



Malaysia's Indisputable Sovereignty Over Sabah

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Abstract

This article discusses on the recent issue pertaining to the 'Sulu state arbitration' requesting Malaysia to pay compensation to the heirs of the Sulu Sultanate for exercising sovereignty over Sabah from the purview of international law and state sovereignty. The heirs of the defunct Sulu Sultanate are adamant that Sabah is still 'part of their territory'. On Jan 22, 1878, an agreement was signed between the Sultan of Sulu with two British agents, Alfred Dent, and Baron von Overbeck, ceding North Borneo to the British in return for the payment of cession money of 5,000 Malayan dollars annually to the Sultan. The payment was increased to 5,300 dollars per year when nearby islands from Banggi Island to Sibuku Bay were also ceded. Sabah was briefly placed under Japanese rule during World War II and later reverted back to British rule upon Japanese surrender in 1945. Sabah remained a British crown colony until it gained independence within Malaysia in 1963. As a component state of the Federation, Malaysia has invested billions of Ringgit to develop Sabah, establishing a working government to administer this territory. The heirs of the forgone Sulu Sultanate have not done much to display that they are in fact the sovereign rulers of Sabah. This article concludes that Sabah is recognized globally as part of Malaysia, in no way Malaysia is obliged to entertain claims of descendants of a long-lost sovereign. As a full member of the United Nations, Malaysia is an independent sovereign state and its sovereignty over Sabah must be respected.

Keywords: Sabah, State Sovereignty, International Law, Territorial Integrity, Federation of Malaysia, Sultanate of Sulu

Abstrak

Artikel ini membahas tentang isu terkini yang berkaitan dengan 'arbitrase negara bagian Sulu' yang meminta Malaysia untuk membayar kompensasi kepada ahli waris Kesultanan Sulu karena telah menjalankan kedaulatan atas Sabah dari lingkup hukum internasional dan kedaulatan negara. Ahli waris Kesultanan Sulu yang sudah tidak ada bersikeras bahwa Sabah masih merupakan 'bagian dari wilayah mereka'. Pada tanggal 22 Januari 1878, sebuah perjanjian ditandatangani antara Sultan Sulu dengan dua agen Inggris, Alfred Dent dan Baron von Overbeck, yang menyerahkan Kalimantan Utara kepada Inggris dengan imbalan pembayaran uang penyerahan sebesar 5.000 dolar Malaya per tahun kepada Sultan. Pembayaran tersebut ditingkatkan menjadi 5.300 dolar per tahun ketika pulau-pulau di dekatnya, dari Pulau Banggi hingga Teluk Sibuku, juga diserahkan. Sabah sempat berada di bawah kekuasaan Jepang selama Perang Dunia II dan kemudian dikembalikan ke kekuasaan Inggris setelah Jepang menyerah pada tahun 1945. Sabah tetap menjadi koloni mahkota Inggris hingga memperoleh kemerdekaan di Malaysia pada tahun 1963. Sebagai negara bagian dari Federasi, Malaysia telah menginvestasikan miliaran Ringgit untuk mengembangkan Sabah, membentuk pemerintahan yang bekerja untuk mengelola wilayah ini. Para pewaris Kesultanan Sulu yang telah hilang tidak melakukan banyak hal untuk menunjukkan bahwa mereka sebenarnya adalah penguasa Sabah yang berdaulat. Artikel ini menyimpulkan bahwa Sabah diakui secara global sebagai bagian dari Malaysia, dan Malaysia tidak berkewajiban untuk melayani klaim keturunan penguasa yang telah lama hilang. Sebagai anggota penuh Perserikatan Bangsa-Bangsa, Malaysia adalah negara berdaulat yang merdeka dan kedaulatannya atas Sabah harus dihormati.

Kata kunci: Sabah, Kedaulatan Negara, Hukum Internasional, Integritas Wilayah, Federasi Malaysia, Kesultanan Sulu

I. Introduction

Malaysia has its origin from pre-colonial Malay sultanates. It was once part of the mighty Srivijaya and Majapahit kingdoms before it came under the rule of the Malacca Sultanate¹. After the fall of the Malacca Sultanate in 1511, smaller kingdoms emerged across the Malay Peninsula - Johor, Negeri Sembilan, Kelantan, Pahang, Terengganu, Selangor, Perak, Kedah and Perlis². These Sultanates later became British protectorates alongside with crown colonies of Malacca, Penang, and Singapore³.

