JABATAN PERDANA MENTERI
BAHAGIAN HAL EHWAL UNDANG-UNDANG

ASIAN INTERNATIONAL ARBITRATION CENTRE

INSTITUTE FOR DEVELOPMENT STUDIES (SABAH)

SABAH LAW SOCIETY

INTERNATIONAL ARBITRATION COLLOQUIUM 2023: STATE SOVEREIGNTY AND IMMUNITY IN COMMERCIAL ARBITRATION (SABAH EDITION)

SPECIAL RAPPORTEUR REPORT

KOLOKIUM TIMBANG TARA ANTARABANGSA 2023: KEDAULATAN DAN KEKEBALAN NEGARA DALAM TIMBANG TARA KOMERSIAL (EDISI SABAH)

LAPORAN KHAS RAPPORTEUR

TABLE OF CONTENTS

EXECUTIVE SUMMARY

On 6th June 2023, Malaysia successfully anchored a landmark victory, through the Paris Court of Appeal's ruling, in the ongoing legal battle against the self-styled descendants of the long-defunct Sulu Sultanate. The Partial Award on Jurisdiction rendered in Madrid on 25th May 2020, being one heavily relied upon by Dr Stampa and the Claimants as the basis of the purported Final Award, has now been decisively annulled both in Spain and France.

In addition to this pride, on 27th June 2023, the Government of Malaysia is graced with another remarkable victory when the Hague Court of Appeal in the Netherlands unequivocally rejected the recognition and enforcement of the purported Final Award. Needless to say, the Hague's ruling posits a relatively authoritative precedent to the 171 New York Convention signatory States against the Claimants' global enforcement strategy. What is most significant, at this juncture, is that these successive victories strengthen Malaysia's ongoing determination in strategising robust defence against the Sulu claims and ensuring that the purported Final Award will be eventually overturned.

Echoing the position of Dato' Sri Azalina Othman Said (Minister in the Prime Minister's Department (Law and Institutional Reform)), Datuk Seri Panglima Haji Hajiji bin Haji Noor (The Honourable Chief Minister of Sabah) in his Keynote Address, alluded that both victories secured in France and The Netherlands affirmed the steadfast commitment of the Federal Government to safeguard the rights, integrity, and sovereignty of Sabah. In advancing Malaysia's global legal pursuits, Datuk Seri pledged that the State Government of Sabah will stand in resolute unity with, and endow unreserved support to the Federal Government in this ongoing legal duel.

In light of the above, the second instalment of the International Arbitration Colloquium (Sabah Edition) on 4th July 2023, once again, drew upon the solid alliance between the Legal Affairs Division of the Prime Minister's Department (BHEUU, JPM) and the Asian International Arbitration Centre (AIAC), and with this Edition, the Institute for Development Studies, Sabah (IDS) and the Sabah Law Society (SLS). This Colloquium, in the words of Dato' Sri Khairul Dzaimee (Director General, Legal Affairs Division of the Prime Minister's Department), aimed to engage an all-encompassing academic discourse at Sabah, specifically to unweave the historical and legal complexities of the Sulu case.

Keeping in mind the above, the Sabah Colloquium brought upon an opportune moment to undertake an in-depth academic understanding and scrutiny of the recent development of international commercial arbitration *vis-à-vis* the Sulu case. Akin to the earlier Kuala Lumpur Colloquium, this second instalment of the same strived to revisit the historical antecedents of the Sulu dispute, examine the sovereign immunity that is at stake, and explore the ramifications of the purported Final Award on both the New York Convention and the global arbitral system. As evident, the profound wisdom and expertise of our panel have, no doubt, added tremendous

insights to the discussions and skilfully steered the public through the intricacies that the Malaysia-Sulu case presents thus far.

As pointed out by Tan Sri Dato Sri Dr Haji Wan Junaidi bin Tuanku Jaafar (President of the Senate) in his Special Remarks, the welfare of the Sabahan must not be held to ransom merely by an archaic colonial 1878 Agreement which clearly does not envisage a validly binding arbitration clause. This has been recently affirmed by the Hague court. In furtherance, Malaysia, as an independent sovereign State, should never be subject to the whims and fancies of a rogue arbitrator especially when our sovereign immunity remains intact. Speaking of this, Dato' Sri Azalina stressed that the Sulu case necessitated the introduction of an international regulatory framework to uphold the ethics, integrity, and impartiality of international arbitrators. Hopefully, this could, in one way or another, restore the global community's confidence and trust in the arbitrators and the arbitration system as international arbitration continues to develop.

On that note, Tan Sri Datuk Seri Panglima Anifah bin Aman (Senator, Dewan Negara and Special Advisor to the Chief Minister of Sabah for International Relations and Foreign Investment) emphasised that Malaysian should not be dissuaded from engaging and utilising international arbitration, following this unprecedented Sulu fiasco and its corresponding repercussions. Rather, as Tan Sri urged, Malaysia should continuously draw lessons from this experience and pursue our ongoing commitment to preserve the sanctity of international arbitration.

WELCOMING REMARKS BY YBHG. DATO' SRI KHAIRUL DZAIMEE BIN DAUD
DIRECTOR GENERAL, LEGAL AFFAIRS DIVISION OF THE PRIME MINISTER'S DEPARTMENT

Dato' Sri Khairul Dzaimee pulled off the curtain of the second instalment of the '*International Arbitration Colloquium 2023: State Sovereignty and Immunity in Commercial Arbitration*' by first extending his appreciation to the support and presence of the distinguished guests, members of media, esteemed panel of national and international speakers, moderators, and the overwhelming number of participants in bringing this Colloquium a successful event. Special gratitude was likewise extended to 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 fruitful collaboration in organising this Colloquium.

In his Welcoming Remarks, Dato' Sri Khairul Dzaimee underlined that the primary testament of this Sabah Colloquium is to engage an all-encompassing academic discourse at Sabah, examining the historical and legal perspectives of the Sulu case. Specifically, this Sabah Colloquium promised an interesting line-up of panel discussions ranging from the issues relating to the 1878 Agreement concluded between the Sulu Sultanate and North Borneo Company, the implications of the New York Convention 1958, the doctrine of sovereign immunity, and the abuse of arbitral processes within the Sulu case.

For the benefit of the participants, Dato' Sri Khairul Dzaimee further walked through the agenda of three sessions for the day, starting with the first session entitled "*The Sulu Case: Discovering the Missing Puzzle Pieces*". In this regard, Dato Sri alluded that the historical aspect of the relevant issues in dispute, the legitimate descendants of the Sulu Sultanate, the role of the North Borneo Company together with the formation of Malaysia, will be deliberated in this session.

Following that, Dato' Sri Khairul Dzaimee pointed out that the second session entitled "*The Sulu Case: Time to Preserve Sovereign Immunity?*" strived to enlighten the participants on the principle of sovereignty immunity and its relevance in the present Sulu dispute. Further, the panel will examine the advantages flowing from the codification of a domestic State Sovereignty Act, whilst acknowledging the absence of such legislation since the formation of Malaysia. Apart from that, the third and final session of the Colloquium entitled "*The Sulu Case: Its Effects on the New York Convention and The Global Arbitral System*" will delve into the claims raised by the relevant parties and fundamental principles of the New York Convention 1958.

Having explored the mandates of each session, Dato' Sri Khairul Dzaimee concluded his remarks by extending his utmost appreciation once again to all distinguished guests and participants for their unwavering support towards the Sabah edition of International Arbitration Colloquium 2023.

OPENING REMARKS BY YB DATO' SRI AZALINA OTHMAN SAID

MINISTER IN THE PRIME MINISTER'S DEPARTMENT (LAW AND INSTITUTIONAL REFORM)

The Sabah Colloquium witnessed the virtual presence of Dato' Sri Azalina Othman Said delivering her Opening Remarks live from Japan despite her foreign engagement at the ASEAN-Japan Special Meeting of Justice Ministers and ASEAN-G7 Justice Ministers' Interface in Japan.

Taking this opportunity, Dato' Sri expressed her gratitude to the Prime Minister of Malaysia, YAB Dato' Seri Anwar Ibrahim, for his wholehearted support and confidence in the ongoing legal pursuits to safeguard Malaysia's interests and sovereign immunity. In the same vein, she was thankful for the presence of Tan Sri Dato' Sri Dr Haji Wan Junaidi bin Tuanku Jaafar in this Sabah Colloquium and similarly would appreciate his continuous support in the forthcoming London Colloquium.

Alongside that, Dato' Sri Azalina Othman Said further congratulated 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.

Whilst acknowledging the growing public awareness towards the Sulu claims, Dato' Sri Azalina Othman Said described the Sulu case as the "Sulu Fraud" as nowhere in the 1878 Agreement envisaged the parties' intention to elect arbitration as the preferred dispute resolution mechanism. Given the absence of the pre-requisite arbitration agreement, Dato' Sri strongly believed that the commencement of the purported arbitration proceeding by the Sulu Claimants is manifest without basis. On that ground, the sham Final Award should therefore be treated as null and void.

Dato' Sri Azalina Othman Said further elaborated that the doctrine of sovereign immunity is a well-established principle under customary international law. Under this doctrine, it is trite that no State ought to be subject to the jurisdiction of the national court of another State. Putting it in another way, all States are equal in the sense that none of them is superior to another. Given the above, she reiterated that the Government of Malaysia has never, in any circumstance, renounced its sovereign immunity in defending itself in the Sulu arbitration. The Government of Malaysia has been consistently raising timely objections against the Sulu heirs' recurring attempts to threaten our sovereignty.

Apart from the above, Dato' Sri pointed out that the Sulu case has presented several alarming concerns, one of which concerned the ethical standard of third-party litigation funder given that the Sulu claims are heavily bankrolled by Therium. In this respect, Dato' Sri explained the proliferation of frivolous claims has warranted the necessity to regulate the ethical conduct, integrity, professionalism, and good practices in the legal financing industry.

