(2026) 36(1) JUUM 71 – 87
https://doi.org/10.17576/juum-2026-3601-05

JURISDICTIONAL DISPUTES OVER OIL AND GAS IN SARAWAK: A CONTEMPORARY LEGAL ANALYSIS

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ABSTRACT

This article provides a contemporary legal analysis of the jurisdictional disputes surrounding oil and gas resources in Sarawak. The tension between the federal and state governments has intensified in recent years, driven by competing interpretations of key legislative instruments, including the Petroleum Development Act 1974 (PDA), the Territorial Sea Act 2012 (TSA), and the Sarawak Oil Mining Ordinance 1958 (OMO). Central to this conflict is the question of whether the federal government, through PETRONAS, holds exclusive control over the state's petroleum resources, or whether Sarawak retains regulatory authority under its constitutional and historical rights, particularly as enshrined in the Malaysia Agreement 1963 (MA63). This article examines the constitutional framework, relevant statutory provisions, and recent political and legal developments to assess the validity of competing claims. It also evaluates the implications of these disputes for resource governance, federalism, and legal certainty in Malaysia. Ultimately, the article argues for clearer legal harmonisation and a cooperative federalist approach to ensure balanced resource management and state-federal relations.

Keywords: Malaysia; Sarawak; Federalism; Oil and gas; Jurisdictional Conflict; Petroleum laws

INTRODUCTION

One of the most significant historical moments of Malaysia is its formation on 16 September 1963. The event on 16 September 1963 consists of the cooperation between Malaya, North Borneo (Sabah), Sarawak and Singapore, though, in 1965, Singapore left Malaysia (Ayu Nor Azilah Mohamad et al., 2020). In discussing the formation of Malaysia, the Malaysia Agreement 1963 (hereinafter referred to as the 'MA63') is a pivotal historical document which needs to be mentioned. The MA63 was executed in London on 9 July 1963 and was signed by the representatives of the United Kingdom, the Federation of Malaya, North Borneo (which then became Sabah), Sarawak and Singapore (A Rahman Tang Abdullah & Pandikar Amin Haji Mulia, 2018). The MA63 is a very important and significant agreement as it outlined the fundamental terms and groundworks for the participation of Sabah and Sarawak and Singapore in the Federation of Malaysia. The representatives from Sarawak and Sabah made it abundantly evident to the Inter-Governmental Committee that special treatment was a requirement in order to establish Malaysia (Shad Saleem Faruqi, 2020). Among the safeguards included were giving the Borneo states full control over their natural resources, such as their land, forests, and minerals both onshore and off-shore, additional revenue streams, local government, immigration, and the use of English in court proceedings (Faisal S. Hazis, 2018). Sabah and Sarawak were given special rights (such as autonomy in terms of religion, immigration, language, civil service, and finance) (Abdul Aqmar Ahmad Tajudin & Mohammad Agus Yusoff, 2020).

[Received: 20 October 2025; Accepted: 24 April 2026; Published: 30 June 2026]

The special position of Sabah and Sarawak are spelled out in the Federal Constitution. Among others, Article 161E of the Federal Constitution is the important provision which has safeguarded the constitutional position of Sabah and Sarawak. Meanwhile, Article 112C of the Federal Constitution upholds the special grants and assignments of revenue to Sabah and Sarawak. Additionally, Article 95D of the Federal Constitution provides that Sabah and Sarawak are excluded from the Parliament's power in the passing of uniform laws about land or local government. Despite the rights given, there has been conflicts as to the jurisdiction of oil and gas in Sarawak where the question is whether it belongs to the Sarawak State Government or the Federal Government of Malaysia. The claim of the Sarawakian Government on state jurisdiction over oil and gas on the continental shelf founded on the legality of the resource in historical context, is among the issues that is now under Malaysian politics dispute (A Rahman Tang Abdullah et al., 2023).

Tracing back to the formation of Malaysia in 1963, when Sarawak joined in the formation of Malaysia, the MA63 had promised certain degrees of autonomy to Sarawak. This is a special privilege accorded not only to Sarawak but Sabah as well. Hence, the MA63 must be studied to have a better understanding as to how does the MA63 grants autonomy to Sarawak of its natural resources, particularly in this context, its oil and gas resources. Besides that, oil and gas exploration activities in Sarawak have long flourished much earlier before the formation of Malaysia, i.e., back in 1910. The early discovery of the onshore Miri field in Sarawak by Shell in 1910 had started a long period of exploration of hydrocarbon in NW Borneo and just in Miri field, there have been 612 wells drilled where 585 were drilled before 1931 (Rijks, 1981). Moreover, Sarawak also has its own regulatory frameworks governing its oil and gas resources prior to the formation of the federation, namely, the Oil Mining Ordinance 1958 (hereinafter referred to as the 'OMO 1958'). Therefore, this brings the question of whether these pre-merdeka Sarawakian laws which have long existed before the formation of Malaysia should prevail over the latter national laws made.

A BRIEF INTRODUCTION TO THE LEGAL CONTEXT

This claim for jurisdiction stems from the fact that the ownership of petroleum in Malaysia was shifted by virtue of the Petroleum Development Act 1974 (hereinafter referred to as the 'PDA') in the year 1974. Through the PDA, the entire ownership of petroleum in Malaysia is vested solely to Petroliam Nasional Berhad (PETRONAS) (hereinafter referred to as 'PETRONAS'), a corporation wholly own by the Malaysian government. The PDA has led to the centralisation of rights over oil to the federal government (Yeoh, 2014).

