THE LEGISLATIVE FRAMEWORK FOR THE DEVELOPMENT OF PETROLEUM IN MALAYSIA: AN OVERVIEW

Introduction

Broadly there are three categories of systems prevailing in various countries for the development of their hydrocarbons:

a) general legislation system;
b) ad hoc agreements; and
c) a hybrid system of general legislation and individually negotiated agreements.

The system presently in operation in Malaysia may be described as the hybrid system, whereby certain fundamental aspects are to be found in general legislation whilst certain other important aspects are left to be settled by negotiations. Malaysia in fact moved from the (b) position above to the (c) position only recently.

The importance of a balanced legal framework cannot be over emphasized if a developing country like Malaysia is to properly benefit from her natural resources. It is imperative, in order to achieve the maximum benefit, to improvise a legal infrastructure which sustains the delicate balance between fostering national goals and aspirations on the one hand and maintaining an investment climate in the country which is attractive enough to the multi-nationals, on the other. Needless to say, because of continued dependence on these multi-nationals for the development of hydrocarbons, a shift in the balance might be disastrous to a developing country like Malaysia.

Reasons For A New Legal Infrastructure: The Pre 1966 Position

Sarawak Shell Berhad which had been granted a prospecting licence ten years earlier had discovered oil in 1964, in the Baram field about 14 kilometers from the Sarawak coast. This was the time when oil was becoming 'big business' in Malaysia and more and more companies were coming into the oil scene with applications for licences both off the East Coast and West Coast of Peninsular Malaysia. And by the beginning of 1966 there were not less than ten companies tendering for licences in just one area — off Malacca.[1] In fact the Royal Dutch/Shell Group of Companies were said to be exerting more energy in oil search in the Malaysia/Brunei

[1] Rosemary Nuek, *Oil Industry*, New Sunday Times, April 1981 (Supplement).

area than anywhere else outside the United States.[2] Vis-a-vis this intense activity such provisions regarding oil as existed in the mining enactments of the West Malaysian States were certainly insufficient to cope with the new importance of oil: provisions as to oil were few and were of secondary importance and the emphasis was on the mining of other minerals and metals owing to the then insignificance of oil. However, as the possibility of oil becoming crucial to the economy loomed large the scant provisions of the mining enactments were not the proper means of regulating its control. As a matter of fact, so far as oil was concerned there was little in the enactments by way of overseeing its exploration, prospecting and production. The terms 'mineral oil' and 'oil shales' mentioned in the FMS enactment have not been defined anywhere in it. And of course, the term 'petroleum' not surprisingly, does not appear anywhere either. Similarly, the ownership of mineral oil or oil shales has not been made clear anywhere in the enactment though there is a general section[3] providing for the withholding of oil rights unless expressly granted. Though the provisions as to mining leases found in the enactment (sections 14 to 26 inclusive) are of general application (and therefore also applicable to oil mining leases) section 14(i) seems to except mineral oil. Section 14(i) is as follows:

> '14. Every mining lease shall vest in the lessee thereof in the absence of any express condition to the contrary the following rights and such other rights, if any, as may be expressly set forth therein:
>
> (i) the right to win and get all metals and minerals OTHER THAN MINERAL OIL AND OIL SHALES found upon or beneath the land and, subject to provisions of subsection (iv), to remove, dispose of, and dress the same during such term as may be mentioned in the mining lease.'
>
> (emphasis added).

And subsection (v) of section 14 states that should mineral oil or oil shales be found by the lessee the land shall be surrendered to the Ruler in return for compensation but so that such compensation shall not include any sum on account of the value of the oil which the land may contain. 'Land' here means land comprised in a mining lease or a mining certificate[4] and a 'mining lease' is defined in the same place as a 'lease of state land'. However, the position is far from clear in the case of land alienated otherwise than for mining. Moreover, other than the provision regarding the surrender of oil-bearing land there is nothing in the enactment to deal with oil mining as such. As a matter of fact on reading the rather scant provisions as to mineral oil in the enactment one cannot help coming to the conclusion that the entire situation is far from satisfactory. Then there are

[2]Oil and Gas Journal, November 16, 1970, page 104.

[3]Section 7, FMS Enactment, Cap. 147.

[4]Section 3 FMS Enactment, Cap. 147.

some very basic forms at the end of the enactment. These are in the form of 'schedules' from schedule II[5] to schedule XX. They covered a variety of matters, from an application for mining land to a water licence. Of all the schedules only one mentions the words "oil shales or mineral oil' and this too is a negative reference in order to except them from the 'Individual Mining Licence' under section 45 as follows:

> 'This licence authorises. . .of. . .personally and not otherwise, to mine any mineral deposits OTHER than oil shales or mineral oil. . .' (emphasis added)

Apart from this reference there is nothing at all in the forms regarding oil. The prospecting licence (schedule XIII) is general in form, referring only to 'the following metal or mineral - namely. . .'. The Mining Certificate[6] (schedule III) and the Mining Lease (schedule VIII) are also of general application only. This situation is probably not surprising considering that even in the case of metals and minerals other than oil the role of the State was merely as collectors of annual rents and royalties; and there being no prospect of any oil at the time there was no attempt made to improve the position as the situation did not warrant any elaborate regulations regarding oil.

Even the mining rules[7] made pursuant to the enactment were only of general application and there is no special mention of oil. An examination of these rules immediately reveals that these are preoccupied with matters which have little bearing on the control of oil production. The rules have detailed schedules of premia, rents and fees for a variety of purposes, including items exempted from these. Part II deals with certain general provisions such as penalties for offences against the rules, appeals to the Chief Inspector of Mines, mining managers, keeping of certain books, dumping, furnishing samples, accounts and such matters. Part III deals with 'Rules Referring to Open Mines' whilst Part IV concerns 'Rules Common to Open Mines and Underground Mines'. Part V contains 'Rules Referring to Underground Workings' and has detailed rules regulating the actual working in the Underground such as the various signals the workers are to be acquainted with, mechanical haulage system and the like. Part VI contains detailed rules regarding Dredging. Then Part VII has rules covering the use and abuse of explosives whilst the final part, Part VIII deals categorically with rules referring to coal mining.

Thus, it is apparent that these rules have little, if anything, to do with the mining of oil as such. As intimated above, extensive rules regarding the mining of oil were presumably unnecessary at that point in time for the obvious reason that oil was not in the picture at all and it appears that

[5]There is no schedule 1.

[6]This is a certificate granting permission to mine pending the issue of the actual lease itself; it is issued under section 11(i).

[7]The Mining Rules 1934, made under section 130, FMS Enactment.

such scant provisions regarding oil were just 'left' in the enactment, just in case.

It would have been highly imprudent for the government to sit idly by and be content with the old laws and rules about this new commodity, oil, particularly when it was gaining momentum in the sixties, not only in and around Malaysia but also worldwide. It could be fairly said that it was at this time that there was a general awakening in the developing countries regarding the potential of oil and the stranglehold of the oil industry by the Majors. It was also at this time that some of the exporting countries in the Third World thought it imperative to act in unison and founded OPEC. Thus, the sixties was an imortant if not crucial period in the development of the international oil industry[8] and Malaysia was not to be left behind.

