ASEAN LAW JOURNAL

$5.00 a copy

VOLUME 2, 1986

ASEAN LAW ASSOCIATION

The ASEAN LAW JOURNAL is published annually by the ASEAN Law Association. The annual subscription is $5.00, exclusive of postage. Subscriptions, manuscripts and all correspondences relative to the Journal should be addressed to the Assistant Editor, U.P. Legal Resources Center, Bocobo Hall, Diliman, Quezon City 3004, Philippines. Telephone number 972-180, cable address UPLACEN.

ISBN 971-15-0261-5

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ASEAN LAW ASSOCIATION

The ASEAN Law Association (ALA) is a private confraternity of jurists, lawyers, and legal academicians from the five ASEAN countries, namely: Indonesia, Malaysia, Philippines, Singapore and Thailand. Organized in 1979, it seeks to promote closer relations, cooperation and mutual understanding among members of the legal profession in the ASEAN region and endeavors to support the aspirations of the Association of Southeast Asian Nations through the forging of a viable legal framework for cooperation.

The ALA Charter also expresses the following specific objectives:

> To provide the organizational framework for regional cooperation in the study of and research in the harmonization of relevant fields of law among the ASEAN countries as required by the social and economic development of the region;
>
> To provide organizational facilities for ASEAN cooperation in conflict avoidance, in the arbitration or resolution of legal disputes in transnational contracts within the ASEAN region; and
>
> To cooperate with international, regional, national and other organizations in the furtherance of the Association's objectives.

While ALA was formerly constituted in 1979 at Kuala Lumpur where its Constitution and By-Laws were adopted, the gestation period dates back to 1978 when the idea was initially broached at a meeting of some Asian lawyers in Bangkok. It was in February 1979 that formal proposals to organize the members of the legal profession were presented before a Djakarta Conference on Legal

Developments in ASEAN countries. The response to idea was uniformly enthusiastic.

At the First General Assembly, held in Manila from November 24-29, 1980, attended by some one thousand delegates, the ALA Constitution and By-Laws were ratified. In accordance with the Charter, the Second General Assembly is to be held at Kuala Lumpur on October 25-29, 1982.

The dialogue of national committees of ALA and their members is thus underway through bilateral as well as multilateral arrangements. ALA encourages and sponsors discussions on vital topics of common interest, including administration of justice, legal education, code of ethics, disciplinary procedures for the legal profession, and settlement of commercial disputes.

To facilitate sustained communication and cooperation, ALA publishes the *ASEAN Law Journal* and the *ASEAN Comparative Law Series*. It has a program for exchange of scholars and is developing a network for the regular exchange of legal periodicals among the region's law schools and institutions for legal research. Finally, the ALA Foundation has been created to ensure the Association's viability and development.

PRESIDENT'S PAGE

The idea of having a proper *Journal* for the Asean Law Association was first mooted in 1980. In the beginning we had a modest *Newsletter* prepared and published entirely through the efforts of the Philippine National Committee with the able assistance of the University of the Philippines Law Center. In September, 1982, under the auspices of a predecessor of mine, Atty. Edgardo J. Angara, the same national Committee published the first volume in time for the ALA meet in Kuala Lumpur. After a lapse of four years, we have decided to continue with the publication, hopefully this time, on an annual basis.

Much of the credit for the publication of this volume must again go to the Philippine National Committee chaired by Mr. Avelino V. Cruz. The Editors have tried to include in this issue an article by scholars/experts from each of the Asean countries. This is a format we should try to follow whenever possible as one of the objectives of the Asean Law Association is the dissemination and exchange of ideas and views among the Asean lawyers.

I hope that this resuscitated publication will be a forerunner of better publications to come. I am confident that with the efforts of an energetic and hardworking Editorial Board we will witness a steady flow of learned articles in the *Journal*. I am also confident that with the necessary effort and goodwill, this *Journal* will make a positive contribution to the well-being of the Asean Law Association.

I wish the Editorial Board and the *Asean Law Journal* every success.

T. P. B. MENON
President
ASEAN LAW ASSOCIATION

EDITOR'S NOTE

The launching of the ASEAN LAW JOURNAL was an event we recall happily. The venue was the General Assembly in Kuala Lumpur in November 1982. Vol. I No. 1 was received with much enthusiasm and after the ALA meet, inquiries continually poured in the office of the National Committee in the Philippines. We had promised to come out semi-annually! One can but guess at a dozen reasons why we were unable to fulfill the commitment. But it is hard to kill a good idea and four years later, we are pleased to renew publication.

A few changes have been made among which is the decision to start out modestly, with one issue per year. For the present, the Journal will not be thematic.

In this issue are included topics as diverse as an ASEAN legal order as a framework for diplomacy and legal protection of computer software in the ASEAN. All, however, in our judgment, give information useful in the building of the viable legal community that the ASEAN Law Association seeks to bring about.

Acknowledgement must be made here of the paper on 'Foreign Investment Requirements in Malaysia' by W. S. W. Davidson which was delivered in 1986 at the International Conference on Energy Law and Policy in Asia and the Western Pacific. The Editorial Committee felt that this article reinforce Dr. Hartono's paper on the promotion of Intra ASEAN trade and investment through legal development.

In the same vein, 'Some Thoughts On The Legal Protection of Computer Software in ASEAN' by Mr. Richard Magnus, highlights the need for legal development to keep in step with the latest in technology if the objectives of ASEAN are to be realized.

President Edgardo J. Angara's paper on ASEAN Legal Order and Framework for Diplomacy on the other hand, brings to the fore the public character of the ASEAN and its particular work ethic in dealings between Member-States.

Finally, Dr. Sunaryati Hartono's article which actually opens this volume, on 'Legal Development and the Promotion of Intra-ASEAN Trade & Investment' is academia's contribution to the issue. Dr. Hartono cogently argues for the need to include lawyers and legal scholars in the decision-making processes if ASEAN countries are to deal with each other constructively in bringing about a viable legal order within the region.

The Book Notices and ASEAN Documents have been retained as regular sections of the Journal. The Editorial Committee hopes to institutionalise the section on Special Feature in future volumes.

It is, above all, the aim of the Editorial Committee, to include in future volumes, contributions from each of our member countries. This, then, serves as an invitation to all our readers to send in manuscripts that they may consider of interest to the ALA and its objectives.

It is our aim to make the ALA Journal *the* 'tribunal' for the testing of ideas and exchange of information in order to bring about the ASEAN legal order the Association seeks.

MYRNA S. FELICIANO
Assistant Editor

LEGAL DEVELOPMENT AND THE PROMOTION OF INTRA-ASEAN TRADE AND INVESTMENT

*Dr. Sunaryati Hartono, SH**

INTRODUCTION

In his address to a meeting of ASEAN ministers at Kuala Lumpur, Malaysia's Prime Minister Mahatir Mohamad complained that the ASEAN has not made much progress in establishing closer economic cooperation, nor in promoting intra-ASEAN trade and investment, although numerous meetings have already been held between the respective Asean governments.

These meetings have, more often than not, focussed on specifics such as the reduction of tariffs, and on how administrative procedures may be simplified in order to promote intra-ASEAN trade and investment, rather than trying to evolve an overall plan for economic cooperation in the ASEAN. Planners, scholars, and lawyers have played no significant role in those meetings.

This paper will attempt to argue how law and lawyers can be instrumental in the planning process and to show what ASEAN lawyers can do to promote intra-ASEAN trade and investment.

LAW AND ECONOMICS

As intra-ASEAN economic cooperation must be established within the norms of international trade and investment, any design for regional trade will have to be made against the background of the General Agreement on Tariffs and Trade (GATT), and other existing international laws and instruments, together with each of the Contracting Parties' national economic laws. Thus, international economic laws on the one hand and national economic laws and policies on the other, are the parameters within which the

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design for closer economic cooperation will have to be drawn. Consequently, a thorough knowledge and mastery of these instruments is of utmost importance, which task is best entrusted to specialists on international law and comparative economics lawyers of the ASEAN countries, who in turn should advise and brief their respective delegations at ASEAN meets.

LEGAL DEVELOPMENT

In this respect the study of International Economic Law and Comparative ASEAN Law is essential. It is not sufficient for negotiators, who most often are economists or administrators, to read and be familiar with legal documents of GATT or the IMF, or the national investment or trade laws of the contracting parties. A thorough knowledge of the background, objectives, philosophies, legal and economic systems, and national legal environments along with international law, is necessary for a good understanding of these legal instruments. To cite an example: the Dutch delegation to the UNCTAD conferences has for many years included a law professor, who is an expert in International Economic Law, and author of many thought provoking books and articles.

It is strange, and perhaps a sign of ignorance, that developing countries rarely consider it worthwhile to include a lawyer in their business negotiations or governmental economic planning meetings. In this regard, the seminars held by the ASEAN Law Association (ALA) Conferences and the comparative studies programme of the Academy of ASEAN Law and Jurisprudence at the University of the Philippines Law Complex therefore, are a step in the right direction. Much still remains to be done in order that economists, businessmen and government recognize the indispensability of legal considerations and the value of lawyers specializing in economic laws, being present during negotiations.

Comparative studies of the legal aspect of trade and investment within the ASEAN indicate that there are legal obstacles which need to be hurdled. The ALA and its standing committees, should be seriously considered as a vehicle for legal development towards closer economic cooperation, particularly with respect to promoting intra-ASEAN trade and investment for the benefit of its member-nations. After all, no bilateral or multilateral treaty, however

perfectly formulated will be able to bring about closer economic cooperation, if it is not translated by the acts of businessmen who, after all, are motivated by personal gains.

COMPARATIVE OBSERVATIONS

After having studied the country papers on Investment Laws and on Lease Financing, Business Organizations, and Business Law, Domestic and Off-Shore Financing, Tax Systems and Laws of member countries presented at the different ALA Conferences I discovered that many basic legal concepts, relevant to business, trade and investment had different connotations in each of the legal systems. For instance, a "private company" in Indonesia means a company completely owned and managed by private person(s), as contrasted with a "public company", which is wholly or partially owned by the State. In contrast to the Indonesian meaning, a "public company" in Malaysia, the Philippines or Singapore, seems to be a limited company owned by more than a specific number of shareholders, whereby the shares are easily transferable. This kind of company would, in Indonesia, be a company, private or public, which has "gone public".

In the Indonesia context, a company may become a public company in the Malaysian, Philippine, or Singaporean sense only after it has "gone public". Whether a public company (in the Indonesian sense) can be regarded as a private company in the Malaysian, Philippines or Singapore context, would be interesting to discover.

Another example is the notion of the "foreign company". In Indonesia and the Philippines this means any company established abroad and under foreign law[1], because any company established in Indonesia under Indonesian law, or in the Philippines under its law, is an Indonesian or Philippine company as the case may be. In Indonesia, no foreign company may do business without having established itself as an Indonesian company. Hence, legally speaking, there are no foreign companies doing business in Indonesia.[2] In the Philippines," in order to transact business . . . or maintain any suit in its courts, a foreign company must be duly licensed . . .

(SEC) attesting to the solvency and sound financial condition of by filing a statement with the Securities and Exchange Commission the corporation, and setting forth its assets and liabilities".[3]

In Malaysia "a foreign company" may include a company, corporation, society, association or other body incorporated in Malaysia, although "in order to operate its business in Malaysia, a foreign company has to incorporate a subsidiary company or to register a branch".[4] Thus, the term "foreign company" has a much broader meaning in Malaysia.

In Singapore, a foreign company is defined as:[5]

(a) a company, corporation, society, association or other body incorporated outside Singapore; or

(b) an unincorporated society, association or other body which under the law of its place of origin may sue or be sued, or hold property in the name of the secretary or other officer of the body or association duly appointed for that purpose and which does not have its head office or principal place of business in Singapore."

As in Malaysia, foreign companies seem to be capable of carrying on business in Singapore, if within one month they lodge certain documents and information with the Registrar of Companies for registration.[6]

According to Nobpun Muangkote[7] "there are not specific requirements for foreign companies to register with the Ministry of Commerce and thereupon assume the status of juristic entity under Thai law".

Aside from the above legal variations, the terminology is used differently in the field of economics. In the latter context, a foreign company is one that is wholly or partially owned by foreign nationals, because they have invested their capital in that company, which might either be a "domestic" or a "foreign" company in the legal sense of the word.

According to a recent arbitration award of the International Center for the Settlement of Investment Disputes (ICSID)[8] a company established in Indonesia under Indonesian law was found

to be a "foreign company", because of foreign capital invested in it, and its foreign management. Thus, an Indonesian company recognized as such under Indonesian law, became a foreign company according ICSID arbitrators; or a subsidiary or branch of a foreign company, according to foreign law, or as dicussed in business or economic reviews.

A proper dialogue among member-states may become even more complicated when we consider that in the Philippines, a company which is 60% or more owned by Filipinos is regarded as a domestic company. It is uncertain whether a Malaysian company consisting of more than 30% foreign equity capital would be regarded as a foreign company in Malaysia, and as a domestic company by the *lex originis* of the investors.

INVESTMENT INCENTIVES

To encourage foreign investment each of the ASEAN countries promises foreign investors a range of incentives from tax holidays, tax deductions, accelerated depreciation and the like, to the establishment of free trade zones, and free flow of foreign exchange. Moreover, Investment Guaranty Agreements contain extra guarantees and protection of their interests and investments, which foreigners or foreign companies may rely on.

Furthermore, the adherence to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, under which the ICSID has been set up also serves as an investment incentive, along with the ratification of the recognition and enforcement of foreign awards or foreign judgements.

With regard to the latter, three ASEAN countries (Malaysia, Singapore and Brunei Darussalam) have worked out a form of closer legal cooperation with each other, based on historical, pre-independence affinity. Although quite understandable, this form of legal and economic cooperation builds a "group within a group", with aspirations not necessarily compatible with the larger group of ASEAN to which they belong. It may be mentioned here that even within this smaller group, Singapore attracts foreign investors and foreign business more successfully, with the most liberal investment policy, very competitive business environment, efficient and speedy administration of investment applications, highly modern facilities and effective law enforcement.

ECONOMICS AND LEGAL DEVELOPMENT IN INDONESIA

In contrast with Singapore, Indonesia has, since the New Tax Laws of 1984 which introduce a totally new taxation system, done away with most of its tax incentives, relying on its natural resources and potential market for its development, though this does not mean that there are no incentives at all.

The State now finds that after seventeen years of accelerated industrial and economic development (1967-1984), in line with its plans for Indonesianization, the country has reached the stage, where it should select more carefully the foreign technology it would like to see transfered to Indonesians. Apparently the government has opted for high and more sophisticated technology, and does not want to see Indonesia become a dumping ground for foreign, low and medium level technology, which is already outdated or prohibited in the country of origin.

Also, the investment policy, since the mid-seventies, has shifted from import substitution to export promotion, in an effort to discourage the habit of consumerism, among Indonesians as well as to fulfill the need of the State to diversify its income sources from those of oil and gas.

After three Development Plans the Indonesian people have now attained new skills, developed new life styles, but also new social demands. With the promotion of agribusiness industry, since the Fourth Development Plan (1984-1989) Indonesia has entered a new phase of national development. This Plan also heralds the beginning of the "Era for Legal Development", during which the drafting of a whole new package of laws and legal institutions, based on a new legal philosophy and new legal theories, is planned.. These laws and legal institutions to support and promote economic and industrial development, are to become the base as well as the frame work for a future National Legal System.

The shift in investment policy, the abolition of previous tax incentives and stricter application of labour laws should be seen as a natural phase for further development towards economics self-reliance and socio-political integrity. It is not an indication of change in outlook towards foreigners and foreign investment *per se*. The drastic change in trade and investment, however painful for Indonesians and foreigners, is but part and parcel of the systematic

change this generation will have to undergo for the sake of the welfare of the next generations.

The laws and legal institutions now being drafted and planned will therefore be designed to support an industrial society in which the agrarian sector will be modernized through mechanization, i.e. agribusiness. The banks and monetary system will have to be modernized too, along with banking laws and negotiable instruments. In other words, from 1984, partly induced by the international environment, and also because of the country's own economic development and social change, Indonesia has entered a new stage of socio-economic development namely the stage of normalization and integration of the country's economic and legal systems as a whole.

In the past, the law was used only as an instrument to sanction changes, without thorough consideration of the basic principles and design of the Indonesian legal system. Any economic or legal measure was introduced to overcome one or another of economic, social or political problems. Indeed, up the present time, it is quite difficult to speak of the Indonesian legal system as a comprehensive *national* legal system, such as we might do when speaking about the Dutch legal system, an English legal system or a Japanese legal system. The Indonesian legal "system" presently comprises the following:

1. The 1945 Constitution;
2. A number of very basic Decrees of the People's Consultative Council (PCC or MPR);
3. Some remnants of colonial legislation such as the Civil and Commercial Codes, interpreted within the context of: (a) the 1945 Constitution, (b) the PCC/MPR Decrees, especially those containing the Basic State's Direction/GBHN and the Five Year Development Plans Repelita, (c) case law which has grown from 1945 onwards, (d) governmental or administrative decisions, (e) comments or opinions of prominent legal experts;
4. New legislation promulgated by the Indonesian Legislative Council since 1945;
5. *Adat* Law;
6. Islamic law, concerning marriage and divorce and in some territories, also includes inheritance;

7. International treaties; and
8. Foreign elements — mostly English and American.

Until the Fourth Development Plan, no attempt was made to integrate these different and sometimes conflicting sub-systems into one comprehensive and harmonious legal system. In 1984, the *Badan Pembinaan Hukum Nasional* (the National Law Development Agency) of the Department of Justice, was entrusted with the gigantic task of planning and designing this integration and harmonization of the law, in order that at the turn of the century we will finally accomplish the "creation" of one *national* legal system in the true sense of the word.

It seems that this process of integration has been undertaken in the Economy sector as well. This can be discerned, among other developments, when considering the history of the present Investment Coordinating Board, which began as a Foreign Investment Committee but later included the administration of domestic investment as well. In 1977 its jurisdiction and authority widened and further changes were made between 1977 and 1981 until now it has become a national planning agency on investments as a whole.

The abolition of special incentives, the improvement of the economic and administrative infrastructure, the overall liberalization of economic rules, and other measures seem to be part of the normalization and integrating process of the socio-political and economic life in Indonesia. More important, the extraordinary facilities and protection granted to foreigners and their property during the earlier years of development (1967-1983), will now give way to the "national treatment" principle, which is more equitable vis-a-vis our own nationals and domestic corporations, but still in accordance with International Law.

