MALAYSIA: AN OVERVIEW OF THE LEGAL FRAMEWORK FOR FOREIGN DIRECT INVESTMENT

Abstract

Among the Southeast Asian countries Malaysia has keenly pursued in attracting Foreign Direct Investment (FDI). In this respect it has constantly striven to maintain the competitiveness of FDI determinants, including the legal infrastructure. Various policy instruments and institutions have been deployed. Today, Malaysia is encountering fresh challenges has FDI flow seems to have dwindled in the region. To counter this phenomenon the Government of Malaysia (GOM) has enhanced the utility of the existing determinants and is constantly considering new strategies to attract FDI. Accordingly, the FDI legal framework has also been enhanced. This paper examines the legal aspects of FDI in Malaysia on a broad basis and within the context, the emerging legislative policy trends.

I. Background

Since independence (1957) Malaysia has fully capitalized on both its tangible assets — such as rich natural resources, abundant and cheap labour, and its sizeable domestic market — as well as its intangible assets, namely its preferential trade status under the Generalized System of Preferences (GSP), macroeconomic stability, liberal trade regime and an efficient legal infrastructure to attract Foreign Direct Investment (FDI).[1] Broadly speaking, as of date, FDI in the context of Malaysia has been a relatively successful experiment.

It must be borne in mind that the Government of Malaysia's (GOM) principal policy is to harness FDI as part of the economic development strategy in order to obtain foreign technology, capital and skills. To this end, the predominantly import substitution-based economy of the 1960s was, to a large extent, replaced by a vigorous and diversified export-oriented economy. This was followed by an unprecedented real GDP growth rate averaging 8.9 % per annum from 1988 to 1996, particularly buoyed by FDI in the manufacturing sector (Okposin and Cheng 2000).

However, since the onset of the Asian crisis (1997), FDI inflows have declined significantly in Malaysia *vis-a-vis* Southeast Asia as a whole (UNCTAD 2001). Mirza (2001, p. 5) attributes this emerging trend to "shifting technological/trade patterns, the lure of China, the liberalization of other emerging economies and the dampening effect of the Asian crisis".

Arguably China, now as a full-fledged member of the World Trade organization (WTO), is the favored destination for FDI (UNCTAD press release, 21/1/2001). However, it

is debatable whether China has in placed an enabling and responsive legal framework and judiciary. Although it has embraced several commercial laws underpinned by universal principles, its judiciary and legal profession are, to a large extent, meagre by international standards (Yusof 2001; *The Straits Times*, 16/4/2002). Hence, it remains to be seen as to the manner and form in which the "jurisprudence culture" would shape up in the face of rapid FDI inflow. Furthermore, China embraces a communist ideology and that raises questions about its dexterity for freedom of contract and inherent property rights.

On the other hand, Malaysia has a relatively long legal history with a fairly reputable judiciary (although this is often perceived to be vulnerable, as will be discussed below). Hence, the challenge is to enhance and deepen the existing legal infrastructure and thereby reap economic comparative advantage vis-à-vis those of other ASEAN member countries.

The motivation for the present paper, therefore, is to provide a critique of the legal framework for FDI in Malaysia, with a focus on the various areas of law that especially pertain to FDI. These include, but are not limited to, Malaysia's legislative policy — its limitations, restrictions, and *modus operandi* — land, labour and environmental laws, non-fiscal incentives, tax regime, intellectual property rights framework, and justice administration/dispute resolution procedures. The paper is thus organized as follows: Section II describes the legal system of Malaysia; this will be followed by Section III, which examines the various legal aspects of FDI in Malaysia, as described above. Finally, Section IV closes by briefly addressing present and future challenges.

II. The Legal System of Malaysia

In order to fully understand the underlying legal processes and the policies from which they derive, it is necessary to attain some familiarity with the overarching legal system of Malaysia. This section seeks to provide this background by outlining several salient aspects that pertain to the legal structure, including its historical basis, the Constitution, as well as fundamental laws and institutions.

Legal History

Prior to the arrival of the British in Peninsular Malaysia, Sabah and Sarawak the main sources of general law were adat[2] (*dyak, perpateh* and *temenggong*) customary laws (Chinese and Indian) and *syariah* law. Upon establishing colonial rule, the British systematically introduced English common law, particularly with regard to commercial transactions, albeit by and large retaining the then existing laws. After independence, Malaysia essentially inherited the legacy of English laws and judicial institutional setup.[3] Henceforth, the direct

implication today is for Malaysia to be able to capitalize on the English jurisprudence culture, which itself has gone through a vigorous and thorough experiment.

Constitution

Symbolically and theoretically, the Federal Constitution of Malaysia is the supreme law protecting against arbitrary actions of the Executive and the Legislature, as well as safeguarding basic fundamental liberties.[4] Invariably, the Judiciary is the custodian of the Federal Constitution. To this end, the Malaysian Judiciary has, over the years, taken great pains to declare several statutes and administrative actions/decisions as unconstitutional, to the applause of many legal observers and jurists (Jain 1986, Pillay 1999). To this end, Abdoolcader J pronounced in *Public Prosecutor v Datuk Haji Harun Idris* (1997, 1 MLJ 180):

> The court stands as arbiter in holding the balance between individuals and between the state and the individual and will not have the slightest hesitation to condemn or strike down any statutory shelter for bureaucratic discrimination, any legislative refuge for the exercise of naked arbitrary power in violation of any of the provisions of the Constitution and equally any executive action purported to be made thereunder.

However, the inherent power of the judiciary must be considered against the feasibility of amending the Federal Constitution by merely requiring a two-third majority in each of the two Houses of Parliament, which apparently is not a dilemma for the present polity.[5] Indeed, Harding (1996, p. 53) cautions:

> Moreover, principles apart there is utility in preserving the most fundamental features of the Constitution from amendment when amendment has become such a frequent occurrence, and there is in fact a real danger that the basic structure of the Constitution may be amended out of existence. Indeed it might be argued persuasively that this has already occurred, and precisely because there is no restriction on the power of constitutional amendment.

Also, it should be noted that the basic fundamental liberties as enunciated in the Federal Constitution can be abrogated in the event of a national emergency (Article 150) and via imposition of preventive detention (Article 149).[6] Furthermore, the said laws have wholly barred judicial review on the veracity of its application (Article 150(8) of the Constitution and s.8b and 8c of the Internal Security Act), albeit Article 151 imposes a certain degree of procedural restrictions on preventive detention. Broadly speaking, some degree of security law is necessary, but concurrently there must be viable checks and balances on its usage, particularly during peacetime. Apparently, the Judiciary in Malaysia has over the years vociferously upheld the ancient remedy of *habeas corpus*, even insofar as Article 149 and 150 are concerned.[7] It is no exaggeration to say that foreign entities regard the 'Constitution' of a

sovereign nation as an emblem of democratic principles, particularly in a parliamentary democracy dominated by a single political party. In the context of Malaysia, the rather active role of the Judiciary over the years in safeguarding the Constitution is noteworthy; but many observers have argued persuasively that the original essence of the Federal Constitution may slowly wither, if amendments to the same are made frequently and indiscreetly. Consequently, such a trend may send the wrong signals to foreign investors.

Laws and Institutions

As alluded to earlier, by virtue of the Civil Law Act, Malaysia inherited the English legal system[8] which is largely premised on common law. However, strictly speaking, Malaysia by and large embraces a pluralistic legal system comprising the tenets of limited customary law and constitutionally defined Islamic law. Also, the reception of English law in 'commercial matters' — save for the jurisdictions of Malacca, Penang, Sebah and Sarawak — squarely faced a cut-off period ranging from 1956 (West Malaysia) to 1951 (Sabah) and to 1949 (Sarawak).[9] Consequently, the implications were as follows: the Judiciary in Malaysia was compelled to develop its own legal principles and jurisprudence culture premised on its own commercial needs and cultural affinity. Second, it prompted Parliament to actively engage in the legislative function. Third, it has, to some degree, encouraged 'imaginative' judiciary participation; hence, it is no surprise that today, Malaysia possess an increasing number of local laws dealing with commercial transactions with a corresponding decrease in dependence on English law (Wu 2000). Accordingly, Harding (1996, p. 131) observes:

> In general the Malaysian judiciary is recognized to have a high standard of competence. Not only did Malayans speedily replace expatriate Europeans on the bench without any noticeable decline in the quality of decision-making. The local judiciary was also drawn all races and religions, and acted, and continues to act, as symbol of unity in a diverse nation.

Can Islamic law be adopted as the national law? Constitutionally, the ambit of Islamic law is within the state governments' jurisdictions and is, as such, limited to family and personal matters (9th schedule, list 11, Constitution), as well as further being applicable to Muslims only. From a legal perspective, any attempt to venture beyond the said ambit is unconstitutional and to the extent of inconsistency, is void (Article 4; Seda-Poulin 1993; Bari 2000). Essentially, the Constitution itself needs to be amended to cater for this notion. Logically, such a scenario is unlikely as it would lead to a rather precarious situation — since the present common law system is largely based on 'positivist law', there may be incompatibilities with Islamic law. To do so would entail a major paradigm shift in the

conduct of both local and international businesses. Historically, no sovereign nation has made such a dramatic change to its legal system.

In general, Malaysia adopts a parliamentary system in which the King (*Yang di Pertuan Aguang*) is the ceremonial head of state and the federal legislature comprises of the *Dewan Negara* (Senate) and the *Dewan Rakyat* (House of Representatives). The members of the latter are elected by adult suffrage. The type and scope of laws to be enacted by the federal and state parliaments are clearly demarcated in the Federal Constitution. Hence, in this sense, confrontations between Federal and local governments are very rare. Most importantly, crucial aspects of the laws — including finance, trade commerce and industry — are within the purview of the Federal Parliament. Consequently, this has facilitated uniformity in commercial laws throughout the nation.

The Malaysian Judiciary has a rather elaborate structure of both superior courts (consisting the Federal Court, Court of Appeal and High Court) and subordinate courts (consisting the Session Court, Magistrate Court and Juvenile court). To a large extent, judicial independence is secured by a number of constitutional provisions. Notwithstanding this, the Judiciary has apparently stood the test of time in the face of onslaughts from the Executive and Legislature (discussed below). Undeniably, Malaysia's judicial decisions are held in high esteem and readily applied by fellow judges in the common law jurisdictions. However, as mentioned earlier, given the present tendency to amend the constitutional provisions as and when necessary, could inadvertently subvert the independence of the judiciary.

On the importance of law and rule-based transactions

As has been argued by Yusuf (2001), "[the] importance ascribed to governance in the 1990s has brought legal institutions into the mainstream of development thinking." Indeed, increasingly, empirical evidence suggests that efficient law and legal institutions promote and sustain economic activities. To this end, both create an ascertainable "structure of expectations". Certainly, the law does not eradicate all eventualities and/or uncertainties, but it does substantially reduce commercial risk. There are several theoretical reasons typically advanced in this regard. First, the law conceptualizes and underpins the rights, obligations and liabilities of all business parties. Second, the existence of laws allows business parties to pursue their commercial transactions with a reasonable degree of certainty and predictability. Third, the law provides legal recourse and due process. Fourth, and most importantly, it promotes and sustains business confidence. To this end, 'investment laws', from an economic perspective, engender an orderly framework by which prospective investors are

encouraged to undertake projects that are consistent with a country's economic goals. Conversely, an inefficient legal system would, amongst other things, increase transaction costs and in the long term reduce private accumulation and investment (North 1990).

In general, Malaysia has consistently adopted modern and proactive commercial laws. However, some laws are in need of fresh impetus. The recent (2000) enactment of an array of intellectual property laws and cyber laws is a clear testimony that Malaysia is indeed in the right direction of keeping in tune with international business practices.

III. Legal Aspects of FDI

Legislative Policy

At the outset, it is important to note that the GOM utilizes both written laws (formal) and policies (informal) to chart its economic goals. As Jomo (2001, p. 481) observes:

> Without government leadership, it is unlikely that Malaysia would have emerged from the 1970s as a major offshore site for electronics assembly. The state (federal and state governments) has played a crucial role in attracting foreign investments to particular locations by providing facilities and improving them in response to changing needs and requirements.

To this end, various FDI policy instruments, including laws, informal guidelines, and institutions, have been put in place. To a large extent, it is perceived that the commercial sector is heavily regulated. La Porta, Lopez-de-Silanes, Shleifer and Vishny (1999), in a detailed study, found that heavy regulatory frameworks largely support the 'grabbing-hand' theory, which asserts that politicians and bureaucrats exploit rent-seeking opportunities. Undeniably, the elements of transparency and accountability are the vanguard for an efficient regulatory framework. Neilson (1993) appropriately emphasizes the need for the following:

- A systematic openness of the rules governing the regulation of the economic activity in question;
- A consultative process for reviewing, changing or modifying established rules;
- The accountability of those in authority in the public service and the Cabinet; and
- The periodic evaluation of the effectiveness of the regulatory programme.

At all times it must be borne in mind that, in the context of Malaysia, essentially all economic-social-political paradigms are premised on the principle of its 'affirmative-action' policy — exercised in favour of the *bumiputras* (ethnic Malays and other indigenous people). The Federal Constitution explicitly provides for this.[10] Specifically, the New Economic Policy (NEP) and its successor the National Development Policy (NDP), together with the recently promulgated New Vision Policy, operationalize the concept. As *Business Asia*

(16/4/2002) reported, "[the] so-called New Vision Policy (2001-2010) unveiled on April 3rd promises the pursuit of the long-running affirmative action strategy in favour of *bumiputras*".

In sum, the crux of the affirmative policy is that 30 per cent of the corporate wealth of the nation should, ideally, be held by *bumiputras*. Does this mean that there could be more pressure on foreign entities to 'Malaysianize' their operations and accommodate Malay controlled firms as joint-venture partners and suppliers? Evidently, a level playing field for all is still a long way off. Furthermore, it can be argued that the affirmative action policy is inconsistent with the principle of 'national treatment' and 'most favoured nation treatment' as advocated under the World Trade Organistion (WTO) forum and its related treaties. Needless to say, this policy has from time to time caused social tension (Nathan 2001), and analysts have argued that it engenders undesirable economic distortions, a culture of complacency, and an aversion to risk-taking.

