "primal source" of title in North

Borneo. The Philippines interprets the instrument as a lease and not as a cession of sovereign title. It also acknowledges that the territorial scope of the instrument described in its first paragraph ("together with all the islands which lie within nine miles from the coast") did not include Pulau Ligitan and Pulau Sipadan.

66. The Court observes, however, that the Philippine claims of sovereignty, as shown on the map presented by the Philippines during the oral proceedings, do not coincide with the territorial limits of the grant by the Sultan of Sulu in 1878. Moreover, the grant of 1878 is not in issue as between Indonesia and Malaysia in the case, both agreeing that Pulau Ligitan and Pulau Sipadan were not included in its reach. Also, the question whether the 1878 grant is to be characterized as a lease or a cession does not form part of the claim to title of either Party to the islands in issue. Neither Indonesia nor Malaysia relies on the 1878 grant as a source of title, each basing its claimed title upon other instruments and events.

67. The burden which the Philippines carries under Article 62, to show the Court that an interest of a legal nature may be affected by any interpretation it might give or reasoning it might adduce as to its "primal source" of title, is thus not discharged.

68. The Philippines supplements its contention that sovereignty in North Borneo was retained by the Sultanate of Sulu by means of cited extracts from British State Papers of the late nineteenth century and the first part of the twentieth century.

69. The 7 March 1885 Protocol between Great Britain, Germany and Spain, recognizing the sovereignty of Spain over the Archipelago of Sulu (Joló), and by which Spain renounced "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", is said by the Philippines to have great importance for its claim. This is because — in the Philippine view — this Protocol too made clear that sovereignty in North Borneo lay with Sultans and not with the British Crown. However, neither Malaysia nor Indonesia base their claims to Pulau Ligitan and Pulau Sipadan on the Protocol. It is not to be envisaged that either through its reasoning or through interpretation any legal interests as articulated by the Philippines may be affected.

70. The Philippines has also explained to the Court its view that the Royal Charter of 1 November 1881, incorporating the BNBC, clearly shows that the BNBC was not itself invested with a sovereign character. The Philippines also finds support for its claim of sovereignty in North Borneo in the Agreement of 12 May 1888 between the British Govern-

ment and the BNBC, and especially Article III thereof, which provided that "The relations between the State of North Borneo and all foreign States . . . shall be conducted by Her Majesty's Government." The Philippines advances comparable views as to the Confirmation by the Sultan of Sulu of the Cession of Certain Islands, dated 22 April 1903, asserting that this instrument shows a continuing and uninterrupted sovereignty of the Sultan of Sulu over the mainland of North Borneo as well as islands lying off that coast.

Neither of these agreements is regarded by the Parties to the main proceedings as founding title to Pulau Ligitan and Pulau Sipadan. Their claims do not implicate the precise status of rule in North Borneo at this period. Accordingly, the Philippines has not demonstrated any interest of a legal nature that could be affected in relation to these agreements, and which might warrant intervention under Article 62 of the Statute.

71. Certain other instruments to which the Court was referred by the Philippines do appear to have a certain relevance not only to the Philippine claims of sovereignty in North Borneo, but also to the question of title to Pulau Ligitan and Pulau Sipadan. The Philippine interest in the 20 June 1891 Convention, concluded between Great Britain and the Netherlands for the purpose of defining boundaries in Borneo, lies in noting that while the Convention set boundaries defining "Netherlands possessions" and "British Protected States", the "State of North Borneo" was indeed one of the British Protected States.

72. Indonesia does claim Pulau Ligitan and Pulau Sipadan under the same Convention. In particular, it contends that, for various reasons, Article 4 of that Convention should be read as extending into the sea on the latitude 4° 10′ north mentioned therein. Thus, in Indonesia's view, islands to the south of that parallel, such as Pulau Ligitan and Pulau Sipadan, did not belong after 1891 to the State of North Borneo, but to the Netherlands. Malaysia offers various grounds for rejecting that interpretation of Article 4.