NATIONAL DEVELOPMENT AND HARMONIZATION OF THE LAW

As part of this development process was conducted with the assistance of foreign aid, foreign investment and international trade, we have already adopted a number of foreign i.e. English and American legal concepts, rules and legal institutions, which were formerly unknown to Indonesian lawyers. Examples are: the concept and institution of "delivery order", "letter of credit", "leas-

ing", "guarantees and warranties" etc., as understood in the English or American contexts. These foreign legal concepts have most often been introduced by non-lawyers (businessmen and administrative decision-makers) without realizing that the foreign term also contains foreign concepts, which may result in different legal consequences from its original legal culture, when applied in the Indonesian legal environment.

What has happened during Indonesia's 40 years of socio-political and economic development, is that we have become aware of an uncontrolled legal "abracadabra" as the outcome of intensive international cooperation, without the time to properly acculturize foreign elements into the philosophy and network of the Indonesian legal system. The time is ripe now for the restructuring of our legal system on a grand scale, so that internally this national legal system will support the people's aspirations towards a prosperous society based on the *Pancasila* philosophy, while externally promoting closer ties with other countries, for the sake of creating and maintaining a peaceful, equitable and prosperous world order.

It must be noted here that since in the foreseeable future the English language will remain the "lingua franca" between nations, it is inevitable that English and American legal concepts will unconsciously be absorbed in our legal systems. In the ASEAN, only Indonesia and Thailand have not adhered to English (American) legal thinking on a wide scale except in their Contract Law. Thailand has already adopted most English legal concepts in its Commercial Law.

If the ASEAN is to aspire towards a better international economic order, systematic studies must be made on the politico-legal environment of the region where differing legal concepts operate. Although some development has taken place between Thailand and Malaysia, Thailand and the Philippines, and Thailand and Singapore, and trade relations between Singapore, Malaysia and Brunei date from colonial times, the psychological block for doing business with each other remains.

A SPECIAL ASEAN LEGAL REGIME FOR INTRA-ASEAN TRADE AND COMMERCE

Instead of the ASEAN countries developing independently in different directions, and consequently becoming competitors instead of partners in development, it would be desirable to try to harmonize their commercial laws in such a way as to eliminate the obstacles towards closer economic cooperation within the region.

Business or economic lawyers from the region and the ASEAN Chamber of Commerce could convene to study how the contract laws, especially on sales and agency, could be harmonized. Because of differences in natural resources and economic systems in the region, it would be unrealistic to expect that the commercial laws of the different member-States should have developed the same set of legal rules. It would not be impossible, however, to design some kind of an ASEAN regime of rules specifically applicable to intra-ASEAN commercial relations.

In the same manner, a specific ASEAN Corporation Law could also be developed, applicable to corporations in which all the shareholders would be ASEAN countries or natural persons from the ASEAN region where such company has been established or is to operate.

Most important, however, is the need of a common forum or at least common procedural rules for the arbitration and settlement of trade and investment disputes. No new forum need be set up, as we already have the Asian-African Legal Consultative Committee (AALCC) Arbitration Centre in Kuala Lumpur. If the modified United Nations Commission on International Trade Law (UNCITRAL) rules of that Center are unacceptable, drawing up a set of arbitration rules more in line with the English rules could be considered. Another option would be to leave to the parties [in an arbitration case] the choice from a number of rules, such as those of the UNCITRAL, English, American, Japanese, ICSID, or International Chamber of Commerce (ICC) arbitration rules. By making the procedure flexible (except for a new basic administrative rules) we would be closer to the original informal character of the institution of arbitration, and with no serious obstacle to more frequent use of the AALCC Arbitration Center. In fact, the place of arbitration need not be in Kuala Lumpur. The proceedings could be conducted in any city of the ASEAN, with assistance of the local arbitration board or center.

In the long run, the awards rendered by the AALCC Arbitration Center at places all over the Asean region will develop some kind of ASEAN Commercial Law which may further enhance the region's intra-trade and investment. To promote use of the Center as an ASEAN Center, the ASEAN governments could sign a multilateral treaty for the recognition and enforcement of the awards rendered by this and other ASEAN arbitration boards located within the ASEAN region.

CONCLUSION

Much can be done by Asean lawyers to promote trade and investment in this region. In Indonesia, we have discovered almost too late, that economic and social development is not possible without simultaneous legal development. Perhaps, much progress obtained in the economic sector was undone, because the legal sector was unprepared for such a sudden increase of economic activity.

Indeed, in developing countries such as Indonesia, law should be the tool or infrastructure for social and economic engineering. In such a role, however, it should not be forgotten that any development is meant to serve the needs of people, and that people should not be made mere instruments for the sake of social development. Social and economic engineering through law should always be humanistic, i.e. the law created for humanistic social and economic change must itself be humanistic and equitable.

In conclusion, it may be said that acceleration and promotion of trade and investment can never be achieved, if attempted by government, administrators, businessmen and economists alone, without including lawyers, judges and arbitrators in the process. Indeed, agreements or regulations must be translated into legal terms and written up as legal instruments. For the ASEAN the opportunity is ripe and the need is pressing for a new breed of lawyers, who would be more concerned and committed to the cause of social change through legal development, conscious of public welfare and of future generations.

In this age of interdependence, no nation is able to develop without concern for the outside world whether they be super-powers, newly developed or developing countries. As neighbours in one geographic area, not only does our past draw us together but the future will inevitably exert demands on us for ever-closer social, political and economic cooperation.

For legal experts who would be involved in this development there are enough multilateral treaties and comparative legal studies to learn from. The present task of legal harmonization, albeit on a very modest and limited scale, is much easier than for those lawyers of developed countries, who had the zeal to start from scratch.

It is this writer's hope that research projects be conducted by the ALA Standing Committees or by the different legal research centers in the ASEAN region, to be discussed at the next ALA General Assembly, in order to enable our respective governments to come to an agreement in the next years to come.

NOTES

[1]Jose F. S. Bengzon, Jr. and Adolfo S. Azcuna, *Business Organizations, Foreign Corporations and Transnational Corporations — Philippines* in 4 1980 ASEAN CORPARATIVE LAW SERIES 53, 59 [1982).

[2]Except the Freeport Sulpnur Company of Delaware, U.S.A.

[3]Bengzon and Azcuna, *op. cit*, p. 59

[4]Heliliah Yusuf, *Business Organizations, Foreign Corporations and Transnational Corporations — Malaysia* in 4 1980 ASEAN COMPARATIVE LAW SERIES 19, 25 (1982)

[5]Andrew Ang, *Business Organizations, Foreign Corporations and Transnational Corporations — Singapore* in 4 1980 ASEAN COMPARATIVE LAW SERIES 82, 91 [1982)

[6]*Ibid.*, p. 92 (1982)

[7]Nobpun Muangkote, *Business Organizations, Foreign Corporations and Transnational Corporations — Thailand* in 4 1980 ASEAN COMPARATIVE LAW SERIES 96, 101 (1982)

[8]AMCO ASIA CORP. et al vs The Republic of Indonesia

ASEAN LEGAL ORDER AND FRAMEWORK FOR DIPLOMACY

*Edgardo J. Angara**

I. INTRODUCTION

In 1967, the Southeast Asian nations of Indonesia, Malaysia, the Philippines, Singapore and Thailand united in ASEAN with the avowed aim of accelerating "the economic growth, social progress, and cultural development in the region through joint endeavour . . ." Conspicuous for its absence was the explicit mention of politics and it was the insistence on its apolitical character that immediately earned it the indifference of the international community. Yet, the main impetus for this regional action was political, and its chief credit to date, in fact, has been in the political field.

To illustrate, Indonesia had just ended its *konfrantasi* with Malaysia and Singapore, but the bitterness still remained. Singapore was still smarting from its expulsion from Malaysia. Thailand and Malaysia were still polarised over how to handle the Communist insurgencies on their common border, with each accusing the other of bad faith in their respective efforts. The Philippines still maintained its claim to Sabah and there were rumors that a military solution was not out of the question. It was not surprising then that the international community would not take seriously an organization that explicitly excluded the most critical issues in the region, issues that were political. It was understandable also that the organization would not register any notable achievements in the first

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*President, University of the Philippines

eight years of its existence. Time, however, would prove the soft approach of ASEAN the wiser course.

During those eight years, ASEAN would studiously devote itself to sidestepping potentially explosive political issues even as the pace of regional meetings and exchanges accelerated. ASEAN took on the appearance of a Prime Ministers' club for the harmless exchange of innocuous views. In the area of its avowed aims, principally economic cooperation, ASEAN made very meagre gains. The economies of ASEAN, as yet, are too competitive to achieve complementarity. They have the same principal exports for the same shrinking world market.

A case in point is the ASEAN Industrial Project, whereby the region's governments agreed to set up industrial plants in their respective countries on the basis of comparative advantage. The products of these plants would then enjoy preferential trading rights in the ASEAN region. This was launched in 1980, but the different governments started to back out of the scheme as realization grew that the economics of the region was a zero-sum game.

In spite of its poor record of tangible achivements, interaction through the ASEAN forum continued even as in some circles, the exercise were dismissed as one in futility. In 1975, the wisdom of ASEAN's soft approach was proved. The Communists marched into Saigon and all of Indochina fell under their hegemony. Vietnam swept into Kampuchea with the clearly evident intent of uniting Indochina in the disciplined grip of the largest, battle-tested armed force in the world. It was in the face of this first, truly regional crisis that ASEAN showed its true worth.

With amazing alacrity and unanimity, the ASEAN States condemned the Vietnamese invasion and successfully sponsored United Nations General Assembly resolutions to block the Vietnamese puppet government from assuming Kampuchea's U. N. seat, to

promote a conference on Kampuchea at the U. N., secured an agreement to postpone multinational assistance to Vietnam until it withdrew its troops from Kampuchea, and mobilized an international effort to cope with the Indochinese refugee problem.

Eight years of polite and "useless" discussions had paid off in a remarkable record of achievements. The ease with which the unanimity was achieved in an area of potentially divisive issues had its roots in those long, uneventful years of polite exchanges where the common interest of ASEAN was carefully made to emerge out of the welter of conflicting interests and views.

The Vietnam War and its aftermath was the most critical period of the post-war years. The two superpowers — the U.S. and the Soviet Union — and the most populous nation on earth, China, had converged on the Indochinese peninsula to use a national liberation struggle as the venue for confrontation. The magnitude of the conflict was such that the entire region was expected to be drawn into its vortex. But it did not happen. The ASEAN States held themselves unscathed. One expects that the institutional framework that helped make this possible will earn respect for the ASEAN States and confidence in their ability to resolve their own disputes in the future. I shall return to this later and shall now turn the reader's attention to the nature of that framework and its future configuration.

II. ASEAN LEGAL ORDER

1. *Nature of ASEAN Legal Framework*

ASEAN was established by the Bangkok Declaration of 1967.[1] As envisioned, ASEAN would work to accelerate the economic growth, social progress and cultural development in the region; to promote regional peace and stability; to promote active colla-

boration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields; to provide assistance to each other in the form of training and research facilities in the educational, professional, technical and administrative spheres; and to maintain close and beneficial cooperation with existing international and regional organizations.

The spirit of the Bangkok Declaration provided the impetus for subsequent declarations. In 1971, ASEAN foreign ministers signed the Zone of Peace, Freedom and Neutrality Declaration[2] which set forth the desirability of turning the Southeast Asian region into a nuclear-free zone.

Three additional documents of fundamental effect were signed when the ASEAN heads of government met for the first time in Bali in 1976. The Declaration of ASEAN Concord[3] set forth the objectives and principles of political stability shared by ASEAN countries, and drew up a program of action for region-wide cooperation.

The only treaty, in the strict technical sense of the word, ended into by and between ASEAN member-states is the Treaty of Amity and Cooperation.[4] Signed during the Bali Summit in 1976, it provided for "mutual respect for independence, sovereignty, equality, territorial integrity and national identity; the renunciation of threat or use of force; non-interference in the internal affairs of one another; and the right of every state to lead its national existence free from external interference, subversion or coercion." They are the elements of a balance of power system.

More significantly, the Treaty of Amity and Cooperation drew up a mechanism for the "settlement of differences or disputes by peaceful means." As directed in the treaty, all disputes or situations likely to disturb regional peace and harmony are to be referred to

a High Council to be comprised of a representative at ministerial level from each of the member-countries. The Council is then to constitute itself into a committee of mediation, inquiry or conciliation to resolve the dispute.[5]

Other forms of contracts or agreements have been resorted to by ASEAN which are of equally persuasive effect.

Other declarations include mutual assistance by the ASEAN members in cases of natural disasters,[6] region-wide efforts to combat drug abuse,[7] and the 1984 Declaration on the Admission of Brunei Darussalam as the 6th member of ASEAN.[8]

From the period 1969-1984, Indonesia, Malaysia, the Philippines, Singapore and Thailand entered into 26 multilateral agreements on subjects ranging from the promotion of mass media and cultural activities,[9] to the establishment of a cultural fund,[10] commercial rights of non-scheduled air services,[11] to rescue operations of distressed vessels,[12] preferential tradings among the ASEAN countries,[13] the region-wide industrial complementation project utilizing the resources of each member-country[14] and the establishment of an ASEAN Food Security Reserve.[15]

The areas covered by the agreements reflect the emphasis placed by the Southeast Asian countries on the ASEAN as a vehicle to promote economic development in the individual member countries and the region as a whole. This can best be seen in dialogues, bilateral agreements and protocols entered into by ASEAN with individual countries and other regional organizations. Non-ASEAN countries and regional parties with whom ASEAN has had dealings include Japan,[16] Australia,[17] the United States of America,[18] and with increasing, regularity, the European Economic Community.[19]

However, it is in the political field that the world community has taken notice of the emerging voice of ASEAN. Through press releases, communiques and resolutions, the six Southeast Asian countries have expressed their united stand with respect to the Arab-Israel conflict, the Indochinese refugee problem and the conflict in Kampuchea.

Thus, as can be seen in the above discussion, the basic structure of the ASEAN legal order consists of declarations, agreements and a treaty at the regional level; and bilateral approaches and dialogues at another level.

Within the formal structure, however, are observed — especially at the regional level — instances of informal political arrangements whose value in the pursuit of the realization of ASEAN objectives is inestimable. Although these contracts among the representatives of the ASEAN countries are conducted outside the established instrumentalities of the organization and the official agenda, they are very effective in avoiding misunderstanding and promoting closer relations among the members of the regional grouping.

Taken as a whole, the treaty, declarations, agreements and protocols enumerated above form the foundations for the emerging legal order of the ASEAN.

It has been observed that although none of the above legal instruments may be considered by itself as the ASEAN charter, they serve as its constitutional foundation. What may be developing in ASEAN is an unwritten constitution similar to that of the United Kingdom *sans* a supra-national sovereign.

Be that as it may, the ASEAN legal order — as distinguished from the highly formalized legal regime of the European Communities — may be considered of the soft type. Its legal framework is marked by the conspicuous absence of law-making, law-execution and law-interpretation at the ASEAN level. Early in ASEAN's history, there were moves to establish a formal constitution for the Association. During subsequent deliberations, however, the members agreed that the existing basic documents adequately serve the Association's purposes. All in all, the ASEAN's legal framework points to the nature of the relationship established by the charter members among themselves. As conceived, the ASEAN provides for a little more than bilateralism but a little less than supra-nationalism. The member countries continue to promote their respective national development and national interests within the existing framework. Thus, while membership in the Association achieves coordination and cooperation in political, economic and cultural spheres, it does not diminish the strong sense of national sovereignty of each member.

Existing *regional cooperation programmes* in various spheres within the ASEAN, necessarily stem from the political will of each member country to cooperate. The measure of this political will lies in the extent to which the member countries are willing to to pool resources, share opportunities, and mutually explore areas for cooperation. At present, however, it is clear that the final measure for cooperation within the ASEAN is in consonance with national priorities.

III. FRAMEWORK FOR DECISION-MAKING AND DISPUTE SETTLEMENT

ASEAN does not have a clearly articulated legal order as this would entail the member countries surrendering a measure of na-

tional sovereignty in favor of the regional community. ASEAN is not a supranational agency whose pronouncements are automatically binding on the member countries. Neither is it a collegial body where divisive issues are settled by "dividing the house."

Instead, ASEAN has to meet the challenges hurdled at it and its member countries and struggle to keep its programs and viability intact through the consensus-model of decision-making.

1. *Consensus Model*

The consensus model is based on the concepts of *musyawarah*, defined as a process of decision-making through discussion and consultation and *mufakat*, the unanimous decision that is arrived at.

Applying these concepts to the regional and international levels of decision-making, ASEAN, negotiations are done on the basis of accommodating as much as possible everyone's positions. Every effort is made to maintain harmony and conciliatory relationships among the participating countries representatives in the course of negotiations.

The application of these concepts entails continuous consultations and discussions until a viable consensus is arrived at. It is a lengthy and time-consuming process but is regarded as a key to the longevity of the organization and the strength of its collective resolutions.

2. *Formal and Informal Interactions*

The consensus approach to decision-making is carried out either through formal procedures or through informal interaction.

The approach tends to rein in the impetuous and push forward the conservative laggards in a meeting, bringing their positions closer to one another. This approach is illustrated by several examples.

a. *The Case of Kampuchea*

In the case of Kampuchea, ASEAN reached a consensus that Vietnam's military support for Heng Samrin was a violation of the principles of territorial integrity as well as national self-determination. The consensus also was that a Vietnamese puppet government in Kampuchea strengthened the Vienamese-Soviet hand in Southast Asia, thereby upsetting the balance of power in the region and inviting instability.

In 1981, through informal and formal forums, member States reached a consensus that, in view of the Pol Pot regime's genocidal record, only a coalition among the Sihanouk, Son Sann and Pol Pot forces would be acceptable internally in Kampuchea and externally by the international community. The ASEAN consensus began with Singapore and Thailand discussing informally with each other and then proceeding to invite Sihanouk and other groups' representatives to a secret meeting in Singapore.

As a result of the Kampuchean Coalition an understanding with Vietnam regarding the settlement of the Kampuchean issue became an even more distant prospect. It was then decided to use another informal approach: the much-publicized *proximity talks*. The essential feature of these talks had the Coalition and ASEAN Representatives sitting in one room at an agreed venue, with the Vietnamese and the Heng Samrin group in a nearby room. A courier then shuttled between the two rooms making possible an exchange of views. Such informal talks avoided the effect of recognizing the legitimacy of Heng Samrin Government while the whole question of Kampuchea was being discussed.

b. *The Sabah Dispute*

The dispute between Malaysia and the Philippines over Sabah illustrates clearly how bilateral meetings of Heads of States and

informal discussions can set in motion a process towards the solution of a difficult historical problem. Briefly, the case dates to colonial times (19th century) when the Sultanate of Sulu acquired Sabah from the Sultanate of Brunei and, in turn, leased it to a Hongkong-based British company, the Dent and Overbeck Company. The Sultanate later in February 5, 1962, named the Philippines its successor-in-interest. The Philippines filed its claim of ownership in June 22, 1962.

