

MEMORANDUM  
ON THE FINANCIAL RIGHTS  
OF THE STATE OF SABAH  
UNDER THE FEDERAL CONSTITUTION

MEMORANDUM  
BERKENAAN HAK-HAK KEWANGAN SABAH  
SELARAS DENGAN PERLEMBAGAAN PERSEKUTUAN

BON

Edmund Bon, Andrew Yong, Tan Poh Yee, New Sri Teo,  
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and Quratulan Aqilah b. Norzahirul Anuar



(Above) 'Malaysia good now', Luping said before Merdeka, there were no cars and people had to travel on foot. Now with vehicles, travelling is made efficient due to progress.



Left: Bon presenting his paper on the 40 per cent revenue entitlement for Sabah.

# Getting to grips on the 40pc

David Thien

WHEN Foreign Minister Datuk Anifah Aman presented the Sabah Constitutional Financial Rights in a Memorandum of Claims to Prime Minister Datuk Seri Najib Tun Razak pertaining to the State's 40 per cent constitutional entitlement to net Federal revenue derived from Sabah recently, West Malaysian lawyer Edmund Bon of Bon Advocates that (drafted, detailed and presented the claims at seminars) was seen in the company of Anifah's entourage to meet the Premier on the matter.

They earlier had Chief Minister Datuk Seri Musa Aman's blessings to pursue the matter. Bon was among the few speakers who presented Sabah's case during the Foreign Minister's second Malaysia Agreement Public Diplomatic Discourse programme held at the UM's centering on outstanding controversial issues on Sabah within the Federation of Malaysia last May 16.

He told the audience he was aware that he was not eligible to practise law in Sabah even as an advocate and solicitor of the Malaysian Bar, and his presentation here should not be construed as such.

The public wonder why there are no lawyers from Sabah and those practising in Sabah, particularly from the Sabah Law Association (which was recently taken over by the younger lawyers during its AGM voting, edging out the older lawyers) capable of highlighting and championing such claims which should have been defended by our past politicians from members of parliament to senators, State Assembly representatives, attorney-generals, treasurer-generals, who have sworn into office to defend the State and Federal Constitutions, academicians, journalists and other professionals.

The public realised that even among those who now blindly parroted to support the 40 per cent claims drive by Anifah, few really understood comprehensively the issues in detail.

Bon stressed that Sabah is one of the founding members of the Malaysian Federation and one of the five parties to the Malaysia agreement 1963.

"The financial provisions agreed between the Federation, Sabah and Sarawak are based on the recommendations of the Inter-Governmental Committee Report of Feb 27, 1963 and have been entrenched in



Anifah's initiative to champion Sabah's interests at his Ministry's programme.

the Federal Constitution pursuant to the Malaysia Act 1963," he said.

"Sabah and Sarawak have special rights in the Federal Constitution. Its people have special protection over and above Malaysians."

"The Federal Constitution is the highest law of the country. It is supreme. Parliament and the Government cannot cancel or override the special rights of Sabah and Sarawak in the Federal Constitution."

Importantly, according to Bon, Sabah and Sarawak are entitled to "additional revenue" and "special grants" to assist in the quicker infrastructure and economic development of the states (ie, Articles 112C and 112D read with Part IV, 10<sup>th</sup> Schedule of the Constitution).

"It is these financial issues - additional revenue and special grants - that we think have not been satisfactorily implemented according to the Constitution and the Malaysia Agreement 1963 that we want to address."

Sabah's claims are divided into Claim A and Claim B. As for Claim A, Article 112C(1) of the Federal Constitution stipulates that Sabah is to receive:

A. Part IV, 10<sup>th</sup> Schedule yearly grants of 40 per cent of the amount by which the net revenue derived by the Federation from Sabah exceeds the net revenue which would have been derived in 1963, had the Malaysia Act been in operation that year.

Net revenue means the revenue that accrues to the Federation, less any amounts assigned out of such revenue to the State under Part III or V.

Net revenue includes income tax, petroleum income tax, import, export and excise duties, goods and services tax and dividends from Petronas.

It should also cover revenues that are indirectly derived from Sabah (eg, income tax paid in Kuala Lumpur by corporations with operations in Sabah, and Petronas dividends ultimately derived from operations in Sabah).

B. Part V, 10<sup>th</sup> Schedule - all proceeds from the taxes, fees and dues so far as collected, levied or raised within the State.

Includes:

- Import duty and excise duty on petroleum products;
- Export duty on timber and forest produce;
- So long as royalty levied by Sabah on mineral oils does not amount to 10 per cent of value (calculated as for export duty), such part of the export duty as makes the total of royalty and duty on exported minerals up to 10 per cent of value.