As the PDA essentially unified all previous standing agreements between the state governments and multinational oil companies on the nation's oil and gas resources, the said legislation was a strong depiction of the authority and sovereignty of Malaysia (The Editor, 2013). Therefore, the PDA has led to significant changes in the management of oil and gas resources in the country. With such authority, it becomes a huge contributor to debates of the demands among oil-producing states for increased royalties and oil rights, and consequently, conflicts between the federal government and the states (Yeoh, 2020).

According to Section 4 of the PDA, PETRONAS shall make cash payment to the federal government and any relevant state government at the amount as may be agreed between the relevant parties in exchange of the sole exclusive ownership to PETRONAS by virtue of the PDA. PETRONAS had in 1975, entered into an agreement with the respective relevant state governments

[Received: 20 October 2025; Accepted: 24 April 2026; Published: 30 June 2026]

pursuant to the said legal provision. Although Section 4 of the PDA does not specify how much is to be paid to the states, twelve states, entered into a contract with PETRONAS where they hand over their rights and agree to five percent revenue from the production of petroleum (Yeoh, 2014). It was in 1976 that the State Government of Sabah signed an agreement with PETRONAS. With these agreements signed between the states and PETRONAS, the ownership of petroleum which belonged to the respective state governments were effectively handed over to PETRONAS.

THE IMPORTANCE OF OIL AND GAS RESOURCES TO BOTH SARAWAK AND THE FEDERAL GOVERNMENT

The oil and gas industry in Malaysia is one of the most important sectors of the country's economy which have led to the significant growth and development for the country. The industry has brought great contributions to the Gross Domestic Product (GDP), export revenue, public finance and employment and supports the expansion of the industry and social progress (Fitra Syafeeqa Syaheezam et al., 2024). According to the Malaysia Investment Development Authority (n.d), the oil and gas sector contributes around 20% of the annual GDP of Malaysia, offering an abundance of opportunities for upstream and downstream activities. The significant impacts of the industry to the country demonstrates just show how important the sector is to the country.

Refocusing to Sarawak, the state is situated on the northern-western coast of the Borneo Island and is the largest province in Malaysia where it takes up 124,449 square kilometre of area or roughly 37.5 percent of the nation's whole area of land (Andrew Aeria, 2005). Not less than 800 million proven oil reserve barrels are owned by Sarawak, however, with recent offshore discovery along with its first finds in 20 years, around Miri, it suggests that this oil potential is much greater (Regional Corridor Development Authority, n.d.). Sarawak holds 60.87 percent of Malaysia's total oil reserves and contributes almost 90 percent of the country's exports for natural gas (Daily Express, 2024). This figure demonstrates that Sarawak's oil and gas plays a very vital and significant role in the country's economy. However, the petroleum industry is mainly an offshore enclave which is governed by PETRONAS and the federal government is the sole owner of the revenue and profits (Andrew Aeria, 2016).

Despite the noteworthy contributions of Sarawak to the country's oil and gas industry, Sarawak is only entitled to 5% oil royalty which is a stark disparity compared from what the state has contributed. The perception that Sarawak is not on par with West Malaysia in its development is a significant part of the tension between the federal and state government (Ahmad Redzuan Mohamad et al., 2024). Sarawak is rich in natural resources, however, its socio-economic indicators, such as education, healthcare, and infrastructure, are less advanced compared to those in Peninsular Malaysia (Ahmad Redzuan Mohamad et al., 2024). Overtime, this had led to the claim for a higher cut of 20% oil royalty which, however, has never materialised. Subsequently, it led to the widely known claim by Sarawak for the ownership of its oil and gas which is one of the biggest discussions in the country as of recent times.

THE RELEVANT LEGAL FRAMEWORKS FOR DISCUSSION ON OIL AND GAS IN MALAYSIA

THE FEDERAL CONSTITUTION

The Federal Constitution is the supreme law of the Malaysia and where by virtue of Article 4(1) of the Federal Constitution, laws made after Merdeka Day which is not aligned with the Federal Constitution shall to

[Received: 20 October 2025; Accepted: 24 April 2026; Published: 30 June 2026]

the extent of the inconsistency, be void. In the case of Loh Kooi Choon v. Government of Malaysia [1977] 2 MLJ 187, His Lordship Raja Azlan Shah FJ in delivering the decision of the apex court held that the Federal Constitution is the supreme law of the nation which comprises of three fundamental concepts. One of such rudimentary concepts is the division of the sovereign powers between the State and the Federation, where the thirteen states exercise sovereign power in matters which are local in nature while the Federation governs on matters affecting the country as a whole. As the supreme law of the land, the Federal Constitution provides provisions on the delineation of legislative powers within the country.

The Federal Constitution has clearly demarcated the respective federal and state powers in the Ninth Schedule where List I – Federal List enumerates the exclusive legislative powers of the federal government while the List II – State List itemises the legislative powers of the states. Then, there is the List III – The Concurrent List whereby it outlines the subjects which can fall under both the federal and state governments' legislative power. The extent of the legislative powers of the federal and state governments has been outlined in Article 73 of the Federal Constitution. Article 73 (a) of the Federal Constitution provides that the Parliament may make laws for the entire federation with effect both inside and outside of the federation. On the other hand, Article 73 (b) of the Federal Constitution provides that states may only make laws within the state. In regards to the subject matters in which the federal and state legislature is permitted to enact, Article 74 (1) and (2) of the Federal Constitution has clearly provided that the Parliament may make laws on matters enumerated in the Federal List and the Concurrent List in the Ninth Schedule while the State Legislature may make laws on matters enumerated in the State List or the Concurrent List in the Ninth Schedule.