On the other side of the South China Sea, the Malay Sultanate of Brunei dominated Sarawak for hundreds of years before ceding it to James Brooke in 1841⁴. Sarawak was then made private kingdom of the Brooke family until it was ceded to the British at the end of World War II. Sabah was ruled by both Brunei and Sulu sultanates before the sovereignty over it was transferred to the British, administered by the British North Borneo Chartered Company⁵.

Upon the independence of Malaya in 1957 and the attainment of self-government for both Sabah and Sarawak in 1963, negotiations were made to federate the sovereign nation of Malaya with these British colonies. Malaysia was then formed when Malaya was federated with Sabah, Sarawak, and Singapore in 1963⁶. Singapore was then expelled from the Federation in 1965⁷. Despite the popular belief that Malaysia was created in 1965, Malaysia's membership to the United Nations remains in 1957⁸. Under the 20 points elucidated in the Malaysia Agreement, Sabah and Sarawak enjoy a certain degree of autonomy within Malaysia particularly in terms of immigration controls, tariff and finance as well as education. Sabah was federated into Malaysia without any armed conflicts.

As a state rich in natural resources, Sabah has progressed quite rapidly within Malaysia. Sabahans were accorded Malaysian citizenship and were free to reside in any part of Malaysia. Sabah's economy relies on three key development sectors: agriculture, tourism, and manufacturing. Petroleum and palm oil remained the two most exported commodities. Sabah imports mainly automobiles and machinery, petroleum products and fertilizers, food, and manufactured goods.

II. Discussion

1. Should Sabah leave Malaysia?

For the past six decades, Malaysia has transformed itself from a poor agricultural nation into becoming one of the most economically competitive countries in the world. Malaysia is now seen as a leading developing nation. When the British left, Malaya and its Borneo counterparts were suffering from lack of infrastructure. The British brought developments only in areas that would provide them economic benefits. For instance, the first railway line built in Malaya connecting Taiping and Port Weld (now Kuala Sepetang) was used to transport tin from the mining site to the port. This was not done for the benefit of the local population. As such, there was disunity among its multi-racial population with huge income gaps. Nevertheless, things changed after independence and Malaysia is now moving towards achieving the status of high-income nation.

There was nonetheless, calls for Sabah to leave Malaysia. Commentaries were published displaying as if as if Malaysians, or West Malaysians in particular are outright racists against Sabahans⁹. There were accusations that the ruling government is imposing Malay-Muslim way of life on their compatriots in Borneo¹⁰. This accusation is far from true.

¹ Jan Wisseman Christie, "Trade and Early State Formation in Maritime Southeast Asia: Kedah and Srivijaya," *Jebat* 13 (1984): 43-56.

² Richard Winstedt, *Malaya and Its History* (Hutchinson University, 1962).

³ Timothy Norman Harper, *The End of Empire and the Making of Malaya*, ed. Cambridge University Press, 2001.

⁴ Steven Runciman, *The White Rajahs: A History of Sarawak From 1841 to 1946* (Cambridge: Cambridge University Press, 1960), 56-60.

⁵ George McT. Kahin, "The State of North Borneo 1881-1946," *The Far Eastern Quarterly* 7, no. 1 (1947): 43-45.

⁶ Mohd Hazmi Mohd Rusli, "Leaves of the Same Tree," *New Straits Times*.

⁷ R.S. Milne, "Singapore's Exit from Malaysia; the Consequences of Ambiguity," *Asian Survey* 6, no. 3 (1966): 175-177.

⁸ Ahmad Zaini Kamaruzzaman, "Bahasa Melayu Used for the First Time in UN Hq," *New Straits Times*.

⁹ James Chin, "Is Malaysia Heading for 'BorneoExit'? Why Some in East Malaysia Are Advocating for Secession," *The Conversation*.

