Ad Hoc Arbitration

1. **NURHIMA KIRAM FORNAN**
2. **FUAD A. KIRAM**
3. **SHERAMAR T. KIRAM**
4. **PERMAISULI KIRAM – GUERZON**
5. **TAJ – MAHAL KIRAM – TARSUM NUQUI**
6. **AHMAD NAZARD KIRAM SAMPANG**
7. **JENNY K.A. SAMPANG**
8. **WIDZ – RAUNDA KIRAM SAMPANG**

Claimants

v.

MALAYSIA

Respondent

Final Award

February 28, 2022

Sole Arbitrator

Dr. Gonzalo Stampa

Representatives of the Claimants

Mr. Paul H. Cohen
Me. Elisabeth Mason
Me. Denisse DelSignore
4-5- Gray's Inn Square Chambers
London WC1R 5 AH
United Kingdom

Prof. Dr. Bernardo M. Cremades
Mr. Bernardo M. Cremades Román
Mr. Javier Juliani
Me. Paloma Carrasco
Mr. Patrick Byrne
Me. Micaela Ossio
Me. Julie Bloch
B. Cremades & Asociados
Goya 18, 2nd Floor
28001 Madrid
Spain

Representative of the Respondent

Honourable Tan Sri Idrus Harun
Attorney General
Attorney General's Chambers of Malaysia
45 Persiaran Perdana, Precint 4
62100 Putrajaya
Malaysia

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Glossary of Defined Terms and Abbreviations

1878 Agreement	The instrument for grant and cession of a portion of territory along the North Coast of Borneo concluded between Sultan Mohammed Jamalul Alam and Messrs. Alfred Dent and Baron Gustavus de Overbeck, on January 4, 1878
1847 Treaty	Treaty of Friendship and Commerce, and for the Suppression of Slave Trade, concluded on May 27, 1847 between Great Britain and Borneo
1851 Treaty	Treaty signed on April 19, 1851, between Spain and the Sultanate of Sulu, which codified peace terms of the Spanish expedition initiated on December 11, 1850 against Sulu for the suffocation of an internal revolt in that area
1855 Madrid Protocol	Protocol signed in Madrid on March 7, 1885, between Spain, Germany and Great Britain, where the latter two nations recognised both the sovereignty of Spain over the Sulu Archipelago and the limits of its influence on the region
1903 Confirmatory Deed	The confirmatory deed of the 1878 Agreement concluded on April 22, 1903 between the Sultan of Sulu and the British North Borneo Company
1946 North Borneo Cession Agreement	The agreement dated June 26, 1946 and made between the British Crown and the British North Borneo Company for the assigment of all the latter's rights and assets in North Borneo to the British Crown, effective July 15, 1946
1989 Resolution	Resolution of the Institute of International Law of September 12, 1989
Annulment Proceeding 88/2020	Action to set aside the Preliminary Award filed by the Respondent on September 30, 2020, before the Civil and Criminal Chamber of the Superior Court of Justice of Madrid, pursuant to Article 41 of the SAA, with docket number 88/2020
Application	Application for the judicial appointment of an arbitrator pursuant to Article 15.4 of the Arbitration Act 60/2003, of December 23, 2003, filed by Claimants on February 1, 2018 before the Civil and Criminal Chamber of the Superior Court of Justice of Madrid, with docket number 4/2018
Arbitration Agreement	The arbitration clause contained in the Deed
Brattle Report	Expert Report prepared by The Brattle Group, dated June 19, 2020, and its exhibits BR 1 to BR 83
British North Borneo Provisional Association	The British North Borneo Provisional Association Limited, established by Mr. Dent in July 1880

British North Borneo Company	The British North Borneo Chartered Company, incorporated on November 1, 1881.
Brödermann Report	Expert Report by Professor Dr. Eckart Brödermann, along with its Exhibits, addressing the issue of applicable substantive law and dated December 19, 2019
Brödermann Report Addendum	Addendum to the Brödermann Report, along with its Exhibits, issued by Professor Dr. Eckart Brödermann on February 26, 2020
Brödermann Report II	Expert Report by Professor Dr. Eckart Brödermann, dated June 18, 2020, along with its Exhibits
Carpenter-Kiram Agreement	Agreement of March 22, 1915 signed by Mr. Frank W. Carpenter –acting as the North American Governor-General and representative of the government of the United States of America in the Department of Mindanao and Sulu- and the Sultan of Sulu
Claimants	(i) Nurhima Kiram Fornan, (ii) Fuad A. Kiram, (iii) Sheramar T. Kiram, (iv) Permaisuli Kiram – Guerzon, (v) Taj – Mahal Kiram – Tarsum Nuqui, (vi) Ahmad Nazard Kiram Sampang, (vii) Jenny K.A. Sampang and (viii) Widz-Raunda Kiram Sampang
Clarification of the Preliminary Award	Procedural Order 18, dated July 30, 2020, which contained the decision on the clarifications of the Preliminary Award sought by the Claimants
Clerk Communication of July 12, 2021	The communication of the clerk of the Civil and Criminal Chamber of the Superior Court of Justice of Madrid dated July 7, 2021 and served on the Arbitrator on July 12, 2021 issued on an annulment proceeding, which docket number was 88/2020
Clerk Communication of July 7, 2021	The communication of the clerk of the Civil and Criminal Chamber of the Superior Court of Justice of Madrid served on the Arbitrator of July 7, 2021 issued on an annulment proceeding, which docket number was 88/2020
Clerk Communication of October 14, 2021	The communication of the clerk of the Civil and Criminal Chamber of the Superior Court of Justice of Madrid dated October 14, 2021 and served on the Arbitrator on October 14, 2021 issued on an annulment proceeding, which docket number was 88/2020, which contained the Clerk Decree of October 14, 2021 declaring the discontinuance of the annulment proceeding
Cobbold Commission	The Commission of Enquiry, North Borneo and Sarawak
Cobbold Report	The Report of June 21, 1962, issued by the Cobbold Commission
Communication of May 22, 2019	Communication of the Civil and Criminal Chamber of the Superior Court of Justice of Madrid dated May 22, 2019
Counter – Memorial on Jurisdiction	Counter – Memorial on Jurisdiction filed by Claimants on February 10, 2020, along with Exhibits and Expert Report

Decision of June 29, 2021	Decision of the Civil and Criminal Chamber of the Superior Court of Justice of Madrid of June 29, 2021, vacating all rulings adopted in relation to the Application, including the Judgment of March 29, 2019
Deed	An instrument for grant and cession of a portion of territory along the North Coast of Borneo concluded between Sultan Mohammed Jamalul Alam and Messrs. Alfred Dent and Baron Gustavus de Overbeck, on January 4, 1878
Ex parte communication of July 1, 2021	The sudden and unscheduled visit to the Arbitrator's law firm which took place on July 1, 2021 by some representatives of Uria Law Firm –apparently acting on behalf of the State of Malaysia in the Application- and Mr. Ignacio Paz-Ares, a Notary of Madrid, with the purpose of serving on the Arbitrator a notarised deed composed of (i) an extract of the Decision of June 29, 2021, and (ii) a unilateral request on the part of Malaysia, addressed to the Arbitrator, to put an immediate end to the present arbitration proceedings further to the Decision of June 29, 2021
Ex parte communication of December 17, 2021	The *ex parte* communication from Malaysia addressed to the Arbitrator on December 17, 2021, containing the Suspension Order
Ex parte communication of February 18, 2022	The *ex parte* communication from Malaysia addressed to the Arbitrator on February 18, 2022
Exequatur 1017/2020	Request for recognition and enforcement of the foreign Judgement rendered by the High Court of Malaysia of January 14, 2020, and its supporting exhibits filed, by Malaysia, on September 10, 2020 before the Court of First Instance 72 of Madrid, under docket number 1017/2020
Exequatur of the Preliminary Award	Decision of the Tribunal de Grande Instance de Paris of September 17, 2021, ordering exequatur of the Preliminary Award
Final Award	Final Award dated March 1, 2022
FLA	Decree 2011-48 of January 13, 2011, on the new French Law of Arbitration
Geneva Convention	European Convention on International Commercial Arbitration of April 21, 1961
Hearing	Hearing on the merits, held, remotely, from February 15, 2021 to February 16, 2021
Hearing on Jurisdiction	Hearing on jurisdiction held on February 21, 2020, at Hotel Intercontinental Madrid, Meeting Room Toledo, Paseo de la Castellana 49, 28046 Madrid
Judgement of March 29, 2019	Judgment 11/2019 by the Civil and Criminal Chamber of the Superior Court of Justice of Madrid, dated March 29, 2019
Kratz Report	Expert Report by Em. Prof. Dr. Phil. Ernst Ulrich Kratz, dated June 13, 2020, along with its Exhibits

Mackaskie Judgment	Judgment issued by the Chief Justice C.F.C Macaskie of the High Court of the State of North Borneo in the case *Dayang – Dyang Haji Piandao Kiram of Jolo, Philippines & 8 others v. The Government of North Borneo & Others* [Civil Suit No 169/39], dated December 18, 1939
Malaysia	Malaysia
Meehan Report	Expert Report by Mr. Nathan Meehan, dated June 19, 2020, along with its Exhibits
Mr. Capiel's Motion	Email of July 5, 2021, from Mr. Capiel to the Arbitrator, enclosing (i) the full text of the Decision of June 29, 2021, which included a dissenting opinion by Justice Vijande, arguing that the Judgment of March 29, 2019 should not be vacated and (ii) a copy of the motion addressed to the Civil and Criminal Chamber of the Superior Court of Justice of Madrid in the Application to request that the Arbitrator stop the present arbitration
New York Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on June 10, 1958
Notice of Arbitration	Notice of Arbitration filed by the Claimants on July 30, 2019
Notice of Intention to Commence Arbitration	Claimants' notice of intention to commence arbitration dated November 2, 2017, filed against the Respondent
Parties	Claimants and Respondent, jointly
Pre-Hearing Conference	The Pre-Hearing Conference held, remotely, on January 8, 2021
Preliminary Award	Preliminary Award on Jurisdiction and Applicable Law, dated May 25, 2020
Preparatory Conference	The preparatory conference, which took place on October 25, 2019, at Hotel Intercontinental Madrid, Meeting Room Toledo, Paseo de la Castellana 49, 28046 Madrid
Procedural Calendar	Procedural Calendar, established by the Arbitrator on December 10, 2019
Protectorate Agreement	Protectorate agreement signed on May 12, 1888 between the Government of the United Kingdom and the British North Borneo Company for the territory defined on the 1878 Agreement and managed by the British North Borneo Company to become a British Protectorate
Reply	Reply to the Statement of Defence filed by Claimants, by email, on November 9, 2020
Respondent	Malaysia
Response to the Notice of Arbitration	Response to the Notice of Arbitration, to be filed by the Respondent by September 9, 2019

SAA	Spanish Arbitration Act 60/2003, dated December 23, 2003
Statement of Claim	Statement of Claim filed by Claimants on June 20, 2020, along with its Exhibits
Suspension Order	Suspension order, dated December 16, 2021, rendered *ex parte* upon reasoned request by Malaysia before the First President of the Paris Court of Appeal
Suspension Order Request	The request for urgent measures to safeguard the rights of a party, filed by Malaysia before the First President of the Paris Court of Appeal on December 10, 2021, seeking the obtention of the Suspension Order
U&M Legal Opinion	Legal opinion issued on December 1, 2019 by Uria & Menendez to Respondent *«…in connection with procedural matters under Spanish law in the claim filed in Spain by the self-proclaimed successors-in-title to the Sultan of Sulu…against the Government of Malaysia…»*
UNCITRAL Arbitration Rules	Arbitration Rules adopted by the United Nations Commission on International Trade Law on August 15, 2010
UNCITRAL Model Law	Model Law adopted by the United Nations Commission on International Trade Law on June 21,1985
UNIDROIT Principles	Principles of International Commercial Contracts endorsed by the International Institute for the Unification of Private Law and amended in 2016
Updated Procedural Calendar	Updated Procedural Calendar, established by the Arbitrator on August 14, 2020

Procedural Orders

Procedural Order 1	The Arbitrator rendered Procedural Order 1 on June 24, 2019. The Parties were served on the same day by mail, and by express courier service on June 24, 2019, on June 26, 2019, on September 17, 2019 and on September 19, 2019. Claimants acknowledged receipt on June 24, 2019, at 15:40 hours, Madrid Time. The Prime Minister of Malaysia received International Courier DHL, on June 26, 2019 at his Office, located at Main Block, Perdana Putra Building, Federal Government Administrative Centre, 62502 Putrajaya, Malaysia. Mr Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on June 24, 2019, at 04:55:26 hours (Malaysia Time) and read it on June 25, 2019, at 08:15:12 hours (Malaysia Time) and received International Courier DHL, on June 26, 2019 and on September 19, 2019, at his Chambers located at 45 Persiaran Perdana, Precinct 4, 62100 Putrajaya, Malaysia. Respondent failed to acknowledge receipt, nor did it provide an acceptable excuse. Finally, Respondent acknowledged receipt in Exhibit C 54.
Procedural Order 2	The Arbitrator rendered Procedural Order 2 on July 25, 2019. The Parties were served on the same day by email. Claimants acknowledged receipt on July 25, 2019, at 14:35 hours, Madrid Time. Mr. Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on July 25, 2019, at 18:05:12 hours (Malaysia Time) and read it on July 26, 2019, at 08:17:34 hours (Malaysia Time). Respondent failed to acknowledge receipt, nor did it provide an acceptable excuse. Finally, Respondent acknowledged receipt in Exhibit C 54.
Procedural Order 3	The Arbitrator rendered Procedural Order 3 on September 17, 2019. The Parties were served on the same day by email. Claimants acknowledged receipt of same on September 17, 2019, at 15:33 hours, Madrid Time. The Embassy of Malaysia in Madrid received this email on September 18, 2019, at 10:51 hours (Madrid Time) at its email addresses: pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr. Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on September 17, 2019, at 16:50:52 hours (Malaysia Time) and read it on September 17, 2019, at 16:53:18 hours, (Malaysia Time). Respondent failed to acknowledge receipt, nor did it provide an acceptable excuse. Finally, Respondent acknowledged receipt in Exhibit C 54.
Procedural Order 4	The Arbitrator rendered Procedural Order 4 on October 2, 2019. The Parties were served on the same day by email. Claimants acknowledged receipt of same on October 2, 2019, at 09:30:15 hours, Madrid Time.

The Embassy of Malaysia in Madrid received this email on October 2, 2019, at 09:18 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my.

Mr. Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on October 2, 2019, at 15:17:53 hours (Malaysia Time) and read it on October 3, 2019, at 09:05:01 hours (Malaysia Time).

Respondent failed to acknowledge receipt, nor did it provide an acceptable excuse. Finally, Respondent acknowledged receipt in Exhibit C 54.

Procedural Order 5

The Arbitrator rendered Procedural Order 5 on October 21, 2019. The Parties were served on the same day by email.

Claimants acknowledged receipt of same on October 21, 2019, at 17:24 hours Madrid Time.

Mr Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on October 21, 2019, at 23:24:03 hours (Madrid Time) and read it on October 22, 2019, at 11:38:23 hours, Malaysia Time.

Respondent failed to acknowledge receipt, nor did it provide an acceptable excuse. Finally, Respondent acknowledged receipt in Exhibit C 54.

Procedural Order 6

The Arbitrator rendered Procedural Order 6 on October 31, 2019. The Parties were served on the same day by email. Claimants acknowledged receipt on October 31, 2019, at 15:42 hours, Madrid Time. Respondent's then Counsel –Mr. Capiel- acknowledged receipt on October 31, 2019, at 13.25 hours, Madrid Time (Exhibit C 54).

Procedural Order 7

The Arbitrator rendered Procedural Order 7 on November 7, 2019. The Parties were served on the same day by email.

Claimants acknowledged receipt of same on November 7, 2019, at 12:33 hours, Madrid Time.

Respondent's then Counsel received this email on November 7, 2019, at 12:26 hours and read it on the same day at 12:30:54 hours, Madrid Time.

Mr. Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on November 20, 2019, at 02:39:01 hours (Malaysia Time) and read it on November 20, 2019 at 08:37:14 hours (Malaysia Time) (Exhibit C 54).

Procedural Order 8

The Arbitrator rendered Procedural Order 8 on November 26, 2019. The Parties were served on the same day by email.

Claimants acknowledged receipt of same on November 26, 2019, at 13:08 hours, Madrid Time.

The Prime Minister of Malaysia received this email on November 26, 2019, at 11:55 hours (Madrid Time) at his email address info@jpm.gov.

The Embassy of Malaysia in Madrid received this email on November 26, 2019, at 11:55 hours (Madrid Time) at its email addresses: pro.ukk@kln.gov.my and mwmadrid@kln.gov.my.

Mr. Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on November 26, 2019, at 18:54:55 hours (Malaysia Time) and read it on November 27, 2019, at 08:57:28 hours (Malaysia Time).

Respondent failed to acknowledge receipt, nor did it provide an acceptable excuse.

Procedural Order 9	The Arbitrator rendered Procedural Order 9 on December 10, 2019. The Parties were served on the same day by email. Claimants acknowledged receipt of same on December 10, 2019, at 15:30 hours, Madrid Time. The Prime Minister of Malaysia received this email on December 10, 2019, at 10:17 hours (Madrid Time) at his email address info@jpm.gov. The Embassy of Malaysia in Madrid received this email on December 10, 2019, at 10:17 hours (Madrid Time) at its email addresses: pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr. Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on December 10, 2019, at 17:16:53 hours (Malaysia Time) and read it on December 11, 2019 at 09:22:49 hours (Malaysia Time). Respondent failed to acknowledge receipt, nor did it provide an acceptable excuse.
Procedural Order 10	The Arbitrator rendered Procedural Order 10 on January 2, 2020. The Parties were served on the same day by email. Claimants acknowledged receipt of same on January 2, 2020, at 17:36 hours, Madrid Time. The Prime Minister of Malaysia received this email on January 2, 2020, at 17:12 hours (Madrid Time) at his email address info@jpm.gov. The Embassy of Malaysia in Madrid received this email on January 2, 2020, at 17:12 hours (Madrid Time) at its email addresses: pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr. Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on January 3, 2020, at 00:11:46 hours (Malaysia Time) and read it on January 3, 2020 at 09:25:34 hours (Malaysia Time). Respondent failed to acknowledge receipt, nor did it provide an acceptable excuse.
Procedural Order 10 (Amended)	The Arbitrator rendered amended Procedural Order 10 on January 14, 2020. The Parties were served on the same day by email. Claimants acknowledged receipt of same on January 14, 2020, at 20:44 hours, Madrid Time. The Prime Minister of Malaysia received this email on January 14, 2020, at 10:13 hours (Madrid Time), at his email address info@jpm.gov.my. The Embassy of Malaysia in Madrid received this email on January 14, 2020, at 10:13 hours (Madrid Time) at its email addresses: pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr. Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on January 14, 2020, at 17:12:33 hours (Malaysia Time) and read it on January 14, 2020 at 17:18:43 hours (Malaysia Time). Respondent failed to acknowledge receipt, nor did it provide an acceptable excuse.
Procedural Order 11	The Arbitrator rendered Procedural Order 11 on January 14, 2020. The Parties were served on the same day by email. Claimants acknowledged receipt of same on January 14, 2020, at 20:47 hours, Madrid Time. Respondent failed to acknowledge receipt, nor did it provide an acceptable excuse.

Procedural Order 12	The Arbitrator rendered Procedural Order 12 on January 14, 2020. The Parties were served on the same day by email. Claimants acknowledged receipt of same on January 14, 2020, at 20:47 hours, Madrid Time. Respondent failed to acknowledge receipt, nor did it provide an acceptable excuse.
Procedural Order 13	The Arbitrator rendered Procedural Order 13 on February 25, 2020. The Parties were served on the same day by email. Claimants acknowledged receipt of same on February 25, 2020, at 14:20 hours, Madrid Time. The Prime Minister of Malaysia received this email on February 25, 2020, at 12:20 hours (Madrid Time) at his email address info@jpm.gov. The Embassy of Malaysia in Madrid received this email on February 25, 2020, at 12:20 hours (Madrid Time) at its email addresses: pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr. Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on February 25, 2020, at 19:20:18 hours (Malaysia Time) and read it on February 26, 2020, at 08:12:29 hours (Malaysia Time). Respondent failed to acknowledge receipt, nor did it provide an acceptable excuse.
Procedural Order 14	The Arbitrator rendered Procedural Order 14 on March 13, 2020. The Parties were served on the same day by email. Claimants acknowledged receipt of same on March 13, 2020, at 15:56 hours, Madrid Time. The Prime Minister of Malaysia received this email on March 13, 2020, at 14:24 hours (Madrid Time) at his email address info@jpm.gov.my. The Embassy of Malaysia in Madrid received this email on March 13, 2020, at 14:24 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr. Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on March 13, 2020, at 21:23:43 hours (Malaysia Time) and read it on March 13, 2020, at 22:03:56 hours (Malaysia Time). Respondent failed to acknowledge receipt, nor did it provide an acceptable excuse.
Procedual Order 15	The Arbitrator rendered Procedural Order 15 on March 25, 2020. The Parties were served on the same day by email. Claimants acknowledged receipt of same on March 25, 2020, at 22:14 hours, Madrid Time. The Prime Minister of Malaysia received this email on March 25, 2020, at 21:31 hours (Madrid Time) at his email address info@jpm.gov.my. The Embassy of Malaysia in Madrid received this email on March 25, 2020, at 21:31:05 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my and read it on March 26, 2020, at 07:40:13 hours (Madrid Time). Mr. Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on March 25, 2020, at 21:32 hours (Madrid Time). Respondent failed to acknowledge receipt, nor did it provide an acceptable excuse.

Procedural Order 16	The Arbitrator rendered Procedural Order 16 on June 23, 2020. The Parties were served on the same day by email. Claimants acknowledged receipt of same on June 23, 2020, at 19:20 hours, Madrid Time. The Prime Minister of Malaysia received this email on June 23, 2020, at 16:50 hours (Madrid Time) at his email address info@jpm.gov. The Embassy of Malaysia in Madrid received this email on June 23, 2020, at 16:50 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on June 23, 2020, at 22:49:36 hours (Malaysia Time) and read it on June 24, 2020, at 06:48:15 hours (Malaysia Time). Respondent failed to acknowledge receipt, nor did it provide an acceptable excuse.
Procedural Order 17	The Arbitrator rendered Procedural Order 17 on June 29, 2020. The Parties were served on the same day by email. Claimants acknowledged receipt of same on June 29, 2020, at 19:38 hours, Madrid Time. The Prime Minister of Malaysia received this email on June 29, 2020, at 18:40 hours (Madrid Time) at his email address info@jpm.gov.my. The Embassy of Malaysia in Madrid received this email on June 29, 2020, at 18:39:21 hours (Madrid Time) at its email address mwmadrid@kln.gov.my and read it on June 29, 2020, at 21:40:37 hours (Madrid Time). Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on June 30, 2020, at 00:39:21 hours (Malaysia Time) and read it on August 1, 2020, at 16:39:50 hours (Malaysia Time). Respondent failed to acknowledge receipt, nor did it provide an acceptable excuse.
Procedural Order 18	The Arbitrator rendered Procedural Order 18 on July 30, 2020. The Parties were served on the same day by email. Claimants acknowledged receipt of same on July 30, 2020, at 20:55 hours, Madrid Time. The Embassy of Malaysia in Madrid received this email on July 30, 2020, at 20:25:33 hours (Madrid Time) at its email address mwmadrid@kln.gov.my and read it on July 30, 2020, at 21:43:41 hours (Madrid Time). Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on July 31, 2020, at 02:25:33 hours (Malaysia Time) and read it on August 1, 2020, at 10:09:20 hours (Malaysia Time). Respondent failed to acknowledge receipt, nor did it provide an acceptable excuse.
Procedural Order 19	The Arbitrator rendered Procedural Order 19 on August 14, 2020. The Parties were served on the same day by email. Claimants acknowledged receipt of same on August 14, 2020, at 17:36 hours, Madrid Time. The Prime Minister of Malaysia received this email on August 14, 2020, at 11:19 hours (Madrid Time) at his email address info@jpm.gov.my. The Embassy of Malaysia in Madrid received this email on August 14, 2020, at 11:19 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my.

Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on August 14, 2020, at 17:19:01 hours (Malaysia Time) and read it on August 14, 2020, at 17:20:58 hours (Malaysia Time).

Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.

Procedural Order 20

The Arbitrator rendered Procedural Order 20 on August 14, 2020. The Parties were served on the same day by email.

Claimants acknowledged receipt of same on September 7, 2020, at 16:50 hours, Madrid Time.

The Prime Minister of Malaysia received this email on August 14, 2020, at 11:19 hours (Madrid Time) at his email address info@jpm.gov.my.

The Embassy of Malaysia in Madrid received this email on August 14, 2020, at 11:19 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my.

Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on August 14, 2020, at 17:19:01 hours (Malaysia Time) and read it on August 14, 2020, at 17:20:58 hours (Malaysia Time).

Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.

Procedural Order 21

The Arbitrator rendered Procedural Order 21 on August 25, 2020. The Parties were served on the same day by email.

Claimants acknowledged receipt of same on August 25, 2020, at 20:33 hours, Madrid Time.

The Prime Minister of Malaysia received this email on August 25, 2020, at 19:43 hours (Madrid Time) at his email address info@jpm.gov.my.

The Embassy of Malaysia in Madrid received this email on August 25, 2020, at 19:43:06 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my and read it at 19:56:22 hours.

Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on August 26, 2020, at 01:43:06 hours (Malaysia Time) and read it on August 26, 2020, at 06:35:04 hours (Malaysia Time).

Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.

Procedural Order 22

The Arbitrator rendered Procedural Order 22 on September 3, 2020 . The Parties were served on the same day by email.

Claimants acknowledged receipt of same on September 7, 2020, at 16:50 hours, Madrid Time.

The Prime Minister of Malaysia received this email on September 3, 2020, at 10:07 hours (Madrid Time) at his email address info@jpm.gov.my.

The Embassy of Malaysia in Madrid received this email on September 3, 2020, at 10:07 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my.

Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on September 3, 2020, at 16:06:38 hours (Malaysia Time) and read it on September 3, 2020, at 16:09:03 hours (Malaysia Time).

Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.

Procedural Order 23

The Arbitrator rendered Procedural Order 23 on September 18, 2020. The Parties were served on the same day by email.

Claimants acknowledged receipt of same on September 18, 2020, at 16:37 hours, Madrid Time.

The Prime Minister of Malaysia received this email on September 18, 2020, at 9:59 hours (Madrid Time) at his email address info@jpm.gov.my.

The Embassy of Malaysia in Madrid received this email on September 18, 2020, at 9:59 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my.

Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on September 18, 2020, at 15:59:15 hours (Malaysia Time) and read it on September 18, 2020, at 16:10:18 hours (Malaysia Time).

Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.

Procedural Order 24

The Arbitrator rendered Procedural Order 24 on September 18, 2020. The Parties were served on the same day by email.

Claimants acknowledged receipt of same on September 18, 2020, at 18:35 hours, Madrid Time.

The Prime Minister of Malaysia received this email on September 18, 2020, at 18:32 hours (Madrid Time) at his email address info@jpm.gov.my.

The Embassy of Malaysia in Madrid received this email on September 18, 2020, at 18:31 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my and read onn September 18, 2020, at 20:08:29 hours.

Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on September 19, 2020, at 00:31:19 hours (Malaysia Time) and read it on September 19, 2020, at 13:17:43 hours (Malaysia Time).

Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.

Procedural Order 25

The Arbitrator rendered Procedural Order 25 on October 5, 2020. The Parties were served on the same day by email.

Claimants acknowledged receipt of same on October 5, 2020, at 17:22 hours, Madrid Time.

Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on October 5, 2020, at 21:20:03 hours (Malaysia Time)and read it on October 6, 2020, at 05:29:56 hours (Malaysia Time).

Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.

Procedural Order 26

The Arbitrator rendered Procedural Order 26 on October 22, 2020. The Parties were served on the same day by email.

Claimants acknowledged receipt of same on October 22, 2020, at 16:18 hours, Madrid Time.

The Prime Minister of Malaysia received this email on October 22, 2020, at 10:23 hours (Madrid Time) at his email address info@jpm.gov.my.

The Embassy of Malaysia in Madrid received this email on October 22, 2020, at 10:23 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my and read it on October 22, 2020, at 10:38:35 hours (Madrid Time).

Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on October 22, 2020, at 04:23:04 hours (Malaysia Time) and read it on October 22, 2020, at 19:16:14 hours (Malaysia Time).

	Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.
Procedural Order 27	The Arbitrator rendered Procedural Order 27 on November 25, 2020. The Parties were served on the same day by email. Claimants acknowledged receipt of same on November 25, 2020, at 18:53 hours, Madrid Time. The Prime Minister of Malaysia received this email on November 25, 2020, at 17:57 hours (Madrid Time) at his email address info@jpm.gov.my. The Embassy of Malaysia in Madrid received this email on November 25, 2020, at 17:57 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on November 26, 2020, at 00:57:05 hours (Malaysia Time) and read it on November 26, 2020, at 04:28:20 hours (Malaysia Time). Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.
Procedural Order 28	The Arbitrator rendered Procedural Order 28 on November 25, 2020. The Parties were served on the same day by email. Claimants acknowledged receipt of same on November 25, 2020, at 18:53 hours, Madrid Time. The Prime Minister of Malaysia received this email on November 25, 2020, at 17:57 hours (Madrid Time) at his email address info@jpm.gov.my. The Embassy of Malaysia in Madrid received this email on November 25, 2020, at 17:57 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on November 26, 2020, at 00:57:05 hours (Malaysia Time) and read it on November 26, 2020, at 04:28:20 hours (Malaysia Time). Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.
Procedural Order 29	The Arbitrator rendered Procedural Order 29 on November 25, 2020, attaching the Updated Procedural Calendar. The Parties were served on the same day by email. Claimants acknowledged receipt of same on November 25, 2020, at 18:53 hours, Madrid Time. The Prime Minister of Malaysia received this email on November 25, 2020, at 17:57 hours (Madrid Time) at his email address info@jpm.gov.my. The Embassy of Malaysia in Madrid received this email on November 25, 2020, at 17:57 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on November 26, 2020, at 00:57:05 hours (Malaysia Time) and read it on November 26, 2020, at 04:28:20 hours (Malaysia Time). Respondent failed to acknowledge receipt, nor did it provide an acceptable excuse.
Procedural Order 30	The Arbitrator rendered Procedural Order 30 on December 29, 2020. The Parties were served on the same day by email.

Claimants acknowledged receipt of same on December 29, 2020, at 19:44 hours, Madrid Time.

The Embassy of Malaysia in Madrid received this email on December 29, 2020, at 13:09 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my.

Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on December 29, 2020, at 20:08:52 hours (Malaysia Time) and read it on December 29, 2020, at 20:34:39 hours (Malaysia Time).

Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.

Procedural Order 31

The Arbitrator rendered Procedural Order 31 on January 6, 2021. The Parties were served on the same day by email.

Claimants acknowledged receipt of same on January 6, 2021, at 23:28 hours, Madrid Time.

The Embassy of Malaysia in Madrid received this email on January 6, 2021, at 22:38 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my.

Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on January 7, 2021, at 05:37:27 hours (Malaysia Time) and read it on January 7, 2021, at 05:57:08 hours (Malaysia Time).

Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.

Procedural Order 32

The Arbitrator rendered Procedural Order 32 on February 1, 2021. The Parties were served on the same day by email.

Claimants acknowledged receipt of same on February 1, 2021, at 16:18 hours, Madrid Time.

The Embassy of Malaysia in Madrid received this email on February 1, 2021, at 10:47:33 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my.

Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on February 1, 2021, at 18:47:33 hours (Malaysia Time) and read it on February 2, 2021, at 10:51:52 hours (Malaysia Time).

Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.

Procedural Order 33

The Arbitrator rendered Procedural Order 33 on February 1, 2021. The Parties were served on the same day by email.

Claimants acknowledged receipt of same on February 1, 2021, at 16:18 hours, Madrid Time.

The Embassy of Malaysia in Madrid received this email on February 1, 2021, at 10:47:33 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my.

Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on February 1, 2021, at 18:47:33 hours (Malaysia Time) and read it on February 2, 2021, at 10:51:52 hours (Malaysia Time).

Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.

Procedural Order 34	The Arbitrator rendered Procedural Order 34 on February 1, 2021, attaching the Updated Procedural Calendar. The Parties were served on the same day by email. Claimants acknowledged receipt of same on February 1, 2021, at 16:18 hours, Madrid Time. The Embassy of Malaysia in Madrid received this email on February 1, 2021, at 10:47:33 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on February 1, 2021, at 18:47:33 hours (Malaysia Time) and read it on February 2, 2021, at 10:51:52 hours (Malaysia Time). Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.
Procedural Order 35	The Arbitrator rendered Procedural Order 35 on February 8, 2021. The Parties were served on the same day by email. Claimants acknowledged receipt of same on February 8, 2021, at 14:45 hours, Madrid Time. Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on February 8, 2021, at 16:44:06 hours (Malaysia Time) and read it on February 8, 2021, at 22:54:31 hours (Malaysia Time). Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.
Procedural Order 36	The Arbitrator rendered Procedural Order 36 on February 18, 2021. The Parties were served on the same day by email. Claimants acknowledged receipt on February 18, 2021, at 16:22 hours, Madrid Time. The Embassy of Malaysia in Madrid received this email on February 25, 2021, at 18:32:22 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on February 18, 2021, at 19:45:22 hours (Malaysia Time) and read it on February 18, 2021, at 21:31:42 hours (Malaysia Time). Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.
Procedural Order 37	The Arbitrator rendered Procedural Order 37 on March 18, 2021. The Parties were served on the same day by email. Claimants acknowledged receipt on March 18, 2021, at 16:49 hours, Madrid Time. The Embassy of Malaysia in Madrid received this email on March 18, 2021, at 13:46:45 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on March 18, 2021, at 21:46:45 hours (Malaysia Time) and read it on March 19, 2021, at 08:24:58 hours (Malaysia Time). Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.

Procedural Order 38	The Arbitrator rendered Procedural Order 38 on March 26, 2021. The Parties were served on the same day by email. Claimants acknowledged receipt on March 26, 2021, at 15:43 hours, Madrid Time. The Embassy of Malaysia in Madrid received this email on March 26, 2021, at 14:13:24 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on March 26, 2021, at 22:13:24 hours (Malaysia Time) and read it on March 27, 2021, at 05:12:40 hours (Malaysia Time). Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.
Procedural Order 39	The Arbitrator rendered Procedural Order 39 on March 26, 2021. The Parties were served on the same day by email. Claimants acknowledged receipt on March 26, 2021, at 15:43 hours, Madrid Time. The Embassy of Malaysia in Madrid received this email on March 26, 2021, at 14:13:24 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on March 26, 2021, at 22:13:24 hours (Malaysia Time) and read it on March 27, 2021, at 05:12:40 hours (Malaysia Time). Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.
Procedural Order 40	The Arbitrator rendered Procedural Order 40 on April 20, 2021. The Parties were served on the same day by email. Claimants acknowledged receipt on March 26, 2021, at 19:22 hours, Madrid Time. The Embassy of Malaysia in Madrid received this email on April 20, 2021, at 17:16:24 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on April 20, 2021, at 18:54:26 hours (Malaysia Time) and read it on April 22, 2021, at 06:21:04 hours (Malaysia Time). Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.
Procedural Order 41	The Arbitrator rendered Procedural Order 41 on July 2, 2021. The Parties were served on the same day by email. Claimants acknowledged receipt on July 2, 2021, at 13:14 hours, Madrid Time. The Embassy of Malaysia in Madrid received this email on July 2, 2021, at 12:52 (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on July 2, 2021, at 18:49:34 hours (Malaysia Time) and read it on July 2, 2021, at 21:03:47 hours (Malaysia Time). Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.

Procedural Order 42	The Arbitrator rendered Procedural Order 42 on July 20, 2021. The Parties were served on the same day by email. Claimants acknowledged receipt on July 20, 2021, at 13:47 hours, Madrid Time. The Embassy of Malaysia in Madrid received this email on July 20, 2021, at 11:26:06 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my and read it on July 20, 2021, at 13:27:16 hours (Madrid Time). Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my and siti.zainab@agc.gov.my- on July 20, 2021, at 19:26:06 hours (Malaysia Time) and read it on July 20, 2021, at 19:29:58 hours (Malaysia Time). Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.
Procedural Order 43	The Arbitrator rendered Procedural Order 43 on July 21, 2021. The Parties were served on the same day by email. Claimants acknowledged receipt on July 21, 2021, at 20:11 hours, Madrid Time. The Embassy of Malaysia in Madrid received this email on July 21, 2021, at 16:53:57 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my and read it on July 21, 2021, at 18:54:51 hours (Madrid Time). Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my and siti.zainab@agc.gov.my- on July 22, 2021, at 18:34:05 hours (Malaysia Time) and read it on July 22, 2021, at 18:43:56 hours (Malaysia Time). Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.
Procedural Order 44	The Arbitrator rendered Procedural Order 44 on October 29, 2021. The Parties were served on October 30, 2021 by email. Claimants acknowledged receipt on October 30, 2021, at 00:13 hours, Madrid Time. Mr. Idrus received this email – sent to his email address ag.idrus@agc.gov.my and siti.zainab@agc.gov.my- on October 30, 2021, at 00:07 hours (Madrid Time). Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.
Procedural Order 45	The Arbitrator rendered Procedural Order 45 on November 11, 2021. The Parties were served on the same day by email. Claimants acknowledged receipt on November 11, 2021, at 15:16 hours, Madrid Time. The Embassy of Malaysia in Madrid received this email on November 11, 2021, at 10:08:13 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my and read it on November 11, 2021, at 11:10:32 hours (Madrid Time). Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my and siti.zainab@agc.gov.my- on November 11, 2021, at 18:08:13 hours (Malaysia Time) and read it on November 11, 2021, at 22:10:37 hours (Malaysia Time).

Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.

Procedural Order 46

The Arbitrator rendered Procedural Order 46 on November 11, 2021. The Parties were served on the same day by email.

Claimants acknowledged receipt on November 11, 2021, at 15:16 hours, Madrid Time.

The Embassy of Malaysia in Madrid received this email on November 11, 2021, at 11:24:46 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my and read it on November 11, 2021, at 12:27:09 hours (Madrid Time).

Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my and siti.zainab@agc.gov.my- on November 11, 2021, at 19:24:46 hours (Malaysia Time) and read it on November 11, 2021, at 22:15:00 hours (Malaysia Time).

Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.

Procedural Order 47

The Arbitrator rendered Procedural Order 47 on December 15, 2021. The Parties were served on the same day by email.

Claimants acknowledged receipt on December 15, 2021, at 17:29 hours, Madrid Time.

The Embassy of Malaysia in Madrid received this email on December 15, 2021, at 10:20:42 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my and read it on December 15, 2021, at 11:24:01 hours (Madrid Time).

Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my and siti.zainab@agc.gov.my- on December 15, 2021, at 18:20:42 hours (Malaysia Time) and read it on December 15, 2021, at 18:28:36 hours (Malaysia Time).

Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.

Procedural Order 48

The Arbitrator rendered Procedural Order 48 on December 27, 2021. The Parties were served on the same day by email.

Claimants acknowledged receipt on December 27, 2021, at 11:17 hours, Madrid Time.

The Embassy of Malaysia in Madrid received this email on December 27, 2021, at 10:38:16 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my and read it on December 27, 2021, at 10:47:18 hours (Madrid Time).

Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my and siti.zainab@agc.gov.my- on December 27, 2021, at 10:38 hours (Madrid Time).

Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.

Procedural Order 49

The Arbitrator rendered Procedural Order 49 on January 3, 2022. The Parties were served on the same day by email.

Claimants acknowledged receipt on January 3, 2022, at 19:22 hours, Madrid Time.

The Embassy of Malaysia in Madrid received this email on January 3, 2022, at 14:59:36 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my

and mwmadrid@kln.gov.my and read it on January 5, 2022, at 09:31:28 hours (Madrid Time).

Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my and siti.zainab@agc.gov.my- on January 3, 2022, at 21:59:36 hours (Malaysia Time) and read it on January 4, 2022, at 01:04:40 hours (Malaysia Time).

Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.

Procedural Order 50

The Arbitrator rendered Procedural Order 50 on February 19, 2022. The Parties were served on the same day by email.

Claimants acknowledged receipt on February 19, 2022, at 16:15 hours, Madrid Time.

The Embassy of Malaysia in Madrid received this email on February 19, 2022, at 14:09 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my.

Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my and siti.zainab@agc.gov.my- on February 20, 2022, at 3:02:04 hours (Malaysia Time) and read it on February 20, 2022, at 16:50:10 hours (Malaysia Time).

Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.

Procedural Order 51

The Arbitrator rendered Procedural Order 51 on February 24, 2022. The Parties were served on the same day by email.

