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THE ARBITRATION OF EMPIRE:

Colonial-Era Disputes and Emerging Risks to European Courts

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About EDARA

The European Development and Research Academy (EDARA) is an independent Brussels-based think tank founded in 2012, focused on advancing peace, security, integration, and intercultural understanding across Europe and internationally. EDARA conducts rigorous, interdisciplinary research into the political, social, and media dynamics affecting minority and disadvantaged populations. Its work supports policymakers and institutions through original field data, policy diagnostics, and multilingual briefings anchored in real-world contexts.

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With its integrated approach—linking research, institutional support, strategic convening, and cross-regional collaboration—EDARA contributes meaningfully to the development of inclusive, stable, and knowledge-based societies.

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His work is regularly cited by policymakers, academic institutions and media in Europe and the MENA region. Laytouss is a sought-after speaker on radicalisation, Islamophobia, social cohesion, and religious leadership, and has led high-level dialogues with different institutions including ICESCO. The European Commission and Sorbonne University. His leadership situates EDARA as a key partner in policy research, and training to foster inclusive and resilient European societies.

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He earned his Master's degree in Economic Law from Vrije Universiteit Brussel (VUB) between 2021 and 2022, equipping him with specialized knowledge in corporate law, EU regulatory structures, and governance oversight. His dual career enables him to translate complex legal frameworks into high-impact policy recommendations, bridging academic precision with real-world applicability.

Executive Summary

The Arbitration of Empire: Colonial-Era Disputes and Emerging Risks to European Courts presents a comparative, forward-looking analysis of how unresolved colonial-era arrangements are becoming latent legal liabilities—particularly for Europe's court systems.

It argues that the intersection of dormant imperial instruments, transnational enforcement frameworks, and unregulated third-party litigation funding (TPLF) has created a systemic vulnerability with few safeguards. While not all disputes examined in the report have entered the courtroom, each demonstrates how historical claims—whether over territory, sovereignty, or restitution—can be structurally exposed to procedural exploitation and commercial repackaging.

This report addresses a significant gap in existing legal and policy literature. Although there is growing scrutiny of international arbitration and litigation finance in isolation, no study has yet traced how historical grievances risk converging with speculative enforcement strategies. This analysis is the first to frame that convergence as a post-imperial risk ecosystem—one shaped not only by the reactivation of colonial-era instruments but by their interaction with litigation funders, fragmented enforcement regimes, and gaps in European regulatory frameworks.

Using the Malaysia–Sulu arbitration as its anchor, the report examines four additional case studies: the UK's agreement with Mauritius over Chagos, Venezuela's boundary claim against Guyana, Germany's handling of genocide reparations in Namibia, and a composite analysis of Asia's unresolved frontiers. These cases vary widely in their procedural posture, legal strength, and political context, but all point to a shared exposure: the lack of credible, coordinated legal mechanisms for addressing colonial legacies in a manner that is both equitable and immune to manipulation. Where settlements exclude communities, where sovereign immunity blocks access to remedy, or where international courts lack jurisdiction, the risk of procedural escalation grows.

European courts, the report argues, are central to this risk. Their openness to enforcement under the New York Convention, coupled with a lack of harmonised rules for evaluating legacy claims or scrutinising TPLF, makes them prime targets for funder-led litigation. The Malaysia-Sulu case has already demonstrated the potential for forum shopping and arbitrator overreach; future cases could replicate these tactics, even without a strong legal foundation, so long as the commercial incentives are aligned.

The report concludes with a two-track policy recommendation: first, to strengthen EU-level enforcement coherence by revisiting the Brussels I exclusion of arbitration and establishing safeguards for state-facing claims rooted in pre-sovereign instruments; and second, to regulate TPLF through mandatory disclosures, licensing, fiduciary standards, and enforceable return caps. It also calls for integrating these measures into broader EU strategic priorities—such as the Competitiveness Compass—to ensure that Europe's legal infrastructure remains resilient, not exploitable. Without reform, Europe's legal systems will remain vulnerable to the arbitration of empire—not by states seeking justice, but by actors seeking profit. This report offers both a warning and a roadmap for how to prevent that future from taking hold.

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Introduction

Context

Across the Global South, dormant colonial-era arrangements are increasingly resurfacing as flashpoints in legal and political disputes. While many have not yet reached formal adjudication, they are beginning to generate enforcement risks—especially within Europe—where procedural gaps, commercial incentives, and fragmented judicial frameworks enable historical grievances to be recast as legal liabilities.

The Malaysia–Sulu arbitration is the most developed and consequential example of this emerging model. In this case, purported descendants of a former sultanate used an 1878 colonial treaty to launch a $15 billion claim against Malaysia. Despite a Spanish court annulling the arbitrator's appointment, proceedings continued in Paris and enforcement efforts targeted Malaysian assets in France, Luxembourg, and the Netherlands—all without Malaysia's consent.

The case reveals two critical and increasingly interlinked vulnerabilities.

First, it exposes weaknesses in the international arbitration system. Under the 1958 New York Convention, arbitral awards are enforceable across more than 160 jurisdictions. In the EU, the Brussels I Regulation (recast) harmonises civil judgments but *excludes* arbitration, leaving enforcement to national discretion. In the Sulu case, this enabled forum shopping: although the award was legally defective, it moved through multiple European courts.

Second, it shows how colonial-era treaties can be weaponised by opaque investment firms that bankroll lawsuits for a share of the proceeds. Once banned under doctrines of maintenance and champerty (Garcia, 2018), third party litigation funding (TPLF) is now a multibillion-dollar industry. While framed as a tool for access to justice, it often yields funder returns of up to 500 percent while leaving claimants with little (Voss, 2021). Evidence shows that financiers are backing claims and claimants ranging from Indonesian seaweed farmers to fine art auction houses, confirming the European Parliament's Legal Affairs Committee's analysis that profit, not justice, is driving case selection (Funds Europe, 2023).

Such risks of opportunism are compounded by the confidential and decentralised nature of arbitration. Funders can operate across jurisdictions with minimal oversight. As The Economist notes, investors increasingly exploit obscure treaty clauses and acquire shell companies to gain standing under favourable terms ("The arbitration game", 2014). Frank J. Garcia of Boston College has warned that this model enables "*unjustifiable wealth transfers from the citizens of target states for the benefit of speculators*" (Boston College Law Review, 2018).

In a nutshell, the Malaysia–Sulu case is a warning. It shows how quickly a historical document, a private financier, and a permissive legal framework can converge into a multi-billion-dollar liability. And without urgent reform, this model can and will be repeated.

Purpose and Contribution

This report fills a gap in legal and policy discourse by examining how unresolved colonial-era arrangements—land cessions, symbolic payments, and disputed treaties—are resurfacing as legal liabilities within European enforcement systems.

While arbitration and TPLF have been studied separately, their convergence in legacy claims remains largely unaddressed. This analysis is the first to frame that convergence as a post-imperial risk ecosystem—driven by the interplay of historical instruments, commercial funding structures, and gaps in European legal oversight.

The purpose of this study is not only to document this emerging phenomenon, but to provide policymakers, legal practitioners, and civil society with a strategic framework for understanding its drivers—and for designing targeted legal and regulatory responses.

Methodology

This report adopts a comparative legal-analytical methodology.

The Malaysia–Sulu arbitration functions as the central reference point of this study, not simply because it is exceptional in scale, but also precedent-setting in method. The case offers the most granular example of how a treaty from centuries prior was converted into a multi-jurisdictional and multi-billion dollar enforcement campaign—despite unresolved questions of consent, sovereignty, jurisdiction, and historical standing.

To understand how far this model might travel—and under what legal or geopolitical conditions—it is examined alongside three additional case studies:

- **The Chagos Archipelago**, where displaced communities were excluded from a state-to-state sovereignty deal framed as redress;
- **The Guyana–Venezuela dispute**, where an arbitral award from 1899 is being undermined through referenda, parallel claims, and militarised legal strategy;
- **The Herero–Nama reparations campaign**, where legitimate historical grievances remain blocked by sovereign immunity and legal formalism.

In addition, the report surveys unresolved Asian boundaries where colonial-era demarcations continue to generate legal exposure and potential for escalation.

Each case is evaluated along two axes:

1. **Historical–Legal Foundation**: identifying the colonial instrument invoked, its legal trajectory, and whether affected communities were given voice or excluded.
2. **Comparative Enforcement Risk**: assessing susceptibility to the structural features present in the Sulu case—forum shopping, third-party litigation funding, jurisdictional fragmentation, and enforcement in European courts.

The research draws on a cross-jurisdictional body of primary sources, including treaty texts, arbitral rulings, domestic legislation, multilateral resolutions, ICJ decisions, and enforcement records. These are supported by legal scholarship, expert commentary, and media documentation of litigation funding and procedural manoeuvres.

By applying this dual-axis framework across multiple cases and using the Malaysia-Sulu arbitration as a comparative baseline, the report develops a cohesive, transnational risk profile. It demonstrates that the risks posed by unresolved colonial-era legal instruments are no longer theoretical or limited to bilateral diplomatic channels. Instead, they are increasingly shaped by the interplay of speculative finance, fragmented enforcement regimes, and the strategic use of European courts as venues for legal leverage.

