

28 April 2017

Via Courier

Y.A.B. Dato' Sri Hj. Mohd. Najib Bin Tun Haji Abdul Razak
Prime Minister
Office of the Prime Minister
Main Block, Perdana Putra Building
Federal Government Administrative Centre
62502 Putrajaya, Malaysia

Your Excellency,

We write on behalf of our clients, the heirs to the Sultanate of Sulu and Sabah, and successors-in-interest to Sultan Jamalul Alam Kiram, signatory to that certain Agreement dated 22 January 1878 between him and Messrs Alfred Dent and Baron Gustavus de Overbeck.

We call your attention to the following portion of the 1878 Agreement:

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.

The said Gustavus Baron de Overbeck on behalf of himself and his Company further promises to assist his Highness the Sultan, his heirs or successors with his best counsel and advice whenever His Highness may stand in need of the same.

[British translation]

Should there be any dispute, or reviving of old grievances of any kind, between us, and our heirs and successors, with Mr. Gustavus Baron de Overbeck or his Company, then the matter will be

brought for consideration or judgment to Their Majesties' Consul-General in Brunei.

Moreover, if His Highness Maulana Al Sultan Mohammed Jamalul Alam, and his heirs and successors, become involved in any trouble or difficulties hereafter, the said honorable Mr. Gustavus Baron de Overbeck and his Company promise to give aid and advice to us within the extent of their ability.

[American translation]

As you know, the Government of Malaysia is the successor-in-interest to Messrs. Dent and Overbeck and their company in the 1878 Agreement.

On behalf of the heirs and the Sultanate, we hereby invoke the second clause above from the 1878 Agreement, the hardship provision in the UNIDROIT Principles, the principles of Shariah law, the international doctrine of *rebus sic stantibus*, and the general precepts of equity and good faith, in an attempt to negotiate terms of a more equitable and appropriate arrangement between the parties.

Should the Government of Malaysia decline to enter into such negotiations, or should any such negotiations prove unsuccessful, we reserve the right to invoke appropriate dispute resolution remedies, including the arbitration provision from the 1878 Agreement, also excerpted above.

For the purpose of these proposed negotiations, please note that we are *not* seeking to rehash the issue of the term “pajak” and its various translations in the 1878 Agreement. Although we are willing to discuss the question of sovereignty over Sabah as part of any negotiated settlement between the Government of Malaysia and the Sultanate, we view the meaning of that much-disputed term to be irrelevant to the grievance that the heirs now bring. *We therefore urge you to pay close attention to this request for negotiation, since the nature of the request and the means of potential resolution are quite different to those proffered by various representatives of the Sultanate in past correspondence.*

As you may know, Sultan Jamalul Alam Kiram sought to renegotiate the terms of the 1878 Agreement virtually from the outset. At the time of signing the 1878 Agreement, he was not informed of the agreement entered into one month earlier by Messrs. Dent and Overbeck with the Sultan of Brunei for a larger sum in respect of the same territory – despite the fact that Sultan Jamalul Alam Kiram, not the Sultan of Brunei, was sovereign of that territory.

A further attempt to negotiate reasonable and equitable terms was made by US lawyers representing the Sultanate in 1946 in a letter to the British North Borneo Company. Following the dissolution of the British North Borneo Company and its purported transfer of sovereignty to the British Government in 1946, the Government of the Philippines began to advocate on the Sultanate's behalf to resolve the muddled issue of sovereignty. Successive

heirs similarly reached out, first to the British Government, subsequently to the Government of Malaysia, to seek negotiations concerning the State of Sabah, both with and without the assistance of the Philippine government. All such attempts to date have been unsuccessful.

Throughout this period, the British Government, and subsequently the Government of Malaysia, observed the terms of the 1878 Agreement, inasmuch as they paid the heirs the annual sum specified in the Agreement (as modified by a side agreement in 1903). The Government of Malaysia (wrongly) characterizes this payment as “cession monies.” Notwithstanding the characterization, the Government of Malaysia has continued to pay the money in modern times.¹

The sum in question – MYR 5,300 per year – represented the Sultan’s estimate in 1878 of the entirety of the revenue that he received from the territory that was the subject of his deal with Messrs Dent and Overbeck. It has not been altered since the aforementioned 1903 side agreement, despite the passage of more than a century, the concomitant onset of considerable inflation, and, most important, the discovery of game-changing petroleum resources in the region. The last resulted in additional revenue to Malaysia so massive that it would have been inconceivable in scope and scale to the original signatories.

Those resource discoveries – first oil, then more recently natural gas – have utterly transformed the complexion of the region. They were unforeseeable and unexploitable at the time of conclusion of the 1878 Agreement, and they have fundamentally unbalanced the equilibrium of the bargain in the 1878 Agreement.²

We are thus now in a position where the heirs receive the equivalent of US\$1,200 annually in connection with territory that (even with today’s lower oil and gas prices) produces approximately *20 million times* that much in annual revenue from petroleum resources. If ever there were a case for the renegotiation of an agreement that had become fundamentally unbalanced due to changed circumstances, this is it.

We therefore respectfully request that the Government of Malaysia sit down with us to renegotiate the terms of the 1878 Agreement along lines that more equitably and correctly reflect the balance of the bargain originally struck between the parties. We are willing to be flexible and creative in the negotiation of any revised terms, including, as noted above, coming to final agreement on the issue of sovereignty (an issue that the Sultanate alone, not the Government of the Philippines, is competent to dispose of.)

¹ The Government of Malaysia halted payments to the heirs in the wake of the 2013 invasion of Sabah by the late pretender styling himself as Jamalul Kiram III. The current government of the Sultanate and heirs disavow his actions and irrevocably renounce the use of force as a means to resolve the differences between themselves and the Government of Malaysia.

² The financial terms of which, in any event, were unfairly imposed upon Sultan Jamalul Alam Kiram by duress and intrigue.

If the Government of Malaysia does not wish to negotiate, it will constitute a violation of its obligations both under the 1878 Agreement and international law. We are confident that an arbitral tribunal duly appointed to adjudicate this dispute will perfectly well understand the need to adjust the terms of the Agreement, according to the applicable legal and equitable principles. Those principles are well-established and indisputable.

We await your response.

Respectfully,

A handwritten signature in black ink, appearing to be the initials 'P.H.C.' in a cursive style.

Paul H Cohen
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