Further to that, she urged that an international regulatory framework ought to be introduced to preserve the ethics, integrity, and impartiality of international arbitrators. Speaking of this, Dato' Sri drew the audience's attention to the recent prosecution of the sole arbitrator, Dr. Gonzalo Stampa in Spain for contempt of court following his ignorance of the Madrid Court's Annulment Order. As Dato' Sri aptly described, the global community's confidence and trust in the arbitrators and the arbitration system as a whole are vital and must be restored in resonance with the rapid growth of international arbitration.

In light of the above, Dato' Sri Azalina Othman Said emphasised that the recent decisions in both Paris and Hague have added tremendous value and confidence to Malaysia's legal pursuits against this so-called Sulu Fraud. For the benefit of the audience, Dato' Sri iterated the main grounds which substantiated the Hague Court of Appeal decision of rejecting the Claimants' request to recognise and enforce the purported Final Award on 27th June 2023. First, no Final Award could have been lawfully rendered due to the annulment of the appointment of the arbitrator. Second, no valid arbitration agreement exists in the 1878 Agreement. Third, the exceptional grant of a stay of the purported Final Award by the Paris court has rendered it incapable of being recognised and enforced in the Netherlands.

Dato' Sri Azalina Othman Said stressed that the outcome of the Hague Court of Appeal, remarkably, aligned with the expert discussions and findings during the earlier Kuala Lumpur Colloquium. Hopefully, this will set the stage for all forthcoming successes in other jurisdictions. Notwithstanding that, Dato' Sri assured that the Government of Malaysia is always ready to aver the Sulu claims anytime, anywhere.

To prevent similar episodes of claims from recurring, the Government of Malaysia is committed to legislating a State Immunity Act domestically with the aspiration to uphold the rights, interests, and sovereignty of a foreign State. This would, in one way or another, promote cordial relationships and reciprocal treatment of the same with other sovereign States.

In her concluding remarks, Dato' Sri reiterated that Government will continue to probe into the possibility of any Malaysians offering any form of assistance to the self-proclaimed heirs of the Sulu Sultanate in strategising their claims against Malaysia. Thus, any person found to have been in close affiliation with the so-called heirs, based on cogent evidence, will be considered to have committed an offence under our penal laws, among others, an act of treason against Malaysia.

KEYNOTE ADDRESS BY YAB DATUK SERI PANGLIMA HAJI HAJIJI BIN HAJI NOOR

THE HONOURABLE CHIEF MINISTER OF SABAH

In his preliminary remarks, the Chief Minister of Sabah, Datuk Seri Panglima Haji Hajiji Haji Noor canvassed an overview of the Sulu Claims. Having been aware of the widespread discussion and debates sparked by the rather unprecedented Sulu case, Datuk Seri underscored that the State Government of Sabah continuously maintains its rejection against the recognition and legitimacy of the purported Final Award. Echoing the stance of the Federal Government, the State Government of Sabah emphasised that the purported Final Award is baseless, lacking any legal or historical foundation, and it is an attempt by the self-claimed Sulu heirs to undermine the sovereignty and territorial integrity of Malaysia.

As alluded to earlier by Dato' Sri Azalina Othman Said in her Opening Remarks, Datuk Seri Panglima Haji Hajiji Haji Noor concurred that the recent victories both in France and the Netherlands affirmed the steadfast commitment of the Government of Malaysia to safeguard the rights, integrity, and sovereignty of Sabah. Both decisions further solidified the fact that Sabah is always an integral part of Malaysia.

On that note, the Chief Minister expressed his gratitude to the Prime Minister of Malaysia and the Minister in the Prime Minister's Department (Law and Institutional Reform) for their resolute leadership in manoeuvring the Sulu dispute. He assured the audience that Sabah State Government will work closely and support the Federal Government, in all possible ways, in this ongoing legal battle.

In his Keynote Address, Datuk Seri Panglima Haji Hajiji Haji Noor also highlighted that this Colloquium portrayed a fruitful effort and collaboration between different institutes, including 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). The collective efforts and involvement of these institutions have, in one way or another, strengthened Malaysia's determination to strategise a robust defence against the Sulu claims with utmost professionalism through innumerable resources, historical records, extensive research, knowledge, and legal acumen.

In addition to the above, the Chief Minister of Sabah was thankful for the solidarity expressed by the international community which has been pivotal in reinforcing Malaysia's position in the Sulu fiasco. Further credence was extended to Malaysia's research and legal teams who have always been dedicated to safeguarding Malaysia's interests, and to the Sabahan for their confidence towards the Federal Government's commitment in dealing with this matter.

Before concluding his Keynote Address, Datuk Seri Panglima Haji Hajiji Haji Noor, on behalf of the State Government of Sabah, vowed to support the legal battle against the Sulu Claimants. In the same vein, Datuk Seri called upon the global community to stand with Malaysia to put an indefinite end to the Sulu case which not only threatens Malaysia's sovereign territory but also undermines the values of the customary international law.

SPECIAL REMARKS BY YB SENATOR TAN SRI DATO SRI DR HAJI WAN JUNAIDI TUANKU JAAFAR

PRESIDENT OF THE SENATE

The International Arbitration Colloquium 2023 (Sabah Edition) warmly welcomed the presence of YB Senator Tan Sri Dato Sri Dr Haji Wan Junaidi bin Tuanku Jaafar. To begin with, YB Senator expressed his sincere appreciation to the Minister in the Prime Minister's Department (Law & Institutional Reform), Dato' Sri Azalina Othman Said for her professionalism and capabilities in dealing with the Sulu case, the Attorney General, Tan Sri Idrus Harun for his leadership in spearheading the legal team, and the Special Secretariat (led by Dato' Sri Azalina) for their generous sharing of expertise to assist the Government in navigating the complex and technical legal issues.

Following that, Tan Sri Dato Sri Dr Haji Wan Junaidi emphasised that the welfare of the Sabahan must not be put in peril by the 1878 Agreement which, in essence, does not contemplate a validly binding arbitration clause. As an independent sovereign State, the Government of Malaysia should never be made amenable to the whims and fancies of the rogue arbitrator especially when our sovereign immunity remains intact. Likewise, the unethical manipulation of the Filipinos' claims herein by the third-party litigation funder, Therium has gravely imperilled Malaysia's sovereignty and national interests.

Given the inherent flexibility to enforce the purported Final Award across any jurisdictions of the New York Convention signatory States, Tan Sri opined that this remains an unpleasant drawback for Malaysia notwithstanding the existence of Malaysia Agreement 1963.

On that note, Tan Sri Dato Sri Dr Haji Wan Junaidi drew the audience's attention to a statement published in the Straits Times of Singapore by the Claimants' counsel, describing "*...the fight is far from over...*". Despite our recent successive victories, Tan Sri gently reminded the audience that, at this juncture, Malaysia may still run a risk of being hailed further into these preposterous legal proceedings. Having said that, Tan Sri Dato Sri Dr Haji Wan Junaidi is hopeful and confident that Malaysia will succeed in our battle to thwart the entire Sulu claim.

With that, Tan Sri Dato Sri Dr Haji Wan Junaidi pessimistically assured that not a single edge of Malaysia could be violated by the self-claimed Sulu heirs and urged all Malaysians to stay united with the Government in confronting this legal battle.

SESSION 1: THE SULU CASE: DISCOVERING THE MISSING PUZZLE PIECES[1]

Moderator:
Mr. Philip Golingai (News Editor, Star Media Group)

Panellists:
1. **YB Tan Sri Datuk Seri Panglima Pandikar Amin bin Haji Mulia** (President, United Sabah National Organization and Special Envoy BIMP-EAGA, Sabah)
2. **YB Datuk Seri Panglima Yong Teck Lee** (Former Chief Minister of Sabah)
3. **YBhg. Datuk Professor Dr. Danny Wong Tze Ken** (Dean, Faculty of Arts and Social Sciences, Universiti Malaya)
4. **Mr. Avtar Singh** (Private Historical Researcher & Author)

Overview

The first session of the International Arbitration Colloquium (Sabah Edition) is aspired to set the tone for the day, presenting an interesting classical discourse on the topic of "***The Sulu Case: Discovering the Missing Puzzle Pieces.***" The session's objectives included, *inter alia*, unveiling the 300-year historical records that document the sovereignty of North Borneo, examining the contradictions in the historical narratives leading to the present-day dispute between Malaysia and the heirs of the Sultan of Sulu, gaining insights into the Sabahans' exercise of the right to self-determination and the findings of the Cobbold Commission in 1962, as well as analyzing the relationship between the inauguration of the Federation of Malaysia and the sovereignty of North Borneo.

Speaker (1): YB Tan Sri Datuk Seri Panglima Pandikar Amin bin Haji Mulia

YB Tan Sri Datuk Seri Panglima Pandikar Amin expressed his perspective that the present claim should not have escalated to its current extent had the responsible parties attended to and clipped this mess in the bud. He emphasized that the claims by the self-proclaimed descendants of the Sulu Sultanate are not a new rising issue but one that has been in existence even prior to our independence in 1957. Further, Tan Sri Pandikar stated that Malaysia inherited this claim from the United Kingdom post-independence given that North Borneo was once a crown colony on 26th June 1946.

On that note, Tan Sri Pandikar explained that during the negotiations between 1961 and 1963 to establish the Federation of Malaysia, involving Malaya, the United Kingdom, North Borneo, Sarawak, Brunei, and Singapore, the claims against North Borneo by the Philippines Government

[1] Rapporteurs in session: AIAC Case Counsel, Prissilla Ann John and Miguel Jaime Carandang Encarnacion (reviewed by AIAC Case Counsel, Kho Yii Ting).

and the heirs of the Sulu Sultanate were never part of the discussion. Similarly, nothing of such was mentioned during the Malaysia Solidarity Consultative Committee and Inter-Governmental Committee meetings.