¹⁰ "Commentary: The Ghost of Borneo, Talk of Secession Are Back to Haunt Malaysia," *Channel News Asia*.

The Federal Constitution acknowledged Islam as a religion of the Federation as stipulated clearly in Article 3.¹¹ Nonetheless, Malaysia respects freedom of religion as enshrined in Article 11(1) of the Federal Constitution.¹² The multiracial and multireligious atmosphere is apparent in any major cities in Malaysia. Any visitors to Malaysia would realise that there are various places of worship not just limited to mosques. Malaysia's capital Kuala Lumpur is home to a gigantic Hindu temple, Batu Caves, which is the largest Hindu shrine outside of India. Although Malaysia has only about 9% of the Christian population, this majority Muslim nation is home to one of the largest churches in Bukit Jalil, the southern suburban district of Kuala Lumpur. The fundamentally Muslim state of Kelantan is where one of the largest Buddhist temples in Southeast Asia, Wat Photivihan, is located.

Masjid Jamek, one of the largest mosques in Kuala Lumpur is located just a stone's throw away from St. Mary's Cathedral in the heart of the city. A similar scenario could be seen in other cities like Melaka¹³, Johor Bahru¹⁴, and Alor Setar¹⁵. This is a clear manifestation that Malaysia is a nation that respects freedom of religion.

In his commentary, Chin (2020) described that all mega infrastructures in Peninsula Malaysia like the Petronas Twin Towers and the Penang Bridges are funded by resources stolen from Borneo states. Blessed with considerable oil and gas resources, Sabah and Sarawak have contributed to the nation's economic progress. However, this does not mean that states in Peninsula Malaysia are without much national resources. In addition, most taxpayers reside in the states of Peninsula Malaysia.

States within Malaysia could not easily choose to withdraw from the Federation as this violates Article 1(2) of the Federal Constitution. There has been an inaccurate viewpoint amongst some Malaysians that if Singapore could become an independent republic, others too could follow suit. Singapore never left the Federation but was removed in 1965. In addition, Point 7 of the 20-Point Agreement (a list of 20 points drawn up by North Borneo, proposing terms for its incorporation into the new federation) does not even provide the right for Sabah to secede from the Federation.

2. Should the Federation Come Apart?

Unlike movements in Papua, Scotland, Okinawa, Pattani, and southern Philippines, there have never been any formal demands made by the people and/or government of any states within the Federation to secede from the Federation, particularly Sabah and Sarawak¹⁶. Although there are secession movements in Sabah and Sarawak, however, these initiatives are carried out by small organizations and minorities.

In addition, there are no military conflicts or militant movements taking place in Malaysia like that of the Pattani United Liberation Organisation (PULO) in Thailand, the Operasi Papua Merdeka (OPM) in Indonesia and the Moro Islamic Liberation Front (MILF) in the Philippines.

The world recognizes Malaysia as one of the safest nations. The Global Peace Index (GPI) 2022 acknowledges Malaysia has a high state of peace, listed as among the top 20 most peaceful nations¹⁷. Malaysia fared better than its former colonial master, the United Kingdom and other developed nations like Australia, the Netherlands, South Korea, France and Sweden. Malaysia climbed up to the 18th spot in 2022 in the recent report published by the GPI – an indication that Malaysia is safe, stable and peaceful¹⁸.

Moreover, the World Economic Forum has placed Malaysia as one of the world's top-30 most competitive nations in 2022¹⁹. Malaysia too, has one of the best healthcare systems in the world

¹¹ Article 3(1) of the Federal Constitution reads 'Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation'.

¹² Article 11 (1) of the Federal Constitution stipulates 'Every person has the right to profess and practise his religion

¹³ Masjid Kampung Kling in Melaka is located next to a Chinese Temple and a Hindu Shrine.

¹⁴ The Arulmigu Raja Mariamman Devasthanam Temple in Johor Bahru is situated not too far away from a mosque.

¹⁵ Masjid Zahir in Alor Setar is just a stone's throw away to the city's Chinatown and a Hindu Temple.

