

**The Public's Participation in
Environmental Impact Assessment
In Malaysia**

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Summary

This paper addresses the issue of environmental legislation in Malaysia within the constraints of the lack of open and honest public participation.

The present situation in Malaysia is such that while the government is attempting to function as a modern democracy and imitate environmental legislation in countries such as the United States, they are continuing to refuse to act as an honest broker and allow dissent and criticism of proposed projects. The result is an apathetic and disinterested public who feel they have no say in the decision-making process in their own country.

What Malaysia really needs is revised legislation allowing freedom of speech, permitting criticism of the present government, an independent judiciary and an open press. Unless and until the *structure* of the governing bodies is amended, corruption will continue.

I. History and Politics

In the 16th century Malaysia was described by visitors as the “Golden Chersonese”, a term befitting a peninsular that was blessed with vast beauty and abundant natural beauty with plentiful natural resources like gold, tin and now petroleum.¹ Today, it is still considered as one of the 12 most biologically diverse countries in the world and the degree of prevalence of which survives. Its habitats include dry land, forests, lakes and wet lands. While 46% of Malaysia was recorded as forests in 1994, the protected areas only represent 4.88% (1,611,310.09h hectares). Malaysia comprises a federation of 13 states, two of which joined Malaysia in 1963 - Sarawak and Sabah. They are located on the island of Borneo, which is 600 kilometers (373 miles) to the east of the Malaysian peninsular. At the heart of Southeast Asia is peninsular Malaysia with the Kingdom of Thailand to the north and the Republic of Singapore to the south.

In the 16th century parts of Malaya, as it was then called, were occupied by the Portuguese, Dutch and the British - in that order. Finally on the 31st of August 1957, Malaya obtained its independence from Britain. Malaysia’s pattern of politics and governance combines authoritarian controls and democratic procedures which have been culminated in what can best be understood as a semi-democratic regime. Others have labeled it as an “illiberal democracy.”² In order to understand and appreciate the degree to which the public is entitled to participate in matters related to Environment Impact Assessment (EIA) in Malaysia, it would be prudent to appreciate other legislation that

¹ <http://en.wikipedia.org/wiki/Malaysia#History>

² Fareed Zakaria, “The Future of Freedom.” “Illiberal Democracy and Home and Abroad” WW Norton & Co.

deals with freedom of speech - although it's contained expressly in the Constitution – in practice it is severely limited by amendments and court decisions.

Although Malaysia prohibits arbitrary arrests, there are, however, two pieces of legislation (the Internal Security Act, the ISA, and the Emergency Ordinance, the EO) which empower the home minister and the police to detain persons indefinitely without trial where there is reasonable suspicion that an offence is threatened to be committed or said to exist. If two or more persons assemble with a view to protest some government action without a valid permit from the Ministry of Home Affairs, it would be an “unlawful assembly” rendering the participants to criminal proceedings.³ The ISA, in place since 1960 and its predecessor, was meant for the communist insurgency during the Second World War. Now, however, it is primarily leveled against opposition politicians, dissidents, editors of newspapers, journalists and others who purportedly threaten government security – and who may even include environmentalist groups and more recently alleged terrorists.⁴

Malaysia has cracked down on the environmentalists with a view to clamping down on information relating to the displacement of indigenous population and the felling of timber in Malaysia due to government action.⁵ Discussion on matters relating to affirmative action for the majority Malay population as opposed to the minority Indian and Chinese population cannot be discussed and may even be punishable under the Sedition Act or an umbrella of emergency powers regulations that deal with national

³ Police Act.

⁴ <http://www.malaysia-today.net/Blog-e/2005/12/irene-fernandez-wins-swedish-award.htm> Irene Fernandez, a journalist was arrested and tried under the Official Secrets Act for her article about detention of illegal immigrants - the longest trial in the history of Malaysia.

⁵ <http://www.sochaczewski.com/ARTbrunomanserearthtimesjuly2001.htm>

security.⁶ In addition, there is also the Official Secrets Act of 1972 which may be used to prevent information on major projects being released to the public.⁷ Malaysian press freedom is virtually non-existent on matters labeled as “sensitive” and strictly controlled by the government.⁸ All of this legislation hinders public participation in many aspects in Malaysia including criticisms of major environmental projects. These discussions on the various legislation curtailing the freedom of speech plays out later in this paper when we deal with the question of public participation in the assessment of the environment in Malaysia.

II. Climate

As for the climate, Malaysia has an equatorial climate modified by two monsoon seasons. The average temperature ranges from 21° C to 30° C (70° F to 86° F), and the average rainfall is 2000 - 3000 mm (79 – 118 inches). The total land area of Peninsular Malaysia is 131,612 square kilometers (50,815 square miles) including the offshore islands. Sabah comprises 73,711 square kilometers (28,459 square miles); Sarawak comprises 124,658 square kilometers (48,130 square miles). The total population is about 25 million people. (See Figure 1.)