Having said that, the Republic of the Philippines and Indonesia later protested the formation of the Federation of Malaysia, with the inclusion of Sabah, which then resulted in an undesired series of diplomatic tension with the Government of Malaya. To untangle these competing claims, a Conference of Ministers representing the Federation of Malaya, the Philippines and Indonesia was held in Manila on 7th June 1963 to reach a common understanding and to maintain close fraternal cooperation between these nations. As an outcome, the Manila Accord 1963 was signed which, among others, Paragraph 12 expounded on the right to self-determination (reflecting the need to ascertain the wishes of the Sabahans) as well as the Philippines' stance on the inclusion of North Borneo in the Federation of Malaysia.

Tan Sri Pandikar Amin highlighted several key points regarding the claim over North Borneo. He asserted that the Malaysian government holds sovereign rights over the region, emphasizing that the British government legally surrendered its ownership as part of Malaysia. The exercise of the right to self-determination by the local populations should have, in effect, put an indefinite end to any future claims against Sabah. As such, in accordance with Paragraph 12 of the Manila Accord, the Government of the Philippines should discard its territorial claims against Sabah, which is beyond doubt a part of the Federation of Malaysia.

To conclude his presentation, Tan Sri Pandikar Amin advanced his suggestions which include conducting a referendum in Sabah and reassessing the terms outlined in the Manila Accord to realign the developments and changes which have taken place since then.

Speaker (2): YBhg. Datuk Professor Dr Danny Wong Tze Ken

Dr. Danny delivered a concise historical background spanning 300 years of treaties and documentary evidence which played a pivotal role in the establishment of the British North Borneo and its later transformation into Sabah, Malaysia.

As Dr. Danny alluded, the historical period was divided into six (6) distinct phases, starting with the pre-19th century era which focused on the history of Sulu and the island of Balambangan. Dr. Danny noted that, up to 1865, there were limited historical events recorded except for the colonization of Labuan by the British in 1846.

However, Dr Danny explained that the 1865 - 1878 phase marked a critical historical period that charted the formation and sovereignty over North Borneo. During this period, what is of utmost significance is that the 1878 Treaty denoted the perpetual cession or transfer of the territory by the Sultan of Sulu to Baron Gustavus Overbeck and Alfred Dent without any provision for redress

and renegotiation. Thereafter, the period between 1878 to 1909 represented the early stage of the North Borneo Company and witnessed the consolidation of these treaties and territories in the West Coast region, especially following the so-called "Mat Salleh's affairs". Between 1909 and 1941, he explained briefly the occurrence of events which have, in effect, set a clearer demarcation of boundaries. Eventually, the phase from 1961 to 1966 witnessed the formation of Malaysia, the confrontation period as well as the conclusion of the Manila Accord.

Having presented the relevant timelines in North Borneo's history, Dr Danny then drew specific reference to two significant disputes that emerged in December 1939 and July 1946. Essentially, the first event referred to the infamous 1939 Macaskie Judgement wherein the Sandakan High Court ruled on the legitimate heirs to the cession money under the 1878 Agreement following the demise of the last Sulu Sultanate in June 1936. Vide the Macaskie Judgement in 1939, it was found that Dayang-Dayang Piandao Kiram et. al. was the next-of-kin of the late Sultan Jamalul Kiram and thus ought to be entitled to the cession money under the said Agreement. Notwithstanding that, it is pertinent to note that no issue relating to sovereignty over North Borneo was raised in this claim. Speaking of this, it is Dr Danny's view that the Sultanate hierarchy system is now a bygone and no longer recognized by the Philippines Government especially after the passing of Sultan Jamalul Kiram.

On the other hand, the June-July 1946 case revealed the attempts by the Sulu Claimants to end the 1878 Agreement when they engaged a law firm in Chicago and thereafter presented a Letter of Termination conveying such intention to the British North Borneo Company. They argued that the grants were unlawfully terminated and demanded negotiations for new terms in lieu of the prevailing 1878 Agreement. Their call for the renegotiation of the 1878 Agreement was made on the ground of the illegitimate perpetual transfer of territory and unfair payment terms agreed by their predecessors. Additionally, they sought compensation for the arrears of the cession money during the world war period.

The British Government, in response to the above, maintained that the 1878 Agreement was clear and unequivocal in the sense that the late Sultan Jamalul Kiram ceded the territories in perpetuity to both Overbeck and Dent. In return, cession money would be paid to any ascertained heirs of the Sulu Sultanate. At this juncture, is worth noting that the 1878 Agreement did not afford any room for renegotiation of terms and thus any attempts of such nature by the Sulu Claimants are void.

Pursuant to that, Dr. Danny noted that the Sulu case underwent a series of development and several claims against the sovereignty of North Borneo have since then emerged. In the 1950s, occasional claims continued to surface, while in 1962, President Macapagal transformed the Sulu claims as part of the Philippines' claims which then triggered a series of controversies prior to the formation of the Federation of Malaysia in 1963. Subsequently, there have been continuous efforts by various Filipino Presidents to lay claim to the territory and different individuals

asserting themselves as legitimate heirs. Notably, the military incursion by certain heirs of the Sulu family in Lahad Datu back in 2013 has further added complexities to the current situation.

In conclusion, Dr Danny opined that further research is necessary to discover the extensive antecedents and to gain an in-depth understanding of North Borneo's history. He also emphasized that it is crucial to address and put an end to the recurring claims surrounding the Sulu case. Drawing lessons from the position of the British North Borneo Company, it is essential for the authorities involved to maintain a clear and decisive stance, emphasizing the non-negotiable nature of the 1878 Agreement. Likewise, it is imperative to understand that both the 1939 and 1946 incidents have unequivocally established that payment obligations exist solely towards the Sulu heirs, without any involvement of sovereignty issues.

Speaker (3): Mr. Avtar Singh

Mr. Avtar Singh embarked on an interesting discourse shedding light on the 300 years of misleading historical narratives by Sulu over North Borneo (in today's Sabah). His research began around 2018 and primarily focused on circumstantial evidence to better understand the underlying intention of a particular happening or transaction, which in this case - whether the 1878 Agreement constituted a lease or cession agreement.

His presentation started with a background on global developments at that point in time revolving around Sabah, Brunei, and Sulu. In his speech, Mr. Avtar Singh accentuated that Brunei's ruling over Sabah for 500 years has always been conveniently ignored. In this respect, he explained that the Sultanate of Brunei exercised a considerable sphere of influence over the region. However, the Brunei Sultanate had decided to grant all territorial ownership of North Borneo to the Europeans in 1877 in consideration of consistent annual payments without enduring the hassle to administer these regions on his own.

On the other hand, the Sultanate of Sulu was relatively new, and they were one of many kingdoms in the Southern Philippines which paid tribute to Brunei. As Mr. Avtar Singh pointed out, there has been an extensive attempt to revise the past, manipulate the historical timelines and present rather fictitious Sulu historical narratives to the world. Interestingly, another missing puzzle from the Sulu historical narratives was that the Brunei Empire once ruled over the Sulu Sultanate together with many other Islamic Rajas and Sultan in the Southern Philippines.

Mr. Avtar Singh also indicated that Sulu derived its claim from historical documents and books by established authors. Often, historian Dr. Najeeb M. Saleeby's views have been relied upon by the Claimants not only to assert Sulu's dominance over North Borneo but to explain how North Borneo was granted to the Sulu Sultanate post-Brunei Civil War in return for its military aid.

Regrettably, Dr. Najeeb may have indirectly assimilated his personal views, thereby presenting written half-truths and fictitious historical narratives to the readers. While Mr. Avtar Singh does not suggest that these narratives were deliberately made, much attention must be directed to Dr. Najeeb's sources of information and the fact that the Brunei historical narratives have been omitted and ignored in his works.

Another important matter to take note of from Mr. Avtar's presentation is the influence of the Sultanate of Sulu on the East Coast of Sabah. Sufficient reference was made to the findings of the renowned historian James Warren, who maintained the non-existence of such a Sulu administration or system of government on the East Coast of Sabah. Warren further explained that, at most, it was the "*datu*" from the royal court on Jolo Island who asserted their influences on the natives along the coasts of Sabah. At this juncture, Mr. Avtar Singh earmarked that having a group of people travel to the location to demand tribute versus setting up an administrative centre were poles apart different. Given the above, there was no evidence that the latter existed. This eventually raised doubt as to the basis of which the Sultanate of Sulu claimed to have once ruled over North Borneo.

Using William Pryer's journal as a reference, the presentation continued with how the East Coast of Sabah was decimated by years of pirate attack, raid, and kidnap. Specifically, he cited an incident in 1879 which witnessed 60 Bajaus of a native village were killed or kidnapped to be traded as slaves. This unfortunately led to a population imbalance at this point, with the West Coast eventually having a larger population than the East. This is likewise another piece of historical narrative uncommonly cited in records and academic writings.

Moving on, Mr. Avtar Singh stressed that the Sultanate of Sulu portrayed a horrible record of honouring treaties and agreements. Despite the consecutive peace treaties signed with the Spanish after being defeated during times of war, the Sulu clans, in ignorance of the obligations, headed to strategizing plans to conduct raids and kidnaps. As evident, the Sulu Sultanate demonstrated consistent precedence of reneging their promises and obligations, which some common instances include the peace treaties signed in 1640, 1725, 1742, 1744, 1758 and beyond.

As alluded to above, it is worth iterating that there has been a false narrative that the territories in North Borneo were once ceded as a gift by the Bruneian Sultan to the Sulu Sultanate at the end of the Brunei Civil War. In Mr. Avtar's words, this narrative is inconclusive and there is simply no evidence or agreement to support this narrative.

On this point, Mr. Avtar Singh noted that the Brunei Sultanate has never stayed silent in dealing with this misleading narrative. Brunei had set remarkable precedence to wipe out any confusion and misleading facts at that point. On 28th September 1764, the Brunei Sultanate wrote to the East India Company (EIC) conveying its dissatisfaction that the EIC executed several agreements with the Sulu Sultanate over territories owned by Brunei. In this regard, the Brunei Sultanate emphasized that it has never relinquished any of such territory to the Sulu clans.

