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This publication is up to date as of June 2020.

# Industry Overview of Malaysian Oil Sector

Malaysia is the second-largest oil producer in South East Asia<sup>1</sup> and holds the position as one of the world's largest exporters of liquefied natural gas. Malaysia also occupies a strategic location along main routes for seaborne energy trade. The oil and gas industry has been a major contributor to the country's development, and still contributes almost 20 per cent of the country's total gross domestic product<sup>2</sup>.

According to the BP Statistical Review of World Energy 2019, Malaysia held proved oil reserves of 3 billion barrels as of end 2018, the sixth-largest reserves in the Asia-Pacific after China, India, Vietnam, Australia and Indonesia<sup>3</sup>. Almost all of Malaysia's oil comes from offshore fields, from three producing basins: the Malay basin, the Sarawak basin and the Sabah basin. It's oil production has been gradually decreasing mainly because of the declining production in the mature basins located in the shallow waters offshore Peninsular Malaysia and Sarawak that have contributed the most to its oil production.

## Historical Landscape

In 1910, Shell sunk the first producing oil well in Miri, Sarawak. Before 1975, petroleum concessions were granted by state governments. Under those concessions, oil companies were granted exclusive rights to explore and produce oil. The companies would then pay royalties and taxes to the state governments. In 1975, the Petroleum Development Act 1975 ("**PDA**") was enacted and Malaysia's national oil company, Petroliam Nasional Berhad ("**Petronas**") was incorporated in accordance with the PDA.

Petronas is incorporated under the Companies Act 1965. Pursuant to the PDA, Petronas is vested with 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<sup>4</sup>. In return for the ownership and rights in petroleum resources, the PDA states that Petronas is to make cash payments to the federal government and the relevant state governments<sup>5</sup>.

Pursuant to the Petroleum Regulation 1974 ("**Petroleum Regulations**"), Petronas is the responsible authority for licensing any third-party contractors wishing to participate in upstream petroleum activities, including exploration and exploitation<sup>6</sup>. The Malaysian Petroleum Management ("**MPM**") is a division within Petronas, which executes the duties and powers conferred to Petronas under the PDA<sup>7</sup>. It is MPM therefore which more specifically assesses, manages, and awards petroleum arrangement contracts in the upstream sector. This role allows Petronas to manage its affairs under the dual function of being both a regulator, as well as an operator in the upstream business. In addition, Petronas is also responsible for licensing goods and service providers operating in the upstream sector, including providers of rigs and drilling services and supply of general goods and services related to upstream operations<sup>8</sup>.

Petronas' wholly-owned subsidiary, Petronas Carigali Sdn Bhd ("**Carigali**") is its exploration and production arm. By way of policy, Carigali is always required to be a party to any Production Sharing Contract ("**PSC**"). Exploration rights are granted to oil and gas exploration companies through the PSC. The successful company explores for hydrocarbons on behalf of Petronas and, if oil or gas is discovered during the duration of the PSC, it can subsequently proceed to develop and produce the hydrocarbons resources. PSCs were introduced in 1976<sup>9</sup>, two years after the incorporation of Petronas. In addition to PSCs, Petronas has also executed risk service contracts ("**RSC**") since 2011 for the development and production of oil from marginal fields. These work on a reimbursement basis in which Petronas retains ownership of the oil, whilst exploration costs are borne

<sup>1</sup> <https://worldpopulationreview.com/countries/oil-producing-countries/>  
<sup>2</sup> [https://www.mida.gov.my/home/administrator/system\\_files/modules/photo/uploads/20191017113148\\_SIB%20O&G\\_%202019.pdf](https://www.mida.gov.my/home/administrator/system_files/modules/photo/uploads/20191017113148_SIB%20O&G_%202019.pdf)

<sup>3</sup> <https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/energy-economics/statistical-review/bp-stats-review-2019-full-report.pdf>

<sup>4</sup> Section 2(1) of the PDA.

<sup>5</sup> Section 4 of the PDA.

<sup>6</sup> Reg 3(a) of the Petroleum Regulations.

<sup>7</sup> <https://platinum.petronas.com/MPM/Pages/About-MPM.aspx>; and <https://www.petronas.com/mpm/about-mpm/malaysia-petroleum-management>

<sup>8</sup> Reg 3(b) of the Petroleum Regulations.

<sup>9</sup> <https://www.petronas.com/about-us/milestones>

by RSC contractors. Reimbursements are made upon discovery of commercial fields, with RSC contractors being entitled to a share of the profit. According to Petronas' latest published figures (December 2018), there are 98 PSCs, and three RSCs in Malaysia<sup>10</sup>.

### **Key Commercial Aspects**

According to Malaysia's Energy Commission Statistics Handbook 2019, Malaysia's primary energy fuel sources for as of 2017 were: 29.1 per cent crude oil; 63 per cent natural gas; 1.7 per cent coal and coke products; 5.5 per cent hydropower; 0.4 per cent biodiesel; 0.2 per cent biomass; and 0.1 per cent solar<sup>11</sup>.

Further, the breakdown of Malaysia's energy consumption in 2017 was: 49.4 per cent petroleum products; 20.2 per cent electricity; 26.9 per cent natural gas; 2.9 per cent coal and coke; and 0.6 per cent biodiesel<sup>12</sup>. The Malaysian government has emphasised the need for fuel diversification through coal imports and by promoting investments in renewable energy<sup>13</sup>.

In respect of the trading of oil, Malaysia is currently a net oil importing country<sup>14</sup>, as Malaysia's crude oil consumption has overtaken its oil production since 2011 based on the figures provided in the BP Statistical Review of World Energy<sup>15</sup>. The net export of crude oil in Malaysia has also steadily decreased from approximately 16,962 ktoe in 2007 to 14,958 ktoe in 2017<sup>16</sup>.

## Policies in Respect of Oil-related Activities / General Energy Policies in Malaysia

The National Petroleum Policy (1975) is Malaysia's first energy policy which strived for efficient utilisation of petroleum resources for industrial development and to ensure that the country plays a major role in the management and operation of the petroleum industry.

Thereafter, the National Energy Policy (1979) was introduced with broad guidelines on long-term energy objectives and strategies to ensure adequate and cost-effective supply of energy, promote best utilization of energy and to alleviate the negative impact of energy generation on the environment.

In 1980, the National Depletion Policy was introduced to increase the lifespan of the oil and gas reserves in Malaysia. The Four-Fuel Diversification Policy (1981) aimed to ensure reliability and security of the energy supply through diversification of energy resources, i.e., oil, gas, hydropower and coal.

In 2001, the Fifth Fuel Policy encouraged the utilization of renewable resources such as biomass, solar and mini hydro. This policy was put in place to achieve a safe, cost-effective, secure energy supply. Pursuant to the Energy Commission Act 2001, the Energy Commission was empowered as the regulator and enforcer for all matters relating to energy supply activities and laws in Malaysia. In 2006, first National Biofuel Policy was introduced, and in the Eleventh Malaysia Plan (2016–2020) the government continued to emphasise the

<sup>10</sup> <https://platinum.petronas.com/MPM/Pages/About-MPM.aspx>

<sup>11</sup> <https://meih.st.gov.my/documents/10620/bcce78a2-5d54-49ae-b0dc-549dcacf93ae>; page 18.