¹⁶ Mohd Hazmi Mohd Rusli and Fareed Mohd Hassan, "Malaysia Not Heading for 'BorneoExit,'" *Malaysiakini*.

¹⁷ *Global Peace Index 2022: Measuring Peace in a Complex World*, 2022.

¹⁸ "Malaysia Is 18th Most Peaceful Country in the World," *New Straits Times*.

¹⁹ "Malaysia Ranks 32nd in 2022 IMD World Competitiveness Ranking," *New Straits Times*.

outdoing many developed nations like South Korea, the United Arab Emirates, and the United States of America²⁰. Malaysia would never made it into these global rankings if not for the relative peace and stability contributed by its citizens regardless of which part of the Federation they came from. Hence, the argument that Malaysia is moving for BorneoExit is not justified at all. With such peace, progress, and stability, why should Sabah leave the Federation?

3. The Sulu Sultanate

The Sulu Sultanate was established in 1457 as a vassal state of Brunei²¹. It gained independence from Brunei in 1578 with territories stretching from eastern Sabah and North Kalimantan to southwest islands of modern-day Philippines²². This sultanate was so influential that the maritime area of this region is immortalized in the name of this once-powerful kingdom – the Sulu Sea. The Sulu Sultanate stood the test of time and was able to withstand external influence and European colonization. While other kingdoms in Southeast Asia fell under European dominions, Sulu remained intact until the arrival of the Americans in the 20th century. The Carpenter Agreement, concluded between F.W. Carpenter on behalf of the American government with Jamalul Kiram, has ended the sovereignty of the Sulu Sultanate annexed as part of the Philippines²³. In other words, the descendants of Kiram have no right to make claims over Sabah as Sulu's sovereignty over Sabah ended more than a century ago.

The world has acknowledged Malaysia's sovereignty over Sabah as a component state of the Federation²⁴. Malaysia has invested billions of Dollars to develop Sabah establishing a working government to administer this territory²⁵. Since 1878, the heirs of the Sulu Sultanate have not contributed significantly to the political stability and economic development of Sabah. When Sabah was invaded by Japan, they were nowhere to be seen fighting for their 'so-called' land²⁶.

In 2022, the heirs of the defunct Sulu Sultanate initiated legal proceedings to seize assets belonging to the national oil company, Petronas, registered in the Netherlands, the value of which could run into the billions²⁷. This was done to satisfy a US\$14.92 billion award by a Spanish arbitrator Gonzalo Stampa.²⁸

In response, Malaysia has instituted legal proceedings in Luxembourg and will take similar steps in the Netherlands to resist and set aside the unwarranted claims from this arbitral award. Malaysia does not owe anyone money for Sabah, especially to the heirs of the forgone Sultanate of Sulu.

4. The Sabah Claim and International Law

There are a few methods of territorial acquisition under international law. This could be done through conquest, prescription, and cession. Conquest or annexation was recognized as a method of territorial acquisition in the past but has been deemed illegal under international law since the UN Charter came into force in 1945²⁹.

A state may acquire sovereignty over a certain territory if the sovereignty is transferred or ceded by the sovereign to another. The sovereignty over Sabah was transferred from the Sultanate of Sulu to the British via the 1878 Treaty entered between the Sultan of Sulu and the British agents. The sovereignty over Sabah was then transferred by United Kingdom to Malaysia in 1963.

In addition, under international law, prescription refers to acquisition of sovereignty by way of actual exercise of sovereignty, maintained for a reasonable period of time and is affected without

²⁰ "Malaysia Ranked 8th in Asia Pacific for Healthcare Personalised to Each Patient," *MalayMail*.

²¹ Al Jacinto, "Malaysia Rejects PH, Sultanate Claims on Sabah," *The Manila Times*.

²² Cesar Adib Manjul, "Political and Historical Notes on the Old Sulu Sultanate," *Journal of the Malaysian Branch of the Royal Asiatic Society* 31, no. 1 (1965): 23–24.

²³ Mohd Hazmi bin Mohd Rusli and Muhamad Azim bin Mazlan, "Sultan of Sulu's Sabah Claim: A Case of 'Long-Lost' Sovereignty?," *RSIS Commentaries*.

