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OIL DISCOVERY AND TECHNICAL CHANGE IN SOUTHEAST ASIA

Legal Aspects of Production Sharing Contracts in the Indonesian Petroleum Industry

by

Robert Fabrikant

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PREFACE

There are probably few economic developments in Southeast Asia as interesting and so potential of change as the discovery of oil in the region and the industry which is growing up to support it. For much of the region this is an entirely new phenomena; at the same time Singapore stands at its centre and contributes to its technical, administrative and financial development. It would seem therefore appropriate and urgent that studies begin with the view of ascertaining what would be the impact of oil if discovered in large quantities? What impact would it have on uniting the region if the oil is found to lie off the coast of several countries? What impact would it have on shipping, and more importantly on world politics especially if Southeast Asia begins to displace the Middle-East as a prime source of oil for Japan and Australia? With the discovery of oil will also come enormous economic and technical changes as it begins to generate a cheap and fundamental source of power. What are the implications of such developments and changes for Southeast Asian society? It was the feeling of the Institute of Southeast Asian Studies that there should be immediate study of such questions and issues as the foregoing. Indeed, with a generous grant from the Asia Foundation a beginning was made to this end early this year when the Institute inaugurated five pilot studies on aspects of various phenomena associated with

oil discovery and technical change. The study that follows grew out of one of these pilot projects. It is a thought-provoking legal empirical analysis of production sharing contracts in the Indonesian petroleum industry and Mr. Robert Fabrikant rightfully deserves to be congratulated for completing it in good time and spirit. While wishing him all the best, it is clearly understood that responsibility for facts and opinions expressed in this study rest exclusively with the author, and his interpretations do not necessarily reflect the views or policy of the Institute itself or its supporters.

Kernial Singh Sandhu
Director

INTRODUCTION

This paper attempts a legal empirical analysis of production sharing contracts in the Indonesian petroleum industry. In common with numerous other outsiders who have explored the labyrinths of the petroleum industry, the present author disclaims the expertise necessary for a genuinely complete survey of even this limited portion of the industry. A wide variety of people were interviewed because the industry is so vast that very few individuals,even those in its daily employ, have either the time, inclination or opportunity to learn intimately all its parts. To this end, in excess of 400 hours were spent discussing the industry with over 90 individuals.

The last seven years have witnessed a dramatic increase in the interest of international petroleum companies in Indonesia. As of 1965, only four oil companies were operating in Indonesia; during the period from 1966 to 1972, more than 40 1/ companies and Pertamina, the State Enterprise which supervises the petroleum operations of foreign Contractors. 2/

The principal focus of this paper is upon the production sharing contract as the legal agreement which regulates the relationship between foreign Contractors and Pertamina. As with many concession contracts, however, the manner in which petroleum operations are actually conducted is not always reflected accurately in the contract. I ordinarily prefaced interviews by emphasizing that I was undertaking essentially a legal analysis; often, the interviewee noted cautiously that strictly legal analyses frequently distorted reality, since the industry operates primarily on an extra-legal level which is not fully defined by the production sharing contract or by relevant laws. The true relationship

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1/ Since 1967, 49 foreign companies have signed petroleum contracts with Pertamina. These are mostly American-owned companies. See speech by General Ibnu Sutowo, 17 December 1971, San Francisco, U.S.A. Despite the attention given by commentators to these developments in Indonesia, in fact, Brunei has attracted a similar degree of interest by foreign companies. See Dubey, Oil Boom in Indonesia, I INSIGHT, 19 (1971).

2/ Pertamina also engaged in its own petroleum operations.

between the contracting parties can only be discovered through an extensive interviewing process directed towards pin-pointing disparities between the contract provisions and the ensuing conduct.