According to Mr. Singh, one of the most important parts of the research is the understanding of whether the 1878 Agreement was a sale or a lease of territories. This necessitated the re-examination of the happenings in Sulu from 1876 to 1877. In 1877, the Sultan of Sulu wrote to the Governor of Labuan stating his intention to negotiate a truce with the Spanish. The Governor however refused to get involved. This message eventually reached Baron Overbeck.

At this point, it is worth explaining that the Dutch had colonized most territory in the region. The only territory that was left unclaimed by a European power in the region was North Borneo.

Eventually, in 1877, Overbeck concluded a Grant with the Sultan of Brunei granting the entire territory of North Borneo to the former. Having in mind the above, Mr. Avtar Singh elaborated further that the 1878 Agreement, signed with the Sultan of Sulu, merely involved the cession of a small portion of the East Coast of Sabah which the latter claimed to "own". Overbeck would then oversee Sabah with an annual payment of 5,000 pesos to the Sulu Sultan. In the Grant of 1878, Overbeck also relayed that Sabah will be a haven for the family of the Sultan of Sulu where he could retire with his family.

With that, Mr. Avtar Singh reiterated that it is conspicuous that the terms of the agreement do not favour any contention that it was a lease; but rather one that favours the buyer. His final question to the panel and audience has offered much food for thought – "*Which Sultan in history has raided, ransacked, murdered, kidnapped, and sold into slavery his own subjects who he claimed to rule over? Does this make any logical sense to you that the Sulu Sultanate ever ruled Sabah?*"

Speaker (4): YB Datuk Seri Panglima Yong Teck Lee

YB Datuk Seri Panglima Yong Teck Lee offered suggestions on how to address the missing pieces to strengthen Malaysia's narratives of the Sulu case. His main points are as follows:

a. To revisit the Macaskie Judgement of 1939;
b. To strengthen the Eastern Command of Sabah (ESSCOM)'s resources, assets, and manpower in maximizing its roles and contribution; and
c. To facilitate more active and intimate engagements with Bangsamoro Autonomous Region in Muslim Mindanao (BARMM) to do away with the long-defunct Sulu Sultanate.

Speaking of the missing puzzle pieces in the historical narratives, Datuk Seri Yong pointed out that much attention must be drawn to the Treaty between Brunei and Overbeck in 1877. According to him, this is a cardinal instrument which must be relooked to nullify the Treaty of 1878. Under such circumstances, it is imperative to understand that Brunei had already ceded North Borneo to Overbeck and Dent through the earlier 1877 Treaty. This impliedly entailed that the Sultanate of Sulu had no right, or *locus standi* whatsoever, to grant the same territory to Overbeck in 1878. As Datuk Seri Yong aptly described, North Borneo was never part of the Philippines or the Sulu Sultanate's territory, to begin with. He emphasized that, if the 1878 Treaty were to be relied upon, Malaysia would somehow concur with the Sulu Sultanate's assertions that North Borneo was once the latter's territory.

Furthermore, the second missing part was the Paris Treaty concluded between the United States and Spain after the American-Spain War of 1898. In the demarcation of the national boundaries of the Philippines, it is worth noting that North Borneo was not included. Further insights were also provided regarding the missing pieces.

Datuk Seri Yong underscored the availability of historical evidence in support of Malaysia's sovereignty over Sabah is well-kept in the Brunei Museum. Brunei had repeatedly rejected the efforts of Sulu to lay claim over Sabah, even before Malaysia. In his speech, Datuk Seri Yong then pointed out that the timely cessation of the annual payment of 5,300 dollars during the Japanese invasions could be taken as a favourable incident in support of Malaysia's stance.

Interestingly, Datuk Seri Yong magnified the fact that the Sulu descendants had granted the power of attorney to the Government of the Philippines, to process the claim on their behalf. In simpler terms, the Sulu heirs have surrendered their rights and claims over North Borneo to the Philippines Government in Manila. Thus, this means that the Sulu heirs do not possess any valid *locus standi* to raise the present claims against Malaysia.

On that note, he proceeded to draw comparisons between the current 1987 Philippine Constitution and its predecessor, dated 1973, insofar as the definition of "national territory" was concerned. Prior to 1987, the Philippines' territory includes any territory secured by historical right and legal title. Having said that, the revised Constitution in 1987 witnessed the omission of any reference to the treaty between the Sultanate of Sulu and Overbeck in demarcating the Philippines's territory. According to him, in 1987, the Government of the Philippines had removed its legal basis to claim, by virtue of historical right or legal title, any territory in Sabah and North Borneo.

With that said, Datuk Seri Yong concluded his speech with a strong emphasis that the focal point must now be drawn to understanding the history of North Borneo/Sabah during the Brunei Sultanate era. In other words, the revisiting of historical happenings must not be confined to the British colonization period per se. Certainly, this will strengthen our narrative that Sabah was never part of the Sultanate of Sulu.

SESSION 2: THE SULU CASE: TIME TO PRESERVE SOVEREIGN IMMUNITY?[2]

Moderator:

Mr. Roger Chin Ken Fong (President, Sabah Law Society and Partner, Messrs. Chin Lau Wong & Foo)

Panellists:

1. **YBhg. Dato' Firoz Hussein bin Ahmad Jamaluddin** (Partner, Messrs. Firoz Julian)
2. **Professor Robert Volterra** (Partner, Volterra Fietta and Visiting Professor of International Law at University College London, University of London)
3. **Mr. Álvaro López de Argumedo** (Partner, Uría Menéndez)
4. **Mr. Chan Leng Sun SC** (Senior Counsel and Chartered Arbitrator, Duxton Hill Chambers)

Introduction

Interestingly, the academic conversation began with the moderator's question - "*how is it possible for Malaysia in this Sulu claim to be attacked and challenged when Malaysia is a sovereign state?*" Throughout the Session, the speakers brought to light various integral aspects of the doctrine of sovereign immunity and whether Malaysia's immunity is placed in grave peril by the Sulu proceedings.

Speaker (1): Mr. Álvaro López de Argumedo

Mr. López de Argumedo kick-started the session with an overview of how Malaysia's sovereignty has been threatened by the Claimants' unfounded legal pursuits, recounting from the commencement of the arbitration proceeding until the present day. He presented his analytical findings from three different perspectives;

1) Procedural Safeguards for the Jurisdictional Immunity

   At the outset, Mr. López de Argumedo highlighted the timeline of the Sulu case.

   The Sulu case commenced on 1st February 2018 when the Sulu heirs requested the Madrid High Court to appoint an arbitrator under the false pretence that North Borneo was once a colonial territory of the Spanish Empire. Following this request, the High Court of Justice Madrid, unfortunately, proceeded to appoint Dr Gonzalo Stampa on 29th March 2019. Given that the Claimants have failed to serve proper notice for the claims in accordance with the Spanish laws[3] and international laws[4], the High Court of Justice Madrid, on 29th June 2021,

[2] Rapporteurs in session: AIAC Case Counsel, Balqis Binti Azhar and Raagini a/p Sama Sundaram (Reviewed by AIAC Case Counsel, Kho Yii Ting).
[3] Section 27 of the Spanish International Judicial Cooperation in Civil Matters Act and Section 54 of the Spanish Jurisdictional Immunity Act.
[4] Article 22 of the Vienna Convention on Diplomatic Relations.

decisively annulled the appointment of Dr Stampa and ordered for the immediate closure of the Sulu arbitration proceeding. It is notable that this annulment order, specifically due to the improper service of documents, is aligned with the domestic[5] and global judiciary exercises[6].

At this juncture, Mr. López de Argumedo pointed out that such an annulment order, in effect, would mean that all actions and decisions rendered by the arbitrator in the proceedings including both the Preliminary Award and the Final Award are null and void. In this regard, he explained that the nullity of the Final Award has been scrutinised in the recent Hague Court of Appeal's ruling on 27th June 2023, to which the court found it unqualified to be regarded as an "arbitral award" within the ambit of the New York Convention 1958.

Speaking on the appointment itself, he opined that the defective service, as evident, constituted a breach of the doctrine of jurisdictional immunity enshrined in Section 55 of the Spanish Jurisdictional Immunity Act. In this context, as we observed, Malaysia was deprived of the opportunity to invoke its sovereign immunity until and unless proper service of documents is undertaken.

Nevertheless, the High Court of Justice Madrid's annulment order did not leave the Claimants destitute as such order was made without prejudice to the latter's liberty to file a fresh appointment request. Later, in September 2021, the Sulu heirs submitted all necessary documents with respect to the appointment of a new arbitrator in this proceeding, which Malaysia received the same via the Spanish Embassy in Kuala Lumpur. Following that, on 7th January 2022, Malaysia filed a *declinatoria* i.e., an international motion challenging the jurisdiction of the Spanish courts, precisely on the basis that (a) Spain had no connection with the Sulu case under the 1878 Deed of Cession, and (b) Malaysia did not renounce its sovereign immunity in litigating this claim.

Four days later, the Sulu heirs withdrew the appointment application in the Madrid High Court as they managed to secure an Exequatur Order, which has now been determinatively revoked by the Paris Court of Appeal on 6th June 2023, endorsing the Preliminary Award on Jurisdiction previously rendered by Dr Stampa. Having obtained the Exequatur Order, the Claimants prompted Dr Stampa to move the seat of arbitration from Madrid (Spain) to Paris (France).

[5] *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt (I)* (PCA Case No. 2012-07) and *SA Commercial Bank Guinea Ecuatorial v. Republic of Equatorial Guinea*, OHADA Case No. 003/2007/ARB.
[6] *Kuwait Airways Corp v. Iraqi Airways Co. & Republic of Iraq* [1995] 1 WLR 1147 (UKHL) and *Republic of Sudan v. Harrison et. al.* 587 U.S. (2019).