Claimants acknowledged receipt on February 24, 2022, at 12:24 hours, Madrid Time.

The Embassy of Malaysia in Madrid received this email on February 24, 2022, at 12:24:10 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my and read it on February 24, 2022, at 12:42:27 hours (Madrid Time).

Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my and siti.zainab@agc.gov.my- on February 24, 2022, at 12:24 hours (Malaysia Time).

Respondent failed to acknowledge receipt of this email, nor did it provide an acceptable excuse.

I. THE SCOPE OF THE FINAL AWARD

1. The Arbitrator renders this Final Award (henceforth, the Final Award) in accordance with the Updated Procedural Calendar established in Procedural Order 20 (henceforth, the Updated Procedural Calendar) and with Procedural Order 44 for the abovementioned arbitration.

2. Claimants in this arbitration are, jointly, (i) Nurhima Kiram Fornan; (ii) Fuad A. Kiram; (iii) Sheramar T. Kiram; (iv) Permaisuli Kiram – Guerzon; (v) Taj – Mahal Kiram – Tarsum Nuqui; (vi) Ahmad Nazard Kiram Sampang; (vii) Jenny K.A. Sampang; and (viii) Widz – Raunda Kiram Sampang (henceforth, jointly referred to as the Claimants). Respondent in this arbitration is Malaysia (henceforth, Malaysia or Respondent). Claimants and Respondent will henceforth also be referred to jointly as the Parties.

3. The Final Award seeks to determine the differences addressed by the Parties during the present arbitration. The Arbitrator will decide on the admissibility and the factual and legal merits of the Parties' respective claims. The footnotes are to be considered part of the Final Award.

II. THE BACKGROUND OF THE DISPUTE

4. The arbitration concerns a dispute which arose between Claimants and Respondent on the legal characterization and enforcement of an instrument over a portion of territory along the North Coast of Borneo –known today as Sabah, Malaysia- concluded on January 4, 1878, between Sultan Mohammed Jamal-ul Alam and Messrs. Alfred Dent and Baron Gustavus de Overbeck, an Austrian Consul General from Hong Kong (henceforth, indistinctly, the Deed or the 1878 Agreement).[1]

5. Mr. Alfred Dent applied for a Royal Charter from the British Government on December 2, 1878. In July 1880, Mr. Dent established the British North Borneo Provisional Association Limited (hereinafter, the British North Borneo Provisional

[1] Exhibit C 13. The Spanish translation of the Deed refers the date of January 4, 1878 and prevails over the English (Exhibit C 14), for the reasons contained in ¶ 126 of the Preliminary Award. It is its English translation which determines that date on *«…the 22nd of January in the year 1878…»*. The Final Award will refer to January 4, 1878 as the date of the Deed.

Association), for it to apply to the British Government for a Charter of Incorporation of a company to be constituted for the management of the 1878 Agreement.[2] Mr. Overbeck relinquished all his rights and interests in the affair to Mr. Dent on September 1, 1880, leaving Mr. Dent in control.[3] On November 1, 1881, the British Government granted the Royal Charter and the British North Borneo Company was incorporated (hereinafter, the British North Borneo Company).[4] The British North Borneo Provisional Association was dissolved and the British North Borneo Company started to operate in May 1882.[5] On April 22, 1903, the Sultan of Sulu and the British North Borneo Company concluded a confirmatory deed of the 1878 Agreement (hereinafter, the 1903 Confirmatory Deed).[6]

6. Claimants are direct descendants and legal heirs of Jamal-ul Kiram II (1894-1936), the last Sultan of Sulu and North Borneo and successor-in-title of the signatory of the 1878 Agreement.[7] Malaysia, on its part, admitted that it became the successor-in-title of the British North Borneo Company under both the 1878 Agreement and the 1903 Confirmatory Deed upon the establishment of its Federation on September 16, 1963.[8]

7. The Parties have antagonistic views on the substantive aspects of this dispute.

8. Claimants characterise the 1878 Agreement and the 1903 Confirmatory Deed as a commercial transaction, a leasing agreement of certain territory along the North Coast of Borneo, constituted for an undetermined period with Malaysia and in return of a series of annual rental payments. On this basis, Claimants seek to vindicate before Respondent their commercial rights under the terms of both the 1878 Agreement and the 1903 Confirmatory Deed.[9]

Claimants plead a principal claim that they have been complying with both the 1878 Agreement and the 1903 Confirmatory Deed, but Malaysia, on its part, would have incurred in a fundamental breach of its essential payment obligations under their terms since January 1, 2013, for reasons attributable, in their opinion, to the Respondent,[10] as it admitted by the latter in its correspondence of September 19, 2019.[11]

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2 Exhibit C 18.

3 Exhibits C 63 and C 64.

4 Statement of Claim, ¶ 58. Exhibits C 7 and C 18, p.5.

5 Exhibit C 77, p. 6.

6 Exhibits C 17 and C 21.

7 Exhibit C 20; Preliminary Award, ¶ 103.

8 Exhibits C 52, ¶ 6 and C 114, ¶¶ 3, 5 and 21.

9 Exhibits C 35 and C 36.

10 Statement of Claim, ¶¶ 217 – 223.

11 Statement of Claim, ¶¶ 217 – 223, 227, 335 and 340 – 377. Exhibit C 52.

Claimants seek, as main remedy,[12] the termination of the 1878 Agreement pursuant to Article 7.3.1 of the UNIDROIT Principles as of January 1, 2013 or, in the alternative, as of February 2020,[13] so that:

A. If the Final Award declares January 1, 2013 as the date of termination of both the 1878 Agreement and the 1903 Confirmatory Deed, Claimants submit that they are entitled to the restitution value of the rights over the leased territory along North Borneo, with interest as of January 1, 2013, of USD 32.20 billion, or alternatively, USD 24.15 billion, or alternatively, USD 16.10 billion and so seek reimbursement from Malaysia; or, alternatively,

B. If the Final Award declares February 1, 2020, or a later date, as the date of termination of both the 1878 Agreement and the 1903 Confirmatory Deed, Claimants submit that they are entitled:

    a. To the restitution value of the rights over the leased territory along North Borneo, with interest as of February 2020, of USD 26.71 billion, or alternatively, USD 19.28 billion, or alternatively, USD 12.85 billion; and

    b. To non – performance damages for the (adapted or rebalanced) unpaid rent from 2013 to the date of termination of the 1878 Agreement, which amounts to USD 5.72 billion, or alternatively, USD 4.29 billion, or alternatively, USD 2.86 billion, plus interest and so seek reimbursement from Malaysia.[14]

Claimants plead, as an alternative claim,[15] that the 1878 Agreement had become unbalanced to their detriment, as the surrounding circumstances at the time of its signature would have radically changed by the subsequent discovery of natural resources (i.e., hydrocarbons and palm oil) during the decade of the 1970s. Claimants allege that the Parties would not have been unable to anticipate nor to include this expansion in either the 1878 Agreement or the 1903 Confirmatory Deed and failed to make any further amendment of both documents after said discoveries. Claimants seek the delimitation by the Arbitrator of the scope and terms of a properly rebalanced agreement, under the hardship doctrine contained in Article 6.2.2 of the UNIDROIT Principles, as alternative relief, if the Arbitrator does not terminate the 1878 Agreement and the 1903 Confirmatory Deed.[16]

Also, as alternative relief, if the Final Award does not terminate the 1878 Agreement and the 1903 Confirmatory Deed and decides to restore its equilibrium, Claimants seek:

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12 Notice of Arbitration, ¶¶ 86. Statement of Claim, ¶ 592 (iii).

13 Statement of Claim, ¶¶ 353 and 592 (ii) and (iii).

14 Suspension Order Request, ¶¶ 13 – 14.

15 Notice of Arbitration, ¶ 91. Statement of Claim, ¶ 592 (iv).

16 Statement of Claim, ¶¶ 229 – 339.

A. From January 1, 2013 to the date of the Final Award, as unpaid rent under the 1878 Agreement and the 1903 Confirmatory Deed, the amount of USD 5.72 billion, or alternatively, of USD 4.29 billion, or alternatively, of USD 2.86 billion, plus interest, and so seek reimbursement from Malaysia;[17]and

B. The determination of all future annual rent payments in the rebalanced amount of USD 714 million, or alternatively, of USD 535 million, or alternatively, of USD 357 million.

9. Respondent had chosen not to be involved in the present procedure from the beginning of the case, except for a short period of time that will be considered in further Sections of the Final Award.

Notwithstanding its voluntary absence, Respondent submitted a letter dated September 19, 2019, addressed to Claimants –incorporated into the proceedings as Exhibit C 52- and later attached to its email submitted to the Arbitrator on October 3, 2019, with copy to Claimants.[18] This email and its attachments were also incorporated into the proceedings.

Further, on January 4, 2021, Claimants submitted Exhibits C 114 to C 118, which were also incorporated into the proceedings.

On December 17, 2021, the Arbitrator received, by email, an *ex parte* communication from Malaysia in this arbitration (henceforth, the *ex parte* communication of December 17, 2021), informing him, amongst other issues, of the existence of a suspension order, dated December 16, 2021, rendered *ex parte* upon reasoned request by Malaysia before the First President of the Paris Court of Appeal (henceforth, the Suspension Order). The Suspension Order and the Respondent's request of December 17, 2021 were incorporated into the proceedings. The effects of the Suspension Order in this arbitration are analysed in Section IV.4.viii.D of this Final Award.

The contents of the email of October 3, 2019, of Exhibits C 52 and C 114 and of the reasoned request of Malaysia to obtain the Suspension Order allow the Arbitrator to portray the Respondent's main contentions on the substantive aspect of this dispute.

Respondent rejects Claimants' position as to the legal characterisation of both the 1878 Agreement and the 1903 Confirmatory Deed. It affirms that, jointly considered, the 1878 Agreement and the 1903 Confirmatory Deed would constitute an instrument for the permanent cession of territorial sovereignty over certain territories of North Borneo by the Sultan in favour of both Messrs. Alfred Dent and Baron Gustavus de Overbeck.

[17] Statement of Claim, ¶¶ 14 – 16, 114 – 128, 572 and 592. Exhibit C 115, ¶¶ 9 – 26.

[18] Exhibits C 52 and C 54, p. 12.

Therefore, the 1878 Agreement and the 1903 Confirmatory Deed would affect Malaysia's sovereignty and, as such, the Respondent would challenge its substantive arbitrability. Malaysia would also consider its sovereign immunity breached by this arbitration.[19]

However, Respondent admits that it had paid the agreed monies both under the 1878 Agreement and the 1903 Confirmatory Deed to Claimants *«…continuously… until 2010. For the years 2011 and 2012, the Cession Monies were paid directly to the heirs of the Sulu Sultanate…Regrettably, payments ceased in 2013. Malaysia is now ready and willing to pay your clients all arrears from 2013 to 2019, and agrees to fully comply with the 1878 Grant and the 1903 Confirmation of Cession from henceforth with regards to future payments…».*[20]

These Exhibits contain no relief sought by the Respondent in this arbitration.

10. The Arbitrator has considered all the factual and legal arguments presented by the Parties in their submissions.

The Parties' fuller summary of their positions and specific requests for relief are contained in Section VI of the Final Award. The Arbitrator has carefully considered in his analysis the sparse written submissions from Respondent and the Claimants' written memorials, including case law, and oral pleadings made at the convened hearings throughout the arbitration.

To the extent that these arguments and cases are not referred to expressly in the Final Award, they should be deemed to be subsumed into the Arbitrator's analysis.

III. THE PARTIES AND THEIR COUNSEL

1. *Claimants*

11. Claimants set their address for the purpose of these proceedings at *Romulo Mabanta Buenaventura Sayoc & De los Ángeles*, 8741 Paseo de Roxas, Makati, 1200 Metro Manila, Philippines. Counsel representing Claimants in these proceedings –to whom all communications were sent- are:[21]

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[19] Exhibit C 114, ¶¶ 4, 6, 7 and 14 to 23.

[20] Exhibit C 52.

[21] Procedural Order 1, ¶¶ 6 to 10. Exhibit C 54. SAA, Article 5.1.

Mr. Paul H. Cohen
Ms. Elisabeth Mason

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E-mail: pcohen@4-5.co.uk; emason@4-5.co.uk

Prof. Dr. Bernardo M. Cremades
Mr. Bernardo M. Cremades Román
Mr. Javier Juliani
Me. Paloma Carrasco
Mr. Patrick T. Byrne
Me. Micaela Ossio
Me. Julie Bloch
B. Cremades y Asociados
Goya 18, 2nd floor
28001 Madrid
Spain

Tel.: +34 91 423 72 00
E-mail: bcremades@bcremades.com; bcr@bcremades.com; jjuliani@bcremades.com; p.carrasaco@bcremades.com; p.byrne@bcremades.com; m.ossio@bcremades.com; j.bloch@bcremades.com

2. *Respondent*

12. Malaysia –Respondent- is a Sovereign State situated in Southeast Asia, with its Prime Minister's Office located at Main Block, Perdana Putra Building, Federal Government Administrative Centre, 62502 Putrajaya, Malaysia.

13. Malaysia did not appear to be represented by external Counsel in these proceedings,[22] other than by its Attorney General.

14. On October 25, 2019, at 20.17 hours (Madrid Time), Respondent informed the Arbitrator and Claimants of the appointment of Dr. Arias and Mr. Capiel as its Counsel in this arbitration, amongst other issues. Procedural Order 7 noted Respondent's Counsel appointment and invited Respondent to submit to these proceedings its letter of representation in favour of its Counsel, Dr. David Arias and Mr. Luis Capiel, by November

[22] Procedural Order 1, ¶¶ 6 to 10. Exhibit C 54.

12, 2019. Mr. Capiel, in his representation, acknowledged receipt of Procedural Order 7 through email dated November 7, 2019, sent at 18.45 hours (Madrid Time), with copy to Claimants.

15. Nevertheless, on November 18, 2019, Dr. Arias sent an email to the Arbitrator –with copy to Claimants- requesting him to *«…not copy HSF in any further correspondence…»*, implying that Dr. Arias and Mr. Capiel had withdrawn from the case. Procedural Order 8 invited Respondent, amongst other issues, (i) to explain its failure in instructing its Counsel, Dr. Arias and Mr. Capiel, to appear in this arbitration, as directed by Procedural Order 7; and (ii) to confirm in writing their procedural activities in this arbitration from October 25, 2019, until November 18, 2019. Respondent failed to provide a response.

16. Therefore, Respondent's representative in these proceedings –to whom all communications in relation with this matter were sent- is its Attorney General, who has the necessary powers to represent and bind the Malaysian Government in all legal proceedings:[23]

A. From Procedural Order 1 until the Preliminary Award on Jurisdiction and Applicable Law, dated May 25, 2020 (henceforth, the Preliminary Award):

Honourable Tuan Tommy Thomas
Attorney General
Attorney General's Chambers of Malaysia
45 Persiaran Perdana, Precint 4
62100 Putrajaya
Malaysia

Tel.: +60 03 8872 2000
Fax: +60 03 8890 5609

E-mail: ag.thomas@agc.gov.my

B. From the Preliminary Award until the Final Award:[24]

Honourable Tan Sri Idrus Harun
Attorney General
Attorney General's Chambers of Malaysia
45 Persiaran Perdana, Precint 4
62100 Putrajaya
Malaysia

[23] Procedural Order 1, ¶¶ 6 to 10. Exhibit C 54. SAA, Article 5.1.

[24] Claimants' emails of April 2, 2020, and May 25, 2020, to Respondent and the Arbitrator. Mr. Idrus assumed office on March 6, 2020.

Tel.: +60 03 8872 2000
Fax: +60 03 8890 5609

E-mail: ag.idrus@agc.gov.my

IV. THE PROCEDURAL HISTORY

17. The Preliminary Award recounts in detail the procedural history of the bifurcation of these proceedings. The Parties are referred to its contents.

18. This Section of the Final Award summarises the significant procedural events of the substantive dispute that has been referred to arbitration, culminating in the main hearing held on February 15, 2021, and February 16, 2021 and subsequent events to the date of the Final Award.

19. It is not necessary to deal here with less significant events which are recorded at length in the extensive correspondence passing between the Parties and the Arbitrator.

20. All relevant matters, procedural steps and efforts in the present proceedings are recorded and incorporated into the proceedings which are in the possession of the Parties. A full set of papers is in the Arbitrator's professional archive.

1. *The Initial Phase of the Proceedings*

i. The Notice of Intention to Commence Arbitration

21. Claimants served a preliminary notice of intention to commence arbitration, dated November 2, 2017, pursuant to the Deed (henceforth, the Notice of Intention to Commence Arbitration) at the Embassy of Malaysia in Madrid (Spain).[25]

[25] Exhibit C 37. Suspension Order Request, ¶ 15, footnotes 22 –24.

ii. The Agreement to Arbitrate

22. The Deed contains a clause for the resolution of disputes (hereinafter, the Arbitration Agreement) which provides as follows:

> «*…Should there be any dispute, or reviving of all grievances of any kind, between us, and our heirs and successors, with Mr. Gustavus Baron de Overbeck or his Company, then the matter will be brought for consideration or judgment of Their Majesties' Consul-General in Brunei…*».

23. On February 1, 2018, Claimants filed an application for the judicial appointment of an arbitrator before the Civil and Criminal Chamber of the Superior Court of Justice of Madrid (henceforth, the Application), pursuant to Article 15.4 of the Spanish Arbitration Act 60/2003, of December 23, 2003 (henceforth, the SAA). The docket number assigned to the Application was 4/2018.

24. The Civil and Criminal Chamber of the Superior Court of Justice of Madrid rendered Judgment 11/2019, dated March 29, 2019 (henceforth, the Judgement of March 29, 2019), within the context of the Application.[26]

25. The Judgment of March 29, 2019 provided as follows on the Arbitration Agreement:

> «*…Therefore, having unequivocally agreed to submit to arbitration in the following terms:* «…Should there be any dispute, or reviving of all grievances of any kind, between us, and ours heirs and successors, with Mr. Gustavus Baron de Overbeck or his Company, then the matter will be brought for consideration or judgment of Their Majesties' Consul-General in Borneo (Brunei)…»*; before the impossibility of resorting to the arbitrator originally appointed, taking into account that there is apparently, within the scope of cognition of this proceeding, no limitation to the will of the defendant in being subjected to said arbitration clause, an arbitrator shall be appointed, as requested, regardless of further considerations, as the claimant met the substantive requirements for the referred action…*».[27]

26. The Preliminary Award had declared the validity of the Arbitration Agreement[28] and the Arbitrator's jurisdiction over the claims made by Claimants in their Notice of Arbitration of July 30, 2019 (henceforth, the Notice of Arbitration), pursuant to

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[26] Exhibits C 44 and C 54.

[27] Exhibit C 44, Legal Reasoning, Third, last paragraph.

[28] Preliminary Award, Decision, B.2.

Article 22 of the SAA.[29] The Arbitrator refers the Parties to the contents of the Preliminary Award.

2. *The Sole Arbitrator: Appointment by the Civil and Criminal Chamber of the Superior Court of Justice of Madrid*

27. Malaysia failed to jointly appoint the arbitrator for the determination of the dispute under the Deed, as requested by Claimants and within the deadline provided in the Notice of Intention to Commence Arbitration.

28. On February 1, 2018, Claimants filed the Application. Respondent did not appear and was not represented therein.[30]

29. In its Order of May 8, 2018, the Superior Court of Justice of Madrid examined its competence and declared that its Civil and Criminal Chamber had jurisdiction over the Application.[31]

30. On October 29, 2018, the Civil and Criminal Chamber of the Superior Court of Justice of Madrid decided to declare Malaysia to be in default in relation to the Application.[32]

31. The Civil and Criminal Chamber of the Superior Court of Justice of Madrid rendered the Judgement of March 29, 2019 and, on its basis, made the arrangements to make the necessary appointment itself.[33]

32. The Civil and Commercial Chamber of the Superior Court of Justice of Madrid rendered its Communication of May 22, 2019, whereby it appointed Dr. Gonzalo Stampa,

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[29] Preliminary Award, Section IX, Decision.

[30] Judgment of March 29, 2019, Facts, Four and Legal Reasoning, Third, penultimate paragraph. Exhibit C 54. Preliminary Award, Section V. and C 114, ¶¶ 36 – 38. Suspension Order Request, ¶¶ 16 and 23, footnote 25.

[31] Preliminary Award, ¶ 96. ATSJ M 182/2018 - ECLI: ES:TSJM:2018:182A. ID CENDOJ: 28079310012018200021. Exhibit C 40.

[32] Judgment of March 29, 2019, Facts, Four and Legal Reasoning, Third, penultimate paragraph. Exhibits C 39; 43; 54, Appendix A; and C 114, ¶¶ 36 – 38. Preliminary Award, ¶¶ 72, 73 and 95. Decision of June 29, 2021, Dissenting Opinion, ¶¶ 1 and 3.

[33] Exhibit C 44, Reasoning Fourth.

as sole arbitrator (henceforth, the Communication of May 22, 2019).[34] The appointment observed the process provided in Article 15.6 of the SAA.

33. The Arbitrator complied with his duty to disclose. In accordance with the Communication of May 22, 2019, the Arbitrator accepted to serve as sole arbitrator before the Civil and Criminal Chamber of the Superior Court of Justice of Madrid on May 31, 2019, to wit, within the deadline provided in Article 16 of the SAA.

34. The Arbitrator submitted his statement of acceptance, availability, impartiality, and independence pursuant to Article 17 of the SAA and so disclosed before the Court all circumstances that, to the best of his knowledge, might be likely to give rise to justifiable doubts as to his impartiality or independence and affirmed that he would, without delay, disclose any such circumstances that might arise in the future. No objection was raised within the time limit provided in Article 18.2 of the SAA. This remains correct on the date of the Final Award.

35. On June 24, 2019, the Arbitrator sent an email to the Parties, attaching (i) the initial letter from the Arbitrator to Parties, (ii) the Judgement of March 29, 2019, (iii) the Communication of May 22, 2019, (iv) Procedural Order 1, and (v) the Arbitrator's Statement of Acceptance, Independence, and Impartiality. Again, the Parties raised no objection to the appointment of the Arbitrator within the time limit provided in Article 18.2 of the SAA.[35]

36. In Procedural Order 1, the Arbitrator confirmed to the Parties that he was and would remain impartial and independent of the Parties.[36] The Parties raised no objection within the time limit provided in Article 18.2 of the SAA, a substantial contention which ordinarily may be treated as a tacit acceptance of the appointment of the Arbitrator, unless objected.[37]

37. Dr. Stampa's contact details and address for communications are as follows:

Dr. Gonzalo Stampa
STAMPA ABOGADOS

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[34] Exhibits C 54, Appendix A; C 114, ¶ 38; and C 115, ¶ 242 (ii). Suspension Order Request, ¶ 17 and footnote 5 and 26 – 28.

[35] Exhibits C 54, Appendix A; C 114, ¶ 38; and C 115, ¶ 32. SAA, Article 6. Note Verbale of July 10, 2019 by the Spanish Ministry of Foreign Affairs to the Embassy of Spain in Kuala Lumpur for its communication to the competent Malaysian Authorities.

[36] Procedural Order 1, ¶ 20.

[37] SAA, Article 6.

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28001 Madrid
Spain

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3. *The Establishment of the Proceedings*

i. Procedural Order 1

38. Once appointed, the Arbitrator issued Procedural Order 1. Its ¶ 34 invited Claimants to file the Notice of Arbitration by July 30, 2019. Likewise, its ¶ 36 invited Respondent to submit its response to the Notice of Arbitration by September 9, 2019 (henceforth, the Response to the Notice of Arbitration).

ii. The Preparatory Conference

39. ¶ 54 of Procedural Order 1 contemplated the celebration of a preparatory conference for procedural consultations with Parties on organizing arbitral proceedings in the present matter (henceforth, the Preparatory Conference). Its ¶ 55 invited Parties to advise the Arbitrator by July 22, 2019 as to their preference on the manner in which the Preparatory Conference should be held and their availability.[38] In their letter of June 28, 2019, Claimants expressed their preference for the Preparatory Conference to be held in person, in Madrid, on October 24 and 25, 2019. [39] Respondent –copied in the aforementioned letter- failed to provide its views, nor did it indicate its availability for a Preparatory Conference.

40. The Arbitrator convened the Preparatory Conference for October 24 and 25, 2019, in Madrid[40] and invited Parties to submit the list of persons who would be present on their behalf. Claimants submitted its list of attendees on September 10, 2019, with copy to Respondent. Respondent failed to submit the list within the period provided in Procedural Order 2 and extended by Procedural Orders 3 (i.e., by September 20, 2019) and

[38] Procedural Order 1, ¶ 55.

[39] Claimants' letter of June 28, 2019.

[40] Procedural Orders 1 (¶¶ 54 – 56), and 5. Exhibit C 54.

4 (i.e., October 18, 2019). Parties were summoned for the Preparatory Conference with sufficient advance notice.

41. The Preparatory Conference took place on October 25, 2019, between 10.00 hours and 12.00 hours, at Hotel Intercontinental Madrid, Meeting Room Toledo, Paseo de la Castellana 49, 28046 Madrid.[41] The Preparatory Conference was devoted to the procedural organization of the arbitration, in accordance with the proposed agenda of matters for possible consideration, prepared by the Arbitrator and enclosed in Procedural Order 5. Claimants were represented by their Counsel. Respondent –aware of its existence-[42] decided neither to participate, nor to intervene therein, either directly or by proxy. The Preparatory Conference was recorded on DVD, incorporated into the proceedings, which the Parties were invited to download by logging onto an identified ftp site.[43]

42. As previously stated, at 20.17 hours (Madrid Time), on October 25, 2019 –to wit, after the Preparatory Conference- Respondent informed Claimants and Arbitrator of the appointment of Dr. Arias and Mr. Capiel as its Counsel in this arbitration.

Respondent's Counsel sought the stay of the proceedings for one month from the date they had got access to the filed documents, sustained on the limited information allegedly provided by its client, apparently insufficient to familiarize themselves with its content and with the case. Respondent's Counsel did not specify the date on which this documentation was received from its client, nor whether Respondent was aware of having been convened for the Preparatory Conference and the eventual procedural consequences of its inaction.

Claimants sent an email addressed to the Arbitrator –with copy to Respondent- on October 26, 2019, objecting to the suspension sought by Respondent and proposing to move forward with the arbitration, as decided in the Preparatory Conference. Respondent's Counsel rebutted Claimants' arguments on October 26, 2019, through an email sent to the Arbitrator, with copy to Claimants, where he referred to ¶76 of the Notice of Arbitration, thus revealing command of its contents.

The Arbitrator acknowledged receipt of Parties' emails and attachments.[44]

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41 Procedural Orders 1 (¶ 54), and 7. Exhibit C 54.

42 Respondent's emails of October 26 and 27, 2019.

43 Procedural Order 7.

44 Preliminary Award, Section 0. Exhibits C 54 and C 114, ¶ 38.

43. The Arbitrator refers the Parties to the contents of the Preliminary Award.[45]

iii. The Procedural Calendar and its Amendments. The Time Limit for the Final Award

44. The Arbitrator conducts the management of the proceedings, in a flexible manner and in full compliance with the procedural arrangements of the Parties –provided they do not infringe procedural public policy- and observance at all times of the mandatory principles of due process. Article 25 of the SAA, in relation with its Article 24.1, enables the Arbitrator to take decisions on the organization of proceedings in consideration of the circumstances of the case, the expectations of the Parties and the need for a just and costs-effective resolution of the dispute before him. The Arbitrator should respect the Parties' right to be heard and the principle of their equal treatment during the arbitral procedure. Article 1510 of French Decree 2011-48 of January 13, 2011 (henceforth, the FLA) also provides that the Arbitrator must ensure that the Parties are treated equally, and that the principle of due process (*principe de la contradiction*) is observed.

45. The Arbitrator established the Procedural Calendar on December 10, 2019 (henceforth, the Procedural Calendar)[46] and the Updated Calendar on August 14, 2020 (henceforth, the Updated Procedural Calendar) pursuant to these provisions.

The phase on the jurisdictional objections and the determination of the substantive law applicable to the present dispute took place from January 10, 2020 to May 25, 2020, in accordance with Section I of the Procedural Calendar. [47] It ended with the issuance of the Preliminary Award.

The conduct of the substantive phase of the arbitration followed both Section II of the Procedural Calendar and the Updated Procedural Calendar, with the amendment contained in Procedural Order 44, which extended the time limit for rendering the Final Award to March 1, 2022, for reasons which will be explained in subsequent paragraphs of the Final Award.

46. On June 20, 2020, Claimants sought the amendment of certain dates of the Procedural Calendar due to the availability of their Counsel and potential witnesses.

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[45] Preliminary Award, Section IV.3.ii.

[46] Procedural Order 9. Preliminary Award, ¶¶ 56 to 59.

[47] Procedural Order 13. Preliminary Award, Sections IV.3 to IV.6.

These amendments –reasonable and justified- affected the following dates and deadlines of these proceedings:

A. The dates of the hearings;

B. The deadline for submission of Post-Hearing Briefs, with statement of costs;

C. The date of the closure of proceedings; and

D. The deadline for rendering the Final Award.

The dates and deadlines in the Procedural Calendar required revision accordingly.

47. The Arbitrator acknowledged receipt of Claimants' application and invited Respondent to file its comments by July 1, 2020. Respondent failed to submit its comments on Claimants' application within the period provided by the Arbitrator.[48]

48. Procedural Order 20 contained the following decision:

«…The Arbitrator decides and directs:

A. To grant the amendments proposed by Claimants.

B. To enclose an updated Procedural Calendar (hereinafter, the Updated Procedural Calendar).

C. To invite the Parties to comment on the Updated Procedural Calendar on or before August 19, 2020…».

49. The Arbitrator refers the Parties to the contents of Procedural Order 20.

50. Claimants acknowledged receipt of the Updated Procedural Calendar on August 14, 2020 and took *«…note of the contents therein…».* Further, on August 19, 2020, Claimants submitted its comments, as follows:

«…Dear Dr. Stampa,

We write pursuant to Section III. C of Procedural Order 20 to express our views on the Updated Procedural Calendar.

[48] Procedural Order 20.

Claimants are grateful for the Sole Arbitrator's flexibility and appreciate his willingness to accommodate the schedules of Claimants' expert witnesses in rescheduling the merits hearing. Claimants likewise consider the remainder of the Procedural Calendar to be fair and reasonable.

The Updated Procedural Calendar presumes that Malaysia will meaningfully engage and participate in this arbitration. This of course has not been the case to date. Please note, therefore, that Claimants reserve the right to request that the Sole Arbitrator revisit the Updated Procedural Calendar, should it become clear(er) as this matter proceeds that Malaysia chooses to abstain from participation.

Respectfully…».

51. Respondent failed to acknowledge receipt, nor did it provide any comments on the Updated Procedural Calendar.

52. The arbitration suffered some difficulties –unexpected and unforeseeable, beyond the responsibility of the Arbitrator- from the end of June 2021, which created a disruptive situation. Section IV.4.viii of the Final Award will detail these difficulties. As a consequence of this situation, Procedural Order 42 declared the proceedings in abeyance from July 20, 2021 until October 30, 2021 and stayed the deadline for rendering the Final Award, as contained in the Updated Procedural Calendar. The abeyance of the proceedings was lifted as of October 30, 2021 and Procedural Order 44 extended the time limit for rendering the Final Award to March 1, 2022.

iv. The Jurisdictional Objection and the Determination of the *Lex Causæ*: Bifurcation of the Proceedings and the Preliminary Award

53. Respondent –despite having raised the jurisdictional objections and aware of its existence- decided neither to participate, nor to intervene in this phase, either directly or by proxy. Claimants submitted their pleadings on jurisdiction on February 10, 2020, with copy to Respondent. These pleadings included (i) Exhibits numbered C 52 to C 54, (ii) Legal Authorities numbered CL 40 to CL 52 and (iii) Expert Report by Professor Dr. Eckart Brödermann, along with its Exhibits, addressing the issue of applicable substantive law and dated December 19, 2019 (henceforth, the Brödermann Report).

54. A hearing on the jurisdictional objections and determination of the applicable substantive law was held on February 21, 2020, in Madrid (henceforth, the Hearing on Jurisdiction). Claimants were represented by their Counsel. Respondent neither participated in the Hearing on Jurisdiction, nor was it represented therein.

55. During the Hearing on Jurisdiction, the Arbitrator invited the Parties to provide their opinion on the case *National Oil Company (NIOC) v. Israel*.[49] Claimants provided their comments, as directed, by February 24, 2020, with Exhibits CL 53 to CL 56. They were incorporated into the proceedings. Respondent decided not to address such invitation.

56. On February 26, 2020, Professor Dr. Eckart Brödermann issued an addendum to the Brödermann Report, along with its Exhibits (henceforth, the Brödermann Report Addendum). Claimants sent copy of their opinion and their attachments directly to Respondent and they were incorporated into the proceedings.[50]

57. The Arbitrator warned Respondent that if it failed to avail itself of the opportunity to present its case on jurisdiction and applicable substantive law to the Arbitrator –notwithstanding having been given such opportunity to do so- he would proceed to determine its jurisdiction and the substantive law applicable to the matter at hand and issue the Preliminary Award, as determined in the Procedural Calendar. The Arbitrator granted Respondent a final chance to make a submission in connection with the issue of jurisdiction and applicable substantive law (if any) by no later than 20.00 hours on March 23, 2020. The Arbitrator advised Respondent that the Preliminary Award (which may include an award of costs) is binding and legally enforceable against Respondent, notwithstanding its non-participation in this arbitration. Respondent decided not to address such invitation.

58. The Arbitrator issued the Preliminary Award on May 25, 2020.[51] The Arbitrator refers the Parties to the contents of the Preliminary Award, where full details on the bifurcation of these proceedings –conducted in accordance with Section I of the Procedural Calendar- can be consulted.

59. The Preliminary Award addressed Respondent's objections to the jurisdiction of the Arbitrator and Claimants' pretension on the determination of the substantive law applicable to the present dispute. Its substantive part reads as follows:

> *«…For the reasons set forth above, considered all the Parties' arguments and submissions and the evidence before him, the Arbitrator makes the following award and order:*

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[49] *National Iranian Oil Company (NIOC) v. Israel*. Judgment of the French Cour De Cassation. First Civil Chamber, rendered on February 1, 2005. Case No. 01–13.742/02–15.237. Preliminary Award, ¶ 119.

[50] Procedural Order 14.

[51] Exhibit C 114, Introduction, point I, p. 1.

A. *On the procedural aspects of the arbitration:*

1. *The Arbitrator decides, confirms and declares that the place of this arbitration be Madrid (Spain). This does not preclude the Arbitrator conducting hearings and meetings with the Parties and possible witnesses and experts at any other place, after consultation with the Parties, or communicating with the Parties by telephone conference calls or by other available electronic means of communication, if considered appropriate for the orderly and efficient conduct of the arbitration;*

2. *The Arbitrator decides that SAA is the* lex arbitrii *and declares that SAA apply to these proceedings, supplemented –where necessary- by the rules already determined in Procedural Order 1 and such further rules which the Arbitrator may determine, after consultation with the Parties throughout the proceedings;*

3. *The Arbitrator declares that the language of this arbitration should be English and decides that arbitration shall be conducted in the English language; and*

4. *The Arbitrators decides that Claimants' plead on the application of the UNIDROIT Principles as the* lex causæ *of this arbitration is well founded and upheld. The Arbitrator declares that he should apply general principles of international law to the merits of the dispute and, specifically, the Principles of International Commercial Contracts endorsed by the International Institute for the Unification of Private Law, amended in 2016, to wit, the UNIDROIT Principles.*

B. *On the procedural aspects of the arbitration:*

1. *The Respondent's objections are dismissed;*

2. *The Arbitrator decides and declares that the Arbitration Agreement is valid and ratifies the decision contained in the Judgment of March 29, 2019; and*

3. *The Arbitrator decides and declares that he has jurisdiction over the claims made by Claimants in their Notice of Arbitration.*

C. *On the costs:*

1. *The Arbitrator decides that Respondent should bear all legal and expert costs incurred by Claimants in the incidental proceedings in this arbitration. Claimants are entitled to be reimbursed by Respondent of these amounts. Therefore, Respondent is ordered to reimburse Claimants the amount of one million three hundred and eighty-six thousand three hundred and thirteen US Dollars and forty–two cents ($1,386,313.42), corresponding to Claimants' Counsel and Experts' fees and costs;*

2. *The Arbitrator decides that arbitration costs of the incidental proceedings are determined to be four hundred seventeen thousand one hundred and ninety–five US Dollars ($417,195) and four thousand five hundred and ninety-one Euros and six cents (€4,591.06) and that Respondent should bear all the arbitration costs of the incidental proceedings of this arbitration. Therefore:*

    a. *Respondent is ordered to reimburse Claimants the amounts of*

        i. *Four hundred and seventeen thousand one hundred and ninety–five Us Dollars ($417,195); and*

ii. Four thousand five hundred and ninety-one Euros and six cents (€4,591.06); and

b. Respondent is ordered to reimburse Claimants the amount of five hundred and twenty-five thousand Us Dollars ($525,000) for the Respondent's fifty per cent share of the deposit paid by Claimants on behalf of Respondent on August 19, 2019 and on January 7, 2020.

The remaining balance of three hundred and twenty thousand and seventeen US Dollars and fifty cents ($320,017.50) will be drawn from the funds with the Arbitrator deposited by Claimants.

D. All requests and claims not otherwise dealt with in this Preliminary Award are rejected.

E. The proceeding shall continue under the schedule established in the Procedural Calendar…».

60. Parties were duly served the Preliminary Award on May 25, 2020.[52]

61. Claimants filed an application for rectification and clarification of the Preliminary Award on June 2, 2020.[53]

62. The Arbitrator invited Respondent to file its comments on Claimants' application by no later than 20.00 hours on July 2, 2020.[54] Respondent failed to submit its comments on Claimants' application within this deadline.

63. Procedural Order 18 contained the Arbitrator's decision on the clarifications of the Preliminary Award sought by Claimants (henceforth, the Clarification of the Preliminary Award). On July 30, 2020, Parties were duly served on the Clarification of the Preliminary Award.[55]

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[52] Procedural Order 13. Preliminary Award, Section IV.3.vi. Exhibit C 114, ¶¶ 38 and 42, where Respondent admitted the correct service and receipt of the Preliminary Award. Suspension Order Request, ¶¶ 18 –22, footnotes 29 – 32.

[53] SAA, Article 39. Exhibit C 114, Introduction, Point II, p. 1.

[54] The Arbitrator rendered these directions on June 2, 2020. The Parties were served on the same day. Claimants acknowledged receipt of same on June 2, 2020, at 20:16 hours, Madrid Time.

The Prime Minister of Malaysia received this email on June 2, 2020, at 20:16 hours (Madrid Time) at its email address info@jpm.gov.my. The Embassy of Malaysia in Madrid received this email on June 2, 2020, at 20:16:03 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my and read it on June 2, 2020, at 21:37:02 (Madrid Time). Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on June 3, 2020, at 02:16:03 hours (Malaysia Time) and read it on June 3, 2020, at 05:42:40 (Malaysia Time). Respondent failed to acknowledge receipt of this email.

[55] Procedural Order 18. Exhibit C 114, Introduction, Point III, p. 1, where Respondent admitted the correct service and receipt of the Clarification of the Preliminary Award. Suspension Order Request, ¶ 13, footnote 15.

64. On October 11, 2021, Claimants reported that on September 17, 2021 *«…the Tribunal de Grande Instance de Paris has ordered exequatur of the Preliminary Award on Jurisdiction and Applicable Substantive Law (the Preliminary Award) in this case. Accordingly, we respectfully request that the Sole Arbitrator resume his duties in rendering the Final Award, under the aegis of the French courts…»* (henceforth, the Exequatur of the Preliminary Award). Claimants appended the Exequatur of the Preliminary Award. Claimants copied the email and its attachment to Respondent. The Arbitrator acknowledged receipt of this communication and noted its content and the simultaneous service on Respondent. Section IV.4.viii.B of this Final Award will further describe these details.

v. The Place of Arbitration

65. The Preliminary Award determined Madrid to be the place of the arbitration, as the Arbitration Agreement remained silent, and the Parties did not reach any agreement otherwise.[56] This decision did not preclude the Arbitrator from conducting hearings and meetings with the Parties and possible witnesses and experts at any other place, after consultation with the Parties, or communicating with the Parties by telephone conference calls or by other available electronic means of communication, if considered appropriate for the orderly and efficient conduct of the arbitration.