Thus, what was in fact lacking was a more comprehensive legislative infrastructure encompassing the numerous facets of an up and coming modern oil industry. It will be recalled that in the case of the East Malaysian State of Sarawak (where oil figured more prominently almost a century prior to 1966) there were already more specific provisions dealing with oil.[9]

The Post 1966 Position

The present system was not achieved overnight. The other State Governments took no individual action. It was left to the Federal government to take action and this came only in 1966, in the form of the Petroleum Mining Act of that year; the initial reluctance is probably understandable in view of the constitutional problems attendant upon federal action. After claiming jurisdiction over the Continental Shelf via the Continental Shelf Act 1966 there was a need to have a regulatory system for mineral deposits therein. Hence the Petroleum Mining Act; but the Federal Government seized the opportunity and conveniently extended it to cover onshore deposits as well, displacing the outdated oil mining provisions. Before discussing the system introduced by the 1966 Act it will be helpful to state some of the salient features of the Act:

(1) This Act has the only reference which categorically prohibits the exploration, prospecting and mining of petroleum 'upon any land except by virtue of an exploration licence or a petroleum agreement' issued or entered into under the Act.[10]
(2) Subsection (2) of section 3 makes it an offence to contravene the prohibition in subsection (1) or any of the conditions of an exploration Licence and punishable by a fine not exceeding twenty thousand dollars or to imprisonment for a term not exceeding two years

[8]See generally, Peter Odell, *Oil and World Power*, 6th ed. (1981).

[9]The Oil Mining Ordinance of 1958.

[10]Section 3(1).

or both. In addition, plant and other property are liable to confiscation.

(3) (a) All provisions and references to oil prospecting licences and oil mining leases in the Mining Enactments of the States of West Malaysia were to be 'deemed to be repealed' with a saving clause for licences or leases issued prior to the Act;
(b) As for East Malaysian States there is a similar provision but only to repeal provisions of any law so far as they relate to the exploration, prospecting or mining for petroleum in 'offshore land', defined as the Continental Shelf. As to licences, leases or agreements already in existence, the rights and liabilities were to accrue and be due to and imposed on and borne by the federal government.

(4) The Act introduced two forms of rights: the exploration licence[11] and the Petroleum Agreement[12] with an elaborate licence form attached by way of a schedule while the Petroleum Agreement was left to be devised under section 12(i) (under the rule-making power): in fact two such model Agreements were drawn up: one for onshore land and the other for offshore.

(5) The Act also established two 'Petroleum Authorities': the Ruler or Governor in respect of Onshore Land and the Yang DiPertuan Agong[13] for Offshore Land;[14] applications were to be made to the Menteri Besar[15] or Chief Minister or the minister in the case of offshore land.

(6) Provision (Section 14) is also made for a licensee or a party to a petroleum agreement who has been refused entry upon any alienated land to make application to the State Authority to enter such land; and the State Authority may grant the application subject to payment of compensation: initially the whole of this Act was inapplicable to Petronas; by later amendment[16] only section 14 was made to apply to it.

Thus, under the regime introduced by the Petroleum Mining Act in 1966 exploration and development of petroleum could only be carried out if a person held an exploration licence or a petroleum agreement. It should be noted that even under this Act the concession system was not got rid of. This Act merely took the regulation of oil and matters relating thereto out of the old mining enactments and put them under a separate Act. The petroleum agreements under this Act were in essence still the old conces-

[11] Section 7.

[12] Section 8.

[13] The King.

[14] Section 4.

[15] The equivalent of Chief Minister in States having a Ruler.

[16] Petroleum Development (Amendment) Act 1975.

sion whereby the concessionaire was given exclusive rights to search for and develop any petroleum found within the concession area. The concessionaire also got title to the oil on discovery and was free to export as it thought fit subject to local requirements. The concessionaire, usually a company, retained its title to all assets it brought into the country or acquired thereafter. It also was responsible for the management and conduct of all operations in the concession area. Concession periods were also long, about 40 years or so with provision for extension. On the company's part it was expected to spend a certain minimum amount on exploration, surrender parts of the exploration area in accordance with a timetable and carry out operations in a workmanlike manner. It was also required to maintain full and accurate records, keep the government fully informed on all matters pertaining to the agreement and also make provisions to train Malaysians and give employment to them where appropriate. In these circumstances the company was obliged to pay the government the following:

a) Royalty of 12½% of the posted price of the petroleum recovered;
b) Tax under the Petroleum (Income Tax) Act at the then prevailing rate of 50% of net profit;
c) Fixed annual surface rentals; and
d) A signature bonus (nominal).

Despite some clauses which appeared to give the government a stronger position (such as for instance the requirements to keep the government fully informed and to train and employ Malaysians) the government and the people were no better off. The oil companies were behaving as though they were independent owners of the oil. The government was not given any information as to what was going on in the petroleum industry. Hence the lament of the then Minister of Primary Industries[17] that under the concession system 'all we get is a check' and that neither he nor the government was kept informed on operations. He said he favoured a more open dealing with the companies and that was not happening under the concession system. In fact he emphasised the point by admitting his ignorance on several points about the operations of Shell and Esso in Malaysia raised by the reporters of a well-known journal in 1973[18] and ended up saying, 'this is what I mean, Members of Parliament ask me about these things and what am I to tell them?' Thus, it is quite plain that as late as 1973 the companies were still having a field day and the fact that there was a 1966 law was of little consequence from the point of view of the companies. The problem was the law had changed but not the system under the law. The government was still playing the traditional role of tax collector and this state of affairs was most unsatisfactory. The situation was in fact

[17]Taib Mahmud.

[18]Oil and Gas Journal.

precipitated by the government following the opinion of Walter J. Levy,[19] a well-known oil consultant who was earlier engaged by the government to advise on the best method of exploiting Malaysia's hydrocarbon resources.

Reasons For A Modern Legal Infrastructure And The Formation Of A National Oil Company: The Transformation

Though it may be fairly said that there was a 'general awakening' in the developing countries in the early sixties it was in the latter part of the sixties and early seventies that matters came to a head. The oil producing countries the world over were taking positive action in their oil affairs which were hitherto dominated by the Majors. The governments concerned were taking action varying from a full scale nationalisation to acquiring substantial interests in the oil ocmpanies operating within their borders. Quite a number were already having production sharing contracts. Added to this was the supply interruptions of 1973-74[20] which made governments the world over painfully aware of the consequences of the scarcity or non-availability of oil. Prices soared to an all-time high and everyone had to get used to the idea that the era of cheap and readily available oil was over. The situation was particularly serious for oil importing developing countries as great demands were made on their foreign exchange levels. At the same time owing to various programmes of economic development and industrialisation in these countries there was no question of cutting down on oil imports. The governments of these countries did not have any real knowledge of the actual import terms nor the practices of supplying countries' governments. They had suspected that the multinational oil companies were 'placing more than a reasonable burden on them in terms of the cost of oil itself and the logistics of supply.'[21]

In the case of Malaysia the existing position at this time could be described as a 'simple economic model' which leaves the "exploitation of economic wealth to private entrepreneurs and capital while the State attends to other functions, such as levying taxes, royalties and other imposts from these economic activities."[22] And if the nineteen sixties saw intensive search for oil in and around Malaysia the seventies saw a marked acceleration of it and more discoveries were made and more fields came onstream. There was a phenomenal increase in the importance of petroleum in the economy. The place of petroleum in the overall economic development of the country was becoming clearer: whereas the revenue collected from petroleum

[19] Walter J. Levy, *"A Review of the Petroleum Industry in Malaysia"*, Zug, Switzerland, 1965.