As with many empirical studies, the line separating journalism from scholarly analysis often becomes imperceptible. Due to a number of factors, the comprehensive and systematic analysis in which scholars engage when discussing law and legal relationships in developed countries is simply not possible with regard to Indonesia, particularly for one who does not speak the native tongue. Attempts at legal research in Indonesia encounter several formidable obstacles: First there is no institutionalized public distribution of Indonesian statutes or regulations; thus it is virtually impossible to find complete sets of laws or to remain abreast of recent developments; second, there are no official translations of Indonesian laws or regulations into English, third, there is a paucity of English language commentaries on the Indonesian legal system. 3/ The recent increase in foreign investment has prompted a surge of interest in Indonesian legal matters, and has raised unconscionably the cost of English-language legal publications. For these reasons, inordinate amounts of time and money were dissipated collecting source materials and commentaries normally available at reasonable rates and in great quantity in developed countries. 4/

3/ A comprehensive bibliography of English language works on Indonesian law is contained in Damian & Hornick, A Descriptive Introduction to Indonesia's Formal Legal System, with citations, 30 September 1971 (mimeograph), 3 n.1. This article has recently been reprinted as Indonesia's Formal Legal System: An Introduction, 20 A.J.C.L. 492 (1972). All citations hereafter are to the mimeograph publication. Recent additions to this bibliography would include Hartono, Trans-national Problems of Foreign Investment in Indonesia, An English Summary of a Doctoral Thesis entitled "Beberapa Masalah Transnasional dalam Penanaman Modal Asing di-Indonesia", /successfully/ defended before the Padjajaran University on 22 April 1972, and Wirjasuptra & Reiffel, Government-Owned Enterprises in Indonesia, US/AID, Djakarta, 17 January 1970.

4/ Many of these materials are reproduced in an accompanying volume by the present author entitled THE INDONESIAN PETROLEUM INDUSTRY: MISCELLANEOUS SOURCE MATERIALS.

For this particular study, an important obstacle was the general inaccessibility of production sharing contracts. I was informed at the outset that because of their uniformity it would be unnecessary to obtain copies of more than five production sharing contracts. Gradually, however, it became clear that over a seven-year period there had been some changes in the terms of these contracts, and that it would be necessary to retrace many steps to obtain a complete set of contracts. I was eventually able to obtain 35 contracts. 5/

A further problem is that many of the available English translations are produced by persons whose command of the alien tongue, whether English or Indonesia, is less than satisfactory. Thus, many of the English translations are incomplete, inconsistent or sometimes plainly wrong. 6/ In such instances, I attempted to obtain official or unofficial corroboration of the translation.

Perhaps the most serious obstacle to legal research in Indonesia is the degree of variance between laws and administrative conduct. The loose construction of many principal laws enables administrative officials to exercise considerable discretion without directly contravening any legal prohibition. Moreover, decisions made by government officials acquire the force of law through long-standing practice but are never publicly recorded. 7/ I therefore could not disregard information solely because of an absence of documentation. Indeed, I gradually came to the view that it would serve a worthwhile purpose simply to record information in journalistic fashion if only to preserve it for future scholars.

5/ These are summarized in Appendix II, infra.

6/ See Hartono, supra note 3, at 9, where Dr. Hartono states:

> "A word of caution would...not be out of place when translating Indonesian legal terms in English or other foreign languages, as the difference in interpretation may include also a difference of legal consequences."

7/ See Damian & Hornick, supra note 3, at 46-48, discussing "Some Idiosyncracies of Indonesian Law-Making."

Since so few studies have been undertaken with reference to a particular set of concession contracts 8/ it was difficult to decide upon a proper format. Rather than confine myself to a descriptive analysis, I have attempted to evaluate production sharing contracts from several vantage points. Because many issues required attention in more than one context, it was necessary, at the risk of appearing pedantic, to avoid textual repetition through extensive cross-referencing.

I am of course indebted to those who spent many hours divulging much information to me. My only reason for not acknowledging by name these contributors is that many of my observations might prejudice their names within the industry. I should like to acknowledge, however, other persons, whose assistance and encouragement were also indispensable to the completion of this paper. Professor Josef Silverstein, as Director of the Institute of Southeast Asian Studies, suggested the original topic and demonstrated unending patience and keen judgement in advising me on how to treat sensitive issues. Professor Silverstein also obtained the necessary funds which covered the expenses of the project. His successor, Dr. Kernial Singh Sandhu, supplied the necessary encouragement over the final stages of the paper. Mrs. Patricia Lim, the Institute's Librarian, was extremely cooperative in obtaining materials and in not prosecuting the author for violating the library s book loan regulations. I am also indebted to Dr. Narendra Nath Singh of the Law Faculty of the University of Singapore who saved me from errors in the sections dealing with international law.