Thus, all FDI related written laws and policies must be considered against the backdrop of the affirmative action policy. Arguably, this policy and the prevailing industrial guidelines applicable to FDI, such as issued under the Foreign Investment Committee (FIC) lack legal efficacy; since they are not the same as formal enactments. However, it is not entirely clear as to what position the judiciary has taken in this regard. In the civil case of *Ho Kok Cheong Sdn Bhd & Anor v Lim Kat Hong* (1979, 2 MLJ 224), it was held:

> The guidelines were issued not pursuant to any power given by law, and in my opinion they have no force of law but are of an advisory character merely. I do not think that non-compliance with the guidelines can be taken as an act opposed to public policy. The guidelines reflect the Government's political policy, but the Government's political policy is not public policy.

Interestingly, in the case of *David Hey v New Kok Ann Reality Sdn Bhd* (1985,1 MLJ 167), the Federal Court held an opposite view:

> We have studied the 'Guidelines for the Regulations of Acquisition of Assets, Mergers and Take-over', a document which was referred to by the learned trial judge in his notes of proceedings. It would seem to us that it is more than mere political policy, reflecting as it does a national economic policy, the New Economic Policy of which we could properly take judicial notice.

The relatively recent case of *Thong Foo Ching & Ors v Shigenori* (1998, 4 MLJ 585) seems to suggest that the FIC guidelines do not possess legal efficacy — the learned Justice Siti Norma Yaakob held:

> I had, a year later, in the case of *Malaysia Overseas Investment Corp Sdn Bhd v Sri Segambut Sdn Bhd* (1986 2 MLJ 382), ruled the guidelines to have 'no force of law but of advisory character only and non-compliance whatsoever will have no effect as to the legality or otherwise of the contract'... A reading of the guidelines shows that there is no penalty imposed for non-compliance of any of their provisions. From the

> very nature of the document itself and its purpose to eradicate poverty by restructuring the Malaysian society so as to correct any racial economic imbalance, at most I would say the guidelines impose a moral obligation only on those affected to comply with their provisions... At most, non-compliance can be used as a means of refusing to exercise discretion, a purely administrative act, as was done by the directors in *David Hey's* case.

Apparently, the law may not strictly require the FIC approval but 'public policy' could otherwise dictate its compliance. Herein lies the conundrum — contravention of the FIC guidelines and policies, if construed as 'public policy',[11] could result in treating all executed commercial agreements as 'unlawful' under section 24(e) of the Contracts Act 1950 (CA). To put it simply, an unlawful agreement is *void ab initio*, and therefore a foreign entity found in contravention of the FIC guidelines may find itself denied of any legal redress (Tan 2000). Indeed, from a foreign investor point of view this is a daunting scenario, with significant economic ramifications. It is regrettable that there is, as yet, neither a clear judicial nor legislative guidance on this topic. Be it for the right or wrong reasons, the FIC guidelines and the affirmative action policy may be the the culmination of Malaysian socio-politico-economic 'sensitivity', but this should not compromise legal certainty as far as FDI is concerned.

It can be argued that the affirmative action policy and its related policies, strictly speaking, are unofficial laws. However, they derive their legitimacy in part from the Federal Constitution and should therefore, not be derided as wholly insignificant.

On the other hand, there exist clear, written laws that espouse the government's policies. These include the Industrial Coordination Act 1975 (ICA) and the Promotion of Investment Act 1986 (PIA). Evidently, the former is set out to ensure an orderly development of the manufacturing sector and the latter provides a spectrum of incentives to attract FDI. Since the 1990s the GOM has had adopted industrial policies that have supported the promotion of FDI in the capital-intensive and high technology industries.[12] (*The New Straits Times*, 29/06/2001, 10/3/2000, 7/12/1999; *Business Times*, *Malaysia*, 13/7/2001). To this effect, the Multimedia Super Corridor (MSC) scheme was inaugurated in 1996 and 'Vision 2020' envisaged by the Prime Minister, Dr Mahatir Mohammad.[13] It is also instructive to note that in the midst of the Asian crisis the GOM released a 'white paper' that essentially embraced FDI but at the same time held reservation towards portfolio investment (see Appendix I). Still, it seems that the GOM is adamant in attempting to bolster domestic investment and, to this end, is embracing policies that would groom small- and medium-sized enterprises (*Bernama Daily Malaysian News*, 27/3/2002). It is important that the laws and policies that concern both domestic and foreign entities are premised on equal footing.

Restrictions and Limitations

In a bid to promote the manufacturing sector that has a focus on high-value-added products, the GOM has imposed several restrictions on FDI; in part, this was implemented in order to stem the overcrowding of foreign entities, alleviate labor shortages and to promote domestic industries. To this end, all foreign manufacturing activity must be licensed. Technically, foreign ownership of 100% equity is not allowed. In summary, the following industrial guidelines apply (EIU 2001):[14]

- For FDI projects exporting at least 80% of production, no equity conditions are imposed;
- For FDI projects exporting 51-79% of their production, foreign-equity ownership of up to 79% is allowed, depending on the level of technology involved, potential spin-off effects, size and location of the investment, and extent of local value added in production;
- For FDI projects exporting 20-50% of their production, foreign-equity ownership of 30-51% is allowed, depending on similar factors as above; and
- For FDI projects exporting less than 20% of their production, maximum of 30% foreign-equity ownership is allowed. If the firm's products are in a priority sector or involve advanced technology, foreign equity of up to 100% is allowed.

In furtherance to the preceding, the operationalization of the above-mentioned, affirmative action policy translate as follows:

- FDI levels of foreign equity of 70-100%, the balance of the equity is reserved for *bumiputras*;
- FDI levels of foreign equity less than 70%, then 30% should be reserved for *bumiputras*; and
- In the event that the *bumiputra* quota is not taken up the authorities may allocate part of such balance to non-*bumiputras*.

In addition, the Foreign Investment Committee (FIC)[15] guidelines are applicable in the following circumstances:

- Any proposed acquisition by foreign interests of any substantial fixed assets;
- Any proposed acquisition of assets or any interests, mergers and takeovers of companies and businesses in Malaysia by means which will result in ownership or control passing to foreign interests;
- Any proposed acquisition of 15% or more of the voting by any one foreign interest or associated group, or by foreign interests in the aggregate of 30% or more of the voting power of a Malaysian company or business;
- Control of Malaysian companies or businesses through any form of joint-venture agreement, management agreement and technical assistance agreement or other arrangement;
- Any merger or take-over of any company of business in Malaysia or foreign interest; and
- Any other proposed acquisition of assets or interests exceeding in value RM$5 million whether, by Malaysians or by foreign interests.

What do the FIC guidelines seek to promote and/or achieve? They are as follows:

- Against the existing pattern of ownership, any proposed acquisition of assets or interests, merger or take-over should result directly or indirectly in a more balanced Malaysian participation in ownership and control;
- The proposed acquisition of any assets or interests, merger or take-over should lead directly or indirectly to net economic benefits being derived by the nation 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, research and development;
- The proposed acquisition of any assets or 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; and
- The onus of proving that the proposed acquisition for any assets or interests, merger to take-over of companies and businesses *are not against the national interest* is on the acquiring parties concerned (emphasis added).

Reportedly, the FIC, as a general rule, would prefer equity ownership to be distributed as follows: 30% foreigners, 30% *bumiputras*, and 40% non-*bumiputras*. However, an element of flexibility is exercised in cases involving FDI in high technology and value-added product sectors. In addition, pursuant to the 'Statement of Bold' measures (ASEAN 1998), Malaysia now effectively allows 100% foreign equity ownership for FDI entry between 31/7/1998 and 31/12/2003 in all manufacturing sectors, except for seven specified activities.[16] However, the reversal of policy must be seen in the light of the Asian crisis (1997), when FDI inflows rapidly dwindled in the region (UNCTAD 2000). Realistically, in the face of tense competition for FDI at the present time, it is questionable as to whether equity restrictions should continue. Corollary to this, the utility of the affirmative action policy is also questionable. Jomo (2001, p.482) asserts:

> Also, particular policies have specific consequences, some of which may be more compatible with industrial policy than others. For example, heavy investments by the Malaysian government in the 1970s to improve the quality of ethnic Malay human resources have contributed much more to enhancing industrial productivity than say, the 1975 Industrial Coordination Act's requirement of at least 30 percent ethnic Malay ownership of enterprises beyond a certain size.

Furthermore, even within the manufacturing sector, the GOM seems to limit foreign participation in the automobile sector. In this regard, Malaysia attained ASEAN approval in May 2000 to defer reducing tariffs for completely built-up (CBU) automotive products (in the context of AFTA), which is relatively high.

As mentioned earlier, in order to encourage high capital and technology and to deter labor intensive investments, the GOM imposed a formalized system of 'capital investment per employee' (CIPE) with the threshold is set at M$55,000 — accordingly, CIPE values below this sum will generally not be approved except for certain exceptions.[17] Arguably, from a legal point of view, this scheme also infringes the principle of 'national treatment'.

Routinely, the GOM intervenes directly when considering technology transfer agreements involving foreign parties. Apparently, this is done to ensure that such agreements do not impose unfair and unjustifiable conditions or restrictions on Malaysians. It follows that such agreements must compulsorily define: the technological content and principal features of technology; the training aspect of local personnel; the royalty's sum and method of payment; and infringement and dispute governing law, which must be Malaysian law. It can be argued that such direct government intrusion is tantamount to contravention of the principle of freedom of contract, wherein business parties should be free to enter business transactions without any undue influence or duress. Conversely, the GOM may argue that such administrative intervention is necessary in order to safeguard public and economic interests.

In general, the service sector is, to a large extent, restricted to foreign participation. The finance sector is open to a limited extent, but professional services, by and large, are closed to FDI.[18] Interestingly, foreign banks must incorporate their local operations as properly capitalized Malaysian public companies with a local board of directors responsible to the Central Bank (EIU 2001). It should be noted that the recently announced the 'Eight Economic Plan' envisages further gradual liberalization of the service sector. In line with the policy to promote the information technology sector, the telecommunication sector has been partially liberalized.[19] The General Agreement on Trade in Services (GATS) and the ASEAN Framework Agreement on Services (AFAS) poses new challenges for the GOM in the context of liberalizing and promoting its service sectors. Certainly the recent partnership of Port of *Tanjong Pelepas* with foreign shipping companies such as *Maersk* and *Evergreen* in providing shipping services is a step in the right direction.

Unlike other natural resources, petroleum (oil and natural gas) is within the jurisdiction of the federal government and by virtue of the Petroleum Development Act 1974 (PDA), the Malaysian National Oil Corporation or *PETRONAS* was established. Furthermore, *PETRONAS* is incorporated under the Companies Act 1965. However, herein lies a legal dichotomy — it is not entirely clear if *PETRONAS* is a government instrumentality or purely a private entity. If it is the former, it should be able to claim state immunities or privileges in

the event of a lawsuit against it. Moorthy (1981) argues that it is indeed a partial government instrumentality, but the position is far from clear.

Foreign investors involved in the extraction of natural resources are required to seek the approval of the state government concerned. In this regard, the enactment and policies concerning natural resources to some extent varies amongst the states in Malaysia. Excessive state power and authority in resource management could engender the arbitrary application of laws and over-regulation, which invariably would increase transactions costs and legal uncertainty and risk. Hence, it is crucial that the federal government steps in expeditiously to prevent such occurrences.

Another problematic matter is the privatization programme, which, to a large extent, is closed to foreign participation.[20] In the recent years, several former state-owned enterprises-turned-private entities were bailed out by the GOM for reasons of bad governance and huge corporate debts. The list includes the *Indah Water Konsortium, Malaysia Airlines Bhd*, and the *Renong Group* (*Asian Wall Street Journal*, 18/7/2001; *Business Times Malaysia*, 27/7/2001). Media reports seem to suggest that 'cronyism and collusion' have tainted the privatization programme. Not surprisingly, in the light of the 'MAS debacle', Dr Mahatir commented that "even though the previous owner was probably a crony of the government, this does not prevent us from taking actions against the people who have misappropriate funds" (*Straits Times*, 26/02/2002).

Increasingly, at present, there is a perceived lack of transparency in the privatization process, which is further exacerbated by the nuances of the affirmative action policy. There is a need to add a fresh impetus to the present privatization inertia — both conceptually and functionally. Perhaps the inception of an enabling market-oriented written privatization law and a relevant regulatory institution devoid of politicization would be the initial step towards the right direction. To establish an independent regulatory scheme, it is necessary, amongst other things (Pritchard and Webb 1996):

- To make the regulator legally and organizationally separate from the government and the SOEs;
- To specify the objectives of the regulator in clear and unambiguous terms;
- To limit the scope for the regulator to exercise personal discretion (in order to maintain confidence in the impartiality of the regulatory process);
- To make regulatory procedures transparent and easy to administer;
- To require regulatory procedures to be carried out promptly;
- Where regulation of prices is necessary (for monopoly services), to provide for a method which enables producers to benefit from efficiency improvements and which leads to simple, automatic adjustments;
- To empower regulators to obtain direct access to information about service quality and user satisfaction, with mechanism to consult with the public;

- To specify that the regulatory system is to function free from political interference.

Modus Operandi

Practically all foreign entities are incorporated as limited companies, either private or public, by virtue of the Companies Act 1965.[21] Basically, shareholder liability is limited to the extent of the shares or guarantee pledged. Rights to transfer shares are restricted at private limited companies, and are furthermore not allowed to raise capital from the public. Companies that do not conform to these criteria are deemed to be public companies. Evidently, the limited-liability company is the most common form of organisation amongst foreign companies in Malaysia (MIDA 2002).

In its quest to mould a 'corporate jurisprudence', the Malaysian courts (to a large extent) have been influenced by common law jurisdictions such as the U.K., Singapore, Australia, New Zealand and India. However, by and large corporate governance is meagre by international standards. Partly, this is due to the inability of the law to progress rapidly with modern times, and it partly stems from institutional failures and enforcement inadequacies as well. Aziz (2001, p.5) asserts that "[c]orporate governance in Southeast Asia, remains, at best patchy and uneven and, at worst downright unwholesome in an ethical sense".

