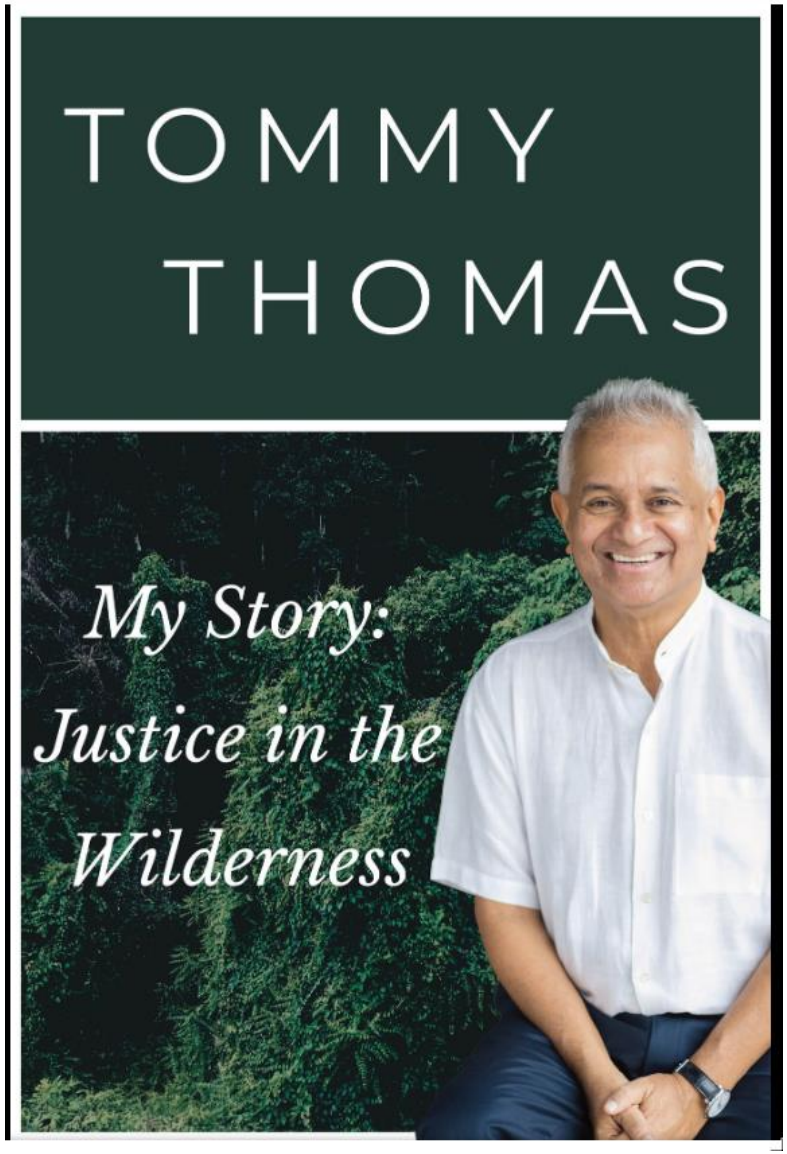
TOMMY
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39

SULU

Although I was only in Standard 6 in my primary school in 1963, I was aware of the establishment of Malaysia in September of that year. Indonesia immediately declared Confrontation. In the early months of the life of the new sovereign nation the threat of armed invasion by the Indonesian armed forces was a real possibility. Our newspapers were dominated by stories about Malaysia's formation and the opposition from Indonesia and the Philippines. The latter never took its claim to the boisterous heights President Sukarno did. The Philippines' opposition to the formation of Malaysia was limited to its claim to North Borneo, which changed its name to Sabah upon entry into the new Federation. But over time, the Philippines quietly placed its claim on the back-burner, preferring to place emphasis on developing strong bilateral ties with Malaysia. Further, the membership of both countries in the Association of Southeast Asia (ASA), which later became the Association of Southeast Asian Nations (ASEAN), a regional association for independent nations in South East Asia, also meant that there were so many areas of mutual benefit through cooperation and collaboration that it made practical sense to relegate its claim to Sabah to the background. The Philippines however has never renounced its claim: that would be unacceptable to the domestic audience.

Accordingly, I never expected to deal with any Filipino or other interest in, or claim to Sabah or its resources during my time in office. Hence, the total surprise when I was briefed sometime in 2019 of a separate and independent claim by private individuals, all of whom claimed to be descendants of the Sultan of Sulu, for annual compensation. After briefing from the relevant officers, and studying the relevant documentation, I discovered the true position. As always, it began with history and empire.