<sup>12</sup> <https://meih.st.gov.my/documents/10620/bcce78a2-5d54-49ae-b0dc-549dcacf93ae>; page 42.

<sup>13</sup> [https://umexpert.um.edu.my/public\\_view.php?type=publication&row=NTE4MzQ%3D](https://umexpert.um.edu.my/public_view.php?type=publication&row=NTE4MzQ%3D); page 2.

<sup>14</sup> <https://www.thestar.com.my/business/business-news/2015/01/21/clearing-the-air-treasury-sec-gen-malaysia-net-importer-of-crude-oil-petroleum-products-since-2014/>

<sup>15</sup> <https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/energy-economics/statistical-review/bp-stats-review-2019-full-report.pdf>

<sup>16</sup> <https://meih.st.gov.my/documents/10620/bcce78a2-5d54-49ae-b0dc-549dcacf93ae>; page 21.

utilisation of renewable sources of energy and energy efficiency.

The Twelfth Malaysian Plan (2021-2025) ("**12 MP**"), that is, the first phase of the Shared Prosperity Vision 2030 ("**SPV 2030**") will be tabled in Parliament in January 2021<sup>17</sup>. The SPV 2030 is a government blueprint released in October 2019 which is primarily aimed at improving the standards of living of all Malaysians by 2030. The 12MP broadly encompasses three dimensions, namely economic empowerment, environmental sustainability and social re-engineering, which will be supported by policy tools and governance<sup>18</sup>. All three dimensions will also be aligned to the Sustainable Development Goals (SDGs) under the 2030 Agenda by the United Nations<sup>19</sup>. The economic empowerment dimension will include new sources of growth, including sustainable energy sources, whilst the environmental sustainability dimension, among others include renewable energy as well as adaptation and mitigation of climate change<sup>20</sup>.

## Regulatory Overview

The key laws and regulations in relation to oil and activities in Malaysia are:

- (a) the PDA, which provides for the vesting of the entire ownership of, as well as rights, privileges and benefits in relation to exploring and producing oil and gas, offshore and onshore Malaysia, in Petronas;
- (b) in addition to exclusive rights over petroleum onshore and within the territorial seas of Malaysia, the Exclusive Economic Zone Act 1984 ("**EEZA**") and the Continental Shelf Act 1966 ("**CSA**") extend Petronas' exclusive rights to petroleum to include Malaysia's exclusive economic zone and its continental shelf respectively;
- (c) the Petroleum Regulations, which sets out the licensing requirements for upstream and

downstream activities of refining, marketing and distribution of oil products;

- (d) the Petroleum (Safety Measures) Act 1984 ("**PSMA**") and its associated regulations which govern petroleum transportation, storage and handling;
- (e) Petronas licensing guidelines, which sets out the general requirements for application of Petronas licences or registration and the local bumiputra participation requirement for equity, board of directors, management and employees based on the SWEC applied by Petronas.

Petronas has imposed local incorporation and equity requirements for certain activities in the petroleum sector, pursuant to its powers and responsibilities under the PDA and Petroleum Regulations, and accordingly corporations wishing to engage in such activities must comply with such requirements in order to obtain the necessary licences from Petronas for their business operations in Malaysia;

- (f) the Companies Act 1965, which sets out the legal basis upon which companies are formed, operated and managed;
- (g) the Environmental Quality Act 1974 ("**EQA**"), the primary legislation governing the protection of the environment and the prevention of oil spills and pollutants on land and in Malaysian waters; and
- (h) the Merchant Shipping Ordinance 1952 ("**MSO**"), the primary legislation governing licensing of vessels in Malaysia. All vessels engaged in providing shipping services in the Malaysian domestic shipping sector must be licensed by the Domestic Shipping Licensing Board under the Ministry of Transport.

<sup>17</sup> <https://www.epu.gov.my/sites/default/files/Online%20Public%20Engagement.pdf>; <https://www.theedgemarkets.com/article/12th-malaysia-plan-postponed-2021-%E2%80%94-report>

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> <http://rmke12.epu.gov.my/about-us>

### **Key Regulatory Bodies**

Under the PDA, all upstream activities such as exploration, development and production of resources are regulated by Petronas through PSCs and RSCs that contractors are required to enter into with Petronas in order to acquire the right to explore and produce oil in Malaysia. Goods and service providers operating in the upstream sector including providers of rigs and drilling services and supply of general goods and services related to upstream operations also require a licence from Petronas.

Under the Petroleum Regulations, the Ministry of International Trade and Industry ("**MITI**") is responsible for regulating the processing or refining of petroleum or manufacture of petrochemical products from petroleum<sup>21</sup>, and the Ministry of Domestic Trade and Consumer Affairs ("**MDTCA**") is responsible for regulating the marketing and distribution of petroleum and petrochemical products in Malaysia<sup>22</sup>.

### **Licensing or Registration Requirements**

As mentioned above, a contractor wishing to participate in oil exploration and production activities must apply for and receive a licence from Petronas, in the form of a PSC or RSC. The Petronas licensing guidelines ("**Petronas Guidelines**") sets out the general requirements for application of Petronas licences to provide goods or services to the upstream sector and registration with Petronas to participate in Petronas' tender and activities in the downstream sector. The respective equity requirements, where applicable, are based on the Standardised Work and Equipment Categories ("**SWEC**") applied by Petronas. There is currently no official register setting out oilfield ownership or operatorship available to the public.

### **Local Content Requirement**

There are no specific requirements on the use of a minimum amount of locally sourced goods, services or capital. Such use is encouraged and incentivised through import restrictions or import duties on imports. There is, however, a clear policy to encourage local equity participation in various economic sectors, but the approach taken by the Malaysian government towards local equity participation requirements for the past few years and of

late has been a positive one, with the liberalisation of such requirements for different sectors.

### ***Historical Background***

The New Economic Policy ("**NEP**") aimed to ensure that the local indigenous people (known as bumiputra) became full partners in all aspects of the economic life of the nation. Thereafter, the Malaysian government implemented new policies such as the National Development Policy ("**NDP**") and the National Vision Policy ("**NVP**"). The overall objective of these policies was to achieve a 'balanced development' within a framework of rapid growth with equity as its primary thrust. In particular, one of the main objectives of the NVP was to achieve at least 30 per cent bumiputra participation in all industries by 2010. The Foreign Investment Committee ("**FIC**") was formed to implement the goals of NDP and NVP and as a result, the guidelines regulating foreign participation in acquisition of interest, mergers and takeovers, and acquisitions of properties ("**FIC Guidelines**") were introduced.