73. In resolving the disputed interpretation of Article 4, the Court has no need to pronounce upon the precise nature of the British interests lying to the north of latitude 4° 10′. Notwithstanding that the 1891 Convention may be said to have a certain relevance for Indonesia, Malaysia and the Philippines, the Philippines has demonstrated no legal interest that could be affected by the outcome or reasoning in the case between Indonesia and Malaysia.

74. The Philippines has also explained to the Court its view that the Exchange of Notes on 3 July and 10 July 1907 between Great Britain and the United States, relating to the administration of certain islands on the east cost of Borneo by the BNBC, again shows that Great Britain was acting in a capacity other than as sovereign over North Borneo. While

this Exchange of Notes is also of a certain interest for Malaysia, it relies on the exchange as evidence that the two islands it disputes with Indonesia were at that time historically and administratively tied to North Borneo. The precise status of the legal ties in 1907 is not central to Malaysia's claims. Accordingly, no interest of a legal nature that requires an intervention under Article 62, to present their interpretation of the 1907 Exchange of Notes, has been shown by the Philippines.

75. The 2 January 1930 Convention between Great Britain and the United States regarding the boundary between the Philippine Archipelago and North Borneo may assume a somewhat greater significance for these proceedings.

76. One of Malaysia's arguments appears to be that the BNBC's right of administration of the islands was, by the terms of the 1930 Convention, converted into a full right of sovereignty.

77. It is recalled that the Philippines, commenting on this Convention, stated that it follows from the sovereignty held by the Sultan of Sulu over North Borneo that the attribution of islands to the south and west of the described line was on behalf of the Sultan of Sulu (see paragraph 41 above); and that this is supported by the text.

78. The Court notes that the 1930 Convention, which delimits the boundary between the Philippine Archipelago (under United States sovereignty) and the State of North Borneo (under British protection), has as its particular object the determination of which of the islands in the region "belong" to the United States on the one hand and to the State of North Borneo on the other. This Convention does not appear to the Court at this stage of the proceedings to concern the legal status of the principal territory of North Borneo. As the Court has already had occasion to emphasize above (see paragraph 59), the interest of a legal nature invoked by the Philippines in order to be permitted to intervene in the case must be shown with a particular clarity, since it does not relate to the actual subject-matter of the case. It appears, however, in light of the object of the 1930 Convention and of the rights claimed by the Philippines in North Borneo, that the Philippines has not shown how any interpretation of that Convention which the Court might make for purposes of the case between Indonesia and Malaysia could affect an interest of a legal nature of the Philippines which would justify its intervention under Article 62 of the Statute.

79. The North Borneo Cession Order in Council, adopted on 10 July 1946, which provided in its sixth paragraph that "with effect from the fifteenth day of July, 1946, . . . the Crown should . . . have full sovereign rights over, and title to, the territory of the State of North Borneo", is said by the Philippines to demonstrate that only on that date did the British Crown purport for the very first time to acquire full sovereign rights over North Borneo. The Philippines couples that position with the

contention that any such purported order of cession is without legal effect.

80. Indonesia does not contest the status of the 1946 Order or British competence to act thereunder; rather, its views diverge from those of Malaysia as to the bearing it has on Pulau Ligitan and Pulau Sipadan. Any interest that the Philippines claims to have as to references that the Court might make in the case between Indonesia and Malaysia to the 1946 Order is too remote for purposes of intervention under Article 62.

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81. The Philippines needs to show to the Court not only "a certain interest in . . . legal considerations" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1981*, p. 19, para. 33) relevant to the dispute between Indonesia and Malaysia, but to specify an interest of a legal nature which may be affected by reasoning or interpretations of the Court. The Court has stated that a State seeking to intervene should be able to do this on the basis of its documentary evidence upon which it relies to explain its own claim.

82. Some of the instruments which the Philippines has invoked, and the submissions it has made as to them, may indeed have shown a certain interest in legal considerations before the Court in the dispute between Indonesia and Malaysia; but as regards none of them has the Philippines been able to discharge its burden of demonstrating that it has an interest of a legal nature that may be affected, within the sense of Article 62. The Philippines has shown in these instruments no legal interest on its part that might be affected by reasoning or interpretations of the Court in the main proceedings, either because they form no part of the arguments of Indonesia and Malaysia or because their respective reliance on them does not bear on the issue of retention of sovereignty by the Sultanate of Sulu as described by the Philippines in respect of its claim in North Borneo.