⁶ <http://www.malaysia-today.net/Blog-e/2006/05/developed-malay-race-by-2020.htm>

⁷ Article 19, Memo on the Malaysia Official Secrets Act, Global Campaign, Lon Sept 2004. <http://article19.org/pdfs/analysis/malaysia-official-secret-act-sept-2004.pdf>

⁸ Steven Gan “Virtual Democracy in Malaysia: Putting Press Freedom on the Front Burner”; <http://www.wacc.org.uk/es/content/pdf/636>



Figure 1

MALAYSIA

III. People

The population of Malaysia is comprised of Malays, Chinese, Indians, and indigenous peoples. The Malays are the major ethnic group and make up more than half of the nation's population. The Malay language is the national language. The Chinese migrated to Malaysia in the 19th century to work in tin mines, and they currently form about 35 percent of the population. Another 10 percent is made up of Indians, who also migrated to Malaysia in the 19th century (due to the poor economy in India). They were engaged in the planting and tapping of rubber. The majority of the Malay, Chinese and Indian populations lives in West Malaysia.

The oldest inhabitants of Malaysia, however, are the indigenous peoples. They make up 5 percent of the total population. In Sarawak and Sabah, these groups are the majority. Sarawak is the least populated state in Malaysia. There are 27 distinct indigenous ethnic groups that speak 45 different languages and dialects. The tribal people prefer to be named by their individual tribes. In most states, the indigenous people are usually known as the Orang Asli (a general term for Original People). In Sarawak, the dominant tribal groups are the Dayak (tribal people who live in longhouses). There are the Iban (Sea Dayak), and the Bidayuh (Land Dayak). The tribal people feel a strong spiritual connection to the rainforest. The majority of the populations in East Malaysia – Sabah and Sarawak - are subsistence farmers who practice shifting agriculture. Each village is an exclusive, tight-knit community and has kept its name for over 200 or 300 years.⁹

⁹ www.sarawak.gov.my

IV. Federal Environment Impact Legislation and Procedures.

The Environmental Quality Act 1974 (EQA)¹⁰ was enacted as the primary Federal environment statute with a new Department of Environment (DOE) established as the administrative agency implementing the statute. The EQA is the basic instrument for establishing national environment objectives.¹¹ While the environment assessments for development projects have been practiced for more than 30 years, the introduction of the environment impact assessment (EIA) legislation did not come into force until 1988. The Malaysian Environment Impact Assessment procedures are comparable to the National Environmental Policy Act 1969 (NEPA) in the United States of America.

It's important to point out that in the Malaysian context, although a major requirement for ensuring that a country has the capacity to implement EIA successfully is the existence of an administrative structure that has sufficient personnel with the necessary skills and experience to evaluate the reports submitted, the presence of such formal institutional structures in Malaysia to coordinate different sectoral policies, strategies and plans has been ineffective. The final decision making eventually is done at the executive levels in the name of developing Malaysia to reach "developed country" status by 2020 and sometimes regardless of the fact that environmental degradation will occur.¹²

In expanding the point on the various departments and agencies that regulate the environment policies in Malaysia, the EQA contains several provisions; some of the more important are outlined as follows:

¹⁰ EQA 1974 - <http://www.elaw.org/assets/pdf/malaysiaEQA1974.pdf>

¹¹ EQA 1974 (Act 127).” An Act relating to the prevention, abatement, control of pollution and enhancement of the environment...”

¹² <http://nation.ittefaq.com/artman/exec/view.cgi/25/14682> Malaysia 2020 Vision, Prime Minister Malaysia.

- (a) The establishment of an inter-agency body known as the Environmental Quality Council to advise the Minister on various spheres of environmental protection. The council is made up of representatives from several ministries, the East Malaysian states of Sabah and Sarawak, the petroleum, oil palm, rubber and manufacturing industries, and other registered societies as well as academia;
- (b) The prohibition of specified materials, equipment or plant in any process, trade or industry;
- (c) The prescription for the reduction, recycling, recovery or regulation of specified hazardous substances;
- (d) The prescription of minimum percentages of recycled substances for specified products, and the labeling of such with declarations on recycled constituents and methods of manufacture and disposal (eco-labeling);
- (e) The prescription of rules on deposit and rebate schemes to ensure environmentally sound recycling or disposal of specified products;
- (f) The power of the Director General to require any operator to install, operate, repair, alter or replace any pollution control equipment, to take samples and to report on pollutants, to conduct studies on environmental risks, to install or maintain monitoring programmes at the operator's expense and to adopt pollution control measures, irrespective of whether the operator is operating out of prescribed premises or conveyances;
- (g) The provision for environmental audits to be conducted, irrespective of whether the operator is operating out of prescribed premises or conveyances;
- (h) The stipulation of "prescribed activities" having significant impact on the environment and requiring an environmental impact assessment (EIA) to be prepared, and the power of the Director General to approve the activity after reviewing the EIA;
- (i) The establishment of an Appeal Board to hear appeals from any person aggrieved by any decision of the Director General in relation to the licensing system and the EIA procedure;
- (j) The imposition of a research on wastes generated for purposes of financing research into any aspect of pollution or the prevention thereof;
- (k) The establishment of an Environmental Fund to be operated as a Trust Account within the Federal Consolidated Fund, for the purposes of financing research, controlling pollution in general, preventing or combating spillages, discharges or dumpings of oil, wastes or hazardous substances, and encouraging conservation measures against damage arising from the aforementioned;