The report's methodology is designed not only to trace how historical grievances can re-enter contemporary legal systems, but to assess the structural conditions that enable this process—and to identify where reform is most urgently needed.

Way Forward

The report calls for urgent reform on two fronts: international arbitration procedures and the regulation of third-party litigation funding.

First, the legal architecture governing arbitration must be strengthened. The EU should pursue enforcement standards to close the jurisdictional gaps that allow claimants to shift enforcement efforts across Member States. This includes reviewing the application of the New York Convention where claims are based on pre-sovereign instruments, and ensuring that enforcement is consistent with core principles of sovereignty, public policy, and legal consent. The exclusion of arbitration from the Brussels I Regulation must be reconsidered in light of the systemic strain now facing national courts.

Second, regulation of third-party litigation funding is essential. Funders should be subject to licensing, full disclosure of financial terms and strategic control, and enforceable fiduciary duties to claimants. Where litigation is speculative or excessively extractive, courts must have the power to limit recoverable costs and impose transparency obligations. The European Parliament has already criticized the urgency of this issue. Action must now follow.

Without reform, European jurisdictions will continue to bear the brunt of costly, protracted disputes engineered for profit rather than justice. The stakes are not merely financial. Each case that circulates through the system unchecked chips away at public trust, legal coherence, and the authority of the rule of law.

The arbitration of empire is underway, and without decisive legal intervention, Europe may be forced to bear its most volatile consequences.

The Malaysia–Sulu Arbitration: Colonial-Era Claims and Modern Legal Risks

Context

What began as an obscure 19th-century colonial arrangement has spiraled into one of the most contentious international arbitration battles of the modern era, raising critical questions about the interpretation of historical treaties, the reach of modern arbitration frameworks, and the limits of state sovereignty.

At the core of this dispute lies an ambiguously worded 1878 treaty, negotiated between the Sultanate of Sulu and representatives of the British North Borneo Company. The Sultan ceded territorial rights over North Borneo—today the Malaysian state of Sabah—in return for an annual payment. Drafted in Jawi Malay, Britain interpreted the agreement as an outright territorial transfer, while the Sultan's descendants insisted it was a lease. Despite these differing interpretations, Malaysia quietly paid symbolic cession money—around $1,000 annually—for decades, until 2013.

That year, two hundred armed militants loyal to the self-styled 'Sultan of Sulu', Jamalul Kiram III, landed on Sabah's shores, sparking the Lahad Datu incursion. The confrontation resulted in over 50 deaths, including civilians and Malaysian security personnel. Malaysian Prime Minister Najib Razak halted the annual cession payments immediately, asserting, "*It was incumbent upon my duty and responsibility to protect the sovereignty of Sabah and the people of Sabah*" (Latiff and Ananthalakshmi, 2022). Although the Sulu heirs denied involvement in the violence, the government viewed continued payments as untenable.

Malaysia's decision was subsequently framed by the Sulu heirs as a contractual breach. They initiated arbitration proceedings on the basis that Malaysia had violated the terms of the 1878 agreement. Crucially, the 1878 document did *not* contain any modern arbitration clause. It only mentioned that any disputes should be referred to the long defunct office of the British

Consul General in Borneo – an outdated provision that does not meet contemporary standards for international dispute resolution.

Multiple experts have questioned the validity of using this colonial-era treaty as the basis for a massive legal claim in the 2020s. Distinguished historians – including Bruneian scholar Jamil Al-Sufri, Philippine historian Cesar Majul, and British historian Leigh R. Wright – have concluded that the Sultan of Sulu may never have had legitimate sovereignty over North Borneo to begin with, casting doubt on the 1878 agreement's relevance (Khan, 2023). Moreover, subsequent colonial accords like the 1885 Madrid Protocol—in which Spain recognized British rights in North Borneo—agreed that the territory was ceded, effectively extinguishing the Sulus' claims.

Given these facts, commentators argue the 1878 deal is a tenuous legal foundation that "*cannot be relied upon*" due to fundamental historical realities (Khan, 2023). The weak and outmoded nature of a claim based on the 1878 agreement would later become the crux of Malaysia's defense.

The Role of TPLF

Following years of substantive inaction, the Sulu claim was revitalized in 2016 when UK-based litigation funder Therium agreed to finance the case.

British lawyer Paul Cohen facilitated the arrangement, enabling the heirs to pursue a large-scale arbitration campaign. Therium has reportedly invested at least $20 million so far, conducting nine rounds of funding and marketing the case to investors as a high-value legal asset (Latiff and Ananthalakshmi, 2022; Siegel, 2024).

The terms of Therium's agreement remain undisclosed, but litigation finance arrangements have been known to yield funder returns of up to 500 percent (Voss, 2021). Legal expert Saeed Khan notes:

> *"Therium's behind-the-scenes involvement is not insignificant. Indeed, the company has been singled out by the U.S. Chamber of Commerce for exploiting the FCT's provisions to control certain legal proceedings. According to its report, Therium's track record shows that the FCT "threatens to reduce a judicial system designed to advance the interests of the parties and adjudicate cases on their merits to a litigation system that is effectively controlled by and subservient to third parties whose sole interest is profit"* (Vox Europ, 2023).

This case, driven by litigation finance, has become a reference point in the debate over regulatory gaps in Europe's third-party funding landscape.

Jurisdictional Fragmentation and Forum Shopping

In 2017, the Sulu heirs initiated arbitration proceedings in Madrid. The Spanish High Court subsequently identified, upon an application from Malaysia, a serious procedural error in the appointment proceedings and annulled the arbitrator's appointment, ordering him to close the case. However, arbitrator Gonzalo Stampa defied the court and unilaterally transferred the proceedings to France, arguing that the Spanish rulings no longer applied.

In early 2022, Stampa proceeded to hear the Sulu heirs' case *ex parte* (without Malaysia participating or being represented) and issued a $14.9 billion award against Malaysia: the second-largest arbitral award on record. With the usual checks and balances of the adversarial process missing, any evidence presented by the claimants went unchallenged, leading to a sovereign country being asked to pay a colossal award, equaling 16 percent of its annual budget.

Stampa's actions have drawn legal and professional criticism. He continued the arbitration process despite an annulled appointment and accepted an "*unusually high*" fee of $2.7 million for his role (Meneshian, 2024). Critics have highlighted his ties to legal networks perceived to facilitate jurisdictional opportunism (Cleppe, 2023).

Observers and officials alike have also denounced the outcome. Malaysia's former Attorney General Tommy Thomas, who had earlier tried to settle the case, said the heirs' demands were a "*ludicrous*" attempt to claim billions in resource wealth from Sabah long after relinquishing it (Latiff and Ananthalakshmi, 2022). The sole arbitrator's decision not only granted an exorbitant sum far beyond the token cession payments of old, but also did so without Malaysia's input, since Malaysia boycotted the proceedings as a matter of principle. This meant that an arbitrator appointed (and then removed from post) in Madrid, purported to continue his mandate in Paris, without the consent of all parties involved.

Crucially, Malaysia's decision not to participate in the arbitration had a double-edged effect. On one hand, it underscored Malaysia's consistent stance that the process was illegitimate – preserving arguments of sovereign immunity and lack of consent. On the other hand, by ignoring the proceedings, Malaysia forfeited any opportunity to contest the claimants' case on the facts.

Malaysia maintained it did not recognize the award, as it had never agreed to the arbitration in the first place. In late 2021, the country had already won an injunction from a French court in Paris staying the enforcement of any award pending a full appeal on jurisdiction. That French court stay came just in time – it meant the $14.9B award could not be executed in France immediately. However, under the New York Convention, even stayed awards can be pursued elsewhere, unless formally annulled by a competent court. This technical nuance set the stage for the next phase: a globe-trotting enforcement battle.

Enforcement Actions and Sovereignty Risks

An award is only as good as a claimant's ability to enforce it. Armed with their $14.9B parchment and the New York Convention's broad enforcement reach, the Sulu claimants immediately went asset-hunting across the globe. Their targets: Malaysian assets overseas, which could be seized to satisfy the award.

In July 2022, Luxembourg court bailiffs seized two subsidiaries of Petronas, the state-owned multinational oil and gas company, headquartered in Malaysia. These entities, worth an estimated $2 billion, became targets for satisfying the arbitration award. Although Malaysia successfully overturned the initial seizure on procedural grounds, the claimants secured fresh orders in early 2023 (The Peninsula, 2022).

Similar enforcement efforts began in the Netherlands, where additional Petronas-linked entities were pursued. These tactics grew increasingly aggressive. In one instance, French bailiffs arrived at the Malaysian Embassy in Paris with orders to attach diplomatic properties, but were immediately turned away, as diplomatic assets are protected under international law.