66. Procedural Order 44 replaced the previously determined place of arbitration – i.e., Madrid- for Paris (France) at the request of Claimants and once the Parties had been heard. Section IV.4.viii.C of this Final Award will describe in detail the process followed and reasons given for this relocation.

vi. The Applicable Procedural Rules

67. The Arbitration Agreement contains no reference to the procedural law of the present arbitration. The Preliminary Award declared the SAA as the *lex arbitrii* in these proceedings, supplemented –where necessary- by the rules already established in Procedural Order 1 and such further rules which the Arbitrator may determine, after consultation with the Parties throughout the proceedings.[57] The Parties have not made

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[56] SAA, Articles 3 and 26. Preliminary Award, Section IV.3.iii and Decision, A.1.

[57] SAA, Article 25. Preliminary Award, Decision, A.2.

any arrangement otherwise. The Arbitrator refers the Parties to the contents of the Preliminary Award.[58]

vii. The Language of the Arbitration

68. The Arbitration Agreement contains no reference as to the language of this arbitration. The Parties did not reach any agreement otherwise. In the absence of Parties' agreement, the Preliminary Award determined that the language of this arbitration should be English. The arbitration was conducted in the English language, including the Final Award.[59] The Arbitrator refers the Parties to the contents of the Preliminary Award.[60]

viii. The Applicable Substantive Law

69. The Arbitration Agreement does not provide for an applicable law on the merits. The Preliminary Award declared the general principles of international law as the *lex causæ* in this arbitration and, specifically, the Principles of International Commercial Contracts endorsed by the International Institute for the Unification of Private Law, amended in 2016, to wit, the UNIDROIT Principles.[61] The Parties have not made any arrangement otherwise. The Arbitrator refers the Parties to the contents of the Preliminary Award.[62]

ix. The Amount in Dispute

70. The amount in dispute in this arbitration is finally determined as USD 32.20 billion.[63]

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[58] Preliminary Award, Section IV.3.iv.

[59] SAA, Articles 25 and 28. Preliminary Award, Decision, A.3.

[60] Preliminary Award, Section IV.3.v.

[61] SAA, Article 34. Preliminary Award, Decision, A.4.

[62] Preliminary Award, Section VII.3.

[63] Statement of Claim, ¶ 572.

4. *The Merits Phase: Conduct of the Arbitration*

i. The Written Submissions

71. Claimants filed the Notice of Arbitration and included Exhibits numbered C 1 to C 51 and CL 1 to CL 26.

The Arbitrator acknowledged receipt of an electronic copy of the Notice of Arbitration and its Exhibits and noted Claimants' comments contained therein by email dated July 30, 2019, dispatched at 12:49:24 hours (Madrid Time).[64] A hard copy of the Notice of Arbitration, along with its attachments and exhibits, followed on July 31, 2019. Procedural Order 3 incorporated the Notice of Arbitration and its Exhibits C 1 to C 51 and CL 1 to CL 26 into the proceedings.

Claimants served Respondent with the Notice of Arbitration on August 2, 2019, dispatched by express courier service, in accordance with Procedural Order 1.[65]

Respondent failed to submit the Response to the Notice of Arbitration within the period provided in Procedural Order 1 and further extended by Procedural Orders 3 (i.e., by September 30, 2019) and 4 (i.e., October 18, 2019).[66]

72. On October 2, 2019, Claimants submitted an email to the Arbitrator, with copy to Respondent, with the attachment of a copy of the correspondence exchanged with Respondent between July 31, 2019, and September 19, 2019. This email and its attachments were incorporated into the proceedings.[67]

73. On October 3, 2019, Respondent submitted an email to the Arbitrator, with copy to Claimants, with the attachment of a copy of its letter dated September 19, 2019, addressed to Claimants.[68] This email and its attachments were incorporated into the

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64 The Prime Minister of Malaysia received this email on July 30, 2019, at 12:50 hours (Madrid Time) at his email address info@jpm.gov.my. The Embassy of Malaysia in Madrid received this email on July 30, 2019, at 12:50 hours (Madrid Time) at its email addresses: pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr Thomas received this email –sent to his email address ag.thomas@agc.gov.my- on July 30, 2019, at 18:49:24 hours (Malaysia Time) and read it on July 31, 2019, at 08:43:10 hours, Malaysia Time. Exhibit C 54.

65 On September 18, 2019, Claimant submitted evidence on the date of dispatch and delivery of the Notice of Arbitrator to Respondent by express courier service. Suspension Order Request, ¶ 15, footnotes 12, 15 –21 and 59.

66 Procedural Order 1, ¶ 32. Exhibit C 54.

67 Exhibit C 54.

68 Exhibits C 52 and C 54.

proceedings. Respondent submitted further correspondence to the Arbitrator on October 14, 2019, with copy to Claimants.[69]

74. On October 25, 2019, Respondent's Counsel admitted that its client had provided a copy of the Notice of Arbitration –apparently without exhibits- and of Procedural Orders 1 to 5, rendered throughout the proceedings, for its analysis and consideration.

75. Claimants filed their Statement of Claim on June 20, 2020 (hereinafter, the Statement of Claim), pursuant to the Procedural Calendar, along with:

a. Exhibits C 55 to C 113, CL 57 to CL 174 and CER 2;

b. The Expert Report prepared by The Brattle Group dated June 19, 2020 and its exhibits BR 1 to BR 83 (hereinafter, the Brattle Report);

c. The Expert Report by Professor Dr. Eckart Brödermann dated June 18, 2020, along with its Exhibits (hereinafter, the Brödermann Report II);

d. The Expert Report by Em. Prof. Dr. Phil. Ernst Ulrich Kratz dated June 13, 2020, along with its Exhibits (hereinafter, the Kratz Report); and

e. The Expert Report by Mr. Nathan Meehan dated June 19, 2020, along with its Exhibits (hereinafter, the Meehan Report).

Claimants invited both Respondent and the Arbitrator to download the Statement of Claim and its Exhibits, the Brattle Report, the Brödermann Report II, the Kratz Report and the Meehan Report by logging onto an identified ftp site.[70]

The Statement of Claim and its Exhibits were incorporated into the proceedings.

76. On June 23, 2020 and pursuant to the Procedural Calendar, the Arbitrator invited Respondent to submit its Statement of Defence, together with all documentary evidence –including witness statements and expert reports- by no later than 23.59 hours on August 20, 2020.[71] Respondent failed to submit its Statement of Defence within the period provided therein.

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69 Exhibits C 53 and C 54.

70 Procedural Orders 1 (¶ 27) and 16.

71 Procedural Order 16.

On August 25, 2020, the Arbitrator granted Respondent an additional extension to submit its Statement of Defence on September 1, 2020.[72] Respondent again failed to submit its Statement of Defence within the extended period.

The arbitration proceedings continued as scheduled in the Updated Procedural Calendar.[73]

77. On September 3, 2020, the Arbitrator invited the Parties to file their requests for production of documents in *Redfern Schedule* format by no later than 23:59 hours on September 7, 2020, pursuant to the Updated Procedural Calendar.[74]

Claimants expressed their views on Procedural Order 22 on September 7, 2020, as follows:

> *«…given that Respondent has not meaningfully engaged in this arbitration to date, Claimants do not wish to waste the Sole Arbitrator's time with a Redfern Schedule. We reserve the right to revisit the issue, should the situation change…».*

Claimants' communication was copied to Respondent, but the latter failed to provide any views on the topic. The Arbitrator acknowledged receipt of Claimant's communication of September 7, 2020 and noted its contents, which were incorporated into the proceedings.

78. On September 18, 2020, the Arbitrator granted an extension of the deadline for Respondent to submit any requests for production of documents in Redfern Schedule format by no later than 23:59 hours on September 23, 2020. Respondent failed to submit any such request.[75]

79. On October 5, 2020, pursuant to the Updated Procedural Calendar, the Arbitrator invited Claimants to file their Reply to the Statement of Defence by November 9, 2020.[76]

80. Claimants filed their Reply to the Statement of Defence by email dated November 9, 2020 (henceforth, the Reply), with due copy to the Respondent. The Reply was incorporated into the proceedings, which continued as scheduled in the Updated Procedural Calendar.[77]

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[72] Procedural Order 21.

[73] SAA, Article 31.b.

[74] Procedural Order 22.

[75] Procedural Order 24.

[76] Procedural Order 25.

[77] Procedural Order 28.

81. On November 25, 2020, the Arbitrator invited the Respondent to submit its Rejoinder together with all documentary evidence –including witness statements and expert reports- by no later than 23.59 hours on December 9, 2020, pursuant to the Updated Procedural Calendar. The Arbitrator drew Parties' attention to ¶ 32 of Procedural Order 1 and Article 31.b of the SAA.

82. On November 25, 2020, the Arbitrator informed the Parties of an *ex parte* communication which took place on November 18, 2020, at 19:45 hours (Madrid Time). The Arbitrator required Malaysia to provide a proper explanation of these actions and the confirmation of whether representatives of Madrid–based Uria Law Firm were to be considered as its Counsel in this arbitration, by November 30, 2020, at 12.00 hours. Respondent failed and/or refused to avail itself of an opportunity to do so. The *ex parte* communication was incorporated into the proceedings.

83. Further, on this same date, November 18, 2020, the Arbitrator received a Judicial Order, along with proceedings, from the Court of First Instance 72 of Madrid, including the request for recognition and enforcement of the foreign Judgement rendered by the High Court of Malaysia of January 14, 2020, and its supporting exhibits, filed by Malaysia on September 10, 2020, under docket number 1017/2020 (henceforth, Exequatur 1017/2020).[78] Exequatur 1017/2020 was incorporated into the proceedings.

84. On December 9, 2020, Respondent failed to submit its Rejoinder within the period provided in Procedural Order 28.

85. On December 29, 2020, based on ¶¶ 67, 132 and 254 of the request of Exequatur 1017/2020, the Arbitrator invited the Parties to update him on the status of the challenge –if any- of the Preliminary Award and, if so, to file their views on whether the present arbitration should be stayed until the decision of the challenge, by no later than 23.59 hours on January 4, 2021.[79]

86. On this same date, the Arbitrator invited the Parties to provide their opinion on the rules and principles regarding the presumption of immunity of Malaysia, as Sovereign State, and arbitrability of the present dispute.

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[78] Procedural Order 29.

[79] Procedural Order 30.

The Parties were invited to consider, amongst others, the following documents:

A. Cases:

   a. *The United States of America v. Menteri Sumber Manusia Malaysia & Ors*, High Court Malaya, Kuala Lumpur, Nordin Hassan J [Judicial Review No: WA-25-342-07-2019], of January 8 ,2020;

   b. *Commonwealth of Australia v. Midford (M) Sdn Bhd & Anor* [1990] 1 CLJ 878; [1990] 1 CLJ (Rep) 77; [1990] 1 MLJ 475;

   c. *I Congreso del Partido* (1983) 1 AC 244 (HL); and

   d. *Empire of Iran*, German Federal Constitutional Court, 45 ILR 57 (1963);

B. The State Immunity Act 1978 (United Kingdom);

C. The Immunities and Privileges Act 1984 (Malaysia), in relation with Section 5 of its Arbitration Act 2005;

D. The applicability of Article 6 of the European Convention on Human Rights;

E. The applicability of Article 47 EU Charter of Fundamental Rights and State Immunity;

F. The applicability of the United Nations Convention on Jurisdictional Immunities of States and Their Property, done in New York on December 2, 2004; and

G. The applicability of Organic Law 16/2015, of October 27, on Privileges and Immunities of Foreign States, International Organizations with Headquarters or Offices in Spain and International Conferences and Meetings Held in Spain.

The Parties were invited to file their views, together with all documentary evidence, including witness statements and expert reports, by no later than 23.59 hours on January 18, 2021.

The Arbitrator determined that Parties' respective documentary and expert evidence thus submitted would be received into evidence in this arbitration and Experts –if any- might be called at the Hearing.

87. Claimants submitted their views on January 4, 2021 –along with exhibits C 114 to C 118- and portrayed their position as follows:

> *«…Hence, given: the unambiguous construction of Article 22.3 of the Spanish Arbitration Act; the implausibility of Malaysia's grounds for challenge and their very low likelihood of success; Malaysia's regrettable history of failing to engage directly in this arbitration, except to stymie it; the procedural calendar's lengthy period contemplated between a Preliminary and a final Award, and Malaysia's failure to object to that calendar, and; Claimants long-delayed attempt to have their grievance finally heard, we express in the strongest terms our opinion in favour of continuing these proceedings as scheduled…».*

The exhibits Claimants attached to their submission demonstrated that –as indicated in ¶¶ 67, 132 and 254 of the request of Exequatur 1017/2020- Respondent filed an action to set aside the Preliminary Award on September 30, 2020, before the Civil and Criminal Chamber of the Superior Court of Justice of Madrid, pursuant to Article 41 of the SAA (henceforth, Annulment Proceeding 88/2020).[80]

Both the Claimants' views and its exhibits were incorporated into the proceedings. Respondent failed to submit its comments on this issue within the period provided in Procedural Order 30.

The arbitration proceedings proceeded as scheduled, in accordance with the Updated Procedural Calendar.[81]

88. Claimants submitted their views on January 18, 2021 and portrayed their position as follows:

> *«…We write pursuant to the Sole Arbitrator's request in §IV of Procedural Order 30.*
>
> *We respectfully refer the Sole Arbitrator to: Claimant's Counter-Memorial on Jurisdiction (¶78-87); the Preliminary Award (¶¶ 90-97), and; the Opposition to Malaysia's Petition to set aside the Preliminary Award (Doc. C-115) (¶¶202-31) in respect of sovereign immunity. We likewise refer the Sole Arbitrator to the Preliminary Award (¶¶115-16) and the Opposition to Malaysia's Petition to set aside the Preliminary Award (Doc. C-115) (¶¶78, 162-201) concerning arbitrability…».*

89. Respondent failed to submit its comments on this issue within the period provided in Procedural Order 30.

90. On February 18, 2021, the Arbitrator invited the Parties to submit their views on the contents, context and scope of the historical and public document titled *«A Proclamation»*, dated November 25, 1957, of unrestricted access [82] and signed by Muhammad Esmail Kiram, Sultan of Sulu *«…for himself and on behalf of the heirs of Sultan Mohammad Jamalul Alam…»* and its relationship with the claim in this

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[80] Exhibit C 114.

[81] Procedural Order 31. SAA, Article 22.3.

[82] https://www.officialgazette.gov.ph/1957/11/25/philippine-claim-to-north-borneo-vol-i-a-proclamation/

arbitration by no later than 23.59 hours on March 5, 2021.[83] Claimants submitted their views –which was incorporated in the proceedings-[84] on February 24, 2021. Respondent failed to submit its comments on this issue.

ii. The Evidence

91. On December 15, 2020, and pursuant to the Updated Procedural Calendar, Claimants provided the names of witnesses whom Claimants would make available at the Hearing, to be held during the week of February 15, 2021 (henceforth, the Hearing).

92. Claimants indicated that they had no witnesses of fact to be offered and proposed the following Expert witnesses for direct testimony and cross-examination:

A. Professor Dr. Eckart Brödermann;

B. Mr. Richard Caldwell;

C. Professor E. Ulrich Kratz;

D. Mr. Carlos Lapuerta; and

E. Dr. Nathan Meehan.

93. Respondent failed to offer witnesses of fact, nor Expert witnesses to be heard at the Hearing and made no proposal for evidence. Respondent was properly served with the Updated Procedural Calendar, was aware of its content and was given throughout this arbitration an equal, fair and reasonable opportunity to present its case to the Arbitrator, including its proposition of fact witnesses and experts. Respondent was informed of the consequences of its non-participation in the arbitration, including its absence from the Hearing.

94. On December 29, 2020[85] and on January 6, 2021,[86] the Arbitrator rendered his decision on the admissibility of evidence.

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[83] Procedural Order 36.

[84] Procedural Order 32.

[85] Procedural Order 30.

[86] Procedural Order 31.

Claimants' documentary and expert evidence were received into evidence in this arbitration.

The following Experts were called at the Hearing:

A. Professor Dr. Eckart Brödermann;

B. Mr. Richard Caldwell;

C. Professor E. Ulrich Kratz;

D. Mr. Carlos Lapuerta; and

E. Dr. Nathan Meehan.

iii. The Pre-Hearing Conference

95. The Arbitrator convened the Pre-Hearing Conference to be held remotely –due to the uncertainties inherent to the Covid-19 pandemic- for January 8, 2021, between 11.00 a.m. and 12.00 p.m., Madrid Time (henceforth, the Pre-Hearing Conference), pursuant to the Updated Procedural Calendar.[87] The Webex system was used. The Arbitrator included all the available email addresses of Parties in the invitation. Claimants submitted their list of attendees in advance to the Pre-Hearing Conference. Respondent failed to provide any list of attendees.

96. Claimants were represented in the Pre-Hearing Conference by their Counsel. Respondent neither participated in the Pre-Hearing Conference, nor was it represented therein, either directly or by proxy.

97. The Pre-Hearing Conference was devoted to the procedural organization of the Hearing, according to the following agenda:

a. Hearing to be held in person or remotely. Proposal and suggestions for its organization. Implementation of available protocols;

b. Contents of opening statements, summarizing Parties' views on the major issues, and allocation of time for their presentation;

[87] Procedural Order 30.

c. Order of appearance of Experts' testimonies and allocation of time;

d. Schedule for the hearing; and

e. Miscellaneous issues.

98. The Pre-Hearing Conference was recorded and incorporated into the proceedings on January 30, 2021, which Parties were invited to download by logging onto an identified ftp site.

99. Respondent was repeatedly informed of the consequences of its non-participation and warned throughout the arbitration that if it failed to avail itself of the opportunity to attend the Pre-Hearing Conference, notwithstanding having been given such opportunity to do so, the Arbitrator might proceed with arbitration as scheduled, as indeed did occur.

iv. The Hearing

100. The Parties were duly summoned for the Hearing, in accordance with the Updated Procedural Calendar and the Pre-Hearing Conference. The Hearing was held remotely on February 15, 2021 and February 16, 2021, due to the uncertainties inherent to the Covid-19 pandemic.[88] Arbitration Place was the Remote Hearing Manager.[89] Claimants *«…expressly recognised the legitimacy of remote proceedings in this arbitration, under the SAA and otherwise…».*[90] Respondent, despite having been invited, neither participated in the Pre-Hearing Conference, nor did it submit any objection.

101. During the Hearing, Claimants were present, represented by their Counsel. Respondent neither participated in the Hearing, nor in its organization, nor was it represented therein.

102. The Hearing was devoted to the determination of the substantive issues of the present dispute. The Hearing mainly progressed in accordance with Procedural Order 34. Claimants made opening oral submissions on the first day of the Initial Hearing, summarizing their views on the major issues and clarifying those questions addressed by

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88 Procedural Orders 30, 34 and 35. Claimants' pleadings dated February 2, 2021.

89 Procedural Order 34. Claimants' pleadings dated February 2, 2021. www.arbitrationplace.com.

90 Procedural Order 34. Claimants' pleadings dated February 2, 2021.

the Arbitrator. Claimants had sufficient opportunity to defend their positions and to examine the proposed evidence and experts.

103. The Hearing was recorded, and transcripts of the sessions were provided by Arbitration Place –the Remote Hearing Manager- to the Parties and the Arbitrator. All these materials were incorporated into the proceedings. Parties made no objection to the neutrality of the professionals entrusted with these necessary tasks. Consequently, the Arbitrator deemed them as valid documentary support.

104. The Arbitrator noted that Respondent was properly served with all substantive pleadings and exhibits attached thereto and the summons to the Hearing. Respondent was aware of its content, scope and location. Respondent failed and/or refused to avail itself of the opportunity to do so and made no submission, nor did it otherwise participate in the Hearing, nor did it intervene therein, either directly or by proxy.

The Arbitrator granted Respondent a final chance to make submissions in connection with the substantive issues in dispute in this arbitration, including its submission on costs by no later than 20.00 hours on March 25, 2021. The Arbitrator advised Respondent that the Final Award (which may include an award of costs) is binding and legally enforceable against Respondent, notwithstanding its non-participation in this arbitration. Respondent decided to not address this invitation, without any further explanation.

105. The Hearing was validly held, as the Parties had sufficient opportunity to defend their respective positions and to examine the result of the evidence taken in this arbitration.[91]

v. The Post-Hearing Briefs

106. On March 16, 2021, Claimants delivered their written conclusions (henceforth, the Claimants' Post Hearing Brief), as determined in the Updated Procedural Calendar. Respondent failed to submit its written conclusions, within the period provided in Procedural Order 28.

[91] Procedural Orders 1(¶32), 34 and 37. SAA, Articles 25.2 and 31.b.

vi. The Costs Submissions

107. On March 16, 2021, Claimants made their submission on costs, additional to that contained in Section VI of the Statement of Claim. This submission and its attached documentation are incorporated into the proceedings. Respondent decided to not address the request contained therein. The Parties' respective costs submissions are discussed further in Section VIII of this Final Award.

vii. The Closing of the Proceedings

108. The Arbitrator declared the proceedings closed on March 26, 2021 with respect to the matters to be decided in the Final Award.[92]

viii. The Procedural Activity after the Closing of the Proceedings

A. *On the Judicial Appointment of the Arbitrator and the Abeyance of Proceedings*

109. On June 29, 2021, two years after the conclusion of the judicial appointment of this Arbitrator described in Section IV.2 of this Final Award, the Civil and Criminal Chamber of the Superior Court of Justice of Madrid upheld –by majority vote- a motion from the Respondent in the Application and vacated all related rulings for the reasons expressed therein, including the Judgment of March 29, 2019 (henceforth, the Decision of June 29, 2021). The Decision of June 29, 2021 contained a dissenting opinion, arguing that the Judgement of March 29, 2019 should not be vacated.[93]

The Arbitrator was not a party to the Application. The Civil and Criminal Chamber of the Superior Court of Justice of Madrid did not serve on this Arbitrator any communication regarding the Decision of June 29, 2021.

110. On July 1, 2021, further to Procedural Orders 39 and 40, an *ex parte* communication took place. Representatives of Madrid–based Uria Law Firm –acting on behalf of the State of Malaysia in the Application- and Mr. Ignacio Paz-Ares, a Notary of Madrid, paid an unscheduled visit to the Arbitrator's law firm. The purpose of this visit

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92 Procedural Orders 39 and 40.

93 Suspension Order Request, ¶¶ 23 – 29, footnotes 33 – 40.

was to serve on the Arbitrator a notarised deed composed of (i) a copy of an extract of the Decision of June 29, 2021 and (ii) a unilateral request by the Respondent, addressed to the Arbitrator, to put an immediate end to the present arbitration proceedings because of the Decision of June 29, 2021 (henceforth, the *ex parte* communication of July 1, 2021). The *ex parte* communication of July 1, 2021 was incorporated into the proceedings.

111. Procedural Order 41, of July 2, 2021, enclosed the *ex parte* communication of July 1, 2021. The Parties were invited to provide their written views and comments on its contents and to inform the Arbitrator on its effects on this arbitration by July 6, 2021, at 12.00 hours. The Parties were convened for a remote hearing to discuss the issue, to be held on July 7, 2021, at 17.00 p.m.

112. On July 5, 2021, at 19.15 hours, Madrid Time, Mr. Capiel addressed an email to the Arbitrator, with copy to Dr. Arias and Messrs. García-Casas and Cojo, acting as Counsel for the Respondent in the Application and with the attachment of (i) the full text of the Decision of June 29, 2021 and (ii) a copy of the motion addressed by the Respondent to the Civil and Criminal Chamber of the Superior Court of Justice of Madrid in the Application for it to request that the Arbitrator stop the present arbitration (henceforth, Mr. Capiel's Motion). The full text of the Decision of June 29, 2021 was incorporated into the proceedings.

113. The Arbitrator acknowledged receipt of Mr. Capiel's Motion on the same day (i.e., July 5, 2021), by email sent at 19.28 hours, Madrid Time, with copy to the Parties. The Arbitrator attached in this email a copy of Procedural Order 41 –as served on the Parties on July 2, 2021- and invited Mr. Capiel to submit in the arbitration proceedings, on behalf of his client, the Respondent, any comments on the *ex parte* communication of July 1, 2021, and to participate in the hearing scheduled for July 7, 2021, pursuant to Procedural Order 41. Mr. Capiel declined this invitation by email of July 5, 2021, which the Arbitrator received in his email inbox at 21.17 hours, Madrid Time; it was not copied to Claimants. Mr. Capiel alleged that Mr. Capiel's Motion was exclusively related to the Application and solely made in this judicial context. On July 6, 2021, at 10.03 hours, Madrid Time, the Arbitrator informed of the contents of this email to the Parties.

114. On July 6, 2021, Claimants filed their pleadings on Procedural Order 41, along with exhibits C 123 and CL 175, with copy to the Respondent. Both Claimants' views and their exhibits were incorporated into the proceedings. Respondent failed to submit its comments on this issue within the period provided in Procedural Order 41.

115. The hearing was remotely held on July 7, 2021, in accordance with Procedural Order 41, and was devoted to assessing the legal consequences of the Decision of June 29,

2021, and foreseeable lines of action. During the hearing, Claimants were present, represented by their Counsel. Respondent, despite having been duly summoned, neither participated in the hearing, nor was it represented therein. The hearing was recorded. All these materials were incorporated into the proceedings.

116. On July 7, 2021, at 13.37 hours, Madrid Time, the Civil and Criminal Chamber of the Superior Court of Justice of Madrid served on the Arbitrator a communication issued in Annulment Proceeding 88/2020. It contained an instruction from the clerk of the Court addressed to the Arbitrator for him to stop and close the present arbitration immediately further to the Decision of June 29, 2021 (henceforth, the Clerk Communication of July 7, 2021). The Arbitrator is not a party to Annulment Proceeding 88/2020. The Clerk Communication of July 7, 2021 was incorporated into the proceedings.

117. The Arbitrator attached the Clerk Communication of July 7, 2021 in an email addressed to the Parties, at 18:02:47 hours, Madrid Time, where they were invited to provide their written views and comments, if any, on its contents by July 9, 2021, at 12.00 hours, Madrid Time.[94]

118. On July 8, 2021, Claimants filed their pleadings on the Clerk Communication of July 7, 2021, which were incorporated into the proceedings. Respondent failed to submit its comments on this issue within the period provided in the email of July 7, 2021.

119. On July 12, 2021, at 11.58 hours, Madrid Time, the Civil and Criminal Chamber of the Superior Court of Justice of Madrid served on the Arbitrator another communication, dated July 7, 2021, issued in Annulment Proceeding 88/2020, which contained the Clerk Communication of July 7, 2021 and some additional reasoning (henceforth, the Clerk Communication of July 12, 2021). The Clerk Communication of July 12, 2021 was incorporated into the proceedings. The Arbitrator attached the Clerk Communication of July 12, 2021 in an email addressed to the Parties, at 12:11.31 hours, Madrid Time, where they were invited to provide their written views and comments on its contents by July 14, 2021 at 12.00 hours.[95]

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[94] Claimants acknowledged receipt on July 7, 2021, at 18:11 hours, Madrid Time and took *«…note of your invitation to comment…»*. The Embassy of Malaysia in Madrid received this email on July 7, 2021, at 18:03 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on July 8, 2021, at 00:02:47 hours (Malaysia Time) and read it on July 8, 2021, at 04:32:12 hours (Malaysia Time). Respondent failed to acknowledge receipt of this email.

[95] Claimants acknowledged receipt on July 12, 2021, at 12:34 hours, Madrid Time. The Embassy of Malaysia in Madrid received and read this email on July 12, 2021, at 12:29 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my- on July 13, 2021, at 02:14:10 hours (Malaysia Time) and read it on July 13, 2021, at 04:59:15 hours (Malaysia Time). Respondent failed to acknowledge receipt of this email.

120. The Decision of June 29, 2021, the Clerk Communication of July 7, 2021 and the Clerk Communication of July 12, 2021 took place (i) once the Preliminary Award had declared, on May 25, 2020, the validity of the Arbitration Agreement and the Arbitrator's jurisdiction over the present dispute, (ii) once the arbitration proceedings were closed on March 26, 2021, according to Procedural Order 40, and (iii) when the Final Award was pending, then scheduled for September 2, 2021, pursuant to the Updated Procedural Calendar.

121. Claimants challenged the legal validity of the Decision of June 29, 2021, of the Clerk Communication of July 7, 2021, and of the Clerk Communication of July 12, 2021. Claimants characterised the Clerk Communication of July 7, 2021 and the Clerk Communication of July 12, 2021 as mere communications, lacking any «*…official binding nature…*»[96] and challenged their adequacy to stop the present arbitration, as they had been rendered in breach of the principle of judicial non-interference in international arbitration proceedings, recognised in Article 7 of the SAA.

122. Respondent has been invited to develop its arguments in this arbitration but did not submit in this proceeding copies of the motions it filed before the Civil and Criminal Chamber of the Superior Court of Justice of Madrid that resulted in the Decision of June 29, 2021.[97]

123. Pursuant to the wording of the Decision of June 29, 2021, the Clerk Communication of July 7, 2021, and the Clerk Communication of July 12, 2021, it can be inferred that the Respondent sought the termination of this arbitration proceedings both in the Application and in Annulment Proceeding 88/2020.

124. The Decision of June 29, 2021 has created a disruptive situation in the arbitration, with no analogous precedent known to date in Spain.

125. The Clerk Communication of July 7, 2021, and the Clerk Communication of July 12, 2021 lacked any support in the provisions of the SAA.

The Clerk Communication of July 7, 2021, and the Clerk Communication of July 12, 2021 sought to impose arguable restrictions on Parties' actions which are justified based on

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[96] Claimants' pleadings dated July 8, 2021 and July 12, 2021.

[97] Suspension Order Request, footnote 6.

them having consented to arbitration through the Arbitration Agreement, the validity of which was determined in the Preliminary Award pursuant to the applicable provisions of the SAA.

As analysed therein, Claimants did not waive any right to arbitrate the present dispute in accordance with the Arbitration Agreement. Conversely, Claimants relied on the Arbitration Agreement as the agreed and valid means to solve their disputes with Respondent arising from the Deed and put forward that they sought to defend in this arbitration their commercial rights under the terms of the Deed.[98] This statement cannot be characterised as repudiatory, as Claimants acknowledge the Arbitration Agreement. Claimants confirmed their willingness to proceed with the arbitration with this Arbitrator remaining in office until the issuing of the Final Award, during the hearing of July 7, 2021.[99] The Exequatur of the Preliminary Award ratified this reasoning.

126. Based on these arguments, Procedural Order 42, rendered on July 20, 2021, considered that the Arbitrator should not be swayed by outside pressures, including unauthorised intrusion by local courts, such as the Clerk Communication of July 7, 2021, and the Clerk Communication of July 12, 2021, in breach of Article 7 of the SAA. According to the principle of minimum interference with the arbitral process contained therein, if the arbitration process has been initiated, it follows that (i) judges cannot prohibit parties from initiating arbitration, and (ii) judges cannot interfere in an ongoing arbitration. This provision excludes judicial intervention except for cases especially provided for in the SAA, so that the scope for the court to intervene by injunction before an award is rendered by arbitrators is very limited.

127. Procedural Order 42 (i) confirmed that the Arbitrator remained in office, (ii) stayed the present arbitration proceedings to ensure his jurisdiction and to protect their integrity and legitimacy pending the clarification of the situation generated by the Decision of June 29, 2021, the Clerk Communication of July 7, 2021, and the Clerk Communication of July 12, 2021 and (iii) invited the Parties to comment and inform the Arbitrator on the evolution of this situation, including whatever procedural steps were adopted by the Parties to facilitate the continuation of this arbitration and the rendering of the Final Award –whichever occurred first- at their earliest convenience.[100] The Arbitrator refers the Parties to its contents.

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98 Preliminary Award, ¶ 106. Notice of Arbitration, ¶¶ 13 and 146.

99 Procedural Order 42.

100 Suspension Order Request, ¶ 28, footnote 40.

B. *On the Preliminary Award and the Exequatur of the Preliminary Award*

128. Respondent filed Annulment Proceeding 88/2020 on September 30, 2020.[101]

129. On October 11, 2021, pursuant to instructions contained in Procedural Order 42, Claimants reported that the Tribunal de Grande Instance de Paris ordered the Exequatur of the Preliminary Award on September 17, 2021. Claimants appended the Exequatur of the Preliminary Award. Claimants copied the email and its attachment to Respondent.

The Arbitrator acknowledged receipt of this communication and noted its content and the simultaneous service on Respondent. The Arbitrator invited Respondent –and copied Claimants- to provide its written views and comments on the Exequatur of the Preliminary Award, if any, by October 15, 2021.[102]

130. On October 14, 2021, at 14:08 hours, Madrid Time, the Clerk of the Civil and Criminal Chamber of the Superior Court of Justice of Madrid served on the Arbitrator another communication, dated October 14, 2021 (henceforth, the Clerk Communication of October 14, 2021), issued on the Annulment Proceeding 88/2020. The Clerk Communication of October 14, 2021 included the Clerk Decree of October 14, 2021, declaring the discontinuance of Annulment Proceeding 88/2020.[103]

The Arbitrator attached the Clerk Communication of October 14, 2021 to an email dated October 20, 2021 and addressed to the Parties, at 19:48 hours, Madrid Time. The Arbitrator invited the Parties to provide their written views and comments on its contents by October 25, 2021, at 12.00 hours (Madrid Time).[104]

131. On October 25, 2021, pursuant to instructions contained in the email, Claimants submitted their views on the Clerk Communication of October 14, 2021. Claimants sustain that the Clerk Communication of October 14, 2021 does not affect the

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[101] Exhibit C 114.

[102] Claimants acknowledged receipt on October 11, 2021, at 22:46 hours, Madrid Time. The Embassy of Malaysia in Madrid received this email on October 11, 2021, at 22:28:59 and read it on October 13, 2021, at 10:37 hours (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my. Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my and siti.zainab@agc.gov.my- on October 12, 2021, at 04:27:06 hours (Malaysia Time) and read it on October 12, 2021, at 07:28:33 hours (Malaysia Time). Respondent failed to acknowledge receipt of this email and to submit its comments on this issue within the period provided therein.

[103] Final Award, Section IV.4.viii.D, Claimants Comments of February 23, 2022: «…*Neither party appealed the* Decreto…».

[104] Claimants acknowledged receipt on October 20, 2021, at 19:52 hours, Madrid Time. Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my and siti.zainab@agc.gov.my- on October 21, 2021, at 01:48:18 hours (Malaysia Time) and read it on October 21, 2021, at 05:41:33 hours (Malaysia Time). Respondent failed to acknowledge receipt of this email

validity of the Preliminary Award, as it cannot be characterised as *«…a decision from the Justices of the Court…»* on the Preliminary Award. Respondent failed to submit its comments on this issue within the period provided therein.

132. The Preliminary Award has not been set aside by any Court as the Clerk Communication of October 14, 2021 confirmed. The Exequatur of the Preliminary Award implies the recognition of the Preliminary Award in France.[105] Respondent informed the Arbitrator in the *ex parte* communication of December 17, 2021 that it had filed an appeal against the Exequatur of the Preliminary Award on December 10, 2021, before the Paris Court of Appeal, but did not submit to this proceeding a copy of its arguments.

C. *On the Relocation of the Place of Arbitration*

133. Madrid was selected in the Preliminary Award as the place of arbitration based on its consideration as a neutral venue, located in a third country from that of either of the Parties (see Section IV.3.v of this Final Award).[106]

134. On October 11, 2021, Claimants also submitted their reasoned request to relocate the place of arbitration so established from Madrid to Paris. It was based on the concurrence of two factors, after the Preliminary Award: (i) the Exequatur of the Preliminary Award, which implies the recognition of the Preliminary Award in France, and (ii) the questionable interference by the Civil and Criminal Chamber of the Superior Court of Justice of Madrid, in view of the Decision of June 29, 2021, and the subsequent Clerk Communication of July 7, 2021, and Clerk Communication of July 12, 2021, characterised as supervening events aimed at stopping the present ongoing international arbitration proceedings without any legal support.[107]

135. The Arbitrator invited Respondent –and copied Claimants- to provide its written views and comments on Claimants' communication, if any, by October 15, 2021, at 20:00 hours (Madrid Time). Respondent failed to provide any comment on Claimants' proposal.[108]

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[105] Procedural Order 44.

[106] Preliminary Award, ¶¶ 28 – 37.

[107] Procedural Order 42.

[108] Suspension Order Request, ¶ 36 and footnote 47.

136. The Arbitrator carefully considered this submission in Procedural Order 44.[109]

137. The Arbitrator confirmed that the Arbitration Agreement –valid- remains silent on the issue of the place of the arbitration; it was determined in the Preliminary Award. The Arbitrator also ensured himself that Claimants were entitled to request a modification of the place of arbitration and that the Parties failed to reach any agreement on this relocation otherwise. The arbitration proceedings were closed as of March 26, 2021, according to Procedural Order 40. The Final Award had not yet been rendered at the time Claimants filed the request for relocation.

138. In the absence of an agreement by the Parties and any other rule for the relocation thereof, the Arbitrator assessed Claimants' request, *«…having regard to the circumstances of the case and the convenience of the parties…»*.[110]

139. The Arbitrator concluded that circumstances that gave rise to the need of a relocation of the place of arbitration from Madrid to Paris were reasonably unforeseeable at the time the Arbitration Agreement was entered into and at the time the Preliminary Award, rendered.

140. As explained in Section IV.4.viii.A of this Final Award, the Decision of June 29, 2021 vacated the Judgment of March 29, 2019, amongst other decisions. The Decision of June 29, 2021, rendered two years after the conclusion of the judicial appointment of this Arbitrator, thus created a disruptive situation in the arbitration, with no analogous precedent known to date in Spain.

141. The Clerk Communication of July 7, 2021, and the Clerk Communication of July 12, 2021 followed the Decision of June 29, 2021 and were served on the Arbitrator.[111]

The Arbitrator characterised the Decision of June 29, 2021, the Clerk Communication of July 7, 2021, and the Clerk Communication of July 12, 2021 as supervening events to the Preliminary Award that threaten to render the Arbitration Agreement inoperative or incapable of being performed and the Parties' legitimate expectations in the arbitration, thwarted.

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[109] Suspension Order Request, ¶¶ 5 and 37 – 41, footnotes 8 and 48.

[110] SAA, Article 26.1.

[111] Procedural Order 42.

The Clerk Communication of July 7, 2021, and the Clerk Communication of July 12, 2021 lack any support in the provisions of the SAA and therefore can be categorized as an unauthorised local–court intrusion on this ongoing arbitration process, in breach of the principle of judicial non–interference recognised by Article 7 of the SAA,[112] by the New York Convention [113] and by the Geneva Convention, [114] both ratified by Spain. [115] These provisions leave no room for national courts to supervise or regulate the arbitrator's procedural decisions during an ongoing arbitration.

It follows that this intrusion will simply lead to the relocation of the current place of arbitration –Madrid- to another venue (Paris) where no local courts interfere with the arbitral adjudicatory process –at least, until the enforcement stage is reached- and allow the parties full control over the procedural and substantive rules governing the arbitration.[116]

142. It is the Arbitrator's view that the Decision of June 29, 2021, the Clerk Communication of July 7, 2021, and the Clerk Communication of July 12, 2021 create a certain risk for the Parties of incurring in a denial of justice in Madrid, as the Parties would not be able to exercise their rights of access to arbitration under the Arbitration Agreement and pursuant to the Exequatur of the Preliminary Award as the agreed mechanism to solve their current dispute on the Deed. [117] Claimants confirmed their willingness to proceed with the arbitration and with this Arbitrator remaining in office until the issuing of the Final Award, during the hearing of July 7, 2021.[118] The Exequatur of the Preliminary Award ratified this reasoning. The right of a party to an arbitration agreement to submit its dispute to arbitration is part of French public policy.

143. France is a favourable venue for international arbitration. Its legal climate is supportive of international arbitration, which legal framework is established through the provisions of the FLA. Its Article 1505.4 confers on the courts the power to support any international arbitration proceedings if a party is at risk of denial of justice.[119] Its Article 1448.1 provides a legal safeguard which reinforces the authority and discretion of the Arbitrator in the case at hand to conduct the proceedings. This provision enables the

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[112] SAA, Preamble, II and Article 7.

[113] New York Convention, Article II.3.

[114] Geneva Convention, Article IV.1.

[115] The Geneva Convention entered into force in Spain on August 10, 1975. The New York Convention entered into force in Spain on August 10, 1977.

[116] Resolution of the Institute of International Law of September 12, 1989 (henceforth, the 1989 Resolution), Articles 1, 3.d and 6.

[117] *National Iranian Oil Company (NIOC) v. Israel*. Judgment of the French Cour de Cassation. First Civil Chamber, rendered on February 1, 2005. Case No. 01–13.742/02–15.237. Preliminary Award, ¶ 119. Claimants' Letter dated October 11, 2021, p. 1.

[118] Procedural Order 42.

