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**ASEAN LEGAL SYSTEMS AND REGIONAL INTEGRATION**  
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**MALAYSIA COUNTRY REPORT**

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*The Malaysian Environment: An Overview*

There is of course a range of environmental problems in Malaysia and arguably the main one is the loss of natural forest cover as a result of developmental projects.<sup>1</sup> The reason why this particular issue is emphasised is because the clearing of land can affect the ecology in many ways, each with serious environmental implications. The most obvious of these is the loss of biological diversity. At the end of 1997 Malaysia's natural forest covered 62.6% of the country, totalling 20.6 million hectares.<sup>2</sup> This may seem like a lot of forest cover, but the quality or the integrity of the forest need to be questioned. This is mainly because the management of this forest cover is not necessarily sustainable. Under the National Forestry Act 1984,<sup>3</sup> and the National Forestry Policy (1992),<sup>4</sup> there is to be established Permanent Forest Estates (PFE), which will be managed, and classified under four major functions that are:

- Protection Forests: for ensuring favourable climatic and physical conditions of the country, the safeguarding of water resources, soil fertility and environmental quality, the conservation of biological diversity and the minimisation of damage by floods and erosion to rivers and agricultural lands;
- Amenity Forests: for the conservation of adequate forest areas for recreation, eco-tourism and in enhancing public awareness in forestry;
- Research and Education Forests;

<sup>1</sup> Aggressive logging has reduced significantly at least in the Peninsular, *Malaysian Environment Alert 2001*, Sahabat Alam Malaysia, Penang, 2001 at page 30.

<sup>2</sup> Department of Forestry.

<sup>3</sup> Laws of Malaysia, Act 313.

<sup>4</sup> The National Forestry Policy was accepted by the National Forestry Council in 1977. It was later endorsed by the National Land Council in 19 April 1978. The policy was revised in 1992 to take its present form.

- Production Forests: for the supply in perpetuity, at reasonable costs of all forms of forest produce, which can be economically produced within the country and are required for agricultural, domestic and industrial purposes, and for export.

PFE as a concept, has many problems, not least among them is the assumption that forests can be logged and still be termed forests, whereas the quality of a logged forest is inferior to natural primary forests. Biological diversity is compromised not just in the logged areas but also in the Virgin Jungle Reserves established within each PFE. This is not aided by the fact that standard logging practices in Malaysia do not include the rehabilitation of affected land. Furthermore the Selective Management System (in short, a thirty year cutting cycle) used in PFE is yet to be determined as being sustainable or not, seeing as it has only been introduced in 1971. Which leads to another problem, and that is the lack of baseline information on the ecological forces underlying hill forests. It is still uncertain for example as to the minimum set of species required in order for a forest ecosystem to persist.<sup>5</sup> This information is necessary for formulating an effective system to exploit the forest with minimal damage.

The PFE system therefore leaves a lot to be desired, yet, even this imperfect system is under threat from State governments who are unwilling to create or even maintain the PFE, preferring instead to use the land for other purposes.<sup>6</sup> In 1995, the Director General of the Peninsular Malaysia Forestry Department revealed that between 1986 and 1994 State Governments had de-gazetted 144406 hectares of PFE. This means that such forests were now available to be used for other purposes. According to the 1994 Annual Report of the Forestry Department, despite pledges to gazette 186341 hectares of forests as PFE, seven of the eight State Governments failed to do so. The state of Terengganu gazetted only 7699 of the 96179 hectares it has pledged.<sup>7</sup>

The loss of forest, either due to their outright destruction through clearing or even poor logging practices has serious environmental implications above and beyond the loss of the forest itself. This is especially true when highland forests are destroyed for developmental projects. The effects of such acts are far reaching. Soil erosion is one of the main side effects of forest cover loss. Malaysia's hilly geography and wet tropical climate makes it especially vulnerable to soil erosion in the event that there is no forest cover to act as a buffer. Apart from the loss of fertile soil, erosion leads to pollution, particularly water pollution. In 1995, 56% of rivers in Malaysia were polluted (45% heavily

<sup>5</sup> N. Manokaran, *The Role and Importance of Malaysia's Rainforest*, CAP-SAM National Conference, 1996.

<sup>6</sup> The legal issues regarding land and State Governments is discussed later in the chapter.

