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Sarawak's Claim on the State's Jurisdiction over Oil and Gas on the Continental Shelf: A Legal Historical Perspective

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Abstract.

This paper aims to conduct a preliminary re-evaluation of the claim made by the Government of Sarawak regarding its jurisdiction over oil and gas on the continental shelf. The basis of Sarawak's claim is rooted in the pre-Malaysia status quo of state territory, which was established through the Alteration of Boundaries of 1954. This proclamation extended the borders of the state to include the continental shelf adjacent to its coast, ensuring the state's rights to natural resources, including oil and natural gas. However, this research questions the legality of the 1954 law based on the context of legal history. It appears to be incompatible with the 1958 Geneva Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea. These conventions provide the statutory basis for incorporating sea territorial waters beyond three nautical miles and designating Exclusive Economic Zones for specific nations. As such, obtaining jurisdiction over sea territorial waters was the responsibility of the federal government of Malaysia, which acted as the deemed signatory. The research will employ content analysis of relevant secondary sources, as well as selected historical and legal documents. By doing so, it hopes to bring clarity to the legal complexities in the historical context surrounding Sarawak's claim. The ultimate goal is to redefine the current dimension of the issue and seek an amicable solution to address the jurisdictional matter.

Keywords: Sarawak's claim, state jurisdiction, state autonomy, oil and gas, continental shelf

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1. Introduction

One of the issues which is currently subject to contention in Malaysian politics is the claim by the Government of Sarawak on state jurisdiction over oil and gas on the continental shelf based on its legality in historical context. The legal premise in Sarawak's claim is purportedly based on pre-Malaysia status quo of state territory

derived from the Alteration of Boundaries of 1954 that proclaimed the extension of the borders of the state to include the area of the continental shelf adjacent to the state's coast to safeguard the state's rights to all the natural resources, with exclusive reference to oil and natural gas in the designated areas. Accordingly, it is claimed that the territory of Sarawak which includes the continental shelf adjacent to the state's coast had been established before Sarawak joined to form the Federation of Malaysia in 1963.

However, from the context of legal history, this claim could be subject to dispute since the incorporation of the territorial sea into nations had not been finalized and was still in a formative process under international laws of the sea. This means that the source of legitimacy for territorial sea of nations is derived from international laws ratified under the United Nations. Consequently, the territory of a nation which included territorial sea defined as continental shelf is subject to international law on the matter rather than the internal law per se. Moreover, in this respect, the legality of this 1954 law can be questioned since it does not correspond to the 1958 Geneva Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea. These two conventions provide the statutory basis that stipulated the incorporation of sea territorial waters beyond three nautical miles and designated Exclusive Economic Zones of a particular nation. Hence, in order to obtain jurisdiction over the sea territorial waters, it was the Federal government of Malaysia that was the deemed signatory.

Thus, this paper will present a brief re-evaluation on the claim by the Government of Sarawak on state jurisdiction over oil and gas on the continental shelf based on its legality in historical context. This research will be based on content analysis on relevant historical and legal documents. It is hoped that this research outcome will provide clarity to understand the legal complexity in historical context surrounding Sarawak's claim in order to redefine the current dimension and to seek an amicable solution to the issue.

2. Literature Reviews on the Issue

The issue of jurisdiction over oil and gas on the continental shelf has not been comprehensively discussed even though it is a topic that can profoundly affect many. In fact, until this present day, there are very limited existing writings on the legal and constitutional aspects on whether the jurisdiction should fall under the federal government or the state government. It can be identified that the views presented in those writings tend to be in favour of the federal government of possessing jurisdiction over the continental shelf

and its oil and gas resources based on the promulgation of Petroleum Development Act (PDA) of 1974 (Fong 2008; Sukumaran Vanugopal 2013).

The only existing writing to oppose the above view can be found in Zainnal Ajamain (2015) who has gained alacritous support from the Sabahan and Sarawakian activists and politicians. More importantly, his view had inspired the government of Sarawak to pursue this claim. His main idea is centred on the claim of the Bornean states' rights as enshrined in MA63. However, his view does not conform to the historical context on the matter, especially with reference to his interpretation on the legal terms and provisions in MA63. In addition, he fails to incorporate the Geneva Convention on the High Seas of 1958 and the United Nations Convention on the Law of the Sea of 1982 (UNCLOS 1982). These conventions specifically constitute the incorporation of the continental shelf into sovereign nations. Undoubtedly, these historical developments cannot be disregarded.