[119] FLA, Article 1505.4

Parties to conduct the present arbitration in accordance with the principles of due process and equal treatment and without undue interference by the courts of the place of arbitration.

144. Within France, Paris is a well-established impartial and neutral venue, a major arbitral seat where the prominent factors to be considered in the selection of a reliable place of arbitration concur, located in a third country from that of either of the Parties.

The neutrality of the present arbitration proceedings or of the Arbitrator will not be impaired. France signed the New York Convention on November 25, 1958 and ratified it on June 26, 1959. The New York Convention entered into force in France on September 24, 1959. To date, only the reciprocity reservation remains in force, as France withdrew the commercial reservation on November 17, 1989. France signed the Geneva Convention on April 21, 1961 and ratified it on December 16, 1966.

Its election as the place of the arbitration does not and will not be seen as favouring either of the Parties.

145. For these reasons, the Arbitrator decided in Procedural Order 44, to uphold Claimants' request for the relocation of the place of this arbitration from Madrid to Paris. The Arbitrator refers the Parties to its contents.

D. *On the Suspension Order*

146. Mr. Tim Portwood, acting on behalf of Malaysia but without submitting proper evidence of such representation, addressed the *ex parte* communication of December 17, 2021 to the Arbitrator, by email. The *ex parte* communication of December 17, 2021 contained a letter, with enclosures, informing of the filing by Malaysia of an appeal against the Exequatur of the Preliminary Award on December 10, 2021, before the Paris Court of Appeal and of the existence of the Suspension Order, which was also attached, along with its request filed before the First President of the Paris Court of Appeal and dated December 10, 2021 (henceforth, the Suspension Order Request).

147. On December 18, 2021, the Arbitrator acknowledged receipt of the *ex parte* communication of December 17, 2021 and attached both the email received and its exhibits to Claimants, once noted that Claimants had not been copied by Respondent and so

preserving Parties' fundamental rights in this arbitration. The Arbitrator invited Claimants to provide their comments by December 18, 2021.[120]

148. In the *ex parte* communication of December 17, 2021, Malaysia requested that the arbitration be immediately discontinued –*«…by December 20, 2021…»*- on the basis of the Suspension Order, as the *«…First President of the Paris Court of Appeal has: (i) stayed the effects of the [Exequatur Order]; (ii) barred Messrs. Nurhima Kiram Fornan, Fuad A. Kiram, Sheramar T. Kiram, Permaisuli Kiram-Guerzon, Taj Mahal Kiram-Tarsum Nuqui, Ahmad Nazard Kiram Sampang, Widz Raunda Kiram Sampang and Ms. Jenny K.A. Sampang from availing themselves of the [Exequatur Order]…».*

Respondent's representative, Mr. Portwood, stated that *«…nothing in this correspondence or in the suspension order should be construed as participation in or acknowledgement by Malaysia of the legitimacy of the proceeding or any of the decisions and orders rendered by you in the proceedings, including the purporting change of the arbitral seat to Paris, France…».* [121] The Arbitrator noted Respondent's awareness of both the ongoing arbitration and the decisions rendered in the proceedings.[122]

149. Claimants submitted their views on December 22, 2021, pursuant to the Arbitrator's invitation of December 18, 2021.

Claimants rebutted Respondent's position on the suspension sought based on several arguments. Claimants denied that the Suspension Order could have any effect on the arbitration itself, as the Preliminary Award is still recognised in France and incorporated into the French legal order by virtue of the Exequatur of the Preliminary Award.

Claimants rejected that Malaysia's sovereignty is at risk, as the sole purpose of the arbitration, in their opinion, is to adjudicate a commercial dispute under the UNIDROIT Principles.

Claimants also considered that the Suspension Order is flawed and cannot serve for the intended purpose of the Respondent, because the Suspension Order cannot have any effect on the arbitration under the FLA.

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[120] Claimants acknowledged receipt on December 18, 2021, at 18:17 hours, Madrid Time. The Embassy of Malaysia in Madrid received this email on December 22, 2021, at 19:45:04 (Madrid Time) at its email addresses pro.ukk@kln.gov.my and mwmadrid@kln.gov.my and read it on December 23, 2021, at 09:05:01 (Madrid Time). Mr. Portwood received this email on December 22, 2021, at 19:45:04 (Madrid Time) at his email address timportwood@bredinprat.com and read it on December 22, 2021, at 20:54:31 (Madrid Time). Mr. Idrus received this email –sent to his email address ag.idrus@agc.gov.my and siti.zainab@agc.gov.my- on December 23, 2021, at 02:45:04 hours (Malaysia Time) and read it on December 23, 2021, at 07:37:13 (Malaysia Time)

[121] *Ex parte* communication of December 17, 2021.

[122] Procedural Order 49.

Claimants finally sustained that the Suspension Order cannot curtail, delay or disrupt the ongoing arbitration proceedings and characterised the Respondent's request for this arbitration to be discontinued on such basis as procedurally and substantially groundless under Article 1526 FLA.

Claimants thus requested that the Respondent's pretension be dismissed, and arbitration continued as planned to issue the Final Award.

150. Having considered the Parties' arguments carefully, the Arbitrator rejected the Respondent's request contained in the *ex parte* communication of December 17, 2021.

The Preliminary Award had declared on May 25, 2020 the validity of the Arbitration Agreement and the Arbitrator's jurisdiction over the claims made by Claimants in their Notice of Arbitration, pursuant to Article 22 of the SAA.

The Preliminary Award has not been set aside by any Court, as the Clerk Communication of October 14, 2021 confirmed. At the date of the Suspension Order being rendered, the Preliminary Award was still recognised in France, as the Exequatur had incorporated it into the French legal order.

Respondent confirmed in the Suspension Order Request that *«…Malaysia does not ask the Tribunal to intervene in the arbitral proceedings…»*. Therefore, Respondent admitted that the Suspension Order had no effect on the arbitration and proceedings continued as planned.[123]

151. Mr. Tim Portwood, apparently acting on behalf of Malaysia but without submitting proper evidence of such representation, addressed a further *ex parte* communication of February 18, 2022 only to the Arbitrator, by email (henceforth, the ex *parte* communication of February 18, 2022). Claimants were not copied.

The *ex parte* communication of February 18, 2022 contained a letter, which was both intimidatory and coercive, with terms which cannot be acceptable in any circumstance. Respondent reiterated its request that the arbitration be immediately discontinued, already sought in the *ex parte* communication of December 17, 2021.

The Arbitrator enclosed the *ex parte* communication of February 18, 2022 in its Procedural Order 50 for proper service and information of Claimants under the principles of due process and procedural fairness, which comprises, amongst others, the following rules:

a. Throughout the proceedings, the parties shall be treated with equality;

[123] Procedural Order 49.

b. Each party shall be given a full opportunity to present its case at all stages of the proceedings and to rebut its opponent case at a meaningful time and manner;

c. All written pleadings, documents or other communications supplied to the arbitral tribunal by one party shall be communicated to the other party; and

d. The parties are entitled to be legally represented.

The Arbitrator invited Mr. Portwood to provide a letter of representation in his favour, given by his apparent client, Malaysia, and a written confirmation by Respondent that has duly authorised its Counsel, Mr. Portwood, to act and express himself in this arbitration on its behalf and of his procedural activities in this arbitration (i.e., the *ex parte* communication of December 17, 2021 to the Arbitrator and the *ex parte* communication on February 18, 2022).

The Arbitrator also informed the Parties of an ongoing criminal investigation against the Arbitrator, initiated by Respondent –according to the summons received by the Arbitrator- before the Prosecutor's Office at the Provincial Court in Madrid early in February 2022 which has been referred to Criminal Court of Madrid number 40 for further investigation under the Spanish Court of Criminal Procedure.

152. On February 23, 2021, Mr. Portwood submitted his views, pursuant to the Arbitrator's invitation contained in Procedural Order 50, portrayed as follows:

> *«… Dear Sir,*
>
> *I write as counsel of Malaysia in France in the context of the defence of its interest in connection with (but without any form of acknowledgement of the legitimacy of or participation in) the supposed* «proceedings» *in which you purport to act as* «sole arbitrator» *(the* «Purported Proceedings»*) despite:*
>
> – *the Spanish courts' decision rendered on 29 June 2021 annulling your appointment as arbitrator and all subsequent acts (the* «Annulment Decision»*) and those courts' clear instructions to you to stop the Purported Proceedings; and*
>
> – *the* ex-parte *order rendered on 16 December 2021 by the First President of the Paris Court of Appeal upon reasoned request by Malaysia (the* «Suspension Order»*), through which the First President of the Paris Court of Appeal has* «stay[ed] the effects» *of the exequatur order on the basis of which I understand you allege to find grounds to carry on the Purported Proceedings.*
>
> *For good order, I note that you were informed of the Suspension Order on 17 December 2021 and that its nature and effects were further explained to you by letter of 18 February 2022.*
>
> *Despite the above, the facts of which I am aware show that you are still purporting to act as arbitrator and pursuing the Purported Proceedings.*

This letter is a formal notice sent on behalf of Malaysia for you to stop the wrongful acts committed by pursuing the Purported Proceedings.

Should you fail to put an end to these wrongful acts, Malaysia will seek your liability for continuously acting as an arbitrator in these Purported Proceedings and for the consequences for Malaysia of any purported «final award» *that may be rendered in these Purported Proceedings, as well as for the costs of challenging any such* «final award» *and its enforcement, if, wherever and whenever this may occur.*

Should you have counsel instructed to represent you, please do not hesitate to provide me with his or her contact details or to request that he or she reaches out to me directly.

This correspondence is sent exclusively to preserve the rights of Malaysia and without prejudice to (i) Malaysia's sovereign immunity, including its jurisdictional immunity and immunity from execution, (ii) Malaysia's rejection of and challenges to the Purported Proceedings, and (iii) Malaysia's claims and defences relating to the Purported Proceedings.

Nothing in the fact or contents of this correspondence should be construed as participation in or acknowledgement by Malaysia of the legitimacy of the Purported Proceedings or any of the supposed «decisions» *and* «orders» *rendered by you in the Purported Proceedings, including the purported change of the supposed* «arbitral seat» *to Paris, France. The Purported Proceedings are illegitimate, null and non-existent. For the avoidance of doubt, this correspondence is not a procedural request within the framework of the Purported Proceedings; it is a formal notice.*

Sincerely yours…».

Claimants were not copied. The Arbitrator acknowledged receipt and enclosed Respondent's Counsel letter, with copy to Claimants, for proper service and information under the principles of due process and procedural fairness.

153. Claimants submitted their views on February 23, 2022, pursuant to the Arbitrator's invitation contained in Procedural Order 50 and portrayed as follows:

«…Dear Dr. Stampa,

I write on behalf of Claimants pursuant to your instruction in Procedural Order 50.

We are astonished to learn that Malaysia has resorted to referring you to the Spanish criminal authorities for your conduct of these proceedings. We had no idea it was a crime to serve as an arbitrator (or even, per Malaysia's misrepresentations, to pretend to serve as one).

We are likewise appalled by Mr. Portwood's specious, melodramatic, utterly wrong and highly offensive letter of 18 February 2022. Threatening an arbitrator in an ex parte *communication with civil and criminal liability is outrageous and an affront to all the ethical principles our profession is supposed to hold dear. To add insult to injury, virtually every argument Mr. Portwood advances is flatly incorrect.*

Malaysia toggles between the extremes of decrying this arbitration as a transparent farce (in which case it should have no fear of its conclusion, because enforcement and annulment proceedings would inevitably see through it) and warning that it represents a mortal threat to Malaysia's territorial security.

Neither position, of course, is anything close to the truth. As you well know, this is a commercial dispute concerning the proper valuation of payment arising out of the 1878 Agreement, from the time Malaysia stopped making payments in 2013, through the early 2020s. In the course of the French proceedings, however, Mr. Portwood and company have invented a new –and fictitious- claim that the dispute is somehow a proxy for Claimants' true aim, to «reclaim» *the State of Sabah for themselves, at the cost of the Malaysian Federation's integrity.*

This would be amusing if it were not so serious. The assertions of Malaysia's counsel have placed our clients in legitimate fear for their own safety; it has led them to take measures to safeguard their personal security. The insinuation that Claimants are fighting a proxy legal battle for extremists who launched a violent attack on Sabah in 2013 is reckless and irresponsible.

It is also plainly wrong, as Malaysia's own Attorney-General acknowledged in his autobiography:

> Although there appears to be no evidence of any link between the Sulu descendants who were receiving the annual fees from Malaysia, under the 1878 Agreements [sic], and the armed invaders into Lahad Datu, the Malaysian government ceased payments from 2013.
>
> There were no legal grounds for Malaysia's refusal to pay annually since 2013. It resulted in Malaysia being in breach of the 1878 Agreement.

Mr. Thomas took the same position in his correspondence of 19 September 2019 (sent to me, copied to the Sole Arbitrator, and thus part of the record of this arbitration), when he offered to settle the matter by resuming payments, provided that Claimants discontinued the arbitration. Clearly (and correctly), Malaysia's Attorney-General never perceived this arbitration as in any respect an assault on Malaysia's sovereign prerogatives.

Malaysia's counsel have turned what its Attorney-General had conceded was a dispute over resuming payment in a contract – albeit one in which the Parties disagree radically over the quantum – into a full-blown fight about the ownership of Sabah. Deluded rhetoric of this kind not only massively misrepresents the nature of the case (as indeed Malaysia has done before the French courts); it also exposes Claimants to a very real risk of violence, because of the volatile part of the world where they live.

Our clients' lives are at stake. They do not have the luxury of living in London, Paris, or Madrid, where throwaway misrepresentations against them are mere abstractions. Allegations that blur the otherwise-obvious distinction between this arbitration and the incursion of 2013 are dangerous. They must stop.

***

Notwithstanding Mr. Portwood's misrepresentations concerning the current state of affairs, the status of the various proceedings actually is as follows:

The Decision of 29 June 2021

Claimants incorporate by reference their views on the impact of the Decision of 29 June 2021 in their letters to the Sole Arbitrator of 6 July 2021, 8 July 2021, 12 July 2021, 11 October 2021 and 25 October 2021.

*Leaving aside our well-aired opinion about the manifest irregularities of the Decision of 29 June 2021, we reiterate that it does not deprive the Sole Arbitrator of his function as such. Nor, thus, does it prevent him from concluding –as he did- that the 29 June 2021 decision constituted unprecedented interference in a Spain-based arbitration, in contravention of the explicit terms of the Spanish Law 60/2003, of 23 December, on Arbitration («*SAA*»), requiring and warranting a change of seat.*

The Decision of 29 June 2021 is currently on appeal to the Constitutional Court. Claimants launched the appeal on 5 November 2021. As you know, there is no set timeframe for when the Court might decide whether to hear the appeal. No other proceeding (to our knowledge) is in prospect in respect of the decision.

*Mr. Portwood states at p. 2 of his letter that the Superior Court of Justice of Madrid «*has repeatedly reminded you that you are no longer authorized to act as arbitrator and has expressly requested you to cease acting as arbitrator». *In fact, the Superior Court of Justice of Madrid has never ordered the Sole Arbitrator to do any such thing. It is the clerk –not the court- who has been corresponding with the Sole Arbitrator. For the reasons explained in Claimants' letters of 8 and 12 July 2021, any request or* «order» *from the clerk does not bind the Sole Arbitrator.*

The Sole Arbitrator agreed with Claimants at ¶ 24 of Procedural Order No. 44, of 2 November 2021:

> Clerk Communication of July 7, 2021, and the Clerk Communication of July 12, 2021 lack any support in the provisions of the SAA and therefore can be categorized as an unauthorised local–court intrusion on this ongoing arbitration process, in breach of the principle of judicial non–interference recognised by Article 7 of the SAA, the New York Convention and the Geneva Convention –both ratified by Spain- and by international and domestic judicial case law. These provisions leave no room for national courts to supervise or regulate the arbitrator's procedural decisions during an ongoing arbitration…

Mr. Portwood and the clerk appear to share an affinity for ex parte *communications, as well as an unfortunate tendency to mischaracterize court decisions. Mr. Portwood's misrepresentations thus come as no surprise.*

The Preliminary Award

There has never been any suggestion that the Preliminary Award was rendered contrary to the letter or spirit of the original court decision appointing the Sole Arbitrator. Recall that Malaysia's Attorney-General wrote to me and you on 19 September and 14 October 2019; the Attorney-General was clear that his letters should not be taken to imply his acceptance of either the Spanish courts' or the Sole Arbitrator's jurisdiction over the dispute, but at no point then or thereafter did he allege any misconduct or irregularity in relation to the Sole Arbitrator's rendering of the Preliminary Award.

Likewise, during Herbert Smith Freehills' brief foray into the arbitration in late 2019, there was much discussion of the Sole Arbitrator's jurisdiction or lack thereof, but no mention of any impropriety in respect of the pursuit of his court-certified appointment. If there had been any such concern, one would imagine Herbert Smith Freehills would have raised it. To the contrary, the Sole Arbitrator provided the courtesy (and then some) of extending the procedural schedule on the jurisdiction phase by nine whole months to accommodate Malaysia's ostensible new counsel.

Malaysia's only argument concerning the illegitimacy of the Preliminary Award therefore rests on its assertion that the Decision of 29 June 2021 (issued more than a year after the Preliminary Award) unwound everything that the Sole Arbitrator had done previously. The Sole Arbitrator has already rejected that contention in Procedural Orders 42 and 44; therefore, there is no extant point of argument concerning the legitimacy of the Preliminary Award.

As explained in Claimants' letter to the Sole Arbitrator of 25 October 2021, the Preliminary Award has not been, and will not be, annulled in Spain. Indeed, the Decreto issued by the clerk on 14 October 2021 states, in relation to the vacatur of the Preliminary Award, «acuerda el archivo del presente procedimiento, por carencia de objeto, y sin imposición de costas a las partes». *Neither party appealed the Decreto.*

Hence, the Preliminary Award has not been vacated by a Spanish Court and therefore remains in full force.

The Exequatur of the Preliminary Award

Mr. Portwood's hyperbolic description of the French proceedings completely distorts the reality. Claimants' counsel, first of all, are not violating the stay of the Exequatur by responding to the Sole Arbitrator's invitation to comment on it (what an absurd allegation!).

Second, the stay of the Exequatur has no bearing on the Sole Arbitrator's right –and duty- to conclude proceedings with a Final Award. This is a point we have already litigated and the Sole Arbitrator decided in Procedural Order 49.

Contrary to Mr. Portwood's assertion, the date for the appeal of the Exequatur has not been finalised. Claimants consider that no procedural calendar has been validly set for the time being in the appeal proceedings of the Exequatur Order; a procedural hearing is set for 28 February 2021 [corrected, 2022]*, during which the judge and the parties will discuss the schedule.*

As for Mr. Portwood's scurrilous suggestion that the Sole Arbitrator would be in violation of French law and liable to civil penalty in France by rendering a Final Award, this is a complete misrepresentation. Even overlooking the fact that Mr. Portwood's communication is based on contested legal and factual issues before the French Courts in the pending proceedings, and that Malaysia's Counsel has misleadingly presented the same contested issues as established facts, Mr. Portwood's ex parte *communication to the Sole Arbitrator is unfounded as a matter of French law.*

According to case law that has been settled and applied consistently for decades (inter alia, since the French Supreme Court decisions in the Hilmarton *and* Putrabali *cases), arbitral awards under French law are* «decisions of international justice». *They are not integrated into the legal system of any State and can only be subject to review pursuant to the rules in force in the country where recognition or enforcement is sought, in the context of recognition or exequatur proceedings.*

*Consequently, and further to our correspondence of 22 December 2021, neither the recognition/*exequatur *of the Preliminary Award pursuant to the Exequatur Order by the French Courts, nor the order purportedly staying the effects of the same, nor the appeal brought by Malaysia before the Paris Court of Appeal, nor any decision rendered by Spanish courts, can affect pending arbitration proceedings, or the Sole's Arbitrator's duty to conduct those proceedings diligently and expeditiously through to the Final Award.*

Consistent with the above, it is a fundamental principle of the French legal order that French courts lack jurisdiction and/or power to interfere with arbitrations, including inter alia *to order*

an arbitral tribunal to suspend any such ongoing proceedings. In respect, the Paris Court of Appeal has ruled that anti-arbitration injunctive measures are contrary to international public policy and cannot be recognized in the French legal order.

For the same reason, the Sole Arbitrator cannot incur any criminal or civil liability whatsoever under French law for diligently discharging his duties as to the conduct of the proceedings. This is true both where non-French decisions purportedly set aside an arbitral award previously rendered in the same arbitration, and where parties seize French courts to deny or frustrate the arbitration's exequatur.

Mr. Portwood's assertion is therefore wholly incorrect: not only is there no rule of French law that the Sole Arbitrator could possibly violate by rendering a Final Award, nor any provision that could impose civil penalties upon him for doing so; but also, more fundamentally, the imposition of any such liability would be fundamentally antithetical to the French philosophy of arbitration.

Criminal Proceedings in Spain Against the Sole Arbitrator

We reiterate our bafflement upon learning that Malaysia has prompted a criminal investigation against the Sole Arbitrator in Spain. Claimants note that «no further particulars are known to the Arbitrator in this regard».

While we reserve our right to comment on the criminal investigation if and when further information emerges, Claimants are unaware of any provision of the Spanish Criminal Code that the Sole Arbitrator could possibility have violated in the conduct of these proceedings. Serving as arbitrator is not a crime. Moreover, there is no obligation in Spain to stay or otherwise suspend an arbitration proceeding in light of a potentially related satellite criminal investigation.

***

In nearly 25 years of practice on matters domestic and international, civil and criminal, I regret to state that I have never encountered more hostile, vexatious, and desperately dishonest behaviour from a litigant and its counsel. Malaysia veered long ago off the course of vigorous advocacy for its case into outright intimidation and falsehood. Malaysia's recourse to the criminal authorities in Spain and Mr. Portwood's letter epitomize Malaysia's willingness to abandon all standards of legal practice and ethics.

As we have said many times before, Malaysia has every right to challenge the Sole Arbitrator's decisions and Awards, even if it chooses not to participate in the arbitral proceedings. But to endanger the other side's safety by equating a commercial dispute with an armed incursion is not lawyering – it is reckless endangerment.

Likewise, to posit that the proper –or even the improper- assertion of an arbitrator's role is somehow a matter of criminal culpability is as reprehensible as it is nonsensical. It goes against every established principle of arbitral immunity and all the canons and customs of international law.

Portwood's letter of earlier today (yet again rendered ex parte*) recycles the unfounded and unethical threats made to the Sole Arbitrator in Mr. Portwood's prior correspondence. There is nothing new in his latest letter. Given that Mr. Portwood's threats, as discussed herein, are utterly empty, and that he has pointedly declined to provide a letter of representation for this arbitration, we find no basis for further comment. Likewise, the Sole Arbitrator should ignore*

all further communications from Mr. Portwood, as they are full of sound and fury, signifying nothing.

For the reasons set forth above, the Sole Arbitrator should ignore these latest, and most shameful, efforts to deter him from fulfilling his function on or before 1 March 2022. Enough is enough.

Respectfully…».

154. Having considered the Parties' arguments carefully, the Arbitrator rejected the Respondent's request and proceedings continued as planned.[124]

5. *Respondent's Refusal to Participate in the Arbitration*

155. It is the Arbitrator's view that both due process and equality of arms of the Parties have been duly respected throughout this arbitration.[125]

156. Claimants were properly served with all submissions, procedural steps and requests; were aware of their content, acknowledged receipt in a timely fashion and participated throughout the proceedings.

157. Respondent was given an equal, fair and reasonable opportunity to present its case to the Arbitrator throughout this arbitration. Respondent refused to participate, nor intervene –directly or by proxy- in the arbitration, except for the period from October 25, 2019 until November 18, 2019 and Mr. Capiel's Motion. The Arbitrator notes that Respondent finally admits that it was properly served with all submissions, procedural steps, notices, documents and requests in connection with the arbitration, sent to its official address.[126] Respondent also admits that it was summoned to the hearings held in these proceedings and was aware of their contents.[127]

In the *ex parte* communication of December 17, 2021, Respondent's representative, Mr. Portwood, admitted that *«… Malaysia chose not to participate in the arbitral proceedings because of, inter alia, (a) the irregularity of the appointment of the Sole Arbitrator (see infra, § 23) and (b) the serious infringement of its immunity from jurisdiction resulting*

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124 Procedural Order 51.

125 SAA, Articles 24.1 and 25; FLA, Article 1510.

126 Exhibit C 54.

127 Exhibits C 54 and 114, ¶ 38. Suspension Order Request, ¶¶ 3 – 8, 13 – 32, 35 – 45, footnotes 2 – 8, 12, 15 –21, 24 – 32, 35, 37 – 42, 46 – 50, 52 and 59.

from the initiation of arbitral proceedings against it (i) without its consent to the arbitration (the 1878 Agreement does not contain an arbitration clause) and (ii) to hear claims that would challenge its sovereignty over its own territory (see supra, §§ 10-13). It thus indicated that it was challenging the arbitration proceedings in their entirety…».[128]

Mr. Portwood also stated that «*…nothing in this correspondence or in the suspension order should be construed as participation in or acknowledgement by Malaysia of the legitimacy of the proceeding or any of the decisions and orders rendered by you in the proceedings, including the purported change of the arbitral seat to Paris, France…».*[129]

Respondent was aware of the consequences of its non-participation, as it had been repeatedly warned and informed throughout the arbitration, that notwithstanding having been given such opportunity to do so, the Arbitrator might proceed with arbitration as scheduled and that both the Preliminary Award and the Final Award are binding and legally enforceable against Respondent.[130]

158. Respondent's non-appearance will not be treated as an automatic admission of Claimants' assertions and relief sought on the substantive issues of this dispute.[131] Before doing so, the Arbitrator needs to satisfy himself the Claimants' arguments are well founded in fact and law and Claimants –as appearing party- are entitled to obtain the relief they sought in this arbitration.

V. THE FACTUAL BACKGROUND ON THE MERITS

159. This Section of the Final Award summarizes the essential characteristics of the claim as set out in the Notice of Arbitration, in the Counter – Memorial on Jurisdiction, in the Statement of Claim and in some written submissions from Respondent and as resulted from the evidence on these disputed issues gathered throughout this substantive phase of the arbitration, as presented by the Parties to the Arbitrator.

The relevant documents were contained both in the Exhibits for Claimants and, eventually, in those for Respondent; reference is made to both where necessary.

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[128] Suspension Order Request, ¶ 18.

[129] *Ex parte* communication of December 17, 2021.

[130] Procedural Orders 1, ¶¶ 32, 14 and 37. SAA, Article 31.

[131] Exhibit C 114, ¶¶ 38 and 42.

Most of these materials to which the Parties referred in their pleadings in this arbitration are historic in nature and contained in archives for public and unrestricted access. It is the Arbitrator's view that the Parties' right to be heard and the principle of their equal treatment were observed because the Parties referred –directly and indirectly- to these exhibits in their pleadings and therefore it must be presumed –unless otherwise stated- that the Parties were familiar with their contents.

Within these boundaries, the contents of these materials will be complemented in the Final Award, where necessary, by those other related and which consultation may be eventually recommended for the proper assessment of the present dispute. Additional facts will be discussed in the Arbitrator's analysis of the disputed issues, to the extent they are relevant and useful.

160. Sultan Mohammed Jamalul Alam and Messrs. Alfred Dent and Baron Gustavus de Overbeck signed the Deed on January 4, 1878, in Sulu.[132] It was written in Jawi, a form of Malay in Arabic script.[133] The Preliminary Award declared that its Spanish translation prevails over the English for the reasons contained therein and provides as follows:[134]

> *«…Es verdad que nos el P.M.M. Sultan M. D. Alam, hijo del difunto P. M. M. Sultan Mujamad Pulalum Sultan de Jolo, todos nuestros súbditos descendientes y sucesores sepan que esta es nuestra voluntad así como la de los Dattos; de haber convenido en terminar el contrato de arrendamiento de Sandakan que nos propone el Señor Baron de Overbeck, Jefe de una Compañia de Hong-Kong y de Alparid Denet Ascubir residente en Londres, de cuya Compañía es Gerente, en su nombre y sucesores, socios y sus descendientes, puede mandar en las Islas y costa de la tierra grande, (Ysla de Borneo) desde el río de Pandasan, parte norte hasta Sibuco parte Sur, asi como en los demás ríos comprendidos entre dichos dos puntos y a la distancia de nueve millas de la ribera de mar, quedan comprendidos en el arriendo que hace el Sr. Barón de Overbeck Alparit Denet Ascubir, y ofrecieron al Paduca M M. Sultan Mujamad Dehamalul Alam así como a sus descendientes darle cinco mil pesos anuales.*
>
> *Convenimos desde este día el arriendo de dichos puntos con el Sr. Barón de Overbeck y Alparid Denet Ascubir así como nuestros descendientes y sus socios sucesores y descendientes; cualquiera, de ellos puede Gobernar dichos puntos y si acaso no quedara ya ninguno de los arrendatarios no podrán estos cederla a Extranjero ni a otra Compañía sin la voluntad del Rey.*
>
> *Si acaso en lo sucesivo hubiera controversia por nuestro contrato entre nuestros sucesores asi como los del Sr. Barón de Overbeck o de la Compañía en los extremos que abraza este contrato se someterá al juicio del Consul Gral. de Borneo (Brunei).*

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[132] Notice of Arbitration, ¶¶ 5, 6 and 42 – 48. Statement of Claim, ¶¶ 49 – 52. Exhibits C 12, C 13, C 52, ¶¶ 3 – 5, C 54 and C 114, ¶¶ 14 – 27. Suspension Order Request, ¶¶ 11 – 12. On Exhibit C 12, Professor Kratz clarified during his testimony that *«… this is what was called the letter of authority, and it is referred to the term* pajakan*, third line. It is highlighted, seventh line is highlighted. And in those two cases, it is highlighted. Basically that he voluntarily and freely had given the lease of the certain territory and full authority that goes with the lease to his European partners, in that case Baron Von Overbeck, Mr. Dent…»* (Professor Kratz Transcription, pp. 55 and 56).

[133] Kratz Report, ¶¶ 38 and 47 – 51. Statement of Claim, ¶¶ 49 and 182. Exhibit C 114, ¶ 108.

[134] Exhibit C 13. Preliminary Award, ¶ 126.

Si acaso hubiese contrariedad o duda por parte del Paduca Majasan Maulana Sultan Mujamad Dehamalul Alam y sus sucesores por algunos inconvenientes, en los sucesivo, el Señor Barón de Overbeck y la Compañía que contratan, ayudaran para aclararlo por complete.

Así también hará saber a todas las demás naciones de como el Paduca Majasan M.S. Mujamad D. Alam, hijo del difunto P M M. Sultan Muj. Pulalun, que es el que gobierna Jolo, sus dependencias y archipelago así como se han enterado todos los Dattos de que he concedido y entregado generosamente al nombrado Sr. Baron de Overbeck y a Alparid Denet Ascubir para que administren las tierras que son de mi dominio, que principia al Este del Rio Pandasan, siguiendo las orillas del mar y sus rancherías hasta el Rio de Sibucu, comprendiendo los pueblos de Sugut, Bancuca, Labuc, Sandakan, Quinabatangan, Mamiyang, así como las demás tierras inmediatas al otro lado del Rio Sibucu, las Yslas que se encuentran en dicha zona, por hallarse incluidas en el contrato del arrendamiento, que es verdad que el Sr. Gobernador B. de Overbeck es el que hará cabeza y es gerente de la Compañía de Borneo desde ahora sepan todas las gentes do que es verdad que el Paduca Maj. Maulana Sultan Mujamad Dehamalul Alam, hijo del difunto P.M.M. Sultan Mujamad Pulnlun, Sultan de Jolo, hizo y afirmó al Sr. (Barón de) Overbeck, incluyéndole título de Datto Bandajara Radeha de Sandacan, durante su vida; Sépanlo todos los habitantes de estos pueblos y sus principales, que es verdad que podrá imponer derechos en esa tierra así como también aprovechar sus minerales, productos forestales y animales; así mismo administrará justicia y cobrará derechos á los comerciantes de dichos pueblos, así le he entregado todo y es mi voluntad, así mismo hago saber á todas las naciones comerciantes este contrato y la fraternidad que de nuestra mutua voluntad se ha efectuado.

Concluido este escrito en Jolo ante el Sultan Dehamalul Alam el primer día de la luna Mujanam año de la égira de 1295 (4 de Enero de 1878)…».

161. Mr. Dent applied for a Royal Charter from the British Government on December 2, 1878. In July 1880, Mr. Dent and his partners established the British North Borneo Provisional Association, a British commercial syndicate which *«…consists of persons who lately agreed to join together for the temporary purposes of acting as intermediaries between the Petitioner Alfred Dent, on the one hand, and a company to be incorporated (if We should so think fit) by Royal Charter, on the other hand, and of carrying out until the grant of such a Charter the management of the affairs arising…»*[135] under the management of the 1878 Agreement. Mr. Overbeck relinquished all his rights and interests in the affair to Mr. Dent on September 1, 1880, leaving Mr. Dent in control.[136]

162. On November 1, 1881, the British Gladstone Government granted the Royal Charter and the British North Borneo Company was incorporated.[137] The British North Borneo Provisional Association Limited was dissolved and restructured itself as the British North Borneo Company, which started its activity on May 12, 1882.[138] The British North Borneo Company assumed and honoured the payment obligations undertaken by

[135] Exhibit C 18, p. 5.

[136] Statement of Claim, ¶¶ 53 to 58. Exhibits C 18 and C 77, p. 17.

[137] Statement of Claim, ¶ 58. Exhibits C 6, pp. 121 – 125, C 7, C 18 and C 25.

[138] Exhibit C 77, p. 17.

Dent and Overbeck and the North Borneo Provisional Association Limited in the 1878 Agreement.[139] The British North Borneo Company was authorised and empowered to assume the management of the territory delimited on the 1878 Agreement,[140] under the conditions provided by the Royal Charter.

163. The granting of the Royal Charter created concerns with both the Spanish and Dutch authorities, as it might overlap other relevant colonial spheres of influence already existing in the Indian Archipelago: the Spanish Government of the Philippines and the Netherlands Indian Government.[141]

164. The Netherlands, alarmed with the granting of the Charter, sought to protect their existing colonial possessions in the region from Great Britain.[142] In September 1879, a landing party of a Dutch gunboat hoisted the Netherlands flag well within the territory of North Borneo and initiated a dispute on the determination of its north-eastern boundary.[143] After diplomatic exchanges, the Netherlands Government complained in August 1881 before the British Government of the political power to be exercised by the British Government over the affairs of the British North Borneo Company. On November 21, 1881, the Right Honourable Earl Granville –Secretary of State for Foreign Affairs in Gladstone's Second Government of the United Kingdom- sent a note to the Netherlands Government clarifying that *«…the territories ceded to Mr. Dent will be administered by the Company under the suzerainty of the Sultans of Brunei and Sulu, to whom they have agreed to pay a yearly tribute. The British Government assumes no sovereign rights whatever in Borneo…»*.[144] The Boundary Treaty of June 20, 1891, entered into between the Netherlands and Britain, had the express purpose of delimiting the land boundary between North Borneo and the Dutch territories in Borneo.

165. Spain was also worried about British expansion in North Borneo. The basis for its claim on Borneo was based on the terms of the Treaty signed on April 19, 1851 (henceforth, the 1851 Treaty), which codified peace terms between Spain and the Sultanate of Sulu as a consequence of the Spanish expedition initiated on December 11, 1850 against Sulu for the suffocation of an internal revolt in that area.[145]

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139 Exhibits C 7, p. 23, and C 18.

140 Exhibit C 77, Map 4, p. 18. Brattle Report, ¶ 15, Figure 1.

141 Exhibit C 7, p. 23.

142 Statement of Claim, ¶ 194. Exhibit C 96, p. 1070: *«…The object of Her Majesty's Government was not to set up any dominion, or to enter upon controversy with respect to territorial claims, but simply, if we saw an opportunity, to promote the development of the resources of the country under discussion…»*.

143 Exhibit C 7, p. 33.

144 Exhibit C 6, p. 123.

145 Preliminary Award, ¶ 132. Statement of Clam, ¶ 36. Exhibit CL 2, pp. 9 – 13.

The 1851 Treaty contained the Act of Incorporation of the Sultanate of Sulu with the Spanish Crown, where the Sultanate of Sulu admitted vassalage to Spain. Under its Article 3, the signatories declared that *«…all treaties made with other powers to be null and void if they are prejudicial to the ancient and indisputable rights held by Spain over the entire Sulu Archipelago as part of the Philippine Islands, and they ratify, renew and leave in force all documents containing clauses favourable to the Spanish Government that may have been drawn up before this date, however old they may be…».* Spain and the Sultanate of Sulu signed and sealed the 1851 Treaty, with its complete and exact translations into Spanish and Sulu.

The effect of the 1851 Treaty was temporary, as it was not immediately acknowledged by Britain.[146] It also created an ambiguous situation for Spain; it would be willing to defend before the international system its rights over Borneo and the Sulu Archipelago, but it would only deploy its military forces in the protection and preservation of the latter, in fear of otherwise creating an international conflict. In fact, Spain perceived the granting of the Charter as a confirmation of the emergence of a potential British sphere of influence in North Borneo, which might affect political jurisdiction between Spain and Great Britain.

However, the absence of the desired internal consensus, along with its weakness in the international arena, led Spain to cede its rights to the designs of the great commercial powers in that region. Further to the conversations held between 1881 and 1882 in London and Berlin to overcome these differences, Spain, Germany and Great Britain finally signed a protocol in Madrid on March 7, 1885 (henceforth, the 1885 Madrid Protocol),[147] where the latter two nations recognised both the undisputed sovereignty of Spain over the Sulu Archipelago and the limits of its influence on the region. Under its Article III, Spain relinquished all claims to Borneo and adjacent islands and renounced, as far as regarded the British government, all claims of sovereignty over the territories of the continent of Borneo which have belonged in the past to the Sultan of Sulu and *«…which form part of the territories administered by the Company styled the* British North Borneo Company*…»* delimited in the 1878 Agreement and in the Royal Charter.[148]

The Government of the United Kingdom sought to forestall any further claims from Germany and France derived from their interest in the Asian region and to finalize the prevailing anarchy in Brunei. Great Britain achieved this twofold object on May 12, 1888, when the Government of the United Kingdom and the British North Borneo Company signed a protectorate agreement for the territory delimited in the 1878 Agreement –to be officially referred to from then on as the State of North Borneo until 1946- to become a

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146 Statement of Claim, ¶ 36. Exhibits CL 2, pp. 9 – 13, C 6, p. 112 and C 59, pp. 40 – 47.

147 Exhibit C 19.

148 Notice of Arbitration, ¶ 50. Statement of Claim, ¶ 63. Exhibits C 7, p. 12, C 19 and C 20.

British Protectorate (henceforth, the Protectorate Agreement).[149] Under the Protectorate Agreement, the British North Borneo Company came under the protection of Great Britain. Thus, the British North Borneo Company would continue to manage the territory without inferences and could call upon the support of the Royal Navy and the British Army should any European power have attempted to or seized control over the territory.[150]

166. On April 22, 1903, the Sultan of Sulu and the British North Borneo Company concluded the 1903 Confirmatory Deed, in which the names of a certain number of islands were to be treated as having been included in the 1878 Agreement were specified.[151] The 1903 Confirmatory Deed added 300 dollars to the annual rental of 5,000 dollars provided by the 1878 Agreement, paid retroactively.

167. On March 21, 1904, the United States of America unilaterally abrogated the agreement known as the Bates Treaty, because its conditions were not complied with.[152] Following this abrogation, on March 22, 1915, Mr. Frank W. Carpenter –acting as the North American Governor-General and representative of the government of the United States of America of the Department of Mindanao and Sulu- and the Sultan of Sulu signed a mutual understanding (henceforth, the Carpenter – Kiram Agreement).[153]

The Carpenter – Kiram Agreement instrumented the Sultan's recognition as the ecclesiastical or spiritual head of the Sulu Mohammedans in consideration of the agreement of the Sultan of Sulu to relinquish its temporal powers over Sulu. In his letter of May 4, 1920, addressed to the Director of Non-Christian Tribes, Mr. Carpenter stressed that the sovereignty of the Sultan of Sulu over the Sultanate of Sulu remained and was not affected by the Carpenter – Kiram Agreement.[154]

The Sultanate of Sulu was understood to be held under lease by the British North Borneo Company.[155]

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[149] Statement of Claim, ¶ 65. Exhibit C 7, p. 23. https://www.officialgazette.gov.ph/1888/05/12/philippine-claim-to-north-borneo-vol-i-british-north-borneo-1888-protectorate-agreement/

[150] Exhibit C 6, pp. 120 and 121.