In 2009, the Prime Minister acknowledged the need for Malaysia to undergo a transformation in order to achieve the status of a developed nation and announced the removal of the 30 per cent bumiputra equity requirement for 27 services subsectors. Shortly thereafter, on 30 June 2009, the Malaysian government announced further measures to liberalise a host of restrictions on foreign investments in Malaysia, including the disbanding of the FIC and the repeal of the FIC Guidelines.

In particular, the Malaysian government has stated that sectoral regulation by the relevant government ministries and agencies continues to apply. As such, there continues to be requirements for local equity participation in foreign investments in certain sectors. The requirements for local equity participation in foreign investments are administered by way of legal and non-legal controls. Legal controls are exercised via the enforcement under statutes or subsidiary legislations; and non-legal controls are carried out via the Guidelines on Foreign Participation in the Distributive Trade Services published by the MDTCA, whereby non-compliance of the guidelines may result in administrative sanctions.

<sup>21</sup> Reg 3A(1) of the Petroleum Regulations.

<sup>22</sup> Reg 3A(2) of the Petroleum Regulations.

### ***Local Content Requirement in respect of the Oil Sector***

Generally, there are local or bumiputra equity conditions for companies wishing to supply goods and services in the upstream sector or provide downstream services to Petronas under the Petronas' licensing and registration regime.

As further detailed below, companies that wish to supply any goods or services to operators for upstream activities require a licence from Petronas and compliance with the Petronas Guidelines and the licensing requirements, which may include a minimum local or bumiputra equity requirement in accordance with the SWEC.

Given the foregoing, foreign companies in the business of supplying goods and services in these sectors must either do so through an agency agreement with local companies licensed by Petronas, or by forming a joint venture with a local company / individual. In the case of agencies, the company providing agency services must be licensed by Petronas. For joint ventures, licensing, permits or authorisations from Petronas would still have to be obtained.

# Regulatory Issues Relating to Upstream and Downstream Sectors

## **A) Upstream**

### ***Exploration and Production***

#### *General Character of Oil Exploration and Production Activity*

All exploration and production are dependent upon approval by Petronas, and Petronas determines the exploration locations and blocks. Presently, all oil exploration and oil production activities in Malaysia are conducted offshore.

#### *Ownership of Title over Oil Reservoirs*

Pursuant to the PDA, Petronas is vested with the entire ownership in, and the exclusive rights, powers, liberties and privileges of exploring, exploiting, winning and obtaining oil and gas whether onshore or offshore of Malaysia, which extends to include Malaysia's exclusive economic zone<sup>23</sup> and its continental shelf<sup>24</sup>. In relation to oil and gas, there is no legal distinction between surface rights and subsurface mineral rights. Given that the ownership of the petroleum vests in Petronas, any transfer or disposal of title in the extracted oil would be subjected to Petronas' consent or approval. As such, the terms of the transfer of title is generally set out in the contract between the licensee, lessee or contractor and Petronas.

#### *Seaward Extent subject to Regulatory Regime for Oil Production*

Under the EEZA, Malaysia's exclusive economic zone extends to 200 nautical miles from the baselines from

<sup>23</sup> Section 4(a) of the Exclusive Economic Zone Act 1984.

<sup>24</sup> Section 3(1) of the Continental Shelf Act 1966; section 2(1) of the PDA.

which the breadth of its territorial seas is measured<sup>25</sup>. Malaysia has sovereign rights for the purpose of exploring and exploiting natural resources in its exclusive economic zone<sup>26</sup>.

#### Grant of Exploration and Production Rights - Procedures and Licensing Requirements

A contractor wishing to participate in oil exploration and production activities must apply for and receive a licence from Petronas. Although the PDA and Petroleum Regulations are silent on what form such licence should take, in practice, the licence will normally take the form of a PSC or RSC.

The Petroleum Regulations provide that the applications for a licence shall be made to the President of Petronas<sup>27</sup> and thereafter the Chairman and Chief Executive of Petronas shall process the applications and forward such applications to the Prime Minister for approval<sup>28</sup>. Other than the aforementioned, neither the PDA nor the Petroleum Regulations stipulate the procedures and/or selection criteria for a contractor to qualify to apply for a PSC with Petronas.

For the purposes of the licence application, the Petronas Guidelines provide that the interested entity must be registered with the Registrar of Companies as a private limited company (ie, Sdn Bhd); a public company (ie, Berhad/ Bhd) or land surveyor, quantity surveyor, architect or other related professional bodies<sup>29</sup>. It should be noted that under the new Companies Act 2016, companies may be formed by a single person and the prohibition on carrying on business with less than two shareholders no longer applies. Under the Petronas Guidelines, the company is also required to, amongst other things, have a minimum paid up capital of RM 100,000 for a licence application and meet the applicable bumiputra participation requirement in accordance with the SWEC<sup>30</sup>.

The successful contractor explores for hydrocarbons on behalf of Petronas, and if oil or gas is discovered during the duration of the PSC or RSC, it can subsequently proceed to develop and produce the hydrocarbons resources. The rights to oil exploration and production can

be secured through participating in the Petronas bidding rounds for a PSC or RSC. Alternatively, farm-ins into existing contracts can be undertaken with the prior approval of Petronas.

In Malaysia, there is no separate legal regime for joint ventures in the oil sector. Contracting parties to a PSC can be one or more companies but there must always be at least one company that 'operates' on behalf of all contracting parties. The PSC requires the contractors to enter into a joint operating agreement ("**JOA**") in instances whereby there is more than one contractor to the PSC. The contractual relationship, rights and liabilities are regulated through the JOA. Each party's participating interests and obligations in the joint venture are set out in the JOA.

#### Limitations on Acquisition of Oil-related Interests by Foreign Companies (Upstream)

For upstream exploration and production activities, there are no special requirements or limitations at law on the participation of foreign companies. In order to participate in exploration and production activities, foreign companies must receive a licence from Petronas, which in practice, will normally take the form of a PSC.

There are substantial local or bumiputera equity conditions for companies wishing to supply goods and services, i.e., which are enforced through the Petronas licensing regime.

As such, foreign companies in the business of supplying goods and services to the upstream oil industry in Malaysia often either do so through an agency agreement with local companies licensed by Petronas, or by forming a joint venture with a local company / individual.

#### Participating Interest of Petronas in PSCs

It is the policy of Petronas that Petronas's wholly owned subsidiary, Carigali, its exploration and production arm, is one of the contracting parties to each PSC. Carigali's participating interest in each PSC varies, but it usually participates with no less than 15% interest.

<sup>25</sup> Section 3(1) of the Exclusive Economic Zone Act 1984.

<sup>26</sup> Section 4(a) of the Exclusive Economic Zone Act 1984.

<sup>27</sup> Reg 3 of Petroleum Regulations.

<sup>28</sup> Reg 5 of Petroleum Regulations.

<sup>29</sup> <https://www.petronas.com/sites/default/files/join-us/GENERAL%20GUIDELINES%20-%20PETRONAS%20License%20%26%20Registration%20Applications%20v9.0.pdf>, pg 4.