The Courts in Malaysia have from time to time highlighted the importance of adhering to the above provisions of the Federal Constitution. In the landmark case of Ah Thian v. Government of Malaysia [1976] 1 MLRA 410, His Lordship Suffian LP in delivering the Federal Court's decision held that the legislative powers of the Parliament and the State Legislatures are not boundless, instead are limited by the Federal Constitution. In the context of oil and gas, it is pertinent to highlight that in Item 8 (j) of the Federal List in the Ninth Schedule, basically, it has been stipulated that the legislative power of the federal government in relation to mineral and oil resources is subjected to Item 2 (c) in the State List. Item 2 (c) of the State List in the Ninth Schedule clearly states that the State Legislature have the legislative power over land which includes on the issuance of permits and licences for prospecting for mines, mining leases and certificates. Sarawak indeed has laws which govern oil and gas and the laws governing the issuance of the relevant leases.

In respect to the above, Sarawak has its own Oil Mining Ordinance 1958 which specifically regulates oil and gas within its boundaries and this Ordinance has long existed before the formation of Malaysia. Furthermore, Sarawak's Distribution of Gas Ordinance 2016 (hereinafter referred to as the 'DGO 2016') has clearly stipulated in Section 7 that only the gas aggregator appointed under Section 7A (1) of this Ordinance shall distribute gas in Sarawak or carry out the activities enumerated under Section 7 without a licence issued under this Ordinance. This, therefore raises the debate over PETRONAS's control over oil and gas in the country and that it is not absolute where it is subject to state laws particularly on the permit and license to operate within the state.

THE MALAYSIA AGREEMENT 1963 (MA63)

[Received: 20 October 2025; Accepted: 24 April 2026; Published: 30 June 2026]

The MA63 is one of the most important documents in Malaysia as it outlines the salient terms for the formation of Malaysia. It is an international treaty registered by the United Kingdom of Great Britain and Northern Ireland on 21 September 1970 under the United Nations. Although this pre-constitutional document has been in existence for many decades, it must not be misconceived to be irrelevant or outdated. It in fact remains as a relevant and applicable legal document today. The MA63 must be fulfilled to its full terms to achieve the true spirit intended in the formation of Malaysia back in 1963. The legal fulfilment of the MA63 is further made by the amendments made to the Federal Constitution back in 2021.

Before 2021, Article 1 (2) of the Federal Constitution states Sabah and Sarawak as one of the states of Malaysia, having the same status as all the other states of Malaya. However, by virtue of the amendment in 2021, Article 1 (2) was amended where it provides that the states of Malaysia are made up of the States of Malaya and the Borneo States. Therefore, this has brought Sabah and Sarawak, the Borneo States to an equal footing to Peninsular Malaysia and the exact wordings as intended in the Malaysia Bill (Annex A of the MA63). Furthermore, Article 160 (2) of the Federal Constitution has been amended where the Federation means the Federation first established under the Federation of Malaya Agreement 1957 and further pursuant to the MA63. This amendment highlights the MA63 and shows the clear formation of Malaysia, i.e., that there is the inclusion of Sabah and Sarawak in forming Malaysia.

In addition to the above, the relevance and applicability of the MA63 today have from time to time been emphasised by the courts in Malaysia. One of such judicial decisions is found in the case of Tr Sandah Ak Tabau & 7 Ors v. Director of Forest, Sarawak & Anor [2019] MLJU 850 where the Federal Court, in essence, held that the total lack of a judge of Bornean judicial experience in a case which involves the constitutional right to livelihood of the native people of the Borneo State which is protected by the Federal Constitution was a breach of Section 74 of the Court of Judicature Act 1964 pursuant to paragraph 26(4) of the IGC Report read in tandem with Article VIII of the MA63. Another important legal view of the Federal Court is that the recommendations in the IGC report qua the MA63 must be applied with equal legal effect to Section 74 of the Court of Judicature Act 1964 similarly to the Federal Constitution. For reference, Article VIII of the MA63 is reproduced as follows: -

> "The Governments of the Federation of Malaya, North Borneo and Sarawak will take such legislative, executive or other action as may be required to implement the assurances, undertakings and recommendations contained in Chapter 3 of, and Annexes A and B to, the Report of the Inter-Governmental Committee signed on 27th February, 1963, in so far as they are not implemented by express provision of the Constitution of Malaysia".

The Federal Court in this case has also held that to ignore the IGC Report (paragraph 26(4) in this case) read together with Article VIII of the Malaysia Agreement 1963 would mean to be in contravention with the terms for the formation of Malaysia. Therefore, not only has this judicial decision upheld the relevancy of the IGC Report and the MA63, the Federal Court in the above case has also clearly held that even if the recommendations in the IGC Report have not been written in law, pursuant to Article VIII of the MA63, legislative, executive and even judicial actions must be taken to implement such assurances, undertakings and recommendations. There is therefore, no excuse to ignore the recommendations stated in the IGC Report merely because it has not been legislated or otherwise this would go against the terms of the formation of Malaysia.

[Received: 20 October 2025; Accepted: 24 April 2026; Published: 30 June 2026]

The relevance of the MA63 in the discussion of oil and gas rights in Sarawak is evident where the pre-constitutional document is often heavily cited in support of claiming for the rights of Sabah and Sarawak. Many of those who claim for the rights of Sabah and Sarawak have widely argued that the MA63, despite holding the fundamental terms for the formation of Malaysia, has not been put into its full term. It has been debated that not all promises to Sabah and Sarawak has been fulfilled. One of such promises is that the MA63 has promised the Borneo States autonomy over its own natural resources, and that includes oil and gas. Further discussion of such claim under the MA63 shall be delved deeper in the lower parts of this article.