<sup>7</sup> Note 4 at page 13.

polluted) by suspended solids, signifying silt from soil erosion.<sup>8</sup> Overall water quality is not good and in 1998 72.5% of Malaysian rivers were polluted with 13% being highly polluted.<sup>9</sup>

The lack of vegetation also leads to flash floods as rain water flows from high to low lands without the absorption that plant life provides. It has been estimated that 29000 sq. km. or 9% of the total land area of the country is flood prone affecting up to 18% of the population.<sup>10</sup> Conversely, this loss of highland forest also means the degradation of catchments areas leading to losses in the water supply. The depletion of forest cover affects interception of falling rains, the absorption of surface water runoffs into the soil, the amount of time it takes water to reach the mineral soil and the overland travel time of water to the drainage system. These are important processes that affect the ability of a catchments area to produce water.<sup>11</sup> Although as a whole, Malaysia does not suffer from poor water supply, there are areas where it can be quite chronic, for example the serious water shortages experienced in the state of Melaka in the mid 1990's.

The proposed future development of highlands further perpetuates this problem. Many areas, such as Cameron Highlands are already facing problems such as rising temperatures and water shortages due to over cultivation and land clearing for building works. The new planned "Highland Highway" linking Genting Highlands, Fraser's Hill and Cameron Highlands would doubtlessly exacerbate this loss. The Highlands being a unique and fragile ecosystem, as well as an important factor in water management, would have to be treated in a more careful manner in order to preserve and conserve their integrity.

Another side effect of the destruction of ecosystems, be it forests, wetland, limestone hills, highlands or marine ecosystems, by whatever method, is the major threat it poses to wildlife. If however that method is through logging, it then poses a double threat. Not only does logging destroy habitats, it also has the unfortunate effect of providing poachers easy access into forests by using the roads made by logging companies. The combination of habitat loss and poaching has seen the disappearance of many flora and fauna. For example, at present count, there are only 600 tigers, 80 Sumatran rhinoceros, 400 water buffalo and

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<sup>8</sup> Malaysia, *Environmental Quality Report 1995*, Department of the Environment, Ministry of Science technology and the Environment, Kuala Lumpur, 1996.

<sup>9</sup> Department of Environment, 1998 and Department of Statistics 1998. Quoted in *Malaysian Environment Alert 2001*, at page 55.

<sup>10</sup> Keizrul Abdullah, *An Appraisal of Malaysia's Water resources Problems and Prospects*, CAP-SAM National Conference 1996.

<sup>11</sup> Hamirdin Ithnin, *Are We Heading for a Water Crisis*, CAP-SAM National Conference, 1996.

1200 elephants left in the Malaysian forest. The rhino is practically gone completely from the Peninsular.

Other environmental problems in Malaysia range from poor air quality<sup>12</sup> and the formation of heat sinks in large cities, poor methods of dealing with chemical and hazardous wastes, industrial and household pollution and the loss of green lungs within urban areas.

### *The ASEAN Connection*

Many of the problems mentioned above are very domestic in nature. Therefore their solutions would also be internal. From a legislative point of view for example, there is a need for a law protecting fauna. As it stands fauna is protected indirectly through the establishment of protected sites. Unlike wild animals and birds however there are no laws regulating the taking of wild plants *per se*. Be that as it may, there are still many areas where there is a need for a combined effort on the part of the region. Some of these shall be dealt with here.

### *Biological Diversity*

There are two main areas of concern regarding biological diversity in the region. The first is the concern of contamination by genetically modified species. The second concern is about biological prospecting. Both these issues have serious regional implications and are therefore best dealt with at a regional level.

With regard to the contamination of indigenous species by biologically modified species, there already exists an international treaty on the matter in the form of the Cartagena Protocol on Biosafety. The Conference of Parties of the Convention on Biological Diversity 1992<sup>13</sup> adopted this protocol on 29 January 2000.

The protocol seeks to protect biological diversity from the potential risks posed by living modified organisms that are the result of modern biotechnology. It does this through a system of advanced informed agreement (AIA), a procedure where parties are to be properly informed about a particular organism before allowing it to enter its territory. The protocol follows the precautionary principle and encourages its parties to err on the side of caution when there is insufficient expertise or data to make informed decisions.

It also establishes a Bio-safety clearinghouse, which is fundamentally an information collection and supply system that facilitates the exchange of

<sup>12</sup> The DOE 1995 Annual Report states that Georgetown and Johor Bahru suffer from an above average level of air pollution.