[20] Malaysia was a 'favoured nation' in the oil embargo and was not affected.

[21] Joel Bell, *The Need for National Oil Companies and Their Relationship to Government and Industry, page 37, Energy Law 1981 Proceedings Vol. I.*

[22] Abdul Hady Hassan Taher, *The Future Role of the National Oil Companies in the World Petroleum Industry*, Proceedings of OPEC Seminar 1977 (Vienna), page 187.

operations was an insignificant four million dollars in 1971 the amount had shot up to $27 million in 1973 and to a record of $144 million in 1974. Of course, even in these circumstances it would have been possible for the government to stand by the sidelines and still take a bigger slice of the oil earnings of the multinationals by imposing an appropriate fiscal regime. Perhaps this would have been a less expensive means of reaping the benefits brought by the new-found commodity instead of establishing a whole corporation to deal with it. But there were other reasons for the formation of a national oil company. In common with most of the newly independent countries in the process of developing, Malaysia realised that mere financial profits, though important, cannot be the ultimate goal in respect of a commodity which had become so vital the world over and becoming crucial in the local economy. At a time when the oil potential was not clear (the sixties) the concession system had its value. The same could not be said in the seventies. Though by world standards the presently known oil deposits in Malaysia are by no means great, it was an entirely new commodity in the local economy. And Malaysia was not content in leaving the entire control of this vital asset in the hands of foreign-based oil companies. The 1973 oil crisis had made it clear that availability of oil, especially in times of international shortage, was a very crucial factor, particularly for a developing country like Malaysia which has committed itself to industrialisation. It is common place that multinationals make and review their decisions and priorities on a global basis and hence it would be too much to expect of them to have any appreciable concern for local needs. Thus, national interests of Malaysia might well be sacrificed for the international objectives of the multinationals. Hence, "controlling one's own resources" became very important as put by the first Chairman and Chief Executive[23] of Malaysia's National Oil Company (PETRONAS) ". . .from now on, we will no longer be simply tax collectors, but will actively participate in and control petroleum and related industries in the country."[24] Thus, political independence could never be complete without economic control.

Moreover, being a developing country there was not a large enough private sector capable of handling a concern the size of a modern full fledged industry. The only alternative was to create a government entity. The existing government departments and civil service were thought to be thoroughly inapt for handling sophisticated dealings in the oil industry and the multinational oil companies. Oil was to be a specialised field and though the National Oil Company was not geared immediately to displacing the multinational oil companies (as it totally lacked any technical know-how and markets) it set the stage for a growing role and possibly eventual takeover of the petroleum operations. As more and more oil was being

[23]Tengku Razaleigh Hamzah.

[24]Tengku Razaleigh Hamzah, *'Towards a National Oil Policy'* 2nd Malaysian Economic Convention, 1975.

available to the government it needed a specialised organisation - a business arm - to handle it.

Thus, the concession-type arrangement had outlived its use. Even well before the creation of PETRONAS in 1974 some of the States in Malaysia had converted their arrangements with the multinational oil companies to production sharing. The terms were not consistent: they varied from State to State and sometimes variations were to be found in the same State in contracts with different oil companies. What was needed was some central control and administration; the individual States also lacked the bargaining strength vis-a-vis the international oil companies; it was felt that a national oil company with the full backing of the federal government will be ideal as it would then have sufficient standing. It would also be more convenient for the oil companies to deal with a single government agent instead of going through a host of State government departments possibly encountering differing rules and procedure.

The government also realized that greater involvement directly in the oil industry was the best way to keep within Malaysia the overall benefits: control will give the government the opportunity to create employment in the various sections of the industry. True, the oil industry is basically capital intensive and not labour intensive: of the latter at least, Malaysia had an abundance, and outlets could be found in the downstream activities, transport and oil stations. In short, though the upstream activities may still have to be in the hands of foreign oil companies there was a great deal to be gained by way of ancillary industries which must, of necessity, crop up as the industry flourishes.

It is important, at this juncture, to note that great demands were being made of the government in the field of economic development. Malaysia had started a series of five-year plans paving the road to industrialisation. To make matters more pressing, as an aftermath of the 1969 racial riots the government had declared what it called the New Economic Policy.[25] This was certainly an important factor for consideration in setting up a National Oil Company. Basically the new policy was a two-pronged effort to eradicate proverty and to redistribute the wealth in the country in order to give Bumiputras (the Malays and indigenous races) a share of 30% in all spheres of commerce and industry. ". . .the government has embarked upon an ambitious programme to eradicate poverty. Funds will be needed for this purpose and it is only fair that the petroleum sector should be called upon to make some immediate contributions. . .".[26] This share target is to be reached by the year 1990. A further requirement was that employment in all sectors should reflect the racial composition and foreign and local businesses alike had to employ a certain specified percentage of Bumiputras. Hence, the prospects of the spawning off a whole host of subsidiary industries around the oil industry were very important to the govern-

[25] See the Second Malaysia Plan, 1970-75.

[26] Tan Sri Abdul Kadir bin Shamsuddin, in a speech on the National Oil Policy, 20th January, 1977.

ment to assist its new policies. This could only be achieved if the government had full control of all aspects of the oil industry, from exploration to marketing and distribution. Consequently, the best way to accomplish its policies was to have its own instrumentality which will have the national interests as a top priority. The previous situation where the government could neither control the prices nor the production levels of a depletable resource nor have any say as to whom to sell the oil to was clearly untenable any longer.

Another reason for full control via a national oil company was the goverment's desire to be self-sufficient in a whole host of petroleum products such as plastics and fertilizers for which there was a great local market. The Yang di Pertuan Agong's speech[27] in parliament made clear the government's policy behind the setting up of PETRONAS:

> 'My government has established the Perbadanan Petroliam National, i.e. Petronas, which has been given ownership and control of all matters relating to oil and which will take an active part at all levels of the industry from production to marketing. In this way my government will be able to ensure that the people will get the fullest benefit from our rich natural resources. This is in line with our objective to be self-reliant in fields such as fertilizers, raw materials for plastics and other commodities relating to the petroleum industry. Many of our people will have the opportunity to get employment and to acquire new skills.'