Meanwhile, it is noticeable that Sarawak's claim has been developed into polemics that reflect the political tensions between the federal government and the state. It is suggested by Harding (2017) that this political tension is to be resolved through the process of devolution of powers to the state. Even though it appears that such a step could provide an amicable solution, his discussion does not include Sarawak's claim that could be regarded as the manifestation of the increase in demands for state autonomy that could lead to redesignation of territorial governance in a federal system. However, this view is to propose a new deal through political expediency rather than a view based on the existing legal fact on the matter.

Moreover, this issue had been widely disseminated in newspapers and the media, such as *The Star*, *Borneo Post*, *Dayak Daily*, *Free Malaysia Today* and *Malaysia Kini*. The highlight in the mainstream newspapers, notably *The Star*, focuses on real political demands channelled through legislative procedures by the State Assembly of Sarawak. In 2017, it was reported that the Sarawak Legislative Assembly had unanimously approved a resolution giving the mandate to the state government to form a high-level special taskforce for the negotiation with the federal government in order to resolve outstanding issues on Sarawak's rights under the Malaysia Agreement 1963, with particular reference to oil mining rights and territorial waters (*The Star Online*, 10 Nov 2017). Furthermore, the State Assembly has given the mandate to the state government to take all necessary measures to ensure the complete implementation of the Inter-Governmental Committee's (IGC) recommendations to protect Sarawak's special interests (*The Star Online*: 11 Nov 2017). The political oppositions in the state also support Sarawak's claim that the constitutionality of the PDA 1974 and the Territorial Sea Act 2012, neither of which were consented to by Sarawak in the manner provided

for under Article 2 (b) of the Federal Constitution is questionable, as any law passed by the Parliament purporting to alter the boundaries of Sarawak without the consent of the Sarawak Legislature is clearly unconstitutional and therefore null and void (Dayak Daily: 20 Nov. 2017).

Thus, it was reported that on the 13th of April 2018, the Government of Sarawak had sent an official letter to Petronas notifying that from July 1, the state government would regulate the downstream and upstream O&G industry in accordance with the state laws. It further stated that the state government had issued a notice that they would not allow Petronas to disrespect and disregard Sarawak's rights to regulate the upstream activities under the state laws, such as the Oil Mining Ordinance and the Land Code (*The Star Online*: 11 Jun 2018). It was then reported on the 4th of June 2018 that Petronas filed an application before the Federal Court seeking for a declaration on the Petroleum Development Act (FDA) 1974 being the law applicable for the petroleum industry in Malaysia. The oil and gas company in a statement sought to clarify that under the law, it is the exclusive owner of the petroleum resources and the regulator for the upstream industry throughout Malaysia, including in Sarawak. The matter was confirmed by the Sarawak Attorney General's Chambers who admitted receiving a notice from the Registrar of the Federal Court that the state government was a party to the petition filed by Petronas (*Malaysia Kini*: 4 Jun 2018; *Borneo Post*: 18 Jun 2018).

Accordingly, it was reported on the 22nd of June 2018, the Federal Court dismissed the Petroliam Nasional Bhd's (Petronas) application for leave to commence proceedings against the Sarawak state government. After hearing arguments from both parties, Chief Judge of the High Court of Malaya Tan Sri Wira Ahmad Maarop said he was satisfied that the Sarawak legal counsel team has proven their case and awarded RM50,000 cost to the Sarawak state government (*Borneo Post Online*: 22 Jun 2018). Accordingly, it was reported that the Sarawak state assembly passed the Oil Mining (Amendment) Bill 2018 on the 10th of July 2018. With the amendment, the state would be able to strengthen the regulatory control over the exploration of petroleum and mining activities in the state (*Free Malaysia Today*, 18 Jul. 2018).