<sup>13</sup> <http://www.biodiv.org>

information on living modified organisms and that assists countries in the implementation of the protocol. In the event of an accidental release of genetically modified organisms, and their transboundary movement, the protocol does provide for an information mechanism where potentially affected nations are informed.<sup>14</sup>

The concern of transboundary contamination therefore is dealt with in the Cartagena Protocol. However, amongst the members of ASEAN only Malaysia, Indonesia and the Philippines have signed (though not ratified) the protocol.<sup>15</sup> The acceptance of the protocol is a fine starting point for other members of ASEAN concerned with biohazards and transboundary contamination. However, there is nothing to stop member nations from devising a policy, treaty or agreement amongst them selves.

Any such document should incorporate the following factors:

- An information sharing system where all members are told when a neighbour intends to develop or introduce a genetically modified organism into their country. The information must be comprehensive with an emphasis on the risks involved, particularly that of transboundary contamination.
- A capacity building device where resources and expertise are shared and pooled.
- A warning system along with the necessary mechanism for appropriate action in the event of transboundary contamination.

The other concern is in relation to bio prospecting. Even though the Convention on Biological Diversity does provide for the principles of fair methods of bio prospecting,<sup>16</sup> there is still room for unscrupulous bio prospectors to circumvent any agreement based on the equitable sharing of commercial benefits. This is because many species are endemic to the region and not to any particular country. A plant species found in the jungles of Sarawak may also be found on other parts of Borneo, which includes Brunei and Indonesia.

What is to stop a bio prospecting company having made an agreement with the Sarawak government, from claiming that a particular specimen that they have obtained has come from another country? ASEAN nations have to make a concerted effort at ensuring that such abuses do not happen. There is a need for

<sup>14</sup> United Nations Environment Programme Web Page:  
<http://www.biodiv.org/biosafety/default.asp>

<sup>15</sup> All on 24 May 2000.

<sup>16</sup> Namely Article 15.

proper monitoring along with sufficient expertise to prevent ASEAN countries from being cheated of their sovereign rights over their resources.

#### *Equal Access and Non-discrimination*

ASEAN by no stretch of the imagination has anything anywhere near the same integrated system as the European Union. There is no central law making body and naturally there is no such thing as an ASEAN court. This may mean that disputes have to be settled either through the International Court of Justice or some sort of arbitration. There is however an alternative and that is the concept of Equal access and non-discrimination.

Equal access and non-discrimination means giving transboundary claimants the same rights as the citizens of the country within which they are litigating. It also means that the same standards of legality are applied both to domestic and transboundary harm. The Organisation for Economic Co-operation and Development (OECD) have recognised equal access principles and they have laid out five principles which are:<sup>17</sup>

- a. The provision of information concerning projects and new activities which may cause harm to the environment
- b. Access to information held by public authorities and which are ordinarily made available to the public
- c. The participation in hearings, preliminary enquiries and the making of objections in respect of proposed decisions by public authorities which could lead directly or indirectly to pollution
- d. Recourse to and standing in administrative and judicial procedures, including emergency procedures
- e. Equivalent treatment to that afforded in the country of origin in cases of domestic pollution for the purpose of preventing or abating pollution or compensating for the damage it causes

These rights are available even to foreign individuals, NGO and Public Authorities, as long as these rights are available to the citizens of the country where action is to be taken. In short the idea is to make the world a truly global village, at least where environmental law is concerned. Boundaries and nationalities should not matter when it comes to matters of the environment. Of course the OECD principles are in no way binding although they do have some influence over member states. There is however a treaty that takes this principle

<sup>17</sup> OECD Council Recommendations reprinted in OECD, *OECD and the Environment* (Paris, 1986).

of equal access and makes it into international law. This is the Nordic Environmental Protection Convention (NEPC).<sup>18</sup>

The purpose of this treaty is to eliminate national boundaries that hindered co-operation for environmental protection. Pollution in a neighbouring country is tantamount to pollution in one's own country. The treaty thus attempts to eliminate national political boundaries in environmental protection matters by giving administrative authorities and individuals the right of access to courts and administrative authorities in other Nordic states as if the parties were in the same jurisdiction.