These enforcement actions have prompted renewed scrutiny of the tension between investor rights and sovereign immunity, particularly regarding state-owned commercial assets. Malaysian officials argue that allowing a private arbitration award – especially one stemming from a dubious historical claim – to trigger seizures of sovereign assets undermines international law protections for states. Typically, government assets used for public functions are protected by sovereign immunity. Yet, the targeting of Petronas' foreign ventures show in cases like this, a nation's commercial holdings are also unsafe, and can easily become bargaining chips.

Legal Pushback and Judicial Reversals

Malaysia adopted a *"vigorous defense"* to the enforcement proceedings, fighting back fiercely across courts in Paris, Luxembourg, and The Hague (Reuters, 2023). Its lawyers argued that the award was void, that Malaysia enjoys sovereign immunity over state assets, and that the entire arbitration was a legal aberration.

One by one, European courts began to agree.

In January 2023, a district court in Luxembourg overturned the attempted seizure of the Petronas subsidiaries and their assets, rejecting the Sulu claimants' enforcement efforts on procedural grounds. A similar fate unfolded in the Netherlands, where the Dutch courts declined to uphold the $14.9 billion award. But the most significant turning point came in Paris. In June 2023, the Paris Court of Appeal ruled that the arbitration tribunal lacked jurisdiction altogether—effectively declaring that the arbitration proceedings were void from the outset as the so-called arbitration clause was no longer valid and enforceable. That ruling was upheld in November 2024 by the French Cour de Cassation, the country's highest court, which found the award "*manifestly unenforceable*" and legally baseless (Reuters, 2023).

Leading legal publications and experts praised the French court's decision as a significant win for Malaysia and one that effectively marked the end of the Sulu case (Osborne-Crowley, 2024; LexisNexus, 2024). These rulings not only safeguarded Malaysia's assets, but also signalled that European courts would not be complicit in transforming colonial-era grievances into billion-dollar legal entitlements. For Malaysia, it was a vindication of both its legal position and its insistence on keeping sovereignty out of the hands of private arbitrators.

Criminal Proceedings and Retaliatory Gambits

As proceedings carried on from one court to the other, the case leapt from civil arbitration into the realm of criminal law and diplomatic crossfire.

In a virtually unprecedented step, the Madrid Criminal Court convicted the arbitrator, Gonzalo Stampa, in December 2023 for willfully disobeying the order of the Madrid court by moving the arbitration abroad. Stampa was sentenced to six months in prison and handed a one-year ban from practicing as an arbitrator. The Madrid Court of Appeal upheld the sentence in May 2024, emphasizing Stampa's deliberate violation of judicial authority.

It is exceedingly rare for an arbitrator to be penalized in this fashion, raising questions about arbitrator immunity and oversight in international arbitration. The Advocate General for the Dutch Supreme Court in relation to the Malaysia-Sulu case, Ruth de Bock, strongly criticized Stampa for issuing an award after his appointment had already been annulled by Spanish courts (Jones, 2024). Former Spanish judge Josep Galvez—barrister at 4-5 Gray's Inn Square Chambers, the same chambers as Paul Cohen—commented that the case underscores the paramount importance of adhering to judicial orders, stating that "*the conviction of Stampa serves as a lesson for international arbitration practitioners*" (Law360, 2024).

The Sulu heirs and their backers were unable to accept the actions of the Spanish court. In a dramatic counter-offensive, they lodged an $18 billion claim against Spain at ICSID, the World Bank's investment arbitration forum, in September 2024, alleging that Spain's courts denied them justice and improperly quashed their arbitration. The heirs contend that the Spanish court was politically pressured into annulling Stampa's appointment and argue that it was a mere court clerk in Madrid, rather than the Madrid Court itself, who—without proper documentation and in excess of his powers—ordered Stampa to bring the proceedings to a halt. The heirs now seek redress from Spain itself for allegedly breaching international law.

What is significant here is that this is one of the largest claims ever brought against Spain or even at the ICSID, marking a novel invocation of denial-of-justice doctrines in investor-state arbitration. Experts note this retaliatory gambit is a "*desperate financial maneuver [rather] than a legal strategy*": it would require showing that Spain's judiciary acted improperly or in bad faith, despite ample evidence that the Madrid court gave the Sulu claim a fair hearing before dismissing it (Gurbuz, 2024).

These escalations – a criminal case against an arbitrator on one side, and an $18B arbitration claim against a state on the other – highlight the legal spiral that the Sulu dispute has become. What began as a contractual quarrel has morphed into a full-blown confrontation entangling criminal courts and international tribunals, all while Malaysia and its assets remain caught in the middle.

Analysis: Legal and Institutional Implications

Former MEP Mary Honeyball notes, "No case highlights the need for stronger EU regulation of litigation funding than the $15 billion arbitration award against the Government of Malaysia in the Sulu case" (Funds Europe, 2023).

The Malaysia–Sulu arbitration saga is a cautionary tale of how historical ambiguities can collide with modern legal mechanisms—and of how private capital can exploit those mechanisms to bypass state consent, manipulate venue selection, and transform archival grievances into enforceable financial instruments. What began as a defunct colonial arrangement was reengineered into a multi-billion-dollar claim, not through intergovernmental diplomacy or transitional justice mechanisms, but through an unregulated commercial arbitration process backed by speculative finance. The case demonstrates the perils of structural permissiveness within European legal systems, where investor-backed claims can circulate even after being annulled or rejected elsewhere.

The cast of characters spans continents: heirs of a lapsed sultanate, well-heeled lawyers and financiers, an arbitrator who defied his own courts, judges from Madrid to Paris to The Hague, and a sovereign government. Most importantly, it highlights, as Former Vice Chairman of the Democratic National Committee Keith Ellison states, "*the considerable scope for bribery, irresponsible profiteering, and foreign influence operations to subvert arbitration proceedings*" (Bensoussan, 2024). The opacity surrounding third-party litigation funding arrangements, combined with the lack of disclosure obligations in most European jurisdictions, allowed the proceedings to move forward under a veil of procedural legitimacy while bypassing scrutiny.

As the case reaches its final stages, it seems the rule of law has prevailed over legal opportunism—but perhaps only after considerable damage was done to institutional trust, diplomatic relations, and public resources. Malaysia has emerged with its sovereignty and assets intact, its stance validated by Europe's highest courts. The Sulu heirs' once-vaunted $15 billion award is now effectively void, and its enforceability lies in tatters. But enforcement battles are only one part of the harm. What remains are arguably strained ties and ongoing side-litigation, like the heirs' quixotic claim against Spain, and a chilling precedent: that under current conditions, no sovereign state is fully insulated from similar manufactured claims.

In a scathing analysis, legal scholar Dr. Wojciech Sadowski raised critical alarms about the case's implications for European courts. He questioned how such an arrangement—where a colonial-era cession was reinterpreted by a lone arbitrator as a perpetual lease over sovereign territory—could be entertained in any modern legal system. Sadowski asks:

> *"Is it conceivable, in today's world, to give an entire province of a state into a leasehold as a 'commercial lease transaction'? And for perpetuity? Would it be conceivable e.g. for Canada to give perpetual effective control over the entire Quebec to a foreign company? Or for Spain to do the same in Andalucia? In all probability, such contracts would be regarded, in most jurisdictions, as unconstitutional and contrary to the public order"* (European Neighborhood Monitor, 2023).

His rhetorical comparison illustrates the absurdity of legitimizing such claims and the failure of some courts to apply the doctrine of ordre public with sufficient rigor at the outset. The fact that a single arbitrator—whose appointment had been nullified—could issue a near-unprecedented award against a state with no standing or participation in the process exposes deep institutional vulnerabilities.

Within Malaysia, the episode spurred reviews of how to better protect the country from such claims. Legal reforms are under discussion to shield state assets abroad and restrict recognition of arbitral claims based on colonial-era instruments lacking express jurisdictional consent. Internationally, arbitration practitioners now face growing pressure to address arbitrator accountability, funder influence, and the limits of historical treaty interpretation. European bar associations and courts are being urged to examine whether existing procedural safeguards are sufficient to prevent abuse by speculative litigation structures.

Ultimately, the case has reinforced a core principle: old treaties and private arbitrations cannot be allowed to subvert national sovereignty and public order without rigorous judicial review. The Malaysia-Sulu case has become a benchmark for what can go wrong when judicial fragmentation meets financial engineering. It underscores the urgency of developing harmonized legal standards across the EU to deal with legacy treaty claims and to prevent arbitration from being co-opted into a shadow market of historical profiteering.

While the Malaysia-Sulu arbitration has now been nullified, the legal and structural vulnerabilities it exposed remain relevant far beyond this single case. Similar risks can be observed in other colonial-era disputes, where historical arrangements continue to shape, and at times strain, the capacity of international legal systems to deliver predictable and equitable outcomes.

Britain and the Chagos Archipelago: The Long Road to Partial Redress

Context

The Chagos Archipelago case represents a prominent instance of contested sovereignty stemming from the late colonial period.