<sup>30</sup> Ibid.

Additionally, it is not unusual for there to be more than one contracting party to the PSC owing to the high-risk nature of the venture, including the risk that no commercially viable hydrocarbons may be found despite considerable capital outlay. However, there will usually be one designated "Operator" with primary responsibility who "operates" on behalf of all other participating contractors. Carigali may also be the operator, but this is not generally the case.

### Oil Royalties

The PDA provides that royalties (or 'cash payment', as provided under the PDA) are payable by Petronas to the federal government and each of the thirteen state governments to the extent petroleum production is undertaken in or offshore from the relevant state's shore<sup>31</sup>. The royalty rates are set out in agreements between Petronas and the federal government and each of the 13 state governments. These agreements currently provide for 5 per cent of the value of the petroleum obtained to be paid to the state in which the oil is found, and 5 per cent to be paid to the federal government.

Instead of royalties, the PSC or RSC contractors will have to pay export duty for the export of crude oil.

### Duration of PSCs

The term of a PSC or RSC will vary. There will generally be timeframes for exploration, development and production. The period for production for PSCs is typically 20 years and thereafter, may be extended from time to time upon an application for extension.

### Title to Facilities and Equipment used for Oil Exploration, Development and Transport

The title to all equipment and assets purchased by PSC contractors which are used for oil exploration and petroleum operations are generally vested with Petronas. The contractors retain the right to use those assets for the duration of the relevant PSC. The costs of such items are recoverable in barrels of cost oil or gas equivalent.

### No Difference between Exploration and Production Activities Onshore and Offshore

The PDA regulates the exploration and production of petroleum, which is defined under the act as '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'. As such, there is no difference between the onshore and offshore regimes as both are governed by the PDA.

### Reservoir Unitisation applicable to Domestic and Cross-Border Reservoirs

It is a standard provision in the PSCs, that Petronas may ask the affected PSC contractors to unitise the reservoirs, where Petronas is satisfied that the strata in a PSC contract area forms a single geological structure or reservoir with another PSC contract area.

In respect of cross-border reservoirs, Petronas will, upon consulting with contractors of the relevant PSC areas, represent PSC contract areas in the international unitisation agreements. PSC contractors are required to comply with the terms agreed by Petronas in international unitisation agreements.

### Limitation of Liability under a Licence or Contract

The limitation of liabilities of each party is set out in the JOA, PSC or RSC. The contractors are required under the PSC to provide all the financing and bear all the risk of exploration, development and production activities in exchange for a share of the total production. The PSC contractors are also required to, amongst others, seek authorisation prior to incurring any expenditure beyond a certain threshold, and other approvals from Petronas throughout all stages of operations. Failure to comply with these requirements may result in a termination of their rights to carry out the operations.

Further, the Petroleum Regulations provide that any person who, amongst others, fails to comply with any condition of the Petronas licence shall be guilty of an offence and on conviction, shall be liable to a fine not exceeding RM 50,000 or to imprisonment for a term not exceeding two years, or both and in the case of a

<sup>31</sup> Section 4 of PDA.

continuing offence he or she shall be liable to a further fine of RM 1,000 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.

#### Parental Guarantees or Other Forms of Economic Support

Parental guarantees would be required where a subsidiary is a party to the PSC or RSC. Such parental guarantees need not necessarily be from an ultimate parent but would have to cover all commitments of the subsidiary. Bank guarantees and security deposits are not normally used to cover all commitments. They may be required for specific work commitments or to cover certain operations.

#### **Consent for Transfers to Third Parties**

According to the MDTCA Guidelines on PDA, a PDA licence may not be transferred unless permission is granted by Petronas. PSCs or RSCs will typically impose the requirement on a contractor to obtain Petronas' prior approval before any participating interests in the PSCs or RSCs of the contractor may be transferred or assigned to any related party and will also stipulate that the consent of other contractors is also required for an assignment or transfer of a participating interest to a third party (other than a related party), though such consent shall not be unreasonably withheld. If the operator is a Petronas licence holder, a change of shareholding or control of the operator will also require the consent of Petronas under the relevant PSC or RSC.

There is no law or regulation that expressly provides for the procedures for obtaining approval for change of control. However, the PSC or RSC will typically contain a change in control clause, which requires a contractor to obtain written consent of Petronas before affecting a change in control of the contractor. The approximate timeline for obtaining approval from Petronas is six weeks to two months. There are also no legislative provisions or guidelines providing preemptive rights. Any such rights will be contractual.

Whilst there are no specific fees or taxes levied by the government on a transfer or change of control, stamp

duty would be payable on the instrument effecting the transfer or change in control.

#### **Cost Recovery**

The PSCs entered into between contractors and Petronas set out the provisions which govern the payment of royalty, caps on cost oil, and sharing in profits from the production of petroleum. Cost oil is the share of production that is allocated to contractors to permit the contractors to recover the costs it has incurred in conducting operations under the PSC. Notably, the cost recovery does have a 'ceiling' as sanctioned by Petronas which is up to 50% since 1976 PSC and revised to 70% in later version of contracts<sup>32</sup>.

A PSC may stipulate terms that reduce entitlement of production for respective PSC contractors once the PSC contractors reach certain cost-recovery milestones laid down in the PSC. In accordance with the Petronas Procedures and Guidelines for Upstream Activities ("**PPGUA**"), which are required to be complied with by parties to PSCs with Petronas in Malaysia, there are generally, three categories of non-recoverable costs ("**NR costs**"), which are:

- (a) governance and common issues;
- (b) pending approval from Petronas; and
- (c) operational and business risks.

The NR costs are typically further detailed in the terms of the PSCs.

#### **Decommissioning**

##### Legal Framework and Operation

Whilst there is no specific decommissioning regulations in Malaysia, there are provisions of several legislations which would be applicable to the abandonment and decommissioning of oil and gas facilities and pipelines in Malaysia, such as:

- (a) the EQA, which prohibits discharge of oil and wastes into the Malaysian waters<sup>33</sup>;

<sup>32</sup> [https://www.researchgate.net/figure/Concept-of-Production-Sharing-Contract-PSC-in-Malaysia\\_fig2\\_311067476](https://www.researchgate.net/figure/Concept-of-Production-Sharing-Contract-PSC-in-Malaysia_fig2_311067476)

<sup>33</sup> Sections 27 and 29 of the EQA.

- (b) the CSA, which empowers the Yang di-Pertuan Agong to make regulations for, amongst others, the removal of installations or devices constructed, erected, or placed in, on, or above the continental shelf which have been abandoned or become disused<sup>34</sup>;
- (c) the Occupational Safety and Health Act 1994 ("**OSHA**"), which generally covers the safety, health and welfare of persons at work and protection of others against risks to safety and health in connection with the activities of persons at work;
- (d) the MSO, which empowers the Minister of Transport to make regulations to ensure the safety of and control over offshore industry structures, offshore industry mobile units and vessels<sup>35</sup>; and
- (e) the EEZA, which requires the owner of any submarine cable or pipeline which has fallen into disuse or is beyond repair to inform the Government and to remove such cable or pipeline where it is directed to do so by the Government<sup>36</sup>.