Evidently, the Asian crisis revealed the mismanagement and inefficiencies inherent in many corporate entities and, as some observers have argued, total disregard for the rights of minority shareholders. *Malaysian Business* (16/2/2001) reported that "[t]he lack of transparency and shady corporate conduct have often been cited as the main impediments to the flow of foreign investments".

Undoubtedly, given the GOM's active policy of promoting foreign participation via joint ventures with local parties, the importance of minority shareholders' rights becomes that much greater. On a broader context, the Companies Act 1965 does encapsulate the legislative policies underpinning corporate governance. To this end, it includes provisions for accountability, such as the compulsory requirement of holding an annual general meeting (s.143) and the filing of financial statements with the Registry of Companies. In addition, it spells out the powers and duties of directors. This is further supplemented and complemented by a substantial body of settled common law principles that address corporate governance. Finally, it should be borne in mind that company directors and officers can be liable for offences that are economic in nature and relevant in the context of corporate crimes (Vyas 1989). Under the Malaysian Penal Code, this includes criminal misappropriation, criminal breach of trust, cheating, fraud, forgery, falsification of accounts, false information, and

omissions in the provision of information and assistance to a public servant. However, anecdotal evidence seems to suggest that enforcement with regard to the said offences remains slack and is apparently also selective (Aziz 2001).

In a bid to improve corporate governance[22] — particularly in the publicly-listed companies which, from a theoretical point of view, is necessary for socio-politico-economic justification — a new code of corporate governance has been incorporated into the revamped listing requirements.[23] This new code is said to enhance transparency and accountability (*Business Times Malaysia*, 28/6/2001, 20/7/2001). Among other things, the code introduces the concept of independent directors, stricter criteria for disclosure of corporate information, and most importantly, it deepens the enforcement power of regulatory authorities. On the one hand, it is conceivable that proper implementation and enforcement of the code would certainly bolster the much needed investor confidence, however, on the other hand, rigid regulations could possibly stifle business creativity.

Most importantly, in order to reform the securities market, a pragmatic approach is essential. First, there is a need to co-ordinate the rather fragmented regulatory structure.[24] Second, in a globalized world, it is crucial to establish formal and informal links with other regulatory authorities. Third, and related to the second, Malaysia ought to harmonize its securities law along with other countries in the region, particularly Singapore — where the modality of the corporate structure is largely similar — as this would create business synergy and curtail unwarranted inconsistencies in the application of the laws (Woon 1995). It would also not be farfetched to say that on the long term regional consistency in the application of various commercial laws would translate into a deepening of regional trade and investment. Fourth, the enforcement machinery should be constantly re-engineered along the lines of changing business practice.

It remains to be seen if the new code, would indeed, have a positive impact on corporate governance. The executive chairman of the Kuala Lumpur Stock Exchange, Datuk Mohammad Azlan Hashim (*Malaysian Business*, 16/2/2001, p. 40) depicted in a positive note:

> If there is good understanding of the revised listing requirements and a concerted effort by all to implement it well and properly, we will see a general improvement in the overall conduct of companies. And with that, it would increase the confidence of investors, both domestic and foreign.

Furthermore, in September 2001, the Companies Commission Act 2001 was enacted for the purposes of establishing a Companies Commission to take over the functions of the Registrar of Companies and Businesses. It is believed that this structural change would

considerably overhaul the regulation of businesses towards better corporate governance (*Business Asia*, 11/2/2002). Of course, in the final analysis, the success of corporate governance is attributed to, among other things, institutional ability and efficiency, professionalism of bureaucracy, and most importantly, a judicial system that is independent, proactive and dynamic. Koh (1994) identifies three aspects whereby socio-economic tensions exist in corporate governance.

- First, within a large corporation, the interplay between structures of authority and accountability and the conditions to encourage entrepreneurship and adaptability.
- Second, the long-term responsibilities of management and the more restrictive immediate self-interest; and
- Third, the more complex interplay of the often conflicting interests between shareholders and the work-force, and the community's interest as a result of the drive towards a more caring and socially responsible corporation.

The challenge, therefore, is to address these in a flexible and manageable manner.

Related to the foregoing is the entry of FDI via the mode of mergers and acquisitions (M&As) mechanism. Undeniably, Malaysia has, over the years, strengthened the laws relating to the securities market, both conceptually and functionally (Rider 1994). However, the current policy of FDI entry via M&As is by and large restrictive (UNCTAD 2000). Firstly, the approval of the FIC is compulsory insofar as all M&As involving foreign entities are concerned. Reportedly, the FIC administers the affirmative action policy strictly. From a commercial perspective, this would limit the business choices and strategies of foreign entities.

Secondly, in light of the affirmative action policy, foreign investors more often than not become minority shareholders — which inevitably focuses the issue of corporate governance in a paramount context. Logically, abrogating the affirmative action policy, which is hard to envisage but cannot be ruled out completely, can to a certain extent redress this concern.

Malaysia has no formal competition or anti-trust laws although the GOM constantly claims that such policies are adhered to. At the time of writing, a formal competition law is being considered in Parliament.[25] It can be persuasively argued that there is a need for a formal written competition law in Malaysia. First, the FIC, by virtue of implementing the affirmative action policy, may excessively circumvent the notion of a 'level playing field'. Second, restrictive business practices (RBPs) such as collusive tendering, market allocations or quotas, refusals to supply, cartel price fixing, predatory pricing, and so on, are believed to be widely practised; yet, existing laws cannot prohibit or control such RBPs, nor can they

control the abuse of power by dominant enterprises. Third, competition law facilitates cooperation between competition authorities and in the process enables the free exchange of information, consultation on real cases, coordination of procedures, and so on, thus ensuring the effectiveness of multilateral trade rules (Govindan 1997). Empirical studies suggest that the strength of competition law, as perceived by potential investors has a significant influence on FDI flows compared across countries (APEC 1999).

Amongst the ASEAN countries, Malaysia, Singapore and the Philippines do have in place a comprehensive set of commercial laws. Unlike Singapore, Malaysia has, to a large extent, codified the principles of contract law (which includes the principles of offer and acceptance, consideration, and the intention to create legal intentions, *inter alia*). In addition, common law development in the area of contract law is also evident — partly, this has kept the Judiciary rather imaginative in keeping up with modern business norms and trends. This notion is clearly illustrated in the celebrated cases of *JM Wotherspoon & Co LTD v Henry Agency House* (1962, MLJ 86) and *Royal insurance Group v David* (1976, 1 MLJ 128 per Gill LP). Suffice it to say that the crux of business dealings and confidence very much rests on the availability of a modern and pro-business contract law. The governing contract law is the lifeblood of the legal framework for a market economy, regulating the way in which property rights are transferred. In fact, the very essence of joint-venture agreements is governed by contractual principles.

In all fairness, Malaysia's Judiciary has constantly taken great pains to apply the law to augment a vibrant business environment. In this regard, the law courts have creatively used universally known civil law remedies such as injunctions, specific performances, and anton pillar orders, amongst others. Furthermore, a combination of both statutes and common law addresses a myriad of substantive and procedural issues involving the sale of goods, Bills of Exchange, negotiable instruments, insurance, amongst others.[26] However, to some extent, the commercial laws in Malaysia remain disorderly. Statues such as the Companies Act, Bankruptcy Ac, and several others are in need of revision and in some respects the unwieldy common law needs codification.

Land, Labour and the Environment

The land law in Malaysia is basically premised on the Torrens system of South Australia as encapsulated in the National Land Code (NLC) and the Sarawak Land Code for Peninsula Malaysia and Sarawak, respectively. Due to reasons of incompatibilities, the English land law is not followed (s.6, Civil Law Act). However, equity and common law principles of English law have been applied by the courts in the event of a lacuna in the law.

Consequently, this has facilitated greater jurisprudence depth and width in land law matters. In the case of *Bhagwan Singh & Co Sdn Bhd v Hock Hin Bro Sdn Bhd* (1987, 1 MLJ 324), Edgar Joseph J held that the "Torrens system does not prevent the courts from using equity where the rights of third parties have not intervened".

However, from an academic point of view, many have argued that in light of S.6 of the Civil Law Act and the NLC, which is seen as a 'complete and comprehensive' code of law governing land matters in West Malaysia, English common law and equity should not — strictly speaking — be applied. To date, there is no consensus on this point of contention; neither has there been any clear legislative nor judicial guidance. Arguably, wholly removing English common law and equity in the context of Malaysian land law would dilute the jurisprudence richness — will the domestic land law be able to deal with all aspects of land matters? Policy circles must ponder this question carefully and rationally.

Basically, land matters lie within the jurisdiction of state governments (9th schedule, Federal Constitution). However, concurrently, the Constitution specifically provides for federal legislation in land matters for the purposes of ensuing uniformity of law and policy in various aspects of land matters (Article 76, Constitution). It is important to keep in mind the constitutional imperative of this aspect of the law — in sum, it prevents the state governments from arbitrarily enacting laws with regard to land matters. Indeed, the National Land Code, as mentioned earlier, is viewed as a complete and comprehensive code relating to land matters in Peninsula Malaysia.

Traditionally, the state authorities exercise strict control over land matters. For instance, non-transferability without the state government's approval is enforced and there is the requirement that a development project be completed within a specified period of time. Industrial land is leased on the basis of 33, 66 and 99 years' leases, with an allowance period of 6-9 months for the physical development of the land.[27] Reportedly, industrial investors found that the land acquisition and conversion account for more than one-quarter of the time spent on project implementation (EIU 2001). Available literature suggests that legal and other restrictions on the transfer of interests can often hinder productivity, income gains, and increase transactions costs (Knetsch 1993).

Furthermore, land remains a highly charged political issue, and state governments have shown a few instances of restricting foreign ownership (for example, in Sarawak, Perak and Kelatan). In addition, by virtue of the Land Acquisition (Amendment) Act 1997,[28] the authorities have all-encompassing powers to acquire land for the purposes of public and economic needs. There are suggestions that this aspect of the law has been used in a heavy-handed manner, particularly with regard to land belonging to locals (Raman 2000). Unwieldy

acquisitions of domestic land may lead to substantial social and economic ramifications, as is widely seen in the context of Indonesia today. It is crucial that policymakers constantly re-engineer the legal framework for land matters — particularly with regard to compulsory acquisition — in conjunction with modern universal practices. It is also instructive to note that the judiciary in Malaysia has taken pains to pronounce as to what amounts to a 'fair and just' compulsory acquisition — see, for example, *Ng Tiou Hong v Collector of Land Revenue* (Gombak 1984, 1 CLJ 350). Of course, an embarrassment may arise when administrative authorities show complete disregard to the judicial stand — such a scenario must be avoided at all costs, as it would clearly weaken investor confidence.

Regrettably, the NLC sets a stringent and — by all accounts — unreasonable period of 3 months for an appeal to be lodged in the civil court against a decision (or inaction) by the Land Administrative Authority.[29] Undue restrictions concerning access to courts would only entail social and economic upheaval. It is important to keep in mind that land rights are a basic component of property rights. Therefore, this aspect of the law should be repealed.

Reportedly, the National Land Council (the Council)[30] has recently ordained that the FIC guidelines are also applicable to all acquisitions of foreign industrial land, both at the federal and state levels. Under s.433B of the NLC, consent of the state authority is not necessary for foreign acquisition of industrial land — to outdo this aspect of the written law with the Council's decision (unwritten law) would, to say the least, cause a legal quagmire, which in turn would erode investor confidence. Legislative policies should not be tempered with, as such an act tends to undermine the lawmaking process and, more importantly, the supremacy of parliament — policymakers ought to be extremely mindful of this fact. Arguably, the NLC should take precedence, as it is a higher form of law as opposed to a policy statement by the Council; however, this legal nicety is not entirely clear and warrants immediate clarification from the GOM.

Labour Issues

It is the GOM's policy that Malaysians are eventually trained and employed at all levels of employment. However, foreign entities may employ expatriate personnel in areas where there is shortage of trained Malaysians (MIDA 2002; also, see Appendix II).

Labour matters are within the jurisdiction of the Federal Parliament and hence there is a high degree of uniformity and certainty in labour-related laws and policies. The main labour laws include the Employment Act 1935 (EA), the Industrial Relations Act 1967 (IRA), and the Trade Unions Act 1959 (TUA).

The EA administers employer-employee relations. In essence, it spells out the various statutory rights, including the working hours, working conditions, wages, holidays, and other such matters. The IRA essentially governs employer-union relations — to this end, it establishes the legislative policies on which these relations are founded, namely: trade unionism, union recognition, collective bargaining and dispute resolutions (Ayadurai 1998). The TUA defines trade unions, regulates their composition and membership, and sets out their rights, powers, duties and responsibilities. The labour court and the industrial court are tribunals (as opposed to civil courts) and essentially hear various types of labour disputes. It should also be noted that the civil courts have supervisory jurisdiction over the said courts, which means that there is some degree of 'checks and balances' on administrative actions and decisions. It is not common to see labour strikes or unrest in Malaysia — conciliatory techniques (negotiation, fact finding, conciliation, mediation and arbitration) are preferred as opposed to open-ended actions. That said, the prevailing law does recognize that industrial action may be necessary, but certainly regulates its nature and scope so as to avoid adverse economic and social consequences. In the case of *South East Asia Fire Bricks Sdn Bhdd and Nonmetallic Mineral Products Manufacturing Employees Union & others* (award 39/94), the court held that:

- There is a right in Malaysia to strike or to lockout;
- A strike or a lockout which does not contravene the IRA or any other law would be a legal strike or lockout;
- A strike or a lockout must not only be legal but also justified, i.e. used as last resort, to be lawful;
- A lawful strike merely suspends and does nor sever the employment contracts between the employer and employees involved in the strike; and
- A lawful strike affords 'reasonable excuse' for the absence from work of the employees involved in the strike.

However, the Industrial Court has also stated clearly that any industrial action must be kept within the bounds of legitimate interest. In *Syarikat Ong Yoke Lin Sdn Bhd and National Union of Commercial Workers* (award 38/1974), it was held that:

> Before a hardened dispute comes to the Industrial Court, it is only right that the alternative avenue of conciliation which the IRA offers should be taken advantage of and tried. ...If the rules and standards of orderly social behavior accepted for the rest of the community are to be valid also for industrial relations, then settlement of labour problems should be sought through arbitral elements, especially now that it is recognized that arbitration is the remedial substitute for force.