No manuscript reaches publication without consuming many Ms. hours of typists and proofreaders. This manuscript was no exception. I should therefore like to acknowledge the contribution of Miss Iris Tay, who typed and retyped most of the manuscript, Miss Peggy Lee and Miss Celina Heng. Finally, my wife spent incalculable hours editing most of the manuscript. I am profoundly grateful to her for adding order and color to an otherwise insipid paper.

8/ The only commentary which seems to deal with complete sets of concession contracts is H. Cattan, THE EVOLUTION OF OIL CONCESSIONS IN THE MIDDLE EAST AND NORTH AFRICA, (Oceana Publications, 1967). See also Smith, The Concession As An Economic Development Agreement: Some Basic Principles for the Host Country, (Harvard Law School) (in mimeograph).

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PART I

A. SKETCH OF LEGAL BACKGROUND */

The history of mining in Indonesia dates back to 1816, 1/ when the Dutch colonial government initiated tin exploration on Banka Island. In 1849 coal mining commenced in East Kalimantan,

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*/ The author received a J.D. degree from Georgetown University Law Center in 1968. During much of the writing of this monograph the author was an overseas fellow of the International Legal Center, New York. The author is now associated with the Singapore Office of Graham & James.

1/ Indonesian folklore is

> "that in the eighth century people living by the Straits of Sumatra were using earth oil for fuel. During the sixteenth century the fleet of the Kingdom of Atjeh defeated a Portuguese armada under Alfonso D'Alburquerque by the use of 'fireballs' - clumps of rags immersed in oil found in seepages in the Atjeh region, lighted and catapulted at the enemy ships which were thus set on fire - effective until the Europeans returned with long-range guns."

Dubey, Oil Boom in Indonesia, I INSIGHT, 21, (1971). A similar version appears in THE STORY OF THE OIL INDUSTRY IN INDONESIA (published by P.N. Pertamina, 1970) at 7. See also H.L. Oei, Petroleum Resources and Economic Development: A Comparative Study of Mexico and Indonesia, (Doctoral Thesis, University of Texas, 1964), at 122.

> "One of the earliest recorded mentions /sic/ of oil in Indonesia appears in the Annals of the Chinese Court of 971 A.D., which relate that in that year some lamp-oil was sent by the Sumatran Emperor of Sriwidjaya to the Emperor of China." (footnote omitted).

and in that same year the publication of reports of oil seepages in West Java generated interest in petroleum. Exploratory drilling began in 1871. The first petroleum concession was granted by the colonial government in 1883 for exploration in North Sumatra, and the first commercial discovery was made there two years later. 2/

The first general mining legislation was introduced in 1907, when the East Indies Mining Law of 1899, promulgated by the Netherlands Parliament, was officially received into the Colony by the Governor-General. 3/ This law was re-enacted in

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2/ The information contained in this paragraph was gathered primarily from the following sources: Oil Discovery and Technical Change in South East Asia: Industry Background, background paper submitted by Mr. R. Anderson, Esso delegate to seminar conducted by Institute of South East Asian Studies, January 1971; Hunter, The Indonesian Oil Industry, in THE ECONOMY OF INDONESIA: Selected Readings, (ed. B. Glassburner), Cornell University Press: (1971) 254-55; J.O. Sutter, Indonesianisasi, Politics in a Changing Economy, 1940-1955, Data Paper No. 36, Department of Far Eastern Studies, Southeast Asia Program, Cornell University, Ithaca, N.Y., 1959, p. 64. See also Mining in Indonesia, at 1, paper submitted by Indonesian delegation to Economic Commission for Asia and the Far East Committee on Industry and Natural Resources Seminar on 18-25 October 1971. Bangkok, Thailand. (hereinafter cited as 1971 ECAFE Seminar).

3/ State Gazette 1906, No. 434. H.L. Oei, attributes the eight year hiatus to "lengthy deliberations on the executing provisions." H.L. Oei, supra note 1, at 91. This law was popularly known as the "Minjweet" or "Mijnwet". This law and the succeeding East Indies Mining Ordinance of 1930 are reproduced in an accompanying volume by the present author entitled THE INDONESIAN PETROLEUM INDUSTRY: MISCELLANEOUS SOURCE MATERIALS. H.L. Oei reports that an Indonesian mining law was enacted in 1850, H.L. Oei, supra, at 87 (semble); I was unable to obtain any information regarding the existence of such a law.