The legislation requires relevant operators in the oil and gas industry to ensure that the abandonment and decommissioning activities are carried out in a safe manner. Further, such activities must not cause any pollution or interfere with other offshore activities.

Petronas also regulates the decommissioning of oil and gas structures through PSCs and RSCs. The Guidelines for Decommissioning of Upstream Installations as part of the PPGUA, provides the regulatory framework for decommissioning of facilities. Malaysia is also a party to various international conventions that regulate the decommissioning of offshore installations, such as the London Dumping Convention 1972/1996, the Geneva Convention on Continental Shelf 1958 and the United Nations Convention on the Law of the Sea 1982.

The Malaysian PSC typically requires a contribution of abandonment cess to Petronas. The operator is

responsible for calculating the cess payments annually in respect of its abandonment work programme and budget and to submit such calculations to Petronas for approval. Such calculation of the annual abandonment cess is by reference to the annual production in million barrels of oil equivalent and an estimated abandonment cost. However, the operator is entitled to recover these costs through the cost recovery mechanism in the PSC from Petronas.

## **B) Downstream**

### ***Transportation***

#### ***Relevant Laws and Regulatory Bodies***

The PSMA and its associated regulations govern the transportation, storage and handling of petroleum. The PSMA regulates all modes of transportation of petroleum, including transportation of petroleum by road and railway, by water, and by pipelines.

The transportation of petroleum in pipelines to places, including production facilities, tank farms, natural gas processing plants and terminals (covered pipelines)<sup>37</sup>, are governed by the PSMA and the Petroleum (Safety Measures) (Transportation of Petroleum by Pipelines) Regulations 1985 ("**PSMR-Pipelines**"), save for certain pipelines which are excluded from the application of the PSMA, such as pipelines within refineries, industrial plant, bulk plants and service stations<sup>38</sup>.

Under the PSMR-Pipelines, separate authorisations are required for the installation and operation of pipelines. A contractor must submit an application to the Department of Occupational Safety and Health ("**DOSH**"), which is entrusted by the MDTCA (the original ministry responsible for issuing the licence), in order to obtain the relevant licences.

The requirements for vessels carrying petroleum are provided under the Petroleum (Safety Measures) (Transportation of Petroleum by Water) Regulations 1985 ("**PSMR-Water**"). The PSMR-Water provides for, amongst others, the requirement for all vessels carrying

<sup>34</sup> Section 6(1)(i) of the CSA 1966.

<sup>35</sup> Section 485A of the MSO.

<sup>36</sup> Section 23 of the EEZA.

<sup>37</sup> Reg 3(1) of the PSMR-Pipelines.

<sup>38</sup> Reg 3(2) of the PSMR-Pipelines.

prescribed classes of petroleum to be licensed by the Surveyor General of Ships<sup>39</sup>.

The Marine Department of the Ministry of Transport is the main government department which administers matters relating to the shipping industry in Malaysia, which include regulating the registration of Malaysian ships and providing for a Malaysian international registry. The Merchant Shipping Ordinance 1952 ("**MSO**") provides that domestic shipping must be conducted by Malaysian registered ships. The Domestic Shipping Licensing Board regulates and controls the licensing of ships which conducts domestic shipping between any ports in Malaysia.

In respect of transportation by land, the Land Public Transport Commission enforces the Land Public Transport Act in regulating all land-based public transport. The Land Public Transport Commission is responsible for issuing commercial vehicle licenses to prime-movers which transport petroleum products.

### ***Processing / Refining of Petroleum and Manufacturing of Petro-Chemical Products; and Marketing and Distribution of Petroleum or Petro-Chemical Products***

#### ***Relevant Laws and Regulatory Bodies***

In Malaysia, any business of processing or refining petroleum, manufacturing of petro-chemical products (collectively, the "**Refining and Manufacturing Activities**") and marketing and distribution of petroleum or petro-chemical products (collectively, the "**Marketing and Distribution Activities**") may not be carried out by any person other than Petronas unless the person has obtained permission from the Prime Minister<sup>40</sup> ("**PDA Approval**").

As abovementioned, the Refining and Manufacturing Activities are regulated by MITI, through its agent, the Malaysian Investment Development Authority ("**MIDA**"), whilst the Marketing and Distribution Activities are under the purview of MDTCA.

Notwithstanding the above, where a contractor is servicing a Petronas contract or sub-contract, a registration with Petronas may also be required.

<sup>39</sup> Reg 10 of the PSMR-Water.

#### ***Limitations on Acquisition of Oil-related Interests by Foreign Companies (Downstream) and Other Licensing Requirements***

In respect of Refining and Manufacturing Activities, the PDA Approval is typically issued by MIDA alongside the manufacturing licence under the Industrial Co-ordination Act 1975 applicable to such activities. A foreign company must set up a local subsidiary and comply with the conditions set by MITI. However, there are no local equity requirements in manufacturing and refining. Foreign companies may set up a 100 per cent-owned subsidiary for this purpose.

For Marketing and Distribution Activities, the PDA Approval Application Guideline ("**PDA Guidelines**") issued by MDTCA provides for the criteria and qualifications required to obtain a PDA License from MDTCA. Under the PDA Guidelines, there are four categories of PDA Approvals / licences issued by MDTCA, i.e.:

- (a) operation of petrol stations, skid tanks and floating barges;
- (b) provision of bunkering services;
- (c) provision of logistics services for petroleum products; and
- (d) wholesale of petroleum products (i.e., which includes gasoline, diesel oil, methane, ammonia nitrate etc.)

Foreign companies may only participate in the Marketing and Distribution Activities in Malaysia through a locally incorporated subsidiary licensed by the MDTCA, and there are minimum local bumiputra equity participation and share capital requirements stipulated for such licences. In particular, the PDA Guidelines provides that the following factors will be taken into consideration in deciding whether or not the approval / licence should be granted:

- (a) fulfilment of equity conditions: foreign equity or foreign shareholders must not exceed 30 per cent of the total shareholding of the company and 70 per cent of the shareholding in the company must be held by local citizens, of which 30 per cent are bumiputras; and

<sup>40</sup> Sections 6(1) and 6(3) of the PDA

- (b) priority will be given to individuals or companies that possess no less than 30 per cent of its equity shareholding held by bumiputras.

Further, contractors who provide downstream services to Petronas' group of companies are required to register with Petronas and comply with the requirements under the Petronas Guidelines, including a minimum paid up capital of RM 10,000 for registration and compliance with the applicable bumiputra participation requirement in accordance with the SWEC.

## Health, Safety and Environment ("HSE") Requirements

The main legislation for HSE Requirements in respect of the oil sector are the EQA, PSMA and OSHA.

