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A CONSIDERATION OF THE SABAH DISPUTE

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Introduction

On June 22, 1962, the Government of the Republic of the Philippines presented a diplomatic note to the British Embassy in Manila in which it asserted a claim to sovereignty over the territory of North Borneo.¹ In a press conference on the following day, Philippine President Macapagal announced that the note had requested talks between the two governments to determine the "ownership, sovereignty and jurisdiction" over North Borneo, which was soon due to be incorporated into the new Federation of Malaysia. The British immediately rejected the Philippine claim and asserted that Britain had a sound claim to continued possession and transfer of the territory to Malaysia - but it never has opened its archives to public inspection of the documentary basis for this assertion.

Although the dispute now is in one of its recurrent calm periods, it is unresolved, and the Philippine Government appears determined to press it. It has been at the root of several messy incidents between Malaysia and the Philippines within the past year and a half, which in turn have led to a virtual suspension of diplomatic relations between them. It therefore seems worthwhile to investigate the background of the dispute, attempt to identify the historical and (so far as this is possible) the legal bases for the claims of the two sides, and describe the current situation with the hope that some solutions may suggest themselves. It might be rewarding to ask the question, if the dispute were to go before the World Court as the Philippines has demanded (and the Malaysians have refused to approve), what might be the result?

Sulu's Affairs in Borneo

The dispute arises from a transfer of territory in North Borneo by

the Sultan of Sulu to two European businessmen in 1878. The Philippines, now claiming the Sultan's former rights to sovereignty over these lands, maintain that the nature of the transfer was a "lease." The British and Malaysians, defending the legitimacy of their acquisitions, retort that it was a "cession." The operative Malay word, padjak, is susceptible to both interpretations.

The origins of the dispute go back to 1865, when an American Consul arrived in Brunei to implement a treaty of commerce with the Sultan. The Consul, Charles Lee Moses, has been termed "an adventurer...from the lower deck of the United States Navy;"² but he secured from the Sultan's heir, on the promise of later payment, a "cession for ten years" of a large tract of Brunei territory to the north.

Moses' company, and his landholdings, passed in 1875 to the Austrian Consul General in Hongkong, Baron von Overbeck. Establishing a partnership with a young Hongkong businessman named Alfred Dent, Overbeck undertook to sell the territory to some interested government as a future colony; Austria was their principal hope. He had been advised by a British official in Brunei that the former grant was by then worthless, and consequently in December, 1875, a new agreement was negotiated.

The Sultan of Brunei, in three grants of territory from Gaya Bay on the west coast to the Sibuco River on the east, and the Sultan's heir, in a grant of two west-coast river valleys, conveyed to Overbeck and his associated, "with all powers of sovereignty" (according to Tregonning), some 28,000 square miles of land for a total yearly payment of fifteen thousand dollars.⁴ The paltry size of the payment, to be made annually in perpetuity, was a reflection of the fact that the area had long since ceased to be under effective control of the Sultan and he consequently "received \$15,000 for nothing."⁵ This new grant covered most of the area

of present-day Sabah, except for several river enclaves on the northwest coast which were held by independent chiefs but which later were added to the territory. It is this grant from the Sultan of Brunei which forms "the chief constitutional basis for the State of Sabah."⁶

Overbeck by this time had learned, that a portion of the northeast coast supposedly was in the hands of the Sultan of Sulu, who reportedly had received it from the Sultan of Brunei in the previous century. To secure his holding, therefore, Overbeck negotiated with the Sultan of Sulu substantially the same agreement as that reached in Brunei, but for a yearly payment of only \$5,000.⁷ There seems to have been some confusion over the extent of the Sulu holding in Borneo: one writer notes that Sulu claimed the entire area as far as Kimanis Bay on the west coast, but "said its authority extended only along the coast southeastward from Marudu Bay" at the northern tip of the territory.⁸ As a compromise, the Pandasan River was specified as the Western limit of the Sulu grant to Overbeck and Dent. It will be necessary to consider further the actual terms of the agreement with the Sultan of Sulu, but first a consideration of the nature of Sulu's position in Borneo is in order.

Tregonning asserts that the northeast coast of Borneo, "though claimed by the Sultan of Brunei, and ceded by him to Moses, had been given to the Sultan of Sulu in 1704 in return for help in suppressing a rebellion."⁹ Though this seems to be a common assumption,¹⁰ at least one recent discussion of Borneo history maintains that it is not clear whether Brunei ceded northern Borneo to Sulu or whether the latter claimed it as a reward for aid to one of the pretenders in an eighteenth-century civil war over the Brunei succession.¹¹ The Sulu claim, according to this view, was disputed by successive Sultans of Brunei, who denied that a cession of North Borneo to Sulu ever occurred. Wright adds that "Sulu had little

success, if indeed any effort was made, in establishing her rule over the area." He also suggests that Charles Brooke, Rajah of Sarawak, "had no doubts as to the nominal sovereignty of Brunei in North Borneo," and considered the Brunei Sultan guilty of "criminal recklessness" for "signing away sovereign rights" over North Borneo to Overbeck and Dent.¹³ Wright expresses doubt whether there is extant any documentary evidence of a Brunei cession of North Borneo to Sulu, and concludes that Overbeck's agreement with Sulu was simply an afterthought designed to remove any lingering question as to the legitimacy of the title granted him in Brunei.¹⁴ Thus, while acknowledging the tradition that Sulu held part of North Borneo, Wright thinks "there is at least equal weight to the Brunei tradition that sovereignty over North Borneo rested with the Sultan of Brunei until ceded by Brunei in 1877 to Overbeck and Dent."

While disputing the Sulu claim to de jure possession of Borneo, furthermore, Wright also declares categorically that it is quite clear "that (Sulu) never held de facto control there. Until 1878 power along the coast of northeast Borneo was in the hands of rapacious pirates" who were mainly Illanuns and Ballagnini but included some Sulus. These pirates were so feared that the population had moved far inland, and when Overbeck first arrived in Sandakan in 1878, the first villages were found sixty miles up the rivers.¹⁵

There thus is some question as to the legal right of the Sultans of Sulu to dispose of territory in North Borneo, since both their de jure and de facto control of that territory were disputed. Nevertheless, the British continued to deal with them as though the Sultans had such a right. Alexander Dalrymple, on behalf of the East India Company, concluded an agreement with the Sultan of Sulu in 1763 for a factory and free trade on Balembangan Island; the Sultan seems to have been led to enter this

agreement by his hope that the English would be useful in fending off the Dutch and Spanish and reopening the trade channels to China. Dalrymple became involved in Sulu politics on behalf of the Sultan, and as a reward for services rendered his grant was enlarged by the cession to him of several islands and the entire mainland coast of Borneo from the Kimanis River on the west to the Kinabatangan delta on the east. But the venture ended in a quarrel and English abandonment of the settlement in 1876, after it had been sacked by the Sulus.¹⁶

But Sulu and its putative Bornean holdings came under greater pressure from the Spaniards on Luzon in the nineteenth century, which was to lead to the loss of the Sultanate's independence. This began with a treaty of "peace, protection and commerce" concluded in September, 1836, which offered Spanish military protection for those Sulu territories "within Spanish jurisdiction...except Sandakan and the other lands tributary to the Sultan on the coast of Borneo."¹⁷ No Spanish claim for sovereignty over any part of Sulu was made or implied by this treaty.

In April, 1851, a new treaty was concluded which, according to the Filipino lawyer, Pacifico Ortiz, "extended the Spanish protectorate and veto over Sulu's foreign affairs."¹⁸ Another writer (Tregonning) concludes that this treaty made Sulu a "vassal" of Spain, but excepted North Borneo in its description of Sulu's dependent territories.¹⁹ Yet a third (American) commentator observes that by this treaty, Sulu agreed not to enter into any other treaty, commercial agreement or alliance with any other European power, company or individual, and hence the 1878 Treaty with Overbeck was invalid.²⁰ It seems that Sulu did become a protectorate of Spain on this occasion, but Borneo was excluded from the treaty's provisions.