1930 to incorporate supervening amendments. The provisions of these laws paralleled contractual principles then governing petroleum concessions in the Middle East. 4/ The colonial government, in which all mineral rights were vested, was statutorily authorised, inter alia, to grant full ownership rights to foreign companies. 5/

The East Indies Mining Law remained valid until 1960, but it was rendered inoperative in 1942 by the Japanese wartime occupation of the Colony. Shortly after the Japanese surrender in 1944, indigenous anti-colonial elements seized control of many petroleum sites formerly operated by foreign concessionaires. Several foreign companies, however, were able to resume operations in areas which remained in Dutch hands but political unrest brought the industry to a virtual standstill. In order to compensate concessionaires for time lost due to the war and to domestic political upheaval, the Dutch "extended the term of mining concessions." 6/ In 1945, however, the first Constitution of the Republic of Indonesia

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4/ See H.L. Oei, supra note 1, at 91-93. The typical features of Middle East concession contracts are set forth at text accompanying note 323 infra. The particular fiscal arrangements applying to Indonesian concessionaires are discussed in Hunter. supra note 2, at 262 n.9. See also J.O. Sutter, supra note 2, at 821-823.

5/ Since these contracts were signed pursuant to Article 5A of the Law, they came to be known as "5A agreements." For a discussion of the petroleum industry during the colonial period, see J.O. Sutter, supra note 2, at 62-65, citing A.L. Ter Braake, MINING IN THE NETHERLANDS EAST INDIES, New York: Institute of Pacific Relations (1944); H.L. Oei, supra note 1; passim.

6/ J.O. Sutter, supra note 2, at 603 citing the Ordinance of 12 April 1948.

was ratified, and its Article 33 7/ was widely interpreted as having eclipsed the East Indies Mining Law and the existing concession agreements. Nevertheless, the legitimacy of the Constitution itself remained in the balance until the official transfer of sovereignty on 27 December 1949. 8/

During the first post-colonial decade, foreign petroleum companies continued to be hampered by nationalism and political instability. The government was faced with the difficult problem of reconciling Indonesia's desire to control its natural resources with the need to develop these resources. Colonial concessionaires 9/ were therefore permitted to operate under "let alone" agreements which had been initially signed in 1948 with the Dutch colonial government. Although the Indonesian government originally committed itself to

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7/ Article 33, which appears under Chapter XIV entitled SOCIAL WELFARE, provides:

"Sect. 1. Economy shall be organised cooperatively.

Sect. 2. Branches of production which are important to the State and which affect the life of most people, shall be controlled by the State.

Sect. 3. Land and water and the natural riches therein shall be controlled by the State and shall be exploited for the greatest welfare of the people."

8/ See H. Feith, THE DECLINE OF CONSTITUTIONAL DEMOCRACY IN INDONESIA, (Cornell Univ. Press, 1962) 54-58, discussing the transfer of sovereignty and power from Dutch to Indonesian hands.

9/ The companies are listed in note 31 infra.

upholding these agreements, 10/ they soon became the target of "nationalistic censure in the legislature." 11/ Of particular concern was the provision which exempted the companies' petroleum export earnings from exchange control regulations. 12/ This immunity was granted in return for an agreement by the companies to finance reconstruction projects from their own foreign exchange. 13/ As the "let alone" agreements expired 14/ they were succeeded by

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10/ These agreements were the outgrowth of the "Hague Agreement," which was the result of the Round Table Conference held from 23 August - 2 November 1949 at the Hague. The Conference was attended by Dutch and Indonesian representatives who negotiated the terms and conditions of the transfer of sovereignty to the Colony. The Indonesians extended

> "a number of guarantees to Dutch investors in Indonesia, acknowledging virtually all rights, concessions and licences granted to private bodies by the Netherlands Indies government. Expropriation would be possible only on the basis of indemnification determined by mutual agreement or by a court of law, on the basis of the real value of the expropriated property."

