A Haze of Secrecy

Access to Environmental Information in Malaysia

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Executive summary

The Malaysian public are being denied access to vital information about the environment. This is not only in breach of international standards, but also places both citizens and the environment at risk. Greater environmental openness would enable more effective participation in environmental stewardship and decision-making, promoting a truly public interest approach in terms of providing an appropriate balance between competing interests, reducing corruption and breach of the rules, and leading to greater protection for the environment. It would also help individuals safeguard themselves against environmental hazards.

Malaysia is home to one of the world's twelve areas of mega-biodiversity. Yet pollution and habitat loss – very often the consequence of big development projects – are taking their toll on local communities and are threatening the country's abundant natural richness. The government's approach has been characterised by undue secrecy and the withholding of information, seriously undermining the ability of citizens to participate in decision-making around issues which affect the environment.

Even where public health is directly and severely affected, the government has reacted with secrecy. The infamous haze which has for many years intermittently shrouded parts of Malaysia, including the capital, Kuala Lumpur, poses serious health risks to those living beneath its mist. Despite this, the Air Pollutant Index (API – the principal measurement of air pollution) was a State secret between the haze crisis of 1997/8 and that of August 2005. As a result, those affected were denied access to information which might have helped them to make important health-related decisions. In many countries, even where air quality problems are not serious, this information is available as a matter of course.

There is evidence that, in Malaysia, the environment is persistently compromised in the push for economic progress, although even this assessment is difficult given the paucity of available information. Furthermore, vital information which would enable the public to engage in public debate around the environment and realise their environmental rights is lacking. The biodiversity sector offers a good example of this. The country's immense biodiversity is being exploited through huge investments in biotechnology and yet the draft National Biotechnology Policy remains a secret, protected under the Official Secrets Act.

Development activities such as building incinerators and dams, and urban expansion threaten local environments. Both urban and rural communities have tried to participate in decision-making around such projects, but they are often denied access to the information they need to engage in an informed and empowered manner on the issues involved. Government officials delay and refuse the release of information, and the reliability of even information that is released is sometimes dubious. Excessive costs, for example for obtaining Environmental Impact Assessments (EIAs), also serve to block access to information.

International law prescribes clear standards on the right to information and, in particular, the right to access environmental information. The importance of openness in underpinning democracy is reflected in strong statements about the need for

comprehensive access to information legislation to give effect to the right to know. The 1993 Rio Declaration recognises a right of access to environmental information and this is bolstered by provisions in international treaties both of a general nature and on specific topics, such as biological diversity, wetlands, endangered species and climate change.

Despite this, Malaysia still has not adopted right to know legislation or even legislation with strong disclosure provisions relating to environmental information. Instead, the harsh Official Secrets Act, which provides for unduly broad and discretionary withholding of information by officials, is relied upon on a regular basis to keep information out of the public realm. Campaigners have had some success in accessing information through progressive provisions in the Town and Country Planning Act, but its scope is limited. Environmental Impact Assessment (EIA) rules should provide a key mechanism for the public to access information about the environment. In practice, however, shortcomings in the EIA process have seriously undermined its ability to play this role.

Malaysia's environment – from its immense natural richness and biodiversity to its endemic pollution and habitat loss – is a key part of the Malaysian people's heritage. They must be empowered to protect and sustain their environment, thereby securing their own right to life. This Report sets forth the unequivocal role of access to information in enabling the Malaysian public to shape a path towards sustainable use of their incredible yet undoubtedly endangered natural environment.

Chapter One provides a general overview of the importance of access to environmental information. It details a number of examples which demonstrate how access to environmental information can secure the right to life by improving livelihoods and equipping people with the knowledge to cope in the event of environmental disasters. A contrast is provided in **Chapter Two,** which provides an overview of the state of the environment in Malaysia, as well as specific concerns regarding the lack of information about protected areas, waterways and logging.