### **HSE Requirements to Oil-related Facility Operations**

The EQA is the legislation that governs environmental matters in Malaysia. The Department of Environment was established under the EQA in order to regulate all controls relating to industrial pollution and promote environmental protection.

Generally, the EQA and its accompanying regulations require an environmental impact assessment ("EIA"), project siting evaluation, pollution control assessment, monitoring and self-enforcement to be conducted in relation to prescribed industrial projects. Prior to the implementation of prescribed industrial projects or activities, relevant companies must obtain, amongst others, the following approvals from the director general of Environment Quality:

<sup>41</sup> Section 34A of the EQA.

<sup>42</sup> Section 19(b) of the EQA.

<sup>43</sup> Reg 5 of the Environmental Quality (Clean Air) Regulations 2014.

<sup>44</sup> Section 19(a) of the EQA.

<sup>45</sup> First Schedule of Environmental Quality (Prescribed Activities) (Environment Impact Assessment) Order 2015.

- (a) an EIA for prescribed activities<sup>41</sup>;  
 (b) site suitability evaluation (for non-prescribed activities);  
 (c) written notification or permission to construct<sup>42</sup>;  
 (d) written approval for installation of incinerator, fuel burning equipment and chimney<sup>43</sup>; and  
 (e) a licence to occupy and operate prescribed premises and prescribed conveyances<sup>44</sup>.

Under the Environmental Quality (Prescribed Activities) (Environment Impact Assessment) Order 2015, the development and construction of petroleum related facilities are listed as prescribed activities<sup>45</sup>. An EIA must be carried out and submitted to the Director General of Environmental Quality for approval, if the project includes any of the following activities:

- (a) the development of an oilfield, gas field or oil and gas field;  
 (b) construction of offshore or onshore pipelines in excess of 30 kilometres in length;  
 (c) construction of oil or gas separation, processing, handling and storage facilities; and  
 (d) construction of product depot for the storage of petrol, gas or diesel that has the combined storage capacity of 60,000 barrels or more (excluding service station) within three kilometres of any commercial, industrial or residential area<sup>46</sup>.

Under the EQA, any person who carries out a prescribed activity without submitting an EIA report will be committing an offence and shall be liable to a fine not exceeding RM 500,000 or to imprisonment for a period not exceeding five years or to both and to a further fine of RM 1,000 for every day that the offence is continued after receiving a notice from the director general requiring him or her to comply with the act specified in the notice<sup>47</sup>.

In addition, the EQA expressly prohibits any unlicensed person from discharging or spilling any oil or mixture containing oil into Malaysian waters in contravention of the acceptable conditions specified under the EQA for the emission, discharge or deposit of oil or any mixture containing oil<sup>48</sup>. Any person who breaches the above

<sup>46</sup> First Schedule of Environmental Quality (Prescribed Activities) (Environment Impact Assessment) Order 2015.

<sup>47</sup> Section 34A(8) of the EQA.

<sup>48</sup> Section 27 of the EQA.

sections will be guilty of an offence and shall be liable to a fine not exceeding RM 500,000 or to imprisonment not exceeding five years, or both.

The PSMA applies to safety matters as regards the transportation, and storage and utilisation of petroleum. The PSMA provides that no person shall store or handle any petroleum without obtaining a valid petroleum storage licence or valid petroleum handling licence granted under PSMA<sup>49</sup>, authorising the storage or handling of petroleum in accordance with such conditions, if any, as may be attached to the licence.

It should also be noted that whenever any person under the PSMA or any regulation is liable to any punishment for any act, omission, neglect or default, he or she shall be liable to the same punishment for every similar act, omission, neglect or default of any agent or servant employed by him or her in the course of business as such licensed person, and every agent or servant employed by a licensed person under the PSMA in the course of business under such licences shall also be liable to every punishment or penalty prescribed for such act, omission, neglect or default contrary to the provisions of the PSMA as if such agent or servant had been the person to whom the licence had been granted<sup>50</sup>.

The OSHA aims to, amongst other things, secure the safety, health and welfare of persons at work and protect persons at a place of work other than persons at work, against risks to safety or health arising out of the activities of persons at work. The OSHA is enforced by the DOSH and is applicable throughout Malaysia to the industries under the OSHA, which in respect of the oil sector, includes the petrochemical manufacturing.

### **HSE Requirements relating to Oil and Oil Product Composition**

The bodies responsible for setting the standards for oil and oil product composition and regulating compliance with the standards are the Department of Standards Malaysia and the MDTCA respectively.

The EQA and PSMA and the relevant subsidiary legislation regulate the safety and environmental requirements in relation to oil and oil product composition. Non-compliance with these legislation may attract a fine or imprisonment, or both, upon conviction.

For example, the Environmental Quality (Control of Petrol and Diesel Properties) Regulations 2007 provides that a fuel supplier is responsible for the sampling and testing of each batch of fuel (i.e., petrol and diesel) after distillation, blending or import for prescribed properties under the Regulations<sup>51</sup>.

The sample and record collected must be kept for a period of six months from the date of sampling and such information must be provided to the Director General or any authorised officer as and when they request it<sup>52</sup>. Any persons who fail to perform the obligations stated above will be committing an offence and shall be liable to a fine not exceeding RM 50,000 or to imprisonment not exceeding two years, or both upon conviction<sup>53</sup>.

In addition, all fuel suppliers in Malaysia must have a quality management system ensuring that when the fuel is delivered to a distributor, retail outlet or a bulk purchaser-consumer, the fuel complies with the properties as specified under the Environmental Quality (Control of Petrol and Diesel Properties) Regulations 2007<sup>54</sup>. Such quality management system must be documented and submitted to the Director General for his or her information and the Director General must be notified in the event that there are any changes to the quality management system<sup>55</sup>.

<sup>49</sup> Section 19 of the PSMA.

<sup>50</sup> Section 41 of the PSMA.

<sup>51</sup> Reg 7(1) of the Environmental Quality (Control of Petrol and Diesel Properties) Regulations 2007.

<sup>52</sup> Reg 7(6) and 7(7) of the Environmental Quality (Control of Petrol and Diesel Properties) Regulations 2007.

<sup>53</sup> Reg 7(8) of the Environmental Quality (Control of Petrol and Diesel Properties) Regulations 2007.

<sup>54</sup> Reg 8(1) of the Environmental Quality (Control of Petrol and Diesel Properties) Regulations 2007.

<sup>55</sup> Reg 8(2) of the Environmental Quality (Control of Petrol and Diesel Properties) Regulations 2007.

## Labour

The Employment Act 1955 ("**EA**") applies only to employees whose wages do not exceed RM 2,000 a month and certain categories of employees irrespective of their wages, such as manual labourers, supervisors of manual labourers, drivers, domestic servants, etc. For those who do not fall under this category, their rights are dependent on the terms of their contract of employment.