In general, the prevailing labour laws in Malaysia are on the whole satisfactory. Notwithstanding this, it is advisable to continue with the reformation of laws to greater accord with market-oriented norms. In this regard, it is crucial to maintain the balance — on the one

hand, the rights of the employees and on the other hand, the expectations of foreign investors. Furthermore, the industrial administrative tribunals should continuously strive to be relevant, as its absence would probably increase transactions costs, which would stifle Malaysia's competitiveness. From a socio-economic perspective Malaysia suffers from the dearth of a highly-skilled labour force, which is the panacea to transform Malaysia into a knowledge-based economy (*Business Asia*, 29/10/2001). To ameliorate this on-going concern, measurable social engineering reform is needed in the educational and vocational training system, amongst others.

In recent times, a certain faction of the immigrant labour force (namely, that from Indonesia), seems to be posing a social problem for the GOM. (*Straits Times*, 6/2/2002, 24/1/2002). Strictly, this is not a labour dispute but rather a social quandary. As of to-date, Malaysia does not have specific laws governing immigrant labour. Given the fact that Malaysia depends substantially on foreign labour, and as a long-term strategy it is perhaps in order to promulgate laws that specifically address foreign workers' rights, obligations, and liabilities.

Environmental Concerns

In effect, three phases of environmental governance can be discerned in Malaysia — colonial orientation, initial efforts to establish national coordination, and greater regulation and strengthening of the legal framework. Analysts argue that Malaysia's bargaining power in its relationship with trans-nationals swayed in its favour in the 1990s, following a huge inflow of foreign capital, rapid growth, and improved social conditions. As a result, then environmental governance has since been beefed up; this was further aided by both global market pressure, especially following rising support for environment-friendly practices, and domestic NGO pressure (Rasiah 1999).[31]

Malaysia has a fairly systematic law on the environment, namely the Environment Quality Act 1974, as amended in 1996 (EQU),[32] and a plethora of secondary legislation thereunder, which are administered by the Department of Environment (which is in turn under the purview of the Ministry of Science, Technology and Environment). In short, the EQA legislative policies are — "an Act relating to the prevention, abatement, control of pollution and enhancement of the environment, and for purposes connected therewith" (preamble of EQA). Seemingly, it covers a wide ambit, both conceptually and functionally. In a bid to shore up environmental governance the 1996 amendments to the EQA added the following features:

- Management and more stringent control of hazardous wastes and products that are considered as environmentally unfriendly, including provision for 'prescribed substances';
- Environmental audit;
- Establishment of a research pool and an environmental fund;
- Higher penalties for non-compliance; and
- The closing down industrial plants that persist in flagrant disregard of environmental protection.

The salient features of the EQA are as follows:

- Licenses are required for pollution of the atmosphere, noise, soil, inland waters, and the discharge of oil and waste;[33]
- In general, all industrial projects are required to conduct some degree of Environment Impact Assessment (EIA) – the 'prescribed' activities need only provide a preliminary EIA; on the other hand, 'non-prescribed' activities require detailed EIAs that are open to public scrutiny;[34]
- The DOE may require an Environmental Audit (EA); and
- The DOE has wide-sweeping powers, from entering a premise or work site, and seizing information, to detaining and questioning any persons suspicious of environmental violations.

On the flip side, environmental management is partly saddled by weak institutions, relatively weak enforcement, a lack of industrial players' participation, potential conflicts between the federal and state governments, and politicization. Notwithstanding this, having already had the laws calibrated in legislative text, it now requires systematic reform of the relevant institutions and streamlining of procedures, in line with modern business practice. To this end, the plethora of secondary legislation under the EQA and other sectoral laws that address environmental matters should be constantly reformed to underpin the certainty and predictability of the law. Most importantly, the elements of transparency and accountability must be adhered to at all levels. An ongoing concern is the perceived politicization of environment management. To this end, Rasiah (1999, p. 29) observed:

> However, because of dominance of the executive and prevalence of feudal practices, environmental regulations have generally been used selectively. Hence, environmentally questionable projects such as the Bakum dam continue to be launched in the country. Also, NGO influences have only been successfully absorbed when aired from within government platforms as feudal practices have meant that rebellious NGOs views have consistently been shunned.

Equally, it is also pivotal that both domestic and foreign entities are treated equally with regard to implementation and enforcement of environmental laws. In the controversial case of the *Director-General of the Department of the Environment v Kajing Tubek & others* (civil appeal no.117/95), the Court of Appeal held that land-related environmental matters should categorically come within the jurisdiction of state governments (9th schedule,

Constitution). This is indeed a tricky situation — arguably, in the ultimate, environmental issues are inextricably interwoven to land. Consequently, if state governments exercised full jurisdiction on environmental matters, it is conceivable that a plethora of environment related regulations differing in form and substance would spawn. Furthermore, this situation can be complicated by the existence of the federal environment law.

Most empirical studies suggest that FDI will not necessarily flow in to take advantage of lower environmental standards and efforts by national governments to compete for FDI by embarking on lower environmental standards are unlikely to be very successful in the longer term. However, excessive regulatory burden on new enterprises for the clearing up of past contamination, or uncertainty about the future liabilities, may deter FDI (OECD 1997). In sum, environmental governance must progress in tandem with changing business trends and the on-going globalization tide. In this regard, 'information regulation' is the latest phase in the evolution of pollution control paradigms. Studies show that mere 'command and control' types of legal framework would not be productive or desirable in the long-term. Will environment-related incentives be of any help? (This is examined in greater detail in Appendix III).

Non-fiscal Incentives

By virtue of Article 13 of the Federal Constitution, the GOM theoretically guarantees against expropriation of property without compensation. As this is a constitutional provision it should be interpreted in the broadest terms and no parliamentary statutes ought to contravene the intention of the said provision. Historically, there have been no cases of nationalization of foreign entities in Malaysia. Furthermore, Malaysia has also concluded Investment Guarantee Agreements with several countries (APEC 2000) and, in general, these include the following features:

- Guarantee against expropriation or nationalization except for the reason of national security. In the event of doing so, there must be fair and equitable compensation;
- The right to remit or repatriate — in any usable convertible currency capital — profits and dividend royalties on investment; and
- The validity of property rights and freedom of commerce.

In the absence of a comprehensive or specific FDI law in Malaysia, the importance of the IGA cannot be over-emphasized. To this effect, there are several relevant factors to consider. First, rights, liabilities, and obligations of the contracting country and the GOM are specifically addressed. Second, arbitrary action on the part of the GOM can be

circumscribed. Third, provisions inculcating international best practice for FDI are normally incorporated. Fourth, there is scope for customized requirements and needs to be fulfilled.

Arguably, the IGAs — in theory — contravene the universally accepted practice of 'most-favoured nation treatment' and to some extent countries with weak bargaining power are put at a disadvantage. Sornarajah (1994, p. 276) opines:

> There are many uncertainties about bilateral investment treaties. But given the uncertainty that exists in the international law on foreign investment, bilateral investment treaties will be looked upon as the best way of securing investment protection as between the parties. Their increase in the present climate of foreign investment is due to the fact that developing states are eager to make so that they could present themselves as having favourable conditions for foreign investment and capital-exporting states are eager to make them so as to secure the best condition for their investors. But each treaty is negotiated by the parties on the basis of their perceptions of mutual advantage and it is too far-fetched to claim that customary principles of law could emerge from them.

In addition, the GOM is party to the Convention for Settlement of Investment Disputes (the ICSID Convention) which provides for arbitration and conciliation of legal disputes arising between an investor and the GOM. Apart from the element of costs and time factor involved, it can be argued that the ICSID Convention, maintains, at the very minimum, some degree of investor confidence — foreign investors will have the assurance of a 3rd party adjudicating a dispute matter with the GOM, if any should arise.

By virtue of the Exchange Control Act 1953, the Bank Negara Malaysia (Malaysia's central bank) does not impose exchange control restrictions, except for the countries of Israel, Serbia, and Montenegro, whereby specific restrictions have been imposed. It follows that any repatriation of capital, profits, dividend, and interests and commissions are freely permitted. Basically, the exchange control policies, in general, are aimed at monitoring the settlement of payments and receipts as well as encouraging the use of the country's financial resources for production purposes. It is important to note that the selective exchange control imposed on 2 September 1988, in the midst of the Asian crisis did not directly affect FDI. Dr Mahatir (Mohamad 2000, p. 46) writes:

> An important point that needs emphasizing is that FDI were not subject to the selective control measures in any way. They were allowed not only to repatriate their profits but were allowed to repatriate the proceeds for the sale of their assets, if they choose to do so.

This is a clear signal that the GOM is not prepared to temper with FDI regulations, even in times of economic crisis.

Are foreign firms allowed to raise capital in Malaysia? In general, financial arrangements for the purposes of FDI are rather flexible and market-oriented. The following salient features are worth mentioning:

- Non-resident controlled companies can obtain any amount of forward exchange contracts, guarantee facilities, and short-term trade financing facilities for a period of 12 months;
- Non-resident controlled companies may borrow a total sum of RM$10 million without the prior approval from the central bank;
- In general, foreign entities that borrow in excess of the said RM$10 million in Malaysia should ascertain that their domestic borrowing does not exceed their capital funds by more than three times — the central policy here is to instill long-term commitment;
- All export proceeds are required to be repatriated back to Malaysia within six months from date of export;
- However, all foreign borrowings must satisfy a prevailing regulatory proviso — 60% of all foreign borrowing must be from Malaysian-owned banking institutions.

The rationale for the final policy was explained by Dr Mahatir (Mohamad 2000, p. 46/7):

> The foreign exchange inflow aspect of the FDIs was never an important consideration in Malaysia's policy towards FDIs. In order to ensure that the local borrowings of the FDIs is not entirely with the subsidiaries of foreign banks operating in Malaysia, a 60:40 rule was imposed which requires the FDIs to meet at least 60% of their business borrowings from Malaysian-owned banks in Malaysia. This liberal policy of allowing the FDIs to borrow from banks in Malaysia has also brought about a win-win situation. They are good paymasters, and banks in Malaysia, including Malaysian-owned banks, make good profit by lending to them. Given that Malaysia has a high savings rate of 38% of GDP, the banks have a need to lend a significant portion of the national saving.

Typically, a wide array of fiscal incentives are offered by virtue of the Promotion of Industries Act 1986,[35] Income Tax Act 1967, Customs Act 1967, and the Sales Tax Act. Rather ironically, fiscal incentives are calibrated via legislative enactment while matters of paramount importance such as the affirmative action policy and related policies are left largely ambivalent (as discussed earlier).

In ASEAN, Malaysia is probably the country that offers the most extensive range of investment incentives. These include schemes such as the Investment Tax Allowance, Pioneer Status, Reinvestment Allowance, Accelerated Capital Allowance, Infrastructure Allowance, and Industrial Building Allowance, amongst others.[36] Many analysts today still question the utility of incentives, both fiscal and non-fiscal (Jomo 2001; Sieh and Yew, 1997; UNCTAD 2000). Instead, there is a growing and considerable need to develop a high-quality work force, good infrastructure, an efficient legal and administrative system, stable political

condition, and prudent economic policies. The recent WTO Trade Policy Review report (5/12/2001) on Malaysia made the following observation:

> Tax measures are among the main instruments of Malaysia's economic development strategy. They include a wide array of investment incentives that are offered to various manufacturing activities, exports thereof, agriculture, tourism, and other approved service sectors, research and development, training, and environmental protection. It appears that some of these incentives might have been provided as a quid pro quo for local-content requirements that the authorities sometimes attached to investments; the question arises whether such incentives are still necessary. Tax incentives are often costly (in terms of tax revenues foregone) and their effectiveness in not always clear. While tax as well as non- tax incentives for investment can sometimes be justified on grounds of 'market failure', they also run the risk of subsidizing good investments, which need no such assistance and could well have been undertaken in any event, or turning otherwise dubious investments into profitable ones. Insofar as incentives have stimulated in the latter, they may well have contributed to over-investment, and to a distortion in the allocation of resources, thereby possibly contributing to the fall in total factor productivity that occurred in Malaysia during the early 1990.

It is not entirely clear if incentives exert an influence on the investment decision process, but anecdotal evidence seems to suggest that apart from tariff and quota restrictions, they tend not to. Therefore, incentive policies should be selectively used to overcome market imperfections, reward performance, and encourage cost efficiency. The GOM needs to be cognizant of the fact that, ultimately, an efficient and responsive administrative control system is highly crucial. Such a system would include (Sumantoro 1994):

- A timely, accurate and complete supply of information to investors;
- The examination and evaluation of all details of proposed investment projects and verification of activity procedures against existing laws and regulations; and
- The continuous monitoring of the implementation of foreign investment projects supported with comprehensive and up-to-date data records of individual projects in accordance with the terms approved by the government.

Taxation

In general, the Malaysian income tax law, namely, the Income Tax Act 1967, is premised on the British model. Hence, common law from the commonwealth countries with similar laws is applied extensively in interpreting the Malaysian tax law. As of 2000, in a bid to shore up the tax administration system, the GOM introduced the 'self-assessment system', which is designed to replace the current 'official assessment system' in an incremental manner.[37] This is a clear indication that Malaysia's tax regime is responding to new business dynamics in the face of rapid globalization and internationalization of commercial activities. In general, tax

morality is fairly high in Malaysia, amongst both corporate entities and individuals. Furthermore, the relevant authorities reportedly enforce the tax laws strictly.