H. Feith, supra note 8, at 15, citing, inter alia, G.M. Kahin, NATIONALISM AND REVOLUTION, at 438-445.

11/ Hunter, supra note 2, at 259. See also J.O. Sutter, supra note 2, at 819-27.

12/ The exemption was later extended to crude oil. Hunter supra note 2, at 260.

13/ J.O. Sutter, supra note 2, at 603. Large scale expenditures were necessary in light of the severe damage inflicted on petroleum installations during and after World War II. The companies also agreed not to make "demands on the government's foreign exchange fund." Hunter, supra, note 2, at 260.

14/ The agreements and their termination dates are detailed in note 34 infra.

new agreements which in essence left untouched the pre-existing foreign exchange arrangements, but embodied tax provisions which reportedly increased government revenues. 15/ The companies also committed themselves either to investment projects in Indonesia or to increased foreign exchange remittances to the government. 16/

Despite the production activities conducted pursuant to these contracts, an overall retrenchment took place in the petroleum industry from 1950 to 1960. Domestic exploitation was stifled by the absence to export opportunities. 17/ The government refrained from signing new concession contracts 18/

15/ The only difference in this regard was the "foreign exchange transactions were recorded by passing through the Foreign Exchange Institute." Hunter, supra note 2, at 262, also stating:

> "Unfortunately the details of these reportedly complicated settlements remained secret. But it is generally presumed in petroleum circles that the net result of the various royalties, income tax, export taxes, levies on foreign exchange, payroll tax, etc., for which the companies were liable amounted to something around a 50:50 division of net revenue (profits) between the companies and the Indonesian government."

16/ See J.O. Sutter supra note 2, at 828-830; Hunter, supra note 2, at 261-262. The total figure exceeded $200 million.

17/ Foreign companies were apparently reluctant to import oil from Indonesian enterprises "fear/ing/ that it might be claimed by the B.P.M./Shell Company." THE STORY OF THE OIL INDUSTRY IN INDONESIA, supra note 1, at 17. See also notes 345-356, infra. It was not until August 1958 that domestic enterprises succeeded in exporting petroleum to the United States. THE STORY OF THE OIL INDUSTRY IN INDONESIA, supra at 17.

18/

> "In 1951, the Parliament adopted a motion, sponsored by the Member Tenku Hassan, requesting the government to suspend grants and renewals of exploration and development rights of mining companies pending the enactment of new mining laws."

STANVAC IN INDONESIA, United States Business Abroad, Sixth Case Study, 1957, at 4.

and confined concessionaires to their existing acreage. Owing to these factors, exploration activities were virtually non-existent. Nationalistic pressures precluded one company, which claimed legal title to certain North Sumatran petroleum installations, from returning to its former sites; 19/ the government was faced with increasing demands for the nationalization of all petroleum fields. The security of existing contracts was further undermined by the widely held domestic view that the 1950 Constitution precluded foreign companies from enjoying concessionary rights to Indonesian mineral resources. 20/ The existence of a State Commission which

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19/ See H. Feith, supra note 8, at 293-298. The company was Royal Dutch Shell.

20/ The 1945 Constitution (the "Federal" Constitution) was replaced by a new constitution (the "Unitary" Constitution) on 14 August 1950. See generally, Supomo, The Provisional Constitution of the Republic of Indonesia, (transl. by Garth N. Jones), Translation Series, Modern Indonesia Project, Southeast Asia Program, Department of Asian Studies, Cornell University, Ithaca, N.Y. 1964. Article 33 of the former Constitution is reproduced at note 7 supra; this article was superseded by Article 38 of the 1950 Constitution which provided:

> "1. The economy shall be organized on a cooperative endeavour based upon the principle of the family relationship.
>
> 2. Branches of production to the state and which vitally affect the life of the people shall be controlled by the State.
>
> 3. Land and water and the natural riches contained therein shall be controlled by the State and used for the maximum prosperity of the people.

It is generally agreed that Article 38 was "derived from Article 33" of the former Constitution. Id. at 29. It seems equally clear that "because of Article /38/... the /Indonesian/economy... is not founded upon a liberal economy; in fact it is opposed to liberalism."

