

KEYNOTE ADDRESS BY YB DATO' SRI AZALINA OTHMAN
INTERNATIONAL ARBITRATION COLLOQUIUM 2023

Tuesday, 9th May 2023

Yang Berbahagia Dato' Sri Khairul Dzaimie bin Daud

Director General of the Legal Affairs Division, Prime Minister's Department;

Yang Berbahagia Datuk Sundra Rajoo

Director of the Asian International Arbitration Centre;

Yang Berbahagia Professor Dr. Jason Chuah

Dean and Professor of International Commercial Law at the Faculty of Law, Universiti Malaya;

Esteemed panel of speakers and moderators;

Distinguished guests;

Members of the Media;

Ladies and Gentlemen.

A. INTRODUCTION

Assalamualaikum and a very good morning to all.

1. It is with **great pleasure and honour** that I stand here to deliver the Keynote Address for the inaugural International Arbitration Colloquium 2023 with the theme, “*State Sovereignty and Immunity in Commercial Arbitration*”.
2. I would also like to take this opportunity to **congratulate the Legal Affairs Division of the Prime Minister’s Department (BHEUU, JPM), the Asian International Arbitration Centre (AIAC), and the Faculty of Law of Universiti Malaya** for their unwavering support and commitment in organising and ensuring the success of this Colloquium.
3. As many may already know, the **Government of Malaysia is presently battling the enforcement of a purported international arbitration award** that was initiated by a group of individuals claiming to be the descendants of the Sulu Sultanate, amounting to **USD\$14.9 billion (the equivalent of over 16% of Malaysia’s annual budget)**, to which its legitimacy and validity are highly contested.

B. HISTORICAL BACKGROUND TO THE PURPORTED SULU ARBITRATION

4. The claim by the Sulu claimants against Malaysia could be traced back to the **1878 colonial agreement** executed between Sultan Muhammad Jamal Al Alam, who was the Sultan of Sulu at that time, with Mr. Gustavus Baron de Overbeck, and Mr. Alfred Dent Esquire.
5. The 1878 Agreement essentially set forth the Sultan of Sulu’s consent **in granting and ceding his territory in North Borneo (in today’s Sabah) to both Overbeck and Dent in consideration of an annual cession payment of 5,000 dollars.**
6. Other than the cession of territory, the 1878 Agreement provides that the Sultan of Sulu at that time had appointed **Baron Gustavus de Overbeck as the supreme and independent ruler with, among others, the absolute power of life and death over the inhabitants of the country and the rights over the productions of the country** including over things in soil, plants and animals.

7. Subsequently, the said cession of territory was also confirmed through a Confirmation by the Sultan of Sulu of Cession of Certain Islands executed in **1903 (“1903 Confirmation of Cession”)** which **increased the annual cession payment by 300 dollars.**
8. The partnership between Overbeck and Dent developed into a company called the British North Borneo Company which was granted a Royal Charter by the British Government in 1881. In **1946**, the British North Borneo Company sold its interests and rights over the State of North Borneo to the British Government and was made the Crown Colony of North Borneo.
9. Upon the establishment of Malaysia on **16 September 1963**, the British Government surrendered all its interests and rights over the Colony of North Borneo to the Federation of Malaysia. Thus, **Malaysia became the successor-in-title to the 1878 Agreement and the 1903 Confirmation of Cession.**
10. At this juncture, I must emphasise that **neither the 1878 Agreement nor the 1903 Confirmation of Cession stipulated any arbitration agreement to reflect the Parties’ intention to adopt arbitration as the preferred mechanism for dispute resolution.** Evidently, in the absence of an arbitration agreement being the pre-requisite and foundation of any arbitration proceedings, the commencement of the purported arbitration proceeding by the Sulu claimants is, as a matter of fact, without basis.
11. As such, I must say that the purported arbitration proceeding commenced by the eight self-proclaimed descendants of the Sulu Sultanate has perfectly illustrated a **grave violation and abuse of the globally respected arbitration mechanism and processes.** Given that there has never been any form of arbitration agreement concluded between the original Parties to the 1878 Agreement and the 1903 Confirmation of Cession as well as between the Sulu Sultanate and Malaysia, it shall naturally follow that the subsequent **issuance of the Final Award dated 28 February 2022 by Dr. Gonzalo Stampa within the purported arbitration proceeding commenced by the Sulu claimants is invalid and unenforceable on Malaysia.**
12. With that in mind, it strongly justifies our stance that **the Final Award should be null and void given that there is no arbitration agreement and that Malaysia has not waived its sovereign immunity in the proceeding.** Weaving every single piece of factual

evidence and reasoning together, it is apparent that the correct and appropriate forum for the settlement of any disputes arising from the 1878 Agreement, including the current claim commenced by the Sulu Claimants, **is our national courts in Sabah.**

Distinguished guests, ladies, and gentlemen,

13. I find it significant to accentuate that the **right to self-determination exercised by the people of Sabah**, as evident in the **Cobbold Commission Report 1962** pertaining to the formation of the Federation of Malaysia, has definitively demarcated the territorial sovereignty over North Borneo (in today's Sabah). In support of this, it is fundamental to note that the **Government of Malaysia has never, on any occasion, acknowledged or recognised the legitimacy of the self-proclaimed Sultanate of Sulu.**

14. On this note, I must emphasise that the **Armed Invasion in Lahad Datu, Sabah back in 2013, resulting in the demise of 73 people, has largely attributed to the stance taken by the Government of Malaysia to cease the payment of cession monies arising from the 1878 Agreement and the 1903 Confirmation of Cession** in response to the threat to our national security and the livelihood of the citizens of Sabah.