A brief summary of the substantive elements of the taxation system is worth mentioning. In general, a tax rate of 28% is applicable to both resident and non-residents companies. Taxable income includes profits, gains, dividends, interest, discounts, rents, royalties, and premiums. A company, whether resident or not, is assessable on income accrued in or derived from Malaysia. Income derived from sources outside Malaysia and remitted by a resident company is not subject to tax, except in the case of the banking and insurance business as well as sea and air transport undertakings (MIDA 2002). For the purposes of taxation, a company is considered resident in Malaysia if the control and management of its affairs are exercised in Malaysia. An interesting feature is that the carrying forward of losses is unlimited in time and, conversely, no provision is made for the carrying back of losses. All individuals are liable to tax on income accrued in, derived from, or remitted to Malaysia. However, non-resident individuals will be taxed only on income earned in Malaysia and are liable to tax at the rate of 29%. In addition, they are not entitled to any personal relief. Apart from the direct taxes mentioned, indirect taxes are also imposed, namely in the form of sales taxes, service taxes, and various excise taxes and import duties. In a bid to gain more revenues from indirect taxes as opposed to direct taxes, the GOM has over the years increased the base and rate of such taxes.

One controversial aspect of taxation is probably the withholding tax. It would not be wrong to say that the commercial viability of transfer technology and licensing agreements partly hinges on the depth of the withholding tax in question. In Malaysia, payments to non-residents of the following are subject to a withholding tax: royalties — 10% and interest — 15%. From a legal point of view, one way to minimize this tax is certainly via an Agreement for the Avoidance of Double Taxation[38] with a home country, which provides for the avoidance of incidence of double taxation on income such as business profits, dividends, interest, and royalties. In this regard, Malaysia has shown great enthusiasm and has accordingly executed such tax treaties with several countries. To a large extent, such treaties also facilitate information and cooperation between Malaysia and its treaty partners and this would certainly reduce the risk of fraudulent commercial practices.

Broadly, Malaysia's taxation regime conforms to international practice. That said, anecdotal evidence seems to suggest that the current weaknesses stem from the bureaucracy, which is apparently fraught with slackness and tardiness (*Malaysian Business*, various years). First, it is crucial that the certainty of the meaning and intent of the tax laws are applied in a consistent and even-handed manner. Second, rapid changes to the tax laws should be

avoided, as this would increase legal uncertainty. Third, it is essential that all taxation policies be clearly spelt out in legislative text. Fourth, ample avenue should be provided for a fair hearing in the event of disagreement of the official computation of the tax amount.

Intellectual Property Rights (IPRs)

The 20th century has seen an increased demand for IPRs protection. The motivation for this rise has been well summarized by (Bragg and others 1999, p. 3):

> There are several forces behind this increasing demand for IPRs protection. One relates to the growing importance of IPRs in international transactions, as described previously. This has led patentees and owners of trademarks to seek broader geographical coverage for their intellectual property... this 'globalization effect' is reinforced by the trend toward strengthened IPRs regimes observed in many countries since 1980s, which has rekindled the interest for protection by knowledge- and information-intensive firms.

Malaysia exhibited a great sense of urgency in improving its IPR regime in the 1980s. Partly, this is due to the fact that during the said period the U.S., by virtue of Section 30 of the Trade Act 1974 resorted to retaliatory trade tactic on nations that exhibited flagrant disregard for IPRs (MacLeod 1992). At the same time, the GOM had initiated economic policy that focused on the need to develop high technology and value added products, which naturally adds to the need for an efficient and credible IPR regime. To this end, the GOM has had taken great pains to enact, amend or modify its IPR laws in tandem with international practice. Hence, Malaysia is a signatory to the Paris Convention,[39] the Berne Convention, and is a member of the World Intellectual Property Organisation (WIPO). This is a clear policy indication that the GOM is committed to align its IPR regime with that of international best practice. Furthermore, as a member of the WTO, Malaysia is obliged to comply with the Agreement of Trade Related Aspects of Intellectual Property Rights (TRIPs) including trade in Counterfeit Goods, to this effect, as of recent an array of IPRs laws both anew and modified were promulgated. These include the Copyright (Amendment) Act 2000, Layout-designs of Integrated Circuits Act 2000, Patents (Amendment) Act 2000, Trade Marks (Amendments) Act 2000, and Industrial Designs Act 2000. Apart from the promulgation of new substantive IPRs laws, the GOM has made a conscious effort to improve both the enforcement machinery and institutional capacity of the policing scheme.

Evidently, international recognition came when, in October 2001, the U.S. Trade Representative Office removed Malaysia from its 'priority watch list' to that of the its 'watch list'. That said, Malaysia still has a relatively long way to go insofar as IPR implementation and enforcement is concerned. For example, the *World Competitiveness Yearbook 2001*

(IMD 2001) survey on IPR enforcement ranked Malaysia 42 among the 49 countries surveyed.

The main legal implications of the various IPR laws are worth mentioning briefly. The Patents Act 1983, as amended in 2000, makes a considerable effort to comply to the TRIPs — to this end, the patent validity period is now extended to 20 years from the date of the application of registration and hence the applicant would have provisional protection while the application is being considered. Also, there is now a clearer legal definition on what constitutes compulsory licensing. In this respect, compulsory licenses are only tenable if the patent in question is attributable to a technical advance of considerable economic significance. Furthermore, the right of the GOM to exploit a patent without prior approval is limited to situations of national emergency and public interest. Undoubtedly, this aspect of the law would allay any fear of arbitrary action on the part of the authorities. Nevertheless, it remains to be seen as to what extent the administrative authorities and the Courts would interpret and apply this statutory proviso.

Unquestionably, the notion of a compulsory license is an extremely important concern for foreign entities — it directly attributes to the potential of economic loss. It should be noted that the law accordingly provides monetary compensation to ameliorate the incidence of such an economic loss. The challenge is to exercise such undertakings with prudence underpinned by the due process of law, transparency and accountability — all of which are essential elements to promote and sustain research and development and inventions.

In essence, an invention is patentable in Malaysia if it is new, involves an inventive step, and is industrially applicable (s11 PA). It follows that a patent owner in Malaysia has the exclusive right to exploit the patent invention, to assign or transfer the patent, and to enter into licensing contracts (s.36(1) PA).[40] Also, in order to circumvent the rather strict requirements that need to be satisfied for patent registration and to stimulate a creative and entrepreneurial business environment, the law provides for inventions to be registered as 'utility innovations' (an example of which is reverse engineering), which are valid for a shorter period of 10 years (s 17c PA).

Undeniably, patent licenses exert a significant role in the Malaysian economy — it provides the mechanism for transferring much-needed modern inventions and technology to the manufacturing industry. In this regard, to actualize the rights and obligations of all parties concerned, license agreements must be in writing and include the following: the period/term of the license, the subject matter referring unambiguously to the invention disclosed in the Malaysia patent, and the consideration for the license. In the *Premier Products Co Ltd case*

(High Court suit no D5-22-120 B93), the High Court held that such statutory stipulations must be strictly adhered to and, in the absence, any rights claimed will not have the force of the law. Arguably, the law should go a step further and mandate compulsory registration of all patent licenses, as this would entail greater legal protection and business confidence. Also, the rights and obligations of patent licensors and licensees should be based on 'equal footing'. Of course, typical restrictive clauses imposed by the licensor — such as tying arrangements, grant backs, price fixing, restrictions on exports, and non-compensation restrictions — would cause unnecessary economic distortions. In recent years, the GOM has constantly complained that such restrictive practices have failed to translate technology transfer and inventions in tangible form in Malaysia. Furthermore, the patent law also fails to establish clearly the application of the doctrine of equivalents, a standard in western patent law that allows courts to rule on whether minor changes to the invention constitute infringement. The challenge is to ensure both foreign entities and the local community benefit from exchange of industrial property and henceforth a pragmatic and flexible approach is preferred. In this respect the local regulation can be complemented by the UNCTAD Code of Conduct on Transfer of Technology Transaction, which has received international recognition.[41]

Trademark law is governed by the Trademark Act 1976, as amended in 1994 and 2000. Essentially, the law confers exclusive rights (s.28(5) TA) for registered patents and correspondingly invokes both civil and criminal sanctions in the event of infringements. A trademark registration is effectively *prima facie* evidence of the validity of the rights of the trademark and all subsequent assignments. Amongst other things, the new amendments introduce protection for well-known trademarks, geographical indication, scope for border enforcement, and streamlining of the registration procedure.

Certainly, the protection of well-known marks has been a major concern in international economy — if left legally unprotected it paves the path for the incursion of substantial economic losses, and the possible stifling of economic development. The amended TA (s.14) prohibits the registration of well-known marks for goods or services by persons who are not the proprietor of the mark. The working definition of 'well-known' marks is not entirely clear; to confound the problem, the definition enumerated in the TRIPs and the Paris Convention also lacks clarity (Zainol 2000).[42] Fortunately, the WIPO, on 11 June 1999, issued a joint recommendation on well-known mark. The litmus test is to examine how the Malaysian judiciary and Trademark Registry interpret the guidelines — will the spirit and letter of the law be adhered to?

The trademark registration procedure has been streamlined and apparently the registration criteria is now less exacting.[43] Accordingly, the standard of 'distinctiveness'

required for registration is merely; 'capable of distinguishing' as opposed to 'inherently adapted to distinguish'. However, a trademark registration may be refused if it is likely to deceive or cause confusion (s.14 TA). In the case of *Yomeishu Seizo Co v Sinma Medical Products Sdn Bhd*, the High Court held that if a person is the owner of a registered trademark in a particular language, another person cannot claim registration for the same word mark in any other language using the equivalent in translation. Furthermore, in the recent Court of Appeal case of *Lim Yew Sing v Hummel Int'l Sports & Leisure* (1996, 3 MLJ 7), it was held that a foreign trademark has no proprietary legitimacy within Malaysia unless registered afresh. It is also instructive to note that the Malaysian courts are readily willing to strike out trademark registration perpetuated by fraud — as clearly encapsulated in the cases of *Tiga Gajah Cho Heng Sdn Bhd Case v Maju Perak Tepung Bores Sdn Bhd* and *Luk Lamelan and Kupplungsbau Gmbh v South East Asia Industries Sdn Bhd.*

It is noteworthy that the new trademark law provides the mechanism for the seizure of counterfeit trademark goods at the point of entry to Malaysia. Undeniably, if this aspect of the law is administered and enforced strictly, counterfeit trademark goods can be kept at bay. However, the procedural requirements concerning the same appear rather tedious and time-consuming — needless to say, it is important to keep the procedural requirement simple and effective, so as not to frustrate the spirit of the law.

All trademark licensing or assignments arrangements must be registered with the Registry of Trademarks; the registered owner(s) — presumably foreign entities — is (are) then afforded wide-ranging legal protection for the trademark in question. This aspect of the law is laudable. It would not be wrong to say that in the context of trademark licensing and assignment transactions there must be some degree of state intervention to protect the original owner's rights.

Perhaps one controversial aspect regarding trademarks in our modern world is its connection with domain name registration (cybersquatting). At issue is: would a domain name similar to a registered trademark be tantamount to infringement? As of 2002, there are no laws addressing this issue, and it is conceivable that in the future this may cause a legal dichotomy[44] if left unattended. Evidently, this is an on-going global quandary. Policymakers and the judiciary need to grapple with the phenomenon, while at the same time applying a generous degree of foresight, pragmatism, and practicality — the penetration of the Internet would only deepen, given time and space.

Apart from the statutory laws, namely the Copyright Act 1987, as amended in 1990, 1997, 2000, Malaysia is also a party to the Berne Convention, which was ratified in 1990. The direct implication of the Berne Convention is that Malaysia is to accord national

treatment (reciprocal protection) to other members and specially grant rights under the convention — hence, Malaysia's copyright protection regime is indirectly compelled to follow that of international norms and standards.

In all fairness, the copyright law has been constantly, modified in tandem with changing business needs. Effectively, literary works, including computer programs and musical and artistic works enjoy copyright protection. Furthermore, all copyrighted works must be original in character and reduced to material form. Consider the case of *Goodyear Tire & Rubber Co & Anor v Silverstone Tire & Rubber Co Sdn Bhd* (where the first plaintiff is a tire manufacturer). The plaintiffs contended that the defendant had breached their copyrighted artistic work (found in the drawing in of their tires), which they claimed had a unique and distinctive set-up, and for which had been copied by the defendant. It was held that what the plaintiffs were seeking to protect was the idea of the function of the tire and not its artistic value, and since the authorship and originality of the drawing of the tires were being claimed, with this being in doubt, there could be no breach of copyright as to the artistic work of the drawing.

However, in line with international practices, copyright protection does not need official registration — copyright is automatic if the work is eligible for copyright. In general literary, musical or artistic works (other than photographs) enjoy proprietary rights during the author's life span and 50 years thereafter the author's demise. However, there seems to be a lacuna in the law — corporate entities are often concerned with the specific point of the demise, if any. Ostensibly, all copyright assignment and licensing must be in writing. In the case of *Barjasa Information systems Sdn Bhd v Tan Gaik Leong & Anor* (1996, 1 MLJ 808), the courts reaffirmed the rights and obligations of licensors and licensees and to this extent it is clear that the judiciary is acutely aware of the needs of licensing arrangements in international business.

It is also instructive to note that a special Copyright Tribunal has been set up to address disputes that particularly relate to licensing. Also, the law now provides for broader enforcement against alleged copyright infringements. Clearly, we see yet again another attempt by the authorities to safeguard copyright protection. Unquestionably, the utility of the same can only be fully realized if consistency and transparency are observed at all times.

It is evidently clear that the judiciary has taken a rather strong stance towards infringements of copyrights associated with computer programs. In the case of *Creative Purpose Sdn Bhd & Anor v Integrated Trans Corp Sdn Bhd & Ors*, the plaintiffs — who were involved in designing, developing, and marketing software programs — alleged that the defendants had infringed the copyright of their computer programs by reproducing and

distributing them to the public. The plaintiff submitted that the defendants had 'hacked' or modified the programs to circumvent the 'dongle', which was a security feature for the programs. The Court held that software programs fell within the definition of computer programs in Section 3 of the Act and should be read broadly to include all manifestations of that set of instructions that can be read by a computer in whatever converted form. The court further found that computer programs were a form of literary work and were therefore eligible for copyright protection so long as sufficient effort had been expended towards rendering the work original, and that the work was additionally reduced to a material form (Karuppiah 2001).