In 1965, before Mauritius achieved independence in March 1968, the United Kingdom detached the entire Chagos Archipelago – including Diego Garcia – from Mauritius, and established it as the British Indian Ocean Territory (BIOT). The UK paid £3 million to Mauritius as compensation – not as a "purchase," but in recognition of detachment and with undertakings to afford Mauritius future rights (e.g., fishing, navigation, mineral benefits) – and agreed that the archipelago could be returned when no longer needed for defence purposes. Diego Garcia, the largest island, was selected by the UK and the United States for a military base. Mauritius later characterized this arrangement as coercive (Boomer, 2021). The strategic rationale behind the move became evident when, in 1966, the UK leased Diego Garcia to the United States. The base subsequently became a central node in Cold War military strategy, under a confidential agreement that offered the UK a £14 million discount on Polaris missiles, linking the transaction to Britain's nuclear posture (Bashfield, 2024; Lawal, 2024).

Between 1968 and 1973, British authorities forcibly expelled an estimated 1,400 to 1,700 Chagossians from the islands, resettling them in Mauritius and the Seychelles. Return was prohibited. The expulsion, conducted covertly, has since been widely criticized, with British officials acknowledging the operation as *"shameful and wrong"* (Human Rights Watch, 2023). Over the subsequent decades, BIOT facilitated Western military operations across the Indian Ocean region, including deployments in the Gulf and South Asia (Daly, 2023).

International Legal Developments

Mauritius challenged the legality of Chagos's separation over several decades. In 2017, the matter was referred to the ICJ, which in 2019 issued an advisory opinion by a vote of 13–1, deeming the 1965 detachment unlawful. The Court cited an absence of *"free and genuine* *expression of the will"* by the Mauritian people and concluded that the UK should end its administration of the territory (International Court of Justice, 2019).

Although advisory, the opinion significantly influenced international perspectives. The United Nations General Assembly subsequently adopted Resolution 73/295 by a vote of 116 to 6, calling on the UK to withdraw within six months (United Nations, 2019). By 2020, the UN began reflecting Mauritian sovereignty over Chagos in its cartographic materials. In 2021, the International Tribunal for the Law of the Sea (**ITLOS**) ruled that the UK lacked standing in a maritime dispute involving Mauritius and the Maldives, further undermining the legal basis of British control (Wintour, 2021).

UK's Response and Negotiations

The UK initially rejected the ICJ's findings, citing national defense interests. However, mounting international and domestic criticism, including from senior political figures, led to a policy recalibration (Bashfield, 2024).

In 2022, Foreign Secretary James Cleverly initiated formal negotiations with Mauritius. Progress was intermittent, hampered by questions surrounding the status of Diego Garcia. Ultimately, under Prime Minister Keir Starmer's government, a bilateral agreement was reached in October 2024.

Chagossian campaigners outside the Royal Courts of Justice, fighting to halt a sovereignty deal they say silences their rights and erases six decades of exile. Their legal challenge briefly delayed the UK-Mauritius agreement, spotlighting the unresolved human cost of colonial dispossession (2025)

The agreement acknowledged Mauritian sovereignty over Chagos, including Diego Garcia, in exchange for a 99-year lease permitting continued UK–US military operations (UK Government, 2024). The UK committed to establishing a Chagossian support trust and providing broader development assistance. Mauritius pledged to facilitate limited resettlement on outlying islands.

The agreement received backing from the United States and India and was framed as a reconciliation of legal rectification with strategic continuity. US officials described the deal as a demonstration of peaceful resolution of historical disputes (Lawal, 2024). India supported the resolution as conducive to regional balance and consistent with broader Indo-Pacific objectives. Although some UK and US policymakers expressed concern over the risk of future political shifts in Port Louis, there was no immediate indication of altered alignment (Guojie & Junlin, 2025).

Domestic Reactions and Stakeholder Concerns

The 2024 agreement was met with mixed reactions domestically. Critics, such as former Prime Minister Boris Johnson, described the outcome as a strategic concession that could erode long-term leverage and increase exposure to geopolitical risks (Daly, 2023). *The Economist* also raised concerns about the strategic implications of the handover calling the transfer a strategic misstep (*"*Britain Should Not Hand the Chagos Islands to Mauritius*"*, 2024).

Within the Chagossian community, responses were divided. While some welcomed the formal recognition of Mauritian sovereignty, others criticized the lack of direct consultation. Activists, including Frankie Bontemps, argued that the arrangement marginalized displaced populations and restricted meaningful resettlement, particularly with respect to Diego Garcia (Harding, 2024). *Human Rights Watch* characterized the original expulsion as a *"colonial crime"* and emphasized that excluding Chagossians from future planning could perpetuate historical injustices ("That's When the Nightmare Started*"*, 2023).

UN experts have also noted the grievances of the Chagossian people over the deal. Recently, a panel appointed by the UN Human Rights Council urged the UK to renegotiate the deal since it "*failed to guarantee*" the rights of the Chagossians, particularly around protection of their cultural heritage and their right to return (Chater, 2025).

In Mauritius, the agreement was largely viewed as a long-overdue rectification. However, following a change in government in late 2024, new officials sought enhanced terms, particularly regarding financial compensation. Deputy Prime Minister Paul Bérenger criticized the UK's refusal to revise the aid package (Courea, 2024). Nonetheless, the Starmer government proceeded with final ratification in May 2025, declaring there was "*no alternative but to act in Britain''s national interest*" (Honeycombe-Foster, 2025).

Analysis: Legal Risks and Future Litigation Pathways

The Chagos dispute offers an instructive contrast to the Malaysia–Sulu arbitration. While both originate from unresolved colonial-era arrangements, their trajectories diverge in crucial ways that shed light on the strengths and limitations of current legal mechanisms. The UK–Mauritius agreement demonstrates the potential of multilateral engagement to address colonial injustices through negotiation, legal opinion, and international support. However, the partial and state-centric nature of the Chagos settlement—particularly the exclusion of the displaced Chagossian population from formal negotiations—leaves significant legal and political risks unresolved.

Because there is no binding legal settlement with the Chagossian community, future claims could still be brought in human rights courts or international arbitration. If the UK fails to provide adequate compensation, resettlement options, or cultural protections, third-party litigation funders may see this as an opportunity. They could support Chagossian claims by framing them as investor-style disputes, using legal arguments like expropriation or denial of justice.

There is already precedent for this. In 2001, U.S. attorney Michael Tigar filed a class action lawsuit in federal court on behalf of Chagossians, seeking between $6 and $12 billion in damages from the U.S. government, Halliburton, and several defense officials, under claims of forced relocation, racial discrimination, and even genocide (Zianet, 2022). While the suit was framed as a human rights claim and reportedly supported by private donations, not commercial funders, it demonstrated that the Chagos case can be—and has been—repackaged as a multibillion-dollar liability. Had a commercial funder taken a standard contingency fee of 30–35%, their share alone could have reached $2 billion. Although Tigar's team claimed to work pro bono, the financial contours of the case make clear its attractiveness to future litigation investors.

The ingredients for third-party funding are now present: a displaced community, an unresolved settlement, lingering claims to land and identity, and past legal attempts to monetise the grievance. If domestic remedies stall or affected individuals are unable to access the benefits of the UK–Mauritius agreement, litigation funders could plausibly step in to support claims under international investment law. The proposed 99-year lease over Diego Garcia may itself become a point of contention in the future, particularly if changes in governance, environmental protections, or benefit-sharing are framed as exclusions from rightful participation. These claims would not necessarily arise from state-to-state confrontation, but from individuals or groups pursuing legal redress through private channels.

Any such development would again place European courts in the crosshairs. As demonstrated by the Sulu arbitration, Europe's fragmented enforcement landscape, high volume of attachable assets, and lack of codified safeguards make it an attractive arena for enforcing complex, politically sensitive claims. Should litigation funders become involved in a future Chagos-related claim—however indirect—European jurisdictions would likely be among the first targeted for enforcement.

In summary, the Chagos case reinforces the broader thesis of this report: unresolved colonial-era arrangements continue to generate legal uncertainty, and existing international mechanisms are uneven in their ability to deliver fair, inclusive, and final outcomes. Where Malaysia–Sulu reveals the dangers of unregulated investor–state arbitration driven by speculative finance, Chagos illustrates the risks that persist even in diplomatically brokered agreements—especially when affected communities remain procedurally marginalized.

Together, these cases expose a structural vulnerability in global dispute resolution: the space between historical injustice and modern enforcement is being filled not by reconciliation, but by litigation strategy. Without reform, that space will increasingly be occupied by private actors who transform postcolonial grievance into legal capital.

Venezuela and the Essequibo: Legal Hybrid Warfare and the Fight for Oil

Context

The territorial dispute over the Essequibo region, which comprises more than two-thirds of Guyana’s landmass and contains significant natural resources, remains one of Latin America's longest-standing and most geopolitically sensitive boundary conflicts.

The origins of the dispute lie in the 1899 Paris Arbitral Award, which assigned nearly 90 percent of the contested territory to British Guiana (now Guyana), leaving Venezuela with a small area near the Orinoco River (Misión Verdad, 2023). For several decades, Venezuela recognized the validity of this ruling. As late as 1941, its foreign ministry described the boundary as *“final and well defined,”* reaffirming its acceptance of the award up to 1962 (Ishmael, 2015).

