

OPENING REMARKS BY YB DATO' SRI AZALINA OTHMAN SAID
INTERNATIONAL ARBITRATION COLLOQUIUM 2023

Tuesday, 4th July 2023

YAB Datuk Seri Panglima Haji Hajiji bin Haji Noor
Chief Minister of Sabah

YB Senator Tan Sri Dato Seri Dr. Wan Junaidi Tuanku Jaafar
President of the Senate

YB Datuk Armizan bin Mohd Ali
Minister in the Prime Minister's Department (Sabah, Sarawak Affairs and Special Duties)

YB Datuk Seri Panglima Haji Kadzim M. Yahya
Speaker of Sabah State Legislative Assembly

YB Datuk Seri Panglima Sr. Haji Safar bin Untong, JP
Secretary of Sabah State Government

YB Tuan Khairul Firdaus bin Akbar Khan
Deputy Minister of Tourism, Arts and Culture

YB Tuan Mustapha @ Mohd Yunus bin Sakmud
Deputy Minister of Human Resources

YB Senator Tan Sri Datuk Seri Panglima Anifah bin Aman
Member of the Special Secretariat

YBhg. Dato' Sri Khairul Dzaimie bin Daud
Director General of Legal Affairs Division
Prime Ministers' Department

YB Deputy Speakers of Sabah State Legislative Assembly and Assistants Minister

**YB Members of Parliament and YB Members of Sabah State
Legislative Assembly**

YBhg. Tan Sri / Datuk Seri Panglima / Datuk / Dato'

Head of Government Agencies

Senior Government Officials

Esteemed panel of speakers and moderators;

Distinguished guests;

Members of the Media;

Ladies and Gentlemen.

*Assalamualaikum and a very good morning to all. Ohayo
Gozaimas!*

1. Once again, it is my pleasure to welcome all of you to the second series of the International Arbitration Colloquium 2023 with the theme, "*State Sovereignty and Immunity in Commercial Arbitration*" at Sabah.

2. At the outset, I must apologise for not being physically present at Sabah Edition Colloquium as I am currently attending the ASEAN-Japan Special Meeting of Justice Ministers and ASEAN-G7 Justice Ministers' Interface in Japan. In fact, I am in the midst of attending bilateral meetings with foreign counterparts. Be that as

it may, it is pertinent that this Colloquium must go on as scheduled especially after the victorious Hague Court of Appeal decision on 27 June 2023 and before the upcoming Colloquium in London, United Kingdom.

3. I would like to thank Yang Amat Berhormat Dato' Seri Anwar bin Ibrahim, the Prime Minister of Malaysia for his continued support and unwavering trust in our ongoing effort in ensuring Malaysia's interests, sovereign immunity and sovereignty are protected at all times. I also want to take this opportunity to extend my respect and appreciation to Yang Amat Berhormat Datuk Seri Panglima Haji Hajiji bin Noor, the Chief Minister of Sabah, who will be delivering the keynote address and officiating our Colloquium today.

4. I wish to take this opportunity to congratulate the Legal Affairs Division of the Prime Minister's Department (BHEUU, JPM), the Asian International Arbitration Centre (AIAC), the Institute for Development Studies, Sabah (IDS), and the Sabah Law Society (SLS) for their commendable effort and commitment in making this Colloquium another reality. I would also like to express my gratitude to all distinguished panelists and moderators for their participation

and unwavering commitment to share their expertise and knowledge with all of us in this Colloquium.

Distinguished guests, ladies, and gentlemen,

5. Turning to the legal standpoint, I must reiterate that the arbitration proceeding, as a whole, is null and void given the absence of any intention between the contracting parties to arbitrate their disputes in the 1878 Agreement. It is evident that the 1878 Agreement, at most, denotes a dispute resolution provision signaling the Parties' mutual consent to appoint an independent third party to resolve any disputes and differences.

6. As we all know, arbitration, akin to other alternative dispute resolution mechanisms, requires unequivocal, express, and mutual consent of both contracting parties to adopt the same. Having said that, nowhere in the 1878 Agreement was the Parties' intention to elect arbitration as the preferred dispute resolution mechanism stated. On that basis, in the absence of the pre-requisite arbitration agreement, the commencement of the purported arbitration proceeding by the Claimants is manifestly without basis.

Distinguished guests, ladies, and gentlemen,

7. I must emphasize that the Government of Malaysia has never, in any circumstance, renounced its sovereign immunity in this purported arbitration proceedings. No State should be subject to the jurisdiction of any court of another State. This is a principle recognised under customary international law.

8. The Government of Malaysia has been consistently raising timely objections against the Claimants' blatant attempt in forum shopping, the jurisdiction of the arbitrator, the continuation of arbitral proceedings despite the Spanish Court's orders, the unprecedented shift in the seat of arbitration, as well as the delivery of the purported Final Award.