Chapter Three highlights international and regional standards on access to information generally, and then specifically to environmental information. The recommendations include the adoption of right to know legislation in Malaysia, in accordance with international standards. Once again, a contrast is provided in the next chapter, **Chapter Four**, which examines provisions on access to information, specifically environmental legislation, in Malaysia. National secrecy legislation is also assessed.

Chapter five provides an in-depth analysis of the system governing Environmental Impact Assessments (EIA) in Malaysia. The extent to which the EIA process facilitates access to environmental information is assessed both analytically and through a number of case studies. The chapter concludes with a review of the shortcomings of the EIA process in promoting transparency around major development projects.

Four case studies illustrating ways in which communities in Malaysia have tried to access information about development projects likely to have an impact on their local environment are presented in **Chapter Six**. The chapter outlines both successful and unsuccessful attempts to access information and, in so doing, demonstrates the

importance of access to information in enabling a community to voice their concerns about the impact of development projects.

Chapter Seven looks at access to environmental information in four different areas: conservation and protected areas, State utilities, biotechnology and disasters. Some cases studies are presented and the analysis generally reveals excessive secrecy and an unwillingness to consult properly. In each case, arguments are presented as to the benefits of greater openness.

Summary of Recommendations

Legislation

- An access to information law which is consistent with international standards should be adopted and implemented as a matter of priority.

- Secrecy legislation and legislation restricting the free flow of information should be reviewed for compliance with international standards and amended and/or repealed as necessary. In particular, the Printing Presses and Publications Act should be repealed and the Official Secrets Act should be substantially revised.

- The proposed whistleblower legislation and Biosafety Bill, which should impose stringent disclosure requirements on both government research departments and private corporations, should be adopted as a matter of urgency.

- Existing environmental legislation should be reviewed and information disclosure provisions should be added or strengthened.

Developing a culture of openness

Access to information legislation is an important first step in promoting openness, which must be backed up by measures to combat the culture of secrecy and to promote a culture of openness. Measures should include, among other things, the following:

- Public officials should receive training on openness and the provision of information to the public.

- Government departments should immediately establish mechanisms to facilitate sharing of information and to promote transparency, without waiting for access to information legislation to be adopted.

- Information on contracts, demand and supply studies, and related matters should be made available to the public to ensure that politicians are held accountable for how natural and public resources are used.

EIAs

The practice regarding Environmental Impact Assessment in Malaysia needs to be greatly improved if it is effectively to serve the public's right to know. The following measures should, as a matter of urgency, be addressed:

- EIA reports should be made public as soon as they are available and the cost of obtaining an EIA should not be prohibitive and, in particular, should not exceed the cost of producing or supplying a copy.

- Civil society and the general public should be provided with effective notice of opportunities to participate in EIA processes, and provided with sufficient information to enable them to do so effectively.

Pollution and natural disasters

The public has a right to be informed of pollution and other environmental risks that can have a damaging impact on health. At a minimum, the following steps should be taken:

- Information on what to do in case of an environmental emergency should be widely disseminated to the public on an ongoing and consistent basis in order that, in the event of such disasters, the public will be equipped to take the most appropriate form of action to safeguard their own and others' safety.

- In the event of an environmental disaster, the government should take all necessary measures to ensure that information and updates are disseminated as quickly and consistently as is possible. This will avoid people having to rely on rumours and to "second-guess" on the nature and outcome of the disaster. It will also facilitate the ability of the public to assist in the alleviation and resolution of the situation.

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Introduction

The power of openness to promote sustainable, people-centred development is now universally acknowledged. Openness is a key underpinning of democracy – it has been described by ARTICLE 19 as the 'oxygen of democracy' – and of effective participation in decision-making. Participation leads to better policies and development approaches, by ensuring that the concerns of affected communities are taken into account. It also leads to better implementation of policy and projects, by promoting local acceptance, buy-in and hopefully even ownership.

Openness is fundamental to good and accountable government. If government operates in secrecy, and citizens do not know what is being done with their public resources, accountability has not been achieved. Transparency is also now widely recognised as an important means of addressing corruption.