Under the Employment (Exemption) (No. 2) Order 1997, Petronas and any of its contractors and subcontractors provided that they are engaged in activities in the upstream oil sector will be exempted from the compliance of certain provisions of the EA<sup>56</sup>. Such exemption applies to the employees of Petronas and its contractors and subcontractors of the contractors, whose place of work is within the territorial waters or the Exclusive Economic Zone or the Continental Shelf of Malaysia<sup>57</sup>.

Foreign workers may only be employed provided that they have been issued a valid employment permit under the Employment (Restrictions) Act 1968<sup>58</sup>. Failure to comply with such requirement may on conviction result in the employer of the foreign worker being liable to a fine not exceeding RM 5,000 or to imprisonment for a term not exceeding one year or both<sup>59</sup>. Further, it is also an offence, pursuant to the Immigration Act 1955, to employ a foreign worker who is not in possession of a valid pass<sup>60</sup>.

Generally, for the purposes of an application of a Petronas licence, the company must amongst other things, meet a prescribed minimum bumiputra requirement for equity and composition of Board, management and employees, where applicable, based on the relevant SWEC Code. For example, if the minimum bumiputra requirement for a certain SWEC Code is 30%, amongst other things, 30% of the employees of the entity shall comprise of bumiputra individuals.

As of 1 June 2015, the Construction Industry Development Board ("**CIDB**") requires skilled

construction workers who are working in any of the 25 skilled trades as listed in the Lembaga Pembangunan Industri Pembinaan Malaysia Act ("**CIDB Act**") to be accredited and certified by CIDB and holds a valid certificate issued by the CIDB under the Act<sup>61</sup>. In relation to the oil and gas industry, these include riggers, scaffolders and chargemen.

## Taxation for Oil Exploration, Transportation and Marketing

### Direct Taxes

The Inland Revenue Board of Malaysia ("**IRB**") is the responsible regulatory body for the administration of direct taxes, whilst the Royal Malaysian Customs Department ("**Customs**") administers customs and excise duties and sales and services tax.

The main tax legislation governing the oil sector are the Petroleum (Income Tax) Act 1967 ("**PITA**") and Income Tax Act 1967 ("**ITA**"). Under the PITA, petroleum income tax is chargeable at a rate of 38 per cent of the income derived by a chargeable person from petroleum operations<sup>62</sup>. '*Petroleum operations*' include, amongst others, the search for and winning or obtaining of petroleum in Malaysia and any sale or disposal of petroleum so won or obtained, including the transportation of the petroleum to any point of sale, delivery or export. The term excludes the following activities:

- (a) any transportation of petroleum outside Malaysia;
  - (b) any process of refining or liquefying petroleum;
  - (c) any dealings with products so refined or liquefied;
- or

<sup>56</sup> Section 2 of the Employment (Exemption)(No.2) Order 1997.

<sup>57</sup> Section 3 of the Employment (Exemption)(No.2) Order 1997.

<sup>58</sup> Section 5 of the Employment (Restrictions) Act 1968.

<sup>59</sup> Section 17 of Employment (Restrictions) Act 1968.

<sup>60</sup> Section 55B of the Immigration Act.

<sup>61</sup> Section 33A and Third Schedule of the CIDB Act.

<sup>62</sup> Section 23(1) of PITA.

- (d) services involving the supply and use of rigs, derricks, ocean tankers and barges<sup>63</sup>.

For petroleum operations derived from a Joint Development Area<sup>64</sup>, the chargeable income is subject to petroleum income tax at the rate of 0 per cent for the first eight years; 10 per cent for the next seven years; and 20 per cent for the subsequent years of production, provided that the prescribed conditions are complied with<sup>65</sup>.

One of the tax incentives applicable to petroleum operations include, a tax exemption for a portion of chargeable income from marginal fields which results in a reduction of the effective tax rate from 38 per cent to 25 per cent for petroleum operations in marginal fields<sup>66</sup>. 'Marginal field' is defined as a field that is determined by the Minister of Finance as a field in a petroleum agreement area which has potential crude oil reserves not exceeding 30 million stock tank barrels or natural gas reserves not exceeding 500 billion standard cubic feet<sup>67</sup>.

As regards non-petroleum operations, the chargeable income derived from such activities are subject to the general tax regime under the ITA. This would include the midstream and downstream activities of refining, processing, transportation, marketing and distribution of petroleum and petroleum products, which would be taxable in accordance with the ITA. Currently, resident and non-resident companies are taxed at the rate of 24 per cent, except for those with paid-up capital of RM2.5 million or less which are taxed at 17% only for the first RM600,000 of income and any excess of RM600,000 at the rate of 24%<sup>68</sup>.

### **Other Applicable Taxes and Customs Duties**

The Sales and Service Tax regime, which has replaced the Goods and Services Tax regime (which was effective from 1 April 2015) on 1 September 2018, may also be applicable to the oil sector. Sales tax is a single-stage tax imposed on taxable goods manufactured or imported into Malaysia, while service tax is a consumption tax levied and charged on any taxable services provided in Malaysia by a registered person.

<sup>63</sup> Section 2, PITA.

<sup>64</sup> as defined under the Malaysia-Thailand Joint Authority Act 1990.

<sup>65</sup> Section 23(2) of PITA.

<sup>66</sup> Section 4 of the Petroleum (Income Tax) (Exemption) Order 2013.

<sup>67</sup> Sections 2 and 3 of the Petroleum (Income Tax) (Exemption) Order 2013.

Stamp duty is chargeable on instruments in accordance with the Stamp Act 1949 and ranges from RM10.00 to ad-valorem rates.

The Customs Act 1976 and its regulations and orders are applicable to cross-border sales and deliveries of crude oil and crude oil products. Export duties are generally imposed on Malaysia's main export commodities such as crude petroleum. Exportation of certain classes of petroleum products may also require an export licence.

## Commodities Price Control

The MDTCA is empowered by the Price Control and Anti-Profitteering Act 2011 ("**PCAPA**") to make orders regulating the maximum, minimum or fixed price for the manufacturing, producing, wholesaling or retailing of any goods<sup>69</sup>.

In Malaysia, the retail prices of petroleum products, such as petrol, diesel and liquefied petroleum gas, is set through an automatic fuel pricing ("**AFP**") mechanism. Since 1 December 2014, the prices of petrol and diesel have been fixed on a managed float system. With effect from 1 January 2019, the Government of Malaysia has decided to reinstate the former weekly price-float mechanism whereby fuel prices are determined on a weekly basis<sup>70</sup>.

The MDTCA also issued the Price Control and Anti-Profitteering (Determination of Maximum Price) (No. 4) Order 2015 which sets the maximum price at which liquefied petroleum gas can be transacted at by producers, wholesalers and retailers. The maximum retail prices for petrol and diesel are also provided under the Price Control and Anti-Profitteering (Determination of Maximum Retail Price For Petrol And Diesel) (No. 45) Order 2019.

<sup>68</sup> Prior to the year of assessment ("**YA**") 2020, the threshold of income subject to tax at 17% is at RM 500,000. Effective YA 2020, the threshold has been revised to RM 600,000.

<sup>69</sup> Section 4 of PCAPA.