9. This frivolous case financed by an international litigation funder, Therium, has raised several alarming concerns specifically in respect of the necessity to uphold ethical conduct, integrity, professionalism, and good practices by international arbitrators which is the cornerstone of any legitimate commercial arbitration. This is fundamental to preserve the confidence of any parties who choose arbitration to settle their dispute, failing which, could cause the whole arbitration system to be undermined.

Distinguished guests, ladies, and gentlemen,

10. On the 6th of June 2023, the Government of Malaysia achieved a landmark victory in the ongoing legal battle against the Claimants wherein the Paris Court of Appeal found that the arbitrator wrongly upheld his jurisdiction. This decision has added tremendous value and confidence to Malaysia's defence in this matter.

11. Most importantly, the recent landmark decision by The Hague Court of Appeal rendered on the 27th of June 2023 is the first decision that rejects the Claimants' attempt to recognise and enforce the purported Final Award. This decision was unequivocally made based on the following 3 grounds:

- (i) no Final Award could have been lawfully rendered due to the annulment of Dr. Gonzalo Stampa's appointment as arbitrator by the Spanish court that appointed him;
- (ii) no valid arbitration agreement exists; and
- (iii) the exceptional stay of enforcement of the purported Final Award in Paris renders the sham award

incapable of recognition and enforcement in The Netherlands.

12. The Hague Court of Appeal decision is indeed consistent with the discussions and findings of the experts that were conveyed during the first series of the Colloquium held in Kuala Lumpur on 9th of May 2023. It is hoped that the success obtained through The Hague Court of Appeal decision will contribute to subsequent successes in ongoing proceedings commenced by the Government in challenging the recognition and enforcement of the purported Final Award in other jurisdictions, including in Luxembourg.

Distinguished guests, ladies, and gentlemen,

13. Dr. Gonzalo Stampa is currently indicted in Spain on the charges of contempt of court and “unqualified professional practice” following his blatant disregard of the Madrid Court’s order which annulled his appointment as the arbitrator in this proceeding. The Criminal Investigation Court had decided to proceed with the oral trial stage against the rogue arbitrator, Dr. Gonzalo Stampa, which will be tried before the Madrid Criminal Court.

14. Keeping in mind the successive victories achieved by Malaysia, the Government remains devoted to our legal pursuits in ensuring that the purported Final Award will be eventually annulled by the Paris Court of Appeal. Rest assured that we will not succumb to any of the unscrupulous enforcement tactics utilized by the Claimants. This would include taking the necessary legal actions in certain identified jurisdictions against Therium, that is known to assist the Claimants in commencing this sham arbitration and to ultimately end the enforcement of the illegal awards.

15. Meanwhile, the Government has also extended its investigative operations to probe into the possibility of any Malaysians providing aid to the Claimants to strategise their claims against Malaysia. In this regard, any person found to have been in close affiliation and contact with the so-called heirs based on clear evidence will be considered to have committed an offense under our penal laws, including an act of treason against Malaysia.

16. In the near future, the MADANI Government will also legislate a State Immunity Act with the purpose of codifying the principle of state immunity as part of Malaysian law to reflect Malaysia's effort to ensure the sovereignty of States are protected, in the event of similar frivolous and claim is brought against those States before the courts of Malaysia.

17. This law will reflect the general principles of international law on sovereign immunity, including effective service on foreign States, to uphold the rights and interest of parties concerned, safeguard the sovereignty of States and to preserve and promote friendly relations with other states. With this, it is hoped that reciprocal treatment will be accorded to Malaysia in the event Malaysia is brought to the courts of a foreign State in the future.

18. The MADANI Government commits to table the State Immunity Bill during the October Parliament session. The law is at present in the works at the policy stage.

Distinguished guests, ladies, and gentlemen,

19. This Sulu fraud is compounded with multiple legal and ethical issues for abusing the established arbitration process, which jointly have adversely affected our sovereignty as well as the global arbitration community. Would it be fair for Member States of the New York Convention, including Malaysia, to deploy significant financial and other resources to defend its sovereignty against the recognition and enforcement of “zombie” arbitration awards? What would be the future of arbitration as an alternative dispute resolution mechanism if unprofessional and unethical arbitrators,

coupled with irresponsible third party funders are allowed to manipulate and abuse the arbitral processes?

Distinguished guests, ladies, and gentlemen,

20. I am confident that our esteemed panel in the Sabah Colloquium today would be able to enlighten the audience as to the threat brought by this case towards the good principles of arbitral processes as well as the globally respected arbitration system. To that end, I wish you all fruitful discussions and hope you will be able to gain insights from the wisdom of our panel today.

Thank you very much.