83. Furthermore, the Court notes that the prime basis which the Philippines cites in support of its claim is the Sulu-Overbeck grant of 1878 and the historical facts which preceded it. It is notable that a number of the documents to which it drew the Court's attention do not appear in the official publication of the Philippines of 1963, presented to the Court by Malaysia, explaining the legal basis of the Philippine claim of sovereignty in North Borneo (*Philippine Claim to North Borneo*, Volume I, Manila, Bureau of Printing, 1963). All instruments to which the Philippines has drawn the Court's attention, save the Sulu-Overbeck grant of

1878, are instruments said to be confirmatory of title, or treaties in respect of which the Philippines wishes to advance interpretations that preclude them being read as entailing a loss of any previous title that may have existed in the Sultan of Sulu. Not only are they not, for the most part, at the centre of the Court's attention in the case between Indonesia and Malaysia, but they are not themselves sources of title for the Philippines. The wish of a State to forestall interpretations by the Court that might be inconsistent with responses it might wish to make, in another claim, to instruments that are not themselves sources of the title it claims, is simply too remote for purposes of Article 62.

* *

84. In respect of the "the precise object of the intervention" (Article 81, paragraph 2 *(b)*, of the Rules of Court), the Philippines states that its Application has the following objects:

> "*(a)* First, to preserve and safeguard the historical and legal rights of the Government of the Republic of the Philippines arising from its claim to dominion and sovereignty over the territory of North Borneo, to the extent that these rights are affected, or may be affected, by a determination of the Court of the question of sovereignty over Pulau Ligitan and Pulau Sipadan.
>
> *(b)* Second, to intervene in the proceedings in order to inform the Honourable Court of the nature and extent of the historical and legal rights of the Republic of the Philippines which may be affected by the Court's decision.
>
> *(c)* Third, to appreciate more fully the indispensable role of the Honourable Court in comprehensive conflict prevention and not merely for the resolution of legal disputes."

The Philippines submitted during the oral proceedings "that the objects *(a)* and *(b)* in the Application make clear the objectives of the Philippines in applying to the Court for permission to intervene under Article 62, are consistent with the Court's jurisprudence; and amply fulfil the requirements of the Statute".

85. For its part, Indonesia argues that

> "the objective of the Philippines is not to inform [the] Court of its interests in the case before [it], but to draw the Court's attention to another dispute, speculating that this might, perhaps, be of interest. At best, the Philippines might appear as *amicus curiae*."

Indonesia further argues that

". . . . . .

(5) the information that the Philippines is seeking, by this means, to give to the Court therefore does not constitute, in the circumstances of the case, a legitimate object of the intervention requested;

(6) this equally applies *a fortiori* to the avowed aim of the Philippines of thus securing communication of the pleadings and documents refused by the Court's decision of 15 March [2001];

(7) more generally, intervention by the Philippines would create a dangerous and unwelcome precedent, which would seriously jeopardize the confidentiality of proceedings which States appearing before the Court are legitimately entitled to expect — and indeed the very system of intervention . . ."

86. As for Malaysia, it maintains that:

"the Philippines assertion that it has historical and legal rights to the territory of Borneo which it wishes 'to preserve and safeguard' is a fiction which is quite unsustainable. It must, therefore, be regarded as a claim evidently lacking in precision. The pursuit of so manifestly defective a claim is not a proper object for an intervention application."

As to the "second stated object" of the Philippine Application (see paragraph 84 above), Malaysia contends that "the assertion of such [historical and legal] rights is manifestly unsustainable", and that "[t]he giving of information to the Court about unsustainable rights is not a proper object for intervention".

Malaysia also maintains that

"by reference to published sources and even without access to the pleadings, the Philippines could readily have ascertained for itself some of the fundamental elements in the dispute between Malaysia and Indonesia; and it could more specifically have related its concerns to those issues".

In this respect, Malaysia concludes that:

"[The Philippines] has not attempted to grapple with the significance of actual British and later Malaysian possession and administration of the territory for a century and a quarter.