The then Primary Industries Minister[28] said that the setting up of Petronas[29] was an 'inevitable extension' of the production sharing contracts entered into with the oil companies and followed international developments in the industry. 'An orderly development of the industry is necessary and since we are just beginning, we could take steps to plan it along the lines that would be most beneficial to the country'.[30]

The intention was to create a national oil company which will finally be fully integrated. To effect the conversion from concession to production sharing contracts or rather to complete the conversion and set it in a legal context the government had to enact new laws. Hence the Petroleum Development Act of 1974. In introducing[31] the bill in parliament the then Minister of Primary Industries stated:

[27] 5th November 1974.

[28] Dato Taib Mahmud.

[29] Originally the National Oil Company was to be named Hidrokarbon Malaysia (HIKMA) but it was dropped after objections from Sarawak over certain aspects of the body. There was also a feeling within government circles that setting up a company along the lines of Pertamina was a dangerous precedent; and it was to avoid Petronas operating as a 'State within a State' that it was decided to bring Petronas directly under the Prime Minister's wing. (Far Eastern Economic Review, *'Razak Taps The Pipeline'*, August 30, 1974, page 15).

[30] *Ibid.*, p. 14-15.

[31] July 1974.

> 'The purpose of the Bill is to provide a legislative framework for the exploration and exploitation of petroleum by a corporation - in which will be vested the entire ownership in petroleum whether lying onshore or offshore of Malaysia'.

The Bill was referred to as 'a historic piece of legislation ever to come before this House',[32] and the Minister explained the government policy behind the legislation as follows:

> 'The strategy is to increase the value of our oil industry and our effort would be based on an integrated approach so that all aspects of the oil industry would be developed complementarily with each other'.[33]

The same Minister also said,

> 'To facilitate the implementation of production sharing contracts my Ministry took the initiative to enter into a series of negotiations with the oil companies to seek their agreement to convert into production sharing contracts, to be implemented when the law establishing a national oil corporation and providing for the conversion to production sharing is passed by this House. . .'.[34]

Strangely, as it transpired, the Act neither ESTABLISHED a national oil corporation nor provided for the conversion: the corporation was in fact created under the provisions of the Companies Act 1965 whilst the 'conversion' was the subject of behind-the-scenes negotiations which were finally concluded only some two years after the passage of the Act.

The Post 1974 Petroleum Regime

As already stated, Petronas was not created by the Petroleum Development Act: it was simultaneously created under companies legislation so as to give effect to the provisions of the Act. However, this Act, brief as it is, had a far-reaching effect on the petroleum industry and acted as a catalyst to speed up the conclusion of the production sharing contracts with the oil companies by forcing the hand of some of the recalcitrant ones. The attitude of the government even prior to the Act itself is clear as to this: asked whether Esso and/or Shell (the two major oil companies in Malaysia) will be required to accept production sharing contracts the then Minister of Primary Industries 'hinted that they will, eventually - either through negotiations or by law';[35] 'It is a question of timing - once the law is passed all will be covered'.[36] Indeed it was and they were. After the

[32] *Ibid.*

[33] *Ibid.*

[34] *Ibid.*

[35] *Malaysia Drives for Production Sharing Pacts'*, The Oil and Gas Journal, June 11 1973, page 62.

[36] *Ibid.*

Act came into force it was really quite immaterial whether all the companies had by then switched to production sharing contracts. The question became academic: by section 9 of the Act all licences and leases under any previous written law and all exploration licences and petroleum agreements issued or made under the Petroleum Mining Act 1966 were to ". . .continue to be in force for a period of six months from the date of the coming into force of this Act or for such extended period as the Prime Minister may allow'. Needless to say, none was in fact allowed to go on after the six-month period. Section 9 had effectively put an end to the old concession-type regime and introduced a new era in the petroleum history of Malaysia. It is remarkable however, that though the Act forms the legal framework for the industry, and much was said about production sharing contracts prior to the passage of the Act, the actual words 'production sharing contracts' do not appear anywhere in it. Neither do they appear anywhere in the regulations made thereunder. On the other hand, the Act has been referred to in subsequent production sharing contracts entered into between PETRONAS and the oil companies: the recitals[37] refer to section 2 (vesting of petroleum and exclusive rights in PETRONAS) and section 9 (termination of earlier leases by 1st April 1975) and go on to state that PETRONAS, ". . . is now desirous of carrying out exploration for exploitation, winning and obtaining of petroleum resources in the area comprising. . ."[38] and that '. . . the parties are desirous of entering into a contract in respect of the exploration. . .".[39] It is obvious that the aforesaid recitals have been included to show the basis upon which PETRONAS has the right and capacity to enter into the contract: apart from this it appears that the only way the Act and the Regulations thereunder control the relationship between the parties or have any direct bearing on the performance of the contract, is the imposition of the conditions and the provision of penalty for breach of such conditions, that is, otherwise from the time of execution of the contract the parties would seem to be governed more by the general law of contract rather than the Act or the regulations thereunder. Instead of directly referring to production sharing contracts both the Act and the Regulations speak of 'applications for licences'.

Before proceeding further, perhaps some of the other salient features of the Act should be noted. These could be summarised as follows:

a) provided for "the entire ownership in, and exclusive rights, powers, liberties and privileges of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia" to be vested in PETRONAS:[40]

[37] A typical production sharing contract.

[38] *Ibid.*

[39] *Ibid.*

[40] Section 2.

b) PETRONAS to make 'cash payments' to the federal and State governments as 'may be agreed';[41]
c) PETRONAS to be under the Prime Minister's control and direction;[42]
d) National Petroleum Advisory Council to be established to advise the Prime Minister on "national policy, interests and matters pertaining to petroleum, petroleum industries, energy resources and their utilization";[43]
e) Prime Minister's permission required by all persons other than Petronas for carrying on of downstream operations;[44]
f) Prime Minister empowered to make regulations for the purpose of carrying into effect the provisions of the Act;[45]
g) the Petroleum Mining Act (save section 14 thereof) not to apply to Petronas;[46]
h) 'petroleum' for the purposes of the Act was widely defined as 'including bituminous shales and other stratified deposits from which oil can be extracted'.[47]

The Act then concludes with a Schedule for the 'Grant of Rights, Powers, Liberties and Privileges in Respect of Petroleum', the 'instrument' of transfer of oil rights from the Federal government and State Governments to PETRONAS referred to in Section 2 of the Act.

Even prior to the passage of the Act the Federal Government had negotiated with the states to transfer the petroleum licences and agreements then subsisting between them and the oil companies — despite the legal position in view of constitutional provisions; and though they did not accede to this all at once, they did so in stages after agreements in respect of shares in the profits from oil were satisfactory to them — and apparently the State then with the most oil, Sarawak, was not easily persuaded, though it too finally succumbed.

With the execution of the instrument[48] of transfer as per the Schedule to the Act the transformation from the concession system to the production sharing system may be said to be complete. The federal government now has complete and central control via its instrumentality, PETRONAS. For the first time then, the Malaysian Government had control of its own

[41] Section 4.

[42] Section 3.

[43] Section 5(2).

[44] Section 6.

[45] Section 7.

[46] Section 8.

[47] Section 10.