Initially, the parties held bilateral talks and negotiations to resolve their conflicting claims. These negotiations ended in Bangkok in 1968, with the question of Sabah's ownership still unresolved.

ASEAN's formation in 1967 gave the disputing parties "an informal, flexible, and non-adversary forum where issues were discussed and views aired; decisions were not called for, thus producing neither winners nor losers... ASEAN provided possibilities for a trade-off."

The Sabah experience to date shows that at the ASEAN level, disputes are being tackled through a mix of bilateral negotiations, informalism and diplomacy. It should be mentioned, however, that the Philippines, at one stage, suggested bringing the issue before the International Court of Justice — but only as a last recourse.

On the other hand, the Philippine claim to Sabah remains a ticklish issue, slowing down many areas of the ASEAN cooperation programmes. For instance, the aversion of Prime Minister Mahathir Mohammad of Malaysia to set foot on Philippine soil until a satisfactory resolution of the Sabah claim, has held off the holding of the ASEAN Third Summit.

The situation improved somewhat last year when, during Brunei's independence day celebration, President Ferdinand E. Marcos of

the Philippines and Prime Minister Mahathir Mohammad of Malaysia met for the first time.

An additional point of conflict over Sabah surfaced several months ago when Filipino pirates robbed a bank in Lahadatu, East Malaysia, which resulted in a retaliatory raid by Malaysians in Mandanas Island, Tawi-Tawi Province, South Philippines. This particular irritant was toned down through an informal exchange of information and national assessments of the incident. It should be noted, though, that the incident had a high potential for crisis.

c. *The Case of Muslim Secessionism in the Philippines*

The response of the ASEAN in general to the Philippine Muslim secessionist problem has been characterized by recourse to bilateral talks and informal negotiations and discussions. These obviously exclude the formal talks on Muslim secessionism held during Islamic Conferences.

The Philippines has managed to cope with the situation through frequent consultations individually with the governments of Brunei, Indonesia and Malaysia. The ASEAN spirit of unity and cooperation has been present during Islamic Conferences where Muslim nations of ASEAN cushion the Philippines from the negative impact of Moro National Liberation Front (MNLF) propaganda. The latest occasion was the 15th Islamic Confernce in Yemen last year.

At the 1984 conference, the MNLF had submitted a draft-resolution calling for the grant of "authority to establish liaison offices and conduct campaigns for financial and humanitarian assistance on the mass level." This was rejected by the Bruneian, Malaysian and Indonesian delegations inspite of their expression of sympathy for the MNLF struggle.

The case of Muslim secession remains a sensitive issue, especially when related to the plight of the 250,000-300,000 Muslim refugees in Sabah, East Malaysia. Any complications, though, of the basic problem of implementing Muslim autonomy have so far been avoided by direct diplomatic and political consultations between Philippine official representatives and those of other Muslim countries, including Brunei, Malaysia and Indonesia.

d. *The Interrelated Cases of Communist Party-Malaya, Malay Ethnic Nationalism in South Thailand, and Border Problems Between Thailand and Malaysia*

The complex and interrelated problems posed by the Communist Party Malaya (CPM), Malay ethnic nationalism in South Thailand and Thai-Malayan border problems were also partially solved through bilateral talks and agreements.

The problems involved the activities of the Communist Party Malaya (CPM) since the independence of Malaya in 1957. The CPM has been constantly on the run from Malay troops patrolling the Thai-Malaysian border. Malaysia accused Thailand of tolerating the CPM cadres. Relations between them soured.

Malaysia believed that the Thais were coddling the CPM to neutralize the ethnic Malays in Thailand. According to this thinking, the incorporation of the ethnic Malay Thais in the CPM would divert their movement from its separatist aims in Thailand.

The interrelated problems arising from CPM activities on the border and in Thai territory and Thai-Malay separatist organizations, compelled the two countries to look across each other's borders for possible solutions or problem-mitigating mechanisms. Bilateral agreements between the two neighboring countries in 1970 and 1977 served to moderate the mutual acrimony.

An aggravating factor, however, surfaced a few years ago. In 1979, the punitive Chinese attacks on Vietnam's northern border diverted Vietnamese attention to the north, away from the Thai border. Malaysian policymakers interpreted the event as the Thai payoff from the Chinese for holding back from the joint border patrols it had agreed upon with Malaysia. The CPM is a staunch Chinese ally. Perhaps as a result of this perception, Malay separatist and nationalist organizations within Thailand issued damaging statements about Thailand's policy toward Thai-Malays at the Islamic Conference. Thailand has now sought direct bilateral talks with Malaysia and Indonesia, too, which has had a deep suspicion of China since the Coup.

e. *The Case of Competing Claims on the Spratley Island Group*

The Spratleys is a group of islands sprawled along the South China Sea, north of Sabah, east of Vietnam and west of Palawan. Its strategic location has made it the object of competing claims among Malaysia and the Philippines as well as China, Taiwan and Vietnam. Recent discovery of its possibly rich seabed resources has only increased the intensity of these claims.

Efforts to cool tensions arising from the competing claims have focused on *conciliation* and *cooperation*. When Chinese deputy vice-premier Li Hsien Nien visited the Philippines in 1978, President Marcos used the occasion to announce that Taiwan and the Philippines had agreed to resolve their competing claims over the Spratleys in a spirit of friendliness and cooperation.

A basically similar agreement was forged earlier between the Socialist Republic of Vietnam and the Philippines. Both Foreign Minister Nguyen Duy Trinh and Premier Pham Van Dong reaffirmed Vietnam's commitment to this agreement when they visited Manila in January and September of 1978, respectively.

Vietnam and the Philippines have agreed that: they will not allow their territories to be used as grounds for staging aggression against one other; they will mutually refrain from acts of subversion or force; and both remain committed to peaceful settlement of any disputes between them.

The Philippines' differences with Malaysia, however, have proved more difficult to resolve. Malaysia recently staked her claim on some portions of the Spratley Islands — also claimed by the Philippines — by publishing two maps in 1980 that include the disputed rocks as part of Malaysia. Four months later, a Malaysian naval vessel accosted some Philippine boats fishing there.

There is great apprehension in the two capitals that the dispute may deteriorate but both governments have studiously avoided the rhetoric of confrontation.

On the other hand, the move of the two countries to downplay their respective national interests in favor of maintaining the viability of the regional organization is a good indication of the prospects of conciliation and negotiation, to finally settle the dispute.

IV. CONCLUSION

George Kennan, the foremost American thinker on foreign affairs, wrote in his *Memoirs* that he "had little confidence in the value of written treaties of alliance generally."

"I had seen too many instances," he said, "in which they had forgotten, or disregarded, or found to be irrelevant, or distorted for ulterior purposes when the chips were down. I had no confidence in the ability of men to define hypothetically in any useful way, by means of general and legal phraseology, future situations which no one could really imagine or envisage. What was needed, it

seemed to me, was a realistic consciousness of where one's vital interests really lay." Given that, the appropriate and viable foreign policy would follow. Kennan deplored that "mixture of arid legalism and semantic pretentiousness that so often passes . . . for statesmanship. I had no patience with that sort of thing then; I have none today. What we need, in order to make an effective foreign policy, is action — not promises to act; decisions — not legal undertakings or attempts to generalize future conduct."

It is the hope of this writer that Kennan's spirit of skepticism and realism will infuse the ASEAN experiment at regional cooperation. The ASEAN countries have just emerged from the period of colonialism. Their respective national interests have yet to be clearly defined. While one that holds great economic promise, the region is also one that is very fluid. Its apparent stability is a function of the common threat that the ASEAN countries see in the growing Soviet naval presence, the exuberant militarism of Vietnam and the nervousness of an increasingly outflanked China, This apparent stability masks many divergent, if not conflicting, interests among the ASEAN member states.

The future development of the ASEAN "legal order," if that loose arrangement of declarations can be called such, should, perhaps, proceed on the present basis of continuing interaction regardless of the small measure of tangible achievements. It is important that the men and women who formulate or implement the various ASEAN foreign policies learn to communicate freely with each other and, over the years, develop the ability to sense unspoken feelings and intents. It is misunderstanding and ignorance, rather than conscious design, that more often explains the outbreak of conflict among nations.

Then again, I must sound a note of realism. Circumstances change for nations as for individuals. What they are content with

as answering their needs today, tomorrow become constraints that frustrate what they then deem essential aspirations. Change is the law of international relations. The chief aim of ASEAN should be the maintenance of the balance of power in the region, with the ends that balanced power has traditionally sought: the independence of nations and the prevention of hegemony on the part of any one of them. We should be aware that the instruments of balance include conflict when all else fails. It is important that we never lose sight of this so that none are taken unawares and no impossible hopes of permanent peace are raised. The balance of power was never intended to guarantee peace — only national freedom.

All that said, ASEAN's continued attempts to forge a clearly articulated "legal order" should be encouraged — not because we shall finally arrive at an international regime where national maladjustments can be resolved as peacefully and definitively as individual maladjustments are in civil courts, but because the effort may forge a common universe of discourse among the representatives of the ASEAN states so that their respective definitions of national interest will never be misunderstood and common grounds for collective action will be readily attained. Eight years of ministerial "junketeering" among the ASEAN states made possible their astoundingly swift recognition of the common threat that Vietnam posed and their equally remarkable unanimity on the matter.

NOTES

[1] 10 YEARS ASEAN 14-6 (1978); 1 VITAL ASEAN DOCUMENTS, 1967-1984, 27-29 (Quisumbing & Pangalangan, ed., 1985) hereinafter cited as V.A.D

[2] Otherwise known as the Kuala Lumpur Declaration, 1 V.A.D. 30-1 (1985).

[3] 10 YEARS ASEAN, 111 (1978); 1 V.A.D. 33-5 (1985).

[4] 10 YEARS ASEAN, 118-123 (1978); 1 V.A.D. 143-5 (1985).

[5] *Id.*, Chapt. IV, arts. 13-17.

[6] ASEAN Declaration for Mutual Assistance on Natural Disasters, Manila, June 26, 1976, 10 YEARS ASEAN 74-5 (1978); 1 V.A.D. 37-8.

[7] ASEAN Declaration of Principles to Combat the Abuse of Narcotic Drugs, Manila, June 26, 1976, 10 YEARS ASEAN 72-3 (1978); 1 V.A.D. 39-40 (1985).

[8] 1 V.A.D. 50 (1985).

[9] Agreement for the Promotion of Cooperation in Mass Media and Cultural Activities, Cameroon Highlands, December 7, 1969, 1 V.A.D. 55-56 (1985).

[10] Agreement on the Establishment of the ASEAN Cultural Fund, Jakarta, December 2, 1978, 1 V.A.D. 81-2 (1985).

[11] Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services Among the Association of Southeast Asian Nations, Manila, March 13, 1971, 1 V.A.D. 57-9 (1985).

[12] Agreement for the Facilitation of Search for Ships in Distress and Rescue of Survivors of Ship Accidents, Kuala Lumpur, May 15, 1975, 1 V.A.D. 63-5 (1985).

[13] Agreement on ASEAN Preferential Trading Arrangements, Manila, February 24, 1977, 1 V.A.D. 71-7 (1985).

[14] Basic Agreement on ASEAN Industrial Projects and Supplementary Agreements, Kuala Lumpur, March 6, 1980, 1 V.A.D. 99-105 (1985).

[15] Agreement on the ASEAN Road Security Reserve, New York, October 4, 1979, 1 V.A.D. 90-2 (1985).

[16] 1 V.A.D. 370-2 (1985).

[17] 1 V.A.D. 296 (1985).

[18] 1 V.A.D. 375-80 (1985).

[19] 1 V.A.D. 301-315 (1985)

SOME THOUGHTS ON THE LEGAL PROTECTION OF COMPUTER SOFTWARE IN ASEAN

*Richard Magnus**

INTRODUCTION

In this article, the writer discusses some of his thoughts on the need for legal protection of computer software in the ASEAN countries. The writer presents an overview of the international trends in the marketplace, the national development of such protection in some of the major countries, the existing international conventions, which are relevant to such protection, and the types of legal protection open to ASEAN countries.

INTERNATIONAL MARKETPLACE

An August 1984 IBM study[1] showed that in a twenty-five year period, computer programs or software have grown into a dynamic industry and it has been estimated that in 1983 the worldwide revenue was US$13 billion. By 1987, it is projected to be US$45 billion. Worldwide, there are 9,000 firms creating software which will probably increase to 17,000 by 1987, and that these do not include the thousands of enterprises which are distributing these programs around the world. By year end 1983, there were about 40,000 programs being used worldwide, and 1,000 new programs enter the marketplace each month. IBM expects this number to increase over the next five years.

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Seventy percent (70%) of the expense related to developing a data processing system is spent on software. Conservatively, the percentage of revenue for programs as a percentage of total revenue from data processing will increase from 10% in 1983 to 30% in 1987.

As the computer software industry is interrelated with the data processing equipment field, and as more programs are developed, there will be more users of computers — ranging from super computers to personal computers.

The need for legal protection of computer programs should be seen not only in terms of the large-scale investment in computer software but also from the viewpoint of the small software enterprises or individual creator of software. The existence of strong legal protection would *encourage the dissemination of their creations and enable such creators to avoid duplication of work.* Without such dissemination, numerous programmers may spend considerable time and effort in order to accomplish, in parallel work, the same objective; although the programs created by them may be different, any one of those programs would probably fully accomplish the said objective. In any case, legal protection will encourage exploitation of software for purposes other than internal use.[2]

The development of the computer industry will have its impact on ASEAN countries. Singapore has deliberately embarked on a policy of developing its computer industry. It is estimated that the computer software and services industry in this city State, has the potential to grow into a S$1,000 million industry by 1990 with S$500 million being attributed to the sale of software.[3] In Singapore, in 1982, 1,215 units of micro, mini and mainframe were sold. In 1984, 22,600 units were sold. This industry is growing in Singapore and would continue to grow. A National Computer Board was established in September, 1981 to co-ordinate the implementation of the computerization policies at a national level. Singapore

then had 800 trained computer professionals, which pool has now increased to 4,000 with a target of 8,000 computer professionals by 1990.[4] This industry was given an added impetus with the establishment, on 23rd July 1985, of a S$100 million Venture Capital Fund. This Fund is to promote investments in high technology development projects to effect the transfer of the state-of-art technologies from other countries to Singapore. Information technology is one such area.

There is as yet no study made of the size of the computer software market in the other ASEAN countries. Such a study is worth undertaking.

DESCRIPTION OF COMPUTER PROGRAMS

The World Intellectual Property Organisation's (WIPO) Model Provisions on the Protection of Computer Software, covers software consisting of the computer program, the program description, and supporting material. The WIPO definitions of each of these are:

> *computer program* means a set of instructions capable, when incorporated in a machine-readable medium, of causing a machine having information processing capabilities to indicate, perform or achieve a particular function, task, or result;
>
> *program description* means a complete procedural presentation in verbal, schematic or other form in sufficient detail to determine a set of instructions constituting a corresponding computer program;
>
> *supporting material* means any material, other than a computer program or a program description, created for aiding the understanding or application of a computer program, for example, .problem descriptions and user instructions.[5]

Section 101 of the amended United States Copyright Act contains the following definition:

> "A 'computer program' is a set of statements of instructions to be used directly or indirectly in a computer in order to bring about a certain result."

On the other hand, Section 10(1) of the 1984 amendment to the Australian Copyright Act 1968 defines the term as follows:

> "computer program" means an expression, in any language, code or notation, of a set of instructions (whether with or without related information) intended, either directly or after, either or both of the following:
>
> a) conversion to another language, code or notation;
>
> b) reproduction in a different material form.
>
> to cause a device having digital information processing capabilities to perform a particular function.

Basically, the common denominator of a computer programme is that it is being used with a computer in order to accomplish a given task.

Programs are written in programming languages that are generally chosen for their suitability for given tasks. A programming language has its own syntex and semantics and is a system of symbols in which the concepts of the program can be expressed in a form the computer can understand. The most primitive notation, the one which actually drives a digital computer, is binary notation, usually used as a "machine language." This is represented as a string of Os and Is — the binary digits of "bits" which are the alternatives provided by the language and which correspond in magnetic notation to the absence or presence of a magnetic signal on a small area of a medium such as magnetic tape, disc or drum. These are the symbols to which the computer hardware responds.

The most widely available high-level language is Fortran, designed principally for mathematical and scientific applications. Fortran was originally developed by IBM and is implemented on almost all computers.

The conventional symbolic programming language, which is quite analogous to a musician expressing his thoughts in the staff notations used for music, is known as *source code* (algorithm). This source code is easily understood by another programmer-operator. The programmer then converts the source code into another form known as *object code*, which is capable of being copied into a computer for execution.

Programs are generally executed by computers in object code and may be fixed in many different forms, such as magnetic tape, magnetic disk, Random Access Memory (RAM), Read Only Memory (ROM), diskettes, etc. Instructions on how to use the program are embodied in manuals.

Software, therefore, consists of source code, object code, and related documentation. It is therefore essentially an intangible asset. Being so, it is not "sold" in the sense that a tangible asset can be sold. Rather, programs are normally licensed to an end-user or to a distributor by the creator throuh some form of contractual relationship. This intellectual property will require protection.

FORMS OF LEGAL PROTECTION[6]

There are two forms of legal protection which are specifically directed to the results of the intellectual creativity in computer software. These are: protection under the laws of patent or under the laws of copyright. In addition, there are other branches of law which can provide means of protecting computer software especially where it constitutes a trade secret. Extra-legal protection

may also be effected in one or two ways:

a) by structuring the commercial environment so as to reduce the incentive to misappropriate; and

b) by using technology so as to render it more difficult to misappropriate.

PATENT PROTECTION

Patent protection may be useful where the program has a fairly long and useful lifetime, and its value resides in its algorithm, which is a step-by-step procedure for solving of problems under all circumstances. However, in many countries, computer programs and other items of computer software, in particular algorithms, cannot be regarded as patentable inventions. The European Patent Convention, for example, contains an express provision to that effect.[7]

In most countries, the question of patentability cannot be answered with any degree of certainty. Moreover, even if patent protection were generally available, it would probably cover only a minute proportion of computer programs since it is considered that only in very few cases (perhaps 1%) would a program have sufficient inventiveness to satisfy the requirements of patent law, although a large amount of time, effort and resources may have been devoted to its creation. There are also serious practical difficulties to be taken into account: difficulties in conducting the examination relating to the novelty and inventiveness of a computer program, in establishing the documentation on the prior art and in finding qualified examiners. One further difficulty is that, under patent procedures, any person has access to a full disclosure of the invention enabling a person skilled in the art to make the patented products or use the patented process; in view of the relative difficulty of detecting misappropriation of a computer pro-

appropriation of a computer program, it could be argued that such an unrestricted disclosure to the public is not desirable; and yet, to make an exception in the case of computer programs might prejudice a fundamental principle of patent law which is disclosure to the public.