Given the GOM policy to actively pursue high value-added industries, including semi-conductors and prefabricated components, the Layout Design of Integrated Circuits Act 2000 has been promulgated to afford proprietary protection in this regard. As this is a relatively new law, it remains to be seen as to how the Courts and the relevant authorities would interpret and implement the same. That said, experiences can be drawn from countries that already have enacted similar laws (for example, the U.K. and U.S.).

Furthermore, to enhance the manufacturing industries, the Industrial Design Act 1999, as amended in 2000, provides protection for industrial design or components that are used as parts in the production of the final product. In light of the rapid technological development in today's globalized world, the above-mentioned law is a necessity. Firstly, technological products inherently have short product life cycles and therefore the traditional way of protection via copyrights and patents in not feasible. Secondly, business confidence would certainly deepen if a specific legal framework addresses specific business needs.

In tandem with the policy to promote information and communications technology (ICT), the GOM has enacted an array of cyber laws, which includes the Digital Signature Act 1997, Computer Crimes Act 1997, Telemedicine Act 1997, and Communications and Multimedia Act 1998. These laws are relatively new in form and substance and its imperative that the judiciary administers them with a high degree of consistency and certainty. It is apt to quote legal practitioner Karuppiah (2001, p. 7-104):

> As new technologies emerge on a daily basis, it is hoped that the legislature will adopt a more flexible and innovative approach while keeping a watch on the direction of growth in the industry. Certain areas that may require creative legislation would be, for example, in the area of cyber-squatting...this area is a legal minefield for users of businesses on the internet and has engendered litigation in other countries particularly, the United States and the United Kingdom. Both these jurisdictions now have or are legislating laws to regulate the use of trademarks in cyberspace. With technology having advanced a step further into mobile Internet, more uncertainty is imminent. Nevertheless Parliament may draw upon the experiences of the other

jurisdictions to lay the necessary legal framework for the smooth development of the Communications and Multimedia industry.

The crucial aspect of the IPR regime is certainly the efficiency of the enforcement machinery. At varying degrees, the above-mentioned laws provide remedies in the event of IPRs infringement, and to a large extent this is buttressed by the common law. To this end, it is also instructive to note that the Malaysian courts have used various remedies to implement and enforce IPRs — including monetary damages, injunction, *anton pillar* orders, accounts of profit, delivery up/destruction upon oaths, costs, and interest. Similarly, criminal sanctions against IPR infringement is undertaken by the competent authorities and the courts. The crux of criminal enforcement certainly impinges on the institutional efficiency — and in this regard, it is felt that the on-going infringement of copyright is not entirely satisfactory (EIU 2001). In a broad sense, observers reckon that the GOM has indeed placed an enabling and responsive IPR regime. Karuppiah (2001, p. 7-102) has further observed:

> The government is committed to fulfil its obligations under TRIPs. Many changes have been made to existing laws and this is continuing. The courts too have been playing a key role in enforcement. The numerous reports on intellectual property cases in the various Malaysian law reports in the last five years are a clear indication of this. With the Multi Media Super Corridor upmost in its mind, there is no doubt that enforcement of intellectual property rights will be given due priority by the government.

Inevitably, in the wider context of intellectual property, the law on confidentiality plays an integral role. From the negotiation to the execution of licensing agreements, or in the process of research and development, substantial amounts of confidential information are exchanged. These include trade secrets, personal secrets, and public and government secrets. Broadly, the Malaysian judiciary has taken great pains to uphold the duty of confidentiality and, accordingly, in the recent case of *Electra Clad Australia Pty Ltd v Mejati RCS Sdn Bhd* (1999, 6 MLJ 280), the Court reaffirmed such a strong stand in no unclear terms. Realistically, in international business the basic 'trust-factor' is underpinned by the same ideals and hence the challenge is for the courts and policymakers to keep abreast the law in tandem with changing business dynamics.

Globalization and the advent of ICT pose fresh challenges for the IPRs regime.[45] First, there is a need to conceptualize an effective and credible enforcement mechanism. Second, there must be an acute sense of transmitting IPR awareness via education, the mass media, and other communications methods. Third, the law must constantly meld together with the economic imperatives to avoid a 'legal vacuum'. Fourth, and most importantly, civil courts must play a pivotal role in enforcing IPR laws and regulations consistently and strictly

— in this regard, it is essential that judges acquaint themselves thoroughly with the rudimentary principles governing intellectual property instruments.

A first step for the GOM towards reforming its IPR regime should be to support initiatives that promote consensus from all affected economic players. It is discernible that the incorporation of the TRIPs framework and the major IPR conventions as mentioned above would provide fresh impetus to the IPR regime in Malaysia. Although the TRIPs agreement lays the foundation for higher standards of protection of IPRS on a global scale, it leaves its signatories with some flexibility in designing national IPR regimes. The performance of a country's court system is an essential part of any legal system framework for business activity. Needless to say, potential investors will be interested in the competence and independence of the Court system, its accessibility, and efficiency. It remains to be seen as to how, in daily legal practice, all these new laws and conventions for the international protection of IPRs will be applied by the Malaysian courts and the relevant institutions.

Administration of Justice/Dispute Resolution

Legal theoretical studies overwhelmingly endorse the inherent advantages — be they social, economic, or political — that stem from a Judiciary that is independent and dynamic. In the context of Malaysia, as the administration of justice is a federal concern, there is a notable uniformity of application of the same laws between all states. This is certainly a welcoming feature for the business community, as it fundamentally underpins the certainty and predictability of prevailing commercial laws. Essentially, the *syariah* law and native matters are adjudicated at state level. As mentioned earlier, the superior courts comprise the Federal court, the Court of Appeal, and the High Courts, all of which, to a greater or lesser extent, exercise original, appellate and supervisory jurisdiction. The latter function is exercised over all subordinate and inferior courts, which consists the session's court, magistrate court and juvenile court. The important questions are: is the Malaysian judiciary independent? Is the judiciary able to exercise unfettered inherent jurisdiction? From a legal point of view, judicial independence is largely vouchsafe, via Part IX of the Federal Constitution, which broadly, includes judiciary — tenure, salaries, qualifications, disqualification's, amongst others (see Appendix IV). That said, there are perceived instances whereby the executive/legislature has seemingly interfered with judicial independence. Pointedly, a series of judicial/executive bouts were exchanged in 1987 and 1988, which also culminated in a constitutional crisis. Of particular importance was the then tumultuous UMNO election case, and as has been observed by Wu (1999, p. 60/1):

> In discharging the function of pronouncing the legality of governmental action, the judiciary often walks the tightrope as the executive not infrequently takes offence, perceiving judicial pronouncements as unjustified intrusions into its authority. This tension came to surface and strained the relationship between the two branches in 1987 and 1988. It degenerated into an open conflict, culminating in the unprecedented removal of the Lord President and two Supreme Court judges and constitutional amendment to article 121, which purportedly downgraded the role of the judiciary. The widely held view in legal circles is that the conflict caused great damage to Malaysia's international reputation as a stable and democratic country, a reputation it had hitherto enjoyed. Most were concerned with the issue of judicial independence.

Subsequently, the *Ayer Molek Rubber Co Bhd v Insas Bhd*[46] (1995, 2 MLJ 734) and the relatively recent criminal case against Datuk Anwar Ibrahim also heightened concerns regarding the independence of the judiciary. Article 121 of the Federal Constitution,[47] prior to the amendment in 1988, squarely vested judicial powers of the Malaysian federation in the judiciary. This provision was subsequently deleted and inserted with a provision that reads "the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law". Many observers (Tan 1997; Lee 1990; Wu 1999) regard the amended provision as tantamount to amongst other things: negation of inherent jurisdiction, executive/legislature usurpation of the judicial function, deviation from the original spirit and letter of the Federal Constitution, and an affront to the doctrine of separation of powers.

However, any perceived severity of the amended article 121, should not be over-exaggerated. Logically, as a constitutional document, Article 121 should read neither in isolation nor narrowly. It is widely known that judiciary independence is essentially the bedrock of democracy, and in all accounts, if a broad and holistic approach is adopted, the Federal Constitution does largely succumb to this postulate. Evidently, there are no indications — be it empirical or systematic — that the Malaysian judiciary has withered since 1988, albeit perceived anecdotal evidence may suggest so. It is believed that to some extent the ill practice of corruption may have infiltrated the Judiciary. The World Competition Yearbook (IMD 2001) ranked Malaysia 34 amongst 49 countries in the survey on 'Fair Administration of Justice' — certainly not an impressive standing. Historically, the Malaysian judiciary represents a long and distinguished tradition, and it has certainly striven to maintain the rule of law and constitution sometimes in very difficult circumstances. Harding (1997, p.136) asserts:

> To summarize the position suggested here, Art. 121, read with the other provisions of Part IX, evince an intention, notwithstanding the omission of the term 'judicial

> enact provisions far more drastic than the amendment under consideration. It would have to find some means of excluding totally and expressly the inherent jurisdiction of the courts to exercise exclusively the judicial power, and of vesting such jurisdiction in some other organ or organs. Accordingly the courts can still strike down an Act of Parliament which purports to interfere with the judicial power, after the fashion of Liyanage and Hinds. One important consequence of this is that the civil courts still retain the power of judicial review of administration acts and decisions by inferior tribunals, including the Syariah Courts.

Apart from the substantive laws, it is important that the procedural law, which lays the method and processes through which substantive law is addressed in a disputed matter, is clear and simple. In sum, the legal process must be able to facilitate expeditious and inexpensive access to the courts. From the writer's experience the procedural law in Malaysia is rather slack — more often than not there seem to be an inordinate delay and high expenses incurred in all stages of a civil suit.

The formal legal institutions have been briefly noted. It is instructive to note that Malaysia has, over the years, taken considerable steps to promote and develop informal alternate dispute resolution machinery, especially arbitration. There are many debates about intrinsic merits of arbitration: speed, confidentiality, finality, special expertise of the arbitrator and inexpensiveness. Today, there is a clear recognition that formal litigation is not the most pragmatic and practical way to resolve commercial dispute, particularly with regard to international business transactions. Anecdotal evidence seems to suggest that countries which have in place a viable alternate dispute resolution machinery tend to meet business needs efficiently and timely (Paulsson 1996). Further, this adds to cost competitiveness. In this regard, Malaysia's effort to promote arbitration is certainly a step in the right direction. In furtherance to this conscious effort must be made attempts to promote other means of commercial dispute resolution, such as mediation, negotiation and conciliation, preferably with international linkages.

In sum, from an economic perspective, foreign investors must be able to avail themselves with a liberal option of choosing between the formal or informal dispute resolution mechanism or, better still, a combination of both. In fact, a holistic and integrated approach has been proven to be productive and cost competitive in the U.S., the U.K., and Singapore.

At present, arbitration in Malaysia encompasses both domestic and international forms. As regards the latter, the Kuala Lumpur Regional Center for Arbitration[48] essentially embraces the widely established UNICITRAL arbitration rules (1976, with slight modifications). Broadly, the Arbitration Act 1952 and the UNICTRAL rules apply to

domestic and international arbitration, respectively. These afford ample informality and flexibility in the management of dispute cases. Furthermore, it is noteworthy that arbitration under ISCID and the Regional Center's rules are excluded from the ambit of the Arbitration Act (s.34). Therefore, in Malaysia, an international arbitration under the above-mentioned rules/conventions is not subservient to the courts. The courts seem to have obliged in upholding this principle of non-intervention; as seen in the case of *Klockner Industries-Anlagen GmbH v Kien Tat Sdn Bhd* (1990, 3 MLJ 183) and *Soilchem Sdn Bhd v Standard-Elektrik Lorenz AG* (1993 3 MLJ 68). This is a matter of policy and entails only international disputes. Clearly, this would allay fear, if any, of judicial inefficiency and/or biases.

Apart from the question of efficiency and efficacy of the judiciary, in the context of FDI, it is also pertinent to identify the scope and extent of recognition and enforcement of foreign judgements and arbitral awards. It would be proper to assume that due to the inherent international character of FDI, commercial litigation may commence frequently outside the host country. In this regard, both statutes and common law principles guide Malaysia. In fact, the latter has invariably accommodated universal principles, particularly in common law jurisdictions (Hickling 1995). By virtue of the Reciprocal Enforcement of Judgements Act 1958 (REJA), foreign judgements registered in Malaysian courts become effectively a judgement of the High Court of Malaysia.[49] However, a registered judgement may be set aside on the courts finding that it is tainted with fraud, or that it is an affront to natural justice or public policy (s.5 REJA).

Correspondingly, foreign arbitral awards shall be recognized and enforced in Malaysian courts by virtue of the following conventions and agreements, which Malaysia is a signatory to: the Reciprocal Enforcement of Judgement Act 1958, the Convention on the Recognition and Enforcement of Foreign Arbitral awards 1958 (the New York Convention), and the Convention on the Settlement of Investment Disputes Act 1966. Not surprisingly, Malaysia, as of to-date, has committed itself to several international conventions in regard to recognition and enforcement of foreign judgements. It would be prudent to continue this policy stance head-on, as any retraction would certainly emit the wrong signal to investors.

Needless to say, to uphold the spirit and letter of the Federal Constitution and the doctrine of rule of law it is crucial that an effective administrative law be in place — whereby the Courts are readily and fearlessly able to strike down arbitrary actions and decisions of government agencies. Such machinery is important in the context of Malaysia, where it is evidently clear that the government plays a direct and pivotal role in the economy and social paradigm. These would apply, for instance, in the issuance of manufacturing licenses and various FDI-related licenses and permissions, and in the affirmative action policy.

In all fairness, administrative law progression in Malaysia has been fairly satisfactory and by and large is in tandem with that of other common law jurisdictions, particularly that of England. However, some jurists are of the view that there is still room for substantial development (Pillay 1999; Ahmad, 1992). Even so, in the face of statutes denying judicial reviews, the courts have remain unperturbed and, indeed, have taken rather restrictive views on such 'ouster clauses' in the interest of justice. Significant numbers of court pronouncements have been made over the years with regard to administrative matters of discretion and denial of natural justice. However, the issue of standing (*locus standi*) which determines whom can challenge the legality of an administrative decision in the courts, is not entirely clear. In the case of *Government of Malaysia v Lim Kit Seng, Federal Court* (1988, 1 MLJ 50, 1988, 2 MLJ 12), the majority adopted a rather narrow approach, whereas the minority (two dissenting views) held liberal, public interest-oriented viewpoints.