- (l) The prescription of penalties for the whole range of offences stipulated in the EQA;
- (m) Miscellaneous provisions on the power to require information, to inspect premises, to seize and forfeit property, to examine persons acquainted with the case, to test and prohibit use of vehicles, as well as on the service of notices, evidential matters, composition of offences, jurisdiction of courts, the delegation of authority by the Director General to federal and state agencies, and the prescription of subsequent subsidiary legislation by the Minister.

Environmental management is conducted at the federal level by the Department of Environment (DOE) of the Ministry of Science, Technology and Environment. The DOE is headed by the Director-General of Environmental Quality, who is appointed by the Minister from among members of the public service. Within each state, the state governments have corresponding authorities and officials in charge of environmental matters. The Director-General has as one of his major functions, the establishment and maintenance of liaison and cooperation with the state authorities in relation to issues of environmental protection, pollution control and waste management.

At the federal level, a vast array of Ministries including the Ministries of Primary Industries, Agriculture, Land and Cooperative Development and Transport, exercise supervisory and state liaison roles over the main natural resource sectors. Thus, issues like forestry, wetlands, mining and marine conservation do not fall directly within the DOE's mandate. It is only through the EIA process that the DOE exercises some measure of central supervision. The DOE principally deals with matters involving air and water quality, industrial wastes, noise levels and environmental impact assessments. Thus, it is concerned largely with industrial pollution and environmental quality in

general. Jurisdiction over land use and natural resource management rests primarily with the respective state authorities exercising competence through state legislation.

The following are the environmental institutions and their division of administrative competences at the federal level:

Ministry	Area of Competence
Ministry of Science, Technology and Environment	
Department of Environment	Environmental quality
Department of Wildlife and National Parks	Wildlife and national parks
Ministry of Agriculture	
Agriculture Department National Rice and Padi Board	Agriculture
Fisheries Development Authority	Fisheries
Ministry of Primary Industries	
Federal Forestry Department Malaysia Timber Industry Board Forest Research Institute of Malaysia	Forestry at federal level
Mines Department	Mining
Ministry of Transport	
Marine Department Peninsular Malaysia Marine Department Sabah Marine Department Sarawak	Marine affairs
Port Authorities nationwide, several of which are corporatised	Port operations
Ministry of International Trade and Industry	
Malaysian Industrial Development Authority	Foreign Investment
Ministry of Energy, Telecommunications and Post	
National Electricity Board Tenaga Nasional Sabah Electricity Board	Energy provision
Ministry of Housing and Local Government	
Local Government Department	Local Government

Sewerage Department	Sewerage Services
Ministry of Land and Cooperative Development	
Land and Mines Department Federal Land Development Authority Sarawak Land Development Authority	Land use and mines
Ministry of Rural Development (through several regional development authorities)	Land development
Ministry of National Unity and Social Development	
Orang Asli Affairs Department	Indigenous people

Within the Malaysian government, each separate agency was and is mainly concerned with optimizing economic use under their jurisdiction. This has resulted in resources that are naturally integrated; for example, water, forests and land areas are subjected to various different conflicting development options which result in the environment being adversely affected and unsustainable.¹³

The EIA processes in Malaysia are a working example of decentralization among participants and tiers of governments and an effective mechanism for inter-governmental and inter-agency co-operation.¹⁴ However in doing there does not appear to be a clear Federal policy that the State is required to follow.

The need for environmental legislation was due to the fact that wastes from the agricultural and mining sectors had caused major environmental problems. Traditionally

¹³ Ismail, MR, and AS Ahmad (1996) Malaysia Environmental Assessment for Agriculture Development in Asia and the Pacific, Report of the Asian Productivity Organization Study Meeting, Tokyo, Japan. Page 272.