This process was carried a step further by the capitulation of July 22, 1878, following a military expedition which resulted at last in the

subjugation of the Sultanate by the Spanish. The Sultan and his Datus declared in this final treaty that the sovereignty of Spain over Sulu and its dependencies was "indisputable," and they constituted themselves "loyal subjects of Alfonso XII." But the internal administration of the Sultanate was left alone, and was not made subject to Spanish jurisdiction.²¹ Wright states that the Sultan offered to turn over even more of his territory to Overbeck and Dent after signing the treaty with the Spanish, presumably to save as much as he could from them, provided the British Government would approve.²²

It seems apparent that, although Sulu had been sufficiently in control of its own fate to be able to conclude international treaties as late as 1850 (with the United States), the encroachments of the Spanish after that year progressively reduced its freedom of maneuver. It seems also that the Sultan respected his treaties with the Spaniards as long as they were around to enforce them, but at the first opportunity he would revert to dealing with the British in an attempt to counterbalance Spanish power. His troubles with the Spanish were compounded by their intrigues against him with one of his own Datus, Haroun al Rasshid, who aspired to be Governor of Sandakan; one chronicler believes that the Sultan was happy to do business with Overbeck as a way of thwarting this intrigue by making a grant of the very area in question.²³ He also hoped, as his predecessor had hoped, to attract a British presence which would keep the Spaniards at a distance.

In short, the Sultan of Sulu in 1878 was in a shaky legal position and an even shakier political position. His kingdom was on the verge of succumbing to a stronger enemy, and the only portion of it which was out of danger for the moment was a wild and sparsely-inhabited stretch of coastline which acknowledged a spiritual submission to him, but not much

more.²⁴ His claim even to this rather uninviting area was challenged by Brunei, and he cannot have derived much revenue from it because of his lack of control over it. Therefore Overbeck's offer of annual payments in return for a British-guaranteed presence must have seemed a golden opportunity.

As a consequence of such considerations, the Philippine contention that the Sultan of Sulu was "coerced" into signing away his property by Overbeck's threats of an imminent Brunei expedition against Sandakan²⁵ sounds far-fetched indeed. On the other hand, if it can be argued that the British abandonment of their Balembangan settlement constitutes a surrender of their prior claim to the lands of North Borneo, then the Spanish treaty of 1851 with Sulu would be operative and the Overbeck concession, invalid. At this point in the discussion, it is necessary to consider the specific provisions of the Overbeck agreement of 1878 with Sulu.

The "Lease" and its Implications

As has been noted, the crux of the present dispute over Sabah is whether the Sultan of Sulu "ceded" or "leased" his Bornean possessions to Overbeck and Dent in 1878. There are conflicting translations of the Malay word padjak in that agreement, as cited by the British and Filipinos, and the relevant passages are therefore reproduced below with the British versions in parentheses:

"We, Sri Paduka (etc.)...with the expressed desire of all Datus in common agreement, do hereby desire to lease (or grant and cede)...to Gustavus Baron von Overbeck...and Alfred Dent...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...

The above-mentioned territories are from today truly leased to (or vested in)...Baron von Overbeck and Mr. Dent... together with their heirs and associates...for as long as they choose or desire to use (hold) them; but the rights and powers hereby leased (conferred) shall not be transferred to another nation, or a company of another nationality, without the consent of the British Government.

Should there be any dispute between the Sultan and Mr. Dent, Baron von Overbeck or their successors,...the matter shall be referred to Her Majesty's Consul-General in Brunei.²⁶

On the same day this agreement was concluded (Jan. 22, 1878), the Sultan gave Overbeck a commission appointing him Datu Bendahara and Rajah (roughly equivalent to "Chief Minister" and "Ruler," respectively) of Sandakan:

"...We, Sultan Sri Paduka (etc.)...do hereby nominate and appoint Baron von Overbeck supreme and independent ruler of the above-named territories with the title of Datu Bendahara and Rajah of Sandakan with absolute power of life and death of the inhabitants of the country with all the absolute rights of property over the soil of the country vested in us and the right to dispose of the same as well as the rights over the production of the country...(and over) making laws, coining money, creating an army and navy and levying customs dues...and other dues and taxes on the inhabitants...together with all other rights and powers usually exercised by and belonging to sovereign rulers...And we call upon all foreign nations...and command all Datus, Nobles, Governors, Chiefs and people owing alliance to us in the said territories to acknowledge the said Datu Bendahara as the supreme ruler over the said States and to obey his commands and respect his authority therein as our own..."²⁷

The Philippine contention is that this is a lease, not a cession.²⁸

In the first place, it has been contended that an Arabic copy of the agreement was obtained from British archives through the United States

Department of State, and that the Arabic word used, translates as "lease."²⁹ Furthermore, British commentators of the period (including especially William H. Treacher, acting Consul-General for Britain in Brunei) are quoted by the Filipinos in references to the agreement as a "lease."³⁰ Finally, in support of this position, authorities in international law are cited by the Philippines to the effect that only "international persons," meaning independent states of international organizations, are by definition competent to enter into treaties or other international relationships. Territorial entities which do not rank as "international persons" are not considered capable of acquiring sovereignty, but only of negotiating for property rights. Therefore the 1878 agreement between Sulu and the Overbeck/Dent combine could not be a treaty of cession, and must be a lease.³¹

The Period of the "cession"

It must be said, in support of the Philippine position in this regard, that several clauses in the treaty and in the commission to Overbeck seem to imply that some sort of sovereignty over Borneo continued to pertain to the Sultan after 1878. For example, although the agreement transfers "all rights and powers" over Borneo "forever and until the end of time," it also limits those powers by providing that they shall not be transferred to another nation or a company of another nationality without the consent of the British Government. It further provides that any dispute between the Sultan and the Overbeck/Dent interests shall be resolved by referral to the British Consul-General, and Ortiz³² argues persuasively such a proviso necessarily implies that a continuing interest in Borneo was held by the Sultan. Finally, it seems implicit that the Sultan's power to bestow the titles of "Rajah" and "Datu Bendahara" on

Overbeck, along with the impressive list of powers which went with them, necessarily connotes that the Sultan also has the power to withdraw those titles and privileges, or at least retains a pre-emptive claim to them in the event they are given up.

The countervailing British argument once again is provided by Wright, whose case is set in the historical and political context of the late nineteenth century. In brief, he asserts that such words as "lease" and "cede" were rather sloppily used in such treaties in East Asia at the time, and that little distinction was made between them. Instead, the operative words in such treaties were those stipulating the length of time of the concession. Thus, he notes that Germany was "ceded" the Kow Chaw district in China "for 99 years," and a French enclave in China was likewise "given by lease for 99 years."³³ In this context it might also be recalled that the 1865 agreement between the Sultan of Brunei and the American Consul, Charles Moses, provided for the "cession" of a portion of North Borneo "for ten years."³⁴

Wright's proposition~~s~~ sounds plausible since a good many of the "legal" arguments which have been advanced to support the Philippine case draw on present-day sources in international law without any demonstration that the same legal principles prevailed in 1878. A reference to the texts of the letters and agreements cited by Wright, Ortiz, Tregonning and the other authorities on which this essay draws, seems to indicate that the distinctions made in them between "cession" and "lease," "sovereignty" and "use," etc., may not have been so precise as in the present day. The Sultan of Sulu, in particular, in my opinion seems to have placed more importance on the political and personal aspects of his relationship with the British as a counterweight to Spanish influence than in such legal niceties - especially in view of the tenuousness of his

position in North Borneo.³⁵ Wright therefore concludes that the agreement between Overbeck and the Sultan was a cession, since it specifies that Overbeck and Dent shall hold the lands granted them "forever and until the end of time." This portion of the argument seems to be a standoff, and since the writer is not a lawyer he does not feel competent to judge between Philippine contentions that the Sultan held residual sovereignty, and Wright's claim that the transfer was permanent and "in perpetuity." However, this need not be crucial to a resolution of the case, as will be seen.

The Question of Coercion

The question of what rights, if any, the Sultan retained in Borneo arose quickly, at the time of the Sultan's capitulation to the Spanish on July 22, 1878. On that day, the date of his acknowledgment of Spanish "sovereignty" over Sulu, the Sultan wrote letters to the Spanish Governor of Sulu and to Overbeck himself stating that the previous agreement with Overbeck had been obtained under duress and that the Borneo lands should now be under Spanish "sovereignty." It appears, however, that the Sultan was writing these very letters of repudiation under duress - this time from the Spanish. Not only does the tone of the letters seem inconsistent ~~of Spanish~~ ^{with the} Sultan's previous struggles to stay clear of Spanish domination, but even Ortiz notes that the letters were drafted by a Spanish military official and were forwarded to Overbeck through the office of the Spanish Governor.³⁶ Ortiz thus agrees that the Sultan was "coerced" by the Spanish as much or more than by Overbeck, and Overbeck quickly denied that the Sultan could abrogate the agreement of January 22, 1878. It consequently is a conclusion of this paper that, due to this consideration and to the shaky state of Sulu authority in its Bornean "possessions" as described earlier, the Philippine allegation that the

concession to Overbeck was invalid because obtained under duress is unsubstantiated.