2) The Sulu Dispute and Malaysia's Sovereignty

By virtue of the 1878 Agreement, the Sultan of Sulu ceded in perpetuity certain territories in North Borneo and granted full power over such territories to Mr. Gustavus Baron von Overbeck in exchange for pecuniary considerations of 5,000 pesos annually.

The main contention in this Sulu case involved the nature of the 1878 Agreement i.e., whether it is an international private lease agreement of commercial nature or a cession of lands and sovereign powers representing a non-commercial claim. Malaysia's position on this has always been unequivocal in the sense that the 1878 Agreement is wholly of sovereign territorial and non-commercial claim. Mr López de Argumedo, in support of Malaysia's stance, opined that it was impossible to infer a lease agreement out of the cession of sovereign power given that the 1878 Agreement, among others, empowered Overbeck to enact laws, raise soldiers/ships/war, impose taxes, and decide the life and death of North Borneo's inhabitants.

In Mr. López de Argumedo's words, the threat against Malaysia's sovereignty crystallised upon the delivery of the sham Final Award by Dr Stampa on 28th February 2022. The purported Final Award, upon scrutiny, encapsulated Dr Stampa's findings that the 1878 Agreement was a lease agreement and USD$ 14.92 billion was ordered upon termination of the same, to the disadvantage of Malaysia, as a restitution in kind to the value of the natural resources in North Borneo (in today's Sabah). This is a clear breach of Malaysia's sovereignty because the value of the natural resources of territories is the attribute of the sovereignty of a State – a principle recognized under public international law.

Specifically on this aspect, Mr. López de Argumedo stressed that an order for a stay of enforcement of the purported Final Award was granted in favour of Malaysia by the French Court of Appeal on 12th July 2022. In essence, the order for the stay of the recognition and enforcement was granted taking into consideration of the potential corresponding impacts on Malaysia's territorial sovereignty, if enforcement were to be allowed.

3) Immunity from Execution

Mr. López de Argumedo, at the outset, explained that assets used by a State (*jure imperii*) or for diplomatic purposes are generally immune from execution purposes by the forum court of another State. Putting it in another way, insofar as diplomatic and consular assets are concerned, no attachment actions such as a claim for overdue payments by a State could be undertaken. The inviolability of diplomatic premises is preserved both under Article 22 of the Vienna Convention on Diplomatic Relations and customary international law.

At present, the regime for enforcement against State Assets in France is envisaged in the Code of Civil Enforcement Procedure. The enforcement of assets in France may be granted in

three circumstances prescribed under Article L.111-1-2 of the Code of Civil Enforcement Procedure[7]:

1. The State concerned has expressly consented to the application of such measure;
2. The State concerned has reserved or affected this property to the satisfaction of the claim which is the purpose of the proceedings;
3. When a judgment or an arbitral award has been rendered against the State concerned and the property at issue is specifically in use or intended to be used by the State concerned for other than government non-commercial purposes and is linked to the entity against which the proceedings are initiated.

On 31st October 2022, in seeking enforcement of the purported Final Award, the Sulu heirs registered a statutory mortgage on three real estate properties which were confirmed to be the premises for the Malaysian diplomatic mission and residences of embassy staff in France. The Malaysian government challenged this statutory mortgage on the ground of a breach of diplomatic immunity and our sovereign immunity from execution.

In consequence, the statutory mortgage is lifted immediately following the 6th June 2023 judgment by the Court of Appeal in Paris reversing the recognition of the Exequatur Order, which was the substantive basis of the said statutory mortgage.

On that note, Mr. López de Argumedo summarised that Malaysia's sovereignty has been adversely jeopardised by this unfounded Sulu proceeding. However, with the Government's persistence and determination, he is confident that our sovereignty will be restored by 2024, hopefully with the setting aside of the sham Final Award by the Paris Court of Appeal.

Speaker (2): Dato' Firoz Hussein bin Ahmad Jamaluddin

In continuing this conversation, Dato' Firoz expounded on the intertwining relationship between the Sulu arbitration proceedings and international customary law. From the historical point of view, he remarked that the infamous 1878 Agreement must not be regarded as binding on Malaysia, particularly having considered an earlier agreement concluded by the Brunei Sultanate with the English merchants.

Adding on to that, Dato' Firoz pointed out that the fatal armed incursion in Lahad Datu, Sabah back in 2013 has prompted the Government of Malaysia to cease all *ex-gratia* cession payments to the heirs of the Sulu Sultanate. As a result, the cessation of such a non-binding payment obligation has then become the trigger point to the entire Malaysia-Sulu fiasco, among others, the arbitrarily transfer of the seat of arbitration from Spain to Paris and the unprecedented delivery of the Final Award by Dr. Gonzalo Stampa on 28th February 2022.

[7] Herbert Smith Freehills. (2016). "A Law on Immunity from Enforcement in France". Retrieved from https://hsfnotes.com/publicinternationallaw/2016/12/01/a-law-on-immunity-from-enforcement-in-france/ [Accessed on 15th May 2023].

To begin with, Dato' Firoz explained how the doctrine of sovereign immunity has been a classic defence raised by a sovereign State in both civil and criminal proceedings. It is a doctrine traced back to Roman times and is founded on the Latin maxim "*par in parem non habet imperium*" or in a simpler sense, an equal shall have no sovereignty over the other. In concept, it hinges on the fundamental principle of the equality of States – being a core tenet of the United Nations Charter. Specifically, Article 2 of the UN Charter embodies the essence of sovereign equality and calls for the mutual respect of such equality among its member States[8].

In the context of international law, this doctrine serves to preserve the cordial relationships between States and as part of the many ongoing initiatives to maintain international legal order. On that basis, a State in exercising its *de jure* sovereignty should not be subject to the jurisdiction of another State, either in the domestic courts or arbitral tribunals. In this regard, Dato' Firoz referred to the International Court of Justice's ruling in *Germany v Italy* (2012) which aptly affirmed that the doctrine of sovereign immunity derives its source from the principle of equality among States. The ICJ, in its judgement, stressed that sovereign immunity is not a matter that arises out of comity between States, rather, it is a principle well-founded and governed under international law.

Applying this doctrine to the context of the Sulu case, Dato' Firoz accentuated that the enforcement of the purported Final Award sought by the Sulu Claimants is a question of international law and cannot be dealt with by way of arbitration per se. In fact, the arbitrability of the subject matter in dispute which manifestly involved the sovereign of Sabah is highly contentious. Dato' Firoz underlined that the purported Final Award rendered by Dr. Stampa envisaged his determinations in respect of the natural resources and territorial sovereignty of Sabah, to which both are matters of non-commercial and non-arbitrable nature. Additionally, given that Malaysia has never waived its rightfully entitled sovereign immunity, no arbitration proceeding could be initiated under such circumstances. Thus, the Sulu claims and attempts for the recognition and enforcement of the arbitral award are a breach of Malaysia's sovereign immunity.

Exploring further the doctrine of sovereign immunity, Dato' Firoz added that the doctrine is generally categorized into jurisdictional immunity and enforcement immunity. For countries which practice absolute sovereign immunity such as China and Hong Kong, neither jurisdictional nor enforcement action could be undertaken against a foreign State notwithstanding that it concerns a commercial dispute involving a sovereign State. Whilst, other countries such as Malaysia, the United Kingdom, and Singapore, which adopt the restrictive sovereign immunity approach, allow legal actions to be instituted against a foreign State if it involves purely commercial transactions (*jure gestionis*).

[8] Article 2 provides: "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:
(1) The Organization is based on the principle of the sovereign equality of all its Members..."

Having in mind the right of self-determination and territorial sovereignty herein involved, it is in Dato' Firoz's views that the ownership of Sabah cannot, in any way, be construed as a private commercial transaction to be determined through arbitration. Malaysia has always maintained the non-arbitrability of the subject matter and the Claimants' adamant pursuit of arbitration violates our state immunity and sovereignty. This position has recently been affirmed and acknowledged by the Hague Court of Appeal in the Netherlands on 27th June 2023.

At this juncture, Dato' Firoz opined that Dr Stampa should have identified the nature of the subject matter and its arbitrability at the outset. Evidently, the judgments of the Court of Appeal in the Hague, in favour of Malaysia, once again drew attention to the fact that the subject matter of the dispute does indeed concern sovereignty issues and should not be arbitrated.[9] Interestingly, Dato' Firoz highlighted that the New York Convention 1958, as much as it serves to facilitate the recognition and enforcement of foreign arbitral awards, it embodied a system of mechanism specifically to exclude the enforcement of arbitral awards which are non-capable of settlement by arbitration or contravene public policy (*see* Article V(2) of the New York Convention).

Dato' Firoz concluded his presentation by putting forward his stance that all member States of the New York Convention are obliged to refuse recognition and enforcement of non-arbitrable awards, otherwise, it constitutes a breach of international law.

Speaker (3): Professor Robert Volterra

The third speaker, Professor Volterra who joined virtually, spoke about the arbitrability of territorial sovereignty disputes *vis-à-vis* the Sulu arbitration dispute. Professor Volterra began his presentation by outlining the concepts of title to territory, sovereignty, and jurisdiction – which are pertinent in understanding the essence of Statehood in the realm of public international law. In this regard, international public law portrays a State-centric international legal order that emphasizes the rule of law in the community of nations with balance, stability, and order as its focal points. At this point, Professor Volterra noted that disputes remain inevitable between the community of nations, and thus, it necessitates the implementation of public international law to guide the States concerned in manoeuvering disputes.

Further, Professor Volterra added that the title to territory and resources contained in it shall only belong to the States, and not private persons or non-State actors. Any territorial sovereignty disputes which arise are often regarded as State-to-State disputes which can only be resolved between State actors. Owing to the notion of territorial sovereignty, there is generally no

[9] The decision of the Hague Court of Appeal in the Netherlands dated 27th June 2023, para 4.2.7.

obligation to litigate or arbitrate, Professor Volterra argued, and such obligation only comes into existence when a State's expressed consent is obtained. As such, it is trite that domestic commercial law is incapable of regulating public international law sovereign disputes, i.e., where territorial disputes are concerned.