At some point in its history, North Borneo was part of the Sulu Sultanate. In 1878, the Sultan of Sulu entered into an agreement with representatives of a company, later incorporated as the British North Borneo Company (BNBC) – a trading corporation of the East India Company variety, but obviously not as well known – to cede lands and maritime waters in and around North Borneo for an annual fee. The British Empire grew from the 16th century, through the private efforts of individual warriors, who through sheer bravado, captured territories that were subsequently absorbed by the Crown. Intrepid

pioneers included Robert Clive, Francis Light, Stamford Raffles and James Brooke. In North Borneo, the pioneering efforts were made by the BNBC. The acquisitions by James Brooke in Sarawak and the BNBC in Sabah were vested in the British Government: the states became protectorates. All the rights and obligations of the BNBC passed to Great Britain. Thus, Britain became the successor in title to the 1878 Agreement and the 1903 Confirmation with Sulu. Upon the formation of Malaysia, all the rights and obligations of the retreating colonial power passed to the new Federation. In the same way, Malaysia became the successor in title to the 1878 Agreement and the 1903 Confirmation.

If the historical narrative is paused for a moment, mention can be made of a court order in 1939. By that time, some sixty years had passed since the original claimants on behalf of the Sulu Sultanate had received annual fees from the BNBC. A dispute broke out between the descendants of the Sulu family as to who would be entitled to share in the annual payments by the British government. The family members chose to sue in the High Court of North Borneo at Sandakan. In 1939, Chief Justice C.F.C. Macaskie ruled on the matter. In the course of his judgment, the Chief Justice noted that the Government of the State of Borneo (representing the British Crown) admitted that moneys were payable annually. The only issue was the rightful beneficiary legally entitled among the Sulu descendants to receive them. The 1878 Agreement and the 1903 Confirmation were admitted in evidence as being legally binding. The Sandakan High Court determined the identity of the claimants in the 1939 case.

In 2013, an armed incursion into Lahad Datu in Sabah garnered media attention. The group travelled by boats from islands in the Republic of the Philippines. The militant group claimed to represent Jamalul Kiram III, a self-proclaimed Sultan of Sulu. Malaysian security forces engaged with the foreign invaders, who were defeated. Casualties were high. Although there appears to be no evidence of any link between the Sulu descendants who were receiving the annual fees from Malaysia, under the 1878 Agreements, and the armed invaders into Lahad Datu, the Malaysian government ceased payments from 2013. There were no legal grounds for Malaysia's refusal to pay annually since 2013. It resulted in Malaysia being in breach of the 1878 Agreement. As one would expect, the families of the Sulu descendants who had been receiving payment for 135 years threatened legal action against Malaysia. Such threats were not taken seriously by past administrations.

In 2019, demand letters were sent by lawyers from London, acting on behalf of the Sulu descendants, seeking Malaysia's participation in

arbitration proceedings before a single Spanish arbitrator in Spain. I was shocked by this turn of events. It was understandable that the previous recipients were peeved with Malaysia ceasing to pay them. If they were minded to resort to litigation, the proper forum was the High Court at Sandakan, as their ancestors themselves recognised in 1939. What was absolutely not acceptable was suing in a foreign country which had no connections, either as a matter of fact or legally, with their claim for annual compensation. The dispute revolved around the failure to pay an agreed sum as consideration for land surrendered in Sabah. All the connections were with Sabah, which was the proper forum to adjudicate any dispute.

The British lawyers representing the eight individuals initially requested the British Government to appoint an arbitrator. That request was rejected. So they turned to Spain. The 1878 Agreement provides that any dispute "*shall be submitted to Her Britannic Majesty's Consul-General for Borneo*". That office disappeared upon the formation of Malaysia. The only possible link to Spain was that for a short period between 1878 and 1885 Spain had some rights over North Borneo, which as stated above, were passed over in 1885 to Great Britain. Since there was no arbitration agreement in the 1878 and 1903 documents, the Sulu claimants applied to the courts in Spain, which appointed a Spanish arbitrator to determine a dispute between Philippine citizens and Malaysia, pertaining to agreements dealing with land in Malaysia and payments by Malaysia in ringgit. How absurd and how ludicrous.

My initial response was to disregard the arbitration, and to advise the government that Malaysia should neither submit to the jurisdiction of the courts of Spain nor participate in the *ex parte* Spanish arbitration before a single Spanish Arbitrator. On my instructions, the IAD division of the AGC appointed a reputable multi-national firm of solicitors, headquartered in London, but with a branch in Spain to advise us. But I was not impressed with their advice and their fees were exorbitant. They were soon replaced by a firm of Spanish lawyers.