But that does not entitle the Philippines to be given a second chance by being allowed now to intervene further in this case. A failure specifically to define the object of the Application cannot be converted into a statement of an object. The Philippines has not met the

> requirements that the Court has laid down for a successful application."

As to the third stated object of the Philippine Application (see paragraph 84 above), Malaysia considers that "[t]his is a purely abstract and general matter, on which the Court needs no instruction from the Philippines or anyone else" and that "[i]t is a gratuitous and impermissible object for an intervention".

*

87. As regards the first of the three objects stated in the Application of the Philippines (see paragraph 84 above), the Court notes that similar formulations have been employed in other applications for permission to intervene, and have not been found by the Court to present a legal obstacle to intervention (*Continental Shelf (Libyan Arab Jamahiriyal Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, pp. 11-12, para. 17; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, pp. 108-109, para. 38, and pp. 130-131, para. 90; *Land and Maritime Boundary between Cameroon and Nigeria, Application to Intervene, Order of 21 October 1999, I.C.J. Reports 1999 (II)*, p. 1032, para. 4).

88. So far as the second listed object of the Philippines is concerned, the Court, in its Order of 21 October 1999 in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria, Application to Intervene*, recently reaffirmed a statement of a Chamber that:

> "[s]o far as the object of [a State's] intervention is 'to inform the Court of the nature of the legal rights [of that State] which are in issue in the dispute', it cannot be said that this object is not a proper one: it seems indeed to accord with the function of intervention" (*I.C.J. Reports 1999 (II)*, p. 1034, para. 14).

89. That the rights claimed by the Philippines lie in North Borneo rather than in Pulau Ligitan and Pulau Sipadan makes the second stated object of the Philippines no less a proper one.

90. As to the third object listed in its Application, very occasional mention was made of it during the oral pleadings. But the Philippines did not develop it nor did it contend that it could suffice alone as an "object" within the meaning of Article 81 of the Rules. The Court rejects the relevance under the Statute and Rules of the third listed object.

91. Indonesia also suggested that the Philippines has another object in seeking intervention, and it stated that "although the Philippines denies this . . ., it has indeed progressively transformed its Application for per-

mission to intervene into an appeal against the decision not to allow it to have access to the pleadings".

92. During the oral proceedings, the Agent of the Philippines, on behalf of his Government, presented by way of conclusion the desire of that State to be furnished with copies of the pleadings and documents as a first "remedy" under Article 85 of the Rules (see paragraph 13 above). The Court notes however that Article 85 does not provide for "remedies" as such, but rather deals with the procedural consequences of a decision to accede to an application for permission to intervene under Article 62.

* *

93. Notwithstanding that the first two of the objects indicated by the Philippines for its intervention are appropriate, the Court finds that the Philippines has not discharged its obligation to convince the Court that specified legal interests may be affected in the particular circumstances of this case.

94. The Court nevertheless observes that, notwithstanding its finding that the Philippines has not demonstrated an entitlement to intervene in the pending case between Indonesia and Malaysia, it remains cognizant of the positions stated before it by Indonesia, Malaysia and the Philippines in the present proceedings.

* * *

95. For these reasons,

THE COURT,

By fourteen votes to one,

Finds that the Application of the Republic of the Philippines, filed in the Registry of the Court on 13 March 2001, for permission to intervene in the proceedings under Article 62 of the Statute of the Court, cannot be granted.

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Weeramantry, Franck;

AGAINST: *Judge* Oda.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-third day of October, two thousand and one, in four copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of

the Republic of Indonesia, the Government of Malaysia, and the Government of the Republic of the Philippines, respectively.

(Signed) Gilbert GUILLAUME,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge ODA appends a dissenting opinion to the Judgment of the Court; Judge KOROMA appends a separate opinion to the Judgment of the Court; Judges PARRA-ARANGUREN and KOOIJMANS append declarations to the Judgment of the Court; Judges *ad hoc* WEERAMANTRY and FRANCK append separate opinions to the Judgment of the Court.

(Initialled) G.G.
(Initialled) Ph.C.