²⁴ Danny Wong Tze Ken, "The Name of Sabah and the Sustaining of a New Identity in a New Nation," *Archipel* 89 (2015): 161–178.

²⁵ Tracy Bull, "Sabah Tables RM5.1bil Surplus State Budget for 2023," *Free Malaysia Today*.

²⁶ "Only in Sabah – an Uprising!," *Daily Express*.

²⁷ Jose Barrock, "Sulu Sultan's Heirs Strike Again," *The Edge Markets*.

²⁸ "Report: M'sia Ordered to Pay Almost RM63b to Sulu Sultan's Descendants," *Malaysiakini*.

²⁹ Eugene Kontorovich, *International Responses to Territorial Conquest*, 2009.

objection from any states³⁰. Even if the British version is contested and the Sulu version of the 1878 Treaty (that it was leased, not ceded) is upheld, the Sultanate may not be able to claim sovereignty over Sabah as Malaysia has, since 1963, exercised prescription and administered Sabah without any consistent objection from any members of the United Nations (UN).

Sabah was not annexed as it voluntarily joined the Federation of Malaysia in 1963. Malaysia has since installed a working government to administer Sabah, with the international community recognizing Sabah as part of Malaysia. This could be seen in the 2002 ICJ decision which awarded the islands of Sipadan and Ligitan located off Sabah, which were claimed by Malaysia and Indonesia, to the former. This decision has further underscored the fact that Sabah has always been part of Malaysia. The claim of Sabah as the ancestral territory of the Sultan of Sulu may also seem to be baseless. The claim of 'ancestral territory' does not carry much weight under international law. While historically, Sabah was part of the Sulu Sultanate, the political scenario of Sabah and the Philippines had changed since the Spanish, the British and the Americans colonized this part of the world.

a. 1878 Treaty

The 1878 treaty signed between the then Sultan of Sulu and two British agents, Baron Von Overbeck and Alfred Dent on the cession of Sabah was utilized by the heirs of Kiram, to claim 'cession money' from Malaysia³¹. The former territory of North Borneo was ceded or leased in perpetuity to the British in January 1878 by an agreement signed between the then Sultanate of Sulu and two British commercial agents, namely Alfred Dent and Baron von Overbeck of the British North Borneo Company, in return for payment of 5000 Malayan dollars per year³².

The sum was increased to 5,300 dollars when the cession was extended to include islands along the coast of North Borneo in a treaty entered into in 1903. Before that, the Sulu Sultanate based in Jolo and parts of Mindanao, was absorbed by the Philippines, which was under Spanish rule³³. The Philippines became a territory of the United States in 1898 but without North Borneo³⁴. Subsequently, the Sulu Sultanate was disbanded by the Americans in 1915 via the Carpenter Accord³⁵.

During Japanese occupation in 1941, Sabah was made a Japanese colony³⁶ and the Japanese empire obviously did not pay any 'cession money' to the heirs of the defunct Sulu Sultanate. The Philippines claimed sovereignty over Sabah but agreed in 1977 not to pursue the claim³⁷. In 2008, an initiative by Nur Misuari, a leader of the Moro National Liberation Front (MNLF) to take the Sabah claim to the International Court of Justice (ICJ) was regarded as a non-issue by the Sabah authorities³⁸.

Malaysia consistently paid the so-called 'cession money' or 'compensation money' amounting to RM5,300 to the heirs of Kiram until 2013³⁹. This was meagre sum, amounting to RM441.67 per month. This payment was discontinued after the terrorist group named 'the Royal Sulu Army' unwarrantedly invaded Sabah a decade ago causing clashes between the terrorist group and the Malaysian authorities. The invasion was successfully quelled, and peace was then restored in the affected area.

Within 51 years in the Federation, Sabah has undergone rapid modernisation that never took place in 253 years being under colonial rule⁴⁰. Unlike adverse contentions made

³⁰ Y.Z. Blum, "Prescription in International Law," in *Historic Titles in International Law* (Dordrecht: Springer, 1965).