The Terms of Payment

Yet another argument relating to the content of the treaty also has been advanced by some writers: that the terms of payment indicate a lease. Ortiz states, "...the very manner in which payment...is made, which is annually in perpetuity, and the smallness of the amount offered, ...underline the nature of the transaction as one of lease."³⁷ Ortiz goes on to maintain that "it is characteristic of sale that the consideration should at least equal the value of the object, and should be paid outright or within a terminable and definite time; as it is characteristic of lease that the consideration be paid from time to time as long as the tenancy exists."³⁸

The rejoinder to this position is given by R.H. Leary, who evidently agrees with the earlier assessments presented herein that North Borneo in 1878 was sparsely populated, largely beyond the control of the Sulu Sultanate, and hence of little effective value to the Sultan. Leary argues that the method of compensation does not affect the permanence of the transfer, and states, "... (annual payment) was given, not as rent, but as a pension to compensate for the loss of - in theory - income-producing lands. There is nothing strange about this; it was standard practice, and surely it was a good bargain for a sultan to receive a regular and secure income simply for signing away a hunk of useless jungle."³⁹ To this proposition Gordon adds that in his conversations with attorneys on the subject, "the comment is regularly made that the method of payment is quite similar to what is known today as an annuity. They argue that it is perfectly acceptable practice for a seller of a property to demand and obtain payment annually or at any other interval, and for any period,

finite or not."⁴⁰

On this point too there does not seem to be a clearcut advantage in the arguments of either side, and so it is necessary to look elsewhere for an indication of what rights, if any, the Sultan continued to hold in North Borneo after 1878.

The British Position on "Sovereignty" in Borneo

From the discussion thus far it appears that the merits of the case by no means lie all on one side. The British and Malaysians assert that North Borneo was ceded. In support of their position, they can point to: British interests in the area far antedating those of the Spanish; a weak and beleaguered Sultan to whom an income-producing British presence on his southern flank must have seemed valuable as a counterweight to the Spanish in the north; language in the agreement of January 22, 1878, which seems to contemplate a perpetual surrender by the Sultan of all powers and privileges of sovereignty in North Borneo; and irregular international usage in treaties of the time, which would seem to make the specified length of time the determining factor in whether such an agreement were a "lease" or a "cession."

The Philippines, on the other hand, can argue that the British abandoned their 18th-century concessions in North Borneo; that Sulu's treaties with Spain ruled out any subsequent agreements with any other European interests after 1851; that the Spanish treaties revoked only the Sultan's right to conduct foreign affairs and limited his internal sovereignty within Sulu, but did not strip him of that sovereignty altogether and did not include North Borneo within the zone of Spanish control; and that the language of the agreement with Overbeck presupposed some retention by the Sultan of "sovereignty" in Borneo, however that may have been defined at the time.

Decisive indications as to how the Overbeck-Dent agreement was regarded at the time seem in this writer's judgment to arise only in 1881, when Dent applied to the British Government for a Royal Charter to strengthen his Company's standing in the London financial markets. Tregonning reports that when Dent's request was received the British Colonial Office "objected strenuously, considering that no private company should exercise sovereign rights."⁴¹ The Foreign Office was more sympathetic, however, according to Tregonning, because of its desire to strengthen the British positions in Borneo against Spain and Holland as well as to defend the flank of the valuable British trade routes to China. Dent astutely sweetened the deal by proposing that the Charter incorporate a series of restrictions obligating the Company to eradicate slavery, defend native rights, and pursue other policies in accord with British Government objectives and subject to a British Government veto. In this way the project for a Chartered Company could appear to further the larger British effort to remove sources of friction in the area, which had been a subject of concern since 1877, while giving the British Government a means of preventing the abuses which had followed the grants of some earlier charters.⁴² The Charter also would be useful as a cheap means of indicating formally that North Borneo fell within a British sphere of influence.⁴³

Not surprisingly, there were immediate and strenuous objections from the Spanish, Dutch and others when it became known that the British intended to resurrect the old "Chartered Company" form. In reply to such protests, Her Majesty's Government told the Spanish Government in 1881 that "there was no question of the annexation of North Borneo by Great Britain or of the establishment of a British Protectorate there...the incorporation of the company by Royal Charter would be the formal recognition of the title of Mr. Dent and associates...and in return for such recognition (they) offered to submit to the control of Her Majesty's

Government in the exercise of powers derived from the Sultan...(the Charter's) effect is to restrict and curtail the powers of the Company and not to enlarge them...the Crown in the present case assumes no dominion or sovereignty over the territory occupied by the Company, nor does it purport to grant to the Company any powers of government thereover."⁴⁴

Further testimony to the effect that the Charter did not connote an actual or potential assumption of British sovereignty in Borneo was forthcoming within Whitehall and in Parliament. "(The Permanent Secretary for Foreign Affairs) was called on to reassure Lord Kimberley that the Charter did not vest the sovereignty of the territory in the British Government," and another Cabinet officer even is reported to have said that the Prime Minister did not remember acquiescing in the grant of a Charter and would have stopped the whole affair.⁴⁵ As late as March 9, 1881 - two days after the Charter was granted - Government spokesmen were saying in Parliament that "Her Majesty's Government do not regard North Borneo as being under British sovereignty."⁴⁶

Spanish Sovereignty over Sulu?

This seemed to leave Borneo somewhere in limbo, unless it be assumed that sovereignty over it continued to be held by the Sultan. Spanish sovereignty in Borneo had specifically been rejected by the British on several occasions since 1851, and the definitive statement of the extent of Spanish (and British) influence was given in 1885. In that year the Protocol of Sulu was signed by Britain, Germany and Spain, recognizing that North Borneo was in the British sphere of influence and that the rest of Sulu was in the Spanish zone.⁴⁷

Ortiz, drawing on Saleeby,⁴⁸ concludes that Sulu after 1878 was a protectorate, not a dependency, of Spain, and that the Sultan consequently could still be "sovereign" over North Borneo. To the obvious objection

that the Sultan had already acknowledged himself a "loyal subject of King Alfonso" and could not simultaneously be a sovereign, Ortiz responds that the British had already acknowledged James Brooke to be both "sovereign" of Sarawak and a subject of the Queen.⁴⁹

To a layman, this argument appears to have a certain validity, but it must be noted that the precedent is not fully applicable. Brooke, after all, was subject to the government in whose sphere of influence his territories were located, while the Sultan was under Spanish sovereignty and his claimed territory was under the British.

Moreover, there seems to be a viable argument under international law that the Spanish were entitled to exercise (or give up) sovereignty on behalf of the Sultan with respect to all lands claimed by him. Gordon observes, "...according to accepted international law at that time (i.e. after 1885), Spain had sovereignty not only over Sulu's domains but throughout the Philippines. Thus the British view (and again within the perspective of nineteenth-century international law) is likely to be that Spain was empowered to renounce the Sultan's claims on the Borneo mainland."⁵⁰ Such writers as Tregonning, of course, have no doubt that this was the case, and the presumed sovereignty of Spain probably was the justification for the British installation of a Protectorate over all northern Borneo in 1888, in spite of the assurances given to Spain seven years earlier. (Tregonning believes that the main reason for the Protectorate was to make it possible for the British Government to regulate the cutthroat competition then existing between Sarawak and North Borneo over the remaining lands of the Sultan of Brunei.)

The loss of Sulu's sovereignty to Spain seems also to be confirmed by American actions after it assumed sovereignty over the Philippines from Spain in 1898. According to the Carpenter Agreement of 1915, the

Sultan was recognized solely as a "Moslem ecclesiastical authority," without any temporal power in those of his former possessions which fell under United States sovereignty.⁵¹ Ortiz goes on to quote a letter written by the American author of the Carpenter Agreement, addressed to the Philippine Government's Director of Non-Christian Tribes in 1920, stating that this denial of temporal authority to the Sultan was "wholly without prejudice of effect" to the sovereignty of Sulu over its territories outside American jurisdiction, specifically those in North Borneo which were "understood to be held under lease by the North Borneo Company."

Ortiz' inference from this letter is that the United States administration in the Philippines believed as late as 1915 that the Company's mandate in North Borneo was still to be regarded as a "lease." He supports this conclusion with the observation, by former Governor-General of the Philippines Harrison, that up until the death of Sultan Jamalul Kiram of Sulu in 1936, "whenever the Sultan of Sulu visited Sandakan his flag was flown above that of the Chartered Company and his vessel was given a twenty-one gun salute."⁵² The Company also, according to Ortiz, made several efforts to bring the Sultan to Sandakan, which the American authorities however prevented.