<sup>70</sup> <https://paultan.org/2018/12/24/ron-95-petrol-weekly-float-to-start-from-jan-1-2019/>

Under the PCAPA, it is an offence to buy and sell liquefied petroleum gas above the price set by the order. Upon conviction, the person shall be liable to a fine not exceeding RM 500,000 and RM 1 million for subsequent offences if committed by a body corporate<sup>71</sup>. For non-body corporates, the penalty is a fine not exceeding RM 100,000 or imprisonment for a term not exceeding 3 years, or both, and for subsequent offences, a fine not exceeding RM 250,000 or imprisonment of 5 years, or both<sup>72</sup>.

## Regulation of Competition Aspects of Oil Sector

The Malaysian Competition Commission ("**MyCC**") enforces the Competition Act 2010, which generally applies to commercial activities in Malaysia or commercial activities conducted outside of Malaysia which has an effect on competition in any market in Malaysia<sup>73</sup>.

All commercial activities regulated under the PDA which are directly in connection with upstream operations comprising the activities of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia are, however, exempted from the Competition Act<sup>74</sup>.

Petronas is the regulator of all upstream activities. On the other hand, MyCC is the regulator having the authority to both prevent and punish anticompetitive practices in connection with non-upstream activities, such as the transportation and marketing of crude oil or crude oil products.

<sup>71</sup> Section 18 of the PCAPA.

<sup>72</sup> Ibid.

<sup>73</sup> Sections 3(1) and 3(2) of the Competition Act.

## International Treaties

International treaties signed by Malaysia have no domestic legal effect, unless the Parliament passes a law to give effect to the treaties. An example of a statute which was passed by Parliament to give effect to a treaty concluded by Malaysia, is the EEZA which gives effect to certain provisions of the United Nations Convention on the Law of the Sea 1982.

Some other treaties that Malaysia has signed are of particular relevance to the oil sector and they include:

- (a) the London Convention 1972/1996;
- (b) the Geneva Convention on Continental Shelf 1958;
- (c) the United Nations Convention on the Law of the Sea 1982;
- (d) the International Convention for the Prevention of Pollution from Ships, 1973 and its 1978 Protocol;
- (e) the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990;
- (f) the International Convention on Civil Liability for Oil Pollution Damage, 1992; and
- (g) the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992.

Malaysia has, to date, signed 71 bilateral investment treaties ("**BITs**"), of which 54 are in force<sup>75</sup>. BITs signed by Malaysia typically includes clauses such as "fair and equitable treatment", "protection from expropriation" and "Most Favoured Nation" ("**MFN**") which, amongst other things, provide for broad guarantees of treatment or protection for investors. For example, the MFN clause ensures parties to a treaty provide treatment no less favourable than the treatment they afford to investors under other treaties.

<sup>74</sup> Section 3(3) and First Schedule of the Competition Act.

<sup>75</sup> <https://investmentpolicy.unctad.org/international-investment-agreements/countries/127/malaysia>

# Enforcement of Foreign Arbitral Awards

Malaysia is a party to the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 ("**New York Convention**"), which requires courts of contracting states to recognise and enforce arbitration awards made in other contracting states. Section 38 of the Arbitration Act 2005 ("**AA**") provides for the procedure for recognition and enforcement of awards where the seat of arbitration is in Malaysia, or where the award is from a state which is a contracting party to the New York Convention. A party who seeks to enforce such arbitral award must apply to the High Court to have the award recognized as binding. Upon such recognition by the High Court, the award may be enforced as if it were a court judgment in terms of the award. The AA also provides for grounds upon which such recognition or enforcement of an award may be refused at the request of the party against whom it is invoked<sup>76</sup>. Examples of such grounds include, but are not limited to:

- (a) the award being in conflict with the public policy of Malaysia;
- (b) the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or
- (c) a party to the arbitration agreement was under an incapacity.

<sup>76</sup> Section 39 of the AA.

## KEY CONTACTS

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### Projects & Construction

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**Christopher Lee**  
Christopher & Lee Ong  
Partner

T +601 2273 1919  
E [christopher.lee@christopherleeong.com](mailto:christopher.lee@christopherleeong.com)



**Nikki Ho**  
Christopher & Lee Ong  
Associate

T +601 2273 1919  
E [nikki.ho@christopherleeong.com](mailto:nikki.ho@christopherleeong.com)

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### Banking & Finance

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**Jack Chor**  
Christopher & Lee Ong  
Partner

T +601 2273 1919  
E [jack.chor@christopherleeong.com](mailto:jack.chor@christopherleeong.com)

## OUR REGIONAL CONTACTS

### RAJAH & TANN | *Singapore*

**Rajah & Tann Singapore LLP**

T +65 6535 3600  
F +65 6225 9630  
sg.rajahtannasia.com

### R&T SOK & HENG | *Cambodia*

**R&T Sok & Heng Law Office**

T +855 23 963 112 / 113  
F +855 23 963 116  
kh.rajahtannasia.com

### RAJAH & TANN 立杰上海 SHANGHAI REPRESENTATIVE OFFICE | *China*

**Rajah & Tann Singapore LLP  
Shanghai Representative Office**

T +86 21 6120 8818  
F +86 21 6120 8820  
cn.rajahtannasia.com

### ASSEGAF HAMZAH & PARTNERS | *Indonesia*

**Assegaf Hamzah & Partners**

**Jakarta Office**

T +62 21 2555 7800  
F +62 21 2555 7899

**Surabaya Office**

T +62 31 5116 4550  
F +62 31 5116 4560  
www.ahp.id

### RAJAH & TANN | *Lao PDR*

**Rajah & Tann (Laos) Co., Ltd.**

T +856 21 454 239  
F +856 21 285 261  
la.rajahtannasia.com

### CHRISTOPHER & LEE ONG | *Malaysia*

**Christopher & Lee Ong**

T +60 3 2273 1919  
F +60 3 2273 8310  
www.christopherleeong.com

### RAJAH & TANN | *Myanmar*

**Rajah & Tann Myanmar Company Limited**

T +951 9345 343 / +951 9345 346  
F +951 9345 348  
mm.rajahtannasia.com

### GATMAYTAN YAP PATACSIL GUTIERREZ & PROTACIO (C&G LAW) | *Philippines*

**Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)**

T +632 8894 0377 to 79/ +632 8894 4931 to 32  
/ +632 8552-1977 to 78  
F +632 552 1978  
www.cagatlaw.com

### RAJAH & TANN | *Thailand*

**R&T Asia (Thailand) Limited**

T +66 2 656 1991  
F +66 2 656 0833  
th.rajahtannasia.com

### RAJAH & TANN LCT LAWYERS | *Vietnam*

**Rajah & Tann LCT Lawyers**

**Ho Chi Minh City Office**

T +84 28 3821 2382  
F +84 28 3520 8206

**Hanoi Office**

T +84 24 3267 6127  
F +84 24 3267 6128  
www.rajahtannlct.com

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