15. With our national security and sovereignty at stake, the Government of Malaysia has been firm and consistent in standing against the legitimacy and validity of the Final Award. We are fully committed in advancing our position across various jurisdictions, in challenging the enforceability of the Final Award on Malaysia.

C. THE PURPORTED ARBITRATION PROCEEDINGS AGAINST THE GOVERNMENT OF MALAYSIA

16. Having covered the historical aspects of the Sulu claim, I will now turn to the purported arbitration proceeding as was first instituted in Spain by the Sulu Claimants.

17. I will refrain from providing an extensive account of the facts concerning the arbitral proceedings – these are already provided for on the **dedicated website of the Government of Malaysia on the Sulu Claims**. I will, however, take this opportunity to highlight some of the key elements, so as to provide an insight to some of the issues that will be discussed during the Colloquium.

18. To put things into perspective and to highlight the magnitude and importance of the issue at hand, thus far, the Sulu claim has involved the foreign jurisdictions of **France, Spain, the Netherlands, and Luxembourg.**
19. The purported arbitration process which began on **2nd November 2017** through the first request by the Sulu Claimants to commence arbitration proceedings, has now translated into a legal battle involving **USD\$14.9bn.** As alluded to earlier, what is at stake now is an amount that is approximately over **16% of Malaysia's yearly budget** and the **multiple attempts to enforce payment of this exorbitant amount against the Government of Malaysia.**
20. In any event, as we await the decision from the **French Court of Appeal in June 2023 to determine the status of the Partial Award on Jurisdiction that has been challenged by Malaysia,** Malaysia continues to remain steadfast in its position and confident in the legal arguments it has taken, particulars of which are best reserved for the courtrooms.

Distinguished guests, ladies, and gentlemen,

21. For the purposes of academic discourse, the **Sulu case presents a complex dispute which involves a myriad of fundamental issues** that directly affect the arbitration community and stakeholders in the international community, as well sovereign States. Discussions on issues such as the sovereign immunity of Malaysia under the customary international law, are indispensable to practitioners, academicians and students of alternative dispute resolution and international law.
22. Before I comment on the Colloquium which promises an insightful line-up of events, I wish to state in no unclear terms that the Sulu claim has no bearing on the attractiveness of Malaysia as a growing foreign direct investment destination. Our pursuits in battling the Sulu claim stand as a testament to Malaysia's commitment in upholding international law as well as preserving the efficacy of the international arbitration system as the ever-growing global dispute resolution mechanism. Having been brought together through a coalition government, we look forward to a continued economic development for the benefit of all Malaysians.

23. Accordingly, beyond our physical infrastructure to encourage commerce and trade – with the strength of our Judiciary and the Asian International Arbitration Centre, I am confident that we will be able to fully implement our **MADANI policy for the benefit of our nation**.

D. THE INTERNATIONAL ARBITRATION COLLOQUIUM 2023

24. **The International Arbitration Colloquium**, which we are all a part of today, features esteemed panellists from around the world who will take us through the different facets of the **doctrine of state sovereignty and immunity in international arbitration**.

25. I commend the organisers for their joint effort in curating today's sessions for the benefit of the attendees, as it brings together the foremost voices to examine and discuss the interesting yet intricate issues that this Sulu case brings to light – **ranging from the sovereign immunity question to reviewing the procedural irregularity including the arbitrary movement of the seat of arbitration from Madrid to Paris**. In the same vein, I also look forward to the Plenary Lecture, which will be delivered by **Professor Dr. Jason Chuah shortly, in respect of the legal and procedural issues in the Sulu case**.

Distinguished guests, ladies, and gentlemen,

26. When Malaysia adopted the New York Convention back in 1985, we formally agreed to participate in the streamlined process of "*recognition and enforcement of the foreign arbitral awards*".¹ We must understand that the streamlined process of recognition and enforcement of the foreign arbitral award, as prescribed under the New York Convention, clinches on the principle of reciprocity among its signatory states. To put it in another way, we would be subject to the enforcement of an arbitral award in a foreign jurisdiction as much as we would be entitled to enforce a foreign arbitral award in our jurisdiction.

27. However, the fact remains that any misuse of the arbitration processes and **breach of professional conduct by counsel and arbitrators will hinder the efficacy of arbitration as an equitable dispute resolution mechanism, to which unfortunately is habitually evident in the present Sulu case to our disadvantage**.

¹The New York Arbitration Convention of the Recognition and Enforcement of Foreign Arbitral Awards, accessible at <https://www.newyorkconvention.org/>

28. At this point, I wish to emphasise that the purpose of today's Colloquium does not serve as the Government of Malaysia's response to the ongoing Sulu case. It is likewise not appropriate for me to delve into the details of our submissions before the courts across Europe. Having said that, I believe that the diverse panels comprising academicians, legal practitioners, and experts from different domains will illuminate us with valuable insights on matters pertinent to the subject matter from different perspectives in promoting and facilitating informed discourses on the Sulu case among the members of the public.
29. Finally, I am confident that by the end of the Colloquium, everyone here will develop a better understanding of the Sulu case which is compounded with a corpus of intricate issues. I am hopeful that the Colloquium will promote more active and informed discussions within the arbitration community as well as the public at large as the Sulu case runs its course.

E. CONCLUSION

30. As I bring my Keynote Address to an end, I would like to express **my gratitude once again for the opportunity to be here to share my thoughts on the theme of state sovereignty and immunity**. I truly look forward to the remainder of the day's panel discussions and reflections on the matter of state sovereignty and immunity in commercial arbitration.
31. I look forward to continuing the conversation with all of you in the near future and have a fruitful colloquium ahead.

Thank you.