Id., summarizing the Government's reply to the Reporting Committee of the new Constitution.

had been formed in 1951 to draft, inter alia, "an Indonesian mining law in harmony with present conditions," 21/ gave the companies further reason to believe that they were operating in a legal twilight zone.

The Commission did not report until eight years later, 22/ and in 1960 the mining sector was divided into two categories, 23/ each governed by separate legislation: Government Regulation 24/ in lieu of Law No. 37 of 1960, covering hard minerals and oil and natural gas. This legislation harbingered a new era in the Indonesian petroleum sector. The traditional concession structure was replaced by a system in which petroleum operations were to be undertaken only by the State 25/ and "exclusively

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21/ J.O. Sutter, supra note 2, at 820, apparently quoting the draft motion submitted to Parliament. See note 18 supra.

22/ See Hunter, supra note 2, at 264.

23/ The East Indies Mining Law was abolished with the enactment of Government Regulation in Lieu of Law No. 37 of 1960. This law was subsequently revised by Law No. 11 of 1967. Regulations implementing this law were issued in Government Regulation No. 32 of 1969.

24/ See generally Damian & Hornick, A Descriptive Introduction to Indonesian's Formal Legal System, with citations, 30 September 1971 (mimeograph), for a discussion of the Indonesian legal framework. This article has recently been reprinted as Indonesia's Formal Legal System: An Introduction, 20 A,J.C.L.492 (1972). All citations hereafter are to the mimeograph publication.

25/ Article 3(1), Law No. 44, 1960. This law is reproduced in an' accompanying volume by the present author entitled, THE INDONESIAN PETROLEUM INDUSTRY: MISCELLANEOUS SOURCE MATERIALS.

carried out," by State Enterprises. 26/ Existing concessionaires were ordered to terminate their operations "during a period of time which shall be as short as possible." 27/ The allotted period was to be designated by a government regulation which would have the effect of revoking present mineral rights. 28/ Although existing operators were divested of their concession rights, the law authorised the Minister of Mines to "appoint ... parties as contractors to the State Enterprises, if required,

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26/ Article 3(2), Law No. 44, 1960.
State Enterprises were created by Law No. 19, 1960, which is reproduced in an accompanying volume by the present author entitled THE INDONESIAN PETROLEUM INDUSTRY: MISCELLANEOUS SOURCE MATERIALS. The Government, on the proposal of the Mining Minister, was to issue "mining authorizations" to State Enterprises. In this manner, the seizure of North Sumatran oil fields in 1957-58 by Permina was retroactively legalized. These sites had been the subject of dispute since the end of World War Ii because Shell, the colonial operator, claimed legal title. In the early 1950's these fields came under the control of labour unions which reportedly started selling scrap iron instead of oil. Because of reported Communist infiltration in the unions the Army, through P.T. Permina, a private enterprise, assumed control of the fields. See THE STORY OF THE OIL INDUSTRY IN INDONESIA, supra note 1, at 15. This action was apparently authorized by Decree No. 17 of 1957. See id. at 15, 21. Although I was unable to locate the source or to obtain a copy of this decree, I was informed that it had been issued by the military government in Sumatra. In the opinion of most people I interviewed the decree was blatantly illegal since the army was not lawfully authorised to confiscate or occupy oil fields. Cf. Article 5(1) and (2) of Law No. 44, 1960. This decree was rescinded by Presidential Decree in Lieu of Act No. 19 of 1960 which converted P.T. Permina "into a state-owned enterprise...P.N. Permina."

27/ Article 22(1), Law No. 44, 1960.

28/ Article 22(3), Law No. 44, 1960. Government Regulation No. 18, 1963 stipulated the deadline of the interim period as 1 June, 1963. The effect of this regulation was to make operative the Heads of Agreement, note 36 infra.

for the execution of operations...." 29/ Moreover, the law promised existing operators that they would""be given priority in the appointment of contractors in their present mining areas."30/

Surrounding the passage of these laws, the Government, departing abruptly from its former policies entered into a series of long-term contracts with foreign oil companies other than the existing triumverate of concessionaires. 31/ It is generally believed that these agreements were designed

> "to demonstrate the independence of the Indonesian government in oil matters, and at the same time to condition the 'majors' into a frame of mind more amenable to Indonesian demands." 32/

Most significantly, one of these contracts 33/ foreshadowed the arrangement which Indonesia, in light of the new petroleum law, would seek to impose upon the remaining concessionaires.