The Dilemma of Sovereignty in Sulu

There seems, then, to have been at least the supposition in some quarters that the Sultan of Sulu still maintained some sort of residual sovereignty in North Borneo into the twentieth century. While American beliefs on this score would have no legal force at all, they might be significant in reflecting a general climate of opinion at the time. Insofar as the Sultan of Sulu was treated like a sovereign when he visited "his" territories (and Harrison's testimony on this score is not echoed in any other source that this writer has seen, although there seems to be

no reason to doubt his word), this supposition may have been shared by the British officials of the Chartered Company in Sandakan.

When the Sultan died in 1936, moreover, no action was taken to abolish the Sultanate. President Quezon is reported to have said, in response to a question regarding the possibility of electing a new Sultan in 1937, that "he would not recognize a Sultan; to have a Sultan was incompatible with the notion of sovereignty (of the Republic)."⁵³ But as Ortiz points out, this kind of pronunciamiento does not amount to legal abolishment of the Sultanate. Ortiz emphasizes that Quezon's "Moro policy" of 1937, declaring that Philippine officials were to deal directly with the people rather than going through the sultans and datus, was a reaffirmation that there was to be no dual system of government for the Moros within the Philippines, but must also be ruled out as a legal step to end the Sultanate.

None of the writers reviewed for this discussion have demonstrated that the Sultanate was, in fact, legally abolished. However, there is one opinion which states that the successor to sovereignty of the Sultanate is the Philippine Government. In 1939 the eight heirs to the Sultan brought suit to recover the annual payments, which had been held in escrow since the death of Jamalul Alam three years earlier. They sought money, not sovereignty.⁵⁴ Chief Judge Macaskie, of the North Borneo High Court, on December 18, 1939 issued the "Macaskie Decision," which acknowledged the eight plaintiffs to be the heirs to the private property of the Sultan. The Court then went on to add an obiter dictum to the effect that "It is abundantly plain that the successors in sovereignty of the Sultan are the Government of the Philippine Islands."⁵⁵

The consensus among writers who have dealt with this decision is that the judge was ruling only on proprietary rights, and ruled in favor

of the status quo; that the issue of sovereignty did not arise because it had not been a specific subject of litigation in the suit; but that the judge felt called upon to raise the subject due to his conviction that the Philippine Government, as the "heir in sovereignty" of the Sultanate, should also legally be heir to the property rights. The judge reportedly felt that the Sultan of Sulu had lost his sovereignty to Spain and the United States in 1878 and afterwards, and that he could not have sold sovereign rights to private persons such as Dent and Overbeck. In effect, the judge was supporting the position which the Philippines Government now takes. But since the Government failed to step forward to claim the money, he awarded it to the Sultan's private heirs.⁵⁶

The Philippines case comes out of this discussion looking worthy of serious attention - although not so strong as Ortiz and other Filipino partisans believe. The behavior of the British Government from 1878 until 1888 indicated that it rejected any pretensions to sovereignty over North Borneo; the behavior of the Chartered Company and some others, even into the twentieth century, suggested that they believed the Sultan still to be sovereign. The Macaskie Decision, seen in one way, appears to give aid and comfort to the Philippines by rejecting the 1878 "cession" to the Dent/Overbeck interests as not valid, and asserting that the Philippines is the heir in sovereignty of the Sultanate.

But in another respect the Macaskie Decision appears to favor the British, since it asserts that the Sultan lost sovereignty to Spain and the United States. The latter point would mean that the Philippines, as successor in sovereignty to the United States, is committed to the Boundary Convention of January 2, 1930 between the United States and Britain, under which the boundaries of 1885 were accepted and the national territory of the Philippines was drawn to exclude North Borneo. These

boundaries were incorporated in the Philippine Constitution, which was ratified by plebiscite in May, 1947.

Thus while the Philippines seems to have a case of some strength, the opposing brief seems, as a result of this incomplete inspection, to be equally as strong. A tentative verdict, based on the legal merits of the case as discussed so far, would be that the Philippines has not conclusively proved that the British had no right to make North Borneo a Crown Colony in 1946. This is the more true in view of the fact that the Sulu claim applied only to a portion of the territory, and by no means to all of North Borneo.

Private vs. State Claims

So far the discussion has centered on the conflicting legal claims over Sabah within the historical context in which those claims evolved. This portion of the narrative reaches its climax just after the Second World War, with the formal adoption of the Philippine Constitution and the change in Sabah's status to that of Crown Colony. From this time on the emphasis shifts to the accelerating attempts of the Sulu heirs to press their claims, the gradual elevation of the focus of those claims from matters of private monetary gain to an affair of state policy, and the emergence of the Philippines' Sabah claim finally as a full-blown political issue. As will be seen in the following discussion, each successive stage in this process raised the stakes and made a solution more difficult (and probably more expensive) to achieve.

At the time the British Government purchased North Borneo from the Chartered Company in 1946 and made it a Crown Colony, Francis Harrison (a former Governor-General of the Philippines) warned the Philippine Government that the action was taken unilaterally and without consideration of the rights of the Sulu heirs; that it was an act of "political aggression;"

and that it should be repudiated by the Philippine Government and taken to the United Nations.⁵⁷ But Harrison seems to have been more concerned about this subject than anyone in the Philippines Government at the time. Filipino officials apparently made desultory inquiries from the late thirties onward to see whether any intervention by them was justified; but their conclusion appears always to have been negative, either out of lack of conviction that the Philippines Government had any real case, or from a belief that it was strictly a private affair, or due to a reluctance to take on both the British and the Americans.⁵⁸

The heirs themselves, in the postwar years, permitted a series of increasingly ambitious lawyers to promote several schemes designed not just to obtain more money, but to bring about a return of North Borneo to them - or at least to hold conferences between the British and the heirs in which the subject could be discussed. These lawyers always paid the heirs for the privilege of receiving a power of attorney under which to act, and Garner concludes that they had in common the hope that they could make a large amount of money for themselves and also, incidentally, for their clients.⁵⁹ Nicasio Osmena, a politically well-connected son of the former President, reportedly paid the most.⁶⁰ In 1957 one of the heirs announced the "abrogation" of the "lease" on North Borneo, but then offered to lease part of it back to ^{the} British. Later in the same year Osmena, "acting as attorney-in-fact for the heirs," asked the British for fifteen million American dollars in full settlement of the lease.⁶¹ The British by this time were regarding all such approaches as sleazy profiteering; and declined to discuss it.

The Philippines press and congress, according to Garner, had for years shown about as little interest in the claim as had the government. But in 1961 Osmena, having gotten no farther with the British, told the

story of the claim to the publisher of the Manila Free Press. There resulted, late in 1961 and early in 1962, a series of articles by Napoleon G. Rama entitled "North Borneo is Ours!" which finally forced the government to sit up and take notice. In April, 1962, all the heirs' claims to sovereignty in Borneo (but not their property rights, i.e., not their claims to money which might have been due the sultan) were "ceded" to the Philippines Government at the insistence of a Congressman who stated that the Government could do nothing unless this step were taken.⁶²

The North Borneo Claim as State Policy

The official adoption of the Sabah claim by the Philippines Government after so many years of inaction thus seems to have been due to the Free Press campaign, to a sudden and intense interest in the subject in congress, and to the election of Diosdado Macapagal to the Philippine Presidency. Several writers⁶³ agree that Macapagal was the decisive influence, since he had long been interested in this issue. He appears to have adopted it at this time (in 1962) because he was dissatisfied with American handling of the "special relationship" with the Philippines as it affected, say, the sugar and tobacco trade; he was smarting under political criticism for allegedly being too "pro-American" in his actions; he disagreed with the United States on Laotian and other policies; and he was outraged at the United States Congress' rejection of the Philippine war-damage bill.

His purpose seems to have been to attempt to assert an "Asian" identity in foreign policy, independent of the United States, and force the latter to heed Philippine nationalist sentiment. The attitude within the Philippine Government bureaucracy, Garner believes, was that the country had nothing to lose and that the mere assertion of the claim, if it were later rejected by some such body as the World Court, would have

hurt no one. Macapagal accordingly ignored the recommendations of his Vice President that the Government support only the heirs' proprietary claims, and adopted a claim to sovereignty. Bernard Gordon seems to have been precisely right in his assessment that Macapagal, by seeking to establish a mild irritant in his dealings the United States and Britain, unleashed forces greater than he had foreseen. (See previous citation.)