This is the most substantial attempt at equal access yet Charles Phillips<sup>19</sup> has found that the practice of the treaty is far from satisfactory. In his research he had used several case studies which show that the running of the treaty was inconsistent and far from satisfactory. In one case, the Swedish Environmental Protection Agency, after being informed by the regional government of Copenhagen (Denmark) about a power station's plan for expansion, managed to stop the permit being granted by objecting. Yet Sweden was not informed about oil drilling activity by Denmark due to Danish administrative buck passing and incompetence. In another case study, a dirty smelter in Norway continued its operations despite Swedish objections. The reason why the Norwegian authorities refused to stop the smelter was because of the fear of job losses. The fact that 58% of the emissions were carried into Sweden was not considered in their deliberations. It can be seen here that political influences are still an important factor.

According to Phillips, "[t]he lag in the implementation of the NEPC is largely due to the lack of knowledge about the convention and its provisions. The appropriate authorities for its implementation have issued no regulations. Thus officials and civil servants at national level as well as the local environmental authorities are neither aware of their responsibilities nor of their rights under the convention".<sup>20</sup>

Amongst the other problems with the implementation of the NEPC, an important shortcoming is the fact that citizen participation is limited because standing is not liberally interpreted in Scandinavia. Which reflects a more general problem with the concept of equal access and that is the system is only a

<sup>18</sup> 13 ILM (1974), 511. Came into force on 5 October 1976.

<sup>19</sup> *Nordic Co-operation for the Protection of the Environment Against Air Pollution and the Possibility of Transboundary Private Litigation*, in *Transboundary Air Pollution: International Legal Aspects of the Co-operation of States*, ed. Flinterman C, Kwiatkowska B and Lammess J, Martinus Nijhoff Publishers, 1986, p 153.

<sup>20</sup> *Ibid* at p163.



effective as the legal system within which one wishes to take action. Standards really have to be similar if the principle is to be of any worth. What is the point of bringing an action in the polluter country if its legal system is slow and unreliable? Furthermore where the environmental degradation is global or emanates from more than one source then the principle is of limited use. Problems such as species extinction and global warming need global regulations.

Be that as it may, equal access is most useful in localised problems with neighbouring states. Surely, that makes it ideal for a small geographically close community like ASEAN. Equal access, as a principle is an admirable ideal. Several countries in Europe<sup>21</sup> already allow some degree of equal access amongst its neighbours. The basic idea that there should be procedural openness is one that ought to be emulated and aspired towards.

#### *Crimes against the environment?*

Many environmental offences are already designated as crimes in local jurisdictions. The Malaysian Environmental Quality Act 1974<sup>22</sup> and the Protection of Wildlife Act 1972,<sup>23</sup> for example, provide for jail sentences in the event of a breach.

A certain degree of uniformity within ASEAN can be achieved through international law making. The Convention on the Protection of the Environment through Criminal law (1998)<sup>24</sup> is one particular model. It is submitted that most of what the treaty requires its members to do are most likely already in existence. For example, the criminalizing of activities such as the dumping of hazardous wastes.

There are however a few interesting points that could be drawn from the provisions. Firstly the extension of jurisdiction to all citizens regardless of where the crime was committed. Be it in another nation or in a place that does not fall under any territorial jurisdiction.<sup>25</sup> In effect this means that a wrong doer can not escape justice in his own land simply if the offence was committed elsewhere.

On an international level, the treaty simply provides for international co-operation in criminal matters, including investigations and judicial proceedings. This goes hand in hand with the principles of equal access and non-

<sup>21</sup> Namely France, Holland and Switzerland, see Birnie P and Boyle A, *International Law and the Environment*, Clarendon Press, Oxford, 1992, at p 198.

<sup>22</sup> Laws of Malaysia, Act 127.

<sup>23</sup> Laws of Malaysia, Act 76.

<sup>24</sup> European Treaty Series No 172. Made in Strasbourg, 4 November 1998.

<sup>25</sup> Article 1 (c).

discrimination. Perhaps, this is another area that could do with further study within the ASEAN context.

### *Conclusion*

The environment recognises no borders. Neither does the environmental catastrophes that occur due to either natural causes, or more likely, through the folly of man. All nations now face a dire situation where our own environment is deteriorating and that deterioration is also affecting our neighbours. The situation can be said to be critical. With regard to finding solutions to our environmental problems, there is no time for political niceties; there is a need for urgent action. It is hoped that ASEAN as a region will recognise this and that this paper has provided some food for thought.

SESSION II - TOPICS  
Panel III - Labour and Social Security

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