[48] The actual terms of the agreements between Petronas and the States are not available as they have refused to divulge them.

vital oil resources and when the terms of the production sharing contracts are considered it will be clear that the control is complete, if not in immediate practice, in theory at least. In view of the vesting of the entire petroleum resources in PETRONAS the position of PETRONAS is quite unlike, say for instance, British National Oil Corporation (BNOC). While the latter is a licensee like any other petroleum company vying for licences in the North Sea, PETRONAS as owner of the resource, is in fact in the position of licensor. PETRONAS has the dual role of participation in and regulation of the petroleum industry at the same time. Though the Act (in terms) really envisages the role of PETRONAS as the sole company to be undertaking exploration and exploitation of petroleum in Malaysia this is perhaps only feasible in the long run. As an immediate change from the old system PETRONAS has gone in for joint ventures with majority equity participation. And by the terms of the production sharing contracts PETRONAS is to share the profit oil with the multinational oil company on whose technical know-how and financial resources PETRONAS still has to rely.

Another important aspect of the Act is the control to be exercised by the government in the field of downstream activities. Section 6(1) is as follows:

> "6(1) Notwitstanding the provisions of any other written law, no business of processing or refining of petroleum or manufacturing of petrochemical products from petroleum may be carried out by any person other than PETRONAS unless there is in respect of any such business a permission given by the Prime Minister."

All existing businesses coming within the purview of the above section had to apply for permission from the Prime Minister within six months of the coming into force of the Act. In other words unless the application for permission was actually rejected the business could be legally carried on. Section 6 is in line with the intention of the government to make PETRONAS an 'integrated oil company'. This is reflected in the National Oil Policy - '. . . the first ingredient of our National Oil Policy is to ensure that the control and management of all oil AND RELATED OPERATIONS within the country are in the hands of the nation, represented by PETRONAS'.[49] (emphasis added). However, it will be noticed that section 6 as it stood in the Petroleum Development Act only covered the businesses of processing refining and manufacturing of petrochemical products. The vital aspects of marketing and distribution of petroleum and petrochemical products were omitted. The situation had to be remedied and this was done by an amendment[50] to the Act in the very next year, 1975. From then on the entire downstream operations sector came within

[49]Tan Sri Abdul Kadir bin Shamsuddin, *National Oil Policy*, Rotary Club Address on 20th January 1977.

[50]Petroleum Development (Amendment) Act 1975.

the exclusive control of PETRONAS. This amendment apparently came as little or no surprise to those in the industry as it was '. . . generally considered that marketing and distribution were omitted from the original Act due to an oversight in drafting'.[51] As to the general tenor of the Petroleum Development Act and the introduction of the production sharing system the foreign oil companies mostly resigned to their fate, considering the overall global changes taking place - 'they've learned to live with that in Indonesia'.[52] But the amendment to section 6 did not stop in the bare inclusion of marketing and distribution. It also enabled the Prime Minister to impose 'terms ad conditions' where he grants permission to other companies which may wish to engage in these activities. The purpose of this appears to be to ensure that companies involved in downstream operations comply with the requirements of the New Economic Policy as regards bumiputra participation, proper racial balance in employment and conditions as to the use of local services and materials. Contravention of the section was made an offence: a maximum fine of one million dollars and/or imprisonment for five years plus a hundred thousand dollars fine per day for continuing offences or confiscation of all plant, etc. This made it quite clear that the government was viewing the downstream sector quite seriously. It would give PETRONAS complete control of the sector and enable it to oversee and plan the sector in line with overall development in the petroleum industry. It would also enable PETRONAS to make sure that local demands for petroleum products was met at reasonable prices.

Even all the above did not worry the foreign oil companies. But what really perturbed them was another amendment in the same amendment Act: a new section 6A introduced the management shares concept, to the alarm of all those (mainly foreign) oilmen involved in the downstream sector. The important parts of the section are as follows:

> '6A(1) Any company which carries on any business referred to in subsection (1) and (3) of section 6. . .shall -
> (a) have two classes of shares, called the management shares and the ordinary shares; and
> (b) issue no management shares except to the Corporation.
>
> (2) As soon as practicable after the commencement of this section -
> (a) every relevant company the shares of which are quoted on a Stock Exchange in Malaysia or elsewhere shall issue for cash at a price which is equivalent to the market price of the ordinary shares prevailing at the date of the issue; and
> (b) every relevant company the shares of which are not quoted on a Stock Exchange in Malaysia or elsewhere shall issue for cash

[51] Philip Bowring, *'Malaysia's Petronas: A Legislative Overkill'*, Far Eastern Economic Review, May 16 1975, page 63 — this appears strange in view of the fact that UN help was sought in drafting the new legislation. (See *'Malaysia drives for production-sharing pacts'*, The Oil and Gas Journal, June 11, 1973, page 62).

[52] Frank J Gardner, *Watching the World*, Oil and Gas Journal, June 1975, page 31.

at such fair and reasonable price as may be determined by the Prime Minister.

Such number of management shares as is equal to one percent or more of its issued and paid up capital; and whenever any subsequent issue of shares is made by the relevant company one per centum of every such issue shall consist of management shares.

(6) The holder of management shares of a relevant company shall be entitled either on a poll or by show of hands to five hundred votes for each management share held by him upon any resolution relating to the appointment or dismissal of a director or any member of the staff of the relevant company but shall in all other respects have the same voting rights as the holder of its ordinary shares.

. . .

Section 6A was to be effective 'notwithstanding' the provisions of any other written law or of the memorandum or articles of association of a relevant company.'

Even a cursory glance at the above provisions would immediately make it clear to the reader that, if put into effect, they will have far-reaching implications. Shorn of all the legal jargon it was a blatant attempt to control existing and forthcoming downstream companies outside the context of economics and via the process of law. Such a provision was certainly a step towards the demise of the entire concept of free enterprise to which the government professed and still professes to subscribe to. This is the type of law which will shatter foreign investor confidence and put the brakes on further investment. It may be said that despite the Petroleum Development Act in 1974, the overall investment climate in the country had been good but the amendment shook the very foundations of free enterprise and caused widespread concern, especially amongst foreign investors.

As was to be expected the introduction of the management shares concept drew a storm of protests by oil companies and other foreign investors in the country. Fears were expressed that such "massive voting rights provides for effective nationalisation without compensation"[53] And some even alleged that the amendment was unconstitutional, being contrary to Article 13 of the Federal Constitution which guarantees private property rights.[54] If "the clouds began to gather"[55] upon the passing of the Petroleum Development Act, the Amendment Act may be likened to a whirlwind, uprooting existing established businesses. It was viewed as an Act "nationalizing refining, marketing and petrochemicals and taking a share of private firms' stock. . .".[56] Both the United States (homeland of

[53] Philip Bowring, *op. cit.*, page 63.