[151] Notice of Arbitration, ¶¶ 53 and 54. Statement of Claim, ¶¶ 76 to 81. Exhibits C 7, C 17, C 21, C 52, ¶ 6, C 76 and C 114, ¶ 18 and footnote 9. The islands mentioned were as follows: Muliangin, Muliangin Kechil, Malawali, Tegabu, Bilian, Tegaypil, Lang Kayen, Boan, Lehiman, Bakungan, Bakungan Kechil, Libaran, Taganack, Beguan, Mantanbuan, Gaya, Omadal, Si Amil, Mabol, Kepalai and Dinawan. Professor Kratz Transcription, pp. 79 – 87.

[152] Notice of Arbitration, ¶ 52. Exhibit CL 5. The Bates Treaty was signed on August 20, 1899, between Brigadier – General of the United States Army, John Coalter Bates, the Sultan of Sulu and certain chieftains of the Jolo Archipelago. The Bates Treaty included the recognition of the sovereignty of the United States of America over Sulu and its dependencies in return of non-interference in Islamic religious and juridical affairs while formally recognising the limited authority and sovereignty of Muslim leaders, which were allotted a monthly stipend in Mexican dollars.

[153] Exhibits C 22, C 23, C 6 and C 7.

[154] Exhibit C 20.

[155] Exhibit C 7, p. 28.

168. Jamalul Kiram II, the Sultan of Sulu since 1894, died on June 7, 1936 without an immediate heir and payments under the 1878 Agreement and 1903 Confirmatory Deed were interrupted and held in escrow.[156] The interpleader procedure initiated in 1939 against the Government of North Borneo and the British North Borneo Company concerned the determination of the heir to the Sultan Jamalul and the legitimate recipients of the payments under the 1878 Agreement and the 1903 Confirmatory Deed. On December 18, 1939, Chief Justice Charles Frederick Cunningham Macaskie, in the High Court of the State of North Borneo, delivered the Judgment in the case *Dayang – Dyang Haji Piandao Kiram of Jolo, Philippines & 8 others v. The Government of North Borneo & Others* [Civil Suit No 169/39 (henceforth, the Macaskie Judgment).[157] The Mackaskie Judgment ruled that payments pursuant to the 1878 Agreement and to the 1903 Confirmatory Deed should be resumed to the heirs named in the Sultan's will – Claimants- and in the proportion set therein.[158]

169. The British North Borneo Company administered the territory until the Japanese occupation in January 1942. On September 10, 1945, Lieutenant General Masao Baba, Supreme Commander of the 37th Japanese Army in Borneo, was escorted by Australian Soldiers of the 9th Division of the Australian Imperial Forces to the Surrender Point in Labuan, where he capitulated the forces under his command and signed the Instrument of Surrender before Major General George Frederick Wootten CB CBE DSO, General Officer Commanding the 9th Division of the Australian Imperial Forces.[159]

170. Immediately after the liberation of North Borneo, the British North Borneo Company faced the reconstruction of a devastated area[160] and decided to relinquish its ownership –defined as *«…all the…properties and assets as they exist on the fifteenth day of July, 1946…»*-[161] to the British Colonial Office for a certain financial consideration. On June 26, 1946, the British North Borneo Company assigned all its rights and assets in North Borneo to the British Crown effective July 15, 1946 and North Borneo thereby changed its status from that of a British Protectorate –as established in the Protectorate Agreement- to a British Crown Colony (henceforth, the 1946 North Borneo Cession Agreement).[162]

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156 Notice of Arbitration, ¶ 57. Statement of Claim, ¶ 85. Exhibit C 20.

157 Statement of Claim, ¶¶ 85 – 88. Exhibits C 20, C 52, ¶ 7 and C 114, ¶¶ 30 and 31. Preliminary Award, ¶¶ 102 – 107.

158 Notice of Arbitration, ¶¶ 57 – 59. Statement of Claim, ¶ 85 – 88.

159 Statement of Claim, ¶ 89.

160 Notice of Arbitration, ¶¶ 60 – 62. Exhibit C 77, p. 19.

161 Exhibit C 7, p. 132. Claimants' pleadings of February 24, 2021.

162 Exhibits C 7, pp. 131 – 140 and C 25. Brattle Report, ¶ 19.

171. On November 27, 1946, the office of the Britain's Prime Minister, Mr. Clement Richard Atlee, sought information about[163]

> *«…the whereabouts of the private heirs of the late Sultan Mohammed Jamalul Kiram of Sulu, who died on the 10th June, 1936. My object is to arrange for the resumption of the payment to them of the annual grants of cession monies, formerly paid by the British North Borneo (Chartered) Company…For your own strictly confidential information I hope that it will be possible to resume payment of the cession monies without delay, since the alleged failure of the North Borneo Company to pay these annual grants is being used as a pretext for claiming that the concession granted to the Company by the late Sultan has terminated…».*

172. On November 25, 1957, Muhammad Esmail Kiram signed *«…a Proclamation…for himself and on behalf of the heirs of Sultan Mohammad Jamalul Alam…»* apparently terminating the 1878 Agreement.

173. Preceded by high level meetings and discussions started on May 27, 1961, the proposal to create a Federation of Malaysia –which would embrace the Federation of Malaya, Singapore, North Borneo, Sarawak and Brunei- was considered a desirable aim. During the meeting of July 23, 1961, of the Commonwealth Parliamentary Association Branch of Malaya and Borneo, held in Singapore, it was agreed to establish the Malaysia Solidarity Consultative Committee.

On February 3, 1962, the Committee rendered a Memorandum on Malaysia, submitted for consideration by the Commission of Enquiry, North Borneo and Sarawak, known as the Cobbold Commission (henceforth, the Cobbold Commission).

The Cobbold Commission issued a Report on June 21, 1962, which unanimously agreed that a Federation of Malaysia was in the best interest of North Borneo (henceforth, the Cobbold Report). The proposal of the Cobbold Report was that the Federation should be brought into being by August 31, 1963.[164]

174. On July 9, 1963 the Federation of Malaya, the United Kingdom of Great Britain and Northern Ireland, North Borneo, Sarawak and Singapore concluded in London an Agreement relating to Malaysia.[165] Under its Article I, which entered into force on September 16, 1963, the colony of North Borneo was to be *«…federated with the existing States of the Federation of Malaya as the States of Sabah, Sarawak and Singapore in accordance with the constitutional instruments annexed to this Agreement and the Federation shall thereafter be called Malaysia…».*

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[163] Notice of Arbitration, ¶ 62. Statement of Claim, ¶¶ 90 and 91. Exhibits C 6, p. 104, and C 24. Claimants' pleadings of February 24, 2021.

[164] Notice of Arbitration, ¶ 63. Statement of Claim, ¶ 92.

[165] Exhibit C 6, pp. 104 and 105. Claimants' pleadings of February 24, 2021.

The proclamation of Malaysia finally took place on September 16, 1963. North Borneo became independent and reverted to its pre-colonial name, on becoming the 13th State of the Federation of Malaysia.[166]

175. Respondent admitted that it became the successor-in-title of the British North Borneo Company under both the 1878 Agreement and the 1903 Confirmatory Deed, upon the establishment of its Federation on September 16, 1963, and assumed the role of the contractual counterparty under the 1878 Agreement and the 1903 Confirmatory Deed.[167]

176. Respondent admitted that «*…from 1963 to 2012, that is, for an unbroken and continuous period of 49 years…*» it paid Claimants the annual rental of 5,000 dollars agreed in the 1878 Agreement and the 1903 Confirmatory Deed and pursuant to the Macaskie Judgment.[168]

177. Respondent also admitted that those payments were stopped in 2013 and have not been paid to Claimants since. On September 19, 2019, Malaysia stated that «*…is now ready and willing to pay your clients all arrears from 2013 to 2019 and agrees to fully comply with the 1878 Grant and the 1903 Confirmation of Cession from henceforth with regards to future payments. As to the arrears, Malaysia is also agreeable to paying simple interest of 10% p.a. on the annual payments for each of the years concerned…*».[169]

178. Claimants sought to initiate conversations with Respondent to settle their differences on the 1878 Agreement and the 1903 Confirmatory Deed on April 28, 2017, and on July 2, 2018.[170] Claimants received no response from Respondent to these legitimate requests.

179. Parties' positions on the claim are irreconcilable and their disagreements remain.

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166 Notice of Arbitration, ¶ 64. Statement of Claim ¶¶ 92 and 93. Exhibit C 7. Suspension Order Request, ¶¶ 10 and 12.

167 Notice of Arbitration, ¶ 65. Statement of Claim, ¶ 94. Exhibits C 35, C 36, C 37, C 52, ¶ 6 and C 114, ¶¶ 3, 5 and 21.

168 Notice of Arbitration, ¶¶ 65 and 73. Exhibits C 52, ¶¶ 6 – 8, C31 and C 32. Brattle Report, ¶ 20.

169 Exhibit C 52, ¶ 9.

170 Notice of Arbitration, ¶¶ 76 and 77. Exhibits C 35 and C 36.

VI. PARTIES' POSITIONS AND RELIEF REQUESTED ON THE MERITS

180. The Arbitrator will summarize Parties' respective positions, before setting out the reasons for his decision. For the avoidance of any doubt, the Arbitrator has considered the entirety of Parties' submissions on record; its summary is not meant to be exhaustive.

181. In the Notice of Arbitration, Claimants' position in this arbitration is formally pleaded as follows:[171]

> *«…The Claimants respectfully request that the Sole Arbitrator issue an Award in the following terms:*
>
> *(i) Declaring that the Respondent has breached the 1878 Lease Agreement;*
>
> *(ii) Ordering (a) the Respondent to pay the Claimants damages that more fairly and accurately reflect the value of the 1878 Lease Agreement from the year of Malaysia's breach (2013) through the date of the award; and (b) the rebalancing of the 1878 Lease Agreement for prospective revenues;*
>
> *(iii) In the alternative, if the Sole Arbitrator chooses not to rebalance the 1878 Lease Agreement, an award ordering (a) the termination thereof and (b) the Respondent to pay damages to the Claimants;*
>
> *(iv) Ordering the Respondent to pay pre-award and post-award interest on any and all damages awarded to the Claimants;*
>
> *(v) Ordering the Respondent to pay all of the Claimants' costs of this arbitration and pay post-award interest on these amounts; and*
>
> *(vi) Ordering any and all other relief that the Sole Arbitrator deems appropriate…».*

182. Respondent's substantive position in this arbitration is contained in its letter of September 19, 2019, and pleaded as follows:[172]

> *«…2. It is vital at the outset to appreciate the legal basis of your clients' claim against the Government of Malaysia…*
>
> *3. That legal basis arises from a Grant by Sultan of Sulu of Territories and Lands on the Mainland of the Island of Borneo dated 22nd January 1878 (1878 Grant) issued by the Sultan of Sulu to a British Company acting through its representatives Gustavus Baron de Overbeck of Hong Kong and Mr. Alfred Dent Esquire of London, whereby the Sultan of Sulu granted and ceded to the British Company* «for ever and in perpetuity all the rights and powers» *belonging to the Sultan of Sulu, territories and land in the island of Borneo specified in the said Grant to the British Company, in consideration of* «the sum of five thousand dollars per annum».

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171 Notice of Arbitration, Section VII, ¶ 146.

172 Exhibit C 52.

4… the British Company can only transfer the territories and lands concerned upon «the sanction of Her Britannic Majesty's Government first being obtained»…

5. On the same day the Grant was issued (22nd January 1878) the Sultan of Sulu also issued a Commission appointing Baron de Overbeck (the chief and only authorized representative of the Company in Borneo) to be the Datu Bandahara and Rajah of Sandakan. Upon the death or retirement from office of Baron de Overbeck, the British Company was empowered to appoint others to the office of Datu Bandahara and Rajah of Sandakan.

6. Over time, obviously the contracting parties changed. Upon the establishment of Malaysia on 16th September 1963, Malaysia became the successor-in-title to the British Company viz. the British North Borneo Company under the 1878 Grant and Confirmation by Sultan of Sulu of Cession of Certain Islands dated 22nd April 1903 (1903 Confirmation of Cession). From 1963 to 2012, that is, for an unbroken and continuous period of 49 years, Malaysia had been, under the 1878 Grant, paying your clients (themselves the successors-in-title to the Sultan of Sulu) the annual sum 5300 dollars. The payment was increased by 300 dollars per annum by way of the 1903 Confirmation of Cession.

7. From the beginning, Malaysia paid to your clients the agreed annual sum (Cession Monies) of 5300 dollars in Malaysian Ringgit, that is, 5300 MYR. The payment of Cession Monies had been made to the rightful heirs of the Sulu Sultanate, consistent with the judgment delivered Chief Justice C.F.C Macaskie in 18th December 1939 in the High Court of the State of North Borneo in the case Dayang – Dyang Haji Piandao Kiram of Jolo, Philippines & 8 others v. The Government of North Borneo & Others [Civil Suit No 169/39]. *That judgment declared that the Plaintiffs are the rightful heirs with the right over the Cessions Monies. The grounds of judgment are attached hereto as Annexure A.*[173]

8. Malaysia had continuously paid the Cession Monies to the heirs of the Sulu Sultanate through their appointed attorney Ulka T. Ulama until 2010. For the years 2011 and 2012, the Cession Monies were paid directly to the heirs of the Sulu Sultanate and not through their appointed attorney as the Ambassador of Malaysia to the Republic of the Philippines had received complaints from the heirs to the Sulu Sultanate on the delay of payments made previously and costs charged by the attorney for such services. Due to these complaints, the Ambassador of Malaysia to the Republic of Philippines decided to make payment directly to the heirs of the Sulu Sultanate. The payment of the Cession Monies were made in Philippine Peso based on the prevailing exchange rates. A copy of letter dated 28 June 2012 from the Ambassador of Malaysia to the heirs of the Sulu Sultanate concerning the aforesaid payment is attached as Annexure B.

9. Regrettably, payments ceased in 2013. Malaysia is now ready and willing to pay your clients all arrears from 2013 to 2019, and agrees to fully comply with the 1878 Grant and the 1903 Confirmation of Cession from henceforth with regards to future payments. As to the arrears, Malaysia is also agreeable to paying simple interest of 10% p.a. on the annual payments for each of the years concerned, as stated in the Table below:

Year	*Arrears (Malysian Ringgit)*	*10% interest*
2013	*5,300,00*	*3,180.00 (6 years)*
2014	*5,300,00*	*2,650.00 (5 years)*
2015	*5,300,00*	*2,120.00 (4 years)*
2016	*5,300,00*	*1,590.00 (3 years)*
2017	*5,300,00*	*1,060.00 (2 years)*

[173] Exhibit C 20.

2018	*5,300,00*	*530.00 (1 year)*
2019	*5,300,00*	-
TOTAL	***37,100,00***	***11,130.00***
	Gran Total	***48,230.00 MYR***

10. Accordingly, please revert with details of your clients' names and banking records so that we can arrange the telegraphic transfer of the relevant payments, immediately.

11. In these circumstances, there is no longer any disagreement between the parties, and we therefore expect your clients to discontinue all proceedings they have instituted in Spain (or indeed elsewhere) upon receipt of the arrears. Indeed, this payment will be paid on that basis.

12. We conclude by reiterating that this letter and our intention to re-commence payment of the Cession Monies under the 1878 Grant and the 1903 Confirmation of Cession should not be construed as submitting to the jurisdiction of Spain…».

183. In the Statement of Claim, Claimants' substantive position in this arbitration is formally pleaded as follows:[174]

«…590. Claimants had hoped to settle this dispute amicably; they tried for decades to negotiate in good faith for a change in the terms of the 1878 Lease Agreement. It was to no avail. Claimants nonetheless anticipate dedicating a substantial portion of any monies received to a fund for the enrichment of the region that spanned the old Sultanate of Sulu – a region that, despite its wealth in natural resources, has found itself impoverished from colonial times to this day.

591. Claimants, in sum, seek redress for the manifest unfairness of the situation into which the Malaysian Government has placed them. They pray that they can find it through this proceeding. And they hope for the realization of the words of Martin Luther King: «The moral arc of the universe is long, but it bends toward justice».

592. The Claimants accordingly request that the Sole Arbitrator issue an award:

(i) Declaring that the 1878 Lease Agreement is a lease;

(ii) Declaring Malaysia in breach of the 1878 Lease Agreement;

(iii) Declaring the 1878 Lease Agreement terminated, and:

a. if terminated as of 1 January 2013, ordering Malaysia to pay Claimants the restitution value of the rights over the Leased Territories as of that day, reflected at § V.F above; or

b. if terminated as of February 2020 or later, ordering Malaysia to pay Claimants the restitution value of the rights over the Leased Territories as of that termination date, reflected at § V.F above, plus non-performance damages for the (adapted or rebalanced) unpaid rent from 2013 to the date of

[174] Statement of Claim, Section VIII, ¶¶ 572 and 590 – 592.

termination of the 1878 Lease Agreement, reflected at § V.F above (currently for seven years);

(iv) Alternatively, if the Sole Arbitrator does not terminate the 1878 Lease Agreement, ordering Malaysia to pay Claimants:

a. a lump sum for the (adapted or rebalanced) unpaid rent from 2013 to the date of the arbitral award, reflected at § V.F above (currently for seven years); and

b. all future annual rent payments in the adapted or rebalanced amount reflected at § V.F above;

(v) Ordering Malaysia to pay all Claimants' costs in this arbitration;

(vi) Ordering Malaysia to pay pre-award and post-award interest on any and all amounts awarded to Claimants, except for the award on costs, which should accrue post-award interest only; and

(vii) Ordering any and all other relief that the Sole Arbitrator deems appropriate…».

184. In the Reply, Claimants portrayed their position as follows:

«…2. As the Sole Arbitrator knows, Malaysia was due to submit its Statement of Defence on 20 August 2020.1 Malaysia did not do so. The Sole Arbitrator accordingly extended Malaysia's deadline to submit a Statement of Defence until 1 September 2020.2 Again, Malaysia failed to make a submission.

3. As with a Redfern Schedule –where Malaysia likewise declined to engage- Claimants see no point wasting the Sole Arbitrator's time with a Reply in a vacuum. The Procedural Calendar calls for Claimants to respond to Malaysia's contentions; there are no such contentions to which to respond.

4. As before, should Malaysia eventually deign to engage in these proceedings, and should the Sole Arbitrator indulge any desire Malaysia might have to submit a grossly untimely Statement of Defence, Claimants reserve their right to issue a more fulsome Reply accordingly…».

185. The Arbitrator has had the benefit of some written submissions from Respondent and of extensive written and oral submissions from the Claimants, both in relation to the substantive issues presented. The Arbitrator has carefully considered all these submissions and refers to their central point in the next Section of the Final Award.

VII. THE ARBITRATOR'S ANALYSIS AND FINDINGS ON THE MERITS

1. *The Legal Characterisation of the 1878 Agreement and of the 1903 Confirmatory Deed*

i. The Parties' Positions

186. Claimants characterise the 1878 Agreement and the 1903 Confirmatory Deed as a commercial transaction, a leasing agreement of certain territory along the North Coast of Borneo, constituted for an undetermined period with Malaysia and on which the Sultan remained sovereign.[175]

187. Respondent denies Claimants' position. It affirms that, jointly considered, the 1878 Agreement and the 1903 Confirmatory Deed would constitute an instrument for the permanent cession of territorial sovereignty over certain territories of North Borneo by the Sultan in favour of both Messrs. Alfred Dent and Baron Gustavus de Overbeck. Therefore, in the Respondent's opinion, the 1878 Agreement and the 1903 Confirmatory Deed would affect Malaysia's sovereignty and, as such, the Respondent would challenge its substantive arbitrability.[176]

ii. The Arbitrator's Analysis and Findings

188. The core of the Parties' debate on the legal characterisation of both the 1878 Agreement and the 1903 Confirmatory Deed is to ascertain whether their terms and conditions (i) could imply the cession by the Sultanate of Sulu of its sovereignty or its sovereign title to the territories defined therein –i.e., North Borneo and adjacent islands- in favour of both Mr. Alfred Dent and Baron Gustavus de Overbeck or, to the contrary, (ii) were to be considered as a simple commercial lease of these territories in favour of Messrs. Alfred Dent and Baron Gustavus de Overbeck, with a perpetual duration and an annual rental.

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[175] Statement of Claim, ¶¶ 181 to 223. Exhibit C 115, ¶¶ 9 – 30.

[176] Exhibits C 52, ¶ 3 and C 114, ¶¶ 4, 6, 7, 14 to 23, 70.1, 77, 80, 89, 120, 145, 150, 153, 155, 177 and 191. Suspension Order Request, ¶ 13.

A. *The 1878 Agreement and the 1903 Confirmatory Deed: Invalid Instruments Under International Law of Permanent Cession of Territorial Sovereignty over the Mainland of North Borneo and its Adjacent Islands*

189. Malaysia purports to present the 1878 Agreement and the 1903 Confirmatory Deed as an instrument for the permanent cession by the Sultan of Sulu of territorial sovereignty over certain territories of North Borneo in favour of both Messrs. Dent and Overbeck.[177] It is Respondent's view that both the 1878 Agreement and the 1903 Confirmatory Deed would affect Malaysia's sovereignty and, as such, Respondent would challenge its substantive arbitrability. Respondent failed to develop its assertion further in this arbitration. The allegations contained in the Suspension Order Request and in Exhibit C 114 are not supported by any evidence. The Arbitrator carefully considered Respondent's position in this issue, as it could affect the present arbitration, and reached the conclusion of the inaccuracy of the Respondent's assertion, for the reasons which are explained below.

190. The Sultanate of Sulu, founded in 1457, existed as international legal person prior to the signature of both the 1878 Agreement and the 1903 Confirmatory Deed. The 1851 Treaty so demonstrates, as it was entered into by Spain and the Sultanate of Sulu, both acting as two sovereign countries, independent from each other.[178]

191. The wording of the 1878 Agreement clearly identifies «…*His Majesty and Lord the Sultan Muhammad Jamalul Azam, son of the late Majesty the Sultan Muhammad Fadlu, Sultan of the State of Sulu*…», as the signatory of the 1878 Agreement, on the part of and on behalf of the Sultanate of Sulu.

192. The wording of the 1878 Agreement highlights that, on the other part, Mr. Alfred Dent and Baron Gustavus de Overbeck jointly acted therein as private individuals, representing private commercial interests. The phrasing is clear: «…*Mr Gustavus Baron de Overbeck, resident of Hong Kong, and to Alfred Dent Esquire, resident of London, representing a British company*…». The evidence available in the proceedings ratify the correctness of this conclusion.

On January 2, 1878, Acting Consul – General, Mr. William Hood Treacher, KCMG, sent a letter to the Earl of Derby, reporting on the activities of Baron Gustavus de Overbeck, when he arrived at Labuan. It is dated two days prior to the signature of the 1878

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[177] Suspension Order Request, ¶ 13.

[178] Exhibit CL 2, p. 9, first paragraph.

Agreement. Mr. Treacher identified Messrs. Dent and Overbeck as private businessmen and portrayed them as follows:[179]

> *«…Baron Gustavus de Overbeck, an Austrian, and Consul-General (unpaid) for Austria-Hungary at Hong Kong, where he has been long resident as a merchant, having previously, I am informed, been manager in the house of Dent and Co. of Shangae…*
>
> *Baron de Overbeck…was acting in conjunction with Mr. Alfred Dent, a member of the well-known British firm of Dent and Co., who, indeed, had the principal interest in the scheme; that the object proposed was to* buy out *the American interest, and form a British Company somewhat, though on a much smaller scale, after the manner of the late East India Company, the main desire being to develop the agricultural resources of the northern portion of Borneo, which, as your Lordship is aware, is considered to be the most fertile part of the island, and well adapted for the cultivation of sugar, pepper, gambier, and coffee, its hills affording at different altitudes the various degrees of temperature requisite…».*

On January 22, 1878, Mr. Treacher sent a letter to the Earl of Derby, explaining that[180]

> *«…the Sultan did me the honour of consulting me on the subject of the Baron's request, and I told him that any advice I gave would be given in the capacity of a friend of His Highness and would bear no official weight, as I had received no instructions from your Lordship in the matter. I Informed him that, to the best of my belief, the Baron represented a* bona fide *British Company or co-partnership with sufficient capital or the capacity of raising it, to carry out an undertaking of this kind…».*

On signing the 1878 Agreement, Mr. Dent confirmed to his brother, Mr. Edward Dent, in a letter dated February 18, 1878, his condition of private businessman in the following terms: *«…We can ask anybody to put money into mortgages in a Crown Colony, but this Borneo scheme is a matter for us to take up as merchants not as investors…».*[181]

The grant of the Royal Charter of the British North Borneo Company –dated November 1, 1881- recorded that:[182]

> *«…an humble Petition has been presented to us in Our Council by Alfred Dent, of 11, Old Street, in the city of London, merchant; the British North Borneo Provisional Association Limited; Sir Rutherford Alcock, of 14, Great Queen Street, in the City of Westminster, Knight Commander of Our Most Honourable Order of the Bath; Richard Biddulph Martin, of 68, Lombard Street in the City of London, banker, a Member of the Commons House of Parliament; Richard Charles Mayne, Companion of Our House of Parliament, Richard Charles Mayne, Companion of Our Most Honurable Order of the Bath, a Rear-Admiral in Our Navy; and William Henry Macleod Read, of 25, Durham Terrace, in the Country of Middlesex, merchant…».*

Malaysia's position in this arbitration confirms that Messrs. Dent and Overbeck were acting in the 1878 Agreement as private merchants, in representation of a *«…British*

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[179] Exhibits C 10 and C 61. Professor Kratz Transcription, pp. 92 – 94.

[180] Exhibit C 11.

[181] Exhibit C 63.

[182] Exhibit C 18, p. 1.

Company…». This British Company to which Malaysia refers was the British North Borneo Provisional Association Limited, later known as the British North Borneo Company (see Section V of this Final Award). In ¶ 3 of the Respondent's letter of September 19, 2019[183], Respondent admitted that the «*…legal basis arises from a Grant by Sultan of Sulu of Territories and Lands on the Mainland of the Island of Borneo dated 22nd January 1878 (1878 Grant) issued by the Sultan of Sulu to a British Company acting through its representatives Gustavus Baron de Overbeck of Hong Kong and Mr. Alfred Dent Esquire of London…».*

On September 19, 2019, Malaysia also admitted that it became the successor-in-title of the British North Borneo Company under both the 1878 Agreement and the 1903 Confirmatory Deed upon the establishment of its Federation on September 16, 1963.[184]

193. Malaysia seems to sustain that both the 1878 Agreement and the 1903 Confirmatory Deed would be characterised as international treaties, as they are the only valid instruments to articulate the alleged cession of territorial sovereignty in international law. Respondent's assertion and assumption imply the analysis of this question from the perspective of international law, which operation is limited in two dimensions: place and time.

194. The principle of contemporaneity applies to treaty interpretation and, consequently, examines the parties' intentions and the relevant circumstances that occurred at the treaty's conclusion.

When it comes, as occurs in the present case with Respondent, to the analysis of the alleged acquisition of territorial sovereignty of North Borneo though cession –one of the five acquisition methods recognised in international law-[185] the application of the general principle of intertemporal law should also guide the examination of the disputed question. This principle provides that the effect of a juridical fact must be determined according to the law contemporary with it, and not of the law in force at the time when a dispute about it arises or fails to be settled.

The result of this assessment, in conjunction with these general principles of international law, the evidence available in this arbitration and the circumstances of the case, must allow the Arbitrator to establish the title –if any- by which territorial sovereignty over North Borneo would have been validly acquired at a certain moment by Messrs. Dent and Overbeck. This critical date provides a definite point at which sovereignty is to be finally

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183 Exhibit C 52.

184 Exhibits C 52, ¶ 6 and C 114, ¶¶ 3, 5 and 21.

185 There are five traditional modes of acquisition of territory in international law: cession, occupation, accretion, conquest and prescription.

determined; in the case at hand, January 4, 1878, the date of the signature of the 1878 Agreement. The Arbitrator should also be satisfied that this territorial sovereignty did exist at the critical date and that, once acquired, this territorial sovereignty has continued to exist in favour of Messrs. Dent and Overbeck, as Respondent alleges.

195. The evidence available in the proceeding shows that the Sultanate of Sulu met all the criteria for statehood and sovereignty. It had a permanent population, it had a defined territory, it had a government, and it had the capacity to enter into diplomatic relations. [186] But the Sultanate of Sulu lacked any written enacted legislation on international treaties at the time of the signature of the 1878 Agreement. In the absence of this legislation, the Arbitrator will also examine the surrounding circumstances.

196. Territory is a tangible attribute of statehood and, within that particular geographical area which it occupies, a state enjoys and exercises sovereignty. As a land, the territory is the place where the *imperium* is exercised, whereas, as a good, it can be subject to appropriation and to the exercise of *dominium*.

197. The concept of sovereignty, a more complex term, is the most fundamental principle of international law because nearly all international relations are bound up with sovereignty of States. It has a threefold aspect: the external sovereignty, the internal sovereignty and the territorial sovereignty.

The external sovereignty –also known as independence- is the right of the State freely to determine its relations with other States or other entities without the restraint or control of another State.

The internal aspect of sovereignty is the State's exclusive right or competence to determine the character of its own institutions, to ensure and provide for their operation, to enact laws of its own choice and ensure their respect.

Territorial sovereignty is one of the most important rules of international law, as it represents the nexus between the State and its territory. It encompasses the complete and exclusive authority which a State exercises over all persons and things found on, under or above its territory. It may thus be defined as the right to exercise therein the functions of a State, to the exclusion of any other State.

198. It is the Arbitrator's view that the result of the evidence in this arbitration demonstrates (i) that the behaviour of the British Government from 1878 until its

[186] Exhibits C 10, C 11, C61, C 62, p. 3 and CL 2. Kratz Report, ¶¶ 39, 40, 56, 84, 89, 93 and 96 – 130.

signature of the Protectorate Agreement (1888) indicated that it rejected any pretensions to sovereignty over North Borneo and its adjacent islands and (ii) that the behaviour of Mr. Dent, of the British North Borneo Company and some others, even into the twentieth century, suggested that they believed the Sultan of Sulu still to be sovereign.

In his letter of January 2, 1878, Mr. Treacher admitted, in relation to the 1878 Agreement, that

> *«…The concessions obtained by Messrs. Overbeck and Dent include the whole northern portion of Borneo from the River Sulaman on the west to the River Sibuco on the east, and, to the south of Sulaman, the harbours and coasts of Gaya and Sapangar, the districts of Pappar, Benoni, and Kimanis in the near vicinity of Labuan…The remaining territory mentioned in the grants is actually under Sulu rule, and occupied by Sulu Chiefs, and it was only because the districts were mentioned in the original American grants that they are again included, and Mr. Overbeck will now have to make a separate Agreement with the Sultan of Sulu for them…».*[187]

Mr. Dent wrote a letter to his brother, Mr. Edward Dent, on February 18, 1878, interpreting the conduct of the Sultan of Sulu: *«…it looks as if the Sultan (of Soloo) retained some of his old rights over that part of the country…».*[188] Mr. Dent further pencilled his perception in his correspondence of April 11, 1878, also addressed to his brother, Edward, as follows: *«…Borneo: Treaty of 1847. I have a copy of it here; the Sultan evades the treaty clause by giving us a sort of perpetual leasehold (instead of freehold)…».*[189]

The Treaty of 1847 to which Mr. Dent referred to be the bilateral Treaty of Friendship and Commerce, and for the Suppression of Slave Trade, concluded on May 27, 1847 between *«…Her Majesty the Queen of the United Kingdom of Great Britain and Ireland…and His Highness Omar Ali Saifadeen, who sits upon the throne and rules the territories of Borneo…the Sultan of Borneo…»* (henceforth, the 1847 Treaty).

The letter sent by Mr. Robert George Wyndham Herbert –Colonial Office of the Kingdom of Great Britain- to Sir Julian Pauncefote on April 24, 1878 contained the position of the British Government on this issue, portrayed as follows:[190]

> *«…2. It appears that this Society is composed partly of foreigners and partly of British subject, but does not seem clear whether it is to be considered as a British or foreign undertaking. If the latter, there would be no means of preventing those to whom the concessions purports to have been granted from disposing of their rights, should they see fit to do so, to a foreign Government. Moreover, Sir Michael Hicks Beach is disposed to think that there may be serious objections to*

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187 Exhibit C 62, pp. 3 and 4.

188 Exhibit C 63, p. 2.

189 Statement of Claim, ¶ 195. Claimants' Opening Statement, p.12. Exhibit C 97, p. 2. Exhibits C 10 and C 61: *«…His Highness received me in evident trepidation at the door of his Palace (an unusual proceeding), and leading me by the hand to my seat. He stated that he had desired to act in accordance with the Treaty* [i.e. the 1847 Treaty] *and his promise to me…».*

190 Exhibit C 11.

> *permitting in this case an infringement of the 10th clause of the Brunei Treaty* [i.e., the 1847 Treaty][191]…»

The Right Honourable Earl Granville sent a note on November 21, 1881 to the Netherlands Government clarifying that *«…the territories ceded to Mr. Dent will be administered by the Company* [i.e., the British North Borneo Company] *under the suzerainty of the Sultans of Brunei and Sulu, to whom they have agreed to pay a yearly tribute. The British Government assumes no sovereign rights whatever in Borneo…».*[192] His Lordship later explained during debates held in the House of Lords on Monday, March 13, 1882 that

> *«…the Royal Charter gives no additional powers to the Company. It is of a restrictive character. We obtain a negative control over the Company with regard to their general treatment of the Natives and to their dealings with foreign Powers. We incur no obligation to give them military assistance, except that which we give to all Englishmen engaged in trade in uncivilized countries. … the Charter would entail no responsibility upon Her Majesty's Government for the protection of the country, beyond that which is inseparable from the nationality of those engaged in developing its resources…The granting this Charter does not vest in Her Majesty any Sovereignty over the territory, which remains under the suzerainty of the Sultan, although he has delegated the administrative power to the Association…».*[193]

According to the above statements, the terms of the granting of the Royal Charter denied the powers of British Government to the British North Borneo Company. Lord Granville also clarified that the British Government was to be considered the only proper party who should have entered into a protectorate agreement with the Sultan of Sulu, in whom –and this is a crucial aspect- the sovereignty over North Borneo remained vested.

The 1903 Confirmatory Deed shows that the Sultan's legal situation with respect to the territory of North Borneo remained unaltered and therefore, the same reasoning and conclusion apply.[194]

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[191] 1847 Treaty, Clause 10: *«…It being desirable that British subjects should have some port where they may careen and refit their vessels, and where they may deposit such stores and merchandize as shall be necessary for the carrying on of their trade with the dominions of Borneo, His Highness the Sultan hereby confirms the cession already spontaneously made by him in 1845 of the Island of Labuan, situated on the north-west coast of Borneo, together with the adjacent islets of Kuraman, Little Rusukan, Great Rusukan, Da-at, and Malankasan, and all the straits, islets, and seas situated half-way between the fore-mentioned islets and the mainland of Borneo. Likewise the distance of 10 geographical miles from the Island of Labuan to the westward and northward, and from the nearest point half-way between the islet of Malankasan and the mainland of Borneo in a line running north till it intersects a line extended from west to east from a point 10 miles to the northwards of the northern extremity of the Island of Labuan, to be possessed in perpetuity and in full sovereignty by Her Britannic Majesty and Her successors; and in order to avoid occasions of difference which might otherwise arise, His Highness the Sultan engages not to make any similar cession, either of an island or of any settlement on the mainland, in any part of his dominions, to any other nation, or to the subjects or citizens thereof, without the consent of Her Britannic Majesty…».*

Exhibits C 10 and C 61: *«…After perusing these documents, I gave the Baron to understand that he was wrong in supposing that I had the intention of opposing him…in accordance clause 10 of the Treaty, the whole concession should be made u by the Sultan, subject to the consent of British Government…His Highness…».*

[192] Exhibit C 6, p. 123.

[193] Hansard HL Deb 13 March 1882: vol. 267, c 715 – 716.

[194] Exhibit C 17.

In his letter of May 4, 1920, addressed to the Director of Non-Christian Tribes, Mr. Carpenter admitted the sovereignty of the Sultan of Sulu over the Sultanate of Sulu – including North Borneo- remained and was not affected by the Carpenter – Kiram Agreement.[195]

Based on the preceding analysis, it is the Arbitrator's view that Mr. Dent, the British Government and other authorities continuously acknowledged the sovereignty and the dominion of the Sultan of Sulu over North Borneo. Therefore, the assessment of the evidence available at the present arbitration sustains that the Sultan was never deprived or divested of sovereignty over the territories of North Borneo, mentioned in both the 1878 Agreement and the 1903 Confirmatory Deed.[196]

199. Once the issue of sovereignty and dominion of the Sultan of Sulu over North Borneo is clarified, the Arbitrator should then turn to the immediate foundation of Respondent's defence in this arbitration.

It is that of cession, which, in its opinion, transferred on a permanent basis all rights of sovereignty which the Sultan of Borneo may have possessed over certain territories of North Borneo in favour of both Messrs. Dent and Overbeck through the signature of both the 1878 Agreement and the 1903 Confirmatory Deed.

The Arbitrator is not persuaded by Respondent's arguments, unsupported by any evidence.

200. The distribution of their own territory between two States is their sovereign prerogative.

Cession was and still is a recognised mode of acquisition of territory in international law.

Cession can be characterised as a bilateral transaction which involves the consensual and explicit transfer of sovereignty over a part of a given territory by one State or ruler (the ceding State, which must be the legitimate sovereign) to another (the acquiring State). It indisputably requires the co-operation and full consent of the two States concerned: the ceding State and the acquiring State.

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195 Exhibits C 22, C 23, C 6 and C 7.

196 Professor Kratz Transcription, p. 57: «*…Q. This is a grant of full authority of life and powers of life and death from the Sultan to Overbeck. Is that correct? A. Yes. Q. Is this, therefore, a delegation of sovereignty to Mr. Overbeck with powers of life and death? A. Under no circumstances, because the Sultan can always revoke that authority. It is by the grace of the ruler, as long as it pleases the ruler…*»; p. 58: «*… Q. To be clear, in your opinion, even the delegation of life and death powers does nothing to alter the sovereign character at the time of the Sultan? A. Yes…*» and p. 90: «*…The ruler, the Sultan stays in control. That is unambiguous. That is understood…*».

Cession is composed of two elements: (i) an agreement to cede, embodied in a treaty, and (ii) the actual handing over of the territory ceded.

A treaty of cession –which effects are opposable to all third States, to wit, *erga omnes*-[197] is the most unequivocal way in which a ceding State expresses its relinquishment of all territorial claims to a territory in favour of another State, the receiving State, which accepts it. The provisions of the treaty of cession should specify precisely the area to be transferred and the conditions under which the transfer should be accomplished. Cession may take place through a treaty of sale,[198] by exchange of one piece of real estate for another,[199] by means of a gift[200] or, occasionally, by conveyance of title by devise.[201]

Since cession entails a derivative title[202] which transfers full rights to the territory concerned, the acquiring State may not possess more rights over the land than its predecessor (*Nemo plus juris ad alium transferre potest quam ipse habet*).[203]

201. In the Arbitrator's opinion, the 1878 Agreement does not meet any of these requirements under international law.

202. The 1878 Agreement cannot be characterised as an international treaty of cession. The same reasoning and conclusion apply to the 1903 Confirmatory Deed, as both

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197 There must be no duress, fraud or corruption in the procurement of the treaty. 1969 Vienna Convention on the Law of Treaties, Article 52.

198 The Louisiana Purchase Treaty, signed on April 30, 1803. In this transaction with France, the United States purchased 828,000 square miles of land west of the Mississippi River for USD 15,000,000.

The Treaty of Nanjing, signed on August 29, 1842, ended the first Opium War and was entered between the United Kingdom and Chine. China paid the British an indemnity, ceded the territory of Hong Kong and its surrounding areas, and agreed to establish a *«fair and reasonable»* tariff.

Treaty with Russia for the Purchase of Alaska, signed on March 30, 1867, where the United States of America reached an agreement to purchase Alaska from Russia for a price of USD 7,200,000. It was negotiated and signed by Secretary of State, William Seward, and Russian Minister to the United States, Edouard de Stoeckl.

199 A bilateral treaty between Belgium and the Netherlands, known as the Land Swap Agreement, signed on November 2016 and where Belgium agreed to cede about a total of 40.45 acres of land to the Netherlands comprising two uninhabited riverine peninsulas, previously cut off from mainland Belgium by Dutch territory: Presqu'île de L'llal and Presqu'île d'Eijsden. In return, the Netherlands gave Presqu'île Petit-Gravier, which was 7.63 acres in size, to Belgium.