³¹ "Filipina Buka Semula Jabatan Menuntut Sabah," *Berita Harian*.

³² P.J. Rivers, "The Origin of 'Sabah' and a Reappraisal of Overbeck as Maharajah," *Journal of the Malaysian Branch of the Royal Asiatic Society* 77, no. 1 (2004): 67-99.

³³ Jamari Mohtar, "Sulu Claims: 1903 Agreement Removed Any Ambiguity," *New Straits Times*.

³⁴ Matthew Wills, "The Ugly Origins of America's Involvement in the Philippines," *Jstor Daily*.

³⁵ Dona Z. Pazzibugan, "Sultanate to Invoke 1915 Pact with US," *Inquirer.Net*.

³⁶ Ooi Keat Gin, *The Japanese Occupation of Borneo, 1941-1945* (Routledge, 2011), 38-42.

³⁷ Jeremia C. Flores, Clarenca S. Reyes, and Rodolfo C. Sabio, "The Legal Implications of the Unilateral Dropping of the Sabah Claim," *Philippines Law Journal* 57 (1982): 78.

³⁸ Stan Yee, "Where the Claim Fails Pt 1," *Malaysiakini*.

³⁹ Mohd Hazmi Mohd Rusli and Mohd Ridwan Talib, "Malaysia Doesn't Owe Anyone Money for Sabah," *Malaysia Now*.

⁴⁰ Rusli, "Leaves of the Same Tree."

by some, Sabah was never 'forced' to be part of Malaysia as it formed the Malaysian Federation with Malaya and Sarawak voluntarily. As reported by the Cobbold Commission, eighty percent of Sabahans and Sarawakians at that time were in favour of joining in to form Malaysia⁴¹.

Timor-Leste, the then Indonesian province of East Timor was invaded and annexed by Indonesia against the will of the Timorese⁴². As a result, a referendum of self-determination was held in 1999 and more than 70 per cent Timorese chose to be independent. Timor-Leste became a sovereign nation in 2002 and still is grappling with economic problems. Nearly half the population lives in extreme poverty⁴³.

The Japanese prefecture of Okinawa was once the Kingdom of Ryukyu that was established in 1429⁴⁴. The Ryukyans are linguistically and ethnically distinct to Japan. It had diplomatic and economic relationships with its Chinese and Japanese neighbours. In fact, it had ties with the Sultanate of Malacca as indicated in several exchanges of letters between these two kingdoms⁴⁵. Nevertheless, the Kingdom of Ryukyu was not able to withstand the might of the Japanese army and was annexed as part of the Empire of Japan in 1879. It was renamed as Okinawa Prefecture⁴⁶.

Japan lost World War II to the Allied Forces in 1945 and Okinawa was placed under American administration until 1972 before it was returned to Japan⁴⁷. Due to this, there have been independence movements initiated to demand independence of Okinawa from Japan, as it was annexed as part of Japan in 1879⁴⁸. Nevertheless, Okinawa remains an integral part of Japan to this day.

Scotland is one of the states that formed the United Kingdom of Great Britain and Northern Ireland (UK) in 1707⁴⁹. Scotland possesses its own Scottish pound as its national currency, its own national parliament, its own armed forces, enjoys a developed economy and home to a number of world-class universities. It has a very high human development index⁵⁰.

Although Scotland is an economically developed state, it took them quite some time to consider whether to leave the UK after more than three centuries of union with England. The independence referendum had already taken place on 18 September 2014 and Scotland has chosen to remain with the UK⁵¹.

Unlike Timor-Leste and Okinawa, Sabah was never annexed as part of Malaysia. This former British colony was voluntarily federated as part of Malaysia. In addition, Sabah uses the Malaysian Ringgit, enjoys a developing economy and does not have its own military establishment. It does not have a parliament of its own but like other states within the Federation, Sabah has a state legislative assembly. Without these qualities possessed by Scotland, it may be quite intricate for Sabah to secede.⁵²

In addition, with the unwarranted invasions by the so-called Royal Sulu army, the security of Sabah is always at risk⁵³. As a member of the Federation, the Malaysian armed

⁴¹ "Formation of Malaysia 16 September 1963," *National Archives of Malaysia*.