COPYRIGHT PROTECTION

Whereas patent law protects the technical idea underlying an invention, copyright law focusses on protecting the form in which ideas are expressed, although protection is not limited to that form. Thus, copyright protection would seem to be particularly appropriate for computer software as a whole (and not merely computer programs) since a large amount of it consists of descriptive or explanatory matter; even a computer program (consisting, for example, of magnetic tape) is a form of expression — of the ideas contained in the software leading up to the program. In most cases the intellectual creativity in computer software resides in the skill and effort used to make those ideas "understandable" to a computer, as economically and as effectively as possible. However, although some kinds of computer software (especially those in verbal form) are clearly protectable under copyright laws, experts disagree on whether other kinds (particularly a computer program, on magnetic tape for example) can be considered a literary, artistic or scientific work, which are the traditional subjects of copyright protection. Moreover, such protection may be of very limited value since it essentially covers only copying (or related acts such as translation or adaptation); thus; in itself, the use of a program to operate a computer cannot be prevented by copyright law (just as the making of a cake cannot be an infringement of the copyright on the recipe). It is essential that use in a computer should be covered by the rights in computer software; it is, in fact, possible that copyright law can provide a remedy in this case since it is probable that the use of a program always involves its copying in the computer memory.

OVERVIEW OF THE LEGAL PROTECTION OF COMPUTER SOFTWARE IN THE WORLD

NATIONAL DEVELOPMENT OF MAIN COUNTRIES

United States of America

In the USA, the matter is governed by Copyright Act, 1980 and the many cases interpreting the Act. The position is explicit that computer software is copyrightable in all its forms of expressions. The main case is *Apple Computer, Inc.* v. *Franklin Computer Corp.*[8] wherein the issue of software in chip form was settled in favor of copyrightability of software contained in firmware.

Congress had set up a special commission called "The Commission on New Technological Uses of Copyrighted Works" (CONTU). This Commission, which comprised experts of great renown, submitted after three years' work, a detailed Report to the President of the United States and to Congress. The suggestions made by the Commission start with the following recommendation:

> "The new law should be amended to make it explicit that computer programs to the extent that they embody the author's original creation are subject matter of copyright."

It is a characteristic feature of American legal thinking that recourse is made to the well-known constitutional clause, according to which Congress has the power to promote the progress of science and useful arts by granting exclusive rights for a limited period of time. If anything, it is computer programs and program descriptions, which are of vital importance for the progress of science and useful arts. Programs are therefore writings within the meaning of U.S. Law; they can be read, no matter whether directed to the results of the intellectual creativity in computer

The amendment, as recommended by CONTU, was adopted by Congress, and put into effect by Public Law no. 96-517 dated 12 December 1980, supplementing section 101 of the Copyright Act (definition of the computer program) and revision of section 117 (limitations of exclusive rights in computer programs). In view of this new legal situation, it is beyond doubt that United States computer program in principle are protected by copyright law under the same conditions as other literary and scientific works.

In the meantime, the Federal courts have started exploring the new territory of computer programs, video games, ROMS and PROMS. The Federal court decision today has revealed a clear tendency on the part of the courts that they are willing and prepared to enforce the protection of computer software intended and afforded by the 1976 Copyright Act as amended, i.e. by accepting that computer programs, whether source or object code, are original works of authorship that are fixed in a tangible medium of expression, even if only embodied in a ROM on a silicon chip; and also that copying a copyrighted program from one data carrier to another, e.g. from one ROM to another ROM, constitutes an infringement of copyright.

United Kingdom

In the United Kingdom, a reform of the existing Copyright Act has been under way for a number of years. For that purpose, a special Committee to Consider the Law of Copyright and Designs was set up, which prepared the Whitford Report that was presented to Parliament in 1977. The Report did not recommend the introduction of special legislation for the protection of computer programs. The term "literary works," according to the Report, is broad enough to encompass computer programs, irrespective of whether the programs are directly perceivable to human senses or only with the aid of a device. The Whitford Report has been widely accepted. This applies in particular to the study presented by British Government in 1981, the "Green paper," which is to

be the basis for a revision of the 1956 Copyright Act. Although the Green Paper does not adopt the Whitford Report in its entirety, it explicitly suggests in conformity with the Whitford Report the recognition of computer programs as being protected by copyright. The very clear and precise statement of the "Green Paper" reads as follows:

> "It may be questioned whether copyright is the right vehicle for the protection of programs. However, as Whitford remarked, it is probable that programs are already protected under the 1956 Act and the Government accepts that there is much to be said for dealing with programs under copyright law, since the essential need is for protection against copying. To remove any uncertainty that may exist it is proposed to make explicit in new legislation that computer programs attract protection under the same conditions as literary works. In these circumstances considerations such as term and ownership, and, indeed, the basic question of whether a program possesses sufficient originality to attract copyright protection, will apply to programs in the same way as to other copyrighted works."

Although there have been no cases decided in point in the United Kingdom on the protection of computer software and the copyrightability thereof, there have been several cases dealing with interlocutory injunctions and Anton Piller orders (an *ex parte* order which allows for the inspection of a defendant's premises for infringing material), which show a clear judicial trend that computer software is copyrightable in the UK in all its forms of expression. The main cases are a *Gates* v. *Swift*[9] RPC and *Sega Enterprises v. Richards.*[10]

The recent 1985 amendment to the UK Copyright Act protects computer software.

Hong Kong

Hong Kong, being a colony of the United Kingdom, follows the UK Copyright Act of 1956. There has been only one case in Hong Kong, *Atari Inc. v. Video Technology*, which makes it unclear whether software in object code form is copyrightable.

FEDERAL REPUBLIC OF GERMANY

In the Federal Republic of Germany, the WIPO Model Provisions were the subject of a thorough analysis by the German Association for Industrial Property and Copyright Law. A special committee issued comments that were published in 1979 GRUR, and represented very important contribution to that question. The Association, far from favouring special protection for computer programs, recommends the application of copyright law as it stands. In late 1981, the Federal Ministry of Justice has, in response to the WIPO Model Provisions, taken a position which is substantially on the lines of the paper submitted by the German Association for Industrial Property and Copyright Law.

Considering the generally positive opinion in German literature on copyright as well as the above described developments, those interested in computer software have largely relied on computer programs enjoying copyright protection. Until recently, however, there were no court decisions which dealt with copyright in computer programs. But recently several decisions of courts of first instance have been given which arrive at different conclusions.

In a decision of May 21, 1981, the Kassel District Court, without giving any particular reasons, held that the programs in question in the field of building statics enjoyed copyright protection and ordered an injunction against the defendant for copyright infringement. The Mannheim District Court, on the other hand, in its decision of June 12, 1981, expressed the opinion that computer programs as a rule are not eligible for copyright protection, lacking intellectual-aesthetic substance.

In a judgment of July 13, 1982, the Mosbach District Court held that computer programs, contrary to the opinion of the Mannheim Court, are throughout susceptible of copyright protection and, to the extent they represent a personal intellectual creation, actually enjoy copyright protection, without any aesthetic substance whatsoever being required.

Finally, the most recent decision on copyright protection of computer software, handed down on December 21, 1982 by the 7th Chamber of the Munich District Court (Landgericht Munchen I) specializing in intellectual property matters, is worthy of particular attention. The Court had to decide a lawsuit brought by a large American software house against a German competitor, based *inter alia* on infringement of the copyright in a computer program called "VISICALC" and widely marketed by the plaintiff. The Court, allowing the action for copyright infringement, concludes that computer programs are to be regarded as literary works and representations of a scientific or technical nature and, therefore, unrestrictedly eligible for copyright protection. In assessing whether a program meets the requirement of being a personal intellectual creation, the Court refers particularly to the substantive elements of programs in which creativity may find its expression, namely the collection, selection, arrangement and formation of the matter in question, *i.e.* information and instructions, accepting that software development provides ample scope for personal creative design. Consequently, the Munich judges held that the plaintiff's program "VISICALC" as a comparatively complex program product having some 10,000 instructions as well as high quality and originality, as shown by the evidence submitted by the plaintiffs, was protected by copyright and infringed by the defendants, who had copied the program from a diskette of the plaintiffs onto other discettes and had then distributed them as their own products.

Japan

On December 9, 1983, the Subcommittee for Improvement and Strengthening the Foundation for Software for The Industrial Structure Council Information Industry Committee, sponsored by the Ministry of International Trade and Industry (MITI) published a Proposal entitled "AIMING TOWARDS ESTABLISHMENT OF LEGAL PROTECTION FOR COMPUTER SOFTWARE". This proposal argues for the elimination of existing legal protection for software under the present copyright law of Japan and to substitute therefore a new law based primarily on industrial property law concepts which borrow provisions from the patent law of Japan. Accordingly, the legislation proposed by this MITI Sub-Committee sets for Japan a divergent course from the rest of the world. This is despite the fact that the Japanese courts have, in the *interim*, the main case of which is the *Taito Enterprises* (1982), Tokyo District Court Decision, decided that computer software is copyrightable in all its forms of expression. The legislation proposed by this Sub-Committee, to be tentatively called "The Program Rights Law" aims at the promotion and protection and use of programs in order to encourage development, distribution and such use:

(a) Both the source code as well as the object code would be protected for a period in principle of about 15 years. However, other software related items such as flow charts, manuals, ideas and other documentation would not be protected under this law (presumably under Copyright Law).

(b) Those programs which are now widely used and customarily without charge would not be protected nor would other programs, the rights to which are deemed to have been abandoned.

(c) The entire basis of the MITI proposals is designed

to achieve a balance between the interests of software developers and those of users.

(d) The system also calls for registration and deposit with examination formalities and not to grant protection for computer programs which are in the public domain. The compulsory registration of programs is to establish official proof of the rightful developer, the period of protection to be afforded, and to prevent "investment duplication" by requiring public notification of the functions of programs so registered. In addition, this official proof will help lead to speedy resolution of disputes.

(e) In addition to this, the MITI proposal recommends a compulsory licensing mechanism for software, based on the provisions of the Japanese patent law. The objective is to enhance efficient use of programs. The compulsory licensing would apply in cases where:

(i) a program is produced using an existing program or a patent invention;

(ii) it is necessary, in the public interest; and

(iii) there is non-working of the program.

(f) The proposal also recommends that standards be established for basic programs to which software products are linked, in order to avoid duplication of investment and enhance efficient program usage.

(g) In order to protect users, the MITI Report recommends that the name of the producer of software products be identified by affixing indicia on the product, and also show the content, function and conditions for use for the protection of the user.

(h) In addition to these rights, there is also the right to prohibit leasing of the program as a business and the right to prohibit unauthorised copying.

(i) Furthermore, in respect of the moral right of the author, the Report is of the view that there is no reason to protect the personal interest of an author of a program when a program is compared with other economical assets.

(j) The proposal recommended that progress be placed in the public domain after recovery of investment.

(k) In respect of the right of modification, the proposal states that it is necessary to specifically define the rights of the developer of existing products when modifications are made by third parties.

On the other hand, the Ministry of Cultural Affairs in its Report, as well as the Report by the Japanese Software Industry Association, May, 1983, prefers that computer software be protected under the existing Japanese Copyright Actt of 1970.

Australia

Current Australian Law, based on the 1984 amendment to Australian Copyright Act 1968 and the May 1984 appellate case of *Computer Edge v. Apple Computer Pte Ltd,* makes computer software copyrightable in all its expression.

The Act ends the state of uncertainty regarding the legal protection of computer software which has arisen following the decision in the Federal Court last December that certain categories of computer software were not protected under the Copyright Act.

France

In France, two cases, the main one of which is *Apple v. Sègimex* [11] has interpreted the Copyright Law of 1957 to be that computer software is copyrightable in most, if not all, forms of expression.

In *Societe Babolat Maillot Witt v. P.* decided on November 2, 1982, the Paris Court of Appeals held that application programs are original intellectual works which may be protected under French copyright law, stating:

> "The development of an application program for a computer is an original intellectual work in its composition and expression, which go beyond simple, automatic and constrained necessary mechanisms. Indeed, programmers, like translators, must choose among diverse methods of presentation and expression, and their choice thus displays the mark of their personalities."

Thus, the court held that the applications at issue were copyrightable.

South Africa

In South Africa, the only case, *Northern Office Micro Computers* v. *Rosenstein* (1981), which interpreted the Copyright Act of 1980, is reasonably clear that software is copyrightable in most, if not all, forms of expression.

Brazil

Brazil has passed a Bill amending the Copyright Act, allowing for the protection of computer programs on the basis of copyright. This law, however, only protects computer program made by their own nationals.

South Korea and Taiwan

South Korea and Taiwan have tightened their copyright laws, indicating therefore that they are seriously thinking of protecting computer software.

INTERNATIONAL DEVELOPMENT

WORLD INTELLECTUAL PROPERTY ORGANISATION (WIPO)

At the recent WIPO Conference on 'Technical Questions Relating to the Legal Protection of Computer Software', Canberra, April 2 to 6, 1984, an attempt was made to define the content of computer programs. There was no unanimous agreement of what constituted a computer program, but a general agreement that a computer program is a set of instructions intended to cause the information processing device to achieve certain results. This recommendation of experts would be submitted to the governing body of WIPO to work out the legal regime for the protection of computer software. WIPO, together with UNESCO, will in 1985 hold a Conference to discuss a legal regime in which legal computer software should be protected.

WIPO has also drafted a model legislation in 1978 called "The Model Provisions on the Protection of Computer Software'. In June, 1983, implementation of a treaty specifically dealing with international protection of software was proposed. However, the opinions of the major nations represented was that the adequacy of protection under existing treaties should first be discussed, and that no discussions be made on the special treaty until this is being done. It is not anticipated that an agreement on this matter would be reached by the major nations.

BERNE CONVENTION/UCC

There are two Conventions which are of relevance in this area. These are the Universal Copyright Convention (UCC) and the Berne Convention for the Protection of Literal and Artistic Works. The United States is a signatory to the UCC, but not to the Berne Convention.

Although both the UCC and the Berne Convention contain certain minimum protections which member nations must accord eligible works of nationals of other member nations, in general, both Conventions merely obligate member nations to accord copyright proprietors from other member nations the same protections which they grant their own nationals.[12] Moreover, even where the treaties require member nations to grant certain minimum rights, such as the right of translation, the precise nature of those rights varies widely among member nations. Thus the scope of copyright protection which may be obtained under the treaties will depend in large part on the substantive laws of nations where protection is sought, just as parties claiming protection under the treaties must bring an action or actions in the courts of those nations.

Relationship between the Berne Convention and the UCC

(A) *Priority of Conventions.* As between countries which have ratified or acceded to both the Berne Convention and the UCC, the Berne Convention will be applied.[13]

(B) *Obtaining Protection under Both Treaties*

(i) *Nationals of Dual Convention Countries.* Where the author of a work is a national of a country which has acceded to or ratified both treaties, protection is automatic under both treaties, assuming proper notice is affixed as required by the UCC.

(ii) *Nationals of Single Convention Countries.* Where the author of a work is a national of a country which has acceded to or ratified only one of the two treaties, protection would be available under both treaties if the work:

(a) is first published in a country which is a member of both Conventions;

(b) is published simultaneously in two countries, one of which is a member of each of the two Conventions; or

(c) is first published in a country which is a member of the Convention of which the author's country is not a member.

(iii) *Nationals of Non-member Countries.* Where the author of a work is a national of a country which has not acceded to or ratified either Convention, protection would be available under both treaties, if the work:

(a) is first published in a country which has ratified or acceded to both the Conventions; or

(b) is published simultaneously in two countries, one of which is a member of each of the two Conventions;

(c) is published simultaneously in two countries, one of which is a member of each of the two Conventions.

UCC

The Rights Protected by the UCC

(I) *Minimum Protection*

(a) *Adequate and Effective Protection.* Article I of the UCC requires Contracting States "to provide for the adequate and effective protection of the rights of authors and other copyright proprietors", but does not define what is considered "adequate and effective". The Paris Text contains an Article IV *bis* which states that the "rights referred to in Article I shall include the basic rights ensuring the author's economic interests, including the exclusive right to authorize reproduction by any means, public performance and broadcasting". The earlier Geneva Text contained no such provision.

(b) *Translations.* Article V of the UCC requires that Contracting States grant authors an exclusive right to translate and publish or to authorize the translation and publication of protected works.

(c) *Duration of Protection.* Article IV of the UCC imposes a minimum on the duration of copyright protection afforded by Contracting States. In general, the minimum duration is the life of the author plus 25 years.

(II) *National Protection*

Under Article II of UCC, each Contracting State agrees to provide the same protection for works whose author is a national of another Contracting State or which were first published in another Contracting State as they provide their own nationals. Note, however, that the protectability of a work in the Contracting State in which a work is first pub-

lished is not addressed by Article II. This issue would be decided by the domestic law of the Contracting State in which the work is first published.

BERNE CONVENTION

The Rights Protected by the Convention

(I) *Minimum Protection.* The Berne Convention requires Contracting States to provide certain minimum rights. These include the following:

(a) *"Moral Rights".* These rights are independent and survive the transfer of economic rights, and include:

(i) The right to claim authorship; and

(ii) The right to object to any "distortion, mutilation or other modification of, or other derogatory action in relation, to, the said work, which would be prejudicial to [the author's] honor or reputation". Article 6 *bis*, Paragraph 1.

(b) *Minimum Term of Protection.* In general the minimum term is the life of the author plus 50 years. Articles 4, 7 *bis.*

(c) *Right of Translation.* Article 8.

(d) *Right of Reproduction.* Article 9.

(e) *Right of Public Performance* (applies only to dramatic dramatico-musical, and musical works). Article 11.

(f) *Right of Adaptation.* Article 12.

(g) Right to Seizure of Infringing Copies. Article 16.

Although the foregoing list of protected rights is quite extensive, their precise scope and the extent to which they are available is a matter of the law in which protection is sought.[14] Thus, as a practical matter, the ability of an author to enforce any of the foregoing rights will depend upon consideration of the laws of individual Contracting States where their enforcement is sought.

(II) *National Protection.* Article 5, Paragraph (1) of the Berne Convention requires each Contracting State to accord works whose authors are nationals of another Contracting State, which were first published in another Contracting State, or which were published simultaneously in Contracting and Non-contracting States the same protection as they provide their own nationals. Article 5, Paragraph (3) provides that protection in the Contracting State of which the author of a work is a national or where the work is first published is governed by that Contracting State's domestic law. When the author is not a national of the Contracting State in which a work is first published, that Contracting State is required to afford him or her the same protection afforded its own nationals.