[54] *Ibid.*

[55] Frank J Gardner, *op. cit.*

[56] *Ibid.*

ESSO) and Great Britain (part homeland of SHELL and which has a host of other commercial and industrial interests) protested to the Malaysian government in no uncertain terms. They believed that the amendment would be a discouragement to foreign capital investment that Malaysia always welcomed. They were not too happy over the arbitrary manner of altering the status of existing investment. The United States also "gently pointed out that trade concessions are not available to countries which nationalize US-owned assets without compensation".[57] However, as has been pointed out,[58] despite the new amendment the *de facto* situation neutralised most of its effect as many, if not most foreign companies are in joint-ventures with local and usually semi-government organisations like the National Corporation (PERNAS) and others and therefore the provision was unlikely to be used in a disruptive manner. On a point of principle, though, the foreign investors resented the amendment in view of their concern that arrangements which attracted their initial investment should be 'invioable and not subject to unilateral alteration.'[59]

In the face of all this it is interesting to note the 'official' reasons behind the introduction of the management shares concept: these were given by the then Prime Minister and reiterated by the Chairman of PETRONAS and public statements made insisted that there was no intention on the part of the government to nationalise any business. The reasons may be summarised as follows:

1) the need for the exercise of national control over petroleum resources;
2) the need to extend Bumiputra participation;
3) a balance of employment and to ensure a planned growth of downstream activities; and
4) the need to compel oil companies to be more open and co-operative with the government and PETRONAS.

As has been said[60] most of the reasons given are really untenable when viewed in relation to the actual situation at the time of the amendment. To begin with, the government or PETRONAS already had complete control of the downstream sector by virtue of the original section 6 of the Petroleum Development Act as fortified by the Amendment Act: and 'control of petroleum resources' was already an old theme and was over with the vesting of the entire petroleum resources and privileges of mining petroleum in PETRONAS. As to the need to extend Bumiputra participation and to foster a racial balance in employment it is difficult to see how

[57] Philip Bowring, *op. cit.*, page 63.

[58] *Ibid.*

[59] *Ibid.*

[60] Philip Bowring, *op. cit.*

the management shares concept comes into it at all. The licensing system for downstream activities - under the Petroleum Development Act and also the Industrial Co-Ordination Act — are ample in this regard. The foreign companies involved could not have made a move without PETRONAS knowing of it and controlling it.

As for the need for more co-operation and despite the possibility of non-cooperation on the part of the oil companies, it is a matter of wonder how the new amendment - described, amongst other things, as a 'legislative blunderbuss'[61] can remedy the situation. The actual reasons for the management shares concept may never be positively identified but the following theories have been advanced:[62]

1) with a great many of the country's major industries such as rubber, tin and palm oil being already in the hands of foreigners there was an urgent need to exercise the greatest possible control of the entire petroleum industry;
2) as an instrument to beat the oil companies into submission on all points; and
3) politically-motivated, in view of the then pending general elections.

Whatever the actual position, it was rather strange that the National Petroleum Advisory Council was never consulted before the passage of the amendment. Perhaps the government's aim was to use the amendment as a threat only. But in view of the composition of the Council, including some eminent members of the government (such as for instance, the Governor of the Central Bank and the economic advisor to the Prime Minister) it certainly reflects on the poor standing of the Council on the one hand and the overriding power of the Prime Minister on the other.

Pressured by all the protests and the suspension of further investments by certain companies the government finally yielded and repealed the entire section 6A by a further amendment - the Petroleum Development (Amendment) Act of 1977. This Act also empowered the Prime Minister to exempt any downstream business or any company involved in downstream business form the strictures of section 6. The government also took the opportunity to introduce a new subsection to section 9 of the original Act providing for compensation for termination of existing licences and petroleum agreements.

Thus ended the saga of the management shares concept and consequently the 'clouds' cleared, bringing about more stability in the industry as foreign investor confidence was restored; the business of exploiting the petroleum resources was resumed in ernest once again.

The hardline position taken by the government might have set the industry back a little but apparently not much damage was done. Though

[61] Philip Bowring, *op. cit.*

[62] *Ibid.*

it might not have been 'an enviable start for a fledgling oil nation'[63] Malaysia survived the early turbulent period essentially because it had sufficient bargaining power vis-a-vis the oil companies: Malaysia had other exports to rely upon and could afford to 'go slow' whilst the oil companies had already invested heavily and were in a dilemma - they could not afford NOT to go along with the new arrangements.

The Regulations

A word about the Regulations made under the Petroleum Development Act. The Prime Minister was empowered to make regulations for the purpose of carrying into effect the provisions of the Act, in particular with respect to the following:

a) the conduct of or the carrying on of -
   i) any business or service relating to the exploration, exploitation, winning or obtaining of petroleum;
   ii) any business involving the manufacture and supply of equipment used in the petroleum industry;
   iii) downstream activities and development relating to petroleum;
b) marketing and distribution of petroleum and petroleum products;
c) penalties and forfeitures.

Pursuant to this power the Prime Minister made the petroleum Regulations of 1974. It is in fact these regulations which form the basis of the subsequent production sharing contracts as they enumerate a host of 'conditions' which the Prime Minister may impose on an applicant. The conditions[64] relate to the following:

1) Royalties, levies;
2) Work and investment programme, method of work, inspection of work site and plant;
3) Employment and training, report of discovery and production of petroleum;
4) Submission of all data, information and records in any survey or research;
5) Volume of production quality, fixing of prices;
6) Keeping and inspection of records;
7) Distribution, marketing, retailers and exports;
8) Purchase of petroleum from overseas or locally and option to purchase petroleum and right of preemption.

Though the Prime Minister may reject the applications or approve them upon any of these conditions the reality of the matter is that these condi-

[63] Frank J Gardner, *op. cit.*

[64] Regulation 5(3).

tions are in fact the subject of negotiation between the parties as evidenced in subsequent production sharing contracts.

The above regulations also made it obligatory for anyone holding an exploration licence or petroleum agreement under the PETROLEUM MINING ACT 1966 to make available and submit forthwith to Petronas, for no consideration, all data, information and records in respect of any research survey, exploration or production carried out by them.

Under regulation 3 the following applications were to be made to the Prime Minister but addressed to Petronas, whose duty it was to process them and forward to the Prime Minister:

1) all applications to commence or continue any business or service relating to the exploration, exploitation, winning and obtaining of petroleum, in particular involving the supply and use of rigs, derricks, ocean tankers and barges;
2) i) all applications for a licence to commence or continue any business of processing or refining petroleum or manufacturing of Petro-chemical products;
   ii) equipment and facilities referred to in 1 above cover the following:

   Pipelines, road and rail tankers, ocean tankers and barges, installations, supplies and equipment, containers, aviation fuelling facilities, bunkering facilities and chemical and blending facilities.

The above regulation 3 was, however, replaced by a new regulation 3 under the Petroleum (Amendment) Regulations 1981 which were 'deemed to have come into force on 1st October 1978'. The new regulation also made provision for certain applications (regarding upstream operations) to be made directly to the Chairman and Chief Executive of Petronas instead of to the Prime Minister as previously and provided for certain other applications regarding downstream operations to be made to the Secretary-General of the Ministry of Trade and Industry. Further, under the amended regulations the approval of the applications and the imposition of any terms or conditions may be made by the Prime Minister 'or any such person to whom such powers have been delegated by him. . .'. Thus, after the initial personal involvement of the Prime Minister himself, the business of the industry was to be conducted by appropriate departments with overall supervision by him or his delegate. Perhaps, this course of action also indicates the Prime Minister's confidence in PETRONAS.