All of these are central to good public environmental stewardship. Many development projects impact on the environment and participation is key to ensuring an appropriate balance between the various competing interests. Where certain stakeholders, for example those with particular environmental concerns, are shut out of the policy process, this can lead to short-term gain for a few, with devastating environmental impact over the medium to longer term, negatively impacting on many.

Buy-in from affected communities is often central to policy success, for example where exploitation of natural resources is limited to protect those resources. In such cases, consultation can lead to income replacement schemes which are less environmentally harmful, and avoid breach of the rules, or even active sabotage against them, by those affected. Disaster response may require the trust of those affected, for example where preventing the spread of diseases necessitates the widespread slaughter of livestock.

Accountability for both the adoption and implementation of policies is key to the protection of the environment. Indeed, one of the most serious problems facing many countries is that a good legal and policy framework is simply not implemented. Closely related to this is the impact of corruption on the environment, whether this be through skewing policies for private gain, allocation of grants to poor practice corporations, failing to apply approved rules stringently or overlooking a failure to abide by the rules in project implementation.

A further benefit of openness is clearly apparent in relation to the environment: namely empowering the public to take measures to protect themselves against possible negative environmental impacts. It is only where individuals are properly informed about risks that they can take sensible measures, based on their own resources and situations, to mitigate them.

This Report aims to highlight the importance of access to environmental information in the context of Malaysia. It describes the reasons why access to environmental information is important, highlighting key environmental concerns in Malaysia. It assesses international standards in this area, concluding that it is now beyond dispute that individuals have a right to access environmental information.

As the Report shows, the right to access environmental information is far from respected in Malaysia either in law or in practice. Notwithstanding a massive global trend, the federal government of Malaysia still has no plans to adopt access to information legislation. Instead, sweeping secrecy laws, combined with excessive restrictions on publication, seriously limit the flow of information to the public. The few legal provisions that do promote access to environmental information are limited in scope, weak in nature and sometimes simply ignored.

In practice, a few ministries have made important strides in providing access to information about the environment. Even these ministries, however, are limited in what they can do by draconian legislation like the Official Secrets Act. Furthermore, most ministries, and indeed the government overall, are still characterised by a strong culture of secrecy. Emblematical of this is the fact that the Air Pollutant Index (API) remained a State secret from the haze crisis of 1997/8 until the haze crisis of August 2005. While this may be regarded as a somewhat bizarre anomaly, it reflects the tendency of the government to revert to secrecy whenever it faces challenges.

Even systems which should have strong inbuilt mechanisms for release of environmental information – such as Environmental Impact Assessments (EIAs) – have failed to realise their potential in this area. The scope of EIAs is often unduly limited, a problem compounded by the fact that, at least in some cases, the consultants hired to conduct the EIA have later been awarded contracts under the project previously assessed. The consultation process is also unduly limited and there are suspicions that the whole process is, again at least in some cases, just a formality, with the real decision to proceed with the project already having been taken.

These conclusions are backed up in the Report with a series of case studies – for example, looking at an incinerator project, a polluting rubber factory, urban sprawl, dams and dislocation, and various disaster responses – as well as studies of access problems in different sectors, such as protected areas, utilities, biotechnology and disasters.

The Report contains recommendations for reform throughout. Key among these is the adoption and implementation of effective, progressive access to information legislation. Reform of secrecy legislation is also key, as well as the inclusion of openness provisions in specific environmental legislation. Adopting legislation, however, is not enough. Measures need to be taken to address the culture of secrecy within government and to ensure that information relating to the environment is actively disseminated to affected stakeholders and local communities. The practice relating to EIAs needs to be improved in important ways. Finally, open information policies need to be developed to deal with environmental disasters, like the hazes and viral infections that now afflict the country periodically.