This is followed by the measure taken by Sarawak to impose an additional 5% tax on all petroleum products in the state starting January 2019. The matter was conveyed through the notices of assessment dated Aug 28, 2019, Oct 7, 2019, and Nov 13, 2019 of the Comptroller of the Sales and Services Tax (SST) to pay RM1.3 billion in SST. In response, Petronas filed a judicial review application against the State Comptroller challenging the state's right to impose the sales tax on its petroleum-related products. Since Petronas did not pay the tax, Sarawak filed a RM1.3 billion civil suit against the

national oil firm. However, the Kuching High Court decision on the 13th of March 2020 dismissed PETRONAS judicial review application to challenge the sales tax imposed by Sarawak. Judge Azahahari Kamal Ramli in his written order said the state government has the right under the law, particularly the State Sales Tax Ordinance, to impose such tax and that Petronas has no merit in its application for declaratory relief. The court then awarded the cost of RM50,000 to the state government. He further clarified that upon considering the submission (of the state) he found the power of the state to make law for imposing of sales tax derives from Article 95B(3) (of the Federal Constitution). This article [95B(3)] was added to the Federal Constitution upon the recommendation of the Inter-Governmental Committee (IGC) prior to the formation of Malaysia that: '...each Borneo State shall have the power to impose sales tax that any discriminatory rates would not be imposed on goods of the same type but of different origin.' He also said Article 95B(3) was added by Act 26 / 1963 (or the Malaysia Agreement 1963) to take effect from Sept 16 1963 and since then the Legislature of Sabah and Sarawak may make laws for the imposing of sales tax (*Borneo Post Online*: 13 March, 2020). Finally, on the 3rd of August 2020, both parties had reached an amicable solution when Petronas withdrew the appeal and Sarawak also withdrew its cross-appeal over the jurisdiction issue of the High Court (*The Edge Markets*: 3 Aug. 2020).

However, the above narration of the whole issue has not solved the dispute on the jurisdiction over continental shelf since it is limited to the issue of Sales and Service Tax imposed by Sarawak Government on PETRONAS. So far, the specific attention to continental shelf can be found in Mazlan Madon (2017). Although he actually focuses on a geographical aspect, he is also aware of the legality of the incorporation of the offshore sea territorial waters into Malaysia through the ratification and the signing of the UN Conventions.

In this respect, there are several writings that provide a general understanding on the issue. Historically, the sea territorial water of a state was only limited to three nautical miles from its coast. Only in the 1950s, was there a series of discussion in the United Nations to regulate sea territorial waters of the nations beyond 3 nautical miles from the coast. Eventually, the proclamation to recognise sea territorial waters of 3-12 nautical miles was sanctioned with the ratification of the 1958 Geneva Convention on the High Seas. This area is normally associated with the continental shelf. The historical development on the formative foundation for the incorporation of the continental shelf as sea territory of the nations in the 1950s can be found in Morris (1958); Freeman (1970); (Anderson, 2008; Khalilieh, 2019).

Furthermore, there was more development in the negotiation on the expansion of sea territorial waters in the 1970s. As a result of the negotiation process, the sea territorial waters were extended to include the area up to 200 nautical miles under the UNCLOS of 1982. Under this convention, the signatories among the coastal nations are granted to proclaim the areas as Exclusive Economic Zones and have the rights to explore and exploit the natural resources in the designated areas (Quince 2019). However, the more important reason for the incorporation of sea territorial waters into a nation is the transfer of responsibilities for security and pollution in the designated areas in the high seas to the signatories. Accordingly, those nations are required to promulgate their internal laws for the purpose of enforcing their fundamental responsibilities in relations to the aspects of security and pollutions in the designated sea territorial waters (Yang, 2006; Klein, 2011; Bing 2014). Thus, it is beyond any doubt that the incorporation of the continental shelf into the territories of a nation can only be achieved through the signing of these two international laws (Cook and Carleton, 2000; Suarez, 2008). In essence, the current status quo of the continental shelf is governed by UNCLOS 1982 (Tanaka, 2019; Vecchio, and Virzo, 2019).

2.1. The Contestation over Sarawak's Claim

The revelation of the above writings signifies that Sarawak's claim on its jurisdiction over oil and gas on the continental shelf is one of the major issues in Malaysian contemporary politics. Likewise, it is also applicable to the case of Sabah. The fundamental conception in this claim is that its legitimacy is derived from historical legacy rather than new deal in contemporary perspective per se. Accordingly, this issue is to be investigated from a legal history context that encompasses all matters pertaining to law and constitution in the historical perspective (White 2013; Baker 2019).