CONCLUSION

Considering that the overwhelming international trend is that computer programs are protected under national (copyright) laws, it should be in the interest of ASEAN to secure and clarify these rights so as to motivate investment in the development of computer programs for the benefit to users and industry.

NOTES

[1] Presentation by IBM to the National Computer Board, Singapore, on 23 August 1984. See also United Kingdom Report of the Whitford Committee on Copyright and Designs Law (Comd 6732) para 477.

[2] WIPO "Model Provisions on the Protection of Computer Software" (Geneva 1978) at p. 4, para 6(a).

[3] Projection by National Computer Board in July, 1984.

[4] Opening Address by Chairman, NCB before the Seminar on "Venture Capital and Information Technology Development in Singapore" on October 1, 1985.

[5] National Symposium on Legal Protection of Computer Software, Canberra, March 15-16, 1985.

[6] See WIPO "Model Provisions on the Protection of Computer Software" (Geneva, 1978) pp. 4, 5.

David Bender Computer Law: Evidence and Procedure, Sec. 3.2.
Bryan Niblett, Legal Protection of Computer Programs.

[7] Art. 52(2)(c).

[8] 545 F. Suppl. 812 (1982, Ed. Pa), rev'd. (CA3 Pa) 714 F. 2d 1240 (1983).

[9] (1982) R.P.C. 339.

[10] (1983) F.S.R. 73.

[11] Civil Court of Paris, 9/21/83

[12] *See* UCC Article II; Berne Convention Article 5, Paragraph (1) [Paris Revision].

[13] UCC Article XVII.

[14] *See* Article 5, para. 2.

FOREIGN INVESTMENT REQUIREMENTS IN MALAYSIA*

*W.S.W. Davidson***

I. INTRODUCTION

In this paper, I intend to briefly range over Malaysian Foreign Investment requirements generally, and since this conference is on Energy Law and Policy, I shall comment on the field of petroleum exploration specifically.

I shall, however, begin with some comments on the policies existing in Singapore and in Indonesia to show similarities which Malaysia share with them.

Singapore and Malaysia

The main similarity in these two States is a common legal background based on English common law and English, Australian and Indian statutes, and independent judiciary trained in England, and a civil service developed from an English colonial system.

In Malaysia, the Companies Act 1965 follows in most sections verbatim the comparable acts of New South Wales and Victoria. Although the Contracts Act is modelled on the Indian Contracts' Act, the latter is in fact a codification of the English Common law of contract, and, as in Singapore, English case authorities are habitually relied on in the courts both in the field of contract and tort. Up to now, there is still a limited right of appeal to the Privy Council in London in civil cases, although this is on the way out.

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* Paper presented at the International Conference on Energy Law and Policy in Asia and the Western Pacific, Singapore, Nov. 5-9, 1984.

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In short, practising lawyers from other common law jurisdictions including Australia, New Zealand and Hongkong should have little difficulty in understanding and applying Malaysian law.

Indonesia and Malaysia

Here the similarities stem from the fact that both are nations rich in material resources and whose peoples share a common language and similar racial background. Both countries have established policies which differentiate between the indigenous peoples (Peribumin in Indonesia, Bumiputra in Malaysia) and the immigrant races (mainly Chinese in Indonesia, Chinese and Indian in Malaysia) and reserve certain concessions for the former. The background reasons and the rightness or fallacies of this policy are beyond the scope of this paper, but a clear understanding of this distinction is essential for all potential foreign investors in Malaysia and their professional advisers.

In the petroleum field, the national oil company, Petronas[1] has been modelled on the much longer established Pertamina, and, the production sharing contracts now in use in Malaysia between Petronas and the Oil Companies are based on the Indonesian model.

II. THE FOREIGN INVESTMENT COMMITTEE (FIC) GUIDELINES

The 'Guidelines for the Regulation of Acquisition of Assets, Mergers and Takeovers', were first published in 1974 by the Federal Government, and have not since been changed. They are, as the name implies a statement of government policy in relation to this

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1 Petroleum Nasional Berhard (PETRONAS), Sec. 3(1) of Act 166 PETROLEUM DEVELOPMENT ACT, 1974.

subject, but the document is far from being a complete code of such policy and should be understood in the context of the Government's entire policy, usually known as the New Economic Policy (NEP).

This document (See p. 81 to 104) sets out in clear and concise form the basis of Government policy and a clear understanding of the principles set out in this document is essential.

The policy covers all fields of economic activity.

The objectives of the Guidelines

The Guidelines propound and explain policy in relation to the "acquisition of assets, or any interest mergers and takeovers of companies and businesses incorporated or registered in Malaysia" (See par. 1). They are not limited in their scope to foreign investment, but also aim at a better distribution of wealth among Malaysians, along the lines of the NEP (See par. 3 and 5[i]).

They also make it clear that private investment, including foreign investment is still actively encouraged provided it is in line with the NEP (See par. 2 and 4).

Priorities

The "Guidelines" place priority in the following:

i) Balanced structure of ownership and employment, including greater Malaysian and particularly Bumiputra participation at all levels.

ii) Development of natural resources and processing and upgrading of local raw materials.

iii) Engagement in new activities, provision of increased range of products and services, and economic diversification.

iv) Provision of management and technical expertise, coupled with training of Malaysians.

v) Development of export and market outlets.

The Guidelines specifically discourage foreign investment which seeks to gain control of Malaysian companies without visible benefits to the national economy. (See par. 4 and 5)

Application of the Guidelines

i) These are laid down in paragraph 6, and it should be noted that they apply to *acquisition* and new transactions or ventures, and do not in any way seek to impose divestment of existing assets.

ii) It should also be noted that the *quantum* limit for application of $1M applies only to par. 6 (vi), where it clearly applies, for example, to Malaysian acquirers of land. In the case of foreigners, all acquisitions are covered by 6 (i) under which they apply to the acquisition of any substantial fixed assets. The limit also has no relevance to company takeovers or mergers which are separately covered by 6 (v).

The legal status of the Guidelines

It must be stressed that the Guidelines are an exposition of government policy and not a law, not having been passed by Parliament or enacted by way of delegated legislation. This distinction has several important consequences, for example:

i) Attempts to avoid application of the policy by applying a strict and narrow interpretation of the Guidelines, as when splitting purchase of an asset into 2 or 3 contracts which would fail to achieve results in keeping with the Guidelines.

ii) Companies are not bound by law to apply to the FIC and do not commit an offense if they fail to do so. However, this should not be taken as encouragement to flout the Guidelines, since Government has administrative sanctions which may be applied to persons disregarding the policy.

iii) Attempts which have been made by parties to a contract to avoid, through the courts, a transaction on the grounds of there being no provision for FIC approval have failed.

iv) There have been attempts in the past by Registry of Titles officials to reject transfers of land, where FIC permission was not sought, but I understand this practice has been discontinued, probably on legal advice. Here a distinction should be made between situations where the Government authority has no discretion or has discretion exercisable only by certain defined criteria (e.g. transfers of land titles, subdivision of land, etc.) and situations where the discretion is unfettered (e.g. conversion of land, renewal or mining lease, etc.). In the former situation the authority has no right to withhold consent to the transaction, whereas in the latter case, it may validly take into account the applicant's failure to obtain FIC clearance in exercising its discretion.

Enforceability of Contracts and Trusts Contravening the Guidelines

It has already been established that an agreement may still be enforced by the Court, even though, contrary to the Guidelines. FIC approval has not been obtained, but will the Courts recognize an agreement where the transaction itself contravenes the substantive provisions of the Guidelines?

To answer this question a distinction must be made between a transaction which contravenes the policies of a particular government and one which contravenes the policy of the law itself. In the former case, the Courts will still enforce the transaction; in the latter case, the Courts will refuse to enforce it. Thus the Courts would probably recognize a contract for the acquisition of assets by a foreign company, where no breach of any specific law is involved.

A situation which sometimes arises, however, is where on the face of the principal document there is total compliance with the NEP and FIC Guidelines so as to enable the parties to reap the administrative benefits arising therefrom as when a company, by having a majority Bumiputra equity is given favourable treatment on Government tenders. Where, however, under a subsidiary trust arrangement the shares are held by the Bumiputra in trust for a foreign or non-Bumiputra party so as to effectively give the minority shareholder total control as well as the entire profits of the company, such a trust would, in my opinion, fall in the category of a transaction contravening the policy of the law itself and therefore be unenforceable, since to recognize it would be to recognize an active deception. This does not mean that all trusts by Bumi-

putra shareholders are necessarily unenforceable. A voting trust for a specific and legitimate purpose such as to protect loans advanced to the shareholder or limited management rights would probably be enforceable.

Sanctions which may be imposed for contravening the Guidelines

The fact that the FIC Guidelines are not law does not of course mean that parties can contravene the Guidelines with impunity. Where a transaction or scheme clearly complies with NEP and the Guidelines in all respects, the parties may choose not to obtain FIC approval; in all other cases, the parties run the risk of Government imposing administrative sanctions. These are many but include withholding of:

i) Licence or permits under the Industrial Coordination Act, Petroleum Development Act of Investment Incentives Act;

ii) Conversion of land or renewal of mining leases;

iii) Exchange control permission for repatriating funds;

iv) Work permits for expatriate personnel;

v) Import or export licences;

vi) Bank Negara approval for borrowing in the case of non-residence;

vii) Generally any other form of licence, permit or approval, where the granting of the same is permissive and not mandatory.

III. THE ROLE OF FOREIGN EQUITY IN THE FUTURE

I have already mentioned that the Guidelines make it clear that foreign investment will be actively encouraged so long as it conforms to the policy enunciated, and there is no evidence that Government has changed such policy.

Paragraph 588 of the Third Malaysian Plan, which was promulgated in 1976 post-dating the FIC Guidelines, reads as follows:

> "588. Taking account of these apprehensions, the Government has reviewed in-depth its policies in this regard and confirms the following as basic principles which will underlie implementation of the targets of the NEP for restructuring the ownership of equity capital in the corporate sector:
>
> i) Present imbalances in the ownership of equity stock in individual enterprises will be corrected mainly through growth. Disinvestment of existing stock will not be compulsorily enforced for the purpose of executing the restructuring objectives of the Government.
>
> ii) Growth, however, will not be interpreted only in terms of equity expansion as growth may occur not merely by way of stock expansion. A mutually acceptable measurement will be developed in consultation with the private sector.
>
> iii) As the racial pattern of ownership sought by the NEP in 1990 is a global target, it will not necessarily be applied at the level of individual enterprises in the economy. While the Government will seek different degrees of majority Malaysian control in different industries, it continues to be prepared to allow foreign majority control

> for enterprises in sectors like manufacturing where foreign technology, management expertise and capital are required for the accelerated growth of the industry concerned.
>
> iv) The ownership targets of the NEP for 1990 are in general to be achieved by steady progress in the intervening period except in the case of a number of specified industries (including the extractive and resource-based industries) for which immediate conformance will be required .

This statement of policy goes further than the Guidelines in that it places emphasis on implementing the NEP not only through acquisitions, but also through 'growth' which it emphasizes is not confined to stock expansion. Under this concept, the Government views as 'growth', factories which plan to expand or dredging companies which plan to construct additional dredges, even where the expansion is financed from the company's own resources.

This paragraph also made it clear that Government policy is flexible in that the NEP's global target would not necessarily be enforced in every individual enterprise, and the degree of implementation could vary according to factors, such as the amount of capital and technical expertise required, the degree to which the venture export oriented, etc.

The difference between the enunciation of policy in the FIC Guidelines from that in the Third Malaysia Plan has, I think, been a source of misunderstanding, as the private sector has tended to follow the Guidelines while Government has emphasized the more fully developed policy laid down in the Plan. In cases where there is 'growth' in the form of expansion without 'acquisition', there would seem to be no requirement to apply to FIC under the Guide-

lines, but companies carrying out expansion must be aware of the policy enunciated in the Third Malaysian Plan, since Government would undoubtedly seek to enforce the policy wherever possible by means of the administrative sanctions referred to above.

The Third Malaysian Plan not only emphasized the continuing role of foreign equity, but also emphasized that disinvestment would not be compulsorily enforced in existing businesses. There is also constitutional protection under article 13 of the Federal Constitution which forbids the taking of property without compensation and applies to foreign individuals and companies, and under various other articles of the Constitution such as article 153.

There has been no significant change in this policy in the Fourth Malaysia Plan which was promulgated in 1981, and paragraph 146 reads as follows:

> "146. Restructuring ownership of assets includes all financial as well as physical assets, including land, in all sectors of the economy. However, as the economy develops and modernises, the role of the corporate sector will increase, and as the country's financial structure becomes increasingly sophisticated, the key to ownership and control of wealth will be through ownership of equity capital. In this regard, the target is that by 1990 Malaysians would account for about 70% of the total share capital of limited companies with Bumiputra holding at least 30% and other Malaysians, 40%. The remainder will be held by foreign interests. The creation of enterpreneurs among Bumiputra requires the accumulation of savings which is possible only through rapid increase in their income as well as the acquisition of skills and experience."

There is of course a distinction between compulsory disinvestment or acquisition on the one hand, and control on the other, and what can be expected in the future for foreign companies not voluntarily restructuring is an increasing amount of Government control; and foreign companies which do not have any plans for local equity cannot expect long term Government support.

The degree of control varies greatly with the particular industry involved. Manufacturing is now totally controlled by the Industrial Coordination Act, and the same applies to the oil industry under the Petroleum Development Act. Insurance and Banking are also now strictly controlled by their own Acts.

The Mining and Timber Extraction Industries are in a different position because they depend on leases and concessions from the State Governments, where the policy may not always be the same.

Other fields such as agriculture, construction, general trading and consultancy are not controlled by specific Acts, and therefore are less dependent on administrative support from Government for their continued existence.

As time goes on, it is reasonable to expect that statutory controls over the various fields of economic activity will increase. Each new Act tends to tighten the enforcement of the NEP and to close the remaining legal loopholes. For example, the present Companies Act provides for registration of foreign companies commencing business in Malaysia as a right. It can be taken as fairly definite that when amendments to this Act are made, registration of foreign companies will become a privilege and not a right, with the Registrar having power to impose conditions on registration.

As the NEP is enforced by specific acts such as the Industrial Coordination Act and Petroleum Development Act, new projects in these fields will have already received Government approval and an application to FIC would involve duplication. Such duplication can be avoided by invoking clause 7 of the Guidelines — "The above guidelines will not apply to specific projects which are approved by the Government."

IV. ALTERNATIVE FORMS OF JOINT VENTURES

In view of the NEP, it is obvious that most foreign companies wishing to carry on business in Malaysia will have to plan to do so in joint venture with Malaysians, although in certain fields such as businesses which are 100% export oriented, this may not be necessary. Also, in most cases, the foregin company will have no alternative but to accept a minority position.

Without discussing the technical aspects of joint ventures, in this and the ensuing section, I hope to point out some of the ways whereby a foreign company can participate with Malaysian partners, while legitimately protecting its investment.

Usually the most difficult problem facing a foreign company proposing to enter Malaysia is the choice of joint venture partner.

Clearly, the old 'ali-baba' concept whereby the foreign partner seeks a convenient stooge to do his bidding in return for pocket money, is out, and any company hoping to do business by this means is ultimately heading for trouble; I have already explained my view that the Courts will never enforce a trust, where the object is to give a false impression of compliance with the FIC Guidelines. It is necesary to start with the premise that the local

partner will require genuine participation in the activity of the company with opportunity of acquiring expertise in the particular field, though he may require assistance in the provision of his share of the capital. In certain fields, such as civil engineering, foreign companies may prefer to keep their options open by not aligning themselves to one local partner, as it may inhibit or prevent them from going into joint ventures with other local parties with respect to other projects. They may well prefer to set up different joint ventures with different parties for undertaking each project, and in this event may use either the foreign company itself or a wholly owned local subsidiary as the joint venture partner. The form of the joint venture may either be an unincorporated joint venture or partnership or a limited company. In such cases the foreign joint venturer will have to weigh the comparative advantage and disadvantage of having a permanent set-up with one or more local parties against the freedom of being able to deal with different local partners for different projects.

Another form of joint venture, which has been used in the oil exploration and production field, is the production sharing agreement which involves neither partnership nor participation in a joint company, but a sharing of gross returns in the form of 'profit oil', after the oil company has recouped its actual expenditure or a limited amount thereof by means of 'cost oil'.

Generally speaking however, the joint venture takes the form of equity participation in a limited company, and I refer to this type of joint venture when I deal with the next topic, the protection of minority shareholders.

The Concept of 'reserved shares'

It sometimes happens that companies wishing to participate

in new ventures are genuinely prepared to follow Government policy and to provide local and/or Bumiputra equity but cannot find the right partner — this particularly applies in the professional and consultancy fields, where the requirement is for properly qualified individuals and where the requirement cannot be met by a trust corporation. In such a case, it may be possible to provide 'reserved shares'; the idea here is that the articles or other documents should make it clear that a certain percentage of the shares in the company have been set aside for issue to Malaysians and/or Bumiputra as the requirement may be; in this simple form it does not of course mean that the company actually enjoys the the status which the actual issue of such shares to Malaysian or Bumiputra would give it, but it does demonstrate the willingness of the foreign company to comply with Government policy, and thus may be assisted to obtain necessary approvals to operate on a temporary basis.

V. THE PROTECTION OF MINORITY SHAREHOLDERS

Since in most cases, the foreign joint venture partner will have no alternative because of Government policy, but to assume a minority role, it is both fair and reasonable that he should look to legitimate ways and means of protecting his investment. This is particularly so where the joint venture takes the form of equity participation in a local company, since if standard articles are used, the normal workings of corporate democracy will always entail that the majority shareholder will be able to outvote the minority shareholder.

It is very important therefore that an intending foreign joint venturer should not simply subscribe to a standard set of articles,

but should sit down with the local parties and work out point by point how the venture is to be operated and managed. One is sometimes put off by the suggestion that 'this is a matter which the the board of the joint venture company can discuss later'; but this is a fallacy, since if the representatives of the parties cannot agree before the formation of the company, there is no good reason to suppose they could agree later when sitting in the board room. Therefore particularly difficult and sensitive matters should be threshed out in advance, and the understanding reached incorporated in the written documents.