1. The Importance of Access to Environmental Information

1.1. The right to information and good governance

The right to information is acknowledged as a fundamental human right by the United Nations, in many countries around the world and by numerous leading human rights thinkers.[1] Respect for the right to information is an essential part of a democratic system. It promotes accountability and reduces corruption, and is a key pillar of good governance and a crucial factor for reducing poverty worldwide.[2] Access to information has been described as "sunshine" which "helps society to hold government and various public officials accountable for their activities".[3] Justice Kate O'Regan, a member of the South African Constitutional Court, said that the right to information is fundamental to the conception of democracy in the South African Constitution in two key ways: to help citizens become informed about activities of the government to enable them to make informed choices; and to ensure that public power is exercised legitimately and fairly.[4]

Even though Justice O'Regan's statement refers to the South African context, its main message about the importance of the right to information in a properly functioning democracy is applicable everywhere. Access to information is central to achieving political accountability through public participation, and to ensuring sound development approaches. Unless citizens can find out what governments are doing and how they spend their funds, governments have little incentive to improve performance, deliver on their promises, or even provide basic services at adequate levels. Access to information of direct relevance to their livelihoods helps citizens realise their right to life. This includes information on such matters as market prices for crops, alternative cropping or pest control options, the availability of government assistance or training programmes, or opportunities for developing new products or markets for environmental goods, from local crafts to ecotourism.[5]

The power of information to promote better development and livelihoods has been demonstrated on numerous occasions by civil society. For example, in Bangalore, India, citizen groups conducted surveys of municipal government performance and used the information to create "report cards" on the quality and efficiency of services such as water, transport, electricity, and police, and to press for reforms. In Rajasthan, India, citizen efforts to gain access to information on government spending and employment rolls led to exposure of local corruption, initiation of corrective action, and helped promote the adoption of a national right to information law. In Argentina, citizens can access a website, audited by a coalition of 15 NGOs,

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1 See Chapter 2 for detailed discussion on international and regional guarantees of the right to information

2 Transparency and accountability, together with participation and empowerment, play a key role in a human rights-based approach set forth by the United Nations in the Millennium Development Goals.

3 "Freedom of Information – Key Pillar of Good Governance", 1 April 2005, available at: http://www.developmentgateway.org/governance/highlights/viewHighlight.do~activeHighlightId=109001?activeHighlightId=109001

4 O'Regan, Kate, "Democracy and access to information in the South African Constitution: Some reflections" in *The Constitutional Right of Access to Information Seminar Report* No. 5, 2001, p. 11. Available at: http://www.kas.de/db_files/dokumente/7_dokument_dok_pdf_4936_2.pdf

5 *Ibid.*

to find easily understandable information on public expenditures across a variety of government programmes.[6]

1.2. Information and participation in environmental protection

For decades, civil society has played an active role in environmental protection and the promotion of sustainable development. For example, in Sri Lanka, civil society has been active in the conservation of the Singharaja Forest—a forest in the southwest wet zone of Sri Lanka which contains a high level of biodiversity and is considered a World Heritage Site—by pressuring the government to stop illegal logging when it was banned in the mid-1970s and in campaigning against the construction of a thermal plant at Trincomalee which could damage the environment of the district.[7] In India, the Narmada Bachao Andolan movement has brought together scattered voices of protest against the damming of the river Narmada and has raised awareness in India and internationally of the impacts the construction of such a large dam on the livelihood of the poor and marginalised communities (mostly dalits and tribals).[8] In the Pacific, local communities, citizens' groups and the Japanese government have worked together to negotiate with major polluters and, as a result, several companies have now taken voluntary actions on pollution control, setting standards which are stricter than national requirements.

The role of the community in environmental protection and sustainable development has been recognised by national governments and international bodies. New Zealand law requires the government to consult widely with community stakeholders and interest groups, including the Maori people, when developing their ten-year policies and plans.[9] Section 57 of the (recently suspended) 1997 Thai Constitution recognises the right of people to participate in the protection of natural resources and the environment.