This official position shifted following the posthumous release in 1949 of a memorandum by Severo Mallet-Prevost, a member of Venezuela’s legal team. The document alleged collusion between Britain and the tribunal’s president, Friedrich Martens, suggesting political influence shaped the outcome (Ishmael, 2015). Although this claim has never been substantiated in court, it provided the basis for Venezuela’s subsequent repudiation of the arbitral ruling.

In 1962, as British Guiana prepared for independence, Venezuela formally declared the arbitral award *“null and void”* and revived its pre-1899 territorial claim. The decision was widely viewed as a strategic move intended to prevent the boundary from becoming legally entrenched under international law. A colonial-era issue was thereby converted into a contemporary dispute with lasting diplomatic and legal consequences.

Guyana's Legal Battle for Essequibo

In 2018, Guyana filed a case before the ICJ under the 1966 Geneva Agreement, seeking a ruling on the validity and binding nature of the 1899 award. Venezuela contested the Court’s jurisdiction and argued that the United Kingdom was a necessary party to the proceedings (van den Berg & Buitrago, 2023). These objections were dismissed. In April 2023, the ICJ ruled by 14 votes to 1 that it possessed jurisdiction to adjudicate the matter

Guyana interpreted the ruling as progress toward legal resolution. Venezuela, by contrast, reiterated its position that the dispute should be resolved bilaterally and rejected the authority of the Court (The Guardian, 2025). Following concerns raised by Guyana regarding the potential for unilateral action, the ICJ in December 2023 issued provisional measures directing both states to preserve the territorial status quo and refrain from any efforts to alter it through force or annexation (Stabroek News, 2025; The Guardian, 2025).

Venezuela's Hybrid Strategy

Despite these measures, Venezuela has pursued a parallel legal and administrative approach. On 3 December 2023, it held a national referendum to secure a domestic mandate supporting its claim. Questions presented to voters included the proposal to create a new Venezuelan state in the Essequibo, offer citizenship to residents, and formally reject ICJ jurisdiction (The Guardian, 2023). The government reported an affirmative vote exceeding 95 percent, with a turnout of 10.5 million (Buitrago, 2023). Guyana condemned the referendum as contrary to international law, while President Maduro characterized it as a legitimate expression of national will (Taylor, 2023).

Subsequently, in March 2024, the Venezuelan National Assembly passed the *"Organic Law for the Defense of Guayana Esequiba,"* establishing a new administrative region covering the contested territory (Buitrago, 2024). Tumeremo was designated as the capital, and a military officer was appointed governor (Taylor, 2023). In May 2025, Venezuela planned to conduct regional elections in the newly created entity. On 2 May, the ICJ reaffirmed its earlier measures, ordering Venezuela to halt all electoral preparations (Reuters, 2025). Caracas dismissed the ruling and indicated it would not comply.

In effect, Venezuela is treating the Essequibo dispute as legal hybrid warfare – using *fait accomplis* on the ground to undermine judicial proceedings, at the risk of breaching international law and court authority.

Geopolitical Implications

The resurgence of Venezuela's claim over Essequibo is driven, above all, by oil.

In 2015, ExxonMobil announced significant oil finds in Guyana's Stabroek Block, transforming the country into a leading emerging producer in Latin America (Husain, 2024). Subsequent exploration by Exxon, Hess, and CNOOC has confirmed billions of barrels of recoverable oil, establishing the region as a resource-rich zone that also contains valuable deposits of gold and bauxite (The Guardian, 2023).

Venezuela's government has explicitly linked its territorial claim to these resource developments. Following the 2023 referendum, President Maduro ordered PDVSA to "immediately begin exploration and exploitation" in the disputed zone, claiming the vote gave Venezuela the right to "allow oil exploration" in waters currently under Guyanese control (Berg, 2024). This directive has been followed by deployments of survey teams and military personnel into the area, which Caracas describes as Venezuelan national territory. Georgetown has characterized these moves as precursors to annexation (Taylor, 2023).

Naval tensions escalated in March 2025, when a Venezuelan vessel approached a drillship operating under a Guyanese license before withdrawing. Caracas framed the incident as a routine patrol within an area subject to delimitation (King, 2025). International actors, including the United States, warned that further actions could breach international legal obligations and destabilize the broader region (France 24, 2025).

Analysis: Legal Risks and Future Litigation Pathways

The Malaysia–Sulu case demonstrated how a colonial-era treaty could be reactivated through private arbitration and third-party finance to produce one of the largest sovereign claims in history. The Essequibo dispute—though currently before the ICJ—contains many of the same ingredients.

Venezuela's rejection of the Court's jurisdiction, paired with its domestic legislation to annex the region, opens space for legal fragmentation. The real danger lies not in state-to-state litigation, but in how private actors may monetize the dispute's commercial stakes—particularly Guyana's multibillion-dollar offshore oil sector—through investor–state arbitration.

The Stabroek Block, situated in contested waters, holds over 11 billion barrels of recoverable oil. If Venezuela's moves—such as declaring a new state over Essequibo or ordering PDVSA to explore in Guyanese-licensed zones—materially disrupt ongoing projects by energy majors like ExxonMobil, Hess, or CNOOC, these actors are well-positioned to launch investor-state claims under BITs or the ICSID Convention. The structure is all-too familiar: multibillion-euro energy claims, ambiguous jurisdiction, and a politically volatile context. The result is a perfect storm for third-party litigation funders.

As *The Economist* has noted, funders routinely acquire stakes in similar cases by establishing shell entities under favourable BIT regimes ("The arbitration game", 2014). If ExxonMobil or other investors initiate arbitration, there is every reason to expect that litigation financiers would line up to bankroll the case, seeking a cut of any eventual award. The Malaysia–Sulu arbitration showed how a colonial-era claim, with minimal legal grounding, could be engineered into a $15 billion enforcement campaign through private capital. Therium invested over $20 million into that effort, in pursuit of outsized returns. In Essequibo, the commercial prize is even larger and the risks of funder involvement even higher.

Moreover, the risk is not limited to Venezuela. Should tensions escalate to the point of impairing extractive operations, Guyana could face claims for failing to protect investments—even if it played no active role in the disruption. This liability displacement mirrors the Sulu case, where Malaysia, despite contesting jurisdiction and not consenting to arbitration, found itself defending sovereign assets in multiple enforcement jurisdictions. In both cases, litigation is sustained not by legal merit, but by the structural vulnerabilities of an arbitration regime and the incentives of litigation financiers.

The wider concern is that legal action could outpace diplomacy. Venezuela's unilateral steps—backed by domestic legislation and national referenda—have created an alternative legal reality that undermines ICJ proceedings. As with the Malaysia–Sulu case, where arbitration continued despite annulment by Spanish courts, the absence of enforcement across jurisdictions means that even flawed or forum-shopped claims can persist. European courts, given their permissive enforcement frameworks and concentration of attachable assets, would likely become key venues for any such enforcement efforts—especially if funders replicate the Sulu strategy across multiple jurisdictions. Litigation financiers may exploit this vacuum to prolong disputes, manufacture jurisdiction, or force early settlement.

The lesson is clear: when historical disputes intersect with high-value investments and an unregulated litigation funding environment, the arbitration system's weaknesses become a strategic weapon. Without coordinated safeguards, cases like Essequibo risk becoming the next frontier in the "*arbitration game*"—not to resolve postcolonial grievances, but to monetise them (The Economist, 2014).

Germany and the Herero–Nama Claims: From Genocide to Restitution Battles

Introduction

More than a century after Germany's colonial administration carried out atrocities in South-West Africa (now Namibia), the claims of the Herero and Nama communities continue to generate legal, political, and diplomatic scrutiny. What began as a historical grievance has evolved into an ongoing test of international legal frameworks and postcolonial accountability.

Germany formally colonized South-West Africa in 1884, displacing a constellation of established indigenous nations—the Herero, Nama, Damara, and others—with a violent project of land seizure, cattle theft, and forced labor (The Holocaust Explained, 2024).

Racial hierarchy was consistently enforced through systemic violence and economic dispossession, erupting into full-scale bloodshed in 1904. The Herero, led by Chief Samuel Maharero, launched an uprising against German settlers, killing approximately 123 colonists.

Germany's response was ruthless, sparking what is now widely recognized as one of the first genocides of the twentieth century. General Lothar von Trotha issued an extermination order: "*Every Herero, with or without a gun… will be shot*" (Devine, 2018).

Approximately 65,000 Herero—around 80 percent of the population—and 10,000 Nama, or half their population, were killed. At camps such as Shark Island, survivors endured forced labor, sexual violence, and pseudoscientific medical experiments (Middleton, 2025). Victims' skulls were shipped to Germany for racial studies, highlighting the genocidal intent that defined the campaign (BBC, 2021).

The scale and intent of these actions underpin continued claims for reparative justice.