There are a number of ways in which the minority shareholder can be protected, and I mention some of these below:

i) *Splitting the Majority*

There is nothing in the Guidelines which is against the concept of the local equity being shared by more than one party, and no reason why two, three or more local parties should not be involved. The advantage of this from the point of view of the foreign shareholder is that it substantially decreases the chances of being outvoted. In a situation particularly where the foreign shareholder provides the technical expertise, in practice, it is unlikely that two or more local shareholders, not from the same group, would combine to exclude the foreign shareholder unless of course the foreign shareholder was not performing its role satisfactorily.

ii) *Tailor-made articles*

Subject to the Companies Act itself, articles may be

drafted in any way the promoters agree, and it is particularly important in a joint venture of the type contemplated above that the articles are drawn up in a way which gives maximum protection to the minority shareholder. Provided that it holds 30% of the equity it will be able to block any amendments to the articles proposed by the majority, since a special resolution requiring a three-quarter majority is needed. Protection in the articles is stronger than protection in a share-holders' agreement. In the former case a minority shareholder may be able to prevent resolutions (whether at board or general meeting level) from being validly passed, whereas in the latter case he may need to go to Court to enforce his rights under the agreement.

iii) *Limitation on directors' discretion to issue additional shares*

Most articles of a company either give the board total discretion to issue additional shares as they deem fit, or provide (as in the model articles in the Companies Act) that new shares shall be issued *pro rata* to existing shareholders, subject to any directions which may be given by the company in general meeting, implying that the majority could direct the board to issue new shares only to themselves or a friendly ally; and although directors may be restrained by the Court from issuing shares for the purpose of oppressing a minority, this is a case where prevention is better than cure. It is best for the minority shareholder that the articles contain strict provisions to ensure that all new shares are issued *pro rata*,

with the parties subscribing in the articles for the number of shares representing the agreed proportions.

iv) *Appointments to the Board of Directors*

While a foreign shareholder in a minority position can hardly expect to have control of the board, he is legitimately entitled to ensure that his right of representation on the board is protected by the articles; this is a very important point since, in the absence of special provisions, the majority would be able to vote a full board of their own choice. So long as the minority shareholder is represented on the board, he can express his views persuasively and it is only in exceptional cases that board resolutions are actually decided by majority vote. There are a number of ways in providing protection of the minority shareholders. These may involve the issue of different classes of shares, which would not be objectionable from the point of view of Government policy if used to protect minority rights and not as a means of creaming off profits by the minority shareholder. With or without different classes of shares, it is perfectly possible and legitimate to provide in the articles that the holders of a certain percentage of shares be entitled to a certain number of seats on the board *i.e.* proportionate representation.

v) *Opportunity to attend meetings*

Some provisions may be needed to ensure against the majority calling a board meeting at short notice while

the representative of the minority is known to be overseas. This is sometimes done by stating that there is no quorum in the absence of representatives of both parties. However, this could also prove unfair to the majority if the minority deliberately chooses not to cooperate. A fairer provision would be one which requires a fixed period of notice, and also provides for the director to have an alternate choice and on whom notice should also be given.

vi) *Transfers of Shares*

Since a joint venture of two or three parties usually operates on the basis of personal relationship between the shareholders it is most important to have provisions which effectively prevent the majority shareholders from transferring their shares to third parties unknown to the minority shareholder and who have not entered into a shareholders' agreement. This is usually done by means of an article providing for shares to be offered to existing shareholders; however, in the light of Government policy in this respect, it may not be satisfactory to the minority shareholder who, if he exercises his right to acquire the majority parties' shares, will run the risk of losing the protection offered by compliance with Government policies. He should therefore have the right in these circumstances to nominate another local party to acquire the shares.

vii) *Decisions on major matters to require approval of Minority Shareholder*

It is common practice that virtually all memoranda of

association contain an *objects clause* enabling a company to do almost anything, and there is nothing in the standard set of articles to prevent the majority of the board of directors from embarking on almost any type of business venture. Thus, a foreign investor interested in the manufacture of cameras could find the majority shareholders employing his capital or share of profits to invest in a chain of laundries. The minority shareholder certainly has a legitimate right to ensure that his capital is used only for the purpose of the contemplated venture. Equally, he has a legitimate right to ensure that the factory premises are not sold without his concurrence or mortgaged to provide funds for other speculative ventures. It is thus normal to provide special articles to ensure that decisions on certain major matters, both at board and general meeting level, can be taken only with the express approval of the minority shareholder. It is also possible to limit the *objects clause* of the memorandum so as to restrict the type of business venture which the company may enter into. This veto power, if used for a legitimate purpose, does not offend the Guidelines.

viii) *Shareholders Agreements*

All the provisions of sub-paras (iii) to (vii) may be provided for in a shareholders' agreement in addition to or instead of in the articles of association. However, it is better for the minority shareholder to have these provisions in the articles for the reasons already given. Sometimes the majority shareholder may be reluctant to agree to such provisions in the articles themselves, which

are of course a public document, but provided that these provisions are genuine minority protection provisions and not a means of disguised control by the minority, there seems no valid reason on policy grounds why they should not be in the articles. However, usually it is desirable also to have a shareholders' agreement which can formulate into greater detail the proposed administration of the joint venture. To illustrate on the number of posts at all levels which will be held by representatives of the minority shareholders. Where there is a shareholders' agreement, it is important to provide for the possibility of conflict between the agreement and the articles, and state that the shareholders' agreement will rule, the parties being obligated to exercise their rights as shareholders to amend the articles to cure the conflict.

ix) *Management and Technical Assistance Agreement*

The FIC Guidelines specifically apply to regulation of Malaysian companies and businesses in joint venture agreement, management agreement and technical assistance agreement or other arrangements, and it is clear government policy to carefully control the content of agreements of this nature. This is particularly the case in manufacturing ventures, which are strictly controlled by the Industrial Coordination Act. For all manufacturing projects, the prior written approval of the Ministry of Trade and Industry is required. The reason for this is obvious namely that such an agreement, if not controlled, could provide for very substantial sums to be paid out (usually expressed

> as a percentage of gross turn-over) in the guise of royalties or fees for 'technical assistance', thus creaming off the profits of the company to the detriment of the majority shareholder. However, it is clear that any minority shareholder providing capital and expertise is legitimately entitled to protect its investment as well as the quality of the products of the joint venture by stipulating management rights for a fixed period of years as well as the provision of technical expertise from overseas, and to have these rights protected by an agreement between the minority shareholder and the joint venture company. Such an agreement can also provide for use by the joint venture company under licence of the foreign shareholders patents or trade marks, and confidential processes. In my view, such agreements do not contravene government policy, provided that they do not conflict with the policy that Malaysians should be trained to replace expatriate personnel and the payments, whether by way of fees or percentage of turnover, are not such as to prevent a reasonable expectation of dividends for the local shareholders. The normal maximum period approved by the Ministry is 5 years, but this can be extended.

A different form of protection is afforded to minority shareholders by the courts, particularly under section 181 of the Company's Act. This section gives the Court very wide powers to intervene in situations where the majority shareholders, through their board nominees, take unfair advantage of their position, such as contracting with their own company on terms favourable to them but unfavourable to the joint venture company and therefore

the minority shareholder. The type of situations in which the courts may intervene on this ground are infinite and the remedies of the Court very wide. The Malaysian law in this respect follows closely Australian and U.K. law, and remedies are undoubtedly available. However, these provisions have so far been little used in Malaysia, perhaps due to lack of knowledge by the public and specialist experience of lawyers, despite fairly widespread abuse by Directors. This is in direct contrast with the position in United States of America in particular where action by shareholders is very common. While these provisions should be used more often, there are frequently long delays in the hearing of cases and no doubt the use of such remedies should be viewed as a last resort.

VI. FOREIGN INVESTMENT IN THE PETROLEUM FIELD

The Petroleum Development Act, 1974, was promulgated in the same year as the Foreign Investment Committee Guidelines. It represents a particular application of the new Economic Policy and is one of the instruments by which the same is enforced, giving effect to the strongly held view of Government that the mineral and other natural resources of the country should be firmly under its control.

The background

It is not within the scope of this paper to go into the details of earlier legislation. Suffice it to say that earlier agreements for petroleum exploration and production were of the 'concession type' and granted by the Federal or State Governments to individual periods. Such concessions were granted off the East Coast of oil companies granting exclusive rights for substantial future Peninsular Malaysia and in Sabah and Sarawak.

The Petroleum Development Act 1974

The 1974 Act was hurriedly prepared and promulgated with little or no warning. It contains several unusual features which may be of interest to lawyers.

a) *Section 2*

All rights of exploration and extraction of Petroleum are to vest in Petronas[4] subject to the due execution of 'vesting instruments' in the form set out in the schedule. The qualification was necessary as, constitutionally, these rights belonged to the various State Governments in the case of land and territorial waters, and to the Federal Government beyond the limit of the Territorial Waters, although the Sabah and Sarawak Governments also had a claim to the Continental Shelf.

By section 6, Petronas was in effect required to negotiate for the acquisition of these rights in return for a cash consideration. The vesting instrument is a document which would seem to belong more to the sphere of conveyancing than to constitutional law; be that as it may, eventually all the State Government did was in fact to execute these conveyances so as to make Petronas' title absolute.

b) *Section 3*

Petronas itself is a hybrid creation. By sections 2 and 3, it is clear that Petronas was intended to be and was in fact incorporated under the Companies Act with its own memorandum and articles; it is clearly subject to the Companies Act like any other Company.

On the other hand, it is by clause 3 (2) 'subject to the control and direction of the Prime Minister who may from time to time issue such direction as he may deem fit'. By clause 3 (3) these directions are expressed to be binding on the corporation. It is not difficult to conceive situations arising where there would be a conflict between the memorandum and articles on the one hand and the Prime Minister's directions on the other; and while the former is like any other set of memorandum and articles a public document, there is no specific provision for the latter to be made public, and it is not known, if any, what directions may have been given under this provision.

This issue surfaced recently in connection with the purchase by Petronas of a controlling interest in Bank Bumiputra, it being suggested by some critics that this was *ultra vires*, Petronas' powers under the Petroleum Development Act. In my view, this criticism is unfounded since, in the absence of contrary directions from the Prime Minister, Petronas may carry out any objective within its memorandum of association.

Except for the Prime Minister's powers to give directions to Petronas, there would appear to be no fetter to Petronas' absolute ownership of upstream rights, once the vesting instruments are executed, and Petronas does not appear to be fettered by statutory obligations in the enjoyment of its rights of ownership.

c) *Section 6*

Section 6 deals with refining operations in an entirely dif-

ferent way. Here, there is a prohibition on the carrying on of refining operations except with the permission of the Prime Minister, thus effectively giving the Federal Government control over this sector through the power to impose conditions on the granting of such permission. This represents a more traditional way of implementing the New Economic Policy.

d) *Section* 9

This section contained the 'sting in the tail' of the Act. In its original form, the provision for 'adequate compensation' now contained in subsection (2) was not there, so that existing concessionaires faced the prospect of losing their concessions at the expiration of six months without any compensation. This, it was claimed, was unconstitutional in the light of article 13 of the Federal Constitution which prohibits the taking of property without adequate compensation.

In such event, the issue was solved when Petronas and the oil companies concerned were able to negotiate new production sharing contracts, the oil companies agreeing to accept these in lieu of the old concessions. The amendment to section 9 was then inserted in 1977 to ensure the constitutionality of the provision.

The Petroleum Regulations, 1974

These were introduced shortly after the Act under the enabling powers contained in Section 7 of the Act and also bore the signs of hasty drafting. The principle features are as follows:

a) *Regulations 3*

This empowers Petronas to license all companies operating support services in the upstream sector.

b) *Regulation* 3A

This similarly empowers the Ministry of Trade and Industry to license all companies enrolled in refining, marketing and support services in the downstream sector. Originally, all such applications had to be made to the Prime Minister through Petronas. However, in 1981, an amendment was effected which removed these downstream activities from any form of regulatory control by Petronas which is of course itself a competitor in this field.

Summary of the position

My conclusions on the present statutory position may be summarized as follows:

a) As a company under the Companies Act, Petronas may do anything its memorandum and articles allow and which are not expressly prohibited; and is not limited to its role in the petroleum field.

b) As the absolute owner of its upstream rights, it may exploit these rights in any way it choses, *e.g.* through negotiating production sharing agreements, as it has done in the past; or through taking equity in the exploration companies; or by carrying on its own exploration activities, as it has done through its own subsidiary Charigali.

c) Petronas has a regulatory role conferred by section 7 of the Act and Regulation 3 over upstream support activities. These can be and are used to enforce the New Economic Policy including local and Bumiputra equity participation.

d) The Government and the National Petroleum Advisory Council can however control and limit the exercise by Petronas of its rights under (a), (b) and (c) above by means of compulsory directions under section 3 of the Act.

e) In the downstream sector, Petronas no longer has a regulatory role. Quite obviously it is a competitor in this field of growing importance. The role has now been taken over by the Ministry of Trade which also uses it to enforce the New Economic Policy.

f) Petronas not being Government does not give warranties on behalf of Government. Therefore, the viability of a project may change overnight as a result of Government action which may be applied to Petronas itself as well as the oil companies, *e.g.* the imposition of an export duty on crude oil or the removal of customs exemption on drilling equipment.

The near future in the petroleum field

Several factors have recently combined to ensure a flexible approach as regards foreign investments in the petroleum field in the near future.

Although Petronas through Charigali can be expected to increase its own activity in the exploration field, there is no

indication of any intention to exclude foreign participation: on the contrary there has been a recent public indication that there is likely to be a relaxation in the provisions of the current production sharing contracts, with a view to encouraging exploration in less promising areas and development of more marginal fields. I also understand that several areas are likely to be opened up for exploration in the near future. There is also less emphasis now on the 'oil depletion' policy which is intended to restrict and control the extraction of oil and consequent depletion of the natural resources of the country: this is no doubt because, despite the fall in world oil prices, Malaysia badly needs the foreign exchange earnings from the oil sector.

There is also a move to encourage greater use of non-petroleum sources of energy, especially gas as an alternative to the heavy reliance on oil. There are plans for the laying of a national grid system for gas mains, and possible opportunities for foreign investors in this area and other projects.

GUIDELINES

FOR THE

REGULATION OF ACQUISITION OF ASSETS, MERGERS AND TAKE-OVERS

PART ONE: THE GUIDELINES.

I. INTRODUCTION

1. The Government has given careful consideration to the question of the acquisition of assets or any interests, mergers and take-overs of companies and businesses incorporated or registered in Malaysia which result in greater concentration of wealth in the hands of a minority and in increasing imbalance in ownership and control. The Government has therefore decided, in the national interest, to lay down these guidelines to regulate the acquisition of certain assets or interests and mergers and take-overs of companies and businesses in Malaysia.

II. PRIVATE INVESTMENT WELCOMED

2. The Government recognises the strategic role of private investment in the development of Malaysia and regulation and control of private investment are therefore kept to the minimum. The Government welcomes private investment which adds to the resources and potentials of the country, engages in new activities and generally promotes the development of the economy. Private investment, including foreign investment, will be welcomed as long as it is consistent with the New Economic Policy. This is particularly important in the light of the present imbalances in income, employment and ownerhip and control in the Malaysian economy. Accordingly, any proposed acquisition of assets or any interests, mergers and take-overs of companies and businesses must be examined in the light of the objectives of the New Economic Policy.

III. GENERAL POLICY GUIDELINES

3. The Government is aware that economic growth will result in

changes in the pattern of ownership and control. The acquisition by one company of assets or any interests in other companies, take-over of one company by another and mergers of two or more companies are means by which the private sector responds to take advantage of the changing forces in the market. In order to ensure that these changes in the pattern of ownership and control would result in a better distribution of wealth, it is therefore necessary to regulate such acquisitions, mergers and take-overs.

4. Foreign ownership and control of the country's major economic activities are already substantial and there is a marked imbalance in ownership between Malaysians and foreigners. Foreign investment with a balanced structure of ownership and control, therefore, which seeks to develop the vast potentials of the country's natural resources, engages in new activities, provides training to Malaysians, adopts a balanced employment structure, provides management and technical expertise and export and marketing outlets, will continue to be actively encouraged. Foreign investment which acquires assets or any interests to gain ownership and control of companies and businesses in Malaysia, without giving visible benefits to the national economy, will be discouraged.

IV. GUIDELINES FOR REGULATION OF ACQUISITIONS, MERGERS AND TAKE-OVERS

5. The guidelines are as follows:

(i) Against the existing pattern of ownership, the proposed acquisition of assets or any interests, merger or take-over should result directly or indirectly in a more balanced Malaysian participation in ownership and control;

(ii) The proposed acquisition of assets or any interests, merger

or take-over should lead directly or indirectly to net economic benefits in relation to such matters as: the extent of Malaysian participation, particularly Bumiputra participation, ownership and management, income distribution, growth, employment, exports, quality, range of products and services, economic diversification, processing and upgrading of local raw materials, training, efficiency, and research and development;

(iii) The proposed acquisition of assets or any interests, merger or take-over of companies and businesses should not have adverse consequences in terms of national policies in such matters as defence, environmental protection, or regional development;

(iv) The onus of proving that the proposed acquisition of assets or any interests, merger or take-over of companies and businesses are not against the objectives of the New Economic Policy is on the acquiring parties concerned.

6. The above guidelines will apply to the following:

(i) Any proposed acquisition by foreign interests of any substantial fixed assets in Malaysia;

(ii) Any proposed acquisition of assets or any interests, mergers and take-overs of companies and businesses in Malaysia by any means, which will result in ownership or control passing to foreign interests;

(iii) Any proposed acquisition of 15% or more of the voting power by any one foreign interests or associated group, or by foreign interests in the aggregate of 30% or more

of the voting power of a Malaysian company and businesses;

(iv) Control of Malaysian companies and businesses through any form of joint-venture agreement, management agreement, and technical assistance agreement or other arrangements;

(v) Any merger and take-over of any company or business in Malaysia whether by Malaysian or foreign interests;

(vi) Any other proposed acquisition of assets or interests exceeding in value of $1 million whether by Malaysian or foreign interests.

7. The above guidelines will not apply to specific projects which are approved by the Government.

V. SUBMISSIONS OF PROPOSALS

8. Proposals for any acquisition of assets or any interests, mergers and take-overs of companies or businesses in Malaysia as set out in the above guidelines should be submitted and addressed to the Secretary of the Foreign Investment Committee (F.I.C.), Economic Planning Unit, Prime Minister's Department, Jalan Dato' Onn, Kuala Lumpur 11-01.