PETROLEUM DEVELOPMENT ACT 1974 (PDA)

The PDA is a very important key legislation which deals on the ownership and rights over oil and gas in Malaysia. It is to be noted that the PDA was in fact made during the state of emergency within the country. As stated earlier, the PDA has essentially shifted the entire ownership and rights over oil and gas in Malaysia from the states to the federal government. Before 1974, the state governments gave petroleum concessions to oil companies and the state governments had exclusive rights for the exploration and exploitation of oil and gas (Wan M. Zulhafiz Wan Zahari & Farid Sufian bin Shuaib, 2020).

However, the PDA has led to the centralisation of power over oil and gas to PETRONAS. This was made effective when PETRONAS entered into respective agreements with the states in 1975 (and 1976 for Sabah) for the exclusive control over the states' oil and gas in exchange of 5% oil royalty paid in cash. Such agreement was made in accordance to Section 4 of the PDA which prescribes that PETRONAS shall pay a mutually agreed cash payment to the federal or state government in exchange of the ownership, rights, powers, liberties and privileges vested by PETRONAS over the oil and gas in the country.

The extent of PETRONAS' exclusive power is found in Section 2(1) of the PDA which provides PETRONAS with the entire ownership and exclusive rights, powers, liberties and privileges over petroleum, onshore or offshore of Malaysia. According to Section 3(2) of the PDA, PETRONAS is subject to the Prime Minister's control and direction where directions may be issued as the Prime Minister may deem fit. Although it is the discretion of the Prime Minister to issue directions as he deems fit, pursuant to the PDA, he has the National Petroleum Advisory Council to advise him on related matters.

The legal basis for the establishment of the National Petroleum Advisory Council is provided under Section 5(1) of the PDA in which its composition shall include persons including those from the relevant States as the Prime Minister may appoint. The duty of the National Petroleum Advisory Council is prescribed in Section 5(2) of the PDA where the said advisory council is to provide advice to the Prime Minister on national policy, interests and matters pertaining to petroleum, petroleum industries, energy resources and their utilization.

It was reported by Bernama (2024), that according to Dato' Seri Azalina binti Dato' Othman Said, the Minister in the Prime Minister's Department (Law and Institutional Reform), the National Petroleum Advisory Council (in Malay called as 'Majlis Penasihat Petroleum Negara' or MPPN in short) was first assembled on 9 April 1975 with the then-Special Adviser to the Prime Minister, Raja Tan Sri Mohar Raja Badiozaman as the chairman. She further stated that the MPPN has been recorded to be inactive since 1995 (Bernama, 2024). However, a special body like the NPAC is highly important to ensure

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that petroleum matters can be administered smoothly and that any misunderstanding and confusion pertaining to petroleum may be resolved (Wan M. Zulhafiz Wan Zahari & Farid Sufian bin Shuaib, 2020).

TERRITORIAL SEA ACT 2012 (TSA 2012)

The Territorial Sea Act 2012 (hereinafter referred to as the 'TSA 2012') was brought into force on 22 June 2012 and is applicable throughout Malaysia. The TSA 2012 was enacted to replace the Emergency (Essential Powers) Ordinance, No. 7 of 1969 (hereinafter referred to as EO No. 7) enacted on 2 August 1969 and came into force on 10 August 1969 which defined the territorial waters of Malaysia. This was also explicitly stated in the beginning of the TSA 2012 itself. The important provisions in the said Emergency Ordinance are Section 3(1) of the EO No. 7 which provides that the territorial sea of Malaysia shall be twelve nautical miles and Section 4(2) of the EO No. 7 which states that the states' territorial waters shall be not exceed three nautical miles measured from the low-water mark. In para materia to the EO No. 7, Section 3(1) of the TSA 2012 states that the breadth of the territorial sea of Malaysia is twelve nautical miles. The TSA 2012 has also limited the territorial sea of the states as well where according to Section 3(3) therein, the territorial seas is limited to three nautical miles measured from the low-water line. Due to the TSA 2012, the boundaries of states, inclusive of the Borneo States have been altered.

SARAWAK OIL MINING ORDINANCE 1958 (OMO 1958)

The OMO 1958 found its existence much earlier before the formation of Malaysia where the Ordinance gives Sarawak the full authority over the exploration, prospecting and mining of oil and gas within its boundaries. The authority which Sarawak holds over its oil and gas is stipulated in Section 3 of the OMO 1958 which states that it is an offence for any person to explore, prospect or mine for crude oil, petroleum or natural gas upon any land or doing any act with such view on the same without the lawful authority so to do under the OMO 1958. Section 4 of the OMO 1958 then lists the types of licences or leases which can be applied by a person. It is of utmost importance to emphasise that the OMO 1958 is still existing and has not been repealed till today and this has been one of the main grounds for the assertion of Sarawak's authority over the oil and gas found within its boundaries.

Despite the OMO 1958 being a pre-merdeka law, it does not cease to exist where its validity as a pre-merdeka law is supported by the Federal Constitution and the Malaysia Act 1963. Article 162(1) of the Federal Constitution reads that existing laws shall continue to be in force on and after Merdeka Day. Section 73(1) of the Malaysia Act 1963 provides the similar provision where it provides that all existing laws shall continue to be in force after Malaysia Day and constructed as if this Act had not been passed. Furthermore, Section 73(2) of the Malaysia Act 1963 has also made it clear that the Borneo States laws which are present on and after Malaysia Day shall be treated as federal laws where they are laws which the State Legislature could not pass after Malaysia Day and otherwise as State laws.