¹⁴ Ebiseemiju, FS (1993) "Environment Impact Assessment: making it work in developing countries", Journal of Environment Management, 38, Pages 257-273.

Malaysia was an agricultural country with rubber, oil, palm, cocoa and pineapple grown as the main crops. The main subsistence crop was rice, which is the staple food. The country was the world's largest exporter of rubber, tin, palm oil and pineapple.¹⁵ But today it is one of the world's largest manufacturers of consumer electronic goods - primarily for export.¹⁶ The shift from raw material production to manufacturing as the basis of the country's economy in the 1970s also caused concern that preventative controls were necessary.

V. Federal Environment Impact Assessment Procedures

The Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 was gazetted as a project planning tool for new projects or the expansion of existing ones. The Act requires anyone who intends to undertake a listed "prescribed activity" must first conduct a study to assess the likely environmental impacts that will occur from that activity and the mitigating measures that need to be undertaken.¹⁷ Under the Federal Environmental Quality Act, there is a requirement that the detailed EIA prepared by the proponent must be made available to the public and set out in the *Handbook of Environmental Impact Assessment Guidelines*¹⁸. The Environmental Quality (Prescribed Activities) (Environment Impact assessment) Order 1987 specifies some 19 categories of prescribed activities that require an EIA report prior to implementation.

¹⁵ Ismail, MR, and AS Ahmad (1996) Malaysia Environmental Assessment for Agriculture Development in Asia and the Pacific, Report of the Asian Productivity Organization Study Meeting, Tokyo, Japan.

¹⁶ Japan Environmental Council (1999) "The State of the Environment in Asia (Springer / ISEAS, Singapore)

¹⁷ S.34 A (2) Environmental Quality Act 1974.

¹⁸ Department of Environment (1995b), A Handbook of Environment Impact Assessment Guidelines (Department of the Environment, Ministry of Science, Technology and Environment, Government of Malaysia, Kuala Lumpur, originally published 1987, revised 1995).

According to the *Handbook of Environmental Impact Assessment Guidelines*,¹⁹ public participation should be included in all detailed assessments, and sufficient copies of the reports should be made available to the public to view and comment on within a reasonable period of time. Strangely, it should be noted that if a proponent believes that - *in the public interest* - it should not make the report available for public viewing - this may be permitted.²⁰ A researcher noted that most of the EIAs submitted tend to be dealt with as a preliminary assessment when there is not always a public participation facility provided.²¹ Although the principles for allowing public comment in Malaysia have been well established at the Federal level (compared to other countries in the region), notwithstanding the fact that the Malaysian public has been vocal in the press and other publications - there remain many constraints on the freedom of speech insofar as major government-supported projects are concerned.²² This attributed to the poor public response in addition to public apathy, low awareness and lack of expertise. For example, of the 8 detailed reports submitted in 1999, 57 written comments were received on 3 reports. However, 4 of the 8 reports received *no comments at all*, and the other had only one comment.

The guidelines for the EIA contain 3 major steps:

(a) A Preliminary assessment of all prescribed activities

- To examine and select the best from the project options available;
- To identify and incorporate into the project plan appropriate abatement and mitigating measures.

¹⁹ Department of Environment (1995b), *A Handbook of Environment Impact Assessment Guidelines* (Department of the Environment, Ministry of Science, Technology and Environment, Government of Malaysia, Kuala Lumpur, originally published 1987, revised 1995).

²⁰ Department of Environment (1995b), page 34.

²¹ Lee, HK (2000a) "Impact of Assessment: Beyond a Planning Tool," paper presented at the Entrepreneur Cities Crossing Seminar, Malaysia.

²² <http://www.wwfmalaysia.org> – Friends of Penang Hill.

- To identify significant residual environment impacts.

A Preliminary assessment should normally be initiated during the early stages of the project planning. Standard Procedural Steps are provided and the assessment might be conducted “in house” or by a consultant. Some form of public participation is mandatory. Environmental data collection may be necessary and close liaison between the assessor and relevant environment related agencies is encouraged. The results of the Preliminary Assessment are reported formally for examination and approval by the project approving authority and the Director General of Environmental Quality. Preliminary Assessment requires resources that are a small proportion of the man-hours, money, skills and equipment committed to a pre-feasibility study and the assessment should be completed within the time frame of that study.

- (b) Detailed assessment of those prescribed activities for which significant residual environmental impacts have been predicated in the preliminary assessment

The objectives of Detailed Assessment for prescribed activities with potentially significant residual environment impact include:

- To describe the significant residual environmental impacts predicated from the final project plan;
- To specify the mitigating and abatement measures in the final project plan; and
- To identify the environment costs and benefits of the project to the community.