One other important feature of the 1981 amended Regulations is the creation of new offences: Regulations 7 (1) and (3) make it an offence if information or particulars in respect of businesses in Regulatiosn 3 and 3A are not supplied or false information or particulars are supplied: Penalty: fine of $5000/- and/or 2 years and $10,000 and/or four years, respectively. Regulation 9 makes it an offence for any person who commences or continues any business or service mentioned in Regulation 3 without a licence

or fails to comply with any of the terms or conditions of such licence. The penalty imposed by Regulation 9 is a fine of fifty thousand dollars or imprisonment of two years or both. Regulations 7 and 9 impose penalties which are not normally possible as subsidiary legislation cannot be used as a means to impose penalties of more than one thousand dollars or a term of imprisonment exceeding six months.[65] However, in this case it would be a valid exercise of the Prime Minister's powers as the amended section 7 of the Petroleum Development Act specifically authorises the imposition of a penalty not exceeding one hundred thousand dollars or imprisonment not exceeding five years or both. This provision would prevail[66] over section 27 of the Interpretation Act 1967 in view of the express provision in the Petroleum Development Act.

The severity of the stipulated penalties in Regulations 7 and 9 is indicative of the seriousness with which the goverment views the entire spectrum of petroleum and related industries. It would appear that the reasons for the 'substance' of the legal regime being left in the Prime Minister's rule-making power rather than being enacted as substantive sections of the parent Act is to facilitate a flexible system — a system in which the Prime Minister may himself alter the regulatory structure with relative ease, to accord with changes in the industry, both local and in the larger international context if need be. This system avoids the rigidity of an Act of Parliament — if everything is stipulated in an Act the Prime Minister or other person responsible for the industry will have to keep 'running' to Parliament every time a change is needed, however minor.

As to the virtues of delegated legislation it has been said,

> "Statutory rules are in themselves of great public advantage because the details. . . can thus be regulated after a Bill passes into an Act with greater ease and minuteness and with better adaptation to local or other special circumstances than they can possibly be in the passage of a Bill through Parliament. Besides they mitigate the inelasticity which would otherwise make an Act unworkable and are susceptible of modifications. . . as circumstances arise."[67]

Moreover,

> ". . .Parliament is not continuously in session and its processes involve delay, so that any rapid adjustment of the law by direct legislation to meet unknown future conditions is not normally feasible."[68]

[65] Section 27 of the Interpretation Act 1967.

[66] Section 2(3) of the Interpretation Act 1967.

[67] Official Minute by Sir Henry Jenkyns 1893, quoted at page 291, Craies on Statute Law, Seventh Edition.

[68] Craies on Statute Law (Seventh Ed.), page 291.

This probably also explains the rather wide terms in which the rule-making section (section 7) of the Act is framed. It is also noteworthy that the Act itself does not have any elaborate provisions regarding upstream activities: section 7 specifically empowers the Prime Minister to make regulations in respect of them. Even in the case of downstream activities the provisions in the Act are scant and mainly negative, prohibiting the commencement or carrying on of such activities without the Prime Minister's permission, and similarly empowering the Prime Minister to make regulations in regard to them.

A Question of Vires

Flexibility may indeed be a virtue of the system; but it is submitted that if that was the reason for relegating the substance of the regime to subsidiary legislation, then care should have been taken to ensure that such legislation is neither ULTRA VIRES the parent Act nor inconsistent with any other Act of Parliament as otherwise it would be void to the extent of the inconsistency.[69] Both the parent Act (the Petroleum Development Act) and the Petroleum Mining Act of 1966 have to be considered here. The position of the Regulations vis-a-vis the latter Act is considered when the Act itself is considered in the context of the present system.

The Parent Act — The Petroleum Development Act And the Regulations

So far as the parent Act is concerned, however wide the rule-making power might appear to be it is still confined to the making of regulations ". . . for the purpose of carrying into effect the provisions. . ."[70] of the Act. This general power is followed by power to make regulations with regards to some matters which have been particularised (ante, page 127). Nevertheless, it is necessary to consider the ambit of the relevant 'provisions' in the Act to see whether the regulations are intra vires the Act. This is perhaps best done by considering the provisions dealing with upstream and downstream activities separately as they are quite different in substance. The legal position is by no means certain but it would appear to be as follows:

Upstream Provisions

It is remarkable that apart from section 7 itself (which particularises some upstream matters) the only relevant provision is section 2(1) of the Act which vests 'the entire ownership in, and exclusive rights, powers, liberties and privileges of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia. . .' in PETRONAS. The purpose of the section seems to be not only to 'vest' the entire petroleum resources in PETRONAS but also to give it 'exclusive rights' in respect

[69] Section 23(1), Interpretation Act 1967.

[70] Section 7, Petroleum Development Act 1974.

of the resources. And the Act stops there; it appears to contemplate the situation where PETRONAS is meant to be the SOLE operator in the upstream sector of the petroleum industry, to the absolute exclusion of all others. The question, then, of others coming into the business of upstream activities does not arise at all; in fact it is implicit in section 2(1) that others are totally prohibited from engaging in any of the activities set out in the subsection. If this be the case then the power of the Prime Minister to regulate the 'conduct of or the carrying on of any business or service relating to the exploration, exploitation, winning or obtaining of petroleum'[71] should of necessity be confined to the purposes set out in subsection 2(1) of the the Act and therefore be relevant only to regulate upstream activities as undertaken by PETRONAS. It is true that the power to 'control or regulate any matter includes power to provide for the same by licensing and power to prohibit acts whereby the control or regulation might be evaded'.[72] But the power to make regulations in section 7 of the Act does not operate in the air; it must relate to the provisions of the Act and in the instant case the provision is section 2(1). Whilst the power to 'control or regulate' might include the power to 'license' or 'prohibit', it certainly cannot include the power to license where there is a total prohibition, as in section 2(1). In other words, since other parties are totally precluded from engaging in upstream activities by section 2(1) of the Act there is no question of granting licences to any of them to engage in the same. In this event the regulation will be providing a licensing system in the face of a total prohibition by the Act. And if the Regulations purport to do this, as indeed they appear to do, then they are ultra vires the parent Act and to that extent void.

However, this result does not necessarily mean that the subsequent production sharing contracts entered into between PETRONAS and the oil companies are ultra vires too. PETRONAS has the capacity to enter into them by virtue of its ownership of and exclusive rights to petroleum under the same section 2(1). Hence the production sharing contracts should be valid independently of the regulations.

Downstream Provisions:

The position of the downstream provisions in the Act is entirely different.

Section 6 of the Act is more explicit and clearer: Subsection (1) thereof expressly prohibits all persons other than PETRONAS from carrying on the businesses of processing or refining of petroleum or manufacturing of petro-chemical products 'unless there is in respect of any such business a permission given by the Prime Minister'.[73] By subsection (3) the businesses of marketing and distribution are also to be covered by subsection (1). Permission must be applied for existing businesses within six months of the

[71] Section 7(a)(i) of the Act.