The position of the Malaysia Act 1963 is strengthened where Article 159A of the Federal Constitution has stated that the provisions of Part IV of the Malaysia Act 1963 shall be as if embodied in the Constitution. Therefore, this solidifies the validity of the OMO 1958. An example of where a pre-merdeka law was upheld by the judicial court to be valid and applicable can be found in the landmark case of Re Datuk James Wong Kim Min [1976] 2 MLJ 245 where the Federal Court held that the Preservation of Public Security Ordinance 1962 of Sarawak which is a pre-merdeka law still remains in force and is declared as a

[Received: 20 October 2025; Accepted: 24 April 2026; Published: 30 June 2026]

federal law but with effect only within Sarawak.

Therefore, by virtue of the above provisions and applying the case authority above, so long as the OMO 1958 has never been repealed, it continues to be in force akin of a federal law applicable in Sarawak and forms a solid basis to Sarawak's claim for control over oil and gas. A significant achievement for Sarawak which came true under the Premier of Sarawak's administration was in 2017, when Petroleum Sarawak Berhad (hereinafter referred to as 'PETROS') was established and the oil and gas company is fully owned by the Sarawak State Government. According to a speech by the Sarawak Premier Tan Sri Abang Johari Openg, at the Betong Division Gawai Dayak Celebration, he had stated that that the ever existing and enforceable Oil Mining Ordinance enacted before 1963, i.e., before Malaysia was established, gives Sarawak control over its oil and gas (Sulok Tawie, 2024).

In 2018, amendments were made to the OMO 1958 which further put greater footing to Sarawak's authority over its oil and gas. The Sarawak Legislative Assembly had on 10 July 2018 passed the Oil Mining (Amendment) Bill 2018 were such amendments, inter alia, updated some provisions in the OMO 1958 and aligned the said Ordinance with the practices and operation in the upstream activities of the oil and gas industry presently practiced (Borneo Post, 2018). It was reported that the Deputy Premier, YB Datuk Amar Haji Awang Tengah Ali Hasan while tabling the Oil Mining (Amendment) Bill 2018 at the Sarawak State Legislative Assembly said that 'the purpose of regulating the upstream activities of Petronas and its contractors is to ensure that they comply with our state laws' (Sulok Tawie, 2018). He further said that a grace period until the end of 2019 was given by the state government to oil and gas industry companies for compliance and the regularisation of their activities (Sulok Tawie, 2018). Therefore, the amendments to the OMO 1958 by virtue of the Oil Mining (Amendment) Bill 2018 has strengthen Sarawak's authority over its oil and gas.

KEY LEGAL ISSUES AND CONTROVERSIES

VALIDITY AND SUPREMACY OF THE PDA

The PDA passed in 1974 effectively made PETRONAS the sole owner with exclusive rights over the oil and gas resources in Malaysia. Dr. Ismail bin Abdul Rahman, who was the Deputy Prime Minister at that time was the first to propose the PDA and the main reason for the PDA was to regulate the country's oil production (Siti Fahlizah Padlee & Professor Madya Dr. Mohd Rizal Mohd Yaakop, 2023). Tengku Razaleigh (the Founding Chairman and Chief Executive of PETRONAS) had also proposed for the PDA and stated that through the PDA, areas in Malaysia that can produce oil can be united under the federal government (Siti Fahlizah Padlee & Professor Madya Dr. Mohd Rizal Mohd Yaakop, 2023).

The PDA led to Sabah and Sarawak in signing a contract which gives rights to PETRONAS to extract and gain revenue from petroleum found within the said states and in return, the states would get five percent of yearly revenue as royalty (Faisal S. Hazis, 2018). Rahman Yaakub, the Sarawak Chief Minister at that time had proposed the formula for the agreement signed by oil producing states to obtain five percent and Sarawak had accepted this five percent formula and this was further proposed to the other oil-producing states (Siti Fahlizah Padlee & Professor Madya Dr. Mohd Rizal Mohd Yaakop, 2023).

The constitutional validity of the PDA has been widely questioned in Sarawak's claim for ownership of its oil and gas. The PDA was enacted during the country was in a state of emergency where

[Received: 20 October 2025; Accepted: 24 April 2026; Published: 30 June 2026]

the said Act came to force on 22 August 1974 whilst the Emergency Ordinance (EO) 1969 was still in force. The power to enact the PDA during the state of emergency came from Article 150(5) of the Federal Constitution which allows the Parliament to make laws with respect to any matter, if it appears to the Parliament such law is necessary due to the emergency. In furtherance of this, Article 150(6) of the Federal Constitution provides that no provision of any act of the Parliament passed during the emergency shall be invalid on the reason of inconsistency with any of the provisions of the Federal Constitution. However, the said state of emergency was lifted around in November 2011. Hence, with the end of the period of emergency in 2011, it raises the question on the validity of the PDA.

The reason for such question is because according to Article 150(7) of the Federal Constitution, after six months have passed from the date in which the emergency has been lifted, any law made during the said period shall cease to have effect, except for actions or omissions during the period of emergency. Therefore, since more than six months have passed, in fact, more than 13 years have passed since the lifting of the proclamation of emergency in 2011, the PDA would pursuant to the above constitutional provision, cease to have effect. Perhaps, the only thing which can be argued to be still subsisting pursuant to the same provision is the 'things done or omitted to be done before the expiration of that period'. Hence, it is widely argued that the PDA is encroaching the rights and authorities entrenched in the OMO 1958 as there have never been any actual constitutional procedures taken to validate the PDA after the lifting of the said emergency.