⁴² Clinton Fernandes, "Indonesia's War against East Timor: How It Ended," *Small Wars & Insurgencies* 32, no. 6 (2021): 867–886.

⁴³ Muh Khodiq Duhri, "Kemiskinan Ekstrem Jadi PR Berat Ramos-Horta Pimpin Timor Leste," *Solopos*.

⁴⁴ Shunzo Sakamaki, "Ryukyu and Southeast Asia," *The Journal of Asian Studies* 23, no. 3 (1964): 383–389.

⁴⁵ Hashim Musa, "Hubungan Kesultanan Melaka Dengan Kerajaan Ryukyu Jepun," in *Seminar Institusi Raja Dalam Manuskrip Melayu (SIRaj 4)* (Kuala Lumpur, 2016).

⁴⁶ Liu Dan, "The Historical and Legal Status of Pre-Modern Ryukyu and the Sovereignty over the Diaoyu Island," *China Oceans Law Review* 2 (2016): 109–114.

⁴⁷ Ralph Braibanti, "The Ryukyu Islands: Pawn of the Pacific," *The American Political Science Review* 48, no. 4 (1954): 972–998.

⁴⁸ Justin McCurry, "Okinawa Independence Movement Seeks Inspiration from Scotland," *The Guardian*.

⁴⁹ Christopher A. Whatley, "Economic Causes and Consequences of the Union of 1707: A Survey," *The Scottish Historical Review* 68, no. 186 (1989): 150–181.

⁵⁰ Tom Gordon, "Independent Scotland 'Would Be Higher in Human Development Table than UK,'" *Herald Scotland*.

⁵¹ "Scottish Independence: Will There Be a Second Referendum?," *BBC*.

⁵² According to Point 7 of the 20-point agreement is a list of 20 points drawn up by Sabah, proposing terms for its incorporation into Malaysia.

⁵³ Amy Chew, "Sulu Militia Hatched in Southern Philippines: Security Source," *South China Morning Post*.

forces have always been vigilant in protecting Sabah against the intruders from undermining Malaysia's sovereignty⁵⁴.

The world community through prescription, had, for 51 years recognised Sabah as part of Malaysia although the Philippines has never officially dropped the claim⁵⁵. Nevertheless, the fact the Philippines has been dormant in its claim in a way showed that they have acquiesced Sabah as part of Malaysia⁵⁶.

Unlike Scotland, there have never been any formal demands issued by the people and/or government of Sabah to secede from Malaysia. This clearly displayed that Malaysia is exercising effective occupation over Sabah.

Malaysia does not owe anyone money for Sabah based on the following reasons:

- (a) Malaysia is a sovereign over Sabah
- (b) The Sulu Sultanate was disbanded in 1915
- (c) The 1878 Treaty has been invalidated as Sabah became a Japanese colony in 1941
- (d) The Spanish arbitration is illegal
- (e) There was no arbitration clause in the 1878 agreement & arbitration could not be forced upon parties

b. The 1939 Case

Earlier in 1939, the heirs of Sultan of Sulu i.e. the predecessors of the current generation of Kiram's family, had referred to the High Court of Sandakan, Sabah in respect to a dispute under the Deed of Cession 1878. The judge had confirmed the status of Cession Money under the said agreement⁵⁷. Accordingly, by bringing the suit at the North Borneo High Court, the heirs of the defunct Sultanate of Sulu had acknowledged the jurisdiction of the Malaysian Court with regards to solving any issues relating to the agreement.