The 2015 Land Boundary Agreement, signed on June 6, 2015, in Bangladesh, between India and Bangladesh facilitated the transfer of 111 enclaves, adding up to 17,160.63 acres, from India to Bangladesh. Conversely, India received 51 enclaves, adding up to 7,110.02 acres, which were in Bangladesh.

200 The Treaty of Vienna, signed on October 3, 1866, concluded the hostilities of the Third War of Italian Independence, a theatre of concurrent Austro-Prussian War. The treaty confirmed the terms of the Armistice of Cormons, of August 12, 1886, resulting in the transfer of Venetia and most of Friuli to the French Empire, who then gave the region to Italy after the consent of the inhabitants through a referendum.

201 On February 5, 1885, Belgian King Leopold II established the Congo Free State by seizing the African landmass as his personal possession. Leopold privately owned the region.

202 In the sense that the validity of the acquired title depends on the validity of the title of the ceding State.

203 Ulpiano: Digesto 50, 17, 54.

the characterisation of the 1878 Agreement and the legal situation with respect to the territory of North Borneo remained unaltered.[204]

Under international law, a treaty conforms a binding formal agreement, contract, or other written instrument that establishes obligations between two or more subjects of international law, primarily independent States and international organizations.

The content of the 1878 Agreement shows that its terms were neither negotiated, nor signed between two States but, conversely, by the «…*Sultan of the State of Sulu*…», on the one part, and two private individuals, Messrs. Dent and Overbeck –jointly, on the other part- both private individuals representing private commercial interests, specifically *«…a British Company…».* Professor Dr. Brödermann confirms that, in his opinion, *«…the 1878 Agreement does not bind two states…».*[205]

The Spanish translation of the 1878 Agreement does not refer to the word *tratado* –the Spanish translation of the word *Treaty*- but rather to the term *escrito*, which may be translated into English language as *document* or *writ.*[206] The 1903 Confirmatory Deed referred to the 1878 Agreement and characterised it as *«…the Agreement…»*, not as an international treaty according to the definition provided above.

The content of Mr. Dent's letter of April 11, 1878 evidences his technical ability to distinguish between the concept of *treaty* –in the sense of an international instrument, the 1847 Treaty to which he referred therein- and of *commercial agreement*, *«…a sort of perpetual leasehold (instead of freehold)…»* which corresponded to the private scheme he convened with the Sultan of the State of Sulu in the 1878 Agreement.[207]

As analysed in the Preliminary Award, in his letter of July 24, 1878, Baron of Overbeck referred to the 1878 Agreement as *«…the* agreement *executed between His Highness, the Sultan and myself as representative of British interests, in connection with the assignment of certain portion of the eastern coast of Borneo…»* and made a clear distinction *«…with any subsequent* treaty *executed by His Highness with other parts concerning those territories which may still belong to him…».* Therefore, it seems that the Baron of Overbeck –as one of the signatories of the 1878 Agreement- clearly distinguished the term *agreement* from the term *treaty* and, on that basis, characterised the 1878 Agreement as an agreement of a commercial nature.[208]

Mr. Martínez answered this letter on July 24, 1878. Its wording also differentiated between the term *agreement* –referring to the 1878 Agreement as *«…a* contract of lease

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[204] Exhibit C 17.

[205] Brödermann Report, ¶ 50.

[206] Exhibit C 13. Preliminary Award, ¶ 126.

[207] Statement of Claim, ¶ 195. Exhibit C 97, p. 2.

[208] Preliminary Awrad, ¶ 131. https://www.officialgazette.gov.ph/1878/07/24/baron-de-overbeck-to-the-governor-of-sulu/

with the very Sultan…»- and the term *Treaties*, *«…which states in a public and definitive manner what are the rights of Spain…».*[209]

The 1903 Confirmatory Deed include some islands of North Borneo which would have been later *«…ceded to the Government of British Borneo…»* and were to be treated as having been included in the 1878 Agreement.

203. As previously explained, the cession of sovereignty over a given territory requires the co-operation of the two States concerned: the ceding State and the acquiring State. The ceding State –which must be the legitimate sovereign, in this case, the Sultanate of Sulu- can only agree on a cession of sovereignty over a part of its territory to the acquiring State. The terms of the 1878 Agreement do not contain any reference to any acquiring State. The 1903 Confirmatory Deed, on its part, included an alleged cession of certain islands of North Borneo *«…to the Government of British Borneo…».*

204. The capacity of the transferee in the 1878 Agreement and in the 1903 Confirmatory must be assessed carefully and individually.

205. Following Respondent's allegations, Messrs. Dent and Overbeck, the joint counterparty of the 1878 Agreement, were to be considered the transferee of the territory of North Borneo.

The assessment of the evidence contemporary to the signature of the 1878 Agreement submitted to the proceedings confirms –in the Arbitrator's opinion- that Messrs. Dent and Overbeck were acting in the 1878 Agreement as private individuals and not as *international persons* (i.e., a State or an international institution).

Messrs. Dent and Overbeck had private speculative schemes in mind in relation to the exploitation and management of the territory of North Borneo and did not even purport to enter these transactions on behalf of the British Crown. In his letter of April 24, 1878, sent from Downing Street and addressed to Sir Pauncefote, Mr. Herbert confirmed *«…on behalf of this* [Colonial] *Office an opinion on matters relating to Borneo and the contiguous island, Sir Michael Hicks Beach*[210] *has given his attention to the subject, and I am to state that he does not feel able to approve the scheme as he understands it…».*[211]

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[209] Stament of Claim, ¶ 196. Exhibit C 7, p. 35; https://www.officialgazette.gov.ph/1878/07/24/philippine-claim-to-north-borneo-vol-i-the-governor-of-sulu-to-the-baron-de-overbeck/

[210] 1st Earl of St. Aldwyn. Secretary of State for the Colonies (1878 – 1880).

[211] Exhibit C 11.

Mr. Treacher's letter of January 2, 1878, addressed to the Earl of Derby, briefly explained the scheme as follows: [212]

> *«…Baron de Overbeck…was acting in conjunction with Mr. Alfred Dent, a member of the well-known British firm of Dent and Co., who, indeed, had the principal interest in the scheme; that the object proposed was to* buy out *the American interest, and form a British Company somewhat, though on a much smaller scale, after the manner of the late East India Company, the main desire being to develop the agricultural resources of the northern portion of Borneo…*
>
> *I more earnestly desired that that resources if this portion of Borneo should be developed by a* bona fide *British Company…».*

Its text contained no reference to the word *Treaty*.

Mr. Treacher further clarified in his letter of January 22, 1878, also addressed to the Earl of Derby, that *«…the Baron represented a* bona fide *British Company or co-partnership with sufficient capital or the capacity of raising it, to carry out an undertaking of this kind…».*[213], Mr. Dent confirmed this description in the correspondence sent to his brother, Mr. Edward Dent, on February 18, 1878, where the former reflected on the fact that *«…we can ask anybody to put money into mortgages in a Crown Colony, but this Borneo scheme is a matter for us to take up as merchants not as investors…»*[214] and also in his application for a Royal Charter from the British Government made on December 2, 1878.[215]

A cession of sovereign territory to private individuals (i.e., Messrs. Dent and Overbeck) or to a private entity (i.e., the British North Borneo Company) is not possible under international law, because entities which do not rank as *international persons* are not considered capable of acquiring sovereignty or competent to enter treaties or other international relationships.

The British Government shared this conclusion. In his letter April 24, 1878, addressed to Sir Julian Pauncefote, Mr. Herbert expressed *«…on behalf of this Office an opinion on matters relating to Borneo and the contiguous island…3. If it is to be an English Company, it appears to Sir Michael Hicks Beach that it is highly objectionable that sovereign rights should be exercised by a private Company…».*[216]

206. For the sake of discussion, it could have been further argued that Messrs. Dent and Overbeck might have been commissioned as agents of the British Government, with the mandate of acquiring sovereignty over North Borneo from the State of Sulu on behalf

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[212] Exhibits C 10 and C 61.

[213] Exhibit C 11.

[214] Exhibit C 63.

[215] Exhibit C 18, pp. 1 and 5.

[216] Exhibit C 11.

of Britain through the signature of the 1878 Agreement and take successive possession of this territory in favour of the United Kingdom (*cession or acquisition by agents*).

In this event, either of these two options would have been available:

A. That Messrs. Dent and Overbeck had received a previous authorization from the British Government to take possession of North Borneo, so that the assumption of sovereignty over North Borneo on the part of the authorizing state –United Kingdom- would have been complete when Messrs. Dent and Overbeck had properly carried out the annexation on the spot; or

B. That they had acted without any authorisation, subject to subsequent ratification of their act by the British Government, so that the assumption of sovereignty could then, within a reasonable time, be consummated by the ratification of Messrs. Dent and Overbeck's by the United Kingdom.

In either case, Messrs. Dent and Overbeck's alleged acquisition of sovereignty over the territory of North Borneo cannot by any means be imputed to the state for whose benefit they were supposed to be acting (i.e., Great Britain), unless Respondent demonstrated in this arbitration that Messrs. Dent and Overbeck were authorised agents of the United Kingdom in advance, or their acts subsequently ratified by the British Government.

207. Respondent failed to demonstrate in this arbitration that Messrs. Dent and Overbeck acted as authorised agents for the British Crown in the supposed acquisition of North Borneo through the 1878 Agreement.

The Kratz Report confirms that the contents of the 1878 Agreement *«…would not be outside the well-established Malay model of governance and would keep the ruler in his supreme position. Sovereignty was maintained…».*[217] In his testimony during the Hearing, Professor Kratz confirmed that the Sultan of Sulu was an absolute ruler in the territory under his sovereignty, who must look after his people.[218]

On April 26, 1878, the Sultan of Sulu expressed his concern to Mr. Treacher on the fact that the Datu Bandhara (i.e., Baron Overbeck) had hauled down the Sulu flag at Sandakan and *«…has made a Treaty with the Rajah of Brunei concerning our territories…this also we cannot understand. We know this much; that a person is never allowed to sell or dispose of other people's property; the sale will not be considered legal…».*[219]

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[217] Kratz Report, ¶ 129.

[218] Professor Kratz Transcription, pp. 52 – 55.

[219] Exhibit C 62, p. 3.

Earl Granville's statement of November 21, 1881,[220] and his subsequent clarification in the House of Lords on Monday, March 13, 1882,[221] that sovereign rights to the North Borneo territory remained vested in the Sultan in effect deny the issuance of any authorization to Messrs. Dent and Overbeck to act as authorized agents of the British Crown in the signature of the 1878 Agreement.

208. Respondent also failed to establish in these proceedings –through submission of proper evidence in support of its statements- that the British Government subsequently ratified Messrs. Dent and Overbeck's alleged acts of acquisition of North Borneo. On the contrary, the evidence available in the proceedings shows that it does not amount to an expression of ratification of their acts of acquisition of North Borneo by the British Government.[222]

209. Based on the preceding reasoning, the Arbitrator is of the view that Respondent's alleged permanent cession of sovereignty over North Borneo under the 1878 Agreement, while eventually made by a sovereign ruler such as the Sultanate of Sulu, did not involve a State as a transferee of the territory of North Borneo. Messrs. Dent and Overbeck acted as and remained private individuals. Therefore, the 1878 Agreement did not embrace a permanent cession of sovereignty over North Borneo because it is not possible under international law.

210. The 1903 Confirmatory Deed referred *«…to the Government of British Borneo…»*, as the supposed transferee of the territory of North Borneo.

The expression *«…the Government of British Borneo…»* deserves attention.

The first aspect to be highlighted is the reference to an undefined entity known as *«…British Borneo…»*. The Protectorate Agreement –signed on May 12, 1888- officially referred to the territory of North Borneo as the State of North Borneo.[223] This official denomination remained until 1946. But the Protectorate Agreement does not mention any form of State officially named or known as *«…British Borneo…»* –as referred in the 1903 Confirmatory Deed- and therefore *«…British Borneo…»* cannot be characterised either as a subject of international law, or an acquiring State.

The second aspect to be emphasised is the use of the term *«…Government…»* in the 1903 Confirmatory Deed. Under the Protectorate Agreement, the British North Borneo

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220 Exhibit C 6, p. 123.

221 Hansard HL Deb 13 March 1882: vol. 267, c 715 – 716.

222 Exhibit C 6, p. 123. Hansard HL Deb 13 March 1882: vol. 267, c 715 – 716

223 Protectorate Agreement, Preamble.

Company would continue to manage the territory without inferences and could call upon the support of the Royal Navy and the British Army should any European power have attempted to or seized control over the territory.[224] This recognition is consistent with certain relevant facts that occurred prior to the signature of the 1903 Confirmatory Deed.

On November 21, 1881, Earl Granville clarified to the Netherlands Government that *«…the territories ceded to Mr. Dent will be administered by the Company under the suzerainty of the Sultans of Brunei and Sulu, to whom they have agreed to pay a yearly tribute. The British Government assumes no sovereign rights whatever in Borneo…».*[225]

In Article III of the 1885 Madrid Protocol,[226] Spain relinquished all claims to Borneo and adjacent islands and renounced, as far as regarded the British government, all claims of sovereignty over the territories of the continent of Borneo which had belonged in the past to the Sultan of Sulu and *«…which form part of the territories administered by the Company styled the* British North Borneo Company*…»* delimited on the 1878 Agreement and in the Royal Charter.[227]

Thus, the Arbitrator is of the view that Respondent's alleged permanent cession of sovereignty over North Borneo under the 1903 Confirmatory Deed, while eventually made by a sovereign ruler such as the Sultanate of Sulu, did not involve a State as a transferee of the territory of North Borneo.

The *British Borneo* referred therein did not exist as an international person, nor did it have any Government. Since May 12, 1888, the State of North Borneo –on which the British Government assumed no sovereign rights whatsoever- was admittedly *«…administered by the Company styled the* British North Borneo Company*…».*

The British North Borneo Company was a chartered company. A chartered company is an association with investors or shareholders that is incorporated and granted rights (often exclusive rights) by royal charter (or similar instrument of government) for the purpose of trade, exploration, and/or colonization. The granting of the Royal Charter permitted the British North Borneo Company, as a private Company, to administer the State of North Borneo under the conditions provided by the Royal Charter. Hence, the British North Borneo Company had two main responsibilities in return for annual payments made by its shareholders: the economic development through the exploitation of natural resources of the area, purported to producing dividends; and the protection of local religions, customs and rights of its residents, including the commitment to abolish slavery and to cede its foreign relations to Britain to administer. Following the opinion of Sir Michael Hicks

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[224] Exhibit C 6, pp. 120 and 121.

[225] Exhibit C 6, p. 123.

[226] Exhibit C 19.

[227] Statement of Claim, ¶ 63. Exhibits Exhibit C 7, p. 12, and C 19.

Beach, previously quoted, *«…it is highly objectionable that sovereign rights should be exercised by a private Company…»*.[228]

Therefore, the 1903 Confirmatory Deed cannot be characterised as an international treaty. It did not embrace a bilateral transaction between two States to cede with a permanent character the sovereignty over territory of North Borneo by the then Sultan of the State of Sulu in favour of the British North Borneo Company, as transferee. The British North Borneo Company, a private entity, cannot be considered a subject of international law, or an acquiring State.

211. The wording of the 1878 Agreement, as well as the 1903 Confirmatory Deed, also lacks the second element for a cession of sovereignty to be categorised as validly made under international law: the actual handing over of the territory which sovereignty is ceded –to wit, North Borneo- in favour of an acquiring State. The assessment of the evidence available in these proceedings reinforces the Arbitrator's view.

The Royal Charter indicated the exact scope of the powers of the British North Borneo Company. As a private entity incorporated under the laws of Great Britain, the British North Borneo Company cannot be considered as an acquiring State and therefore it could not have possessed sovereign powers on its own under international law. Mr. Treacher (in his correspondence of January 2, 1878 and of January 22, 1878), Mr. Dent (in his letter dated February 18, 1878) and the Respondent in Exhibit C 52 confirmed the private nature of this scheme.

Mr. Dent admitted in his correspondence to his brother of February 18, 1878 that the Sultan of Sulu acted as if he wanted to retain some rights over North Borneo. The Sultan's apparent reluctance was real, derived from the limitations imposed by Clause 10 of the 1847 Treaty, the contents of which were admittedly known to Mr. Dent. In his correspondence of January 2, 1878, Mr. Treacher confirmed to the Earl of Derby that the Sultan of Sulu *«…stated that he had desired to act in accordance with the Treaty…he had endeavoured, so far as he was capable, to fulfil his Treaty engagement in this matter…»*.[229] The letter sent by Mr. Herbert to Sir Julian Pauncefote on April 24, 1878 contained the serious objections of the British Government to the viability of this private scheme, because of the possible infringement of Clause 10 of the 1847 Treaty.

Lord Granville disclaimed on November 21, 1881 any intention on the part of the British Crown to assume either dominion or sovereignty over North Borneo and categorically stated that sovereign over that territory remined vested in the Sultan of Sulu.

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[228] Exhibit C 11.

[229] Exhibit C 61, p. 4.

Article III of the 1885 Madrid Protocol clarified that North Borneo belonged to the Sultan of Sulu and was to be considered as territories administered by the British North Borneo Company.

The Protectorate Agreement recognized that the British North Borneo Company administered the territory of North Borneo. But it did not state nor suggest that sovereignty over North Borneo appertained to the British North Borneo Company as a consequence of the 1878 Agreement.

The 1903 Confirmatory Deed upheld the continuing and uninterrupted sovereignty of the Sultan of Sulu over North Borneo and its adjacent islands and confirmed the extent of his dominion over which the British North Borneo Company had authority to administer and manage under the terms and conditions of the Royal Charter.

The 1903 Confirmatory Deed ratified that the legal situation over North Borneo since the signature of the 1878 Agreement remained unaltered. As a commercial Charted Company, the British North Borneo Company continued as administrator of this territory and not as sovereign, because it was not an international person capable of acquiring sovereignty or competent to enter treaties or other international relationships.

212. The result of the evidence gathered and assessed in this arbitration allows the Arbitrator to conclude that the conduct and legal commitments of both Great Britain and the British North Borneo Company have upheld the independence and sovereignty of the Sultan of Sulu over North Borneo, within the framework of the British legal system as well as before the international community.

Neither Messrs. Dent and Overbeck, nor the British North Borneo Company were authorised to assume sovereign title over the territory of North Borneo for and on behalf of the British Crown.

The 1878 Agreement and the 1903 Confirmatory Deed cannot be characterised as valid instruments under international law of permanent cession of territorial sovereignty over the mainland of North Borneo and its adjacent islands.

Therefore, the signature of the 1878 Agreement and of the 1903 Confirmatory Deed do not affect Malaysia's sovereignty.

B. *The 1878 Agreement and the 1903 Confirmatory Deed: A Lease Agreement*

213. Claimants characterise the 1878 Agreement and the 1903 Confirmatory Deed as a commercial transaction, where Messrs. Dent and Overbeck acted as private

individuals, representing private commercial interests. The Claimants maintain that the Spanish translation of the 1878 Agreement *«…unambiguously describes it as a lease…»*[230] agreement constituted by Messrs. Dent and Overbeck with the Sultan of Sulu for the exploitation of the natural resources of certain territory along the North Coast of Borneo on which the Sultan of Sulu remained sovereign, for an undetermined period and in return of a series of annual rental payments. Therefore, Claimants allege that the 1878 Agreement and the 1903 Confirmatory Deed articulate a *«…commercial concession for the territory at issue…»* [231] and thus a matter of commercial law, rather than that of international law. In support of this conclusion, Claimants submitted with their Statement of Claim both the Kratz Report and the Brödermann Report II.

214. As already explained in the Final Award, Respondent rejected Claimants' characterisation of the 1878 Agreement and the 1903 Confirmatory Deed and chose not to provide any expert report.

215. The analysis deployed in Section VII.1.ii.A of this Final Award confirmed that the disputed relationship, transacted –at least on one side- by private individuals and companies and, therefore, did not involve the transfer of sovereign or even ownership rights over the territory of North Borneo in accordance with international law.

216. The construction of a contract must determine the common intention of the parties, taking into account, in particular, the nature and purpose of the contract, the conduct of the parties though its negotiation and enforcement and the meaning commonly given to contract and trade expressions in the trade concerned. Its stipulations shall be interpreted consideration the entire contract in which they appear.

From this standpoint, it is the Arbitrator's view that the assessment of the legal characterisation of the 1878 Agreement needs to commence on April 11, 1878, immediately after its signature. On this date Mr. Dent, one of the signatories and therefore a relevant source of interpretation, admitted that, through the 1878 Agreement, the Sultan of Sulu gave him and Baron of Overbeck *«…a sort of perpetual leasehold (instead of freehold)…»* over the territory of North Borneo and its adjacent islands. [232]

The result of the evidence gathered ratifies the exactitude of Mr. Dent's assertion.

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[230] Exhibit C 13. Preliminary Award, ¶ 126.

[231] Statement of Claim, ¶ 42.

[232] Statement of Claim, ¶ 195. Exhibit C 97, p. 2.

217. Mr. Dent's statement differentiates three commercial legal concepts pertaining to common law that the Arbitrator needs to consider: the concept of *lease* and the concept of *leasehold*, as opposed to the concept of *freehold*.

Freehold is legally defined as permanent and absolute tenure of land with freedom to dispose of it at will. The proprietor of the freehold –the freeholder- owns the property and the land it stands on.

If a freeholder grants a lease, it becomes a landlord, through the signature of a lease agreement with the tenant, defined as a person who has the right to use something such as land, a building, or a piece of equipment, according to a lease contract and pays a rent to its owner. In the lease agreement, the two parties –the landlord and the tenant- will specify the terms and conditions under which the landlord will convey to the tenant exclusive possession, control, use or enjoyment of land or a building, in return for a quantified rent and for a specified period after which expiration the property reverts to the owner.

Hence, the lease agreement does not result in the transfer of rights of dominion or ownership over the land. The lease creates, instead, the leasehold, defined as the right to use and have exclusive possession (but not ownership) of land where it stands by the tenant for a set period –which can be a number of years, decades or centuries- and subject to the fulfilment of certain conditions as recorded in the lease agreement entered into with the landlord.

218. The 1878 Agreement provides that the Sultan leased[233] the territory of North Borneo –*«…haber convenido en terminar el contrato de arrendamiento de Sandakan…»*- to Messrs. Dent and Overbeck. Claimants identify this point as the core of the present dispute:[234]

> *«…182. This misconception stems for a British (mis)translation of the original language of the 1878 Lease Agreement, namely the Jawi (formal Malay in Arabic script). Whether deliberately or otherwise, the British rendered the operative Malay description of the contractual arrangement as* «…to grant and cede…».
>
> *183. This translation is quite simply wrong. A plethora of both contemporary and modern sources show beyond doubt that the key term in the 1878 Lease Agreement* –«…pajakan…»- *means* «…to lease…»*…».*

219. Page 2 of Exhibit C 14 contains the Malay text of the 1878 Agreement, where the term *pajakan* appears. Claimants sustain their position on this linguistic issue in the Kratz Report, not rebutted by Respondent. The exact interpretation of this term is of

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[233] Exhibit C 14.

[234] Statement of Claim, ¶¶ 182 and 183.

utmost importance in this matter, because when there is doubt as to the meaning of a contract term, an interpretation should be preferred that makes the contract lawful and effective (*ut res magis valet quam pereat*).

In ¶ 1 of the Kratz Report, Professor Kratz discloses that he had *«…been asked by Paul H. Cohen, Esq., of 4-5 Gray's In Square, London WC1R 5AH, to provide a lexicographical analysis of the Malay word* pajakan, *as well as a more extensive report on the* pajakan *system in the context of the traditional Malay polity, with particular reference to two hand-written Malay documents originating from the court of the Sultans of Sulu, a contract of 1878 and a regal declaration from 1903. I understand that these documents have been submitted in an arbitration proceeding as Exhibits C-12 and C-17, respectively…».*

Professor Kratz declared to be independent and impartial of the Parties and their Counsel and held to the statement of truth during the Hearing.[235] The Arbitrator is satisfied with his impartiality and independence, as well as with his technical competencies to deal with this sophisticated analysis. Professor Kratz was made witness available to cross examine regarding the Kratz Report.

The Arbitrator found in the ¶ 38 of the Kratz Report a proper semantical explanation of the term *pajakan*, which is significant for the determination of the debated issue:

> *«…38. Turning to the three Sulu documents from 1878 (A. Treaty and B. Letter of Authority) and 1903 (Declaration and Reaffirmation of 1878 Treaty)* pajak *appears in several forms which are not unusual and conform to the conventions of forming nouns and words in Malay by affixation.* Pajakan *which occurs several times is simply the noun which is created by adding the suffix -an to the root word* pajak*; it means lease, leasehold.* Dipajakkan *is a fully formed narrative (passive) verb which translates best as* «…being given in lease…». Pajakkan *in its turn is grammatically the same* dipajakkan *as before, different only by the dropping of the prefix di- which syntactically has been replaced by the royal We (*kita*) which is best translated as* «…We have given in lease…» *(lit. (the territory) has been given in lease by Us). However, it is probably fair to say that in the third line from the bottom of the 1903 declaration there should be a noun which the scribe spelt erroneously* pajakkan *by adding* -kan *instead of* an *to the root word. This is probably the result of a hearing error as a scribe would listen to the dictation of this statement rather than fully thinking about the meaning of what he took down. The 1903 document looks after all rather like a hastily drawn up declaration. Generally it would have been poor penmanship to correct any scribal mistake in a document of this kind and by doing so draw attention to the mistake. Hence it stands…».*

«…Pajakan…means lease, leasehold…».[236] Exhibit 6 of the Kratz Report contains an extract of *«…classic Jawi-Malay-English Dictionary…»* of 1903, where the word *«…*Pajak

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[235] Professor Kratz Transcription, pp. 50 and 51: *«… Q. Professor Kratz, to continue, there is a statement of truth above your signature. Do you hold by that statement of truth? A. Yes, I do. Q. Is there anything you would like to add, amend or clarify to your report sitting here today? A. No…».*

[236] Kratz Report, ¶ 38. During his testimony, Professor Kratz clarified that *«…* pajakan *is a contract which allows one party, a person and company to own or occupy land and cultivate land, use a building, make use, exploit a building for a certain time against a payment and other conditions which are agreed by the owner…»* (Professor Kratz Transcription, p. 65).

is also used of a private individual letting out the profits of a business or estate for a fixed rent…». It confirms Professor Kratz's conclusion on the meaning of the term *pajak*.[237]

The legal meaning of this term coincides with the three above-mentioned concepts: *freehold, lease* and *leasehold*. It also validates Mr. Dent's perception of the 1878 Agreement articulate *«…a sort of perpetual leasehold (instead of freehold)…»* over the territory of North Borneo and its adjacent islands gave to him and Baron of Overbeck by the Sultan of Sulu.[238]

220. In his letter of January 2, 1878, Mr. Treacher –a direct witness of the transaction- conceptually explained the scheme as follows: [239]

> *«…Mr. Torrey, an American subject, now United States' paid Vice-Consul at Bangkok, Siam, and formerly a trader at Hong Kong, who was the President of the American Trading Company …and in whim, as President were vested all the rights, &c., conceded to said Company by the various grants of the Sultan and Rajahs of Brunei, with the power of disposing of them to other parties…Mr. Torrey consequently claims the right of disposing as he likes of the concessions he holds…*
>
> *When I casually suggested to the Baron that it was possible that the concession held by Mr. Torrey had lapsed from time, they having been made for ten years only, because no payments had been made by the grantee, he pointed out that the concessions were renewable at the end of ten years, and that no fixed time is appointed for the payment of the rental, and that consequently Mr. Torrey had grounds to go upon claiming that the concessions he possessed were still in force, and that in order to take away any such grounds form under his feet, and to do away with the chance of any complication with the United States' Government he had decided to buy him out, as I have already said.*
>
> *I then suggested that the better plan would be not to transfer Mr. Torrey's grant, but to have it cancelled and obtain a fresh one from the Sultan, which should be formally drawn up, and be, so far as regards the Sultan, as fairer and less one-sided concession.*
>
> *Such, the Baron said was his desire…*
>
> *His Highness had a boat prepared to send over to Labuan the drafts of the concessions, but Mr. Overbeck by threatening to leave the river if the deeds were not at once signed, and by actually sending his snip down to the bar while he himself remained in the town io his steam-launch, prevailed upon the Sultan to affix his seal…*
>
> *The concessions obtained by Messrs. Overbeck and Dent include the whole northern portion of Borneo from the River Sulaman on the west to the River Sibuco on the east, and, to the south of Sulaman, the harbours and coasts of Gaya and Sapangar, the districts of Pappar, Benoni, and*

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[237] During his testimony, Professor Kratz stated that *«… One should stress these are contemporary dictionaries for the time when treaties were -- contracts were negotiated, and Klinkert later, the Dutch ones that follow that and Wilkinson are not just old dictionaries of old Malay texts. They were contemporary at the time, and they hit precisely the time of colonial expansion, as well, further contact with Europeans and greater interest in trying to find out what Malay is and using it. That is what it means…»* (Professor Kratz Transcription, p. 69).

[238] Statement of Claim, ¶ 195. Exhibit C 97, p. 2. Professor Kratz Transcription, pp. 75 and 76.

[239] Exhibits C 10 and C 61.

> *Kimanis in the near vicinity of Labuan…The remaining territory mentioned in the grants is actually under Sulu rule, and occupied by Sulu Chiefs, and it was only because the districts were mentioned in the original American grants that they are again included, and Mr. Overbeck will now have to make a separate Agreement with the Sultan of Sulu for them*
>
> *The new lessees thus become possessed of all the best harbours in Borneo, and of those which may be said to command to some extent the route to China, vessels in the north-east monsoon passing at no great distance from North Borneo…Not only does this portion of Borneo contain the best harbours, but it also possesses the best soil, and is richest in natural productions, such as birds-nests (in which the River Kinabatangan is especially rich), camphor, rattans, sago, gutta-percha, &c., and there can be but little doubt but that when explored it will be found to contain valuable minerals; the existence of coal is already known. And here I may mention, that in the new concessions the right to work the coal in the district held by the Oriental Coal Company is excepted, though the Sultan would be justified in cancelling his engagement with that Company…One thing, however, should not be forgotten, and that is; that by the present arrangement the concession to the Americans is cancelled, the Sultan having received the sum of 5,000 dollars in settlement of all claims arising from that concession, while the new grant contains the name of an English merchant of position…».*

In his description, Mr. Treacher detailed the existence of previous concessions granted by the Sultan of Sulu to an American citizen for a period of ten years in exchange of the payment of a rental. These concessions were of commercial nature, as they were granted to American private citizens.

It also mentioned the recommendation Mr. Treacher made to Mr. Overbeck, concerning the obtention from the Sultan of Sulu of a brand-new commercial concession, *«…to develop the agricultural resources of the northern portion of Borneo…». «…Such, the Baron said, was his desire…».* The reiterated use of the term *concession* should be highlighted.[240]

The use of the word *«…lessees…»* by Mr. Treacher applied to refer to Messrs. Dent and Overbeck is significant. *Lessee* is a synonym of *tenant*.

As stated in the Preliminary Award (to which content the Parties are kindly referred),[241] Mr. Treacher used the term *agreement*, when he affirmed that *«…Mr. Overbeck will now have to make a separate* agreement *with the Sultan of Sulu…»* and described it as being of a commercial nature. Mr. Treacher explained its terms and conditions in his letter of January 22, 1878:[242]

> *«… I should also state that the Baron de Overbeck has acted on this occasion with great courtesy, and my suggestions have been in the main embodied in the grant or agreement which has been sealed and signed … By this grant, in consideration of the annual payment to the Sultan of the sum of 5,000 dollars, the representatives of the proposed Company obtain the concession of the country extending from the Pandassan River on the west coast to the Sibuco River on the east, including the five harbours of Maludu and Sandakan and Darvel and Sibuco Bays…*

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[240] Brattle Report, ¶ 23.

[241] Preliminary Award, ¶ 129.

[242] Exhibit C 11. Brattle Report, ¶ 22.

> *The Sultan assured me that at the present moment he receives annually from this portion of his dominions the sum of 5,000 dollars, namely 300 busing of seed pearls from Lingabo River alone, which ta 10 dollars a busing comes to 3,000 dollars per annum, and about 2,000 dollars from four bird -nest caves in the Kinabatangan River which are his family possessions…*
>
> *This portion of Borneo…would become valuable as timber for expropriation; but the soil in many places notably up to Kinabatagan River, is known to be of excellent quality and well adapted for tropical produce… the existence of valuable mineral resources and the trade in bird-nests, rattans, camphor, seed pearls has been ascertained to be valuable and only to require development…».*

It is the Arbitrator's view that the terms and conditions contained therein corresponded to the ones articulated in the 1878 Agreement: the proper identification of the parties (the Sultan of Sulu, on the one part, and Messrs. Dent and Overbeck, on the other), the delimitation of certain territory along the North Coast of Borneo for the exclusive possession, control, use and management by Messrs. Dent and Overbeck, a quantified annual rent *«…to the Sultan of the sum of 5,000 dollars…»* and its duration, constituted for an undetermined period and therefore constituting a long-term contract.[243] These are the constituent elements of a lease agreement, which created *«…a sort of perpetual leasehold (instead of freehold)…»* over the territory of North Borneo and its adjacent islands, in accordance with Mr. Dent's assertion of April 11, 1878.[244]

The Sultan of Sulu reaffirm his twofold condition of freeholder and landlord of North Borneo. According to the of the 1878 Agreement, the purpose of its signature was to allow Messrs. Dent and Overbeck the management of North Borneo and its adjacent islands, *«…the lands that are of my domain…»* («*...las tierras que son de mi dominio…*»). Messrs. Dent and Overbeck hence became tenants. In the Arbitrator's opinion, the Sultan's statement also confirmed that the 1878 Agreement, as a lease agreement, did not result in the transfer of rights of dominion or ownership or permanent cession of his territorial sovereignty over the mainland of North Borneo and its adjacent islands in favour of Messrs. Dent and Overbeck.[245]

221. As mentioned in the Preliminary Award, on July 22, 1878, Mr. Carlos Martínez –the then Colonel-General of Sulu- sent a letter to Baron of Overbeck, where he characterised the 1878 Agreement as a commercial agreement, defined as *«…an*

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[243] Exhibits C 52, ¶¶ 3 and 6, and C 115, ¶¶ 9 – 30. Suspension Order Request, ¶ 10 – 12. UNIDROIT Principles, Article 1.11. Brödermann Report II, ¶ 428.

[244] Statement of Claim, ¶ 195. Exhibit C 97, p. 2. Brattle Report, ¶¶ 17 – 19.

[245] Exhibit C 30, ¶¶ 5 and 6: *«…5…the proprietary rights of the heirs of the Sultan of Sulu could be «waived» and/or extinguished through the payment of a sum of money…6…Both the Philippines and Malaysia have recognized the proprietary rights of the heirs are separate from the sovereign claim of the Philippines. Malaysia, through Primer Minister Mahathir, has on more than one occasion given Malaysian commitment to settle the proprietary claim of the heirs. The Philippines has also made the heirs understand that it will assist them in the proprietary claim…».* Professor Kratz Transcription, p. 90: *«…The ruler, the Sultan stays in control. That is unambiguous. That is understood…».*

engagement … contracted with you for a lease of Sandakan and its dependencies…».[246] Baron of Overbeck answered his letter on July 24, 1878 and referred to the 1878 Agreement as *«…the* agreement *executed between His Highness, the Sultan and myself as representative of British interests, in connection with the assignment of certain portion of the eastern coast of Borneo…».* He himself characterised the 1878 Agreement as an agreement of a commercial nature.[247] Mr. Martínez answered this letter on July 24, 1878. Its wording once again, referred to the 1878 Agreement as *«…a* contract of lease *with the very Sultan…»* and made the reservation that it would be Baron of Overbeck himself who *«…will understand the value of your* contract*…».*[248]

222. Based on this analysis, the Arbitrator concludes that the 1878 Agreement can be characterized as an international private lease agreement, of commercial nature, entered between a local ruler –the Sultan of Sulu- and international private investors, Messrs. Dent and Overbeck.

2. *The Objection on the Admissibility of the Claim*

i. The Parties' Positions

223. Respondent raised objection on the admissibility of the Claimants' claim on the 1878 Agreement and the 1903 Confirmatory Deed. Respondent failed to provide allegations on this issue in the arbitration and, instead, chose to develop them scattered in an anti-suit injunction request filed before the Courts of Malaysia on December 3, 2019,[249] in ¶¶ 6, 7, 14 to 23 and 77 to 89 of Exhibit C 114 and in ¶ 14 of the Suspension Order Request, all of them incorporated into the proceedings.

Based on their contents, Respondent's position on the challenge can be summarised as follows. Respondent contends the commercial nature of the 1878 Agreement and characterises it instead as an international treaty that would have articulated the cession by the Sultan of Sulu of his territorial sovereignty over North Borneo in favour of Messrs. Dent and Overbeck. The 1903 Confirmatory Deed ratified, in its opinion, the nature of the 1878 Agreement.

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[246] Preliminary Award, ¶ 130. Statement of Claim, ¶ 196. Exhibit C 7, p. 35. Https://www.officialgazette.gov.ph/1878/07/22/the-governor-of-sulu-to-baron-de-overbeck.

[247] Preliminary Award, ¶ 131. Https://www.officialgazette.gov.ph/1878/07/24/baron-de-overbeck-to-the-governor-of-sulu.

[248] Statement of Claim, ¶ 196. Exhibit C 7, p. 35. Https://www.officialgazette.gov.ph/1878/07/24/philippine-claim-to-north-borneo-vol-i-the-governor-of-sulu-to-the-baron-de-overbeck.

[249] Preliminary Award, ¶ 77.

Respondent submits that the present arbitration breached its sovereign immunity, as, through this arbitration, Claimants would seek the reversion in their favour of these territories *«…internationally recognized as belonging to Malaysia, a sovereign State…»*.[250] On this premise, Respondent affirms that the subject matter in dispute is not freely negotiated between the signatories of the 1878 Agreement and therefore, it is not capable of being settled by arbitration.

Respondent concludes that the present dispute conflicts with public policy and thus breaches Article 2.1 of the SAA. Respondent chose not to provide any expert report along with its allegations in support of this position and provided no reasons for the absence of this submission.

224. Claimants reject Respondent's position and sustain the arbitrability of the present dispute, based on the arguments contained in ¶ 78 – 87 of the Counter – Memorial on Jurisdiction and in ¶¶ 78 and 162 to 231 of Exhibit C 115. Claimants also consider as relevant the contents of ¶¶ 90 to 97, 115 and 116 of the Preliminary Award.

Claimants are direct descendants and legal heirs of Jamal-ul Kiram II, the last Sultan of Sulu and North Borneo and successor-in-title of the signatory of the 1878 Agreement.[251] Malaysia, on its part, admitted that it became the successor-in-title of the British North Borneo Company under both the 1878 Agreement and the 1903 Confirmatory Deed upon the establishment of its Federation on September 16, 1963.[252]

Claimants affirm that the purpose of the present dispute concerns the resolution of a commercial difference arising from the execution of the 1878 Agreement, a simple private commercial agreement unrelated to any claim of sovereignty over the territory of North Borneo and its adjacent islands. Claimants allege that, through this arbitration, they simply seek to vindicate before Respondent their legitimate commercial rights under the terms of the 1878 Agreement.

Claimants conclude that, contrary to Respondent's opinion, the matter in dispute was freely negotiated by the Parties and is arbitrable.[253]

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[250] Suspension Order Request, ¶ 14.

[251] Exhibit C 20. Preliminary Award, ¶ 103.

[252] Exhibits C 52, ¶ 6 and C 114, ¶¶ 3, 5 and 21.

[253] Exhibits C 42, ¶¶ 18 and 19, and C 44.

ii. The Arbitrator's Analysis and Findings

225. The Arbitrator will analyse the challenge of the substantive admissibility of Claimants' claim raised by Respondent in this international commercial arbitration, pursuant to the provisions of the SAA, which remain silent on any conceptual distinction between jurisdiction and admissibility in arbitration. The Parties' submissions provide no clear – cut distinction between these terms.

226. Jurisdiction is the power of the Arbitrator to hear and decide the case at hand. Respondent challenged the Arbitrator's jurisdiction, through the medium of a plea that, in its opinion, the Arbitrator himself would be incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim on both the 1878 Agreement and the 1903 Confirmatory Deed. ¶¶ 88 – 121 of the Preliminary Award analysed the issue, dismissed Respondent's objection and declared the validity of both the Arbitration Agreement and the Arbitrator's jurisdiction over the claims made by Claimants against Respondent, in relation with the 1878 Agreement and the 1903 Confirmatory Deed. The Parties are kindly referred to the contents of the Preliminary Award.