Gordon shows⁶⁴ that the Sabah issue provided a convenient way for Macapagal to attempt to forge an Asian identity in Philippines foreign policy, and simultaneously to appeal to the pan-Malay sentiment which is latent in some Philippine political circles. His chosen means of doing this, and of trying to delay the creation of Malaysia in furtherance of the Sabah claim, was to broach the idea of a "Malayan Confederation" to include Borneo, Malaya and the Philippines. After the Brunei revolt of 1962 this became the "Greater Malay Confederation" embracing Malaya, northern Borneo, the Philippines and Indonesia; with the application of what could be called "Sukarnospeak," it eventually emerged as "Maphilindo" at the Manila Conference of 1963.

It is unnecessary here to go into all the maneuverings which went on among Macapagal's advisors, or to describe in full the evolution of the "Confederation" policies. It is sufficient to note that they involved a prolonged flirtation with Indonesia and some rather colorful statements of the Philippines' policy goals, which must have made the Macapagal government's purposes seem by turns sinister, incomprehensible or ridiculous. To the Manila Press Club the President proclaimed, "In Maphilindo and through Maphilindo, nourished constantly by their vision and enterprise, the Malay peoples shall be borne upon the true, the vast, the irresistible wave of the future." In a letter to President Kennedy dated April 20, 1963, he is said to have stated that "North Borneo is vital

to the security of the Philippines...The Philippines is like an inverted bottle with the Sulu Sea as its open end...to which North Borneo is the cork...The control of the northern tip of Borneo by an unfriendly power would constitute a more deadly threat to the Philippines than would the island of Taiwan in the hand of an enemy..."⁶⁵ (Malaysia was seen as vulnerable to "the communist menace" on the mainland, and hence - if subverted - in a position to become "the unfriendly power" in question.) And at the time of the London talks with Britain in this same early-1963 period, the President denounced Malaysia before the Philippine Congress as "not in accordance with the principle of self-determination which is the accepted way out of colonialism...Malaya (is) the new colonial power..."⁶⁶

Macapagal's purposes, in other words, seem to have been compounded of political opportunism, pretensions to international statesmanship, and a belief in his own rhetoric. His arguments against Malaysia seem to have shifted according to the audience he had before him, and the British therefore regarded him with disdain, and the Malaysians, with suspicion. He also had his critics within the country. Senator Lorenzo Sumulong, for example, declared that the Philippines had no right to object to the formation of Malaysia since it had waited so long after its own independence to put forth any claim to Sabah.⁶⁷ But Macapagal nevertheless had made the issue a matter of national pride, instead of simply a private monetary claim as it had been until 1962.

The Reaction in Sabah

It should be noted that, following an initial opposition to Malaysia, the political community in Sabah had been won over by Malaysian diplomacy and there was general support in the territory for the new Federation. The Philippine claim, far from finding any support within Sabah, provoked a hostile reaction and, in Ongkili's opinion, confirmed the decision to

proceed with Malaysia.⁶⁸ He cites statements of several of Sabah's political parties and leading politicians, to the effect that the Philippines could take any part of Sabah "only over our dead bodies;" that the claim was "irresponsible" and could only "create hatred between the peoples of Sabah and the Philippines; "and that it was "completely repugnant and unacceptable."

In order to ~~clarify~~^{decrease} Filipino and Indonesian hostility, however, the British and Malaysians agreed just before the formation of Malaysia in 1963 to permit the visit to Borneo of a United Nations mission to observe elections being held there. In his conclusions to the findings of this team, announced on September 13, 1969, the UN Secretary General declared that the peoples of Sabah had adequately considered the question of their future political status and that a substantial majority had decided in favor of Malaysia.⁶⁹ He declared that the elections were free and properly conducted, that the Malaysia proposal had been a significant issue therein, and that the number of persons excluded from voting for any reason was insignificant. He regretted the fact that the British had delayed the arrival of Indonesian and Philippine observer teams (on the grounds that the latter were too large), and he deplored the heavy-handedness of Malaysia and Britain in announcing, while the UN mission still was in the field, that Malaysia would be inaugurated in mid-September; he noted that this action had caused "confusion and resentment." But he concluded nevertheless that the Sabah election had complied fully with the UN requirements for fulfilling the principle of self-determination.

The First Reconciliation

Macapagal's administration soon began to recoil from the implications of its Indonesia policy, since the Philippines had never felt close to or particularly comfortable with the Indonesians. The discrediting of some

of his more pro-Indonesian advisors and the onset of the 1965 elections lowered the level of polemic somewhat, and the Philippines reverted to a legalistic approach, calling for referral to the World Court. A series of communiques, diplomatic notes and verbal understandings was issued in which the two governments agreed to hold talks for the purposes of clarifying the Philippine claim and discussing means of settling it.⁷⁰ But the Philippines in all these communications dismissed the idea that the UN Malaysia Mission's findings made their claim irrelevant, contending that the Mission's conclusions had only obligated them to refrain from obstructing the formation of Malaysia, not to give up the claim. They maintained the contradictory position that they had agreed not to prevent Sabah from joining Malaysia, but that Sabah's inclusion therein was "subject to the final outcome of the Philippine claim."

The election of Ferdinand Marcos to the Philippine Presidency in 1965 seemed to promise a new era in Malaysia-Philippines relations. In the middle of 1966 the two governments announced the elevation of their respective consulates to embassy status - in effect, the Philippine Government recognized the Federation of Malaysia for the first time since its inception. The quid pro quo for the Philippines were a Malaysian promise to hold talks as soon as possible for the purpose of clarifying and settling the Sabah issue, and a Malaysian commitment to conclude an anti-smuggling agreement which had long been desired by the Philippines.⁷¹ This promising development was followed by a successful state visit to Malaysia by Marcos in January, 1968. The chief product of the visit was a warm communique referring proudly to the recently-inaugurated anti-smuggling agreement, a declaration that no problems between the two countries were incapable of peaceful solution, and some commitments to undertake several projects together. The inevitable promise of talks

"as soon as feasible" to "clarify" the claim, and discuss modes of settlement, also was included.⁷²

1968: The Year of Tension

The Sabah issue had not been solved, however, but was lying dormant. Malaysian hopes that it might go away if ignored disappeared rapidly in 1968 and, as on all previous such occasions, it emerged bigger and more troublesome than ever. From private property claim to state policy issue to symbol of national pride, it moved on to become also a subject of internal political maneuvering in the Philippines. This transpired as follows.

At the end of the third week in March, 1968, Manila papers reported the presence on Corregidor Island of a secret jungle-warfare camp. A young recruit from the camp had been found swimming in Manila Bay, and had said that he escaped from the camp after the trainees mutinied against their officers due to mistreatment and failure to receive their pay. At least 14, and possibly as many as 60 of the recruits, as well as the camp commander, reportedly had been shot. The incident took on diplomatic dimensions when it developed that the escapee and four-fifths of his 150 fellow recruits were Moslems from the Sulu islands, and had been told that their mission was to be "infiltration, subversion and sabotage" in Sabah with the aim of wresting it from Malaysia.⁷³

The fact that the trainees were Moslems made it obvious that they were not intended for counterinsurgency activity against the Huks in Christian Luzon, as the Army command first tried to claim. The Army Chief of Staff then asserted, and President Marcos reaffirmed, that the camp was used for training counterinsurgent troops "under sustained and severe jungle warfare conditions" for use against the "rising Communist threat in the South." This explanation was maintained and the Malaysian Ambassador was reassured that there were no aggressive designs on Sabah, that any

training camps were solely for defense. President Marcos refused to permit further details to be made public. However he did announce that the Army Civil Affairs Office, formerly responsible for all Army Special Forces camps, was being abolished, its commander and other officers court-martialed, and all intelligence units placed under a single new command. The Malaysians announced a partial mobilization in Sabah, and filed a formal diplomatic protest.⁷⁴

There was no explanation of who was responsible for creating the camp, or of whether the President knew about it. Since there had been talk of "private armies" and it was rumored that not all the recruits were in the Philippine Army, there seems a possibility that the camp was a project of some military faction, possibly acting with support from outside the Army. It is impossible to draw any conclusions here, except that the existence of the camp came as a bad shock to the Malaysians... ~~to the Malaysians.~~ However it is intriguing to recall, at this point, a recommendation which Gordon states had been made to President Macapagal in 1962, that "...our government seriously consider unofficially supporting a national movement, led by Filipino Muslim leaders, aimed at the recovery of North Borneo..."⁷⁶ A fuller investigation of the Corregidor incident, if it were possible, might reveal much about factional politics in the Armed Forces.