Thus, why did the so-called heirs of the defunct Sulu Sultanate now resort to arbitration in Spain? The significance of the 1939 case is that the heirs of the non-existent Sultan of Sulu had acknowledged Malaysia/Malaysian court as the rightful venue to adjudicate any issues arising from the agreement. Therefore, as the rightful heirs of the obsolete sultanate and the successors to the parties in the 1939's suit, the current generation of the Kiram family are legally bound by the decision made in 1939.

c. The 2020 case

In 2020, Malaysian government had filed a suit at the High Court of Sabah and Sarawak to stop the Spanish arbitration led by a Spanish arbitrator.⁵⁸ The arbitration was filed by the current generation of Kiram family. The judge had to decide on whether:

- (i) There was an arbitration clause in the Deed of Cession 1878
- (ii) Malaysia has waived her sovereign immunity to submit to the Spanish arbitration
- (iii) Malaysia was the rightful venue to decide on issues relating to the said Deed based on historical facts and legal point of views

The High Court contended that nothing in the Deed of Cession 1878 displayed that both Malaysia and the defunct Sultanate have agreed to refer any disputes to arbitration. In fact, the parties must clearly express their agreement to submit to arbitration. Such intention must be clearly mentioned in an 'Arbitration Agreement' or an 'Arbitration Clause'. Further, the word 'arbitration' must also be clearly mentioned in the deed. The court found that there was no such arbitration agreement or arbitration clause in the deed. The absence of which will render no legal basis for the parties to submit to arbitration.

⁵⁴ Yantoultra Ngui, "Malaysia Police Taking Sabah Invasion Plot Report Seriously," *Bloomberg*.

⁵⁵ Mohd Hazmi Mohd Rusli and Mohd Ridwan Talib, "Malaysia Tidak Perlu Bayar Satu Sen Pun Kepada Waris Kiram," *Astro Awani*.

⁵⁶ Flores, Reyes, and Sabio, "The Legal Implications of the Unilateral Dropping of the Sabah Claim."

⁵⁷ Peter Godwin and Daniel Chua, "Malaysian High Court Grants First Anti-Arbitration Injunction on the Grounds of Sovereign Immunity," *Lexology*.

⁵⁸ Niranjana Jose, "Heirs of the Sultan of Sulu and North Borneo v. Malaysia – Explaining the Controversial Ad-Hoc Arbitration Case," *The Geopolitics*.

Moreover, Section 9 (1) Arbitration Act 2005 (Act 646) defines an arbitration agreement as, “an agreement by all parties to submit to arbitration in all or certain disputes between them in a legal relationship either it is contractual or not”. Section 9 (2) states that the agreement for arbitration can either be in the form of an arbitration clause within the main agreement or a separate agreement for an arbitration.

5. The Spanish arbitration is illegal

The Spanish arbitration is illegal as it had violated Malaysia's sovereign immunity and had ignored a crucial legal issue which is whether Spain is the rightful country to determine the claim. By virtue of Madrid Protocol 1885 – an international agreement signed by Spain, Britain and Germany; Spain had relinquished her interest over the Sulu Archipelago and confirmed the British position in Sabah.

Thus, Spain has no relation either to the deed or to Sabah. Therefore, Spain has no jurisdiction to decide on the matter. The country that has the jurisdiction is Malaysia. Section 23 (1) Courts of Judicature Act 1964 (Act 91) confers the jurisdiction to Malaysia since Sabah is the place where the issue arose. Needless to say, jurisdiction is territorial. The Spanish arbitration is illegal and the award is legally unenforceable.

III. Conclusion

As a sovereign State, Malaysia should not have paid even a single cent to the heirs of Kiram since 1963. However, as a gesture of good will, the government at that time paid the annual sum of RM5,300 anyway. It was not wrong for Malaysia to cease payment in 2013 as Putrajaya neither deals with terrorists nor respect treaties with a long-lost sovereign.

There are no reasons for Malaysia to honour a colonial treaty that was signed by an entity which which was disbanded by the Americans more than a century ago. As Sabah is recognised globally as part of Malaysia, in no way Malaysia is obliged to entertain claims of descendants of a lost sovereign. Unlike other territories around the world, Sabah was federated into Malaysia in 1963 voluntarily without use of force or armed conflict. Sabah has been administered by Malaysia without interruption and protests by other sovereigns for almost six decades now.

Lessons must be learnt from this unwarranted ‘Sulu Arbitration’ that may put Malaysia's interest at stake. The ruling government must be aware and steadfast against any attempts to undermine Malaysia's sovereignty. Malaysia has indisputable sovereignty over Sabah.

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