Detailed assessment should continue during the project planning until the project plans are finalized. Standard procedural steps are provided and specific terms of reference based on the results of the Preliminary Assessment are issued for each project. The assessment might be conducted “in house” or by a consultant. The assessment method is selected according to the nature of the project; some form of public participation is

required. Environmental data collection is almost certainly necessary. The results of Detailed Assessment are reported formally.

(c) Review of assessment reports

The objectives of review for prescribed activities subjected to Detailed Assessment include:

- To critically review the Detailed Assessment Reports²³
- To evaluate development and environmental costs and benefits of the final project plan; and
- To formulate recommendations and guidelines to the project approving authority relevant to the implementation of the project.

Review of the EIA reports is carried out internally by the DOE with the assistance from relevant technical agencies for preliminary assessment reports and by an ad hoc Review Panel for detailed assessment reports. The review panel may comprise a number of independent members from relevant disciplines and organizations. These include universities, government agencies, on-governmental organizations, environmental consultants and members of the public. All written submissions made by interested parties are required to be submitted to the review panel for its perusal and comment. Using a wide range of expertise, it should be possible for the panel to identify all deficiencies in the environment impact statement (EIS) and to require the necessary amendments and additions to be made. It has been problematic in certain areas especially in particular to public participation.²⁴

²³ http://www.doe.gov.my/index.php?option=com_content&task=view&id=43&Itemid=616&lang=en

²⁴ Ibrahim, AKC, and MA Rahman (1994), "Environment Impact Assessment in Malaysia – A Reviewer's Perspective" – Paper presented at Environment Impact Assessment in Malaysia, Conference held in Kuching, Sarawak 3-5 February 2004.

The panel is required under the guidelines:

- (a) To review the detailed assessment report in the context of a brief;
- (b) To recommend to the project approving authority on the implementation of the project;
- (c) To specify environmental monitoring and post audit requirements.

A recommendation arising out of the review is transmitted to the relevant project approving authorities for consideration in making a decision on the project according to the DOE's Client Charter. The period allocated for review of a term of reference (TOR) and the EIA report are as follows:

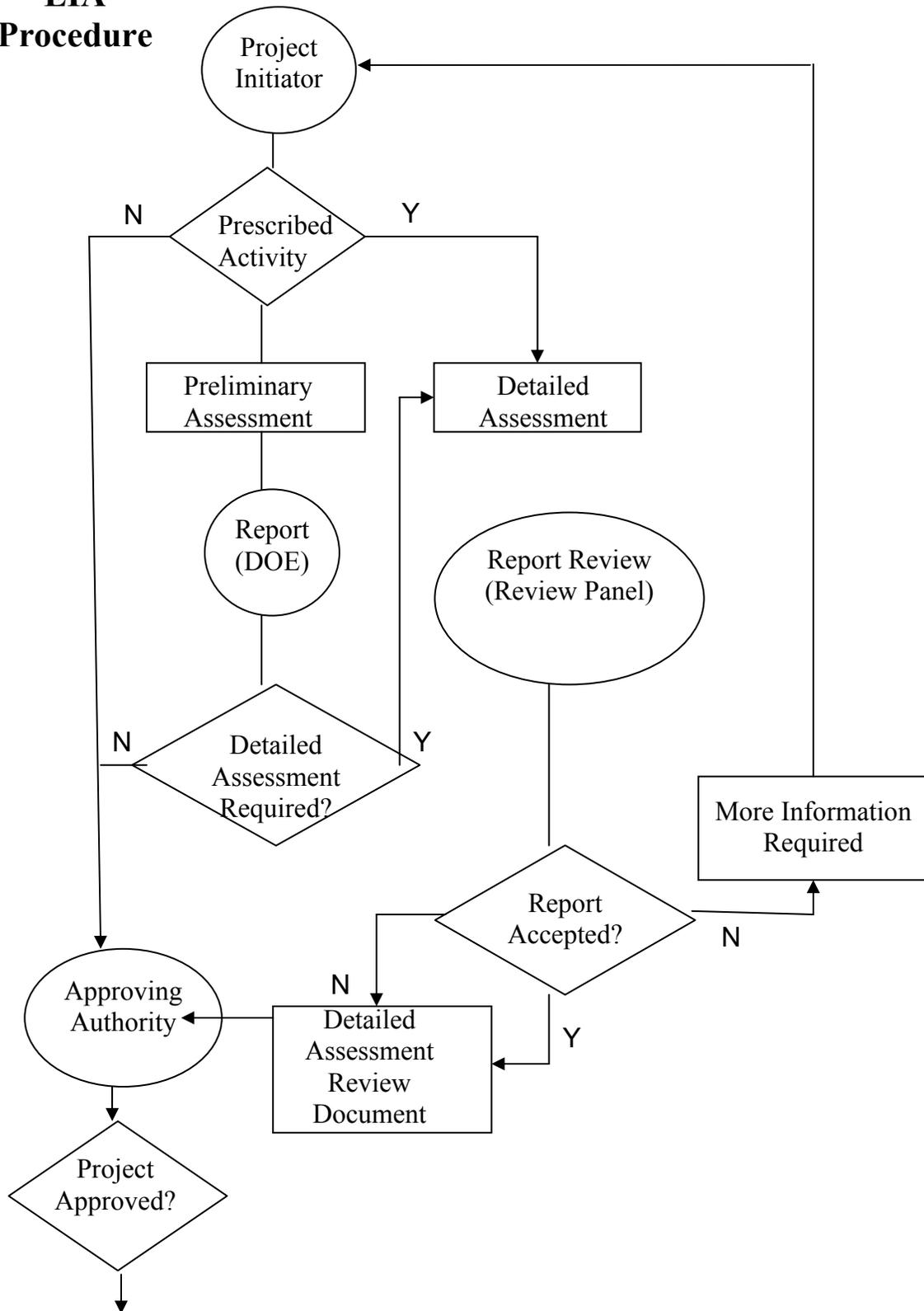
Terms of Reference	-	2 months
Preliminary EIA Report	-	3 months
Detailed EIA Report	-	5 months