With respect to the Sulu dispute, it is evident that the self-styled heirs of the Sulu Sultanate alongside the arbitrator appointed, Dr. Stampa intentionally turned a blind eye to the governing public international law principles. As demonstrated, the Sulu case presents that the Claimants, in the capacity of private entity (non-State actors), sought a determination of the ownership of Sabah and its natural resources, both of which are clearly State-to-State level disputes as governed under public international law. Notably, Professor Volterra shared a similar observation, wherein he highlighted how the Philippines nationals and Dr. Stampa attempted to unilaterally convert the so-called commercial lease claims into a case on territorial sovereignty and sovereign rights – which is against the principles of public international law.

Professor Volterra proceeded with further elaboration on territorial sovereignty, proposing the codification of domestic sovereign immunity legislation as a shield against claims of such nature. The element of sovereign immunity is a foundational rule of public international law that is based on the principle of sovereign equality of States, as reiterated earlier. Therefore, the State under public international law should enjoy immunity in respect of themselves (and their properties) from the jurisdiction of the courts of other States. In further understanding the concept of sovereign immunity under public international law, Professor Volterra outlined the evolution from absolute immunity to restricted immunity under public international law. To summarize, the evolution of trend from pre-World War II and post-World War II revealed an uptrend in the States' involvement in commercial activities and international trade.

Within the realm of public international law, there are several international treaties that deal with sovereign, diplomatic, and consular immunities. This includes the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, the United Nations Convention on Jurisdictional Immunities of States and their Property 2004 ("the Convention"), as well as the European Convention on State Immunity. At present, most countries adopt the doctrine of restrictive sovereign immunity, *inter alia*, including the United Kingdom, Singapore, the United States of America as well as Japan. To date, Malaysia is not a signatory to the Convention and neither does it have any equivalent legislation to the State Immunity Act in the United Kingdom and Singapore. However, Malaysia has accepted the law of foreign state immunity through an established system of domestic case laws that recognize the applicability of the restrictive theory of sovereign immunity.

For the purpose of States' contemplations, Professor Volterra highlighted several benefits of the codification of domestic sovereign immunity legislation:

a. A State can control and clarify sovereign immunities for other States within its domestic courts;
b. A State can limit any restrictions on sovereign immunity (which such authority ought not to be left to the judiciary), enabling the State concerned to be more responsive to domestic stakeholders' needs;
c. A State can promote and encourage legal compliance via mutuality of treatment provisions. This ensures a State will be treated fairly by the courts in other States by virtue of the relevant public international law principles highlighted earlier.

To conclude, Professor Volterra maintained that the Sulu arbitration dispute had inappropriately jumbled the principles under international commercial arbitration and public international law, which eventually led the entire proceedings to a legal impossibility.

Speaker (4): Mr. Chan Leng Sun SC

In the final leap of the session, Mr. Chan took the baton from Professor Volterra, in discussing several key cases on sovereign immunity in international arbitration. Mr. Chan began by outlining the concept of the "act of State", which has a separate concept from the doctrine of sovereign immunity, though intertwined. To ease the audience in the understanding of the concept, Mr. Chan walked the audience through the case of *Belhaj v Straw* [2017] AC 964, to gather the audience's attention. Particularly, the defenses that were put forth by the counsels for the Respondent, involved sovereign immunity and the Act of State. In defining what the Act of State is, Mr. Chan briefly defined it as "*the justiciability of the subject matter of the proceedings, which does not allow another court of law to sit in judgment on the legality of the Act.*" Thus, viewing academic concepts from the perspective of the Sulu arbitration dispute, Malaysia as a State did not renounce its sovereign immunity in the arbitral proceeding concerned. Moreover, it has also been Malaysia's position that no arbitration agreement ever existed between the parties in the 1878 Agreement, thereby rendering the purported Final Award rendered by the arbitral tribunal in the case null and void.

Mr. Chan also shared a similar observation, noting that the 1878 Agreement does not expressly provide for arbitration as the method of resolving disputes. He also explained that neither the Spanish court have the authority to appoint the arbitrator nor is there any implied provision stipulating the Kingdom of Spain as the seat of arbitration in this matter. This is contradictory to the views taken by Dr. Stampa in his Preliminary Award dated 25th May 2020, which amongst others decided that he had the jurisdiction to arbitrate, the Kingdom of Spain as the seat of arbitration, as well as the Spanish law as the *lex arbitri*.

With that said, it is worth iterating that the non-existence of a valid arbitration agreement in the 1878 Agreement is now a settled position in the Hague Court of Appeal's decision (*see* Article V(1)(a) of the New York Convention). The Hague Decision also took the view that the British Consul-General is not an independent arbitrator for the purpose of an arbitration proceeding, therefore, does not give the same allusion to that of an arbitrator.

At present, the position of the British Consul-General is non-existent, and therefore the enforcement of the dispute resolution mechanism is highly contentious. Such a position is also confirmed by the Foreign and Commonwealth Office ("FCO"), as The Hague Decision had also noted. For the benefit of the readers, the extract of the dispute resolution clause in the 1878 Agreement is reproduced below:

> *"In case any dispute shall arise between His Highness the Sultan his heirs or successors and the said Gustavus Baron de Overbeck or his Company it is hereby agreed that the matter shall be submitted to Her Britannic Majesty's Consul-General for Borneo."*

It is obvious that at face value, any dispute shall be submitted to Her Britannic Majesty's Consul–General for Borneo. It is noted that in 2017, the Sulu heirs requested for the FCO to appoint a person or persons to settle their dispute with Malaysia, however, the request was declined later by the FCO. The Sulu claimant proceeded to apply in the High Court of Madrid to appoint an arbitrator, and Dr. Stampa was appointed on 31st May 2019. This leads to a question of forum shopping, if any, and whether the proceeding is valid due to the improper seat chosen to hear the dispute. The unlawful transfer of the seat of arbitration to Paris does not comply with Article V(1)(c) of the New York Convention.

To summarize the above, Mr. Chan emphasized that the Sulu arbitration dispute presents a series of glaring flaws and an abuse of process due to the following reasons:

a. There is no arbitration agreement that exists to bind the parties into arbitration;
b. Dr. Stampa's neutrality is contentious as he is not the United Kingdom Consul-General for Borneo or any successor to that office;
c. Dr. Stampa's appointment was made by the Madrid Court, and there is no basis for Spain to undertake the appointment as Spanish law is not the *lex arbitri* to the dispute;
d. Similarly, the Madrid Court has also nullified his appointment, after the finding in his Partial Award that Spanish law is the *lex arbitri*;
e. The transfer of the seat of arbitration from the Spanish court to the Paris court lacks any legal authority.

Before the Session is concluded, the panel exchanged views on how the entire Sulu saga can be put to an indefinite end. Notably, the speakers explained that States should, in all circumstances, be vigilant on any potential claims that may infringe on their national territories and sovereignty. Further to that, it was stressed that the exercise of self-determination by the State concerned is pivotal in countering claims of such nature.

SESSION 3: THE SULU CASE: ITS EFFECTS ON THE NEW YORK CONVENTION AND THE GLOBAL ARBITRAL SYSTEM[10]

Moderator:

YBhg. Datuk Sundra Rajoo (Director, Asian International Arbitration Centre (AIAC))

Panellists:

1. **YBhg. Professor Dato' Dr. Rahmat Mohamad** (Former Secretary General of the Asian-African Legal Consultative Organization (AALCO))
2. **YM Datuk Tengku Fuad Tengku Ahmad Burhanuddin** (Partner, Messrs FT Ahmad & Co)
3. **Mr. Stephen Fietta KC** (Fietta LLP)

Enforcement and Annulment under the New York Convention 1958

The enforcement and annulment of arbitral awards under the New York Convention exemplify the remarkable balance inherent in the process. Arbitration, being an adversarial procedure, often yields decisions that may not fully satisfy all parties involved. Inevitably, the losing party, driven by a commendable desire for justice, promptly seeks avenues to challenge the decision, whether through separate annulment or setting aside proceedings or during the enforcement proceedings. These enforcement proceedings can occur within the jurisdiction where the arbitration took place or beyond its borders. While variances between the law governing the arbitration and the law governing enforcement may hold implications, it is worth acknowledging across all arbitration laws, the scope of court review of arbitral awards remains rather limited, with any differences being primarily of a technical nature.

In every legal framework, the opportunity to resubmit the dispute to arbitration arises following the annulment of an international arbitration award. It should be noted, however, that this does not hold true in cases where the annulment was based on the absence of a valid arbitration agreement. The Netherlands, specifically, explicitly outlines this provision in Article 1067 of the Dutch Code of Civil Procedure. Datuk Sundra Rajoo highlighted the decisiveness of the Hague Court decision dated 27th June 2023 as a proper precursor for the refusal of future enforcement in the Sulu case. In light of this, he outlined the scope of the session which covered, *inter alia*, the recognition and enforcement of the purported Final Award under the New York Convention 1958 *vis-à-vis* the Paris Court Ruling on 6th June 2023, abuse of arbitral processes, and the general peculiarities of the Sulu Case. Given that the purported Final Award was delivered in France, being the then putative seat of arbitration, it should be noted that the regulations governing the processes of enforcement and recognition are outlined in Articles 1514 to 1517 of the French Civil Procedure Code.

[10] Rapporteurs in session: AIAC Case Counsel, Sharifah Shazuwin Binti Syed Sheh and Sapienza Jazmin Alejandra (Reviewed by AIAC Case Counsel, Kho Yii Ting).

Article V of the New York Convention as A Basis for Defence

National arbitration laws universally prohibit a comprehensive examination of the substance of an arbitral award within the framework of a motion for setting aside or annulment. The available channels for review are predominantly limited to claims related to jurisdictional issues, infringements of procedural fairness and violations of public policy.

Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards sets out the grounds for refusing recognition and enforcement of arbitral awards. For the ease of reference, here is a list of the specific provisions contained in Article V:

- Incapacity or invalidity of the arbitration agreement.
- Improper service of proper notice of the appointment of the arbitrator or the arbitral proceedings, or inability to present a case.
- The award deals with matters beyond the scope of the arbitration agreement.
- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the law of the country where the arbitration took place.
- The award has not yet become binding or has been set aside or suspended by a competent authority in the country in which, or under the law of which, it was made.
- The subject matter of the dispute is not capable of settlement by arbitration under the law of the country where enforcement is sought.
- The recognition or enforcement of the award would be contrary to public policy.

Mr. Stephen Fietta explained the grounds raised by Malaysia to defend itself, particularly Articles V(1)(a), V(1)(b), V(1)(c), V(1)(d), and V(2). He recommended separate annulment proceedings to be secured immediately and that pending a stay of appeal by the Sulu Claimants, the annulment proceedings will most likely conclude successfully. Similarly, the argument of the putative seat of arbitration taken up by the Sulu Claimants during the merits phase is a strong base to annul the sham Final Award.

Article V of the New York Convention as A Basis for Defence

The refusal of recognition in the Hague Court of Appeal following shortly after the French Court delivered the 6th June 2023 decision, is indicative of a ground for refusal in other jurisdictions. Mr. Fietta elaborated that any dispute with respect to the 1878 Agreement should be resolved within the jurisdiction of Malaysia as Malaysia was never a party to the 1878 Agreement. Given the clear absence of an arbitration agreement, it is aligned with the stance taken by the Malaysian Government to annul such an award in the French Court. In a French Court of Cassation case, the court overruled the decision of the Paris Court of Appeal enforcing a Swiss award. The French Court of Cassation stated that the contract concluded between the parties stipulated "*for the*

reimbursement of costs incurred in the exercise of the fiduciary's mandate". Since this mandate is exclusively in relation to certain shares, the part of the award "*directing the defendant to reimburse other costs*" was not grounded on an arbitration agreement.[11]

Any dispute arising from the 1878 Agreement, particularly the early attempts undertaken by the Sulu Claimants to involve British Foreign Office failed and now, the ultimate outcomes in France and Netherlands evidently affirmed the position of the British Foreign Office. In a case decided by the French Court of Cassation which reversed the decision of the Versailles Court of Appeal, concluding that the latter made a wrong application of international customary law. The Court of Cassation found that a waiver of state immunity from execution must only be express and not necessarily specific in order to encompass the assets of diplomatic missions.[12]

Professor Dato' Dr. Rahmat Mohamad demonstrated the comparisons between public and private international law. He explained that public international law involves state sovereignty, state immunity, historical claims, and effective control. In comparison to private international law, from the perspective of international commercial arbitration, the elements comprise arbitral procedures, the New York Convention 1958, global enforcement, effect, public policies, and ethical issues. Furthermore, he highlighted that non-state actors cannot simply impose state sovereignty as evident in the *Sipadan* and *Pulau Batu Puteh* cases.

The Relevance of the *Pulau Batu Puteh* case[13]

It is also known as the *Pedra Branca* case, which involved a territorial dispute between Singapore and Malaysia over a small rocky island located in the Singapore Strait. Both countries claimed sovereignty over the island, which had strategic importance due to its location in a busy shipping lane. The case was brought before the International Court of Justice (ICJ) in 2003. Singapore argued that it had acquired sovereignty over *Pulau Batu Puteh* through continuous and effective administration since the 19th century. Malaysia, on the other hand, claimed the historical title and argued that the island belonged to Johor, one of its states.

In 2008, the ICJ delivered its judgment, ruling in favour of Singapore. The court determined that Malaysia did not provide sufficient evidence to establish its claim of sovereignty over the island. It acknowledged Singapore's long-standing administration and control over the island, considering it as the rightful owner. Having said that, the court also awarded Malaysia sovereignty over two nearby maritime features, South Ledge, and Middle Rocks, stating that they fell within Malaysia's territorial waters. The *Pulau Batu Puteh* case is significant as it clarified the sovereignty rights of Singapore and Malaysia over the disputed island, establishing Singapore's ownership while granting Malaysia control over other maritime features in the vicinity.

[11] *Thierry X v. Paul Y*, French Court of Cassation, 1st Civil Chamber.
[12] *Société Commissions Import Export (Commisinpex) v. République du Congo*, French Court of Cassation, 1st Civil Chamber.
[13] *Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, 23rd May 2008, ICJ Reports 2008, p. 12.

In view of the above, it demonstrates that private parties are barred from asserting a historical claim as how was pursued by Singapore in the *Pulau Batu Puteh* case. In contrast with the *Pulau Batu Puteh* case, the Sulu case is obviously of distinct nature given the non-involvement of the Philippines Government. The latter is a matter of public international law instead of private international law. Professor Dato' Dr. Rahmat emphasised that exceptional care must be taken in the African courts as Malaysia possesses substantial assets in those regions. He recommended that Malaysia stand prepared to defend its interests in any jurisdiction where assets may be located. A second recommendation, albeit remote, was that Malaysia may consider requesting a declaratory judgment from the ICJ and an advisory opinion from the United Nations Security Council.

The *Sipadan* case[14]

This case revolved around a territorial dispute between Indonesia and Malaysia over the ownership of Sipadan Island and Ligitan Island, which are in the Celebes Sea near the island of Borneo. Both countries claimed sovereignty over the islands, which were known for their rich marine biodiversity and were of significant economic and environmental importance. The dispute was brought before the ICJ in 1998.

In 2002, the ICJ delivered its judgment, ruling in favour of Malaysia. The court determined that historical evidence, including maps and treaties, supported Malaysia's claim to sovereignty over Sipadan and Ligitan Islands. It found that the islands were not considered part of the territory of the predecessor state of Indonesia at the time of its independence. The ICJ's decision awarded Malaysia sovereignty over Sipadan and Ligitan Islands, recognising them as part of Malaysia's territorial waters. This ruling, in effect, has resolved the dispute between Indonesia and Malaysia over the ownership of these islands. The *Sipadan* case is significant as it clarified the legal status of the Sipadan and Ligitan Islands, affirming Malaysia's sovereignty over them and defining the maritime boundaries in the region.

Recommendations by YM Datuk Tengku Fuad Tengku Ahmad Burhanuddin

Datuk Tengku Fuad Tengku Ahmad Burhanuddin painted a picture in chronological order outlining the historical pros and cons. Firstly, he glossed over the abuse of process and issues faced by Malaysia under the New York Convention. He highlighted the exorbitant amount granted by Dr Stampa in comparison to the average expenditure of the Sabah State Government. Aside from that, he pointed out that the conduct of Dr Stampa was only scrutinised when he delivered the Partial Award on Jurisdiction and that Malaysia's inaccuracies and missteps resulted in delay and risk to our disadvantage.

[14] *Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, 17th December 2002, ICJ Reports 2002, p. 625.

He elaborated on the consequences of the then Attorney-General's letter dated 19th September 2019 which was addressed to Dr Stampa. Regrettably, that letter was indicative of an admission of fault which later formed the basis of the purported Final Award.

The French Court of Cassation overruled the decision of the Paris Court of Appeal refusing the enforcement of the award. Consequently, the Court stated that the burden of proof is borne by the party alleging there was a breach of due process and it was proven that the receipts from the postal service show that the procedural orders were notified accordingly to both parties.[15] This was not evident in the Sulu Case. In the latter, due process pertaining to the service of the appointment documents was not undertaken by the Claimants in accordance with Section 27 of the Spanish International Judicial Cooperation in Civil Matters Act. This, eventually, formed the basis for the annulment of the Exequatur Order by the French Appellate Court on 6th June 2023, affirming the sole arbitrator's incompetence to assume valid jurisdiction in this Sulu proceeding.

In another matter, the Paris Court of Appeal denied recognition of the arbitral award, stating that there has been a breach of the due process requirement, as the record did not encompass the proof of receipt by the defendant of several procedural orders rendered during the arbitral proceedings.[16]

In conclusion of his remarks, he noted the multiple fit of abuse of process envisaged in the Sulu case, among others, Malaysia was never consulted on the shift in the seat of arbitration and that the Claimants have been adamantly seeking recognition and enforcement of the sham Final Award despite being conscious of Dr Stampa's incompetence to act as the arbitrator-proper in this proceeding.

Aside from that, he stressed, in recommendations, that Malaysia should make a decisive statement heightening the fact that it is not an heir to the 1878 Agreement and that such an Agreement has been superseded through the formation of Malaysia in 1963. In his words, Sabah is always an integral part of Malaysia's sovereignty and Malaysia's Ministry of Foreign Affairs is urged to take an affirmative stance on this, once and for all.

Further, as Datuk Tengku Fuad noted, there exists a strong and meritorious case against the arbitrator alongside Malaysia's legal pursuits against the Claimants and their backers. It is conspicuous that Dr Stampa has acted *mala fide* and beyond the ambit of his long-defunct jurisdiction, to the prejudice of Malaysia. In view of the above, the Government of Malaysia should, by all means, summon Dr Stampa to our jurisdiction to account for all the catastrophes he has brought upon to the Malaysians.

---

[15] *Yukos Capital v. Otkrytoye Aktsionernoye Obshestvo Tomskneft Vostochnoi Neftyanoi Kompanii*, French Court of Cassation, 1st Civil Chamber.
[16] *Otkrytoye Aktsionernoye Obshestvo 'Tomskneft' Vostochnoi Neftyanoi Kompanii v. Yukos Capital,* Paris Court of Appeal, 15th January 2013.

CLOSING REMARKS BY YB SENATOR TAN SRI DATUK SERI PANGLIMA ANIFAH BIN AMAN

SENATOR, DEWAN NEGARA AND SPECIAL ADVISOR TO THE CHIEF MINISTER OF SABAH FOR INTERNATIONAL RELATIONS AND FOREIGN INVESTMENT[17]

Following the conclusion of panel discourses, YB Senator Tan Sri Datuk Seri Panglima Anifah bin Aman delivered his closing remarks for the Sabah Colloquium by first extending his gratitude to the Legal Affairs Division of the Prime Minister's Department (BHEUU), the Asian International Arbitration Centre (AIAC), the Institute for Development Studies, Sabah (IDS) and the Sabah Law Society (SLS) and others who have contributed in organising the Colloquium.