Article 112D of the Federal Constitution

There shall be a review of the special grants made to Sabah and Sarawak for the periods beginning 1969, 1974 and thereafter at such time as the Government of the Federation or the Government of the State may require.

The first review under Article 112D for Sabah - BU (A) 928/1970 dated August 18, 1970. The Federal Government and Sabah Government agreed that instead of the 40 per cent grant, another grant be made as shown in the following:

- 1969 - RM40 million
- 1970 - RM25 million
- 1971 - RM23 million
- 1972 - RM24.8 million
- 1973 - RM26.7 million

The period of this grant was specifically stated to be from January 1, 1969 to January 1, 1974 (under Sabah Special Grant (First Review) Order 1970).

In the absence of any further reviews covering the period 1975 to the present, the 40 per cent grant provided in item 2(1) of Part V is applicable until such time as a further review is conducted and implemented.

However, in order to avoid any dispute or uncertainty over the amounts to be paid to Sabah, a review should be carried out on a regular basis in order to fix the amounts payable, as was done for the period 1969-1974.

It was not known clearly whether Tan Sri Suresh Kechik Nordin (Minister of Home Affairs) in 1965 as political ally of the late Tun Mustapha Harun's close associate, Tan Sri Abdul Rahman's behest, but became the de facto Sabah Chief Minister standing in for the overseas bound Mustapha until the advent of the Berjaya era, had any role in this development when Tun Abdul Razak disposed of his predecessor and backed Berjaya to dispose of Mustapha. Tan Sri Herman Luping could perhaps reveal some light on this.

As for Claim B on all export duty and royalty:

1. The Petroleum Development Act 1974 vested entire ownership, rights, powers and privileges of exploring, winning and obtaining petroleum, whether onshore or offshore, in Petronas. In exchange for such rights, Petronas is to make such cash payments as may be agreed between the Federation and the states.

2. By an agreement dated June 14, 1976, Petronas and the Sabah Government agreed to the following:

- Cash payment to Sabah was fixed at 5 per cent of value;
- Sabah waived any right to royalty or any other payment payable pursuant to any oil mining lease, licence, or agreement under its State laws (eg, Sabah Land Ordinance);
- This agreement in accordance with the Federal Constitution?

4. Further, this agreement is silent on the question of export duty on petroleum. Under the Customs Duties Order

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- Bon

2011, the Federal Government's revised export duties of 10 per cent on the roughly half of the petroleum extracted that is exported from Malaysia.

Until such royalty is increased to 40 per cent, Sabah is entitled to a portion of the export duty to "top up" to 40 per cent of value of the revenue received on crude petroleum extracted from Sabah, including the continental shelf off Sabah, which is exported from Malaysia.

In summary, Sabah is entitled to:

- i. Cash payment: 5 per cent
- ii. Royalty: 0 per cent
- iii. Export duty: 10 per cent + 0 per cent = 10 per cent (on exported crude only, item 3, Part V, Schedule 10)

"Why? Because cash payment is not royalty," Bon concluded.

Meanwhile, Star Sabah Chief Datuk Dr Jeffrey Kitingan said: "This 40 per cent was provided for under the Federal Constitution. So, it should be paid automatically. There's no need for a committee, to study whether the payment should be made."

"There was no excuse for the Sabah Government not to claim for the 40 per cent as it was entrenched in the 10<sup>th</sup> Schedule of the Federal Constitution. It was clear that the failure of the Federal Government to pay the 40 per cent was as good as 'daylight robbery'."

Jeffrey added that the 45 per cent entitlement was apart from other dues to Sabah from the Federal Government under the National Budget and the Malaysia Plans, soft loans and grants.

The 40 per cent, he added, was also apart from the oil and gas royalty issue and includes Federal income tax, lites, GST and other revenues of Federal departments and agencies which could be worth another RM10 billion to RM20 billion but excludes the petroleum tax which is a State entitlement.

Sabah's entitled to incomes generated by foreign workers' levies and charges, global petroleum companies operating in Sabah's oil and gas fields with Petronas along with Felda with its 100,000 hectares of palm plantations and major oil palm plantations from Sime Darby, IJM, Hap Seng, IOI, KI-Kepong to many other West Malaysian and Sarawakian businesses like Pansar, KTS and Servay who are not headquartered in Sabah but have substantial operations in the State.

Many people could not recall at the time when Jeffrey was in the Government like when he was Director of Sabah Foundation, that he (Jeffrey) pursued any of these claims for Sabah with his Chief Minister brother, Tan Sri Joseph Patain Kitingan.

Some members of the public call for and want the claims to be pursued jointly with Sarawak in a united stance as both states enjoy common constitutional privileges in the Federal Constitution.



Jeffrey: It was clear that the failure of the Federal Government to pay the 40 per cent was as good as 'daylight robbery'.