Therefore, there are debates on whether the PDA was enacted with the proper consent of the states. As what has been prescribed in Item 2(j) of the State List of the Ninth Schedule of the Federal Constitution, the power to issue permits and licences for prospecting for mines, mining leases and certificates falls onto the states. However, pursuant to Article 76(1)(b) and (c) of the Federal Constitution, the Parliament may make laws for subject matters in the State List to promote the uniformity of the laws between two or more states, or if requested by a State Legislative Assembly. Despite this, Article 76(3) of the Federal Constitution states that such law made pursuant to Article 76(1)(b) and (c) shall only come into force in a state once it has been adopted by a law enacted by the State Legislature and be deemed as a state law and may be amended or repealed by law made by that Legislature. However, until today, there is no such state law in Sarawak putting the PDA into effect. In fact, Sarawak still maintains its OMO 1958 and has its DGO 2016.

Furthermore, even if the purpose of the PDA was made under Article 76(1)(b) to achieve the uniformity of petroleum law throughout Malaysia, pursuant to Article 95D of the Federal Constitution, the Parliament is not allowed to pass uniform law about land or local government against Sabah and Sarawak as the Borneo States are excluded from such provision. This matter definitely involves the matter of 'land' in Sarawak. Land has been defined in Section 3 of the Sarawak Land Code (Chap. 81) as follows: -

> ""land" includes—
> (i) that surface of the earth and all substances forming that surface;
> (ii) the earth below the surface and all rock materials, minerals and substances under the surface;
> (iii) all vegetations and other natural products whether on or below the surface;
> (iv) all things attached to the earth or permanently fastened to anything attached to the earth;
> (v) land covered with water within the boundary of the State of Sarawak; and
> (vi) that column of the airspace above the surface of the earth on the land;

[Received: 20 October 2025; Accepted: 24 April 2026; Published: 30 June 2026]

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Furthermore, state land has also been defined in Section 3 of the Sarawak Land Code (Chap. 81) as follows: -

> "“State land” means all land for which no document of title has been issued and all land which subsequent to the issue of a document of title may have been or may be forfeited or surrendered to or resumed by the Government, and includes–
> (a) the bed of any river, stream, lake or watercourse; and
> (b) the foreshore and beds of the sea within the boundaries of Sarawak as extended by the Sarawak (Alteration of Boundaries) Order in Council, 1954* [Vol. VI, p.1025];'

Hence, with the fact that Sarawak has its OMO 1958 which pre-dates the PDA and even the formation of Malaysia with its legal footing akin a federal law in Sarawak pursuant to the Malaysia Act 1963 and its validity as a pre-merdeka law supported by the Federal Constitution, it questions the validity of the PDA within its boundaries. Therefore, even if the PDA were to be made constitutionally valid and enforceable in Sarawak notwithstanding Article 95D, pursuant to constitutional procedures, the PDA must have been adopted by Sarawak's State Legislature as a state law. Without such adherence to the Federal Constitution, the PDA will remain being questioned of its validity and enforceability in Sarawak and this will continue to be a basis for Sarawak's claim for ownership of oil and gas.

THE INTERPRETATION OF THE TERRITORIAL SEA ACT 2012

As mentioned earlier, the TSA 2012 was made in replacement of the EO No. 7 and therefore, the TSA 2012 enabled what had been prescribed in the EO No. 7 to continue in force after the lapse of six months from date in which the state of emergency is lifted where the EO No. 7 would cease to have effect. The TSA 2012 as explained earlier, has effectively reduced the state's territorial sea to a mere three nautical miles from the low water line. The result of such limitation to the breadth of the territorial waters is that the rights of the state over its fisheries, marine and mineral resources, tourist locations in marine areas, and others are now limited to just 3 nautical miles (5.56 km) from its shore (Wong, 2016). The question on the validity of the TSA 2012 is among the main grounds used to support Sarawak's claim for jurisdiction over its oil and gas. Hence, the question which must be answered is whether the TSA is constitutionally valid or has it been made in contravention of the provisions in the Federal Constitution.

Article 1(3) of the Federal Constitution must be read where it states that the territories of each state are the territories comprised therein immediately before Malaysia Day. The document which provides for the boundary of Sarawak immediately before Malaysia Day can be found in the Sarawak (Alteration of Boundaries) Order in Council, 1954. By the proper Orders-in-Council made in 1954, the British Government increased the borders of the colonies of Sarawak and North Borneo to cover seawards the submarine region of the continental shelf in addition to its territorial seas (Moorthy, 1982). Hence, immediately before Malaysia Day, Sarawak's boundaries were in fact extended to the continental shelf. Item 2 of the Sarawak (Alteration of Boundaries) Order in Council, 1954 is reproduced below:

> "2. The boundaries of the Colony of Sarawak are hereby extended to include the area of the continental shelf being the seabed and its subsoil which lies beneath the high seas contiguous to the territorial waters of Sarawak."
>
> (Sarawak (Alteration of Boundaries) Order in Council, 1954)

Looking into the procedure for the alteration of state boundaries, pursuant to Article 2(b) of the Federal Constitution, the Parliament can alter a state's boundaries however, such law which alters the state's boundaries shall only be passed with the

[Received: 20 October 2025; Accepted: 24 April 2026; Published: 30 June 2026]

state's consent which must be expressed by a law passed by the state legislative assembly and with the consent of the Conference of Rulers. In Article 38(6)(c) of the Federal Constitution, it is stated that it is the discretion of the members of the Conference of Rulers to act in any proceedings to give or withhold consent to any law on the alteration of the boundaries of a state. It is evident that the Federal Constitution has included sufficient provisions and mechanism which required the Federation to comply to seek the consent of any state to resolve many, if not all, matters, including boundary alterations (Choo & Chang, 2016). However, the provisions in the Federal Constitution on the constitutional process, along with the safeguards and protections therein, seems to have either failed or, in assertion of the Federation of *realpolitik* have been overlooked (Choo & Chang, 2016).