Germany's Partial Acknowledgment and the 2021 Joint Declaration

Efforts by Herero and Nama communities to pursue legal recognition and reparations date back decades. A $4 billion class-action lawsuit was filed in 2001 in U.S. courts against German companies alleged to have profited from the genocide. In 2017, the case *Rukoro v. Germany* was brought under the Alien Tort Statute, seeking compensation and direct representation in negotiations (Aidi, 2015; Devine, 2018). Although both cases were dismissed on jurisdictional grounds, they contributed to broader international awareness.

Advocacy efforts triggered a 2006 Namibian parliamentary resolution urging bilateral talks, and in 2015, Herero and Nama leaders delivered a petition in Berlin signed by 2,000 German figures—including MPs—calling for Germany to accept "*historical responsibility*" (Aidi, 2015). Diaspora protests, symbolic "*reparations walks*," and UN engagement turned their cause into a transnational push for historical redress.

A "Reparation Walk" in Swakopmund, Namibia (2019)

In 2021, following five years of bilateral negotiations, a Joint Declaration was signed. The agreement included Germany's first formal acknowledgment of the genocide and a commitment to provide €1.1 billion over 30 years in development aid targeted toward regions historically affected by the atrocities (Oltermann, 2021). German Foreign Minister Heiko Maas hailed the agreement as a historic gesture, declaring it an effort to "*heal the wounds*" of colonial violence (Oltermann, 2021).

However, German officials consistently emphasized that the agreement was political, not legal, in nature. The funding was explicitly framed as a *"gesture of reconciliation"* rather than reparations. Berlin disavowed any admission of legal liability, asserting that the agreement was not legally binding and did not confer obligations under international law (BBC, 2021).

This semantic distinction is rooted in a broader legal calculus. Germany argues that the events of 1904–08, while morally reprehensible, occurred before international legal instruments like the 1948 Genocide Convention or human rights treaties could apply retroactively (Buser, 2017). As such, Berlin maintains that the crimes fall outside the scope of current international liability. The legal framing also serves a deterrent function: by avoiding the reparations label, Germany seeks to insulate itself from a potential chain reaction of restitution claims across its former colonial empire—including in Tanzania, Cameroon, and Togo.

Herero and Nama Communities' Perspective: Reconciliation Agreement and Its Limitations

For Herero and Nama leaders, the 2021 agreement is inadequate, both in process and content. Talks excluded descendant communities, focusing instead on the Namibian state. "*How do you reconcile with the victims if the victims feel left out?*" asked historian Jürgen Zimmerer (BBC, 2021). Critics argue Germany negotiated with a government that didn't exist during the genocide, bypassing the actual descendants of victims (Teffera, 2023).

Concerns have also been raised regarding the distribution and adequacy of the financial package. The funds are administered through the Namibian state, which some critics argue lacks mechanisms to ensure equitable access for communities most directly impacted. Land restitution, a core demand linked to the original dispossession, was excluded from the agreement. *"It's something to do with genocide, but it's not reparations,"* observed Mutjinde Katjiua of the Ovaherero Traditional Authority (Nyaungwa, 2024).

International observers have echoed these concerns. In 2023, seven UN Special Rapporteurs denounced the exclusion of Herero and Nama communities, urging Germany to "*take full responsibility*" and provide reparations directly (Connolly, 2023). The European Center for Constitutional and Human Rights (ECCHR) called the declaration a "*formal gesture*" devoid of legal accountability (Imani, Theurer and Kaleck, 2021).

Litigation in Namibian courts to block the deal is ongoing. *The Guardian* and *New York Times* have both highlighted how the communities view Germany's actions as "*too little, too late*" (Swift, 2017; Connolly, 2023). Even sympathetic German voices argue that material relief—not diplomatic phrasing—is what truly matters. "*However you label it… support must reach the communities still affected*," said ECCHR's Wolfgang Kaleck (The Economist, 2021).

Analysis: Legal Risks and Future Litigation Pathways

The Herero–Nama case stands apart from other postcolonial disputes examined in this report. Unlike the Sulus, who were able to transform a tenuous colonial-era agreement into a multi-billion-dollar enforcement campaign, the Herero and Nama pursuit of justice is grounded in an undisputed moral claim, but remains legally inert. This is not due to lack of merit, but because of entrenched structural barriers in the international legal system that preclude its enforceability.

Germany's 2021 Joint Declaration acknowledged the genocide in principle but avoided any legal accountability, with Berlin invoking sovereign immunity to block judicial proceedings. The result is a legally choreographed containment strategy: public moral responsibility without legal consequence. Courts have reinforced this position. In *Rukoro v. Germany*, U.S. federal judges dismissed the case under sovereign immunity rules, despite clear documentation of genocidal violence. The ICJ's 2012 *Germany v. Italy* ruling continues to shield former colonial powers from foreign civil liability, even for crimes that today would qualify as jus cogens violations.

Notably, the Herero–Nama campaign has attracted no commercial backing. There is no realistic prospect of financial recovery. No treaty clause offers a jurisdictional anchor; no enforceable award can be issued. Without a path to damages or relief, litigation funders have no incentive to invest—however legitimate the grievance may be.

This exposes a critical asymmetry. In the Sulu case, financiers saw an opportunity to extract value from a weak historical agreement by leveraging arbitration mechanisms designed for commercial disputes. In the Herero–Nama case, even a *morally compelling* and *well-documented genocide* could not access those same channels. The problem is not just legal design—it is systemic distortion. In the current legal landscape, European jurisdictions are more accessible to engineered financial claims than to communities seeking redress for atrocity crimes.

The implications are stark. While a private arbitration attempted to impose a multibillion-dollar liability on Malaysia, Germany has managed to shield itself entirely through procedural defences, despite having acknowledged the underlying harm. The absence of a viable forum leaves Herero and Nama descendants reliant on diplomatic appeals and symbolic gestures, with no mechanism for binding redress.

This case highlights the urgent need to create distinct legal pathways for claims arising from historical violence. Attempts to retrofit commercial arbitration into a venue for reparative justice have produced perverse outcomes: rewarding cases that offer profit potential, while excluding those with substantive legitimacy but no commercial value. Without structural reform, the international system will continue to prioritise form over substance, offering access where there is financial upside and silence where there is none.

In short, the Herero–Nama case demonstrates not the risk of excess legal access, but the cost of its absence. It underscores the need for a parallel framework—one capable of handling collective, non-commercial harms with transparency, enforceability, and equity. Until such a mechanism exists, even the most grievous historical injustices will remain beyond the reach of legal remedy.

Asia's Unresolved Boundaries: Colonial Disputes and Legal Flashpoints

Introduction

Asia's transformation into a network of high-speed economies and nuclear powers masks an unresolved inheritance: borders drawn by colonial powers and never fully accepted by those who inherited them. Many of these boundaries, drawn by imperial administrators and unratified by successor states, remain sources of geopolitical instability. Increasingly, these disputes are being reframed through legal strategies alongside military deployments.

Core disputes—Kashmir, the McMahon Line, and the Durand Line—have persisted for decades, but what has changed is the growing use of international legal discourse and institutions as instruments of leverage. Lawfare, alongside militarization, is becoming a salient feature of postcolonial boundary disputes. As courts, arbitration panels, and treaty bodies gain relevance, both state and non-state actors are recalibrating their approaches to include litigation as a complement to diplomacy and coercion.

i. Kashmir: Between Political Stalemate and Legal Deadlock

Kashmir remains the subcontinent's most enduring colonial legacy. Since 1947, India and Pakistan have fought wars, endured insurgencies, and traded legal fire over its status. *"The partition of the subcontinent in 1947 was incomplete because the only Muslim-majority province … did not become a part of Pakistan,"* notes Foreign Policy Magazine (Fair, 2025). India invokes the maharaja's accession; Pakistan insists on a plebiscite. The result: perpetual stalemate.

The toll is staggering, with more than 70,000 killed, about 10,000 disappeared, and over 200,000 displaced (Waheed, 2025). The recent Pahalgam massacre killed another 26 people, triggering retaliatory Indian strikes, a Pakistani counteroffensive, and drone warfare between nuclear powers (CNN, 2025). A ceasefire was brokered on May 10 with the help of President

Trump's administration. The agreement even included an intriguing promise: renewed diplomatic talks on outstanding issues, facilitated by Washington and others. Yet analyst Michael Kugelman warns, *"this is going to be a very difficult ceasefire to uphold"* (Sharma, 2025).

78 years on, Kashmir's legal status and the rights of its people remain contested. Pakistan has threatened to take India to international tribunals over the crisis and over New Delhi's suspension of the 1960 Indus Waters Treaty (Greenfield, 2025). But legal options are narrow. Both countries have longstanding reservations to the ICJ's compulsory jurisdiction, leaving only treaty-based avenues like Article 36(1) of the ICJ Statute. Past efforts—such as the ICAO case, the Trial of Prisoners of War, and the Aerial Incident of 1999—have floundered on jurisdictional grounds (Pillai, 2019). Even the ICJ's 2019 Jadhav ruling, though favorable to India, has yielded little practical progress.