Resonating the prevailing topic of Sulu Claims, Tan Sri Datuk Seri Panglima Anifah congratulated Malaysia's recent victories in both the Paris and Hague Court of Appeal against the self-proclaimed Sulu heirs over their false and outrageous claims against Malaysia. These victories have reaffirmed the well-established truth that Sabah is part of Malaysia. In this respect, Tan Sri expressed his confidence that Malaysia will continuingly safeguard and defend our national sovereignty and identity in this sham proceeding.

With these positive court rulings, Tan Sri Datuk Seri Panglima Anifah is hopeful that the purported Final Award will be put to a definitive conclusion soon, given that sovereign immunity is a trite principle of customary international law. Having said that, Tan Sri expressed his disappointment to observe how the international arbitration process was subject to innumerable abuses by the self-styled Sulu heirs to threaten the sovereign immunity of Malaysia. It was Tan Sri Datuk Seri Panglima Anifah's opinion that Malaysian should not be dissuaded from engaging in international arbitration. Malaysian should, on the other hand, continuously draw lessons from this experience and pursue its testament to preserve the sanctity of international arbitration.

Flowing from there, Tan Sri Datuk Seri Panglima Anifah pointed out that mutual consent is the cornerstone of alternative dispute resolution mechanisms and specifically in the present case, arbitration is the focal point of discussion. In a strict sense, there is no room for unilateralism in the context of arbitration. The Sulu case is disqualified to be acknowledged as "*international arbitration*" given the absolute absence of an agreement to arbitrate in the Deed of Cession 1878. In this regard, Tan Sri opined that one party cannot thrust international arbitration as a platform for dispute resolution on a non-consenting party simply to achieve their own desired outcomes. Yet, the self-claimed Sulu heirs managed to seize the chance to initiate arbitration with the sole motivation to obtain a financial reward and this forced the Government of Malaysia to engage in frivolous proceedings in order to defend sovereign immunity and the integrity of Malaysia.

[17] Rapporteur in session for the Welcoming Remarks, Opening Remarks, Keynote Address, Special Remarks and Closing Remarks: AIAC Case Counsel, Ooi Wei Qian.

Tan Sri Datuk Seri Panglima Anifah explained that the founding purpose of the New York Convention is to facilitate the recognition and enforceability of legitimate foreign arbitral awards. Under no circumstances should the international comity be belittled or abused, especially when it threatens the assets and sovereign immunity of a State. International arbitration proceedings should portray a right balance between transparency, legitimacy, and legality on one part and flexibility on the other. As evident, the Sulu case has pushed many challenges to the fore including the infinite bankrolling of the Sulu claim by a third-party funder. These challenges are to be grappled with to ensure justice for all parties involved in international arbitration proceedings.

With Malaysia's national sovereignty and security at stake, Tan Sri Datuk Seri Panglima Anifah strongly believed that Malaysia would not hesitate to take action against those who have acted in bad faith and in disregard of the law. This Colloquium is only the first step of Malaysia's continuing efforts to examine the ramifications of the Sulu case.

Before concluding his insightful remarks, Tan Sri Datuk Seri Panglima Anifah took the opportunity to thank Dato' Sri Azalina Othman Said for bringing this Sulu case to light for all Malaysians and for establishing the Federal Government's goodwill to uphold the Malaysia Agreement 1963. Tan Sri further expressed his gratitude to the Chief Minister of Sabah, Datuk Seri Panglima Haji Hajiji Haji Noor for his unceasing support to the Federal Government to obliterate any attempts to assert territorial sovereignty over Sabah. In addition, Tan Sri Datuk Seri Panglima Anifah is confident that the State Government, under the leadership of YAB Datuk Seri Panglima Haji Hajiji Haji Noor, will priortise Sabahan and their interests at all cost.

CONCLUSION

Once again, we were privileged to have leading experts from the legal community, both nationally and internationally, gather to scrutinize a case that has profoundly affected Malaysia - the Sulu matter. Their insightful analysis provided a detailed understanding of the case's exceptional impact on our country. It is essential to clarify that the primary objective of the Colloquium is not to elucidate the Government of Malaysia's response to the Sulu matter. Rather, its purpose is to convene prominent voices and experts to engage in discussions surrounding the intriguing and complex issues that the case brings to the forefront.

Over the recent decade, arbitration has gained momentum and traction becoming the preferred mechanism for resolving disputes both within domestic jurisdictions and international legal landscapes. It has emerged as a pre-eminent means of resolving commercial and cross-border disputes, forming a vital part of our contemporary justice system. Offering privacy, cost-effectiveness, time efficiency, and flexibility, arbitration has captured the attention of various parties seeking an alternative dispute resolution. In this system, arbitrators wield considerable power, akin to judges, in adjudicating matters. However, unlike judges who are assigned impartially, arbitrators are appointed directly by the involved parties. Given this unique aspect, establishing an oversight mechanism becomes crucial to ensure that arbitrators adhere to stringent ethical standards, thus preventing any instances of "rogue arbitrators" or bias. Such safeguards are essential to preserve the integrity and credibility of the arbitration process.

Arbitration is not a foreign concept in Malaysia, or across Asia. Malaysia is home to the Asian International Arbitration Centre (AIAC) establishment under the auspices of the Asian-African Legal Consultative Organization (AALCO). For the past four decades, the AIAC has served as a prominent global hub for alternative dispute resolution. Being the first arbitration centre under AALCO in Asia, it has played a crucial role in facilitating commercial trade and bolstering foreign investors' confidence in our nation. Given Malaysia's status as an open trading economy, it strongly supports commercial arbitration as a means to enhance trade relationships and promote economic growth. Embracing arbitration is seen as an economic imperative, given its significant contributions to fostering an investor-friendly environment and facilitating smooth international transactions.

The arbitration process of today is not immune to abuse. The Sulu case is a prime example where in 2017, Malaysia was dragged into an arbitration proceeding by a group of individuals claiming to be the descendants of the deceased Sultan of Sulu. The Sulu case, as a whole, demonstrated a grave violation of Malaysia's sovereign immunity as well as national security.

The Claimants, with adamant reliance on a colonial agreement - the Deed of Cession executed back in 1878 - mounted an astronomical USD15 billion in claims against Malaysia. It is worth noting that the Claimants were bankrolled by a third-party litigation funder, in pursuing their

claims against the Government of Malaysia. In the Sulu case, the element of professionalism and ethical conduct is absent as the arbitration process was not mutually agreed upon by the parties involved and the purported final award was illegally issued by an arbitrator, Dr Gonzalo Stampa, whose appointment had been annulled by the Spanish court, the very same court which appointed him, and therefore has no jurisdiction to adjudicate the matter. Dr. Stampa has also taken an unprecedented and unusual move to change the seat of arbitration. Before the judgment in Spain was concluded, the arbitrator in the Sulu case moved the seat of arbitration to Paris. The Claimants then continued to pursue the recognition and enforcement of the purported Final Award in other countries such as the Netherlands and Luxembourg. Hypothetically, the Claimants could continue forum shopping indefinitely in as many countries (that are party to the New York Convention) as they choose until they reach an outcome which they find satisfactory.

The Sulu case has brought to light several concerning issues, particularly regarding the paramount need to uphold ethical conduct, integrity, professionalism, and good practices by arbitrators. These principles serve as the bedrock of any legitimate arbitration process and are essential for maintaining the trust and confidence of parties who opt for arbitration to resolve their disputes. Without these fundamental aspects, the entire arbitration system could be undermined. Furthermore, the Sulu case serves as an example of how the arbitration process can be misused to intimidate sovereign countries when there is a lack of oversight mechanism to address arbitrators' shortcomings in adhering to stringent professional and ethical standards. Implementing a stringent code of ethics for arbitrators would significantly reduce the occurrence of sham arbitration proceedings. As a well-established principle under customary international law, no sovereign State should be subjected to the threat of legal or arbitration suits unless the State explicitly consents or enters into the commercial realm. Ensuring this principle is upheld safeguards States from undue coercion and preserves the integrity of the arbitration process.

The Sulu Claimants are able to pursue their case due to the financial backing from a third-party litigation fund with substantial resources and investors seeking a share of the award commission. This financial support allows them to continue the pursuit indefinitely. On the other hand, Malaysia bears the burden of defending its sovereignty and security, with the expenses incurred coming from the taxpayers. From Malaysia's perspective, this is not a commercial dispute but rather a sovereign nation protecting its security and sovereignty against an arbitration process that appears to lack legitimacy. Since there was no pre-existing arbitration clause in the colonial agreement, the entire arbitral proceeding, including the purported Final Award, should be deemed null and void.

To safeguard the integrity of the internationally respected arbitration system, the global arbitration community must take effective and collective measures. No nation should be subject to the whims of rogue arbitrators or held hostage through the sophisticated abuse of arbitral processes, as seen in the Sulu case. Supporting the strengthening of the global arbitration system and advocating for the regulation of third-party litigation funding with transparent

disclosure procedures is essential. Such regulations and regulatory framework would mitigate the risk of abuses and unethical practices by litigation funders, thereby eliminating any incentives for frivolous claims.

The Colloquium held in Sabah has been a resounding success, bringing together a diverse group of experts, legal practitioners, historians, and members of the global arbitration community to foster engaging academic discussions surrounding the Sulu case. This successful event, which showcased various aspects of legal discourse, is now set to be replicated in the United Kingdom later this year. The Government of Malaysia remains steadfast in its unwavering commitment to bringing a definitive resolution to this sham arbitration proceeding and the purported Final Award, which has inflicted detrimental consequences on the people of Malaysia.

[End of Report]