The signing of these contracts, coupled with the passage of the new petroleum law, brought to a head negotiations which had commenced in 1960 between the Government and the concessionaires. For two and one-half years, the companies had resisted demands that their petroleum operations be conducted in a manner

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29/ Article 6(1), Law No. 44, 1960.

30/ Article 22(2), Law No. 44, 1960.

31/ Shell, Stanvac and Caltex. Shell was the successor to BPM, "tactfully ignoring in the selection of name its 60% Dutch ancestry." Hunter, supra note 2, at 263. At least one such contract was also signed in 1962.

32/ Hunter, supra note 2, at 267.

33/ All of the contracts, except the one signed in 1962, were in the nature of financial and technical assistance agreements. See generally, Gibson, Production Sharing, Part I, 3 BULL. IND. ECO. STUD. 52, 60-63 (1966). The 1962 contract with Pan American was the forerunner of the contracts of work which were signed in 1963 with the triumverate. For a discussion of these contracts see Hunter, supra note 2, at 267. Additional details of these contracts may be found in Hunter, The Oil Industry: The 1963 Oil Agreements and After, 2 BULL. IND. ECO. STUD., 16 (1965).

consistent with the recently enacted law. 34/ In May 1963, an agreement was reached in Tokyo which embodied a negotiated settlement. 35/ The details of this agreement were incorporated into contracts of work with each of the three companies; the contracts were subsequently enacted in statutory form by the Indonesian Parliament, 36/ and ratified by President Soekarno

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34/ Hunter, supra note 2, at 262 states that the agreements entered into upon expiration of the "let alone" agreement "lasted until ... 1963". Yet, from the commentaries, it would seem that these contracts expired by 1960. In March 1954, Stanvac had signed a new four year contract, and Caltex a five year contract. Id. at 262-263; J.O. Sutter, supra note 2, at 827. Although BPM's "let alone" agreement expired at the end of 1955,

> "no precise information exists concerning its /new/ agreement with the government, it is usually assumed /however/ that the arrangements were the same as for the two/aforementioned/ companies."

Hunter, supra, at 261-262. See also J.O. Sutter, supra, at 830 (semble). I have been unable to determine whether these contracts were extended beyond their respective dates of expiration, i.e., 1958 and 1959. It would appear, however, that in the interim period ending in 1963 petroleum operations were conducted on an ad hoc basis.

35/ The agreement is officially referred to as the "Heads of Agreement."

36/ Thus, the terms and conditions of these contracts became part of the lex corpus of Indonesia. The enactment of these contracts into statutory form was required by Article 6(2), Law No. 44, 1960. See text accompanying notes 212-243 infra, which also discusses the legal significance of the absence of Parliamentary ratification of petroleum contracts.

on 28 November 1963. 37/

By transforming the existing concession agreements into contracts of work, 38/ operators were relegated to the legal

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37/ Law No. 14, 1963. This law is reproduced in an accompanying volume by the present author entitled, THE INDONESIAN PETROLEUM INDUSTRY: MISCELLANEOUS SOURCE MATERIALS. This law states that the contracts were signed on 25th September 1963, but the date on which Parliament enacted the contracts into law does not appear on the face of the legislative instrument. Professor Hunter states that the Heads of Agreement reached in Tokyo "became Indonesian law in June 1963." Hunter, supra note 2, at 269. I was unable to find any official documentation showing that the Agreement itself was enacted into law by the Indonesian Parliament. In a prior article Professor Hunter states that

> "As the result of the promulgation of Government Regulation No. 18, 1963, the Tokyo Agreement... came into operation as from 1 June 1963"

Hunter, supra note 33, at 16. This Regulation, in fact, stipulated only the deadline for the grace period under Law No 44, 1960, see text accompanying note 27, supra, but it did not expressly incorporate the terms and conditions embodied in the Head of Agreement.