The DOE maintains a list of experts who may be called upon to sit as a member of the Review Panel established.

The EIA procedure under the Malaysian legislation is shown as Figure 2.

Figure 2.

**EIA
Procedure**



VI. State Environment Impact Assessment Procedures

The Malaysian Federal Constitution²⁵ provides for the general distribution of legislative powers between the Federal and the State governments.²⁶ There are two separate lists, the Federal list and the State list where the jurisdiction is spelled out. A third list is a concurrent list which is shared between the Federal and State governments. The Ninth schedule includes a List 2A (A supplement for the states of Sarawak and Sabah) and List 3A (Supplement to the concurrent list for the states of Sarawak and Sabah). Items that are not listed fall into a category referred to as the residual list. Items in this list fall under the jurisdiction of the State. The Lists accord a great deal of control to the two states over natural resources when Sarawak and Sabah joined the Federation on Malaya in 1963 to become Malaysia. Singapore chose to leave the Federation during the same period and Brunei opted not to join.

The Constitution limits the Federal government's jurisdiction on resources when it comes to the States. Under the Malaysian Federal Constitution land use, forestry and water are under the purview of the State governments. This includes the removal of timber, biomass, impounding of rivers, electricity and the production generated by water and local government come under the exclusive jurisdiction of the State. Each State is empowered to enact laws on forestry, water resources, mining, wildlife and fisheries. These are outside the scope of Federal EQA and DOE. This is especially so in the case of the two Borneo states of Sabah and Sarawak. Under the Federal Constitution, the State is

²⁵ <http://www.helpinelaw.com/law/constitution/malaysia/malaysia06.php>

²⁶ Ninth Schedule, Malaysian Federal Constitution.

empowered to make laws with respect to any matter not enumerated in the Ninth schedule.²⁷ The State of Sarawak recognized that “Environment” was not enumerated in any of the Legislative Lists and therefore came under the Residual category.

The then-operative Statute was the “Natural Resources Ordinance” which was a pre-independence statute enacted in 1949 when Sarawak was governed by the Brook colonial administration.²⁸ By virtue of the legislative powers granted to the States under Article 77 of the Malaysian Constitution, the State Government recently amended its “National Resources Ordinance 1949” to become the “National Resources and Environment Ordinance 1993” and established the National Resources and Environment Board (NREB) to enforce the Ordinance. The NREB is a committee made up of ex-officio members drawn from the State government ministries and departments which have responsibilities for natural resources management. The purpose of the Ordinance is to enable the State Government to promote sustainable management of natural resources specifically items that are enumerated in the State List: land use, forestry, agriculture and inland water resources. It is an enabling statute that is implemented by making subsidiary legislation or cross-referencing in other statutes which it over rides.

By virtue of the National Resources and Environment Ordinance 1993, the Sarawak State Legislature passed the Natural Resources and Environment (Prescribed Activities) Order 1994 which prescribed activities that *“injure, or damage or have adverse impact on the quality of the environment or natural resources of the state”*, and which required the NREB’s approval. It also laid down procedures for the application for such approvals.

²⁷ Article 77, Malaysian Federal constitution.