Perhaps, in time to come, the judiciary may be inclined to adopt the latter. From a foreign investor's perspective, an efficient and effective administrative law mechanism provides a psychological safety net — judicial independence and administrative law machinery are highly crucial in the sense that foreign entities will have confidence in the legal system and would be able to counter arbitrary action (if any) of the government, respectively. That said, the challenge is to accord to: 'judicial activism', insofar as not to jeopardize parliamentary democracy — which ultimately would serve to underpin the governance aspects of accountability and transparency and, most importantly, the political legitimacy of the government.

IV. Challenges

There are several key challenges that remain in terms of that legal framework for FDI in Malaysia, and may to be addressed by the system, going forward. The first of these involves its relationship with its ASEAN neighbours. On the 7 May 1998, the GOM executed the ASEAN Investment Agreement (AIA), with a view of reaffirming the importance of sustaining economic growth and development in all member states through joint efforts in liberalizing trade and promoting intra-ASEAN trade and investment flows (as enshrined in the Framework Agreement on Enhancing ASEAN Economic Cooperation executed in Singapore on 28/6/1992). Pursuant to the AIA, Malaysia shall undertake the following (Article 4):

- Accord national treatment (admission, establishment, acquisition and expansion) to all ASEAN member states investors by 2010 and to all other nations by 2020;
- Allow entry to all economic sectors by 2010 and 2020 for ASEAN and non-ASEAN countries, respectively;

- With immediate effect confer most favored nation treatment to all ASEAN members; and
- Accommodate the free flow of capital, skilled labor, professional and technology from member states.

However, the GOM may abrogate from its obligations under the AIA when confronted with certain prescribed circumstances.[50] Broadly speaking, from the regulatory perspective, the AIA in effect subjects each member state's legal framework for investment to scrutiny. Under Article 5, paragraph 5(b) of the AIA, Malaysia is to "undertake appropriate measures to ensure transparency and consistency in the application and interpretation of its laws, regulations and administrative procedures in order to create and maintain a predictable investment regime in ASEAN".

In addition, Malaysia is to inform the AIA council — on a regular basis — of all existing laws, regulations, administrative guidelines, and international agreements relating to investment (Article 11), subject to elements of confidentiality (Article 11 para 3). It is conceivable that, if this functional aspect of the AIA is harnessed diligently, it would to some extent facilitate harmonization of the investment legal framework within ASEAN. Ultimately, this would spur legal certainty and shore up investor confidence in the region. In a broader context, however, the success of the AIA largely hinges on the effectiveness of its institutional framework (AIA council) and, more importantly, the political will of the member states to implement the necessary measures in a timely fashion.

The second challenge is related to the Agreement on Trade Related Investment Measures (TRIMs). Malaysia became a member of the World Trade Organisation on 1/1/1995 and hence is obliged to comply with the TRIMs (one of the agreements negotiated and concluded in the Uruguay rounds). The TRIMS recognize that certain measures imposed by governments in connection with investments have had restrictive and distortionary effects on trade. To this end, it prohibits Malaysia from applying any form of trade-related investment measures that is inconsistent with Articles III (national treatment) and XI (quantitative restrictions) of the General Agreement on Tariffs and Trade (GATT) concerning imports. A direct implication of the TRIMs and TRIPs (discussed below) is that Malaysia can be brought before the WTO Dispute Resolution Mechanism in the event of breach of its obligations under the treaties.

Third, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) was also executed under the WTO fora. This similarly poses a challenge to the future IPR regime in Malaysia. By and large it requires its signatories to apply the principles of most-favored and national treatment to intellectual property protection. Thus far, Malaysia

has made monumental changes to its IPR regime, essentially to comply with TRIMs. However, measurable reform is needed on the implementation and enforcement of IPRs.

A final hurdle involves the ASEAN Free Trade Agreement (AFTA). There is now a tacit recognition that there is a nexus between trade and investment. To this end, Malaysia should make all attempts to comply with the AFTA time frame. In this regard, it is possible that the tariff exemption (discussed above) for CBU automobile products are viewed as a contraction of Malaysia's commitment towards AFTA. It will therefore need to carefully consider any future policy decisions that might be construed as protectionist or downright anti-trade, so as not to diminish its standing in this regard.

NOTES

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1. The International Monetary Fund defines 'direct investment' as the "investment in enterprises located in one country by effectively controlled by residents of another country — generally for statistical purposes, equity investment of 10% is considered direct investment".
2. A practice that is followed in a particular locality in such circumstances that it is to be accepted as part of the law of that locality.
3. Essentially, the main sources of English law are common law, statues, and equity. The institutional setup is rather comprehensive, starting from the court of first instance to an elaborate appeal procedure.
4. Part II consists of the following headings: liberty of the person; slavery and forced labour prohibited; protection against retrospective criminal laws and repealed trials; equality; prohibition of banishment and freedom of speech, assembly and association; freedom of religion; rights in respect of education; and rights to property.
5. The Alliance/Barisan Nasional Government, in power ever since Merdeka, has retained its two-thirds parliamentary majority virtually throughout its tenure, and has therefore been able to secure amendments to the Constitution at will.
6. Since independence in 1957, emergency provisions have been invoked on 4 occasions and numerous arrests made (preventive detention) by virtue of the Internal Security Act and the Dangerous Drugs (Special Preventive Measures) Act.
7. Article 5(2) of the Constitution incorporates the ancient remedy: "Where a complaint is made to a high Court or any Judge thereof that a person is being unlawfully detained the court shall inquire into the complaint, and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him". Not surprisingly, many a *habeas corpus* hearing has been successful.
8. The common law system is characterized by the doctrine of *stare decisis* — a case becomes a binding precedent for other cases because of the decision, which is made. Presumably, all other things being equal, there should be no good reason why a later judge should make a decision different from that of the earlier judge. Essentially, this system engenders certainty and predicability of the law.

9. S5 of the Civil Law Act provides: all questions or issues which arise have to be decided in the States of West Malaysia (other than Malacca and Penang) with respect to the law of partnership, corporations, banks and banking, principals and agents, and carriers by air and land. However, for sea, marine, average, life, and fire insurance, with respect to mercantile law, the law to be administered shall be the same as would be administered in England. At the date of the coming into force of the Act, any questions that arise have to be decided in England, unless other provisions have been made by written law.
10. See article 153 of the Federal Constitution.
11. Chitty on Contracts (25th ed.) para. 1034 at p. 548: "Scope of public policy. Objects which on grounds of public policy invalidate contracts may, for convenience, be generally classified into five groups: first, objects which are illegal by common law or by legislation; second, objects injurious to good government either in the field of domestic affairs; thirdly, objects which interfere with the proper working of the machinery of justice; fourthly, objects injurious to marriage and morality; and fifthly objects economically against the public interests".
12. The industry's future thrust will involve the development of high technology industries which includes a higher level of research and development activities, the establishment of more water fabrication facilities, the manufacture of components to support the consumer and industrial electronic sector, the manufacture of computer and computer peripherals, telecommunications equipment and office equipment.
13. Malaysia's 'Vision 2020' is a long-term policy strategy game plan to elevate Malaysia as a developed country by 2020. The MSC is a technology hub that assures the best possible physical infrastructure, new laws to protect technology, high-capacity global telecommunications and logistics infrastructure. The GOM has targeted seven multimedia applications for development. These flagship applications are: electronic government, telemedicine, smart schools, a multipurpose card, R&D clusters, worldwide manufacturing webs and borderless marketing centers.
14. Technically, all firms require a company licence to operate in Malaysia — according to the Industrial Co-ordination Act 1975, manufacturers with paid-up capital of M$2.5m or more or at least 75 full-time paid employees must obtain a manufacturing licence from the Ministry of International Trade and Industry (MITI)/Malaysian Industrial Development Authority (MIDA).
15. The FIC is placed under the purview of the Prime Minister's Department and its secretariat is based in the Economic Planning Unit of the Prime Minister's Department. Undoubtedly, the FIC plays a vital role in promulgating FDI policies.
16. These activities include paper packing, plastic packing (bottles, films, sheets and bags), plastic injection moulded components, metal stamping and metal fabrication, wire harness, printing, and steel service centres.
17. However, projects which fulfil one of the following criteria will be exempted: if value-added is more than 30%; if the management, technical and supervisory (MTS) index is more than 15%; if the project undertakes activities or products listed as promoted activities and products of high technology; and if the project is located in the Eastern Corridor of Peninsular Malaysia (Kelantan, Terengganu, Pahang and the district of Mersing in Johor), Sabah and Sarawak.
18. Entities established in the Labuan International Offshore Financial Center (IOFC) are declared as non-residents for exchange control purposes after they are incorporated/registered under the Offshore Companies Act 1990, and/or licensed Offshore Banking Act 1990 or Offshore Insurance Act as the case may be. Offshore entities in Labuan are freely allowed to deal in foreign currency with non-residents. Also, offshore banks in Labuan are permitted to receive payments in ringgit from residents arising from fees, commission, dividends or interest from deposit of funds.

19. The GOM decided in 1997 to raise the limits on foreign participation in telecommunication from 30% to 49% and to increase the shareholding in insurance to 51% in certain circumstances. This was followed by the enactment of the Communications and Multimedia Act of 1998 to provide the legal framework for the convergence of telecommunication and technology.

20. In general, foreign participation in a privatized entity is limited to 25% of share capital. Apparently, the GOM is willing to be flexible with this policy on a case-by-case basis.

21. The first step towards incorporation of a company is to make an application to the Registry of Companies (ROC) in the prescribed Form 13A with a payment of RM$30 to determine if the proposed name of the intended company is available. Subsequently, the Memorandum and Articles of Association must be lodged with the ROC and the necessary statutory declarations must be made. A public company cannot offer shares to the public unless: a prospectus has been registered with the Securities Commission; and a copy of the prospectus and the relevant form has been lodged with the ROC on or before the date of its issue.

22. According to the Finance Committee Report 1999, the definition of corporate governance is "the process and structure used to direct and manage the business and affairs of the company towards enhancing business prosperity and corporate accountability, with the ultimate objective of realizing long-term shareholder value, whilst taking into account the interests of other stakeholders".

23. The GOM responded promptly in the face of criticism of its corporate governance during the Asian crisis (1997). In February 1999, the Malaysian Code of Corporate Governance was released by the Finance Committee with a comprehensive set of 70 recommendations for improving the corporate culture. Apparently, many of these recommendations have been incorporated into the Revamped Listing Requirements (RLR) and listed companies must disclose in their annual reports how they have applied and complied with the principles and best practices of the code.

24. Although the Securities Commission Act 1993 was promulgated to integrate the regulatory aspect of the securities market it is not entirely clear if it did succeed to do so. Many analysts feel that by and large the regulatory framework is still fragmented.

25. Seemingly, there is an on-going debate within the policy circle on the issue of enacting a competition law – a first draft appeared in 1993 but unfortunately failed to bear fruition.

26. The statutes are the Sale of Goods Act 1957 (revised 1989), the Hire-Purchase Act 1967, the Insurance Act 1963 (revised 1972), and the Bills of exchange Act 1949 (revised 1978).

27. Several measures introduced in the 1998 budget have encouraged foreign ownership of properties. The government lifted the RM$100,000 levy it charged on foreigners when buying real estate, but they are restricted to 50% (from 30% previously) of the value of units or houses they can purchase. However, the GOM policy towards foreign ownership of real estate has at times been confusing and unpredictable.

28. Raman (2000) asserts: "Recent development trends in the country where lands have been acquired by certain State governments by force – following the amendments in 1991 to the Land Acquisition act 1960 (revised 1992) – had drawn many serious questions as to whether the law had been abused to take lands away from ordinary people in the name of 'economic development' and 'public purpose' and given to private interests and corporations".

29. Sharifah Zubaidah bte Abdul Kader Aljunid (2000) wrote: "In Singapore for example, no limitation period is stipulated whilst in Australia the limitation period is six months from the date of the decisions. Furthermore, even the Public Authorities Protection Act 1948 prescribes a period of three years to commence action against a

public authority for any alleged default or negligence. Land administration officers are public authorities as they administer land for the public. Hence, they cannot be made less accountable then any other public authority. By providing only three months in which to commence action, the NLC has limited to a large extent the accountability of the land administration authority".

30. Article 91(5) of the Federal Constitution stipulates: It shall be the duty of the National Land Council to formulate from time to time in connection with the Federal Government, the State Governments and the National Finance Council a national policy for the promotion and control of the utilization of land throughout the Federation for mining, agriculture, forestry or any other purpose, and the administration of any laws relating thereto; and the Federal and State governments shall follow the policy so formulated.

31. Selected environment-related NGOs in Malaysia include the Malayan Nature Society (MNS), the Federation of Malaysian Consumers Association (FOMCA), the Environment Protection Society of Malaysia (EPSM), Worldwide Fund for Nature (WWF), the Consumer Association of Penang (CAP), Sahabat Alarn Malaysia (SAM), the Asia Pacific People's Environment Network (APPEN), and Persatuan Ekologi Malaysia (PEM).

32. There are also several other statutes that address the environmental aspect.

33. If these polluting actions are carried out without a valid license the punishments vary from fines of RM$100,000 to RM$500,000 — and jail sentences of up to five years. The 1996 amendments therefore impose heavy penalties.

34. Detailed EIAs are required for the following projects: iron and steel industry, pulp and paper mills, cement plants, construction of coal-fired power plants, construction of dams and hydroelectric power schemes, land reclamation, incineration plants, landfills, development projects in which at least half the land are consists of slopes exceeding 25 degrees, and logging of any area exceeding 500 hectares.

35. The Investment Incentive Act 1983 was replaced by the investment promotion Act 1986 due to (amongst other reasons): the old system being too complicated, a bias towards capital-intensive projects, an absence of protection offered to domestic business activities, and excessively generous incentives that resulted in an excessive loss of revenue.