The UN has long been a proponent of public participation in sustainable development, and this has been reflected in many of its declarations and programmes. For instance, Article 26 of the Declaration of the Johannesburg World Summit on Sustainable Development 2002 states that sustainable development requires a long-term perspective and broad based participation in policy formulation, decision-making and implementation at all levels.[10]

It is clear that meaningful participation–which not only means consulting the public on projects already planned but also actively engaging the public in policy making and agenda setting and the monitoring of ongoing projects/environmental issues–is possible only where the public have

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[6] Narayan, D., ed., Empowerment and Poverty Reduction: A Sourcebook (Washington DC: World Bank, 2002). Available at: http://siteresources.worldbank.org/INTEMPOWERMENT/Resources/486312-1095094954594/draft.pdf As quoted in *The World Resources 2005*, Chapter 3, available at: http://www.grida.no/wrr/025.htm

[7] See for example: "Sri Lanka's govt. abandons Trinco coal power plant project", TamilNet, 17 May 2003. Available at: http://www.tamilnet.com/art.html?catid=13&artid=9002

[8] For further information on the civil society movement against the construction of dams in Narmada River, see the website of the Friends of Narmada at: http://www.narmada.org/index.html

[9] Global Environmental Outlook 2000. Available at: http://www.unep.org/GEO2000/english/0164.htm

[10] The full text of the Declaration is available at: http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm

access to relevant information. Access to environmental information is also widely recognised as an instrumental device for securing environmental protection and sustainable development. The link between public participation and access to information was clearly cemented by Principle 10 of the 1992 Rio Declaration for Sustainable Development, adopted by 178 nations (see below, under Access to Environmental Information).

It is also increasingly being recognised that the right to information is essential for the realisation and protection of other human rights, including socio-economic and environmental rights.[11]

1.3. Access to environmental information and the right to life

> [S]ide by side with fundamental rights such as liberty, equality and necessary conditions for people's life, there is the right to the environment […] The right to a healthy environment cannot be separated from the right to life and health of human beings. In fact, factors that are deleterious to the environment cause irreparable harm to human beings. If this is so we can state that the right to the environment is a right fundamental to the existence of humanity.

(Quotation from the Columbian Court of First Instance in the 1993 case of *Antonio Mauricio Monroy Cespedes).* [12]

It follows from the previous section that access to information for public participation is key to achieving environmental protection and sustainable development. Indeed, for hundreds of millions of poor people all over the world, especially the rural poor, access to environmental information is more than a mere realisation of their democratic rights; it is a realisation of the right to livelihood and, by extension, the right to life.[13] The poor are particularly vulnerable as they tend to rely greatly on natural resources and their environment to earn a living through small-scale agriculture. Ironically, it is the poor, along with minority groups, who are most likely to be denied access to environmental information and to have less opportunity to participate in decision-making.

For example, information regarding an imminent drought or flood, or the threat of climate change in general is essential to farmers and fisher folk.[14] For farmers, a change in rainfall patterns can mean their crops fail to mature and communities go hungry. The considerable impact of the 1997/1998, El Niño-related drought in Asia provides a good example of this. In

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[11] For further reading on the link between the right to information and other rights, see Jagwanth, Saras, "The Right to Information as a Leverage Right", in Richard Calland and Allison Tilley (ed), *The Right to Know, The Right to Live* (Cape Town: ODAC, 2002), pp. 3-17. In the paper, she described the right to information as providing leverage for other rights.

[12] Fabra, Adriana and Arnal, Ava, Background Paper No. 6, Review of jurisprudence on human rights and the environment in Latin America for the Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, 14-16 January 2002, Geneva, available at: http://www.unhchr.ch/environment/bp6.html

[13] For more on the right to livelihood see The People's Movement for Human Rights Education page on the Human Right to Livelihood and Land at: http://www.pdhre.org/rights/land.html

[14] Fisheries Management Science Programme Department for International Development (DfID), "Effects of climate change on the sustainability of capture and enhancement fisheries important to the poor: analysis of the vulnerability and adaptability of fisher folk living in poverty" Project No. R4778J, November 2004, available at: http://www.dfid.gov.uk/pubs/files/summary_climatechangefisheries.pdf.