²⁸ http://en.wikipedia.org/wiki/Charles_Vyner_Brooke

However these powers were never exercised until 1994²⁹. During this period, the Federal Government removed these “activities” from the ambit of the Federal EIA orders made under the Environment Quality Act (EQA) 1987 leaving complete control to the State to regulate matters pertaining to the environment in Sarawak. The fundamental difference now between the Sarawak Order and the Federal guidelines is essentially that the entitlement in the Federal EQA to a copy of the EIA report by the public and the subsequent public comments to the Review Panel before an approval can be made by the Director General was excluded by these provisions. Therefore, there is no statutory requirement for the State to solicit public comment on decisions made on the environment in Sarawak.

VII. Case Study – The Bakun Hydro-Electric Project

The Malaysian Government has defined a national “vision” of full industrialization by the year 2020, and sees mega projects as central to its achievements.³⁰ The Federal Government of Malaysia announced the approval of one of the most ambitious projects ever undertaken in South East Asia - which is purportedly designed to meet the long-term energy requirements of the nation – including the possibility of exporting energy to neighboring countries. This project comprised a reservoir, construction of a dam, and the transmission of generated electric power from the State of Sarawak to Western Malaysia by a transmission cable submerged across the South China Sea. The dam was set to produce 2,400MWs by 1990 with the transmission cable being 650 kilometers long.

²⁹ 1994 -Malaysia Government revives the Bakun Hydro-Electric Project.

³⁰ <http://www.wawasan2020.com/vision/>

From the outset, the Bakun Hydro-Electric Project was riddled with controversy ever since its proposal in 1983.

The 205-meter Bakun Dam would flood 69,640 hectares of forest, an area roughly the size of the nation of Singapore, at a cost of in excess of \$2.5 billion. The preliminary studies were to have been done by the Electric Supply Company of the State of Sarawak. The consortium of German and Swiss consultants who prepared the feasibility study report was made *unavailable* for public viewing by government decree as the information has been classified under the country's Official Secrets Act which renders an offender to a mandatory jail sentence of two years.³¹ A Canadian anthropologist has stated that as part of his contract with the Sarawak state government, he was asked to sign a confidentiality clause which he refused to do so although others did.³²

Widespread protests that the project would impact thousands of indigenous population whose livelihood would be affected and their ancestral homes drowned led to the government arresting and detaining citizens under the Internal Security Act.³³ In 1986, the project was abandoned due to the economic recession. With the upturn in the Malaysian economy in 1994, the government announced the revival of the Bakun Project; and in justification said that the project will attract foreign investment in the state in which it's located. At about the same time, the Sarawak legislation was being amended.³⁴

³¹ Dr Kua Kia Soong, Director of SUARAM, speech at the Conference on World Commission on Dams, Hanoi, Vietnam, 26-27 February 2000.

³² Jerome Rousseau, "The Bakun Hydro-electric Project and resettlement: a failure of planning" (Conference on the Bakun Hydro-electric Project, Kuala Lumpur, December 2-3, 1995)

³³ The Internal Security Act is legislation enacted using the Emergency Acts from World War II, detaining communist insurgency without trial and at the pleasure of the government.

³⁴ See. Page 12 Paragraph 1, Amendments to the Sabah State Ordinance.

In 1994, the project was granted to a company called Ekran Bhd, without an open tender and one which has had no experience in building dams.³⁵ The Federal Government by various announcements informed that the EIA report would be made available for public comment prior to its approval under the Federal EIA guidelines. The Ministry had also assured all interested groups that all the EIA procedures under the Federal Environmental Quality Act (EQA) had been complied with by the proposed project and that public views would be considered. In early 1994 Ekran Bhd, the proponent assigned preparation of the Environmental Impact Assessment (EIA) to the University of Malaya³⁶. In 1995, because progress was slow, the EIA process was broken up into four parts, so that each component of the project could be approved separately. In March 27, 1995 the first EIA was approved, without being released to the public. In April 6th, 1995 it was clarified that it was made retroactive to September, 1994.³⁷ It was only then that interested parties knew that the jurisdiction over the EIA had been transferred from the Federal jurisdiction to the State government of Sarawak³⁸. In May, 1995 the public was allowed to be permitted to view the EIA report.

Shortly after its release, the EIA report was evaluated by the International Rivers Network (IRN) who identified numerous shortcomings. The evaluation also concluded that the EIAs' "usefulness is severely limited by basic methodical flaws". The report failed to explain why the dam was needed, failed to consider adequately the no-project alternative, and failed to consider alternative energy sources. Nor did it evaluate long-

³⁵ Ekran Bhd was controlled by a contractor who had close ties to the political elite.

³⁶ <http://blog.limkitsiang.com/?p=751>, Times Higher Education Supplement 2006.

³⁷ The Power Elite: The Politics and Ecology of Malaysia's Bakun Dam, Page 4, By Stephen Bocking, Assistant Professor, Environment History, Trent University.