9. Proposals should be accompanied by all relevant information and documents to enable the Foreign Investment Committee to determine whether the proposed acquisition of assets or interests, mergers and take-overs of companies and businesses are consistent with the national interest. Such documents and information will include:

(i) The scheme of acquisition of assets or interests, mergers and take-overs, including distribution of share-holdings and any other type of securities, by citizenship;

(ii) Financial statements relating to the existing company or business being acquired, for the last three years;

(iii) Financial statements relating to projections for the next three years following the proposed acquisition of assets, or any interests, mergers or take-overs;

(iv) A list of existing substantial shareholders and their nominees showing details of substantial shareholdings by individual foreign interests and associated groups of foreign interests, substantial shareholdings by individual Malaysian interests and associated groups of Malaysian interests, the proportions of ownership held by foreign interests in the aggregate and by Malaysian interests in the aggregate and the proportion of voting rights exercisable by each of the foregoing classes of shareholder. Shareholding and voting rights held by persons or companies known to be nominees should be identified separately. Similar details in respect of all the foregoing classes of shareholder should be provided in respect of the ownership of any voting share option granted by the offeree including options exercisable under the terms of debenture or preference share issues. The list of information should show the existing structure of ownership and control as well as the structure after the proposed acquisition of assets, or any interests, mergers and take-overs of companies and businesses;

(v) Details of any existing associations with the offer or in-

cluding the date(s) on which the equity was acquired, the means of acquisition, mergers, or take-overs (e.g., a new share placement, a public offer or market purchases) and the proportion of the offeree's voting power associated with any existing equity holding. Details should also be given of other associations between the offeror and the offeree, including agreements relating to the provision of financial and technical assstance and to production and marketing. Particular reference should be made to any rights exercisable by the offeror under the terms of any such agreements to participate in the management and control of the company or business;

(vi) Present employment structure of company or business to be acquired and projected employment structure following acquisition of assets or any interests, merger or take-over for the next three years;

(vii) All management, service and technical assistance agreements, joint-venture agreements and other agreements;

(viii) Expert valuation and similar reports of assets, company or business to be acquired;

(ix) Terms of acquisition, mergers or take-overs and financial position of company or business to be acquired;

(x) Details of the activities of the offeree including its economic performance in terms of production, sales, employment, exports and estimates of the value of each Malaysian market for the output of the company or business concerned and the offeree's share of each such market. Estimates

should be given of the likely effects of the acquisition, merger or take-over on the relative balance of Malaysian and foreign ownership and control;

(xi) Information regarding any relevant experience and special skills by the offeror in the offeree's areas of management, production and marketing;

(xii) Details of competition and/or complementarity between the offeror and offeree in production or marketing and of any degree of dependence between the offeror and the offeree in production or marketing;

(xiii) Details of special licences, concessions, leaseholds, special permits from any Government authority in Malaysia, enjoyed by the company or business, and patents, manufacturing rights and export franchises;

(xiv) Details of the economic benefits and costs which as a result of the acquisition, merger or take-over, could be expected to accrue;

(xv) Details of changes expected as a result of the acquisition, merger or take-over in the offeree's practices in matters such as employment, investment, exports, imports, processing and upgrading of local materials, research and development and industrial relations including employee protection. Where the offeree considers that the acquisition is likely to have environmental effects this should be indicated;

(xvi) Details on the proposed extent of Malaysian participation in ownership and management following the acquisition,

merger or take-over. With regard to shareholders' interests the offeree company should state the attitude of its board of directors to the offer; and

(xvii) All other relevant information, particularly evidence to prove that the acquisition of assets, or any interests, merger and take-over is not against the national interest.

10. All proposals and communications addressed to the Foreign Investment Committee will be treated in confidence.

PART TWO: FOREIGN INVESTMENT COMMITTEE (F.I.C.)

I. COMPOSITION

Raja Tan Sri Mohar bin Raja Badiozaman,
Special Economic Adviser to
Y.A.B. Prime Minister.
Chairman

Tan Sri Chong Hon Nyan,
Secretary-General,
The Treasury.

Tan Sri Ismail bin Mohd. Ali,
Governor,
Bank Negara Malaysia.

Datuk Thong Yaw Hong,
Director-General,
Economic Planning Unit,
Prime Minister's Department.

Nasruddin bin Mohamed,
Secretary-General,
Ministry of Trade and Industry.

Jamil bin Mohd. Jan,
Chairman,
Federal Industrial Development Authority.

Haji Abdullah bin Ghazall,
Registrar of Companies and Businesses,
Malaysia.

II. TERMS OF REFERENCE

(i) To formulate policy guidelines on foreign investment in all sectors of the economy to ensure the fulfilment of the objectives of the New Economic Policy;

(ii) To monitor the progress and help resolve problems pertaining to foreign private investment and to recommend suitable investment and policies;

(iii) To supervise and advise Ministries and Government agencies concerned, on all matters concerning foreign investment;

(iv) To co-ordinate and regulate the acquisition of assets or any interests, mergers and take-overs of companies and businesses in Malaysia; and

(v) To monitor, assess and evaluate the form, extent and conduct of foreign investment in the country and to maintain comprehensive information on foreign investment.

III. SECRETARIAT

Senior Staff — Encik Shaharuddin bin Haron,
Secretary.
Encik Zainal Aznam Yusof,
Deputy Secretary.

Address — Foreign Investment Committee,
Economic Planning Unit,
Prime Minister's Department,
Jalan Dato' Onn,
Kuala Lumpur 11-01.

LAWS OF MALAYSIA

ACT 144

PETROLEUM DEVELOPMENT ACT, 1974

An Act to provide for exploration and exploitation of petroleum whether onshore or offshore by a Corporation in which will be vested the entire ownership in and the exclusive rights, powers, liberties and privileges in respect of the said petroleum, and to control the carrying on of downstream activities and development relating to petroleum and its products.

(1st October 1974 — inforce by P.U. (B) 501)

BE IT ENACTED by the Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong with the advice and consent of the Dewan Negara and Dewan Rakyat in Parliament assembled and by the authority of the same, as follows:

1. This Act may be cited as the Petroleum Development Act, 1974, and shall come into force on such date as the Prime Minister may notify in the Gazette.

2. (1) The entire ownership in, and the exclusive rights, powers, liberties and privileges of exploring, exploiting winning and obtaining petroleum whether onshore or offshore of Malaysia shall be vested in a Corporation to be incorporated under the Companies Act, 1965, or under the law relating to incorporation of Companies.

(2) The vesting of the ownership, rights, powers, liberties and privileges referred to in subsection (1) shall take effect on the execution of an instrument in the form contained the Schedule to this Act.

(3) The ownership and the exclusive rights, powers, liberties and privileges so vested shall be irrevocable and shall enure for the benefit of the Corporation and its successor.

3. (1) Notwithstanding the provisions of section 22 of the Companies Act, 1965, relating to the names of companies, the Corporation shall be styled as the Petroleum Nasional Berhad or in short form PETRONAS.

(2) The Corporation shall be subject to the control and direction of the Prime Minister who may from time to time issue such direction as he may deem fit.

(3) Notwithstanding the provisions of the Companies Act, 1965, or any other written law to the contrary, the direction so issued shall be binding on the Corporation.

4. In return for the ownership and the rights, powers, liberties and privileges vested in it by virtue of this Act, the Corporation shall make to the Government of the Federation and the Government of any relevant State such cash payment as may be agreed between the parties concerned.

5. (1) There shall be established a Council to be known as the National Petroleum Advisory Council consisting of such persons including those from the relevant States as the Prime Minister may appoint.

(2) It shall be the duty of the National Petroleum Advisory

Council to advise the Prime Minister on national policy, interests and matters pertaining to petroleum, petroleum industries, energy resources and their utilization.

6. (1) Notwithstanding the provisions of any other written law, no business of processing or refining of petroleum or manufacturing of petro-chemical 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.

(2) Any person, who on the commencement of this Act is carrying on any business referred to in subsection (1) may continue to do so but shall, not later than six months from the date of the commencement of this Act, apply in writing to the Prime Minister for his permission referred to in subsection (1).

(3) Subsection (1) shall apply to any business of marketing or distributing of petroleum or petro-chemical products; and any person who on the commencement of this subsection is carrying on any such business may continue to do so but shall not later than six months from the date of commencement of this subsection apply in writing to the Prime Minister for his permission referred to in subsection (1).

(4) Where the Prime Minister grants his permission under this section he may at his discretion impose such terms and conditions as he may deem fit.

(5) Any person who acts in contravention of this section or fails to comply with any term or condition of any permission granted under this section shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one million dollars or to imprisonment for a term not exceeding five years or to both and

in the case of a continuing offence he shall be liable to a further fine not exceeding one hundred thousand dollars for each day or part of a day during which the offence continues after the first day in respect of which the conviction is recorded and all machinery, tools, plant, buildings and other property or thing used or intended to be used in the commission of the offence and any petroleum or its products thereby obtained shall be liable to forfeiture.

(6) The Prime Minister may by notification in the Gazette exempt any business referred to in subsections (1) and (3) or any company or class of company carrying on any such business from the provisions of this section.

7. The Prime Minister may make regulations for the purpose of carrying into effect the provisions of this Act, and without prejudice to the generality of the foregoing such regulations may in particular provide for —

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;

7. Notwithstanding anything contained in any other written law to the contrary, a Sessions Court or in Sabah and Sarawak, a Court of a Magistrate of the First Class shall have jurisdiction to try any offence under this Act or any regulations made thereunder and on conviction to impose the full penalty therefor.

8. (1) Save for section 14 thereof, the Petroleum Mining Act, 1966 shall not apply to the Corporation.

(2) In the application of section 14 of that Act to the Corporation any reference to the licensee shall be construed as a reference to the Corporation 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, powers, liberties and privileges vested in the Corporation by virtue of section 2(1) of this Act.

9. (1) Any exploration licences issued and any petroleum agreements entered into pursuant to the Petroleum Mining Act, 1966, and any licences, leases and agreements issued or made under any written law in force relating to prospecting exploration or mining for petroleum shall continue to be in force for a period of six months from the date of coming into force of this Act or for such extended period as the Prime Minister may allow.

(2) Where the six months' period has elapsed and no extension thereto under subsection (1) is allowed the licences, leases or agreements mentioned in that subsection shall determine or cease to have effect and there shall be paid to the person whose rights under the licence, lease or agreement have been so determined, adequate compensation which may be in the form of a single sum or in the form of periodical payments of money or in such other form as may be determined by the Federal Government or under any arrangement agreed upon between such person and other person designated by the Federal Government."

10. For the purpose of this Act, the expression "petroleum" means any mineral oil or relative hydrocarbon and natural gas existing in its natural condition and casinghead petroleum spirit including bituminous shales and other stratified deposits from which oil can be extracted.

SCHEDULE

(Section 2 (2))

GRANT OF RIGHTS, POWERS, LIBERTIES AND PRIVILEGES IN RESPECT OF PETROLEUM

I, ...

.....

on behalf of the Government of .....

on this ..... day of ..... 19...., hereby grant in perpetuity and convey to and vest in PETRONAS the ownership in and the exclusive rights, powers, liberties and privileges of exploring, exploiting, winning and obtaining petroleum whether lying onshore or offshore of Malaysia. The grant, conveyance and vesting made hereunder shall be irrevocable and shall enure for the benefit of PETRONAS and its successor.

IN WITNESS whereof I on behalf of the Government of ..... hereunto set my hand the day and year first herein above written.

.....

.....

on behalf of the Government of

.....

Witness's Signature:

.....

.....

I, ...
on behalf of PETRONAS hereby accept the grant, conveyance and the vesting made above.

.....

.....

.....

Witness's signature:

.....

.....

Done at ..... this .....
day of ....., 19.....

PETROLEUM DEVELOPMENT ACT, 1974

IN exercise of the powers conferred by section 7 of the Petroleum Development Act, 1974, the Prime Minister hereby makes the following regulations:

1. These Regulations may be cited as the Petroleum Regulations, 1974.

2. On the coming into force of these regulations, all existing bodies of persons or companies who are issued with exploration licences or have entered into petroleum agreements under the Petroleum Mining Act, 1966 shall make available and submit forthwith to PETRONAS for no consideration all data, information and records in respect of any survey, study, research, exploration and production carried out by them.

3. The following applications for a licence shall be made to the Chairman and Chief Executive of PETRONAS:

(a) a licence to commence or continue any business or service, onshore or offshore relating to the exploration, exploitation, winning and obtaining of petroleum and, in particular involving the supply and use of rigs, derricks, ocean tankers and barges;

(b) a licence to commence or continue any business or service involving the supply of equipment and facilities and services required in connection with the exploration, exploitation, winning and obtaining of petroleum including the following:

(i) survey and exploration services;

(ii) all engineering, technical and consultancy services involved in exploration, drilling and production of crude oil and natural gas;

(iii) all engineering, construction and maintenance works connected with upstream activities;

(iv) rigs and drilling services;

(v) supplies of all exploration, drilling and production materials, equipments, platforms, derricks, tools and installations, pipes and pipe-laying services, barges and tankers;

(vi) transportation and communication services connected with upstream operations; and

(vii) supply of general services connected with upstream operation.

3A. The following applications for a permission shall be made to the Secretary-General, Ministry of Trade and Industry;

(a) a permission to commence or continue any business of processing or refining of petroleum or manufacturing of petrochemical products from petroleum under section 6(1) of the Acts;

(b) a permission to commence or continue any business of marketing or distributing of petroleum or petrochemical products under section 6(3) of the Act.

4. Every application referred to in regulation 3 and regulation 3A hereof shall contain such detail and information as may be required from time to time.

5. (1) The Chairman and Chief Executive of PETRONAS and the Secretary-General, Ministry of Trade and Industry shall process applications made to them under regulations 3 and 3A respectively and shall thereafter forward them to the Prime Minister who shall reject or approve such applications.

(2) In approving any application for a licence or permission under regulation 3 or regulation 3A the Prime Minister or any such person to whom such powers have been delegated by him may impose such terms and conditions as he may deem fit.

(3) Without prejudice to the generality of the foregoing the said conditions may relate to any of the following:—

(i) royalties, bonuses, levies or other such payments;

(ii) fees as specified in the Schedule hereto;

(iii) work and investment programme;

(iv) method of working;

(v) inspection of worksite and plant;

(vi) employment and training;

(vii) report of discovery and production of petroleum;

(viii) submission of all data, information and records connected in any survey or research;

(ix) volume of production;

(x) quality;

(xi) fixing of prices;

(xii) keeping and inspection of records including books of account;

(xiii) distribution, marketing, including the appointment of retailers, and export;

(xiv) purchase of petroleum, petroleum products and petrochemical products from overseas or locally;

(xv) option to purchase petroleum; and

(xvi) right of pre-emption.

6. Deleted by P.U. (A) 10./81 w.e.f. 1/10/78

7. (1) Any officer authorised by the Prime Minister may from time to time by notice under his hand require any person to give in writing within a time specified in the notice all such information or particulars as may be required of him for the purposes of these Regulations in respect of any business specified under regulations 3 and 3A.

(2) Any person who without reasonable excuse fails to comply with a notice given under paragraph (1) of this regulation shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years or to both.

(3) Any person who furnishes or causes to be furnished any false particulars or false information pursuant to paragraph (1) of this regulation shall be guilty of an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding four years or to both.

8. For the purposes of these Regulations —

"officer" means a member of the general public service of the Federation;

"paid-up capital" means that part of the issued capital of the company which has been paid up by the shareholders as a result of calls to pay on the company's shares;

"shareholders' funds" means shareholders' funds as defined in the Income Tax Act 1962.

9. Any person who commences or continues any business or service mentioned in regulation 3 without a licence or fails to comply with any condition of any such licence shall be guilty of an offence and shall on conviction be liable to a fine not exceeding fifty

thousand ringgit or to imprisonment for a term not exceeding two years or to both and in the case of a continuing offence he shall be liable to a further fine of one thousand ringgit for each day or part of a day during which the offence continues after the first first day in respect of which the conviction is recorded.

10. Any licence or permission granted or issued under the Petroleum Development Act 1974 and any regulations made thereunder shall continue to be in force until superseded, revoked or otherwise terminated and the provisions of these Regulations shall apply to such licence or permission:

Provided that any such licence or permission which is expressed to remain in force for a definite period shall not remain in force after the expiration of that period unless it shall be renewed in accordance with the Petroleum Development Act 1974 and these Regulations, as the case may be.

SCHEDULE

(Regulation 5)

(a) (i) Fee chargeable for a licence to commence or continue any business or service specified in regulation 3 in respect of any applicant with a paid-up capital appearing under column I is as provided for in the corresponding entry under column II as follows:

I	II
Paid-up Capital	Fee per year
(i) Less than $100,000.00	$ 50.00
(ii) $100,000.00 to $1,000.000.00	$ 250.00

(iii) $1,000,001.00 to $5,000,000.00 $ 500.00

(iv) More than $5,000,000.00 $1,000.00

(ii) Fee chargeable for a licence to commence or continue any business or service specified in regulation 3 in respect of any applicant which is a sole proprietorship or a partnership for one year $ 25.00

(b) Fee chargeable for a permission to commence or continue any business specified in paragraph (1) of regulation 3A in respect of any applicant with shareholders' funds appearing under column I is as provided for in the corresponding entry under column II as follows:

I	II
Shareholders' funds	Fee on issue of licence.
(i) Less than $100,000.00	$ 50.00
(ii) $100,000.00 to $1,000,000.00	$ 250.00
(iii) $1,000,001.00 to $5,000,000.00	$ 500.00
(iv) More than $5,000,000.00	$ 1,000.00

(c) Fee chargeable for a permission to commence or continue any business specified in paragraph (b) of regulation 3A for one year $ 25.00

Made this 3rd day December, 1974.

TUN HAJI ABDUL RAZAK BIN HUSSEIN
PRIME MINISTER

BANGKOK DECLARATION ON THE ASEAN ENVIRONMENT BANGKOK, 29 NOVEMBER 1984

The Government of Brunei Darussalam,
The Government of the Republic of Indonesia,
The Government of Malaysia,
The Government of the Republic of the Philippines,
The Government of the Republic of Singapore and
The Government of the Kingdom of Thailand,
Member States of the Association of South East Asian Nations (ASEAN)

CONCERNED with the problem of environmental degradation of the region resulting from the stresses of accelerated population growth and development;

HAVING RECALLED the First ASEAN Ministerial Meeting on the Environment and the Meetings of the ASEAN Experts Group on the Environment which recognized the need for cooperation amongst ASEAN countries in order to safeguard the ASEAN Environment and in particular its natural resources;

MINDFUL of the Manila Declaration on the ASEAN Environment signed in Manila, Philippines, on 30 April 1981, which provides that Member Countries shall cooperate in the progressive implementation of projects under the ASEAN Environment Programme (ASEP);

NOTING with satisfaction the progress of the implementation of the projects under the ASEAN Environment Programme (ASEP);

FURTHER NOTING that the ASEAN countries, during the past decade, have accomplished the establishment of national environmental protection agencies, and that these agencies have now accomplished the important step in defining their missions, in gaining an understanding of how environment

protection can feasibly be accomplished within the context of the socio-cultural and economic patterns of the region, in initiating programmes aimed at implementing feasible protection measures, and in developing national capabilities in environmental technology;

CONCERNED with the need to take full advantage of this good beginning to continue the progress over the next decade on national policies in the planning and implementation of development projects;

CONSIDERING that the task of integrating environmental protection concepts into national development planning represents one of the most complex tasks ever faced by governments of the region;

RECOGNIZING the experience and confidence gained in managing the environment during this initial period both in their own countries and through ASEAN cooperation;

DO HEREBY DECLARE their desire to strengthen and enhance their regional cooperation in the field of environmental protection to meet the increasing and challenging environmental problems of the ASEAN region in the decade ahead, and to this end hereby adopt the following objective and policy guidelines;

OBJECTIVE

To implement the ASEAN DEVELOPMENT STRATEGY through an integrated approach entailing advance or forward planning in the environmentally related activities with a view to incorporating environmental dimension in development planning right at the base level in order to achieve sustained development and long-term conservation of environmental assets and at the same time improving the quality of life for all.