227. An objection on the substantive admissibility of the claim refers to the acceptability of the case.

In the case at hand, Respondent articulated the substantive objection as a plea to determine whether the present case itself is defective –so that the Arbitrator should rule the claim inadmissible on some ground other than its ultimate merit- or whether it is appropriate for the Arbitrator to hear it.

For that purpose, Respondent challenged the Arbitrator's exercise of his adjudicative power in relation to the claims on the 1878 Agreement submitted to him by Claimants.

Respondent alleges that, through this arbitration, Claimants would seek the reversion in their favour of territories of North Borneo, «*…internationally recognized as belonging to Malaysia, a sovereign State…*»[254] and therefore and because of its nature, in its opinion, the subject matter of the arbitration would not be capable of being settled in this arbitration.

The result of the evidence gathered in this arbitration disproved Respondent's contention.

[254] Suspension Order Request, ¶ 14.

228. The doctrine of sovereign immunity is composed of two facets: its procedural defence and its substantive defence.

229. As an objection of procedural nature, State immunity serves, amongst other functions, as a method of distinguishing between matters relating to public administration of a State and private law claims. When it comes to arbitration, if there is no title of jurisdiction, then the Arbitrator cannot act.

¶¶ 88 – 121 of the Preliminary Award analysed this issue and declared the Arbitrator's jurisdiction to decide over the Claimants' claim related to both the 1878 Agreement and the 1903 Confirmatory Deed. The Preliminary Award has not been set aside by any Court and has been recognised in France, as the Exequatur of the Preliminary Award demonstrates.

Therefore, beyond the jurisdictional objection decided in the Preliminary Award, Respondent's formulation of a substantive objection related with the 1878 Agreement necessarily assumes the prior existence of the Arbitrator's jurisdiction in deciding the merits of the present claim, as the Preliminary Award declared.

230. The determination of sovereign immunity also depends on the substantive characterisation of the act in question as sovereign or non-sovereign, and, specifically, on whether the debated difference arises from or conforms a commercial transaction of the State.

A simple commercial act performed by a State in the normal course of trading activities implies that it descended into the sphere of commercial contracts and transactions so as to acquire rights and to assume obligations like any other private person. Therefore, in cases involving obligations arising out of contracts or transactions of this nature concluded, a State should not attempt to enjoy immunity as these acts have nothing to do with the exercise of sovereign acts.

This is the essence of the restrictive theory of sovereign immunity, which contributed to a redefinition of sovereign activities and therefore of sovereignty. This restrictive approach focuses primarily on the sovereign or commercial nature of the transaction at issue, rather than on the structural relationship between a private party and the State entity concerned. Even a State is not immune if the disputed transaction is commercial, as it will recognise immunity for those acts the State carried out in the exercise of its sovereign authority but will deny immunity for those acts of a commercial or private law nature

undertaken by the State.[255] Malaysia subscribes to the common law doctrine of restrictive immunity.[256] This will also be the approach followed in the Final Award.

231. The notion of commercial activity –the commerciality test- imports the existence of an activity related to business and trade, arising from a transaction engaged voluntarily between two parties and made –expressly or impliedly- by reference to the private law of a national jurisdiction or alternative dispute resolution mechanism. These requirements are met in the present case.

The Preliminary Award declared the validity of the Arbitration Agreement.

The Final Award has already determined the commercial nature of the 1878 Agreement. It is an international private lease agreement,[257] voluntarily entered into between a local ruler –the Sultan of Sulu- and international private investors, Messrs. Dent and Overbeck, for the exploitation of the natural resources –*«…aprovechar sus minerales, productos forestales y animales…»* (*«…profit from its minerals, forest products and animals…»*)- of certain territory along the North Coast of Borneo –on which the Sultan of Sulu remained sovereign- for an undetermined period and in return of a series of annual rental payments.[258]

232. Mr. Treacher's letter of January 2, 1878 confirmed Messrs. Dent and Overbeck's *«…main desire being to develop the agricultural resources of the northern portion of Borneo…»*.[259] These activities included the exploitation and management of *«…timber…tropical produce…valuable mineral resources and the trade in bird-nests, rattans, camphor, seed pearls has been ascertained to be valuable and only to require development…»*, as explained in Mr. Treacher's letter of January 22, 1878.[260]

Articles 14 and 123 of the Royal Decree-Law 3/2020, of February 4, on urgent measures by which various directives of the European Union are incorporated into the Spanish legal system in the field of public procurement in certain sectors; private insurance; of pension plans and funds; of the tax field and tax litigation provide that those agreements entered by the State or any of its public entities in relation to prospection and exploitation

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255 *I Congreso del Partido,* (1983) 1 AC 244 (HL).

256 *The United States of America v. Menteri Sumber Manusia Malaysia & Ors*, High Court Malaya, Kuala Lumpur, Nordin Hassan J [Judicial Review No: WA-25-342-07-2019], of January 8 ,2020, ¶¶ 26 – 27. *Commonwealth of Australia v. Midford (M) Sdn Bhd & Anor* [1990] 1 CLJ 878; [1990] 1 CLJ (Rep) 77; [1990] 1 MLJ 475.

257 Exhibit C 116, ¶ 55.

258 Professor Kratz Transcription, pp. 91 and 92: *«…I would say flippantly, what he did was by way of privatization, like farming, he gave the rights to exploit that, but at the same time, he would develop it, he would provide labour, therefore doing that, develop…».*

259 Exhibits C 10 and C 61. Statement of Claim, ¶¶ 103, 104 and 106.

260 Exhibit C 11. Brattle Report, ¶ 22.

activities of oil, gas and carbon –those *«…mineral resources…»* to which the 1878 Agreement expressly refer to- may be submitted to arbitration.

Thus, any dispute arising from or related to their enforcement is arbitrable under Articles 9.6[261] and 2[262] of the SAA.[263] According to its Preamble, its *«…Article 2…provides that States and the entities under their* aegis *may not invoke the prerogatives of their own legal systems in connection with matters subject to arbitration. The aim in this respect is to afford States exactly the same treatment as private parties…».*

233. Claimants are direct descendants and legal heirs of the last Sultan of Sulu and North Borneo and successor-in-title of the signatory of the 1878 Agreement, as determined in the Mackaskie Judgment.[264]

In its letter of September 19, 2019,[265] Malaysia admitted in this arbitration that it became the successor-in-title of the British North Borneo Company under both the 1878 Agreement and the 1903 Confirmatory Deed upon the establishment of its Federation on September 16, 1963, as follows:

> *«…6. Over time, obviously the contracting parties changed. Upon the establishment of Malaysia on 16th September 1963, Malaysia became the successor-in-title to the British Company viz. the British North Borneo Company under the 1878 Grant and Confirmation by Sultan of Sulu of Cession of Certain Islands dated 22nd April 1903 (1903 Confirmation of Cession)…».*

On that contractual condition, Respondent freely proclaimed in its letter of September 19, 2019 that *«…from 1963 to 2012, that is, for an unbroken and continuous period of 49 years, Malaysia had been, under the 1878 Grant, paying … (… the successors-in-title to the Sultan of Sulu) the annual sum 5300 dollars…payments ceased in 2013. Malaysia is now ready and willing to pay …* (Claimants) *all arrears from 2013 to 2019, and agrees to fully comply with the 1878 Grant and the 1903 Confirmation of Cession from henceforth with regards to future payments…».* Respondent admitted that the purpose of this payment would be the settling of the present dispute and so invited Claimants to *«…discontinue all proceedings they have instituted in Spain (or indeed elsewhere) upon receipt of the arrears…».*

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[261] SAA, Article 9.6: *«…In international arbitration, the arbitration agreement will be valid and the dispute arbitrable if the requirements laid down in any of the following are met: the legal rules chosen by the parties to govern the agreement; the rules applicable to the substance of the dispute; or the rules laid down in Spanish law…».*

[262] SAA, Article 2: *«…1. Disputes on matters regarded by law to involve free choice are apt for settlement by arbitration. 2. In international arbitration, when one of the parties is a State or a State-controlled company, organisation or enterprise, that party may not invoke prerogatives of its own law to circumvent obligations stemming from the arbitration agreement…».*

[263] Exhibit C 116, ¶¶ 64 – 69.

[264] Exhibit C 20.

[265] Exhibit C 52.

It is the Arbitrator's view that Respondent's position contained in this letter is inconsistent with its challenge of the arbitrability of the dispute.

The transcribed terms reveal the absence of any reservation made at that time (i.e., September 19, 2019), once the present arbitration was set in motion, that these proceedings would breach its sovereign immunity or that Claimants would seek, through their institution, the reversion in their favour of these territories *«…internationally recognized as belonging to Malaysia, a sovereign State…»* as Respondent seems now to maintain.

On the contrary, the wording of this letter may indicate the commercial nature of the transaction articulated under both the 1878 Agreement and the 1903 Confirmatory Deed.

In accordance with Articles 2.1.1 and 2.1.6 (3) of the UNIDROIT Principles, this letter demonstrates that Malaysia, Respondent, accepted the validity of the 1878 Agreement and of the 1903 Confirmatory Deed, their commercial nature and their binding effects between the Parties: Respondent «*…agrees to fully comply with the 1878 Grant and the 1903 Confirmation of Cession from henceforth with regards to future payments…*».

Article 2.1.1 of the UNIDROIT Principles establishes that «…[a] *contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement…*». This provision should be read in conjunction with Article 2.1.6 (3) of the UNIDROIT Principles, which provides guidance on this *«…conduct of the parties that is sufficient to show agreement…»* as follows: *«… if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act without notice to the offeror, the acceptance is effective when the act is performed…».*

Its official comment establishes *«…the form such conduct should assume: most often it will consist in acts of performance, such as the payment of an advance on the price…».* Respondent admitted the existence of annual payments to Claimants under the terms of the 1878 Agreement and of the 1903 Confirmatory Deed *«…from 1963 to 2012, that is, for an unbroken and continuous period of 49 years…».* Respondent therefore admitted that it voluntary incurred in a *«…conduct…that is sufficient to show agreement…»* with the legal nature and binding terms and conditions of the 1878 Agreement and the 1903 Confirmatory Deed towards Claimants.

234. Treating the whole issue as one of individualization and having regard to the factual and legal issues, the assessment of the nature of the 1878 Agreement as a State transaction, and not of the purpose of the State activity, is crucial to determine the existence of State immunity –as Respondent maintains, and Claimants deny- and therefore of the substantive arbitrability of the present dispute. The surrounding circumstances of the case will be characterised as narrowly as reasonably possible as either a commercial transaction or a sovereign act.

235. The general principle is that a State is presumptively immune under International Law.

236. For Respondent's objection to succeed, the preponderance of the evidence required Respondent to prove in this arbitration the characterisation of its acts in relation to the enforcement of the 1878 Agreement and the 1903 Confirmatory Deed as sovereign. However, the fact that the commercial act serves some sovereign or public purpose will not be sufficient to attract sovereign immunity, since every act of the State, by definition, serves a public purpose. For the governmental character to concur, Respondent had the burden of demonstrating to the Arbitrator that what is done must be something which explicitly possesses that nature; specifically, that it has exercised powers peculiar to sovereign (*acta de iure imperii*), as it alleges, that belong to its sovereign authority and therefore to public law.[266] Otherwise, it would be concluded that a State –including Respondent- engages in commercial activity for the purpose of the restrictive theory only where it acts in the manner of a private player within the market.

237. Therefore, a commercial or private law exception to immunity is the hallmark of the restrictive approach, recognised, in principle, by all countries which adhere to the restrictive doctrine of State immunity. When a State is engaged in a commercial transaction, it acts as a trader, not as an independent sovereign State; because it has ceased to act in a public capacity, it has no immunity for the commercial transactions. Consequently, immunity shall be denied in the case at hand in relation to the claims on the 1878 Agreement and the 1903 Confirmatory Deed only if a commercial exception is established through the result of the evidence gathered in this arbitration.

Claimants have the burden of proving in these proceedings that Respondent engaged in the 1878 Agreement as a commercial activity carried out for profit (the payment of an annual rent of 5,300 dollars to Claimants for the exploitation by Respondent –as the successor-in-title of the British North Borneo Company- of the natural resources of North Borneo).

In that case, the commercial nature of the acts performed by Respondent under the 1878 Agreement can be readily assumed, as it is understood that Respondent has then acted as a private person and that activity related to the enforcement of both the 1878 Agreement and 1903 Confirmatory Deed belongs to the sphere of private law, because Respondent, as a sovereign State, then only exercises those powers that can also be exercised by private citizens (*acta de iure gestionis*).

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[266] *I Congreso del Partido,* (1983) 1 AC 244 (HL). *Empire of Iran*, German Federal Constitutional Court, 45 ILR 57 (1963).

238. It can be established that the commercial exception to sovereign immunity will be demonstrated when two conditions are fulfilled:

A. That Claimants discharged in this arbitration their burden of proving the existence of this exception in relation to the enforcement of the 1878 Agreement and the 1903 Confirmatory Deed; and

B. That Respondent, being a foreign State, has not appeared in this arbitration, where the immunity is debated, and therefore provided no defence whatsoever.

Both conditions were fulfilled in the present case. As analysed in Section VII.1.ii.B of this Final Award, the result of the evidence in this arbitration demonstrated the commercial nature of the transaction articulated under the 1878 Agreement and, therefore, the concurrence of the aforementioned commercial exception. Respondent's non-involvement in this arbitration and the absence of any defence whatsoever on this issue has also been determined in Section IV.5 of this Final Award, the contents of which are reiterated hereby for the sake of brevity.

239. Once demonstrated that on September 16, 1963, Respondent –as a sovereign State- entered the market as the successor-in-title of the British North Borneo Company for the enforcement of the 1878 Agreement, an international private lease agreement, a characterisation of that act as commercial continues. The admitted undertaking of this commercial activity by Respondent may be treated as irrevocable in its nature and its subsequent conversion into an exercise of sovereign immunity, as Respondent purported with the objection on the substantive admissibility of the claim in this arbitration, should not be permitted. Therefore, Respondent's objection of the admissibility of Claimants' claims under both the 1878 Agreement and the 1903 Confirmatory Deed cannot be upheld.

3. *The Breach of the 1878 Agreement and of the 1903 Confirmatory Deed*

i. The Parties' Positions

240. Claimants submit that they have been complying with both the 1878 Agreement and the 1903 Confirmatory Deed, but Malaysia, on its part, would have incurred in a fundamental breach of its essential payment obligations under their terms since January 1, 2013, for reasons attributable, in their opinion, to the Respondent,[267] as

[267] Statement of Claim, ¶¶ 217 – 223.

it admitted in its correspondence of September 19, 2019.[268] Claimants seek, as main remedy,[269] the termination of the 1878 Agreement pursuant to Article 7.3.1 of the UNIDROIT Principles as of January 1, 2013 or, in the alternative, as of February 2020.[270]

Claimants plead, as an alternative claim,[271] that the 1878 Agreement had become unbalanced to their detriment, as the surrounding circumstances at the time of its signature would have radically changed by the subsequent discovery of natural resources (i.e., hydrocarbons and palm oil) during the decade of 1970.

Claimants allege that the Parties would have been unable to anticipate nor to include this expansion in either the 1878 Agreement or the 1903 Confirmatory Deed and failed to make any further amendment of either of the documents after said discoveries. Claimants seek the delimitation by the Arbitrator of the scope and terms of a properly rebalanced agreement, under the hardship doctrine contained in Article 6.2.2 of the UNIDROIT Principles as alternative relief, if the Arbitrator does not terminate the 1878 Agreement and the 1903 Confirmatory Deed.[272]

Claimants submitted the Brödermann Report II with their Statement of Claim, in support of their position. Professor Dr. Brödermann was made witness available to cross examine regarding the Brödermann Report II.

241. Respondent's letter of September 19, 2019 contains its position on this issue as follows:[273]

> *«…6. Over time, obviously the contracting parties changed. Upon the establishment of Malaysia on 16th September 1963, Malaysia became the successor-in-title to the British Company viz. the British North Borneo Company under the 1878 Grant and Confirmation by Sultan of Sulu of Cession of Certain Islands dated 22nd April 1903 (1903 Confirmation of Cession). From 1963 to 2012, that is, for an unbroken and continuous period of 49 years, Malaysia had been, under the 1878 Grant, paying your clients (themselves the successors-in-title to the Sultan of Sulu) the annual sum 5300 dollars. The payment was increased by 300 dollars per annum by way of the 1903 Confirmation of Cession.*
>
> *7. From the beginning, Malaysia paid to your clients the agreed annual sum (Cession Monies) of 5300 dollars in Malaysian Ringgit, that is, 5300 MYR. The payment of Cession Monies had been made to the rightful heirs of the Sulu Sultanate, consistent with the judgment delivered Chief Justice C.F.C Macaskie on 18th December 1939 in the High Court of the State of North Borneo in the case* Dayang – Dyang Haji Piandao Kiram of Jolo, Philippines & 8 others v. The Government of North Borneo & Others [Civil Suit No 169/39]. *That judgment declared that the*

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[268] Statement of Claim, ¶¶ 217 – 223, 227, 335 and 340 – 377. Exhibit C 52.

[269] Notice of Arbitration, ¶¶ 86. Statement of Claim, ¶ 592 (iii).

[270] Statement of Claim, ¶¶ 353 and 592 (ii) and (iii).

[271] Notice of Arbitration, ¶ 91. Statement of Claim, ¶ 592 (iv).

[272] Statement of Claim, ¶¶ 229 – 339.

[273] Exhibit C 52.

Plaintiffs are the rightful heirs with the right over the Cessions Monies. The grounds of judgment are attached hereto as Annexure A.[274]

8. Malaysia had continuously paid the Cession Monies to the heirs of the Sulu Sultanate through their appointed attorney Ulka T. Ulama until 2010. For the years 2011 and 2012, the Cession Monies were paid directly to the heirs of the Sulu Sultanate and not through their appointed attorney as the Ambassador of Malaysia to the Republic of the Philippines had received complaints from the heirs to the Sulu Sultanate on the delay of payments made previously and costs charged by the attorney for such services. Due to these complaints, the Ambassador of Malaysia to the Republic of Philippines decided to make payment directly to the heirs of the Sulu Sultanate. The payment of the Cession Monies was made in Philippine Peso based on the prevailing exchange rates. A copy of letter dated 28 June 2012 from the Ambassador of Malaysia to the heirs of the Sulu Sultanate concerning the aforesaid payment is attached as Annexure B.

9. Regrettably, payments ceased in 2013. Malaysia is now ready and willing to pay your clients all arrears from 2013 to 2019, and agrees to fully comply with the 1878 Grant and the 1903 Confirmation of Cession from henceforth with regards to future payments…».

Respondent chose not to provide any expert report nor reasons for the absence of this submission.

ii. The Arbitrator's Analysis and Findings

242. Claimants plead a principal claim and seek, as main remedy, the termination of both the 1878 Agreement and of the 1903 Confirmatory Deed. Claimant plead an alternative claim and seek, as alternative remedy in the event that the principal claim is rejected, the delimitation by the Arbitrator of the scope and terms of a properly rebalanced agreement. Therefore, the admissibility of the alternative claim will be examined only if the principal claim is rejected.

243. The parties to a contract must always act according to what is reasonable in view of the particular nature of their relationship and the circumstances involved, including their economic interests and expectations.

244. The Final Award characterised the 1878 Agreement as an international private lease agreement, of commercial nature, entered into between a local ruler –the Sultan of Sulu, in his twofold condition of freeholder and landlord of North Borneo- and international private investors, Messrs. Dent and Overbeck, who hence became tenants. The 1878 Agreement is a valid contract and its terms, binding upon the Parties.

[274] Exhibit C 20.

On November 1, 1881, the British Gladstone Government granted the Royal Charter and the British North Borneo Company was incorporated. The British North Borneo Provisional Association Limited was dissolved and restructured itself as the British North Borneo Company, which started its activity on May 12, 1882. The British North Borneo Company assumed and honoured the payment obligations undertaken by Dent and Overbeck and the North Borneo Provisional Association Limited in the 1878 Agreement. The British North Borneo Company was authorised and empowered to assume the management of the territory delimited on the 1878 Agreement, under the conditions provided by the Royal Charter. The British North Borneo Company was tenant since then until the signature of the 1946 North Borneo Cession Agreement.[275]

The Final Award has also determined:

A. That Claimants are direct descendants and legal heirs of the last Sultan of Sulu and North Borneo and successor-in-title of the signatory of the 1878 Agreement; and

B. That Malaysia became the successor-in-title of the British North Borneo Company under both the 1878 Agreement and the 1903 Confirmatory Deed upon the establishment of its Federation on September 16, 1963, and assumed the role of the contractual counterparty under the 1878 Agreement and the 1903 Confirmatory Deed.[276]

Accordingly, Claimants are freeholder and landlord of North Borneo and Respondent, Malaysia, tenant under both the 1878 Agreement and the 1903 Confirmatory Deed.

245. The Parties agreed that Respondent would pay an annual rent of 5,300 dollars to Claimants for the exploitation by Respondent of the natural resources of North Borneo pursuant to the 1878 Agreement and the 1903 Confirmatory Deed, which added 300 dollars to the annual rental determined in the 1878 Agreement, paid retroactively. Respondent confirmed this view in its letter of September 19, 2019[277] as follows:

> *«…6. …From 1963 to 2012, that is, for an unbroken and continuous period of 49 years, Malaysia had been, under the 1878 Grant, paying your clients (themselves the successors-in-title to the Sultan of Sulu) the annual sum 5300 dollars. The payment was increased by 300 dollars per annum by way of the 1903 Confirmation of Cession…».*

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[275] Statement of Claim, ¶ 452.

[276] Notice of Arbitration, ¶¶ 8 and 65. Statement of Claim, ¶ 94. Exhibits C 35, C 36, C 37, C 52, ¶ 6 and C 114, ¶¶ 3, 5 and 21.

[277] Exhibit C 52.

246. The result of the evidence gathered in this arbitration confirmed that the payment of the agreed rent under the 1878 Agreement was a matter of serious concern for tenant. On November 27, 1946 (to wit, immediately after the signature of the 1946 North Borneo Cession Agreement), the office of the Britain's Prime Minister, Mr. Clement Richard Atlee, sought information about[278]

> *«…the whereabouts of the private heirs of the late Sultan Mohammed Jamalul Kiram of Sulu, who died on the 10th June, 1936. My object is to arrange for the resumption of the payment to them of the annual grants of cession monies, formerly paid by the British North Borneo (Chartered) Company…For your own strictly confidential information I hope that it will be possible to resume payment of the cession monies without delay, since the alleged failure of the North Borneo Company to pay these annual grants is being used as a pretext for claiming that the concession granted to the Company by the late Sultan has terminated…».*

There is no evidence in the proceedings to confirm that these annual payments ceased at any moment.

Muhammad Esmail Kiram signed on November 25, 1957 a *«…Proclamation…for himself and on behalf of the heirs of Sultan Mohammad Jamalul Alam…»* apparently terminating the 1878 Agreement. In its pleadings of February 24, 2021, Claimants clarified that:

> *«…Sultan Esmail was one of the original nine Macaskie Heirs. Consistent with Sultan Jamalul Kiram II's will, he was awarded 1124th (4 .17%) of the entitlement to payments under the 1878 Lease Agreement. His son, Sultan Fuad Kiram, inherited Sultan Esmail's entitlement under the 1878 Lease Agreement; Sultan Fuad is one of the Claimants in this arbitration.*
>
> *There is no evidence to confirm that Sultan Esmail was in fact speaking on behalf of all the Heirs. Claimants, fmthermore, do not ratify his statement. Consequently, the 1957 Proclamation bears little relevance to this case…»*

Indeed, Respondent, Malaysia, disregarded this unilateral declaration and continued to pay Claimants the annual rental of 5,300 dollars agreed in the 1878 Agreement and the 1903 Confirmatory Deed and pursuant to the Macaskie Judgment[279] *«…from 1963 to 2012, that is, for an unbroken and continuous period of 49 years…».*[280] It is the Arbitrator's view that Respondent continued to perform the 1878 Agreement –freely and without reservations- until the end of 2012, as no one may set himself in contradiction with his own previous conduct.[281] Articles 2.1.1 and 2.1.6 (3) of the UNIDROIT Principles apply, with the same reasoning already explained in Section VII.2.ii of this Final Award.

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[278] Statement of Claim, ¶¶ 90 and 91. Exhibits C 6, p. 104, and C 24.

[279] Notice of Arbitration, ¶¶ 65 and 73. Exhibits C 52, ¶¶ 6 – 8, C31 and C 32.

[280] Exhibits C 31, C 32, C 35 p.4 and C 52, ¶ 6.

[281] UNIDROIT Principles, Article 1.8: *«… A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment…».*

247. A party who performs a contract in accordance with its terms is thereby discharged from its obligations under it and entitled to enforce the other party's undertakings. The 1878 Agreement is valid and articulates binding reciprocal obligations between landlord and tenant, between Claimants and Respondent, between the Parties.

Claimants allege that they have been complying with both the 1878 Agreement and the 1903 Confirmatory Deed. The result of the evidence in the arbitration confirms that Claimants, as landlord, respected the leasehold articulated therein, as they deliver possession of North Borneo to Respondent on their signature and since then allowed Respondent to exploit the territory indefinitely, in accordance with terms of both the 1878 Agreement and 1903 Confirmatory Deed.

A breach of contract is committed when a party, without lawful excuse, fails or refuses to perform what is due from it under the contract. It is the Arbitrator's view that Malaysia's admitted failure to attend these payments since 2013 may be characterised as a contractual non-performance under Article 7.1 of the UNIDROIT Principles, as it establishes that the breach of a contractual obligation exists where it concurs a *«…failure by a party to perform any of its obligations under the contract…».*

Article 7.3.1 (1) of the UNIDROIT Principles contains the general rule regarding the termination of reciprocal obligations for breach of a fundamental contractual obligation in the following terms: *«…*[a] *party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance…».* Hence, Claimants are entitled to seek the termination of both the 1878 Agreement and the 1903 Confirmatory Deed.

The test is to determine whether the party who refuses to perform shows a justified or an unjustified determination to disregard any essential term of the contract. Article 7.3.1.(2) of the UNIDROIT Principles provides the alternative foundations[282] to be applied in

> *«…determining whether a failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether*
>
> *a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;*
>
> *b) strict compliance with the obligation which has not been performed is of essence under the contract;*
>
> *c) the non-performance is intentional or reckless;*
>
> *d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance;*

[282] Brödermann Report II, ¶ 506.

e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated…».

In the case at hand, it will be the burden of Respondent to establish –through the submission of appropriate evidence before the Arbitrator- that its failure to attend the payment under the 1878 Agreement was justified. However, Respondent ostensibly admitted in ¶ 9 of its letter of September 19, 2019 that «…[r]*egrettably, payments* [under the 1878 Agreement] *ceased in 2013…».* The result of the evidence in this arbitration shows that Respondent has been unable to demonstrate the concurrence of any lawful or contractual excuse for its non-performance of its contractual duties under the 1878 Agreement and thus failed to comply with the indicated burden.[283]

This contractual non-performance deprived Claimants of payment of agreed rent under the 1878 Agreement, without explanation. In its letter of September 19, 2019, Respondent offered Claimants to resume this payment under the 1878 Agreement, but solely upon Claimants' withdrawal of this arbitration and the discontinuance of *«…all proceedings they have instituted in Spain (or indeed elsewhere) upon receipt of the arrears…».*

248. It is the Arbitrator's view that Respondent's breach of the 1878 Agreement is material.[284]

The payment of the agreed rent under the 1878 Agreement and the 1903 Confirmatory Deed consistently, in full and on time was Respondent's most fundamental duty as tenant.[285] Respondent failed to perform what was due under the 1878 Agreement and the 1903 Confirmatory Deed and it was unable to demonstrate the concurrence of any lawful or contractual excuse for its non-performance of these contractual duties. On the contrary, Respondent freely admitted that *«…*[r]*egrettably, payments* [under the 1878 Agreement and the 1903 Confirmatory Deed] *ceased in 2013…»* and thus acknowledged its responsibility in the causation of a serious contractual breach to the prejudice of Claimants.

Consequently, pursuant to Article 7.3.1 (1) of the UNIDROIT Principles, the Arbitrator declares the termination of the 1878 Agreement as of January 1, 2013.[286]

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[283] Exhibit C 52, ¶ 9. Notice of Arbitration, ¶¶ 73 – 75. Statement of Clam, ¶¶ 98 and 168. Exhibit C 35, footnote 1: *«…The Government of Malaysia halted payments to the heirs in the wake of the 2013 invasion of Sabah by the late pretender styling himself as Jamalul Kiram III. The current government of the Sultanate and heirs disavow his actions and irrevocably renounce the use of force as a means to resolve the differences between themselves and the Government of Malaysia…».*

[284] Brödermann Report II, ¶¶ 521 and 522.

[285] Brödermann Report II, ¶ 506.

[286] Brodermann Report II, ¶ 523. Statement of Claim, ¶ 410.

249. As the principal Claimants' claim is upheld, the alternative claim does not need to be answered.

4. *Damages and Allocation of Responsibility*

i. The Parties' Positions

250. Claimants plead that, being the 1878 Agreement being an international private lease agreement and based on Article 7.3.5 of the UNIDROIT Principles, its termination would require, in principle, that Respondent return the rights of exploitation of the natural resources of the leased territory along the North Coast of Borneo to Claimants.[287] However, Claimants *«…acknowledge that restitution of the kind called for above is essentially impossible. Malaysia considers Sabah to be its own by right of sovereign prerogative; it is hardly about to surrender the Leased Territories, of any rights associated therewith, no matter how compelling Claimants' argument that the Sultan never ceded Sabah and that sovereignty therefore remains in his descendants' hands. Failing restitution in kind, Claimants seek a sum of money for the loss of what should be theirs after the 1878 Lease Agreement is over…».*[288]

Claimants allege that, based on Articles 6.1.9.(4) and 7.4.12 of the UNIDROIT Principles, that U.S. Dollars should be the currency to be used in the Final Award to calculate and to determine the amount Claimants seek to recover from Respondent, to prevent them *«…from suffering further damages as a result of the interplay between Malaysia's delay in making payment and the fluctuation of exchange rates…».*[289]

As main remedy,

A. If the Final Award declares January 1, 2013 as the date of termination of both the 1878 Agreement and the 1903 Confirmatory Deed, Claimants submit that they are entitled to the restitution value of the rights over the leased territory along North Borneo, with compound pre-award interest on a monthly basis,[290] as of January 1, 2013, of USD 32.20 billion, or alternatively, of USD 24.15 billion, or alternatively, of USD 16.10 billion and so seek reimbursement from Malaysia; or, alternatively,

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[287] Statement of Claim, ¶¶ 422 – 572.

[288] Statement of Claim, ¶ 423.

[289] Statement of Claim, ¶ 309.

[290] Statement of Claim, ¶ 565.

B. If the Final Award declares February 1, 2020, or a later date, as the date of termination of both the 1878 Agreement and the 1903 Confirmatory Deed, Claimants submit that they are entitled:

a. To the restitution value of the rights over the leased territory along North Borneo, with compound pre-award interest on a monthly basis,[291] as of February 2020, of USD 26.71 billion, or alternatively, of USD 19.28 billion, or alternatively, USD 12.85 billion; and

b. To non – performance damages for the (adapted or rebalanced) unpaid rent from 2013 to the date of termination of the 1878 Agreement, which amounts to USD 5.72 billion, or alternatively, to USD 4.29 billion, or alternatively, to USD 2.86 billion, plus interest and so seek reimbursement from Malaysia.[292]

As alternative relief, if the Final Award does not terminate the 1878 Agreement and the 1903 Confirmatory Deed and decides to restore their equilibrium, Claimants seek:

A. From January 1, 2013 to the date of the Final Award, as unpaid rent under the 1878 Agreement and the 1903 Confirmatory Deed, the amount of USD 5.72 billion, or alternatively, of USD 4.29 billion, or alternatively, of USD 2.86 billion, plus interest, and so seek reimbursement from Malaysia;[293]and

B. The determination of all future annual rent payments in the rebalanced amount of USD 714 million, or alternatively, of USD 535 million, or alternatively, of USD 357 million.

In support of their position, Claimants submitted with their Statement of Claim the Brattle Report, the Meehan Report and the Brödermann Report II.

251. Respondent's substantive position on this issue is contained in its letter of September 19, 2019, and pleaded as follows:[294]

> *«…9. Regrettably, payments ceased in 2013. Malaysia is now ready and willing to pay your clients all arrears from 2013 to 2019, and agrees to fully comply with the 1878 Grant and the 1903 Confirmation of Cession from henceforth with regards to future payments. As to the arrears, Malaysia is also agreeable to paying simple interest of 10% p.a. on the annual payments for each of the years concerned, as stated in the Table below:*
>
> *Year* *Arrears (Malysian Ringgit)* *10% interest*

[291] Statement of Claim, ¶ 565.

[292] Suspension Order Request, ¶¶ 13 – 14.

[293] Statement of Claim, ¶¶ 14 – 16, 114 – 128, 572 and 592. Exhibit C 115, ¶¶ 9 – 26.

[294] Exhibit C 52.

2013	*5,300,00*	*3,180.00 (6 years)*
2014	*5,300,00*	*2,650.00 (5 years)*
2015	*5,300,00*	*2,120.00 (4 years)*
2016	*5,300,00*	*1,590.00 (3 years)*
2017	*5,300,00*	*1,060.00 (2 years)*
2018	*5,300,00*	*530.00 (1 year)*
2019	*5,300,00*	-
TOTAL	***37,100,00***	***11,130.00***
	Gran Total	***48,230.00 MYR***

10. Accordingly, please revert with details of your clients' names and banking records so that we can arrange the telegraphic transfer of the relevant payments, immediately…».

Respondent chose not to provide any rebuttal expert report nor reasons for the absence of this submission.

ii. The Arbitrator's Analysis and Findings

252. As explained, Claimants plead a principal claim and seek a main remedy and an alternative remedy and alternative claim and an alternative remedy. Therefore, the admissibility of the alternative claim will be examined only if the principal claim is rejected.

253. Section VII.3.ii of this Final Award determined that the violation of Respondent consisted, as it acknowledged, in the breach of its payment obligations of the annual rent towards Claimants under both the 1878 Agreement and the 1903 Confirmatory Deed –both characterised as a long term international private lease agreement, of commercial nature- as of January 1, 2013. The consequences of the breach of this private contract are subject to the applicable contract law, that the Partial Award determined as being the UNIDROIT Principles.[295] The Arbitrator declared the termination of the 1878 Agreement as of January 1, 2013, pursuant to Article 7.3.1 (1) of the UNIDROIT Principles.[296]

254. The starting point of this assessment is the applicability of the principle of restitution in kind to the present case.

Claimants plead that, being the 1878 Agreement an international private lease agreement –complemented by the 1903 Confirmatory Deed- and based on Article 7.3.6.(1) of the

[295] Final Award, Section IV.3.viii.

[296] Brödermann Report II, ¶ 523. Statement of Claim, ¶ 410.

UNIDROIT Principles,[297] its termination would require, in theory, that Respondent returns the rights of exploitation of the natural resources of the leased territory along the North Coast of Borneo to Claimants.[298] Indeed, upon the termination of the leasehold, the tenant –Respondent in this matter- may revert the property possessed under the leasehold (i.e., North Borneo), in principle, to the landlord or to the freeholder, the Claimants.

However, it is the Arbitrator's view that this effect should be contextualised with the niceties of the present case.[299]

The result of the evidence available in the proceedings shows that, through the proclamation of Malaysia on September 16, 1963, North Borneo became the 13th State of its Federation.[300] This situation did not prevent Respondent anyhow from continuing to pay Claimants the annual rental of 5,300 dollars agreed in the 1878 Agreement and the 1903 Confirmatory Deed and pursuant to the Macaskie Judgment[301] *«…from 1963 to 2012, that is, for an unbroken and continuous period of 49 years…»,* as Respondent admitted in its letter of September 19, 2019.[302]

Regardless North Borneo being one of its States as from September 16, 1963 (an objective fact of which existence Respondent was fully aware), Respondent continued to perform both the 1878 Agreement and the 1903 Confirmatory Deed –freely and without reservations- until the end of 2012. That contractual behaviour is significant in the assessment of the disputed transaction in this arbitration. Respondent accepted this situation and created a reasonable reliance of Claimants in relation to the 1878 Agreement and the 1903 Confirmatory Deed, the contractual relationship existing between the Parties. As the Parties were certainly involved in an international business transaction – a legal character that Respondent did not deny to Claimants on September 16, 1963 nor thereafter- it is presumed that the negotiation, formation, performance and interpretation of the 1878 Agreement and of the 1903 Confirmatory Deed is affected by the standard of good faith and fair dealing in international trade, recognised by Article 1.7.(1) of the UNIDROIT Principles.[303] The principle of prohibition of inconsistent behaviour applies to the Parties and, specifically, to Respondent.[304]

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297 UNIDROIT Principles, Article 7.3.6.(1): *«…On termination of a contract to be performed at one time either party may claim restitution of whatever it has supplied under the contract, provided that such party concurrently makes restitution of whatever it has received under the contract…».*

298 Statement of Claim, ¶ 422.

299 Statement of Claim, ¶ 422.

300 Notice of Arbitration, ¶ 64. Statement of Claim ¶¶ 92 and 93. Exhibit C 7. Suspension Order Request, ¶¶ 10 and 12.

301 Notice of Arbitration, ¶¶ 65 and 73. Exhibits C 52, ¶¶ 6 – 8, C31 and C 32.

302 Exhibits C 31, C 32, C 35 p.4 and C 52, ¶ 6.

303 UNIDROIT Principles, Article 1.7.(1): *«…Each party must act in accordance with good faith and fair dealing in international trade…».*

304 UNIDROIT Principles, Article 1.8: *«…A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment…».*

Aware of this situation, Claimants still *«…acknowledge that restitution of the kind called for above is essentially impossible. Malaysia considers Sabah to be its own by right of sovereign prerogative; it is hardly about to surrender the Leased Territories, of any rights associated therewith, no matter how compelling Claimants' argument that the Sultan never ceded Sabah and that sovereignty therefore remains in his descendants' hands. Failing restitution in kind, Claimants seek a sum of money for the loss of what should be theirs after the 1878 Lease Agreement is over…».*[305] Claimants hence confirmed that their claim in this arbitration is of commercial nature, as they exclusively seek to vindicate their commercial rights before Respondent under both the 1878 Agreement and the 1903 Confirmatory Deed.

255. Claimants allege that, because of the aforementioned situation, *«…it is therefore safe to assume that* «restitution in kind is not possible or appropriate» *in accordance with Article 7.3.6…»*[306] of the UNIDROIT Principles. The Judgement of the International Court of Justice of September 13, 1928, rendered in the *Factory of Chorzow* case, establishes compensation as prevalent remedy in those cases where, as occurs here, restitution in kind is not possible or inappropriate.[307] According to its ¶ 125, if restitution –as Claimants admitted- is not possible, the financial equivalent of this restitution should be paid:

> *«…Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law…».*

Article 7.3.6.(2) of the UNIDROIT Principles endorses this principle as follows: *«…If restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable…».* In its commentary, UNIDROIT clarifies that *«…the allowance will normally amount to the value of the performance received…»* and thus ratifies that the principle enunciated by the *Factory of Chorzow* case uses the criteria of fair market value at the time when restitution was due;[308] in the present case, as of January 1, 2013. The fair market value is a widely accepted basis of value and can be defined as the amount at which property would change hands between a willing seller and a willing buyer when neither is acting under compulsion and when both have reasonable knowledge of the relevant facts.

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[305] Statement of Claim, ¶ 423.

[306] Brödermann Report II, ¶ 564. Statement of Claim, ¶ 426.

[307] Exhibit CL 112: *Factory at Chorzow (Germany v. Poland).* Judgment of the Permanent Court of International Justice of September 13, 1928, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13).

[308] Exhibit CL 61, p. 233: *«… the reasonableness approach should start with the market value at the time when restitution was due…».* Brödermann Report II, ¶ 566.

256. It is a general principle of international law that any breach of an engagement involves an obligation to make reparation of the actual and specific harm caused by an unlawful act.

Damages represent the remedy for contract violation. Article 7.4.1 of the UNIDROIT Principles enunciates this general right to damages as follows: *«…Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused under these Principles…».*

The monetary sums awarded for this reason seek to place the aggrieved party in the same pecuniary position that it would have been if the contract had been performed in the manner provided for by the parties at the time of conclusion. These monetary sums are equivalent to the harm caused to the aggrieved party. Its calculation should follow the general principle of full reparation, formulated in the *Factory of Chorzow* case, as follows:

> *«…The essential principle contained in the actual notion of an illegal act –a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals- is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed…».*[309]

Based on this Judgement, Article 7.4.2. (1) of the UNIDROIT Principles emphasises that *«…*[t]*he aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm…».* Although Claimants are entitled to whatever damages result directly from Respondent's failure to comply with both the 1878 Agreement and the 1903 Confirmatory Deed, the compensatory nature of damages sought to establish that they must be a source neither of gain nor of loss for the aggrieved party.