Separately, I turned for advice to my former partner, Sitpah Selvaratnam. Not only was she a world-class commercial law barrister but also often sat as arbitrator in international disputes. In fact, she represented Malaysia on the ICC Panel in Paris. Sitpah was going through an extremely busy period in her practice. She could only give me brief advice, and pointed us in the right direction. Sitpah also recommended that the AGC appoint Elaine Yap, a commercial barrister who had cut her teeth at Skrine & Co and Baker & McKenzie.

I knew Elaine. She was appointed to advise us. Two Senior Federal counsels were also members of the legal team.

The advice that Sitpah Selvaratnam gave, which was endorsed by Elaine Yap, was that it was perilous for Malaysia to disregard the Spanish arbitration. Sitpah briefed me on the effects of Malaysia's accession to the *Convention on Recognition and Enforcement of Arbitral Awards* signed in 1958 in New York (the New York Convention). The danger was that assets of Malaysia situated in any New York Convention member state (which apparently numbers about 160) would be vulnerable to attachment or seizure, on the application of the eight claimants, if they were awarded damages by a Spanish arbitrator. This was the consequence, regardless of whether Malaysia participated in the Spanish arbitration. Thus, if the arbitration was allowed to proceed *ex parte* without Malaysia's participation, the award could be in millions, and our foreign assets would be in jeopardy. At the same time, Malaysia should not participate in the Spanish arbitration, instituted against our will.

Sitpah Selvaratnam further advised, and Elaine Yap agreed, that in the unhappy circumstances of the situation the government of Malaysia should file an action in the High Court in Sabah, seeking an injunction to restrain the continuation of the Spanish arbitration; what is known as the 'anti-suit' injunction, developed in recent years under English law and spreading to other common law jurisdictions. I gave instructions to do this. Elaine Yap prepared all the court papers, undertook the research and drafted written submissions. The government was represented in court by senior Federal Counsel. The judge in the High Court ordered all the court papers to be served on the British lawyers for the eight individuals and the Spanish arbitrator. That was done by e-mail, registered post and by personal service through our Spanish lawyers. Thus, the eight individuals had actual knowledge of the Sabah court proceedings. None of them participated. The judge granted a declaration to the government of Malaysia to the effect that the proper forum for resolving the dispute was the High Court in Sabah, and not Spain. An injunction was issued to restrain the arbitration. The orders were served on the relevant persons, including the arbitrator.

When I left office, our Spanish lawyers were in the midst of registering the Malaysian court injunction, and issuing a fresh challenge in the courts of Spain. This was to seek the setting aside of the Spanish court order appointing the Arbitrator. All the steps that Malaysia could reasonably take to confront the problem about the Spanish arbitration were promptly and professionally taken. The unforeseen consequences of Malaysia becoming a member of the New York

Convention came to haunt us. What a price to pay when the annual payment to the Sulu claimants was stopped unilaterally by Malaysia in 2013 in the aftermath of the Lahad Datu incursion. And that too for RM5,300 per year. In my letter to the Spanish Arbitrator I had mentioned that Malaysia had recently tendered payment of all payments from 2013 and promised to pay in the future. It followed that there was no longer any dispute in any event. The lawyers for the Sulu claimants responded by stating that they were now claiming billions of ringgit. There was absolutely no legal or factual basis for such an absurd and ludicrous claim.

Based on their Notice of Arbitration submitted in July 2019, it was clear their primary objective was to seek the re-writing of the 1878 agreement so that the annual payments of RM5,300 – which they falsely and wrongly interpreted as 'lease payments' – were adjusted to reflect the value of Sabah's oil and gas revenue since the 1970s. According to the claimants, they should be paid "*some three million times greater than the annual amount called for*" or an equally proportioned lump sum in exchange for terminating the agreement and ceding their sovereignty over Sabah.

Aside from the unmeritorious arbitration claim, the actions of the claimants and the sole arbitrator, as well as the decision of the Superior Court of Justice in Madrid brought to light myriad legal issues. Most important, is the doctrine of state immunity. State immunity is a mandatory rule of customary international law of long standing that sovereign states may not be impleaded in the domestic courts of other sovereign nations against their will. The 1878 Agreement was not a commercial transaction, but an act of a sovereign to cede territories. There was no expressed or implied waiver of state immunity by Malaysia. Thus, the inexplicable decision by the Superior Court of Justice of Madrid to entertain the claimants' request for judicial appointment of an arbitrator against a sovereign state struck me as wholly unacceptable.