POLICY GUIDELINES

To achieve the objective noted above, the following policy guidelines shall be adopted for application through-out the ASEAN region:

(1) With respect to environmental management:

(i) Foster the development of macro-economic cum-environmental development plans which can be accommodated by the environmental carrying capacity of the region.

(ii) Continue and strengthen the use of Environmental Impact Assessment (EIA) process and extended Cost-Benefit Analysis for minimizing the adverse effects and for ensuring proper consideration of environmental values in all projects and programmes under government that are likely to produce significant environmental impact and its gradual extension to the private sector including industry.

(iii) Develop a system of procedures for conducting EIAs and for their review which can be practically utilized within the ASEAN region.

(iv) Continue and increase efforts for establishing environmental units in the planning divisions of major project implementing agencies to ensure that environmental consciousness permeates government departments that development policy and planning in all sectors reflect systematic consideration of the environment.

(v) Establish techniques for quantifying the impact of development projects on environment both favourable and unfavourable.

(vi) Evolve criteria for augmentation of renewable resources and economical use of non-renewable resources.

(vii) Prepare an optimal land use pattern and zoning plan.

(2) With respect to nature conservation:

Develop new and practicable approaches for preserving forests wildlife, and other ecological systems in the face of continuing population pressure.

(3) With respect to marine environment:

Develop practicable methods for the management of pollution discharges so that economic development of coastal resources may proceed in coexistence with preservation of the quality of coastal beaches and resorts and the marine environment.

(4) With respect to industry:

(i) Adopt practicable methods for ensuring reasonable control of waste discharges from the earliest stages of project formulation.

(ii) Wherever practicable adopt low waste and non-waste technology and more effective re-use and recycling of wastes in production.

(iii) Develop a Toxic and Hazardous Waste Control Programme and stimulate efforts by government agencies and industry to develop suitable systems for control.

(5) With respect to urban environment:

Increase efforts to provide water-borne sewerage systems with central sewage treatment facilities at least for the major towns.

(6) With respect to environmental education and training:

(i) Continue efforts to enhance public awareness in respect of the importance of environmental protection and support governmental actions in this regard.

(ii) Provide environmental training of personnel involved in decision-making on projects, programmes, policies and plans with emphasis on cause and effect relationship that exists between an individual's environment and his health.

(iii) Introduce stronger general environmental theme into school and university syllabi.

(iv) Provide technical training for staff engaged directly in the work of environmental protection agencies and in environmental programmes of other agencies.

(7) With respect to environmental information systems:

(i) Develop a comprehensive environmental system to facilitate decision-making.

(ii) Initiate or strengthen efforts for establishment of suitable national data bank/storage and retrieval system.

(iii) Intensify efforts for establishing monitoring programmes for continuing surveillance of sensitive environmental resources.

(iv) Promote increased use of remote sensing as a means of establishing environmental data bases.

(8) With respect to wider involvement in environmental management:

Encourage and promote cooperation between Govenments, Non-Governmental Organizations, Universities, Business Communities within ASEAN in the field of environmental management.

(9) With respect to environmental legislation:

Develop appropriate legislation to support the proper management and development of the environment.

(10) With respect to international cooperation on environmental management in the ASEAN countries:

Establish cooperation with developed and other developing countries and international agencies for transfer of technology and share experiences in the management of the environment.

DECIDE to adopt and implement the revised ASEAN Environment Programme II (ASEP II).

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Bangkok Declaration.

DONE in Bangkok, Thailand, this Twenty-Ninth Day of November in the year One Thousand Nine Hundred and Eighty-Four.

On behalf of the Government of Brunei Darussalam	(Sgd.) **Pehin Dato Abdul Rahman Taib** *Minister of Development*
On behalf of the Government of the Republic of Indonesia	(Sgd.) **Emil Salim** *Minister of State for Population and Environment*
On behalf of the Government of Malaysia	(Sgd.) **Datuk Amar Stephen K. T. Yong** *Minister of Science, Technology and the Environment*
On behalf of the Government of the Republic of the Philippines	(Sgd.) **Rodolfo P. del Rosario** *Minister of Natural Resources*
On behalf of the Government of the Republic of Singapore	(Sgd.) **Ong Pang Boon** *Minister for the Environment*
On behalf of the Government of the Kingdom of Thailand	(Sgd.) **Damrong Lathapipat** *Minister of Science, Technology and Energy*

ASEAN DECLARATION ON HERITAGE PARKS AND RESERVES
BANGKOK, 29 NOVEMBER 1984

The Government of Brunei Darussalam,
The Government of the Republic of Indonesia,
The Government of Malaysia,
The Government of the Republic of the Philippines,
The Government of the Republic of Singapore and
The Government of the Kingdom of Thailand,
Member States of the Association of South East Asian Nations (ASEAN)

CONCERNED with the necessity to preserve and protect national parks and nature reserves of the ASEAN member countries;

AWARE of the uniqueness, diversity and outstanding values of certain national parks and reserves of ASEAN member countries, that deserve the highest recognition so that their importance as conservation areas could be appreciated regionally and internationally;

RECOGNIZING that conservation areas should be managed to maintain ecological processes and life support systems, preserve genetic diversity; ensure sustainable utilization of species and ecosystems; and maintain wilderness that are of scenic, cultural, educational, research, recreational and tourism values;

CONSIDERING that to achieve the aims, purpose and objectives of the heritage parks and reserves of the ASEAN member countries, a master plan should be drawn for each heritage park which shall include but not be limited to management guidelines, research on structure and function of ecosystems and education on wilderness values;

FURTHER CONSIDERING that environmental concerns transcend national boundaries and that individual states are primarily responsible for their respective identified heritage sites;

DO HEREBY DECLARE the following national heritage sites and reserves;

1. Brunei Darussalam
   a. Tasek Merimbun

2. Indonesia
   a. Leuser National Park
   b. Kerinci — Seblat National Park
   c. Lorentz Nature Reserve

3. Malaysia
   a. Kinabalu National Park
   b. Mulu National Park
   c. Taman Negara National Park

4. Philippines
   a. Mt. Apo National Park
   b. Iglit — Baco National Park

5. Thailand
   a. Khao Yai National Park
   b. Kor Tarutao National Park

as ASEAN national heritage parks and nature reserves and

AGREE that a common cooperation is necessary to conserve and manage such parks and reserves including the setting up of regional conservation and management action as well as regional mechanism complementary to and supportive of national efforts at implementation of conservation measures.

DONE in Bangkok, Thailand, this Twenty Ninth Day of November in the year One Thousand Nine Hundred and Eighty-four.

On behalf of the Government of Brunei Darussalam	(Sgd.) Pehin Dato Abdul Rahman Taib *Minister of Development*
On behalf of the Government of the Republic of Indonesia	(Sgd.) Emil Salim *Minister of State for Population and Environment*
On behalf of the Government of Malaysia	(Sgd.) Datuk Amar Stephen K. T. Yong *Minister of Science, Technology and the Environment*
On behalf of the Government of the Republic of the Philippines	(Sgd.) Rodolfo P. del Rosario *Minister of Natural Resources*
On behalf of the Government of the Republic of Singapore	(Sgd.) Ong Pang Boon *Minister for the Environment*
On behalf of the Government of the Kingdom of Thailand	(Sgd.) Narong Wongwan *Minister of Agriculture and Cooperatives*

AGREEMENT ON THE RECOGNITION OF DOMESTIC DRIVING LICENCES ISSUED BY ASEAN COUNTRIES KUALA LUMPUR, 9 JULY 1985

The Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand (hereinafter referred to, as "The Contracting Parties");

BEING members of the Association of Southeast Asian Nations (hereinafter referred to as "ASEAN");

DESIRING to accelerate and intensify the implementation of the aims and purposes of ASEAN as embodied in the ASEAN Declaration;

AND CONSIDERING the desirability of facilitating the movement of citizens of the ASEAN countries by recognizing domestic driving licences issued by the respective countries.

DO HEREBY AGREE AS FOLLOWS:

ARTICLE I

THE CONTRACTING PARTIES agree to recognize all domestic driving licences except for temporary/provisional/learner's driving licences (hereinafter referred to as "the licences") issued by the designated authorities or national automobile associations of the ASEAN countries. The types and classes of the licences issued in the ASEAN countries are listed in Annexes A, B, C, D, E and F for Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore and Thailand respectively. Samples of the licences are also attached as Annexes G, H, I, J, K and L for Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore and Thailand respectively.

ARTICLE 2

By virtue of the recognition hereby of the licences, holders of the licences issued in any one of the ASEAN countries and intending to make only a temporary stay in the territory of any of the other ASEAN countries may drive therein the classes or types of vehicles the licences permit them to drive.

ARTICLE 3

Any licences if not drawn up in English shall be accompanied by a certified translation in English.

ARTICLE 4

A licence which may be determined by the competent licence-issuing authority of an ASEAN country to be invalid or which according to the laws of the country in which it is issued would be invalid or which has expired shall not be recognized for the purposes of this Agreement.

ARTICLE 5

The recognition of the licences shall not absolve the holders of the licences from the responsibility of ensuring the same standard and condition of driving as applicable in the country which accords such recognition.

ARTICLE 6

Holders of the licences of one CONTRACTING PARTY shall be liable for traffic offence penalties in accordance with the appropriate laws of any other CONTRACTING PARTY in whose territory they are driving.

ARTICLE 7

Particulars of a change in the format of licences issued by any one of the CONTRACTING PARTIES should be notified accordingly to all member countries of ASEAN by the CONTRACTING PARTY concerned. Recognition of the licences the format of which has been so changed is conditional upon such notification.

ARTICLE 8

Any amendment to this Agreement may be made by mutual consent.

ARTICLE 9

This Agreement shall be deposited with the Secretary-General of the ASEAN Secretariat who shall promptly, transmit certified true copies thereof to the CONTRACTING PARTIES.

ARTICLE 10

The CONTRACTING PARTIES shall deposit their Instruments of Ratification with the Secretary-General of the ASEAN Secretariat who shall promptly inform each CONTRACTING PARTY of such deposit. This Agreement shall enter into force on the thirtieth day after the sixth Instrument of Ratification has been deposited.

ARTICLE 11

This Agreement may be terminated as between any two of the CONTRACTING PARTIES by either of the parties giving to the other six months prior written notice of the intended termination.

ARTICLE 12

Any dispute between the CONTRACTING PARTIES arising out of the interpretation or implementation of this Agreement shall be settled amicably through consultation or negotiation.

IN WITNESS WHEREOF the undersigned, being duly authorized to sign on behalf of their respective Governments, have signed this Agreement.

DONE at Kuala Lumpur in the English Language this Ninth day of July 1985.

For the Government of Brunei Darussalam	(Sgd.) Prince Mohamed Bolkiam *Minister for Foreign Affairs*
For the Government of the Republic of Indonesia	(Sgd.) Prof. Dr. Mochtar Kusumaatmadja *Minister for Foreign Affairs*
For the Government of Malaysia	(Sgd.) Tengku Ahmad Rithauddeen *Minister for Foreign Affairs*
For the Government of the Republic of the Philippines	(Sgd.) Pacifico A. Castro *Acting Minister for Foreign Affairs*
For the Government of the Republic of Singapore	(Sgd.) S. Dhanabalan *Minister for Foreign Affairs*
For the Government of the Kingdom of Thailand	(Sgd.) A. C. M. Siddhi Savetsila *Minister for Foreign Affairs*

(Note: The Annexes mentioned in the Agreement are not printed here as they are of a technical nature)

ASEAN MINISTERIAL UNDERSTANDING ON THE ORGANIZATIONAL ARRANGEMENT FOR COOPERATION IN THE LEGAL FIELD
BALI, 12 APRIL 1986

We, the undersigned, representing member countries of the Association of Southeast Asian Nations, attending the Meeting of the ASEAN Ministers of Justice, Ministers of Law and Attorneys-General in Bali on 11-12 April 1986 upon the invitation of His Excellency Mr. Ismail Saleh, Minister of Justice of the Republic of Indonesia,

Reaffirming our commitment to the Bangkok Declaration of 8 August 1967 and the Declaration of ASEAN Concord of 24 February 1976, in particular to the latter's programme of action,

Recalling the Seventeenth ASEAN Ministerial Meeting of July 1984, Jakarta, at which it was observed that stress should be made in cooperation, including harmonization in the legal field on matters of mutual interest,

Recognizing the diversity of legal systems in the ASEAN member countries,

Desiring to facilitate the realization of cooperation in the legal field on matters of mutual interest,

Do hereby agree:

1. That legal cooperation among ASEAN countries shall initially comprise the following three aspects;

   (i) exchange of legal materials;

   (ii) judicial co-operation; and

   (iii) legal education and legal research

2. That the three aspects of legal cooperation shall be studied further by the Senior Legal Officials, who may be assisted by one or more experts as they may deem necessary.

3. That the Ministers of Justice, Ministers of Law and Attorneys-General shall meet at such intervals as may be deemed appropriate and necessary in order to, inter alia, review the work of the Senior Legal Officials and give such directions as may be appropriate thereto.

Done in Bali, Indonesia, on the Twelfth Day of April in the Year One Thousand Nine Hundred and Eighty Six.

For the Government of Brunei Darussalam	(Sgd.) **Pikdr Pengiran Bahrin Pengiran Hj. Abas** *Minister of Law Cum Minister of Communications*
For the Government of the Republic of Indonesia	(Sgd.) **Ismail Saleh** *Minister of Justice*
For the Government of Malaysia	(Sgd.) **Datuk Dr. James P. Ongkili** *Minister of Justice*
For the Government of the Republic of the Philippines	(Sgd.) **Neptali Gonzales** *Minister of Justice*
For the Government of the Republic of Singapore	(Sgd.) **Tan Boon Teik** *Attorney-General*
For the Government of the Kingdom of Thailand	(Sgd.) **Pipop Asitirat** *Minister of Justice*

Attested:

(Sgd.) **Phan Wannamethee**
Secretary-General
ASEAN Secretariat

ASEAN BOOK NOTICES

*Vyva Victoria M. Aguirre**

ACCESS TO JUSTICE: HUMAN RIGHTS STRUGGLES IN SOUTH EAST ASIA/EDITED FOR HUMAN RIGHTS INTERNET BY HARRY M. SCOBLE AND LAURIE S. WISEBERG. — London : Zed Books, c1985. 208 p.
ISBN 0-86232-293-6 Pbk

This volume brings together the proceedings of a workshop on "Access to Justice" held in Tagaytay, Philippines from 14-19 February, 1982. The papers were edited and organized under three major themes: (1) Asian perspective on human rights, (2) the Present state of human rights in the Asean nations, and (3) Particular rights, Special problems. Discussions were focused on the following issues of concern: the powerful versus the powerless; protection of detainees; freedom of the press; freedom of association; the rights of indigenous peoples and minorities; economic rights; and the relevance of international standards on human rights.

ADMINISTRATION OF THE SHARI'AH COURT SYSTEM: PAPERS AND PROCEEDINGS OF THE FIRST ASEAN SHARI'AH ADMINISTRATORS' CONFERENCE WORKSHOP, AUGUST 7-11, 1983 / EDITORIAL STAFF, ALFREDO T. TIAMSON . . ., [et al.] — Quezon City : University of the Philippines Law Complex, 1985. 165 p. : photos.
ISBN 971-15-0237-2

*Assistant Law Librarian
University of the Philippines Law Library, Legal Resources Center

The conference-workshop was attended by representatives from the Asean countries whose purpose was to evaluate the administration of Islamic law and to establish linkages among Shari'ah Court administrators in the region. The topics discussed include the following: Administration of Muslim personal law system in a Muslim-majority country: Administration of Muslim personal law system in a Muslim-minority country; Conflict resolution: Personal law system, civil law system and Muslim schools of law; Physical organization of Shari'ah courts; the Role of the Mufti in the administration of court system; and Justice and the Shari'ah.

LEGAL OUTREACH : THE ASEAN EXPERIENCE : SEMINAR PROCEEDINGS, SEPTEMBER 30-OCTOBER 5, 1984 / EDITED BY CASIANO O. FLORES, ELIZABETH A. PASCUAL.— [Quezon City] : U. P. Law Center, c1985. 194 p.

The Seminar was jointly sponsored by the U. P. Law Center, the Asean Law Association and the Asia Foundation in order to bring together legal experts from the Asean countries so that they may "acquaint each other with innovative approaches to legal aid and legal literacy in their respective countries." This particular gathering focused on the Philippine experience especially on the efforts of the U. P. Law Center at bringing the law to the grass roots with the use of mass media.

MUNTARBHORN, VITIT. WOMEN'S DEVELOPMENT IN THAILAND. — [Bangkok] : National Committee for International Cooperation, Thailand National Commission on Women's Affairs, 1985. 170 p.

This volume was published as a background document for the World Conference of the United Nations Decade for Women in Nairobi, Kenya, 15-26 July 1985. As the title suggests, it traces the development of women in Thailand under the perspective of

Thai history and culture. It discusses such areas as national policy and planning, projects undertaken for the development of women, the law on women, as well as employment, education and health. Finally, it postulates that the development of women is closely related to the development of men, particularly in attitudinal changes and role assumptions.

SUKONTHAPAN, PISAWAT. COPYRIGHT LAWS OF THE ASEAN COUNTRIES : PROTECTION OF FOREIGN WORKS. — [s.l. : s.n.], 1985. 222 p.

This study deals, in general, with the copyright laws of the Asean region and, in particular with the protection of foreign works in each of the Asean countries. It is divided as follows: General background; Table of comparative laws; Discussions on some aspects of the copyright laws of the Asean countries; Protection of foreign works in each of the Asean countries; Conclusions and suggestions. The data were gathered from documents, from discussions with copyright law experts from the region, as well as from surveys conducted with the help of questionnaires.