36. It is interesting to note that the GOM offers generous incentives to promote a particular sector. In this regard, the following are promoted activities: the manufacturing sector, high technology sector, strategic projects, agricultural sector, tourism industry, environmental protection, research and development, training, information and communications technology, the Multimedia Super Corridor, acquisition of proprietary rights, operational headquarters, international procurement centers, approved service projects, and the shipping and transportation industry.

37. The order for the changes being as follows: companies — 2001, businesses — 2003, and salaried groups — 2004.

38. As at 18/5/2001, Malaysia has executed tax treaties with 56 sovereign nations (MIDA 2002).

39. The Paris Convention was established in 1883 and it requires member countries to accord national treatment to all other members. It also establishes a system of Convention priority whereby a person filing an application for a patent or trademark registration in one nation union country has a right of priority to file an application for that patent or trademark in any other union country. Reportedly, Malaysia is also considering acceding to the Patent Cooperation Treaty and the Madrid Protocol (which provides for registration of international trademarks).

40. The Patent Registration Office under the auspices of the Ministry of Industrial Property administers the PA. Upon application for a registered patent, the Registrar

will carefully ensure that all formal requirements are duly satisfied. The applicant is given the opportunity to correct any deficiencies. A foreigner not domiciled in Malaysia may file a patent application through a patent agent. It follows that a patent owner has the exclusive right to exploit the patented invention, to assign or transfer the patent, and to enter into licensing agreements.

41. The Code encapsulates the following: Assignment, sale and licensing of all forms of industrial property except for trade marks; service marks and trade names when they are not part of the transfer of technology transactions; provisions of know-how and technical expertise in the form of feasibility studies, plans, diagrams, model etc.; provisions of technological knowledge necessary for the installation, operation and functioning of plant and equipment and turnkey projects; and provision of technological contents of industrial and technical cooperation arrangement.

42. Zainol (2000) asserts that "[t]he new amendments does [*sic*] not aim at incorporating a precise definition of well-known marks. Instead, it provides that art 6bis of the Paris Convention and art 16 of the TRIPs Agreement shall apply for the purpose of determining whether a trademark is a well-known trademark. With due respect, this subsection is itself mildly confusing since art 6 bis of the Paris Convention and art 16 of the TRIPS Agreement do not define well-known trademark. Article 6 bis of the Paris Convention merely provides that the members of the Union may enact legislation to refuse or cancel registration, or prohibit the use of a trade mark which replicates or is confusingly similar to a well-known trade mark for identical or similar goods".

43. Trademark registration is administered by the Registrar of Trademarks. The amended TA has streamlined the registration procedure significantly. Registered trademarks in Malaysia enjoy exclusive rights.

44. At present there is no formal registration system for domain names in Malaysia. The Malaysian Network Information Center (MYNIC) caters to the registration of domain names — however, this does not confer any legal rights to the name.

45. Trademark and Patent applications are not particularly difficult or costly unless disputes arise. Patent applications usually receive a ruling in 3-5 years. Trademark applications have recently taken up to 10 years (EIU 2001). There is an immediate need to shore up the IPRs institutional efficiency.

46. In this case it was alleged that to some extent there was 'judge shopping' – Justice N.H. Chan JCA said: "The fact that proceedings were filed in the wrong division does not render the proceedings in any way invalid but may, coupled with other considerations in the present case, give the impression to right-thinking people that litigants can choose the judge before whom they wish to appear for their case to be adjudicated".

47. Even after the amendment to Article 121 of the Federal Constitution, there is no sign that the judiciary has sobered down — if fact, it continues to exercise its inherent jurisdiction powers and the custodian of the Federal Constitution.

48. The Kuala Lumpur Regional Centre for Arbitration was set in 1978 pursuant to a decision taken by the Asian-African Legal Consultative Committee. In this regard, the Prime Minister, Dato Seri Dr Mahathir Mohamad at a conference in July 1979, said: "On behalf of the Government of Malaysia I wish to reiterate our full support to ensure the success of this Centre. I also wish to give the assurance here that the government will respect the independent functioning of the Centre as an international arbitral institution".

49. The REJA applies on the basis of reciprocity to certain countries specified by the Act, and can be extended to others by order of the Yang di-Pertuan Agong. Under the REJA, before a foreign judgment is registered in Malaysia it must have been that of a superior court of a country to which the Act applies, not an appeal from a subordinate

court; the judgment must also be a fixed sum of money, not a sum in respect of taxes, fines or other penalties; and the judgment must be 'final and conclusive' as between the parties thereto.

50. The circumstances are the following: in the economic sectors under the temporary or sensitive lists (Article 7 (3)); to protect and safeguard the national security, public morals, laws and regulations and fiscal structure (Article 13); provisional emergency to safeguard measures taken to avert serious injury and threat (Article 14); and when confronted with serious balance of payments and external financial difficulties or threat thereof (Article 15).

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Appendix I

This appendix details the key points related to FDI in the 1999 government white paper on the economy.

- Malaysia continues to promote foreign direct investment (FDI), but discourages destabilising short-term capital flows. The selective exchange control measures introduced on September 1, 1998 and its subsequent partial relaxation through an exit tax effective February 15, 1999 clearly illustrate this position. The selective exchange control measures retain full convertibility of the current account and do not change the rules governing FDI. The measures are only targeted at speculative short-term capital flows so that the owners of such capital take a longer-term view of their investments in Malaysia and thus, prevent volatility in the financial market.
- FDI refers to private long-term capital flows which are intended to acquire a significant interest in an enterprise with the objective of being directly involved in its management. Malaysia recognizes that FDI has brought benefits in terms of transfer of technology and management expertise, employment creation, new product development, trade generation and access to new markets, besides being an important source of capital. It is also acknowledged that part of the benefits are offset by taxes foregone through the provision of fiscal incentives, and outflows in the form of higher imports, repatriation of investment income, freight and insurance payments and technical and royalty payments.
- Malaysia continues to provide a liberal and competitive environment for FDI, amongst others, by ensuring the presence of suitable supporting infrastructure, the availability of a well-trained manpower, consistency of policy, unhindered repatriation of profits, expeditious approvals for investments and the provision of an attractive incentive package. While providing an appropriate environment for investment, Malaysia made sure that FDI flows are mutually beneficial as well as consistent with the development objectives of the country. In the 1970s and 1980s, Malaysia promoted FDI inflows, which were assembly-type and labour-intensive, but in the 1990s favoured FDI, which is capital-intensive and high-tech. It also ensures that newly established domestic industries which have potential are not exposed to unfair competition and that the employment and equity objectives under the new Economic Policy and the National Development Policy are not jeopardized.
- Malaysia has in the 1990s continued to witness an increasing inflow of FDI. After the onset of the crisis, inflows into the region including Malaysia decelerated. The UNCTAD *World Investment Report 1998* observes that FDI inflows into the region, including Malaysia, could fall in the immediate term resulting from the decline in intra-regional investment, particularly from Japan, Taiwan and Singapore; the growing competition for FDI from the Caribbean, Latin America and Central and Eastern European economies, and the loss of asset values and reduced earnings for multinational corporations (MNCs).
- However, a 1998 UNCTAD survey of 500 largest MNCs in the world notes that Malaysia continues to remain an attractive investment destination. Amongst the reasons given are its lower property prices and cost of production arising from the currency depreciation and its relatively more liberal approach to FDI.
- Recent trends indicate a recovery in FDI inflows into Malaysia with the second half of 1998 recording a higher inflow compared with the second half of 1997 and the first half of 1998.
- Furthermore, the value of foreign investment approvals for manufacturing projects by MITI which amounted to RM$13.1 billion in 1998 is 14% higher compared with 1997. The value of proposed investments in the form of acquisition of shares and joint ventures of foreign interests to the Foreign Investment Committee which amounted to RM$5.6

billion in 1998 is also higher, i.e. 3.7 times more compared with 1997, indicating that long-term foreign investors continue to have confidence in Malaysia as an attractive investment destination.

- In contrast to FDI, short-term portfolio capital flows refers mainly to the inflow of foreign funds to purchase stocks and bonds to take advantage of the domestic stock market. These flows are motivated by potential returns from the expected future appreciation in the value of the currency, interest rate arbitrage and stock market activity. More recently, these short-term capital flows have become increasingly sensitive to developments in the international financial markets.
- While a country can realize net benefits from FDI, short-term portfolio capital flows however can be potentially destabilizing due to their sheer size and the speed with which they move between markets. These flows can in turn adversely affect the strength of the banking system and its financial intermediation role, and consequently destabilize the real economy, as has been illustrated by the current crisis.
- These short-term capital flows can also lead to misalignments in the exchange rate of the recipient country when the exchange rate becomes non-reflective of the prevailing economic fundamentals. Further, the accumulation of international reserves based on short-term capital flows leaves the country vulnerably to a sudden reversal of these flows.
- Short-term capital has proven to be highly speculative and its movements are greatly influenced by the 'herd instinct'. Waves of excessive optimism result in massive and rapid inflows of short-term capital, which push up prices beyond the level consistent with the fundamentals and corporate performance. The 'bandwagon effect' from domestic market players further exacerbate price increases. The opposite occurs during waves of excessive pessimism as is the case during the current crisis.
- From 1992-94, Malaysia saw rapid inflow of short-term portfolio capital motivated mainly by the large interest-rate differential, the expectations of a ringgit depreciation, the bullish stock market an strong economic fundamentals. Realizing the dangers associated with the rapid build-up in short-term capital flows, Malaysia introduced several administrative measures in 1994, which were successful in dealing with the problem.
- The current crisis witnessed the rapid outflow of short-term portfolio capital, which severely destabilized the financial market as well as adversely affected economic growth. The period between July and December 1997, witnessed a net short-term portfolio capital outflow of RM$22.2 billion. In 1998, the situation began to stabilize with a net short-term portfolio capital outflow of RM$3.5 billion in the first half and RM$4.6 billion in the second half of the year.

Source: Economic Planning Unit, White Paper on Status of the Malaysian Economy, *Kuala Lumpur: EPU, 1999.*

Appendix II

A company with foreign paid-up capital of less than US$2 million will be considered for expatriate posts on the basis of the following:

- Key posts can be considered where the foreign paid-up capital is at least RM$500, 000. This figure, however, is only a guideline and the number of key posts allowed depends on the merits of each case.
- For executive posts, which require professional qualifications and practical experience, expatriates may be employed up to a maximum period of 10 years, subject to the condition that Malaysians are trained to eventually take over the posts.
- For non-executive posts, which require technical skills and experience, expatriates may be employed up to maximum period of five years, subject to the condition that Malaysians are trained to eventually take over the posts.

Appendix III

As discussed in the text, there are several environment-related incentives that are of interest.

- Pioneer Status (PS) and Investment Tax Allowance (ITA) for companies undertaking forest plantation projects, Pioneer Status (PS) and Investment Tax Allowance (ITA) for a period of 5 years for companies undertaking forest plantation projects, and storing, treating and disposing dangerous toxic wastes. PS offers a 100% tax exemption for a period of 10 years. ITA offers 100% tax exemption equivalent to qualifying investment over a period of 5 years.
- Capital allowances for companies providing facilities for storing, treating and disposing their dangerous toxic wastes.
- Import duty, sales tax and excise duty exemptions on machinery, equipment and raw materials imported by manufacturing firms for the control of pollution.
- A price differential of 3 cents a litre between leaded and unleaded petrol through price reduction of unleaded petrol effective from January 1 1994.
- Import and sales tax exemption on catalytic converters.
- Import duty for new diesel powered passenger cars reduced to only 120%. Motor vehicle license fees on road tax halved for new generation diesel-powered motor vehicles.
- Donations to approved organizations established exclusively for environmental protection and conservation offered deductions from taxable income.

Source: Adapted from Sham (1998, Table 8) and Rasiah (1999).

Appendix IV

Judges of the superior courts do not hold office at the pleasure of the Yang di-Pertuan Agong. Unlike public servants, once appointed they hold office till 65 years of age although they are removable by His Majesty on the limited grounds of breach of the code of ethics or of inability from infirmity of body or mind or any other cause properly to discharge the functions of their office, and then only in accordance with an elaborate procedure set out in article 125(3), (4) and (5) of the Constitution. The procedure includes the appointment by His Majesty of a tribunal consisting of not less than five judges or ex-judges to inquire into any allegation properly made. The Yang di-Pertuan Agong may then act upon the recommendation of the tribunal. This procedure was invoked twice in 1988, which culminated in the removal of the Lord President, who was then the head of the Judiciary, and two Supreme Court judges.

The code of ethics for judges came into being in 1994. The *Constitution (Amendment) Act 1994* deleted removal of judges on the "ground of misbehavior" and substituted it for the code of ethics prescribed under article 121(3A). Article 121(3A) reads:

> "The Yang di-Pertuan Agong on the recommendation of the Chief Justice, the President of the Court of Appeal and the Chief Judges of the High Courts, may, after consulting the Prime Minister, prescribe in writing a code of ethics which shall be observed by every judge of the Federal Court."

The code of ethics, which is cited as the Judge's Code of Ethics 1994, came in effect on 2 December 1994. The code is reproduced as Appendix A. It includes such mundane items as not absenting himself or herself during office hours without reasonable excuse or without prior permission of the head of the various courts. The actual office hours are also prescribed in the code. It is reported that a system of clocking in and out of office has been introduction in the court. It is also interesting to note that in the past while the Prime Minister's role in the discipline of judicial personnel was limited to making representation to the Yang di-Pertuan Agong for their removal, under the new provision he must also be consulted in the making of a code of ethics. If nothing else, it does mean that he has now spread his tentacles a little further in matters relating to judicial conduct.

Judges' salaries are provided by an Act of Parliament and charged on the Consolidated Fund. Thus it is paid automatically and not subject to annual approval as is the case of money bills for other purposes.

Judges' salaries and other benefits of office including pension rights may not be altered to his or her disadvantage after appointment.

Judges are entitled to their pension and retire at 65 years of age. Other public servants are only eligible for pension and they retire at 55 years of age.

The conduct of a judge may not be discussed in either House of Parliament except on a substantive motion of which notice has been given by at least a quarter of the members of that House. The State Legislative Assembly may not discuss the conduct of a judge at all and rightly so, bearing in mind that the administration of justice and appointment of judges are the preserve of the Federal Government.

Source: Commentaries from Wu (1999)