The next blow to Malaysian-Philippine amity came on July 16, when the Malaysians abruptly terminated the talks which had been convened in Bangkok to discuss "clarification" of the Philippine claim and "modes of settlement." The leader of the Malaysian delegation, Tan Sri Mohammad Ghazali bin Shafie, delivered an eloquent and scornful speech, full of pointed wit, which castigated the Philippine delegation for coming to the conference unprepared. He accused them of failing to bring basic

documents pertaining to their case, of being ignorant of the bases of their claim, and of being unable to answer fundamental questions about it. He noted that in one month there had been only five substantive meetings, and said that many of the Filipinos' statements were contradictory.⁷⁵ The Filipinos retorted that they were there not to present a brief but to discuss means of settlement; they accused the Malaysians of wanting to be judge, prosecutor and jury, and protested that the Malaysians were bulldozing the conference in hope of making it fail. The Malaysians then rejected the claim and walked out. On July 20, the Philippines withdrew its Ambassador from Kuala Lumpur in protest against "Malaysian intransigence."⁷⁷ Some Congressional leaders demanded a complete break in relations.

Some of the backstage maneuvering at the time of the Bangkok conference was later revealed by Ghazali in a speech to the National Press Club in Kuala Lumpur.⁷⁸ He asserted that the Philippine delegation had insisted, at the first meeting, that the sessions be tape-recorded, then that there should be agreed minutes, and again that there should be daily agreed public statements. The Malaysians considered any real negotiation impossible under these conditions, and when the Philippines representatives turned out also to be ill-prepared the Malaysians concluded that the talks were being used by the other side for their domestic political propaganda value.

But the Philippines did not present a consistent image to the Malaysians. Ghazali reveals that during late June and early July the Malaysian Ambassador in Manila had a series of conversations with high Philippine officials.⁷⁹ In the first of these, the Ambassador heard Foreign Secretary Ramos express anxiety at the course the talks were taking and ponder whether it would not be better if there were to be a

recess followed by a Foreign Ministers' meeting later on. In a second conversation the Philippine Secretary of Justice warned about the possibility of a diplomatic break in the event that the Malaysians should reject the claim. And in the third conversation, Ambassador Hamid was told by President Marcos that Marcos himself would prefer a recess without setting any date for a future meeting. Ghazali confessed to being puzzled over the "soft tone" emanating from Manila at the same time that he and his co-delegates believed they were encountering obfuscation in Bangkok.

It is a contention of this paper, for which suggestive but admittedly not conclusive evidence is available, that President Marcos at that early date already was feeling the pressure of his political opposition on the Sabah issue; that he did not want to make of it a domestic political football, and that he consequently permitted his delegates in Bangkok to perform in a way designed to elicit popular approval at home while hoping that a quiet deal might be made with the Malaysians to postpone the talks until after the national elections set for the following year. According to this interpretation, the only imperative for him in Bangkok was to avoid the appearance of capitulating to the Malaysians.

At this time there was being considered in the Philippine House of Representatives a bill to define the territorial sea of the Philippines, in response to a request by the United Nations.⁸⁰ There also seems still to have been considerable sensitivity on the Sabah issue among Moslems in the southern Philippines, and a disposition on the part of Marcos' opponents in Congress to use the issue to embarrass him.⁸¹ He consequently seems already in July to have been worrying about the possible political impact within the Philippines of the Bangkok talks, and to have hoped to neutralize them.

When the talks ended with the Malaysian walkout, the Opposition in

Congress seized the chance to insert an amendment in the territorial-sea bill declaring that the delineation of the territorial sea "is without prejudice to the delineation of the baselines of the territorial sea around Sabah, over which the Philippines has acquired dominion and sovereignty."⁸² Marcos, finding by this time that his hand had been forced and that the Bangkok talks already had come to nothing, was "apparently determined to convert what had started out to be an Opposition attempt to embarrass him into a politically profitable maneuver."⁸³ On September 19 he signed the bill.

Ghazali's confusion in July, then, over whether the Philippine delegation was speaking beyond its authority, or whether Manila was trying to force Malaysia into ending the talks, apparently rests on the assumption that Marcos was free to order his negotiators to take a conciliatory stance, but chose not to do so. In fact, Marcos seems to have wished above all, in Bangkok, to avoid presenting his domestic political opponents with a ready-made issue of high emotional content. As we have seen, the Sabah issue was thus given a new dimension as an explosive political issue within Philippine domestic politics.

The "Land-Grab" Bill

The explosion came in September when Marcos signed what Prime Minister Tunku Abdul Rahman was to refer to as the "Philippine Land-Grab Bill." Although the foreign ministers of the two countries had just agreed to a second "cooling-off period" on Sabah when they met in Jakarta the month before⁸⁴, and although Marcos had announced soothingly at the signing ceremony for the bill that it did not contemplate either explicitly or implicitly the "physical incorporation of Sabah" into Philippine territory, the Malaysians reacted indignantly. They announced that their ambassador was being withdrawn from Manila and abrogated the new anti-

smuggling agreement concluded just the year before; a crowd of several thousand demonstrators gathered outside Rahman's house to shout their support for their government; Deputy Premier Abdul Razak announced that the Philippines must bear "full responsibility" for disrupting regional cooperation and for any "serious consequences" to peace and security which might ensue; and Malaysia sent a formal note of protest.⁸⁴

The contention that Marcos did not want to permit domestic politics to sour his foreign relations may account for a curious bit of footwork which accompanied the Philippine reply to this Malaysian note of protest. The official Philippine reply, as contained in a diplomatic note, was uncompromising: "The Philippine Government regrets its inability to make any of the affirmations sought by the Malaysian Government... (and) deplores the highly abusive and provocative language used by the Malaysian Government..."⁸⁵ But enclosed with the note was a personal letter from Marcos to his Foreign Secretary repeating that the bill did not contemplate the "physical incorporation" of Sabah and declaring that his government's policy was to pursue its claim solely by peaceful means.⁸⁶ It seems here that Marcos felt the same compulsion as had Macapagal to pose publicly as the heroic spokesman, champion and "father" to his country on such supercharged issues. His response to this imperative, however, was considerably more sophisticated than Macapagal's had been.

Into this highly delicate situation the United States intruded on September 19 with a statement by the State Department press spokesman that the United States "recognizes Sabah as part of Malaysia" and "hopes for an amicable solution to the problem." On the next day the spokesman reversed himself, adding with all the appearance of fluster that the previous day's announcement should not be interpreted to mean that the United States was "pro-Malaysia," but was neutral in the dispute.⁸⁷ The

damage had been done, however, "Ranking Philippine legislators" called the American "recognition" statement a "stab in the back" and a "sneak attack;" the same Congressman who had initiated the territorial sea amendment declared that the "special relationship" with the United States should be reviewed. President Marcos called in the American Ambassador to seek "assurances" that the United States would stand by its commitment to help defend the Philippines against attack "from any source," and asked for a "clarification of the official stand" of the United States.

This unnecessary American irritation of the situation was aggravated twice by the British about September 20, first when a flight of British jets was diverted over Sabah on a routine flight from Hongkong to Singapore, and secondly when the British Commander-in-Chief, Far Eastern Forces, said in Hongkong that the British would stand by Malaysia in the event of aggression against her.⁸⁸ The Philippines of course, interpreted these events as British military support of Malaysia. Within a week both the British and American Embassies in Manila had been attacked by demonstrators, and the British were denounced for "intimidating acts" while the Americans were assailed for "insincere neutrality."⁸⁹

The entire fabric of Malaysian-Philippine relations, or as much as was left of it, seemed to have disintegrated. To be sure, Marcos on Sept. 23 invited the Tunku to meet personally for talks either in Bangkok or Tokyo, and the two foreign ministers at one point actually agreed to meet in Tokyo after October 22 to discuss a reduction of tensions; the Sabah dispute was not to be raised at this meeting, and the Malaysians praised the conciliatory tone of the Philippine communication. But such pacific overtures tended to be lost in the rising tide of rhetoric. On the day before the Foreign Ministers' meeting was to begin, the Malaysians backed out on the ground that they believed nothing useful could be

accomplished due to a statement earlier in the week by Ramos that his country could not recognize Malaysia's right to speak for Sabah. Earlier, Tunku Abdul Rahman had announced that "unidentified" patrol planes (which he clearly implied were Filipino) had been buzzing Malaysian patrol boats off Sabah. The Tunku rather gratuitously added that he did not expect a full-scale war, but thought that "if things continue to worsen, hit-and-run guerrilla operations could be started to demoralize the Sabah population."⁹⁰ The mutual hostility also had led in October to the breakup, after only two days, of a meeting on trade liberalization which was convened in Manila under the auspices of the Association of Southeast Asian Nations (ASEAN).