I am unaware of any legislation which incorporated the Heads of Agreement. Law No. 14 of 1963 mentions specifically the "Agreement on Petroleum in Tokyo on June 1963", but does not, as is customary, refer to subsequent legislation which embodied the Agreement. Moreover, the official explanation appended to the law cites several ordinances leading up to the Tokyo accord, but, again, there is no mention of legislation specifically incorporating that Agreement.

38/ A detailed examination of these contracts appears in Hunter, supra note 33. A copy of the Permina-Stanvac work contract is reproduced in an accompanying volume by the present author entitled THE INDONESIAN PETROLEUM INDUSTRY: MISCELLANEOUS SOURCE MATERIALS. In 1971, negotiations were concluded between Pertamina and P.T. Caltex whereby Caltex's Contract of Work in Central Sumatra, which was due to expire in 1983, was extended to the year 2001 "under terms consistent with the formula of production sharing....", Speech by General Ibnu Sutowo, 17 December 1971, at San Francisco; U.S.A. entitled "Indonesia, A Vast New Oil Province", delivered on the occasion of the Fourth Anniversary of P.N. Pertamina's office in the United States. The office is located in New York City. For details of this contract, see Appendix II, infra, contract number thirty-three.

position of contractors to State Enterprises. 39/ Although this result was impelled by the Constitutional mandate that "natural riches...be controlled by the State," 40/ admittedly the new contracts did "not satisfy completely /Indonesia's/ National Aspiration." 41/ Indeed, the change seems to be and have been one of emphasis rather than of substance.

39/ In 1963, there were three state enterprises in the Indonesian petroleum sector: P.N. Pertamin, P.N. Permina and P.N. Permigan. For a discussion of these enterprises, which were the forerunners of P.N. Pertamina, see H.L. Oei, supra note 1, at 155-157.

40/ Article 33(3), the 1945 Constitution. Cf. Article 3(2), Law 44, 1960.

41/ Government Authority in the Administration of Exploration and Development of Offshore Oil and Gas, at 4, paper submitted by the Indonesian Delegation to the 1971 ECAFE Seminar. The paper continues:

> "Although /the Contracts of Work/ did recognize that the State is and will remain to be (sic) the owner of the oil until it is transferred to a third party at the point of sale, management of these operations is still in the hands of the foreign companies. These contracts of work were the optimum which could be obtained taking into consideration the prevailing circumstances and the conditions of the country at that time."

Id. These must be regarded as Constitutionally troublesome admissions since they strongly imply that the contracts of work violate the Constitution. See Hunter, supra note 2, at 270-271.

It is also of interest to note General Ibnu's comments on Contracts of Work. (cont'd)

If the goals of the new contractual arrangement were the regaining of sovereignty over natural resources, as required by the Constitution, and the supervision of foreign petroleum companies, then the contracts of work effectively changed nothing. The three State Enterprises, with the partial exception of Permina, were either incapable of or uninterested in playing a meaningful supervisory role. In the words of an Indonesian interviewee, "The State Enterprises functioned mostly as post offices." The companies sent their tax statement to the State

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(continuation of footnote 41)

> ""Working Contract' /i.e., contract of work/ brings no change in concession status. Although the formation of the concession has been changed, it was not really changed at all and was still the old concession in a new cloak. While the implementation of this 'working contract' resulted in a change to suit Indonesia's convenience, it did not really change the status of the foreign oil companies, essentially it still amounted to a 'concession' which was not in the Indonesian interest. In reality, if not juridically, the status of the foreign oil companies was unchanged and the 'working contract' still constituted a concession agreement'.... Concession is clearly contrary to Article 33 of the 1945 Constitution."

Speech by Dr. Ibnu Sutowo, Major General (Army), The Role of Oil in the National Life" (undated, but continued present tense references to Permina suggest that the speech was delivered prior to the creation of Pertamina in 1968). In a more recent speech the General stated that Contracts of Work "approached the intention of Law No. 44 /of 1960/." An address by Pertamina's President Director, Dr. Ibnu Sutowo, 14 March 1972, Bandung, Indonesia, entitled "The Role of Petroleum Exploration and Development for the Indonesian People's Future Prosperity." Both of these speeches are reproduced in an accompanying volume by the present author entitled THE INDONESIAN PETROLEUM INDUSTRY: MISCELLANEOUS SOURCE MATERIALS.