³⁸ "EIA for Bakun Dam Subject to Sarawak Regulations", New Straits Times Newspaper (April 7th, 1995).

term impacts, or interactions between different impacts (such as the effect of water quality on fisheries). It did not even estimate the life-span of the project and concluded that the report relied on too much inadequate data or uncertain predictions. In sum, the IRN stated that the EIA “would not meet international accepted standards for environmental assessments”.³⁹

In 1997, with the Asian financial crisis in full bloom, the Bakun Dam Hydro-Electric Project was put on hold for a second time. But the commissioned contractor, Ekran Bhd, subcontracted to another sister company to harvest 1,000 hectares of forest and extracted 79,000 cubic meters of timber in the area - resulting in the forceful evacuation and resettlement of more than 10,000 indigenous people to another area. The published findings indicate that the resettlement housing was inadequate with poor infrastructure, insufficient employment, and insufficient land for food cultivation. As a result, the populations suffered from malnutrition and hunger in addition to other conflicts due to the communal living, alcoholism, etc.⁴⁰ Tens of thousands living down stream depended on the river for their livelihood and transport and were negatively affected by the Bakun Dam Project. The decline in water quality, coupled with the damage to both the aquatic species and more than 105 species of animals impacted areas well beyond the project site itself. All of these factors were not taken into account nor were they made public in the decision-making process.⁴¹

³⁹ <http://irn.org/programs/bakun/bakuneir.html>

⁴⁰ ASAP River resettlement scheme <http://www.surforever.com/sam/sarawak/articles/resettlement/html>

⁴¹ World Commission on Dams; Contributing Paper - “The Resettlement of Indigenous People affected by the Bakun Hydro-Electric Project, Sarawak, Malaysia.

By 1999, the Malaysian Government had taken over the assets and liabilities of Ekran Bhd by paying the latter a sum of Ringgit Malaysian 950 million. The Malaysian government also announced in 1999 that the project would be resumed on a smaller scale (500 MW capacity rather than the previous 2400MW). Environmentally, the damage had already been done. The extensive logging and destruction of aquatic habitats had impacted the sensitive rainforest ecosystem for decades to come.

VIII. Judicial Review of Federal Action.

An “aggrieved person” may apply to quash a decision of a quasi-judicial making body empowered under delegated legislation on the grounds that it had committed errors going to jurisdiction. Such an application can be made to the High Court at Malaya for judicial review to quash the impugned decision. The jurisdiction of the court in these type of proceedings is one of supervision and not that of an appellate body and the court as in the United States will give deference to decisions of agencies unless the decision is “manifestly perverse which no right thinking tribunal will come to given the set of facts before it”⁴² Such an application is limited by “standing” or locus standi of the Petitioner and it is doubted that the Malaysian courts would consider the “loss of recreation use or aesthetic enjoyments” as an injury.⁴³ In the Bakun Hydro-Electric Dam case the Petitioners who were natives in Sarawak failed in their bid to quash the order allowing the development of the dam in the Federal Court on the grounds that they did not have the “standing” to bring the action. The second ground for dismissing the suit was the fact that the Federal Court was of the view that the Sarawak orders although retroactive was

⁴² Frank Ho v CI Holdings (1984) 2 MLJ 230.

⁴³ Lujan v National Wildlife Federation 497 U.S. 871 (1980)

good law. There was no statutory requirement for public participation as regards the State Orders. The scope and standard of review would be similar in all other aspects with NEPA processes.⁴⁴

IX. Conclusion.

Finally, it would not be out of place to be reminded by what the Nobel Prize winner in Economics, Amartya Sen said, in his book “Development as Freedom”. He says that in the past fifty years development has generally been defined in terms of industrialization and this he says is too narrow. Development should include assurances of good health, adequate education, greater longevity, the ability to influence political decisions that affect ones lives and the freedom to choose alternative life styles. No matter which way you look environmental policies and the right to participate publicly should be made an integral part of decision making. The benefits of public participation is so valuable to building a strong civil society in developing countries which opens the decision making process, identifies issues, enhances mutual understanding where better decisions are made enhancing community support and minimizing delays. It is part and parcel of a good democracy. It also brings different races to have a common cause-the environment and enhance racial relations. Agencies will be able to gather the most diverse collection of options, perspectives and values from the broadest spectrum of the public allowing better and more informed decisions.⁴⁵ Since the Malaysian Government has the political will to adopt legislation like the NEPA from the United States it should also go a step further and incorporate the practice and procedure adopted from that legislation so that is does not appear to be merely cosmetic as it presently stands.

⁴⁴ Strycker’s Bay Neighborhood Council, Inc v Karlen. 444 U.S. 223 (1980)

⁴⁵ Effective Public Participation under NEPA, <http://www.eh.gov/nepa/tools/guidance/pubpart2.html>