The Second Reconciliation

Both sides, however, professed to be willing to try to meet and reduce tensions. Their chance came in mid-December, 1968, when Thai Foreign Minister Thanat Khoman quietly invited his two counterparts to Bangkok on the pretext of attending a meeting of the UN's Economic Commission for Asia and the Far East which was then under way.⁹² The New York Times reports that this strategem enabled Razak and Ramos to slip into Bangkok without attracting any special attention, and to meet at Thanat's residence without the presence of hawkish newspaper reporters (both ^{Ministers} reportedly have said in private that a major obstacle to a settlement of their differences has been the "fiercely nationalistic stands" taken by leading Malaysian and Philippine newspapers.) With privacy thus assured, they agreed to drop the Sabah issue for "at least" a year and to restore diplomatic relations; they also agreed "in principle" that their chiefs of state should meet early in 1969.⁹³ Marcos, it was said, already had publicly expressed a willingness to attend such a meeting, and it only remained for the Tunku to assent. By this agreement, then, the

antagonists succeeded in neutralizing the Sabah imbroglio for the year 1969 - a year in which national elections were held in both countries.

As of the date this paper is written, the agreement to restore diplomatic relations has not yet been implemented - for reasons which are not clear.⁹⁴ It should be noted that Ramos went to Bangkok as a lame duck: it had been announced in Manila on Dec. 1, 1968 that a Cabinet shuffle would be made on the first of the year as the first step in a major reorganization of the government, and that Ramos would retire for reasons of health.⁹⁵ His replacement as Foreign Minister is General Carlos P. Romulo. Whether this shift has any immediate significance for the dispute with Malaysia is doubtful, but it is worth taking a look, at this point, at some recent policy pronouncements.

When he took office in January, 1969, Romulo set a nationalist foreign policy line. He emphasized the Government's intention of improving relations with its Asian neighbors and of taking the lead in regional cooperation. Despite what he considered to be Sabah's "fundamental importance" to the Philippines, he promised to handle the issue "with caution, with restraint and with dignity." He announced his belief that a formula could be found for a resumption of diplomatic relations with the Malaysians despite the claim.⁹⁶ Romulo repeated substantially the same themes when he addressed the U.N. General Assembly last September 22. His reference to Sabah was confined to two paragraphs (as compared with twenty-six pages in the Philippine Foreign Minister's speech in the same place in 1968), and those paragraphs stressed the friendly, peaceful, orderly means by which the Philippines intends to press its claim. He again called for reference to the World Court in accordance with the Manila Agreement's emphasis on "negotiation, arbitration, conciliation or judicial settlement;"⁹⁷ and concluded that "...it is hardly possible to envisage a

more friendly and reasonable approach to this particular problem."

Marcos backs him up. In his State-of-the-Nation speech on January 27, the President acknowledged the widespread Filipino demands for "less politics, more work." In a summary of his Government's defense policies, Marcos placed a "high priority on peaceful settlement of the Sabah claim" - within a context of increased regional cooperation.⁹⁸ In general he seemed on this occasion to be reaffirming the themes of a speech he delivered last November,⁹⁹ in which he alluded to the cooperative projects which had been initiated during visits by him to three neighboring countries (of which Malaysia was one) early in the year. In that speech he went on to emphasize the Philippines' commitment to the rule of law, confidence in tribunals "such as" the International Court of Justice, support of the concept of self-determination, and readiness to accommodate "any reasonable" point of view.

There is no indication that Malaysia has budged one degree from its consistent position that there is "no claim," and that the only solution to the affair can be the recognition by the Philippines of Malaysia's right to sovereignty over Sabah. In the same Assembly session at which Mr. Romulo spoke, the Malaysian delegate exercised the right of reply. He declared that the Philippine claim is "a composite of fantasy, fallacy and fiction...it is tedious, tendentious but tenacious." He went on to denounce it as a claim pursued in service of a domestic political cause "with a fanatic fate" (sic). In response to Romulo's invocation of the Manila Agreement, the Malaysian delegate referred to the UN Malaysia Mission's findings and expressed the conviction that "the people of Sabah have chosen their destiny."¹⁰⁰

Conclusion

The Malaysians, strictly speaking, are right, although their acerbic

manner of stating the fact is regrettable. There seem at the conclusion of this discussion to be six compelling points which must decide the case, if it were up for a decision - and none of the six emerge from the early historical record on which most of the Philippine case rests. The six points are:

- 1) The Philippines held a plebiscite in 1947 in which the Constitution, with its specific definition of the national territory, was approved.
- 2) The Philippines recognized Malaysia, as constituted, in 1966.
- 3) The support of the great majority of the Sabah population for their inclusion in Malaysia has been demonstrated convincingly in several ways.
- 4) It would appear to be impossible for practical and ethical reasons to split Sabah in such a way as to satisfy a putative Philippine claim while leaving to Malaysia those portions legitimately acquired as a consequence of the grant from the Sultan of Brunei.
- 5) If such an attempt nevertheless were made, the precedent it might create could be so disruptive of present international arrangements as to make it inadmissible. Would the Philippines then claim the rest of the old Sulu grant in Indonesian Kalimantan? Could Brunei demand reversion of the rest of Sabah, and of Sarawak? Would various African countries be entitled to demand a redrawing of their boundaries to recover old tribal lands?
- 6) There is a far greater similarity of educational, political and other social institutions in Sabah to those of Malaysia than to those of the Philippines, and an existing integration of the economy, government, etc. to Malaysia for the disruption of which, in the absence of any strong demand in Sabah, there seems to be no justification.

By far the overwhelming part of the case against the Philippine claim, then, is political -- not legal at all. Tan Sri Ghazali Shafie recognized this point on page ten of his speech to the National Press Club in Kuala Lumpur (see bibliography) when he remarked that reference of the case to the World Court is irrelevant: by nature it is not, strictly speaking, a matter for the Court to decide. A reference to the Court could nevertheless be made, but if the verdict were rendered on narrowly legalistic grounds (as happened in the Southwest Africa case a few years ago), and if it were found that the Philippine legal case were the stronger (which is by no means a foregone conclusion), the result could just be to fan the controversy rather than to resolve it.

Malaysia should be in a rather secure position and capable, therefore, of exercising some statesmanship. Their exasperation with the whole affair is perfectly understandable by now, since one cannot help wondering why the Philippines will insist on pushing "by peaceful, legal means" a claim which has no prospect whatever of being satisfied except through violent and illegal ones. The answer, clearly, must be that the Marcos Government feels compelled to continue defending supposed national interests lest some unscrupulous political opponent take the initiative. And even from the Malaysian point of view, the present state of affairs must seem far preferable to that which prevailed in 1963, 1964, 1965, or 1968.

Therefore it is a little disappointing to find them responding to a moderate speech of Romulo's in the United Nations by making debating points ("fantasy, fallacy and fiction...") Although one can sympathize with their impatience over a "land grab," is there not an opportunity now for a more imaginative response to the soft words of the Marcos administration? If the World Court is ruled out, ^{perhaps} there is another means of

"conciliation and arbitration" which could be used, with suitable fanfare and possibly the payment of a substantial amount of money, to assuage Philippine pride, give the appearance of "treating Manila's legal claims with respect,"¹⁰¹ and lay the matter to rest now, while the opportunity presents itself.