Claimants –the aggrieved party- have the burden of demonstrating in this arbitration the sufficient causal relationship between an event which may equate to a failure to perform any of the contractual undertakings and the specific breach alleged, as that right to damages arises from the sole existence of non-performance.[310] Respondent admitted that *«…*[r]*egrettably, payments* [under the 1878 Agreement] *ceased in 2013…»*[311], without excuse. Respondent therefore recognized the non-performance of its payment obligations of the annual rent towards Claimants under both the 1878 Agreement and the 1903 Confirmatory Deed as of January 1, 2013, and so discharged Claimants of their burden of proving in this arbitration the existence of this relationship.

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309 Exhibit CL 112: *Factory at Chorzow (Germany v. Poland).* Judgment of the Permanent Court of International Justice of September 13, 1928, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13), ¶ 125.

310 Exhibit CL 61, p. 240.

311 Exhibit C 52, ¶ 9.

257. Section VII.1.ii.B of this Final Award established that the 1878 Agreement and the 1903 Confirmatory Deed were constituted for an undetermined period of time and thus conform long term contracts under Article 1.11 of the UNCITRAL Principles.[312]

Article 7.3.7.(1) of the UNIDROIT Principles[313] contains a special rule applicable to long-term contracts, which excludes restitution for performance made in the past and remits to the provisions of Article 7.3.6 of the UNIDROIT Principles. In ¶ 454 of the Statement of Claim, Claimants complied with this rule, as they allege that *«…*[i]*f the Sole Arbitrator deems the 1878 Lease Agreement terminated from January 2013, all economic benefits from then onward should form part of the restitution value (since Claimants would have collected those economic benefits if Malaysia had tendered restitution upon termination)…».* Respondent did not rebut this allegation in the arbitration and, therefore, it must be considered as validly made, within the boundaries of Article 7.3.7.(1) of the UNIDROIT Principles.

258. Claimants allege that *«…Brattle makes its calculations in U.S. dollars because the industries at issue are indexed to U.S. dollars. Moreover, production of oil, gas and palm oil is mainly intended for export, and therefore paid abroad in U.S. dollars. As a result, damages should be calculated in U.S. dollars...».*[314]

Based on Articles 6.1.9 [315] and 7.4.12[316] of the UNIDROIT Principles, Claimants allege that U.S. Dollars should be the currency of payment to be used in the Final Award to calculate and to determine the amount Claimants seek to recover form Respondent as a consequence of the termination of the 1878 Agreement.

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[312] UNIDROIT Principles, Article 1.11: *«…* «long-term contract» *refers to a contract which is to be performed over a period of time and which normally involves, to a varying degree, complexity of the transaction and an ongoing relationship between the parties…».* Its commentary clarifies the *«…elements* [that] *typically distinguish long-term contracts from ordinary exchange contracts: duration of the contract, an ongoing relationship between the parties, and complexity of the transaction. For the purpose of the Principles, the essential element is the duration of the contract…».*

[313] UNIDROIT Principles, Article 7.3.7: *«…(1) On termination of a long-term contract restitution can only be claimed for the period after termination has taken effect, provided the contract is divisible. (2) As far as restitution has to be made, the provisions of Article 7.3.6 apply…».*

[314] Statement of Claim, ¶ 393.

[315] UNIDROIT Principles, Article 6.1.9: *«…(1) If a monetary obligation is expressed in a currency other than that of the place for payment, it may be paid by the obligor in the currency of the place for payment unless (a) that currency is not freely convertible; or (b) the parties have agreed that payment should be made only in the currency in which the monetary obligation is expressed.*

(2) If it is impossible for the obligor to make payment in the currency in which the monetary obligation is expressed, the obligee may require payment in the currency of the place for payment, even in the case referred to in paragraph (1)(b).

(3) Payment in the currency of the place for payment is to be made according to the applicable rate of exchange prevailing there when payment is due.

(4) However, if the obligor has not paid at the time when payment is due, the obligee may require payment according to the applicable rate of exchange prevailing either when payment is due or at the time of actual payment….».

[316] UNIDROIT Principles, Article 7.4.12: *«…Damages are to be assessed either in the currency in which the monetary obligation was expressed or in the currency in which the harm was suffered, whichever is more appropriate…».*

Provided that the principle of full compensation is respected, Claimants are entitled to choose the currency to be used to calculate the compensation sought.

The result of the available evidence in these proceedings, along with the absence of any rebuttal on the part of Respondent, confirm that Claimants' choice is made in accordance with this principle and with aforementioned provisions of the UNIDORIT Principles. Claimants made this election with the aim to prevent them *«…from suffering further damages as a result of the interplay between Malaysia's delay in making payment and the fluctuation of exchange rates…»*[317] and hence it does not subject Claimants to further losses.

Claimant therefore seek *«…their compensation in U.S. dollars, which is the appropriate currency under the circumstances. This choice binds the Sole Arbitrator…».*[318]

259. The concrete valuation inherent in the principle of full reparation according to the criteria provided in the *Factory of Chorzow* case requires also the assessment of developments occurred after the contractual breach.

The UNIDROIT Principles demand damages representing the full amount of what was agreed in the contract, regardless of the reasons of the breach and regardless of what was *damnun emergens* and *lucrum cessans.* Its Article 7.3.6.(2) emphasises that an allowance in money should be reasonable. It condenses the principle of good faith and fair dealing provided by Article 1.7.(1) of the UNIDROIT Principles.[319]

As the UNIDROIT Principles should focus on the market value at the time restitution is due, the determination of the valuation date is a relevant factor to consider in the calculation.[320] On that basis and given the long-term nature of the 1878 Agreement and the 1903 Confirmatory Deed, it is the Arbitrator's view that, in the present case, Claimants have the right to ask for the fair market value at the date of the violation of the 1878 Agreement, to wit, as of January 1, 2013 onwards. Only those subsequent factors and their negative consequences connected to the breach should be included in this calculation, with the aim to arrive as closely as possible at the situation Claimants would be in absence of the breach.[321] For that purpose, Claimants allege that *«…all economic benefits from then onward should form part of the restitution value (since Claimants would have collected those economic benefits if Malaysia had tendered restitution upon termination)…».* [322] This pretension, which Respondent did not contend in this arbitration, is aligned with the

[317] Statement of Claim, ¶ 399.

[318] Statement of Claim, ¶ 391.

[319] Brödermann Report II, ¶ 565.

[320] Brödermann Report II, ¶ 565, 570 and 574.

[321] Brödermann Report II, ¶ 567.

[322] Statement of Claim, ¶ 454.

special rule contained in Article 7.3.7.(1) of the UNIDROIT Principles and, therefore, valid and legitimate.[323]

260. The standard of proof on the existence and amount of damages claimed includes (i) their existence, (ii) their exact calculation and (iii) their causal relationship with the specific breach alleged. The Final Award already determined the causal relationship and the existence of Claimant's entitlement to damages sought in this arbitration. Therefore, their exact calculation is the only issue pending of assessment by the Arbitrator.

261. ¶¶ 566 to 569 of the Brödermann Report II –which Respondent did not rebut in this arbitration- provide the applicable criteria for this calculation as follows:[324]

> *«…566. To determine the quantum of an allowance in money instead of restitution in kind under a reasonableness-test, regard is to be had to the market value of performance far the lessee. As the exploitation of rights over the Territory has a value for the lessee such value needs to be determined.*
>
> *567. Again, the criteria in article 4.3 can assist. The nature and purpose of the 1878 Lease Agreement (article 4.3 lit. d) - i.e., to exploit the Territory indefinitely - requires, in case of termination under article 6.2.3 (4)(a), that an allowance in money would need to reflect in one sum the indefinite commercial exploitation of the Territory if restitution in kind is impossible or inappropriate. Thus, it would require to not only consider the actual value generated by the lessee between the date of termination and today, but also the value far the lessee in the future.*
>
> *568. Furthermore, applying the reasonableness-test, the Sale Arbitrator may wish to consider that, even if the lessor would receive the rights over the Territory back in their entirety, it would not be able to exercise those rights of exploitation alone. This may require a splitting the revenues between the farmer lessor and the farmer lessee. Good faith and fair dealing (article 1. 7) suggest that the lessor should be awarded at least the share which it would receive if the farmer lessee were to agree with him on a modus to exploit the Territory with due regard to market conditions. In this context, the Sole Arbitrator might also have regard to usages in the industry (articles 4.3 lit. f, 1.9 (2)), e.g. to what kind of revenue splitting is usual in the trade of oil and gas or industrial palm oil exploitation…».*

262. Claimants prepared the damage computations and their quantifications, based on both the Brattle Report and the Meehan Report, submitted to the proceedings. Respondent did not rebut this expert evidence, nor did it offer any expert witness to cross examine regarding the contents of both the Meehan Report and the Brattle Report.

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[323] UNIDROIT Principles, Article 7.3.7: *«…(1) On termination of a long-term contract restitution can only be claimed for the period after termination has taken effect, provided the contract is divisible. (2) As far as restitution has to be made, the provisions of Article 7.3.6 apply…».*

[324] Statement of Claim, ¶ 470.

263. The scope of the Meehan Report *«…is limited to the reasonableness of the offshore areas evaluated in the Brattle Report containing producing oil and/or gas fields and prospective oil and/or gas fields…»* of Sabah.[325] Mr. Meehan was made witness available for cross examination regarding the Meehan Report.

264. The scope of the Brattle Report is based, amongst others, in the assumption of the termination of the 1878 Agreement and delimited as follows: *«…Should the 1878 Lease Agreement be terminated, Counsel for the Claimants has also asked us to compute the restitution value to the heirs of the Sultan of Sulu from Malaysia's failure in light of the significant and unanticipated economic value created by oil and gas, and palm oil production…».* [326] Mr. Lapuerta was made witness available for cross examination regarding the Bratttle Report.

265. The basis of valuation –critical to understanding valuation in this arbitration context- defines the fundamental assumptions on which the value will be based. The Meehan Report –properly supported as expert evidence- concludes that the assumptions of the valuation contained in the Brattle Report are substantively correct on the oil and gas fields assessed and their upside producing potential remining and consistent with the reserves to production ratios. On that basis, the Meehan Report embodies the calculations contained in the Brattle Report as conservative.[327]

266. It is the Arbitrator's views that the Brattle Report, after the establishment of the basis of value, selects the method of valuation defined, explains the result achieved through its assessment, and submits appropriate documentation in support of its analysis.

In its ¶ 25, the Brattle Report declares that *«…Counsel for the Claimants has instructed us to limit our analysis of economic benefits to the oil and natural gas, and palm oil industries…».* [328] According to this scope, the Brattle Report considers that *«…the restitution value should represent only a portion of the total economic benefits to Malaysia, reflecting that neither the Sultan of Sulu in 1878 nor the Claimants as of today are in a position to manage the Leased Territory. Counsel for the Claimants has instructed us to assume that the Claimants should receive a percentage entitlement of 10%, 15% or 20% of the economic benefits from the Leased Territory…».*[329]

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[325] Meehan Report, p. 2.

[326] Brattle Report, ¶ 6.

[327] Meehan Report, Section D.

[328] Statement of Claim, ¶ 458.

[329] Brattle Report, ¶ 7.

The valuation of contract damages should be based in the actual harm incurred and should follow a subjective and concrete approach in accordance with the specific principle of full reparation under international law, contract law and with the UNIDROIT Principles previously indicated. Along these lines of action, ¶ 111 of the Brattle Report discloses that it followed *«…recommended best practice in financial valuation and use the Capital Asset Pricing Model («CAPM») to derive risk-adjusted discount rates. The analysis follows the standard approach of determining the discount rate by reference to the historical stock price performance of comparable companies and financial assets. Appendix E describes in detail our discount rate calculations…».* The Brattle Report refers to the income capitalization approach, a valuation method, based on the economic principle of anticipation of benefits, which includes the application of a discount factor –one of the most widely used types of the Discounted Cash Flow method- that helps to calculate the present value of an amount of money expected in the future.[330] This approach is in accordance the principle of fair market value contained in the *Factory of Chorzow* case.

267. Article 7.4.4 of the UNIDROIT Principles[331] should be taken into account and be analysed in accordance with Exhibits C 35 and C 36.

Exhibit C 35 is a letter dated April 28, 2017 sent by Claimants to Respondent, where Claimants indicated that

> *«…the discovery of game-changing petroleum resources in the region. The last resulted in additional revenue to Malaysia massive that it would have been inconceivable in scope and scale to the original signatories.*
>
> *Those resource discoveries –fist oil, then more recently natural gas- have utterly transformed the complexion of the region. They were unforeseeable and unexploitable at the time of concJusion of the 1878 Agreement, and they have fundamentally unbalanced the equilibrium of the bargain in the 1878 Agreement.*
>
> *We are thus now in a position where the heirs receive the equivalent of US$1,200 annually in connection with territory that (even with today's lower oil and gas prices) produces approximately 20 million times that much in annual revenue from petroleum resources. If ever there were a case for the renegotiation of an agreement that had become fundamentally unbalanced due to changed circumstances, this is it.…».*

Exhibit C 36 is another letter sent by Claimants to Respondent on July 2, 2018, where Claimants stated that *«…*[t]*he core of my clients' claim is that the contract with the Sultan of Sulu allowed for the payment of annual compensation for all lost revenue to the Sultan from what is now, essentially, Sabah. The laws in force when and where the agreement were signed, and today, allow for this to be adjusted as circumstances radically change*

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330 Brattle Report, p. 111. Statement of Claim, ¶ 401.

331 UNIDROIT Principles, Article 7.4.4: *«…The non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its nonperformance…».*

(which of course they have). The payments have never been so adjusted, and the cumulative debt is nominally in the region of RM 2 trillion…».

Claimants offered negotiations to Respondent in both letters. Respondent simply ignored this reiterated offer and provided instead no answer to either of them. The contents of these Exhibits show, in the Arbitrator's opinion, that Claimant informed Respondent of the situation concerning the 1878 Agreement and the 1903 Confirmatory Deed and on their potential financial consequences if Respondent refused to enter into any negotiation with Claimants and the dispute were to be submitted to arbitration, as has finally occurred.

The parties to a contract are always expected to act according to what is reasonable in view of the nature of their relationship, their economic interest and their legitimate expectations. ¶ 603 of the Brödermann Report II identifies the consequences to be derived from Respondent's conduct, in the context of the UNIDROIT Principles, as follows: *«…The refusal to react to any request to renegotiation gives ground for a claim for damages under article 7.4.1 et seq. because it constitutes non-performance to cooperate under article 5.1.3. The amount of damages will need to be calculated on the basis of the principles of full compensation (article 7.4.2) certainty of harm (article 7.4.3) and foreseeability (article 7.4.4). Each refusal to renegotiate may constitute an individual act of non-performance giving rise to damages. It is sensible to include within these damages the legal costs of an arbitration to terminate or rebalance the agreement…».*

268. The Final Award declares January 1, 2013 as the date of termination of the 1878 Agreement and of the 1903 Confirmatory Deed. Claimants' seek, as main remedy, the recognition of their entitlement to the restitution value of the rights over the leased territory along North Borneo, with pre-award interest as of January 1, 2013, of USD 32.20 billion, or alternatively, of USD 24.15 billion, or alternatively, of USD 16.10 billion and so seek reimbursement from Malaysia.

269. The Brattle Reports concludes that each field in Sabah produces crude oil of unique quality. The oil production in this territory amounted to 1,916 million barrels from 1965 to February 2020 and forecasts an additional 1,154 million barrels of oil production from February 2020 to 2044, equivalent to an additional 60% relative to historical production. Based on the financial commitment which represent future contracts for Brent deliveries as far as 2029, the Brattle Report calculates *«…the economic benefits to Malaysia based on the EIA's reference or base case, which forecasts a Brent price of USD 96 per barrel (in 2019 prices) in 2044, equivalent to USD 156 per barrel in nominal terms…».* [332] Respondent did not rebut these figures in the arbitration and was unable to assess an alternative value. The calculations contained the Brattle Report are correct and accurate.

[332] Brattle Report, ¶¶ 48, 74, 75 and 78.

270. The Brattle Report determines that gas production amounted to 364 million barrels of oil equivalent through January 2020 and forecasts a further 1,365 million barrels of oil equivalent in gas production from 2020 to 2044, equivalent to another 375%. It also states that gas production in Sabah nevertheless expanded significantly in late 2014, following the construction of the Sabah-Sarawak pipeline and the development of a cluster of gas fields, which gathers most of the offshore gas from Sabah and transports it to Petronas's Bintulu liquefaction facility in Sarawak for liquefaction and onward export as LNG.

271. The Brattle Report fixes the lifecycle costs around USD 18 per barrel for oil only fields, around USD 8 to 14 per barrel of oil equivalent for gas only fields, and between USD 18 and 23 per barrel of oil equivalent for oil and gas producing fields.[333] Respondent did not rebut these figures in the arbitration and was unable to assess an alternative value. The calculations contained the Brattle Report are correct and accurate.

272. Respondent has promoted the cultivation of oil palm trees in Sabah since the 1960s and saw an overall expansion since 1975.

The Brattle Report concludes that Respondent obtained significant economic benefits from this cultivation under the 1878 Agreement and the 1903 Confirmatory Deed and will continue to generate significant tax and other income for the Malaysian Government, as Malaysian upstream palm oil producers paid corporate income tax at a rate of 25% before 2014, after which the rate decreased to 24%. Additionally, Respondent collects an export duty of approximately 20% from producers of crude palm oil and crude palm kernel oil prior to 2013. The effective export duty rate for crude palm oil was approximately 20% prior to 2013. Respondent implemented a new export duty structure in 2013, reduced the effective duty rate on crude palm oil to less than 5% and effectively eliminated export taxes on crude palm kernel oil. Malaysia finally collects an excess profit tax from crude palm oil producers, which depends on the level of crude palm oil prices.[334]

The Brattle Report indicates that «*…unlike oil and gas, we know of no independent study of palm oil production disruption risks. We therefore apply the same haircut to the production to palm oil in Sabah, as we did to the production of oil and gas. The assumption is that events which could disrupt palm oil production would be similar in frequency, duration and magnitude to those likely to disrupt oil and gas production…*».[335]

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[333] Brattle Report, ¶¶ 81 – 84, 86, 91, 95, 96 and 98.

[334] Brattle Report, ¶¶ 143, 145, 150 and 152.

[335] Brattle Report, ¶ 181.

The Brattle Report concludes that, in accordance with its calculations, *«…Malaysia will receive total undiscounted cash flows of more than USD 2.75 billion from 2020 until 2030. We estimate a corresponding present value of USD 9.12 billion out to perpetuity, equivalent to MYR 37.94 billion at the prevailing USD/MYR spot exchange rate…».*[336]

Respondent did not rebut these figures in the arbitration and was unable to assess an alternative value. The calculations contained the Brattle Report are correct and accurate.

273. Claimants seek to determine their share based on a comparative analysis of *«…the royalty rates of various countries, the practices and promises of the Federal and State Governments of Malaysia and Sabah with respect to their royalties, and the historical expectations of the Sultanate's revenue stream…Claimants consider a restitution value that reflects 20% …, 15%…or 10%…of Malaysia's economic benefit from the Leased Territories to be appropriate…»*,[337] in this order of preference.

The option of 20% royalty rate should be disregarded, as Claimants admit in their analysis that *«…*[g]*iven the current state of federal Malaysian politics, it is unclear when or whether the 20% rate will apply…».*[338]

The option of 10% share to Malaysia's economic benefits should also be discarded, as Claimants consider that *«…*[t]*his 10% share is equivalent to the 10% royalty levied by Malaysia on the value of all oil and gas produced in Sabah. The 10% is also close to the ratio of the Dent Brothers' estimate of the territory's value, compared with the Sultan's annual lease payments according to their correspondence, as well as the ratio of those annual payments to the Company's annual revenue in its first reported year…».*[339]

Therefore, it is the Arbitrator's view that the option of the 15% share to Malaysia's economic benefits is the more appropriate to comply with the criteria of the UNIDROIT Principles, as explained in the preceding paragraphs. Claimants admit that *«…*[f]*ifteen percent includes the 10% royalty the Malaysian government levies on the value of all oil and gas produced in Sabah, and the newly imposed 5% sales tax on petroleum products instituted by the Sabah government in April 2020, pursuant to the State Sales Tax Ordinance 1998…».*[340]

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[336] Brattle Report, ¶ 182.

[337] Statement of Claim, ¶ 460.

[338] Statement of Claim, ¶ 462.

[339] Statement of Claim, ¶ 465.

[340] Statement of Claim, ¶ 463.

274. On this basis and pursuant to Article 7.4.11.(1) of the UNIDROIT Principles,[341] the Brattle Report concludes that the restitution value payable to Claimants since January 1, 2013 to February 2020 under the 1878 Agreement and the 1903 Confirmatory Deed is USD 4.87 billion, including pre-award interest,[342] corresponding to a 15% of the historical benefits obtained by Respondent during that period (i.e., USD 32.49 billion). The Brattle Report also concludes *«…that Malaysia should pay to the Claimants in restitution of the stream of expected economic benefits from Sabah now lost to the Claimants…from continued oil and gas development in Sabah out to a 2044 horizon…»* and *«…from the ongoing cultivation of oil palms in Sabah out to perpetuity…»* (i.e., USD 66.99 billion) the amount of USD 10.05 billion, corresponding to a 15% sharing factor.[343]

275. Claimants also sought compensation from Respondent, in the amount of USD 9.23 billion, as the estimated future economic benefits and revenue that Respondent would, in their opinion, continue to produce after 2044. Claimants maintain that *«…* [i]*f these future economic benefits are not included within the restitution value to be paid to Claimants, they would obviously be undercompensated…».*[344]

This claim cannot be upheld, as it is composed of an assessment of an estimation of future costs projections and therefore, contrary to Article 7.4.3 of the UNIDROIT Principles.[345]

Material damages are calculated as the financial or economic equivalent of the loss caused to Claimants and therefore compensation for damages will only cover the damages that Claimants are able to prove before the Arbitrator, respecting their compensatory nature.

The damage for which compensation is sought must be real and certain and be properly proven. Claimants submitted an assessment of the estimated future, as they admit that *«…contingent fields have not yet been developed…»*[346] and that *«…*[f]*uture economic benefits beyond 2044 cannot be precisely quantified…».*[347] In this regard, the Brattle Report concludes that *«…given the extent of available information, we cannot assess with any certainty whether new drilling campaigns will in fact arise or if new discoveries will*

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341 UNIDROIT Principles, Article 7.4.11.(1): *«…Damages are to be paid in a lump sum…».*

342 Unless the parties agreed otherwise, if the debtor fails to pay a sum of money due, it has to pay the creditor interest on that sum from the time when payment was due. Brattle Report, ¶¶ 553, 213, 198, 197 and 196 and Table 20. The Brattle Report determined the average bank short-term lending rate to primer borrowers prevailing in the United States of America as 3.96% per annum and applied *«…the historical USD-denominated prime interest rates to the seven fixed annual lease amounts that would have come due between 2013 and February 2020…».* Respondent did not rebut the pre-award interest determined by the Brattle Report in the arbitration and was unable to assess an alternative value. The interest rate so determined is reasonable and attaches to what provided by Article 7.4.9.(2) of the UNIDROIT Principles.

343 Brattle Report, ¶¶ 218 and 220 and tables 23 and 24. Statement of Claim, ¶ 478 – 482 and 500.

344 Statement of Claim, ¶ 485.

345 UNIDROIT Principles, Article 7.4.3.1: *«…Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty…».*

346 Statement of Claim, ¶ 484.

347 Statement of Claim, ¶ 487.

be made, leading to a continuation of production after the current forecast horizon of 2044…».[348]

Jointly considered, these statements confirm that damages sought by Claimants on this basis do not rest on sufficiently certain economic projections, with sufficient degree of certainty. They can be characterised as future damages, which cannot be recognised as such.

These reasons, jointly considered, justify the rejection of this Claimants' claim.

276. For the reasons detailed above and on the result of the evidence presented in this arbitration, the Arbitrator concludes that Claimants are entitled to recover from Respondent the restitution value of the rights over the leased territory along North Borneo under the 1878 Agreement and the 1903 Confirmatory Deed, with pre-award interest of 3,96% per annum, as of January 1, 2013 until 2044 in the amount of USD 14.92 billion.

Pursuant to Article 11.2.1 of the UNIDROIT Principles[349] in relation to apportion of performance in cases of several obligees, Claimants admit that their rights are joint and several and, on that basis, kindly consider that the *«…Arbitrator need only award the full amount to Claimants, and thereafter Claimants can distribute the proceeds among themselves…».*[350] This petition is upheld, as Respondent fails to provide any position on same.

277. As the principal Claimants' claim for restitution is upheld, the alternative claim does not need to be answered.

5. *Post-award Interest*

i. The Parties' Positions

278. Claimants submit that their entitlement to post award interest, compounded on a monthly basis, *«…on any amount the Sole Arbitrator awards to Claimants…».*[351]

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[348] Brattle Report, ¶ 222.

[349] UNIDROIT Principles, Article 11.2.1: *«…When several obligees can claim performance of the same obligation from an obligor: (a) the claims are separate when each obligee can only claim its share; (b) the claims are joint and several when each obligee can claim the whole performance; (c) the claims are joint when all obligees have to claim performance together…».*

[350] Statement of Claim, ¶ 567.

[351] Statement of Claim, ¶¶ 563 and 565.

279. Respondent's position on this issue is contained in its letter of September 19, 2019, as follows:[352]

> *«…9. …Malaysia is also agreeable to paying simple interest of 10% p.a…*
>
> *10. Accordingly, please revert with details of your clients' names and banking records so that we can arrange the telegraphic transfer of the relevant payments, immediately…».*

ii. The Arbitrator's Analysis and Findings

280. Post-award and pre-award interest should be handled in a different manner in the present matter. Section VII.4.ii of this Final Award dealt with the issue of pre-award interest.

281. Post-award interest, different from pre-award interest, begins to accrue after the Final Award defines the final amount with certainty and the payment obligation is established. From that moment on, there is a payment obligation so that Respondent is simply in default if it does not fulfil this obligation.

282. Respondent agreed *«…to paying simple interest of 10% p.a. on the annual payments for each of the years concerned…»*. Claimants made no objection and therefore the offer made by Respondent should be considered as accepted. The Arbitrator finds that this rate is reasonable. The Arbitrator orders Respondent to pay interest at a rate of 10% per annum, calculated on a simple basis (i.e., non–compound).

283. Considering the significant amount of damages which Respondent owes to Claimants, Respondent is given a grace period of three months as from the date of the Final Award in which no interest will accrue for it to address the financial and administrative necessities for the payment of the amount of damages determined in the Final Award. After the expiration of such grace period, the simple rate determined in the Final Award will apply until full payment of the sums awarded to Claimants.

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[352] Exhibit C 52.

VIII. THE COSTS

284. Claimants sought a decision on costs of these proceedings in their favour.[353] Respondent failed to provide any views on the issue. The Arbitrator will render a decision on the costs of the merits phase on the arbitration in this Final Award.

285. Claimants' argument, based on the principle of *costs follow the event*, seek that Respondent bear the costs of the arbitration. Claimants also consider Respondent's obstructive behavior in these proceedings as another factor to be aseesed when allocating costs, which Claimants pleaded as follows:

> *«…578. The Sole Arbitrator should take Malaysia's obstructive behavior into account when making a decision on costs. Malaysia's egregious conduct includes the following:*
>
> *(i) Claimants repeatedly, but unsuccessfully, sought to avoid the submission of this dispute to an arbitrator by attempting to engage in negotiations of the 1878 Lease Agreement. Malaysia failed even to reply to Claimants' repeated requests. Therefore, Malaysia breached its duty to engage in renegotiations under both the 1878 Lease Agreement and Article 6.2.3(3) of the UNIDROIT Principles. Prof. Brödermann confirms that Malaysia's evasive behavior is a violation of said provision of the UNIDROIT Principles.*
>
> *(ii) During the arbitration, Malaysia has refused to take part in the proceedings by failing to appoint legal counsel and to respond to the Sole Arbitrator's instructions.714 Out of nowhere, Malaysia appointed the law firm Herbert Smith Freehills («*HSF*») mere hours after the first preliminary conference. HSF participated in the proceeding for a few weeks and then renounced its representation. This stunt caused substantial unnecessary delay and work, also affecting the merits part of this arbitration, which would otherwise be considerably more advanced by now.*
>
> *(iii) Malaysia has failed to pay its portion of the deposits for this arbitration, forcing Claimants to pay all such deposits.*
>
> *(iv) Despite its official non-appearance in the proceedings, Malaysia has systematically sent intimidatory communications addressed to Claimants and the Sole Arbitrator, often containing threats.*
>
> *(v) Malaysia has self-servingly sought an anti-suit injunction in the courts of its own territory, which has led to further intimidatory and coercive visits to, and* ex parte *communications with, the Sole Arbitrator.*
>
> *(vi) Malaysia's conduct has substantially increased the costs of the proceedings by forcing Claimants to serve Malaysia hard copies of their submissions at no fewer than 5 different addresses to ensure safe receipt.*

[353] Final Award, Section IV.4.vi. Statement of Claim, ¶¶ 573 – 587. Claimants' Petition for an Award on Costs (Merits Phase), dated March 16, 2021.

579. For more than two years, beginning with Claimants' notice of intent to commence arbitration dated 2 November 2017,720 Malaysia's tactics have ranged from obstinate silence, to overt defiance of the Court's and the Sole Arbitrator's jurisdiction, to disingenuous delay tactics, and ultimately to illegal attempts to intimidate the Sole Arbitrator. Despite these tactics, the Sole Arbitrator generously offered Malaysia every opportunity to participate in the arbitral process and put forward its position. Malaysia has snubbed the Sole Arbitrator at every turn, either with aggressive threats of contempt of court, or with stubborn silence. All this is plain bad faith, at the very least…».

286. Article 37.6 of the SAA provides as follows:

«…Subject to the agreement of the parties, the arbitrators shall decide in the award on the costs of the arbitration, which shall include the fees and expenses of the arbitrators and, where applicable, the fees and expenses of counsel or representatives of the parties, the cost of the services provided by the institution administering the arbitration and the other expenses of the arbitral proceedings…».

Based on these guidelines, the term *costs*, in the case at hand, includes:

A. The fees of the Arbitrator and his reasonable expenses incurred;

B. The legal and other costs incurred by the Parties in relation to the arbitration, to the extent that the Arbitrator determines that the amount of such costs is reasonable;

C. The reasonable costs of expert advice of the Parties;

D. The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the Arbitrator; and

E. The expenses related to the organisation of the proceedings.

287. It is acknowledged that the successful party is entitled to prosecute or defend its claims in the manner it considers necessary and appropriate, and arguably the party and its representatives are best placed to evaluate what resources are required to win the case. However, it will remain within the arbitrator's discretion to decide whether or not that party will recover its costs in full, according to the reasonability of the expenses incurred and to allocate the costs, weighting the concurring circumstances as he considers relevant.

When allocating costs in international commercial arbitration it may be necessary to consider other circumstances, where relevant, including the extent to which each party conducted the arbitration in an expeditious and cost-effective manner.

In the present case, Respondent's reiterated and unjustified refusal to comply with the deadlines granted were, amongst others, circumstances that contributed to delay the conduct of this arbitration and to incur additional costs. Claimants submitted extensive and supported pleadings, which were not rebutted by Respondent. Respondent's procedural conduct has substantially –and, in the Arbitrator's view, unnecessarily- increased the amount of time the Arbitrator and each Party has had to devote to these proceedings of the arbitration to determine the debated issues contained in the Final Award. The relevance of the grounds raised by Respondent proved to be of limited importance for the proceedings.

The Arbitrator has considered all the circumstances to determine the most appropriate allocation of costs in this arbitration.

288. As a rule, a party may seek reimbursement of its legal and other costs so far as those have been incurred in connection with these proceedings of the arbitration; to wit, only expenses which were necessary for the preparation of the case and directly linked to the filing of the arbitration will be considered costs of the arbitration.

The Arbitrator needs to be satisfied that a cost was incurred specifically for the purpose of pursuing the arbitration, has been paid or is payable, and was reasonable.

The Claimants submitted a summary of detailed costs incurred in this merits phase of the arbitration, including both Counsel (i.e. 4-5 Gray's Inn, B. Cremades & Asociados Abogados and Romulo Mabanta Buenaventura Sayoc & De los Ángeles), Expert Reports and Arbitrator's Fees and determined as follows:[354]

Concept	Amount $
1. Counsel's Fees	2,796,099.81
2. Counsel's Costs	56,299.62
3. Experts' Fees	649,994.81
Total	3.502.394.24

Respondent failed to submit any summary of its detailed costs incurred in this arbitration, nor did it rebut those amounts that Claimants submitted.

289. On August 14, 2020, the Parties were invited to deposit the amount of USD 2,500,000 (USD 1,250,000 each by Claimants and Respondent, respectively) as an advance on account of the Arbitrator's fees and arbitration costs for the substantive phase of the arbitration.[355]

[354] Claimants' Petition for an Award on Costs (Merits Phase), dated March 16, 2021, Appendix 1.

[355] Procedural Order 19.

On August 28, 2020, Claimants paid their share of the deposit (i.e., USD 1,250,000).

On September 4, 2020, Respondent failed to make its payment (i.e., USD 1,250,000), nor did it provide an acceptable excuse.

On September 18, 2020, the Arbitrator granted an extension to Respondent for it to lodge its corresponding deposit of USD 1,250,000 by close of business, Madrid time, on October 16, 2020.[356] Respondent failed, again, to attend this invitation, nor did it provide an acceptable excuse.

On October 22, 2020, the Arbitrator invited Claimants to make a deposit of USD 1,250,000 to substitute for Respondent by close of business, Madrid time, on November 13, 2020 and in accordance with the instructions contained in ¶¶ 59 and 60 of Procedural Order 1.[357]

On November 18, 2020, Claimants substituted Respondent's share of the deposit (i.e., USD 1,250,000) as directed by Procedural Order 26.

290. On July 21, 2021, there was a balance of funds in favour of Claimants in the amount of USD 998,497,36. The Arbitrator transferred this amount to Claimants on July 27, 2021, as a consequence of the situation described in Section IV.4.viii.A of this Final Award.

291. On November 11, 2021 and because of the situation described in Sections IV.4.viii.B and IV.4.viii.C of this Final Award, the Parties were invited to deposit the amount of USD 850,000 (USD 425,000 each by Claimants and Respondent, respectively) by way of further advance on account of Arbitrator's fees and arbitration costs. The deposit was to be made by close of business, Madrid Time, on November 30, 2021.[358]

Claimants paid their share of the deposit (i.e., USD 425,000) on November 29, 2021 pursuant to Procedural Order 46. Respondent failed to make its payment.

On December 15, 2021, the Arbitrator granted an extension to Respondent for it to lodge its corresponding deposit of USD 425,000 by close of business, Madrid Time, on December 17, 2021, pursuant to the instructions contained in Procedural Order 46. The Arbitrator invited Claimants to make a deposit of USD 425,000 to substitute for Respondent by close

[356] Procedural Order 23.

[357] Procedural Order 26.

[358] Procedural Order 46.

of business, Madrid Time, on December 30, 2021, should Respondent fail to attend this invitation, the Arbitrator.[359]

As Respondent failed to attend this invitation, Claimants substituted Respondent's share of the deposit (i.e., USD 425,000) on December 23, 2021.[360]

292. The advance on account of the Arbitrator's fees and arbitration costs for the substantive phase of the arbitration is finally determined in the amount of USD 2.351.592,64.

293. In the Final Award, Claimants' positions on the merits prevailed almost in its entirety. Respondent has been unsuccessful, and its objections have been fully dismissed. It is the Arbitrator's view that Claimants are entitled to be reimbursed by Respondent 100% of the costs and expenses of Counsel, and 100% of their experts' fees and costs incurred in this arbitration.

The resulting figures are determined as follows:

Concept	Amount $
1. Counsel's Fees	2,796,099.81
2. Counsel's Costs	56,299.62
3. Experts' Fees and Costs	649,994.81
Total	3,502,394.24

Respondent is not entitled to be paid either any legal fees or any legal costs.

294. The Arbitrator records that Claimants have deposited a total of USD 2.351.592,64 to cover the arbitration direct costs of the merits phase of the arbitration, which include the fees and expenses of the Arbitrator and other direct expenses and estimated charges related to the conduct of this arbitration including, amongst other, court reporting, interpretation, translations, courier, and audio-visual services.

295. Respondent never paid any funds towards the arbitration costs. Claimants paid the full amount of the initial deposit on November 18, 2020 (USD 1,250,000), and on December 23, 2021 (USD 425,000) on behalf of Respondent.

[359] Procedural Order 47.

[360] Procedural Order 48.

Respondent shall reimburse Claimants the amount of USD 1,675,000 for the Respondent's fifty per cent share of the deposit paid by Claimants on behalf of Respondent.

296. The arbitration costs of the merits phase of these proceedings are determined to be USD 2,351,592.64 comprised of the following:

Concept	Amount $
1. Arbitrator's Fees	2,338,247.42
2. Hearing costs and transcripts	13,345.22
Total	2,351,592.64

Claimants paid USD 1,448,247.42 corresponding to Arbitrator's Fees to date for the merits phase.

These amounts were already deducted by the Arbitrator from the funds deposited with the Arbitrator by Claimants. The remaining balance of USD 850,000 will be drawn from the funds with the Arbitrator deposited by Claimants.

It is the Arbitrator's view that Respondent should bear all the arbitration costs.

IX. THE DECISION

For the reasons set forth above, having carefully considered all the Parties' arguments and submissions and the evidence before him, the Arbitrator makes the following award and order:

A. On the Claim:

1. The Arbitrator decides and declares that 1878 Agreement is an international private lease agreement, of commercial nature;

2. The Arbitrator decides that declares that Respondent breached the 1878 Agreement;

3. The Arbitrator declares the termination of the 1878 Agreement as of January 1, 2013;

4. The Arbitrator decides that Claimants are entitled to recover from Respondent the restitution value of the rights over the leased territory along

North Borneo under the 1878 Agreement and the 1903 Confirmatory Deed, with pre-award interest of 3,96% per annum, as of January 1, 2013 until 2044, and orders Respondent to pay to Claimants the amount of USD 14.92 billion; and

5. The Arbitrator orders Respondent to pay to Claimants interest on the sum in the previous paragraph at a rate of 10% per annum, calculated on a simple basis. Respondent is given a grace period of three months as from the date of the Final Award in which no interest will accrue for it to address the financial and administrative necessities for the payment of the amount of damages determined in the Final Award. After the expiration of such grace period, the aforementioned rate will apply until full payment of the sums awarded to Claimants.

B. On the costs:

1. The Arbitrator decides that Respondent should bear all legal and expert costs incurred by Claimants in the merits phase of this arbitration. Claimants are entitled to be reimbursed by Respondent of these amounts. Therefore, Respondent is ordered to reimburse Claimants the amount of USD 3,502,394.24, corresponding to Claimants' Counsel and Experts' fees and costs;

2. The Arbitrator decides that arbitration costs of the merits phase of these proceedings are determined to be USD 2,351,592.64 and that Respondent should bear all the arbitration costs of this phase of these proceedings. Therefore:

   a. Respondent is ordered to reimburse Claimants the amount of USD 2,351,592.64; and

   b. Respondent is ordered to reimburse Claimants the amount of USD 1,675,000 for the Respondent's fifty per cent share of the deposit paid by Claimants on behalf of Respondent.

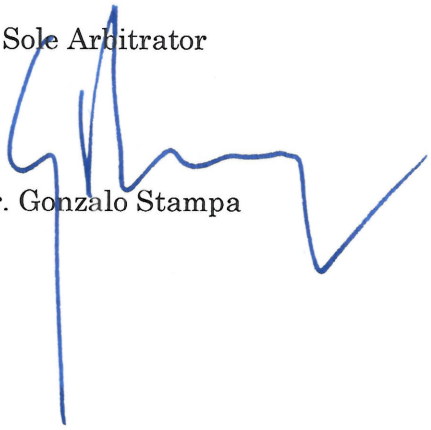
   The remaining balance of USD 850,000 will be drawn from the funds with the Arbitrator deposited by Claimants.

C. All requests, claims, motions and all other and further prayers for relief that the Parties have put forward in this arbitration and not otherwise dealt with in this Final Award are denied and rejected.

Place of Arbitration: Paris (France)

Date: February 28, 2022

Sole Arbitrator



Dr. Gonzalo Stampa