After examining all those writings, it is found that the signatories of these conventions are required to promulgate their internal laws for the purpose of enforcing their fundamental responsibilities in relations to the aspects of security and pollutions in the designated sea territorial waters. This means that all federal parliamentary acts concerning the sea territorial waters must be promulgated in accordance with these two international laws. This refers to the promulgation of the Continental Shelf Act of 1966, which is derived from the signing of the Geneva Convention on the High Seas of 1958 and was signed by Malaya in 1960, and the Sea Territorial Act of 2012 when Malaysia signed UNCLOS 1982 in 1996. Accordingly, the promulgation of Petroleum Development Act of 1974 that gives the rights of the oil and gas located at the continental shelf to

PETRONAS under the federal jurisdiction is valid. Indeed, it is profoundly evident that the 1954 law had been superseded by the Geneva Convention on the High Seas of 1958.

However, Sarawak's claim had totally ignored this fundamental matter thus making this issue essentially subjected to the contestation of whether the continental shelf falls under the state or federal jurisdiction. This will determine whether the oil and gas in the area principally belong to the former or the latter. Sarawak's claim on the issue was based on the premise that the status quo of state boundary of Sarawak had been established before the day of the incorporation of Sarawak into the Federation of Malaysia in 1963.

In this respect, the Sarawak's claim states that the state's boundaries and its territorial integrity are protected by Articles 1(3) and 2(b) of the Federal Constitution. On this basis, the Government of Sarawak is consistent to argue that all federal laws pertaining to the continental shelf and petroleum located in the area should not be applied to Sarawak without consultation with the state government and without securing the consent of the state government under Article 2(b) of the Federal Constitution. It means that all federal laws promulgated after 1963 in relations to the offshore sea territorial waters and oil and gas resources in the continental shelf, such as the Continental Shelf Act of 1966, the Petroleum Mining Act of 1966, the Petroleum Development Act of 1974, and the Sea Territorial Act of 2012 are inapplicable to Sarawak, and considered null and void.

Ultimately, they claim that the laws promulgated before Malaysia, such as the Alteration of Boundaries of 1954 and Oil Mining Ordinance of 1958 still prevail and superior over those Parliamentary Acts. Furthermore, their claim appeared to be strengthened by the High Court's decision on 13th of March 2020 that favoured the Government of Sarawak over the issue of sales and service tax imposed on PETRONAS starting from 1st of January 2020 (*Borneo Post*, 22 Jun 2018). The ultimate goal of their claim is to acquire a larger proportion than five per cent of royalty derived from oil and gas revenues paid by PETRONAS to the state of Sarawak (*Borneo Post Online*: 13 March, 2020)

From a historical perspective, the legal aspect of sea territories is actually very complex since it was associated with the international rather than domestic laws. Before 1958, the status quo of sea territories as a part of the territories of the nations was still obscure since the matter was still subjected to the process of negotiations in the United Nations (UN). Historically, the sea territorial water of a state was only limited to three nautical miles from its coast (Anderson, 2008; Khalilieh, 2019). The incorporation of continental shelves to all nations began to be governed under the Geneva Convention

on the High Seas of 1958 that recognised the areas beyond three nautical miles up to twelve nautical miles from the coastal line as the sea territorial waters of the nations (Convention on the High Seas 1958). This sea territorial water border was later extended to another 200 nautical miles under the United Nations Convention on the Law of the Sea of 1982 (UNCLOS 1982) that gave jurisdiction to the nations to exercise the stipulated areas as their Exclusive Economic Zone. After signing these UN conventions, the jurisdiction of those nations on the designated sea territorial waters are recognised and they are able to exercise their rights to explore and exploit all the natural resources in the areas. More importantly, those nations are required to promulgate their internal laws for the purpose of enforcing their fundamental responsibilities in relations to the aspects of security and pollution in the designated sea territorial waters. (Quince, 2019; Braverman and Johnson, 2020).