China, the drought damaged six million hectares of crops, while it exacerbated forest fires in Kalimantan, Indonesia,[15] and aggravated flooding in Bangladesh, which claimed hundreds of lives and affected more than 20 million.[16] Advance information about these events could have helped mitigate the impact.

Access to information on changes in weather patterns can directly save lives. Studies show that resource-dependent communities in the developing world have adapted to climate variability throughout history. In small-scale fisheries, in both marine and inland waters, and ranging from Artic Canada to Equatorial Pacific, migration and livelihood diversification are key adaptive strategies.[17] However, the increased frequency of extreme weather events due to climate change has hindered their ability to adapt. People living in these communities need to be informed of the consequences and risks of environmental change/disaster, and of how to minimise them. Knowing what changes lie ahead gives farmers, fisher folk and the poor in general a head start in developing new ways to prevent serious damage to their livelihood. As Principle 10 of the aforementioned Rio Declaration clearly states, it is the obligation of governments to disseminate this key information.

Access to information is also essential in the context of disaster. In Bangladesh, people have developed ways to adjust their livelihood around the monsoon, which is a natural occurrence that causes floods covering 20-30% of the country every year.[18] However, as the destruction caused by the 2002 Sunamganj flash flood demonstrated, mismanagement, lack of monitoring and corruption can cause unnecessary suffering. As local people and the Bangladesh Disaster Forum argue, the right to information must be guaranteed: "Government institutions are obliged to provide early flood warnings so communities can be prepared. In 2002 this did not occur."[19] Inhabitants of the villages and isolated areas are particularly vulnerable as they often lack access to the media and telecommunications. A similar case of lack of information on flooding occurred in Jakarta in February 2002. Many people were not prepared for the torrential rains, and the victims said that they were unaware of any potential flood disaster: "They [the government] had not prepared us for the flood and did not assist us during the flooding."[20] In both Bangladesh and Jakarta, lack of access to information resulted in preventable damage.

A good model for providing information on impending environmental disaster is the European Commission's Natural and Environmental Disaster Information Exchange System (NEDIES). One of the rationales for this project was the idea that Member States could benefit from the experience acquired in the context of disasters occurring in other European Union States. Among other objectives, the NEDIES project has been launched in order to "protect citizens

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15 Food and Agriculture Organization (FAO), "The Impact of El Niño and Other Weather Anomalies on Crop Production in Asia", GIEWS Special Report, 1997, available at: http://www.fao.org/WAICENT/faoinfo/economic/giews/english/alertes/nino997.htm

16 OCHA Situation Report No. 8, 9 September 1998, available at: http://cidi.org/disaster/99b/0004.html

17 *Ibid.*, p. 3.

18 DFID, "Negotiating Social Responsibility", available at: http://www.livelihoods.org/info/docs/WSSD_Bang.pdf Last accessed on 25 September 2006

19 *Ibid*, p. 3.

20 The World Bank, *Cities in Transition: Urban Sector Review in an Era of Decentralization in Indonesia*, East Asia Urban Living Paper Series, 30 June 2003, p. 63. Available at: http://www.worldbank.org/urban/publicat/indonesia_english.pdf

from disasters and accidents via the dissemination of targeted information on risk perception and awareness."[21] This is based on NEDIES specific expertise in natural hazard investigations and the use of state of the art technologies to disseminate information through meetings, workshops and online reporting, and to provide lessons learnt forms online. Another example of a government-initiated service to provide information on disaster is the government of British Columbia's Provincial Emergency Program,[22] which promotes 'personal preparedness' for disaster through a comprehensive directory of current information and suggestions for precautionary measures to help minimise the effects of specific hazards.[23]