Nevertheless, the temptation to internationalize the conflict through legal filings remains strong. Pakistan could lean on human rights frameworks—citing detentions, media blackouts, and reports from the UN High Commissioner for Human Rights—to build a political case, even if jurisdiction fails.

ii. The McMahon Line: High-Altitude Hostility

Along the eastern Himalayas, India and China face off across another unresolved colonial boundary: the McMahon Line. Drawn at the 1914 Simla Convention between British India and Tibet, the line was never recognized by China, which rejected Tibet's treaty-making authority. India insists it inherited the boundary post-independence. China calls it a historical fraud.

In June 2020, decades of tense patrols erupted into hand-to-hand combat. Twenty Indian soldiers were killed; China later acknowledged four of its own troops died (Reuters, 2025). It was the first deadly clash on this frontier in 45 years and a warning shot. Since then, both sides have fortified positions, expanded high-altitude infrastructure, and dug in for a protracted standoff. As the International Crisis Group observed, *"The danger of more [clashes] will lurk as long as the countries disagree over where the line lies"* ("Thin Ice", 2023).

Legal resolution remains unlikely. Neither India nor China accepts ICJ jurisdiction for territorial disputes, and China's 2016 rejection of the South China Sea ruling casts doubt on its willingness to comply with any external verdict (India Writes, 2016). The dispute hinges on differing readings of colonial documents, and without mutual consent, no tribunal can proceed (Ahuja, 2025). Even if it could, enforcement would be moot.

iii. The Durand Line: A Historical Boundary Under Strain

To the west, the Durand Line separating Pakistan and Afghanistan continues to spark tensions. Drawn in 1893 to demarcate the limits of British India, the line split Pashtun tribal lands and was never fully accepted by Afghan leaders. Today's Taliban regime still refuses to recognize it as an international boundary, calling it a "*mere line*" imposed by colonial powers (Business Standard, 2023).

Yet, under international law—including the principle of *uti possidetis juris*—successor states inherit colonial borders. Most experts agree the Durand Line is valid. The Islamabad Policy Research Institute noted, *"Afghanistan's contention that the 1893 Durand Agreement was void or has lapsed … is widely considered weak under these principles"* (Khanum, 2024). Even Kabul's tacit compliance, such as acknowledging border security arrangements, suggests reluctant recognition.

Still, the dispute continues to fuel violence. In late 2024, Pakistan launched airstrikes against TTP havens in Afghanistan after a spate of domestic attacks. Taliban fighters responded with cross-border fire, and soldiers were killed on both sides (Al Jazeera, 2024; Jadoon, 2025).

Bringing the issue before the ICJ is a legal gamble. Pakistan avoids admitting any formal dispute; Afghanistan's legal position is fragile. And there's no bilateral or multilateral treaty to anchor a case. If jurisdiction were established, Pakistan's status as British India's legal successor would likely prevail, affirming the border and leaving Afghanistan legally cornered (Qaseem, 2008; Khanum, 2024). These risks explain why neither side has pursued litigation: the law could settle the issue, but not necessarily in their favor.

Legal Risks and Future Litigation Pathways

The Malaysia-Sulu case shows how a colonial-era agreement, once considered politically marginal, can re-enter the legal arena through unexpected pathways. Asia's unresolved boundaries present a different type of exposure. Here, the key risk is not retrospective legal action, but the future potential for boundary disputes to be restructured through investor–state arbitration frameworks, especially where infrastructure or commercial projects straddle contested zones.

With ICJ jurisdiction largely ruled out and bilateral diplomacy consistently deadlocked, arbitration may become the forum of last resort—not because it is suited to resolving territorial questions, but because it is procedurally accessible and structurally unprepared. These systems, designed for commercial protection, can be manipulated when resource corridors, transport links, or development concessions become entangled in historical boundary lines.

The risk is that third-party litigation funders, already active in treaty-based investor claims, begin to see opportunity in these fault lines. Disputes over water rights in Kashmir, mineral extraction near the McMahon Line, or infrastructure along the Durand frontier could be reframed as treaty violations or indirect expropriation. In such cases, funders do not require state consent—only a commercial foothold and legal ambiguity. That combination already exists in several of these regions.

What makes this trend especially problematic is the absence of procedural safeguards. There is no coherent enforcement regime to prevent overlapping or opportunistic claims. Nor are there legal filters to distinguish between good-faith disputes and litigation engineered for leverage. The same structural gaps that enabled problematic claims elsewhere—fragmented jurisdiction, opaque funding, inconsistent scrutiny—are present here, but in a more volatile geopolitical context. And just as in the Sulu case, European courts could once again become enforcement venues of choice, targeted for their openness, asset density, and lack of coordinated arbitral oversight.

If left unchecked, these disputes could evolve into a new class of cross-border litigation: territorially anchored, commercially structured, and externally financed. Arbitration, in such cases, would not offer resolution. It would amplify risk, shift liability, and empower parties with no stake in stability. The legal vacuum around Asia's colonial frontiers is unlikely to remain passive. What fills it will depend on whether international law adapts—or is outpaced.

A Call for EU Action: Emerging Risks to European Courts and Legal Systems

European Courts as Enforcement Hubs for Legacy Claims

"European courts are collaborating in what should be considered legal imperialism by allowing claims to be heard that interfere with the sovereignty of the post-colonial world", warns political analyst Murray Hunter *(Sin Chew Daily, 2022)*.

This critique captures a growing concern: Europe's legal systems are increasingly becoming arenas for the weaponization of historical disputes—some of which are tenuously grounded in law or fact, yet aggressively pursued through transnational enforcement channels.

The Malaysia–Sulu case illustrates this. What began as a precarious demand rooted in an 1878 colonial land deal morphed into a *"sophisticated abuse of the arbitration process"* (Said, 2024). Lacking both jurisdictional validity and historical substance, the claim bypassed Malaysia's courts entirely and hijacked international arbitration channels to pursue a manufactured windfall. European courts—in France, Spain, the Netherlands, and beyond—were forced to invest time and diplomatic capital to scrutinize a "*sophisticated fiction, veiled as a legal process*" (Latiff and Ananthalakshmi, 2022). This is forum shopping at its boldest**:** if one court dismisses the claim, the funders simply try elsewhere, exploiting the fragmentation of Europe's legal landscape.

As the other cases in this report demonstrate, the risk is not confined to the Sulu precedent. In Chagos, any future funder-backed claim by displaced islanders could once again target European courts. In Essequibo, if oil investors pursue arbitration against Venezuela—or even Guyana—enforcement actions would likely centre in Europe, where most multinational energy companies hold assets. Even unresolved Asian boundary disputes could produce spillover effects if infrastructure projects with European financing are disrupted and claims are channelled into EU courts via shell claimants.

In each scenario, Europe's courts are the logical endpoint for enforcement—not because they are complicit, but because they remain structurally exposed.

Legal and Procedural Vulnerabilities

What makes European courts so attractive to claimants and litigation funders is a unique combination of legal openness, enforcement reach, and procedural fragmentation.

Under the 1958 New York Convention, arbitral awards are enforceable in over 160 jurisdictions. Within the European Union, this reach is amplified by the bloc's economic centrality and the concentration of state and commercial assets that are vulnerable to attachment. Yet while the Brussels I Regulation (recast) harmonises the enforcement of civil and commercial judgments across Member States, it expressly excludes arbitration. This exclusion leaves enforcement of arbitral awards to national discretion under the Convention's broad but inconsistently applied framework. The result is a fragmented legal landscape that encourages forum shopping, allowing claimants to shift enforcement strategies across EU jurisdictions until a favourable ruling is secured.

This structure incentivises speculative and opportunistic claims. If a court in one Member State refuses to enforce an award on grounds of jurisdiction or public policy, claimants can simply relaunch enforcement in another. In the Malaysia–Sulu case, after France imposed a stay on enforcement, the claimants moved their efforts to Luxembourg and the Netherlands. This kind of procedural redundancy imposes costs on European courts, forces states to defend themselves in multiple venues, and increases diplomatic and legal uncertainty. At the same time, national judges must rule on complex and politically sensitive claims that may be rooted in colonial-era treaties or driven by non-transparent financing arrangements.

The problem is compounded by the absence of EU-wide regulation of third-party litigation funding. TPLF allows private investors—often hedge funds or specialist firms—to finance legal claims in exchange for a share of the proceeds, sometimes up to 500 percent. These arrangements are rarely disclosed to the court or to opposing parties. As MEP Axel Voss has noted, litigation funding in Europe is "*ripe for abuse*" and suffers from a "*lack of basic transparency*" (The Parliament Magazine, 2021).

In the Sulu arbitration, the identity and terms of the funder, UK-based Therium, were never revealed in the award itself, yet the financing arrangement underpinned a $15 billion enforcement campaign. With no disclosure requirements, no licensing framework, and no cap on returns, funders can steer litigation strategy and settlement decisions from behind the scenes while remaining shielded from accountability.