[72] Section 40(2)(a), Interpretation Act 1967.

[73] Section 6(1) of the Act.

commencement of the appropriate subsection. Thus, unlike the provision relating to upstream activities, section 6 makes it clear that persons other than PETRONAS may also engage in such activities but that in their case the Prime Minister's permission must be obtained. Hence, it is apparent that section 6 clearly contemplates the situation where PETRONAS AS WELL AS OTHERS may be engaged in downstream activities. Therefore the making of regulations under section 7 to license such activities in the case of persons other than PETRONAS is certainly intra vires the Act as the substantive section dealing with downstream activities (section 6) does not absolutely prohibit persons other than PETRONAS to participate in such activities. On the contrary, it specifically caters for them, albeit conditional upon the Prime Minister's permission.

The Petroleum Mining Act 1966 In The Context Of The Present System

It must be noted that despite the passage of the Petroleum Development Act in 1974 (hereinafter the Act) the Petroleum Mining Act of 1966 (hereinafter the 1966 Act) has not been expressly repealed and remains on the statute book. The Act (as it originally stood) made only two specific references to the 1966 Act: by section 8 of the Act it provided that the 1966 Act 'shall not apply to the Corporation' (Corporation meaning PETRONAS); the other reference is in section 9 of the Act declaring that all exploration licences issued and petroleum agreements entered into pursuant to the 1966 Act shall continue to subsist for a period of six months of the coming into force of the Act. Subsequently, however, an amendment was made to section 8 (to be effective retrospectively to the effective date of the Act) providing that 'save for section 14[74] thereof', the 1966 Act shall not apply to PETRONAS; and that, in the application of section 14 of the 1966 Act, any reference to 'the licensee' shall be construed as a reference to PETRONAS and any reference to the exercising of any rights contained in the licence shall be construed as a reference to the exercising of the rights, liberties, etc vested in PETRONAS by virtue of section 2(1) of the Act.

Apart from the above two provisions touching on the 1966 Act the Act totally ignored the existence of the 1966 Act or the effects of its provisions. The Regulations made under the Act make just a single reference[75] to the 1966 Act. And the Continental Shelf Act refers to it once. The terms of section 8 of the Act certainly imply that the 1966 Act is very much alive and not to be regarded as repealed. By section 8 no other provision of the 1966 Act is to apply to PETRONAS: this may be an implication that all the other provsions of the 1966 Act are still applicable but only to OTHER persons who may be disposed to engage in the petroleum activities.

[74]Section 14 deals with the question of compensation to be made in the case of damage to alienated land.

[75]Regulation 2 which requires all former licensees under the Petroleum Mining Act to give up information and records.

To recapitulate, the 1966 Act basically provided for a licensing system whereby applications were to be made to the Petroleum Authority (being the Ruler or Governor for onshore areas and the Yang DiPertuan Agong for offshore areas) and no prospecting or exploration or exploitation was permitted unless a person had obtained an exploration licence (under section 7), or a Petroleum Agreement (under section 8 or 9) thereof. The Yang DiPertuan Agong made Regulations under section 12 and provided two model petroleum agreements: one each for onshore and offshore areas. State provisions regarding oil were repealed. As against these provisions, the Act has section 9 which put an end to the exploration licence and petroleum agreements granted under the 1966 Act and section 2 which vested the entire petroleum resources and exclusive rights in PETRONAS.

In view of the purpose of the Act as seen in the preamble and the effect of section 9 in particular, it appears that there is no question of any further applications being accepted under the provisions of the 1966 Act. Moreover, the whole tenor of the Act is such that PETRONAS is the sole corporation to be involved in all aspects of the petroleum industry to the exclusion of all others. In the circumstances, though the matter is not free from doubt, it would appear that the Act would either supersede[76] most of the provisions of the 1966 Act or the 1966 Act may be considered to be obsolete[77] or virtually repealed.[78] If such be the case, then the concepts of exploration licence, petroleum agreement and petroleum authority are no longer relevant at the present time.

The 1974 Regulations

The question of VIRES in so far as the 1974 Regulations and the 1966 Act are concerned will only arise if the 1966 Act is still a valid Act and not regarded as superseded, obsolete or repealed. If still valid the 1974 Regulations will be in conflict with the 1966 Act and the Regulations made thereunder and will be void to the extent of the conflict. If the 1966 Act has 'ceased to be in force',[79] the 1974 Regulations will be valid.

In any case, the rules as to the construction of statutes (despite the help of the provisions of the Interpretation Act 1967) are so difficult to apply in practice[80] that it would have been salutory for the government to have dealt with the question of the repeal or otherwise of the 1966 Act, if only

[76] See Craies on Statute Law (Seventh Ed.) page 358 - this means where a later enactment effects the same purposes as an earlier one by repetition of its terms or otherwise.

[77] *Op. cit.* — this means where the state of things contemplated by the enactment has ceased to exist, or the enactment is of such a nature as to be no longer capable of being put into force,regard being had to the alteration of political or social circumstances.

[78] *Op. cit.* — this means where an earlier enactment is inconsistent with or is rendered nugatory by a later one.

[79] According to the position in England the laws covered in footnotes 76, 77 and 78 above are classified as laws which have 'ceased to be in force' otherwise than by express specific repeal.

[80] See Chapter 15, Craies on Statute Law, Seventh Ed., page 348 .

to rid the system of deadwood and clarify the position. Perhaps the whole of the 1966 Act should be expressly repealed. If section 14 thereof is needed its substance could be inserted in the 1974 Act. In view of the ambit of the 1974 Act the repealing provisions of the 1966 Act are not relevant in any event.

Conclusion

In conclusion the following observations may be made:

1) the general legislative framework is in an unsatisfactory state: more attention ought to have been given to the question of *vires* and the merits of explicit provisions should have been accorded serious consideration;
2) the Petroleum Mining Act of 1966 has to all intents and purposes been superseded and is no longer of any relevance;
3) the position and powers of PETRONAS must be more explicitly spelt out if it is to function in a proper legal environment, particularly in view of the fact that it has been incorporated under general companies legislation; most importantly, whether or not it has the right to license others in the exploration and exploitation of petroleum merits explicit provision;
4) provisions such as the notorious section 6A should never be contemplated again if an expeditious and smooth development of the petroleum resource is intended; instead the parties concerned should endeavour to settle all problems by negotiations or conciliatory methods; and
5) though flexibility may be a virtue it should not be used as a veil to cover what is otherwise a vague and confused legal structure; the maze of legislation and regulations in the petroleum field needs to be sorted out: a comprehensive set of legislation which is clear and explicit is sorely needed, a set of legislation which will explain the exact nature and powers of PETRONAS vis-a-vis the resource, the government and private oil companies. As it is, it is difficult to get an ordered picture of what the petroleum law of Malaysia is — and such a state of affairs is certainly not conducive to the further development of the resource.

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