Accordingly, it can be argued that the offshore sea territorial waters actually belong to the federal government rather than the state due to the fact that these two conventions can only be signed by a nation. It also implies that the jurisdiction over oil and gas on the continental shelf belongs to the federal government since sea territorial waters beyond three nautical miles can only be acquired by a nation. Under this circumstance, the federal government had entrusted the Petroleum Nasional (PETRONAS) the rights of exploring and exploiting oil and gas resources in the offshore sea territorial waters through the promulgation of Petroleum Development Act of 1974 which was preceded by the promulgation of Continental Shelf Act of 1966 and Petroleum Mining Act of 1966.

On one hand, the recent development in this issue seems to be in favour of Sarawak's claim as the Sales and Service Tax on oil and gas imposed by the government of Sarawak on PETRONAS is regarded as a victory for the former. Nevertheless, this victory does not mean that the jurisdiction on the continental shelf and its oil and gas resources belong to the state. This is because Sales and Service Tax is applied to the down-stream sector in oil and gas industries that is referred to the end product of petroleum, while the same tax is not applicable to the up-stream sector in reference to the exploitation of the crude mineral products in the continental shelf. It could be construed that the exploitation of crude oil and gas would have been more appropriately applied to Goods and Services Tax that had been abolished in 2018. However, further investigation is needed on the question whether this latest development recognises state jurisdiction over the continental shelf that is connected to the ownership of oil and gas resources in the area.

Based on the presentation in the Legislative Assembly of Sarawak (2017), the legal premise in Sarawak's claim on state jurisdiction over oil and gas on the continental shelf

is derived from the Alteration of Boundaries, Order in Council, 1954, that proclaimed the extension of the boundaries of the state to include the area of the continental shelf. This area refers to the seabed and subsoil that lie beneath the high seas contiguous to the sea territorial waters of the state. It further states that Britain determined the boundaries of Sarawak to safeguard the state's rights to all the natural resources, including oil and natural gas in the continental shelf. The same law was also proclaimed by the British Government for Sabah (formerly North Borneo) and Brunei in the same year.

2.2. Hypothesis

The Hypothesis of this research is based on the legal premise that argues that:

1. the establishment of the sea territorial waters beyond three nautical miles can only be acquired by a nation in accordance with the rules and procedures prescribed in the Geneva Convention on the High Seas of 1958 and the United Nations Convention on the Law of the Sea of 1982. A 'nation' here refers to the central government of unitary and federal states. In the case of the latter, the central government of a federal nation refers to the Federation of Malaysia.

1. the offshore sea territorial waters adjacent to Sarawak and Sabah coasts are under the jurisdiction of the federal government rather than the state.

1. oil and gas resources in the continental shelf should fall under the federal jurisdiction that empowers the federal government to exercise its rights over the matter.

1. the Alteration of Boundaries, Order in Council, 1954 is actually not applicable to define the state territory before the formation of Malaysia in 1963 because:

2. the map of North Borneo and Sarawak enclosed in the Cobbold Report of 1962 does not incorporate the continental shelf in the high seas into state territories as stipulated in the 1954 law.

3. the 1954 law did not conform to the fundamental principle of the international laws that prescribe the state/nation jurisdiction over the whole sea territorial waters since this law only covers the seabed and subsoil adjacent to their coasts, while the incorporation of sea territorial waters into a nation is to transfer the responsibilities for security and pollution in the designated areas in the high seas.

4. the 1954 law does not correspond with the Geneva Convention on the High Seas of 1958 and the current status quo of the continental shelf is governed by UNCLOS

1982. The contradictions of the 1954 law with these two UN conventions make these three laws not in *pari materia* and cannot be read together.

5. According to the Federal Constitution, Part IV, Chapter 1, Article 75, "If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void."

1. all federal laws in relations to legal and constitutional aspects in Sarawak's claim should be superior to state laws because:
2. all federal parliamentary acts are promulgated in accordance with the above UN conventions in reference to the promulgation of the Continental Shelf Act of 1966, which was derived from the signing of the Geneva Convention on the High Seas of 1958 and was signed by Malaya in 1960, and the Sea Territorial Act of 2012 when Malaysia signed UNCLOS 1982 in 1996.
3. the promulgation of Petroleum Development Act of 1974 that gives rights of the oil and gas located at the continental shelf to PETRONAS under the federal jurisdiction is valid.
4. the matter can only be questioned if it can be proven that jurisdiction over the continental shelf and natural resources in the areas fall under state list in the 9th schedule in the Federal Constitution.