This legal environment creates a distortion of incentives. Because funders seek high-yield opportunities, they are drawn to claims with political salience, emotional resonance, and speculative upside. The result is a system in which weak or historically tenuous claims can be elevated into multibillion-euro enforcement efforts—not because of legal merit, but because of the availability of capital and the permissiveness of enforcement regimes.

European courts are thus not just being used—they are being targeted. Their openness, asset-rich jurisdictions, and lack of coordinated safeguards make them the venue of choice for transforming archival grievances into commercial instruments. Without a unified approach to arbitral enforcement and binding regulation of litigation funders, EU legal systems will remain vulnerable to exploitation. What is at stake is not merely procedural efficiency, but the credibility of European justice and the integrity of the international legal order.

Demands for Regulatory Reform

Faced with this emerging threat, voices from across the international legal and policy community are calling for urgent reform.

International Arbitration Reform

The enforcement of arbitral awards involving legacy or pre-sovereign instruments has exposed a structural gap in Europe's legal architecture. While the New York Convention permits states to refuse enforcement on public policy grounds, its application remains uneven across Member States—enabling strategic forum shopping, legal fragmentation, and redundant litigation. This inconsistency is most visible in disputes rooted in colonial-era arrangements, where consent is often absent, treaty language outdated, and proceedings susceptible to speculative financing.

As arbitrator Marc J. Goldstein has noted, enforcement must be balanced against "*the principle that a court would not enforce [an award]… that interferes with core sovereign functions*" (Arbitration Commentaries, 2024). Yet no mechanism currently exists within the EU to ensure that courts apply this principle in a coordinated manner, especially when claims bypass state consent or rely on nullified arbitral processes.

To address this, a shared EU enforcement coordination mechanism—potentially overseen by the European Commission—should be established to promote judicial consistency and facilitate real-time information-sharing among Member States. This mechanism would serve as a central reference point for national courts reviewing enforcement applications involving historically rooted or procedurally contested awards. It would enable judges to consult previous rulings on the same or materially similar claims, identify overlapping or duplicative enforcement efforts, and assess whether public policy exceptions or annulment decisions should be given cross-border weight.

Such a mechanism could be modelled on existing EU judicial cooperation frameworks—such as the European Judicial Network (EJN)—but tailored specifically to arbitration enforcement. It would not substitute the authority of national courts but would provide procedural infrastructure for coherence, allowing Member States to uphold the rule of law without acting in isolation. Crucially, it would support the development of a common interpretive baseline for legacy disputes—especially those involving treaties concluded prior to the existence of modern international arbitration norms or state sovereignty as understood today.

By embedding a structured platform for cross-jurisdictional dialogue, the EU would significantly reduce the risk of forum shopping and the manipulation of enforcement gaps. It would also reinforce the principle that arbitration is rooted in consent, legal legitimacy, and procedural fairness—not historical ambiguity or financial opportunism.

Failure to act will leave the EU's enforcement regime exposed to legal engineering that exploits its very openness. Coordinated reform is not only a matter of institutional efficiency; it is a necessary defence against the instrumentalisation of Europe's courts for the monetisation of empire.

TPLF Reform

Alongside arbitration enforcement vulnerabilities, the lack of regulation of TPLF has emerged as a parallel risk to the integrity of Europe's legal systems. The capacity of private financiers to bankroll complex, high-stakes disputes—often with minimal disclosure and no liability—has enabled a wave of speculative claims that leverage jurisdictional fragmentation for strategic advantage. In legacy disputes, particularly those involving pre-sovereign treaties or historical injustices, this financial model introduces an additional layer of opacity and distortion.

Former MEP Mary Honeyball has observed, "*European courts are unwittingly letting a profit-driven privately-funded enterprise hold a sovereign nation to ransom*," and Brussels cannot ignore such "*clear proof*" that the status quo is untenable (Funds Europe, 2023). MEP Axel Voss has similarly cautioned that, without oversight, litigation funding risks transforming EU legal systems into "*pawns in profit seeking*", rather than justice (The Parliament Magazine, 2021). These concerns have been echoed in the European Parliament's 2022 resolution calling for mandatory transparency and safeguards, citing a pattern of unregulated litigation funders extracting disproportionate returns through private arrangements shielded from scrutiny (U.S. Chamber of Commerce Institute for Legal Reform, 2022).

Despite the industry's claims of self-regulation, voluntary codes have been widely criticized as ineffective (Funds Europe, 2023). As the sector grows—over 100 active funders and a 40% investment increase between 2009 and 2019—EU-level oversight has become essential. Courts must be notified at the outset of a case, and again at enforcement, when a third party is funding the claim. Disclosure should cover funder identity, financial terms, and any influence over strategy or settlement. Judges and opposing parties should not be left in the dark about who is backing the litigation—or to what end.

In parallel, funders should be held to a fiduciary duty toward claimants, including obligations of care and fairness in funding agreements. To prevent excessive profiteering, the EU should consider introducing return caps—such as limiting funder shares to 20–30% of the final award. Where a funded claim fails, financiers should share liability for legal costs. This would help filter out weak or speculative cases and reinforce the principle that litigation is not a zero-risk investment.

Legal strategy must remain under the control of claimants and their counsel—not external financiers. Funding agreements that grant funders veto power over settlements, case tactics, or decisions to proceed should be rendered unenforceable under EU law. Courts must be assured that representation is directed by the interests of the party, not the return targets of investors.

Finally, structured regulatory supervision of the TPLF sector is essential. Funders operating within the EU should be licensed and subject to capital adequacy requirements, regular disclosures, and independent oversight. This is not a radical departure—similar requirements already apply to other financial actors operating across borders. As litigation finance continues to expand, EU legal systems must not become vehicles for profit extraction at the expense of sovereign integrity or procedural fairness.

EU's Progress

The EU has already acted to terminate intra-EU BITs and withdraw from the Energy Charter Treaty when investor–state mechanisms clashed with its legal order and policy priorities. A similar scrutiny is now warranted for arbitration claims rooted in long-defunct colonial arrangements. At minimum, third-party funding must be brought into the open, and arbitrators empowered to impose security for costs where speculative claims are being pursued without meaningful downside for funders.

As part of its broader economic strategy, the European Commission has launched the Competitiveness Compass—a flagship initiative to track and enhance Europe's structural resilience through investment, regulatory simplification, and strategic autonomy ("An EU Compass", 2025). While primarily focused on industrial performance and innovation, its emphasis on regulatory coherence and the integrity of the Single Market provides a timely opportunity to incorporate litigation finance oversight into the EU's competitiveness agenda.

A fragmented legal system vulnerable to opportunistic arbitration undermines not only justice but investor confidence. Embedding litigation funding reform within the implementation of the Competitiveness Compass would ensure that Europe's legal infrastructure strengthens, rather than compromises, its long-term economic and institutional resilience.

Conclusion

The Malaysia–Sulu arbitration has laid bare a profound vulnerability in the global legal order. A colonial-era agreement, long treated as dormant, was reactivated through private legal engineering and elevated into one of the largest arbitral awards in history. While no other historical dispute has yet reached this scale, the conditions that enabled the case—fragmented enforcement systems, opaque arbitration procedures, and unchecked TPLF—are systemic and unresolved.

Arbitration systems, designed for commercial disagreements between consenting parties, are increasingly vulnerable to being co-opted for high-risk legacy claims, engineered for profit rather than justice. Across Africa, Asia, and the Caribbean, resurfaced colonial-era arrangements—boundary lines, land cessions, and disputed treaties—remain embedded in legal grey zones and, as this report has shown, risk being transformed into speculative legal instruments through litigation funding and jurisdictional arbitrage.

European jurisdictions, in particular, have become enforcement venues of choice, thanks to the reach of the New York Convention and the absence of proper safeguards. The result is a legal landscape in which manufactured claims can circulate unchecked—undermining sovereignty, distorting legal process, and exposing public institutions to financial coercion.

Urgent reform is now imperative. International arbitration mechanisms must be strengthened to prevent jurisdictional abuse, and third-party litigation funding must be brought under enforceable regulation. Arbitration must return to its foundational principles: consent, neutrality, and judicial integrity. States cannot continue to face billion-dollar liabilities born of disputes they never agreed to litigate, financed by actors they cannot see, and adjudicated by arbitrators whose mandates may lack legal grounding.

Side by side, the regulation of litigation funding is a matter of institutional survival. Without binding transparency requirements, fiduciary duties, and enforcement thresholds, private capital will continue to distort the course of justice, especially in politically sensitive or historically complex cases. The Sulu case was driven not by the pursuit of restitution, but by the mechanics of financial return. That dynamic must be interrupted before it becomes entrenched.

What is at stake is the credibility of the international legal system and the ability of sovereign states to defend themselves against manufactured liabilities. If the vulnerabilities exposed by the Sulu arbitration are not urgently addressed, Europe's courts risk becoming instruments of legal extraction—venues where historical grievances are repackaged for financial gain. The integrity of arbitration, the principle of state consent, and the authority of judicial institutions all hang in the balance.

Europe must act—decisively and collectively—to ensure that its legal frameworks serve justice, not opportunism, and that no precedent allows empire to be arbitrated in the language of investment.

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