The need for access to information has also been demonstrated in the context of people living in close proximity to chemical or nuclear plants, or who might be at risk of chemical/nuclear contamination. Two of the most prominent incidents are the Bhopal incident in India and the Chernobyl disaster in the then Soviet Union. In 1984, the Union Carbide factory in Bhopal released poisonous gas into the atmosphere that killed more than 3,000 people instantly and scarred or disabled more than half a million others.[24] In 1986, a nuclear power station, located 10 miles northeast of the city of Chernobyl, exploded and released massive amounts of radiation into the atmosphere. Years after the accident, many scientists maintain that even present day incidences of cancer and birth defects in the region are directly attributable to the explosion. For a period of time, people in the Soviet Union and surrounding countries were kept in the dark on the potentially damaging health effects of the accident. Much of the information related to Chernobyl was classified as "secret".[25] Yet, if local residents had had access to information about the radiation levels in the surrounding areas and the potential damages to their health, they might have been able to take more effective action to safeguard their health. For example, they may have considered relocating to a more environmentally safe location. Such information would have also empowered them, for example, to lobby the government for compensation.

Box 1: The Media and Disasters

[21] For more information, see: http://nedies.jrc.it/index.asp?ID=67.

[22] British Columbia is a province in Canada.

[23] For more information, see http://www.ess.bc.ca/prepared.htm

[24] Different sources give different figures for the number affected in the Bhopal incident. The government of the State of Madhya Pradesh, where the incident took place, reported that more than 3,000 people died and thousands became physically impaired (see the website of Government of Madhya Pradesh at: http://www.mp.nic.in/bgtrrdmp/profile.htm). Amnesty International claims that more than 7,000 people died in the aftermath of the accident and 15,000 people died later due to exposure to toxin associated illness. See, for example. "A bitter wind in Bhopal", available at: http://web.amnesty.org/wire/December2004/Bhopal

[25] The BBC reported on 121 KGB documents released in Ukraine in 2003, including a report from 1984, which notes deficiencies in the two of the Chernobyl reactors, available at: http://news.bbc.co.uk/1/hi/world/europe/2965375.stm

Role of the Media in Raising Awareness of Environmental Problems

The media plays a key role in dissemination of information, including information related to the environment and to disasters. In 1990, ARTICLE 19 published a report on famine and censorship analysing the patterns of, and responses to, famine in China in 1959-61, and in Ethiopia and Sudan in the 1980s. The report showed that if timely information is collected and made freely available, widespread damage and loss of life can be mitigated. The report went on to demonstrate that a widespread and free media, at national and local level, which reaches a substantial percentage of the population, reduces the likelihood of devastating famine. Even in repressive countries like China, the media still plays quite an important role in raising public awareness of environmental issues. Journalist Dai Qing, for example, was one of the first people to warn and inform the public in the mid 1980s about the problems that might arise from the displacement of over a million people and the potential environmental risks associated with the development of the Three Gorges Dam, that spans the Yangtze River at Sandouping, in Yichang and Hubei provinces.

The media can also play an important role in disaster management before, during and after a disaster. In many areas affected by natural or other disasters, the mass media are the only means by which messages can be disseminated quickly and widely. The media's role is not limited simply to providing a channel for official information dissemination. The media can also play an important role in ensuring that complex messages are translated into a meaningful and understandable form. In order for it to be able to perform this role, the media needs to be able to access accurate and timely information from credible sources. In the longer term, the media can also play a role in raising awareness and facilitating discussions on disasters and other risks, with a view to educating people on preventive and survival actions. After a disaster, the media can provide key information to survivors and monitor relief efforts. The media can also serve to relay messages from those affected to officials and others trying to respond to the disaster.

This role was very much in evidence in the response to the Asian Tsunami in December 2005. In Sri Lanka, in the aftermath of the Tsunami, community media broadcast vital information from government officials and NGOs to local populations, and also relayed information from members of the community on their problems and needs to those managing the crisis. In Aceh, Indonesia, the daily newspaper *Serambi Indonesia* and Metro TV provided services to help locate missing relatives. The Suara Muhammadyah Community Radio, based in Aceh, made humanitarian issues the focus of five programmes: news, information on missing persons, health information, counselling and religious programmes.