However, there are instances where such provisions in the Federal Constitution were adhered. This is evident when there was the alteration of the boundaries of Sabah to establish the Federal Territory of Labuan in 1984. Pursuant to Article 2 of the Federal Constitution, the Sabah Legislature passed an enactment called Federal Territory of Labuan Enactment, 1984 to give consent under Article 2 of the Federal Constitution. Section 5(1) of the Federal Territory of Labuan Enactment, 1984 expresses the consent required under Article 2 of the Federal Constitution. The Enactment had also stated that the Conference of Rulers has consented to the passing of the Constitution (Amendment) (No. 2) Bill 1984 which alters Sabah's boundaries. Therefore, one may question as to why was the same not done for this alteration of Sarawak's boundaries.

Hence, it may be debated that the TSA 2012 was made in contravention of the Federal Constitution. This is because there have been no observation and adherence to the constitutional procedures and protections stipulated therein. With the enactment of the TSA 2012, the power and extend of boundaries which Sarawak once had over its continental shelf by virtue of the Order in Council 1954, is now limited to a mere three nautical miles; a stark contrast to the state's original boundaries.

ROLE AND AUTHORITY OF PETRONAS VS. SARAWAK STATE GOVERNMENT

PETRONAS has the exclusive ownership and rights over the oil and gas found within the country by virtue of the PDA. PETRONAS' role is not regulatory in nature but it directly participates in petroleum exploration and extraction and this means that the federal government has full control in the exploration of petroleum and its exploitation operations which used to be under other oil companies' control (Moorthy, 1982). This is evident in Section 6(1) of the PDA which states that only PETRONAS is permitted in the business of processing or refining of petroleum or manufacturing of petro-chemical products from petroleum, except for where permission has been given by the Prime Minister to person in respect of any such business. However, this causes an overlapping authority as Sarawak under the OMO 1958 has the power to issue the relevant licences and leases for the exploration, prospecting and mining of oil and gas within its state (Section 3 and 4 of the OMO 1958). Furthermore, pursuant to Section 7 of the Sarawak's DGO 2016, no person except the gas aggregator appointed under Section 7A(1) of this Ordinance shall distribute gas in Sarawak or carry out the activities listed in Section 7 without a licence issued under this Ordinance.

On Wednesday, 30 April 2025, a letter was issued by Sarawak's Ministry of Utility and Telecommunications to Petronas Carigali Sdn Bhd, a wholly owned subsidiary of the PETRONAS, where it was stated that the said subsidiary was operating in Sarawak's coastal Miri Crude Oil Terminal (MCOT) facility without a licence which is a requirement under Section 7(e) of

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it's the DGO 2016 (Leslie Lopez, 2025). Petronas Carigali Sdn Bhd was given 21 days to get the necessary licence pursuant to the said notice and that financial penalties under Section 21A of the DGO 2016 would be imposed where there is failure to do so (Business Times, 2025).

On 21 May 2025, the Prime Minister and the Premier of Sarawak had signed a joint declaration in Putrajaya which avowed that there will be respect and co-existence of all federal and state laws related to gas distribution in Sarawak by all parties involved in those activities which includes PETRONAS and PETROS (Ling, 2025). As reported, the Premier of Sarawak has stated that PETRONAS and its subsidiaries are not required to obtain a licence from the Sarawak government to operate in the state, but there must be applications for exemptions (Jude Toyat, 2025). It was further reported that the Premier stated that the declaration is the proof of the Prime's Minister's commitment on behalf of the federal government to honour Sarawak's aspirations and constitutional rights as enshrined under the Federal Constitution, the MA63, and the IGC Report (Jude Toyat, 2025).

However, it is noted that there is an ongoing civil suit between PETROS and PETRONAS. On 15 October 2024, a lawsuit was filed by PETROS to seek a declaration that the demand of PETRONAS' for a RM7.95 million bank guarantee for the payment of gas was "unconscionable, unlawful and, therefore, null and void" (Bruno J, 2025a). It was argued by the lawyers for PETROS and the Sarawak government that there is a failure by PETRONAS to adhere to state laws required under the Sarawak Gas Sales Agreement ('SGSA') executed on 30 December 2019, and still without licence, sought to supply gas to PETROS (Bruno J, 2025b). In contrast, PETRONAS upholds that its rights under the PDA prevails over state laws such as the DGO 2016 (Bruno J, 2025a). As of now, the lawsuit is still ongoing. It is important to see how this lawsuit would unfold as this future judicial decision, in the event where there is no out of court settlement, may deliver important legal principles and may even effectively determine the position on the jurisdiction of oil and gas in Sarawak.

THE PETRONAS SUIT AGAINST SARAWAK IN 2018

The issue on the jurisdiction of oil and gas in Sarawak has been going on for years which inevitably would raise claims of conflicting interests and such issues has ever been brought to court. In 2018, PETRONAS filed a suit to the federal court. PETRONAS filed an application for a declaration from the Federal Court that the PDA was the applicable law for the oil and gas industry (Raynore Mering, 2018). However, the Federal Court dismissed PETRONAS' application. The Federal Court held that the declaration sought by PETRONAS was within the High Court's exclusive original jurisdiction, not the Federal Court, and therefore, there could be no question on obtaining leave under Article 4(4) of the Federal Constitution (Petroliam Nasional Bhd (Petronas) v Kerajaan Negeri Sarawak, 2018).