2.3. Relevance to Government Policy

According to the Shared Prosperity Vision (SPV) 2030, Malaysia aims to be a nation that achieves sustainable growth along with fair and equitable distribution, across income groups, ethnicities, regions and supply chains. Furthermore, importance is emphasised on strengthening political stability, enhancing the nation's prosperity and ensuring that the *rakyat* are united whilst celebrating ethnic and cultural diversity as the foundation of the nation state.

Clearly, the existence of conflict is the very definition of political instability. The danger of political instability is the fact that it can be persistent and is the propensity of a collapse of a government. Therefore, with this in mind, this research is crucial in finding a solution to the contention in order to fulfil the national aspiration of consolidating political stability, fostering prosperity and preserving unity.

This research is relevant to preserving the current status quo of the Federal jurisdiction over sea territorial waters. This is connected to the rights of the federal government

to conduct the exploration and exploitation of natural resources, notably oil and gas in the area. These rights are manifested in the payment of royalty by PETRONAS to the Federal and Sarawak Governments of the amount of 5 percent each.

Nevertheless, the dispute between Sarawak and PETRONAS as a federal government link Company arises due to the demand from the state for an additional percentage of higher than 5% on the royalty and tax on the petroleum and gas products derived from the continental shelf adjacent to Sarawak's coast. This dispute was also exploited by the Sarawak Government to challenge the validity of the Federal laws or Parliamentary acts imposed on the jurisdiction over the continental shelf and its oil and gas resources. In this respect, the action taken by the Government of Sarawak to impose Sales and Service Tax on PETRONAS has its repercussion on the price of petroleum and gas end products. This is because this tax is imposed on the downstream sector in the industry, while in the case of Sarawak, it is imposed on crude oil and gas in the upstream sector. Instead, the tax imposed on the upstream sector is more appropriately derived from Goods and Services Tax, which had been abolished, rather than the Sales and Service Tax.

From the above, there are two main concerns regarding the National agenda, as specified in the Sustainable Development Growth (SDG), article 16.B - Promote and enforce non-discriminatory laws and policies for sustainable development and the SPV Strategic thrust 6, which is to reduce income disparity between regions. Hence, this research is crucial in order to find a solution to alleviate the problem for the sake of the nation as a whole.

In addition, it is hoped that by unfolding the legal and constitutional matters pertaining to this issue, it will pave the way to triangulate the best solutions for both state and federal governments.

2.4. Unfinished Business

In many respects, it can be identified that all legality utilized in Sarawak's claim on the state's jurisdiction over oil and gas on the continental shelf has been largely based on *pre-merdeka* law. However, this legal framework is difficult to be sustained since the Article 75 in the Federal Constitution clearly states that 'If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void.' This refers to all states laws which had been enacted before and after independence.

This legal basis is further strengthened by Article 160 (6) which states that 'The Attorney General shall, on the application of any party interested in any legal proceedings, other than proceedings between the Federation and a State, certify whether any right, liability or obligation is by virtue of this Article a right, liability or obligation of the Federation or of a State named in the certificate, and any such certificate shall for the purposes of those proceedings be final and binding on all courts, but shall not operate to prejudice the rights and obligations of the Federation and any State as between themselves.'

In fact, in the case of mining, including oil and gas, these resources fell under federal jurisdiction as stipulated in the 9^{th} Schedule in the Federal Constitution. Furthermore, on the jurisdiction over the continental shelf, the land specified in all historical documents and legal documents, notably federal and state constitutions, does not include off-shore territories. In the case of the Alteration of Boundaries of 1954, it does not correspond to the 1958 Geneva Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea. Accordingly, this law cannot be used to justify Sarawak's claim for state jurisdiction over the continental shelf. However, the matter can still be solved through political expediency in order to safeguard the cordial relations between the state and federal authorities. This means that any alteration that can benefit all parties could have been better conducted through the process of negotiations to establish a new deal.

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