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Malaysia’s Sulu Problem: Logical Flaws in the Arbitration Process | FULCRUM

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HOME ARTICLES Malaysia’s Sulu Problem: Logical Flaws in the Arbitration Process



A supporter pays respects to the late Jamalul Kiram III (seated), self-proclaimed Sultan of Sulu, after Friday prayers at a mosque in Manila on March 8, 2013, (Photo: Ted Aljibe / AFP)



The recent seizure of the assets of Petronas, Malaysia’s oil and gas firm, is linked to a 1878 agreement made by the Sultan of Sulu and two European merchants. Arguably, the decision hinges on a Spanish translation of the agreement, which is less reliable.

Recently, Luxembourg seized overseas assets belonging to Malaysian oil and gas company Petronas. The seizure comes on the heels of a controversial international arbitration outcome issued in Paris, which threatens to cost the Southeast Asian country at least US$15 billion.

Last year, the Paris Court of Appeal ordered Malaysia to pay US$15 billion to the heirs of the bygone Sulu sultanate which, until 1915, ruled the Sulu Archipelago and parts of present-day Philippines. Today, the heirs are Philippine nationals. They had filed claims over Malaysia ceasing annual payments to them of 5,300 Malaysian ringgit (about US$1,200).

The crux of the matter pertains to the Malaysian state of Sabah, formerly North Borneo. The arbitration outcome was made on the basis of an 1878 agreement. In it, the Sultan of Sulu, Jamalul Alam, gave North Borneo to two European merchants, Baron Overbeck and Alfred Dent, in exchange for annual payments. After the 1963 formation of Malaysia that included Sabah, the Malaysian government continued to honour the payments. However, in 2013, supporters of the self-proclaimed new Sultan of Sulu launched a surprise incursion on Sabah that killed civilians and members of the Malaysian armed forces. In response, Malaysia suspended the annual payments. The saga's latest chapter ends with the European court's award.

Crucially, the Paris arbitration depicts the 1878 agreement as a permanent lease, rather than as a cession. But which was it? The English and Spanish translations of the original Malay-language contract clash on this matter. The Malay word *padjak* used in it could mean either *lease* or *cession*. The Spanish translation (made in 1878) specifies *lease*; the English version (which bears no specified date, but was verified by experts in 2019) uses *cession*. The arbitrator decided that the

Spanish translation prevails, as it was made in the same year as the original.

Yet it is this very contemporariness that makes the Spanish version less reliable. Spanish colonialist aggression in the region had been ongoing since 1705. In 1851, Spain effectively cornered the Sultan into signing a treaty stating that most Sulu territories came under Spanish sovereignty. These aggressions motivated the Sulu Sultan to give away North Borneo to Overbeck and Dent, in return for much-needed money. Therefore, at the time of the Spanish translation, Spain had a vested interest in denying any cession of Sulu territory, representing it as a commercial lease instead.

Two later agreements indicate North Borneo was ceded, not leased. In the Madrid Protocol of 1885, Spain agreed to recognise British sovereign rights to North Borneo, in exchange for international acknowledgement of its authority in the Philippine archipelago. More tellingly, in 1903 the new Sulu Sultan Jamalul Kiram II renewed the terms of the 1878 agreement with the British North Borneo Company. This renewal used the more specific word *menyerahkan* (*to hand over*) rather than *padjak*.

> By focusing on the 1878 agreement, whose original version is ambiguous and whose translations conflict, the arbitrator fails to illuminate the nature of a decades-long, changing relationship. Malaysia may be paying a heavy price for no reason that is valid from a historical viewpoint. This sets a dangerous precedent for what international arbitrators can do that affects sovereign nations.

Furthermore, the arbitration presents as an undeniable fact that Jamalul Alam had sovereignty over North Borneo. But he may

not have. To begin with, North Borneo is commonly described as having been ceded to Sulu by the Bruneian sultanate. But Bruneian historian Jamil Al-Sufri and Sir Stamford Raffles, as well as Philippine historian Cesar Adib Majul and British historian Leigh R. Wright, argue that Brunei's Sultan had never ceded it, as Sulu had not fulfilled the conditions of cession. Therefore, Jamalul Alam may have signed away what was not entirely his to give.

This historical ambiguity is worth considering. Baron Overbeck, one of the Europeans involved in the 1878 agreement, believed Brunei remained the higher authority over North Borneo. Just three years prior, Overbeck had purchased territories there in a deal conditional upon the agreement of the Sultan of Brunei. In 1877, he and the latter had also signed a deal exchanging most of the territory comprising North Borneo for annual payments. However, he was aware of the dispute over the territory between Brunei and Sulu. He only met with Sulu's Sultan later to cement the authority that the Bruneian Sultan had already granted him. Overbeck evidently thought Brunei had greater claim to the land. Strange, then, that the arbitration focuses only on 1878; events not long before that say so much more.

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The legal proceedings against Malaysia have thrice been withdrawn. The Paris court has withdrawn its decision, though it remains enforceable outside of France wherever the Sulu heirs

decide to pursue it; namely, Luxembourg and the Netherlands. Malaysia had also briefly obtained a stay on Luxembourg's seizure of Petronas assets, but the stay was overturned on an unannounced technicality.

But the stakes for Malaysia go beyond the US$15 billion. Foreign investors' confidence in the country may plummet, just when Malaysia's political landscape is stabilising after three years of changing governments amid the pandemic. There is a possibility that other countries may follow up on the award, as Luxembourg and the Netherlands already are. If further blows are dealt to the company, this would endanger a major source of income for Malaysia. According to the 2022 Federal Government Revenue report, over 50 per cent of government revenue that year came from Petronas's 50 billion ringgit dividend paid to the government. In several ways, this arbitration award affects the well-being of all Malaysians. With so much at risk, an international arbitration of this scale should ideally be following more thorough legal procedures and historical analyses, especially with regard to the chosen translation that acts as the basis for all decisions.

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