Hence, PETRONAS' case was heard in the High Court. In 2020, the Kuching High Court, in essence, held that the PETRONAS's ownership of petroleum under the Section 2 of the PDA was not absolute and was subjected to state laws which in the context of this, was Sarawak's State Sales Tax Ordinance (Petroliam Nasional Bhd (PETRONAS) v Comptroller of State Sales Tax, Sarawak & Ors [2021] 9 MLJ 801). Although the decision of the High Court may have shed some light in relation to PETRONAS's ownership over the petroleum in Sarawak, this issue still remains largely unresolved. This is particularly because the High Court did not directly delve into the jurisdiction of oil and

[Received: 20 October 2025; Accepted: 24 April 2026; Published: 30 June 2026]

gas in Sarawak. Therefore, this pressing subject has yet to be judicially determined and is still in debate till this very day.

AUTONOMY AND THE MALAYSIA AGREEMENT 1963 (MA63)

As emphasized earlier, the MA63 plays a pivotal role in the forming Malaysia; laying down all the salient terms for the formation of the country. The MA63 was drafted with the IGC Report in mind which recorded the crucial protections and safeguards for Sabah and Sarawak. The purpose of the MA63 was for the protection of the interests of Sabah and Sarawak due to their cultures, politics, and cultures which different compared to West Malaysia (Arnold Puyok, 2024).

Furthermore, according to Arnold Puyok (2024), safeguards on local governance, immigration control and rights over natural resources are among the key provisions of MA63. Despite these assurances, it has been widely argued such promise of rights over its natural resources, in particular, oil and gas has not been fulfilled. Both Sabahan and Sarawakian leaders have made demands for greater authority over natural resources in accordance with what has been intended originally under the MA63 (Arnold Puyok, 2024). As upheld in the above cited case, the IGC Report and the MA63 is still relevant as ever and therefore, there is validity in those claims on behalf of Sarawak.

Hence, there is a lot of challenge and responsibility to be held by the central government to manage this demand as without a resolution to this issue, it can worsen federal-state relations and worse comes to worse, it may cause a threat of separation in which its consequence would be the country's instability and breakdown (Abdul Aqmar Ahmad Tajudin & Mohammad Agus Yusoff, 2020). Thus, there must be strong federal cooperation in order to overcome this issue where both governments must work hand in hand to respect the rights and promises in the MA63.

IMPLICATIONS AND THE WAY FORWARD

It is highly important that an amicable and mutually benefiting solution is achieved for the federal government and the Sarawak state government. The existence of legal issues pertaining to licencing and ownership may raise concerns on the legal clarity and the investment climate for stakeholders in the country's petroleum industry. One of the main factors which influences the attractiveness of investment and sustainable development is a stable legal environment (Eman Fathi Hassan Algamiel, 2024). A setting which is stable fosters confidence in investors and promotes local market investments (Eman Fathi Hassan Algamiel, 2024). Furthermore, it is pertinent that there should be a harmonious reading of all relevant legislations in order to bring into effect the true intentions of the law. The law should be upheld and applied as how it has been intended when drafted by the Parliament. It is also suggested that an agreement should be executed between the federal government and Sarawak to put into full effect the joint declaration made in 21 May 2025. By doing so, it ensures that the rights as averred in the declaration are upheld and protected. Furthermore, it is suggested that to further strengthen the position of the declaration, a new legislation can be passed incorporating the terms of the joint declaration. It is greatly hoped that a harmonious solution can be achieved for both the federal and state governments in this issue not only for the good of federal-state relations but also to ensure the stability and attractiveness of this highly lucrative industry for foreign investors.

CONCLUSION

In a nutshell, the issue on the jurisdiction of oil and gas in Sarawak has been ongoing for many years. As discussed, there are several

[Received: 20 October 2025; Accepted: 24 April 2026; Published: 30 June 2026]

key legal issues and controversies pertaining to this issue which concerns the MA63, the validity of the TSA and supremacy of the PDA, the pre-merdeka OMO 1958 and the role and authority of PETRONAS and Sarawak. Essentially, the issues revolve around federalism where it involves federal-state relations, namely the distribution of power between the federal government and state government. It is high time for an amicable solution which can mutually benefit both the federal and state governments. This is to ensure good federal-state relationship and such outcome can be made possible through good federal cooperation and respect to each party's rights pursuant to the existing laws. A positive sign of good federal-state cooperation is clearly the joint declaration made in 21 May 2025 which is a leap closer to a conclusion for this issue. It is suggested that an agreement is executed between the federal government and the state government of Sarawak to put into full effect not only this joint declaration but for any other future negotiations terms concluded. By doing so, it ensures that the avowed rights and recognitions in the joint declaration are upheld and protected. Another suggestion is that, to further strengthen the position of the joint declaration, perhaps a new legislation can be passed incorporating all the terms of the joint declaration. All in all, it is greatly hoped that the issue on the jurisdiction of oil and gas in Sarawak can be resolved with mutual benefits for both the federal government and Sarawak where both rights are respected and upheld.

ACKNOWLEDGEMENT

The authors received no financial support for the publication of this article.

CONFLICT OF INTEREST

The authors declare that they have no conflict of interest to this study.

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