Footnotes

- 1) Pacifico A. Ortiz, S.J., Legal Aspects of the North Borneo Question (Manila, 1964), p. 1.
- 2) K.G. Tregonning, A History of Modern Sabah (Singapore, 1965), p. 5.
- 3) Ibid., pp. 8-9.
- 4) Ibid., p. 14.
- 5) Ibid.
- 6) L.R. Wright, "Historical Notes on the North Borneo Dispute" in Journal of Asian Studies 25 (May, 1966), p. 476.
- 7) Tregonning, History, pp. 14-15.
- 8) Wright, Loc. Cit.
- 9) Ibid., p. 11. His source for this assertion is Alexander Dalrymple, "A Full and Clear Proof that the Spaniards can have no claim to Balembangan" (London, 1774).
- 10) See, for example, Wright, op. cit., p. 479, where it is stated that such writers as Ortiz, Majul, Saleeby and de la Costa assume that Sulu held sovereignty over northeast Borneo.
- 11) Quoted in Wright, op. cit., p. 473.
- 12) Ibid.
- 13) Ibid., p. 480.
- 14) Ibid., p. 479.
- 15) Ibid., p. 471.
- 16) Vincent T. Harlow, "Early British Pioneers in Borneo" in the Sarawak Museum Journal VI (1955), pp. 445-450, as reprinted in Bastin and Winks, eds., Malaysia - Selected Historical Readings, Oxford University Press (Kuala Lumpur, 1966), p. 121.
- 17) Ortiz., op. cit., pp. 11-12.
- 18) Ibid.
- 19) Tregonning, History, p. 22.
- 20) Martin Meadows, "The Philippine Claim to North Borneo" in Political Science Quarterly LXXVII (September, 1962), p. 328.
- 21) Ortiz, op. cit., 11-12. See also Wright, op. cit., p. 477, citing British Foreign Office sources.
- 22) Wright, op. cit., p. 477.
- 23) Ibid., p. 476.
- 24) Ibid., p. 480.
- 25) See, for example, Meadows, op. cit., p. 328; or Jovito R. Salonga, "A Reply to the Sumulong Report on the Philippine Claim to North Borneo" in Philippine International Law Journal (PILJ) II, no. 1 (January-June, 1963), p. 18 ff.; and Ortiz, op. cit., p. 7.

- 26) Cited in Ortiz, op. cit., Appendix, pp. 41-44. Also see K.G. Tregonning, "An Outline of the Historical Factors Behind the British Occupation of North Borneo, and some Considerations of the Claim of the Philippines Thereto" in International Association of Historians of Asia, 2nd Taipei, 1962, Proceedings... (Taipei, 1963?), pp. 527-535.
- 27) Ortiz, op. cit., pp. 45-46.
- 28) Jovito R. Salonga, loc. cit.
- 29) See Arturo A. Alafriz, "On the North Borneo Question" in PILJ II, no 1 (January-June, 1963), p. 80.
- 30) Ibid., pp. 86-87.
- 31) See Juan M. Arreglado, "Comments on 'The North Borneo Question'", PILJ II, no. 1 (January-June, 1963), p. 100.
- 32) Op. cit.
- 33) Wright, op. cit., p. 483.
- 34) Ibid., n. 2.
- 35) Ortiz (p. 2) also cites the opinion of Dr. H. Otley Beyer, of the University of the Philippines, that the entire agreement with Overbeck and Dent was invalid since it was concluded by the Sultan personally, without the written consent and supporting signatures of any of his Datus.
- 36) See Ortiz, Appendices, p. 46, and preceding discussion of the document therein set forth.
- 37) Ortiz, loc. cit., as cited in Bernard K. Gordon, Dimensions of Conflict in Southeast Asia, (Englewood Cliffs, N.J., 1966), p. 12.
- 38) Op. cit.
- 39) R.H. Leary, "Sulu and Sabah," Far Eastern Economic Review IV (July, 1963), p. 20 - as quoted in Gordon, op. cit., p. 12.
- 40) Gordon, op. cit., p. 12.
- 41) Tregonning, History, pp. 20-22 et. seq.
- 42) See Wright, op. cit., pp. 478-9.
- 43) Ortiz, op. cit., p. 16.
- 44) Ibid., pp. 18-20.
- 45) Tregonning, History, pp. 27-28.
- 46) Bernabe Africa, "Legal Status of the British Occupation of North Borneo" in PILJ II, no 3 (July-September, 1963), p. 398.
- 47) Ortiz, op. cit., pp. 20-21.
- 48) Ibid., p. 13.
- 49) Ibid., p. 35.
- 50) Gordon, op. cit., p. 17.
- 51) Ortiz, op. cit., p. 25.
- 52) Ibid., p. 27.
- 53) Lela A. Garner, "Heirs, Press and Policy: The Philippine Claim to North Borneo" In Silliman Journal, 11, no. 3 (3rd Quarter, 1964), p. 188.

- 54) Ibid., p. 174.
- 55) Ortiz, op. cit., p. 23.
- 56) For the sources of these assertions, see Garner, op. cit., pp. 175-6; and Meadows op. cit., pp. 329-30.
- 57) Ortiz, op. cit., p. 2.
- 58) Garner, op. cit., p. 188-9.
- 59) Ibid., pp. 178-80.
- 60) Ibid.
- 61) Ortiz, op. cit., p. 3.
- 62) The discussion in this paragraph is distilled from Garner, op. cit., pp. 181-196.
- 63) See Gordon, op. cit., pp. 19-20; Garner, op. cit., p. 198; and Francis L. Starner, "Macapagal and Borneo" in Far Eastern Economic Review 40 (April 11, 1963), pp. 68-71.
- 64) Gordon, op. cit., pp. 22-24.
- 65) Quoted in "Statement by Tan Sri Mohammad Ghazali bin Shafie, Leader of the Malaysian Delegation to the Bangkok Talks, July 15, 1968" (Malaysian Embassy, Washington, D.C.)
- 66) James P. Ongkili, The Borneo Response to Malaysia, 1961-63, Donald Moore Press (Singapore, 1967), p. 90.
- 67) Lorenzo Sumulong, sp., "A Report on Malaysia and on the Greater Malayan Confederation in Connection with a Philippine Claim of Sovereignty to a Portion of North Borneo" in PILJ II, no. 1 and 2 (Jan. - June, 1963) p. 8.
- 68) Ongkili, op. cit., pp. 92-95. See also R.S. Milne, Government and Politics in Malaysia, p. 83, for a Sabah Assembly resolution of 1964 to the same effect.
- 69) United Nations Malaysia Mission "Final Conclusions of the Secretary-General on Sabah" (Malaysian Embassy, Washington, D.C.), passim.
- 70) Arturo M. Tolentino, The Philippines Challenges Malaysia to Bring the Sabah Issue to the World Court, sp. at United Nations General Assembly, New York, October 25, 1968 (Philippine Embassy, Washington, D.C.), pp. 8-10.
- 71) Philippines (Republic), The Philippine Claim to North Borneo, v. ii, Bureau of Printing (Manila, 1968), Appendix XIV.
- 72) Ibid., Appendix XXI.
- 73) See The New York Times (NYT) for 1968; Mar. 22, p. 1; Mar. 23, p. 7; Mar. 24, p. 16; Mar. 25, p. 9; Mar. 26, p. 6; and Mar. 27, p. 6.
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- 77) NYT, July 21, 1968, p. 4.
- 78) Tan Sri Mohammad Ghazali bin Shafie, "The Manila 'Claim' in Perspective," sp. given Nov. 6, 1968 at the National Press Club, Kuala Lumpur (Malaysian Embassy, Washington, D.C.).

- 79) Ibid., p. 7.
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- 90) For the information given in this paragraph see NYT, Sept. 23, 1968, p. 13; Oct. 4, p. 5; Oct. 14, p. 3; and Oct. 20, p. 5.
- 91) NYT, Nov. 1, 1968, p. 2.
- 92) Ibid., Dec. 14, 1968, p. 5.
- 93) Ibid.
- 94) See ibid., Dec. 12, 1969, p. 7.
- 95) Ibid., Dec. 1, 1968, p. 28. Also of interest is the report in NYT for Dec. 9, 1968, p. 43, in which it is stated that one of the new members of the Cabinet is to be Congressman Salih Ututalum - a Moslem from Sulu who on occasion had taken an interest in the Sabah matter. If the reading of Marcos' intentions in this paper is correct, this nomination should be seen as an attempt to placate the Moslems and mute their opposition by giving one of their prominent members (not necessarily the most strident one) a high post in the government. As head of General Services (his new position), moreover, Salih should be in a position to dispense plenty of patronage.
- 96) Ibid., Jan. 3, 1969, p. 4.
- 97) Statement by Mr. Romulo of the Philippines in United Nations General Assembly, "Provisional Verbatim Record of the Seventeen Hundred and Sixtieth Meeting" - New York, Sept. 22, 1969 (English), pp. 12-13.
- 98) NYT, Jan. 28, 1969, p. 7.
- 99) Ferdinand E. Marcos, "Building of a New Asian Society," sp at opening of the Seventh Orient and Southeast Asia Lions Convention, Manila, Nov. 15, 1968 (Philippine Embassy, Washington, D.C.), p. 7.
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