Most of the text in this box is an excerpt from ARTICLE 19's publication "Humanitarian Disasters and Information Rights", published in 2005 available at:
http://www.article19.org/pdfs/publications/freedom-of-information-humanitarian-disasters.pdf

2. State of the Environment in Malaysia

Malaysia is one of the world's twelve areas of mega-biodiversity, home to a number of species disproportionate to its geographical size.[26] This has been recognised in the protection of areas under UNESCO's World Heritage awards, with the Mulu caves of Sarawak being seen as an area of exceptional importance.

This diversity is born of the age of Malaysia's natural heritage, with tropical rainforests that escaped the ravages of the Ice Ages, allowing evolution to occur unimpeded, with niche environments producing a rich panoply of animal and plant life. The slopes of Mount Kinabalu, for example, are home to over 1,000 species of orchid, 579 species of fern and 98 species of figs.[27]

A lot of the species are endemic, being found only in particular areas. For example, of Peninsular Malaysia's 9,000 known flowering species, between 30% and 50% are strictly endemic and can be found only in the Peninsula.[28] This renders them fragile and highly prone to threat, whether natural or manmade. Some species are found only in one small area, such as a particular limestone outcrop. This exacerbates conservation concerns.

Habitat loss remains one of the major threats to Malaysia's biodiversity, whether in the rainforests, the seas or the rivers. A lack of political will to enforce legislation on the environment persists, as demonstrated recently by the Department of Environment's statement that it lacked power to act against toxic dumping on private property,[29] and the continuing lack of resources allocated to environmental protection.

In addition to its inherent harm, habitat loss and the unprecedented rapid change to Malaysia's natural ecosystems are also having an impact upon human life. Disasters due to mismanagement of hill slopes, such as the collapse of the Highland Towers condominium in 1993, concerns regarding water supply and quality due to river pollution and leakage, and the recurring problems of air pollution and haze are strong indicators that there is a need to re-evaluate Malaysia's environmental strategy.

This chapter examines some general trends in environmental management and protection.

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[26] World ranking of mega-biodiversity countries can be seen in Giri, Prasad Chandra, *et al.*, "Global Biodiversity Data and Information", Table 4, p. 6, available at: http://planet.unescap.org/stat/envstat/stwes-26.pdf#search=%22list%20of%20countries%2C%20mega%20biodiversity%22

[27] Soepadmo, E., ed., *The Encyclopaedia of Malaysia*, *Volume Two: Plants*, (Kuala Lumpur: Editions Didier Millet, 1998), p. 31.

[28] Jabatan Perlindungan Hidupan Liar dan Taman Negara (Perhilitan) Semenanjung Malaysia, *Capacity building and strengthening of the protected areas system in Peninsular Malaysia: A master plan*, 2nd Edition, (Kuala Lumpur: 1996), p. ii.

[29] See, for example, Emmanuel, Tony and Annie Freeda Cruz, "Helpless!", *New Straits Times,* 20 April 2005.

2.1. History of conservation

The history of environmental management in Malaysia has had a lasting impact on its institutional framework. While native methods of harvesting and exploiting Malaysia's natural resources inevitably affected the surrounding environment, environmental degradation began to be of serious concern during the period of British rule. Mining, for example, had significantly degraded the quality of the Perak River by the middle of the nineteenth century.[30] Following the Second World War, growth in demand for rubber led to the opening up of land for large British owned and run plantations. Land use change from forest to plantations, particularly oil palm, remains the major threat to biodiversity in Malaysia.[31] The Peninsula's first environmental legislation, enacted in the late nineteenth century, dealt with land use and mining. The British also gazetted the first protected areas, the oldest being Chior Wildlife Reserve in Perak, which dates back to 1903.[32] One of the key problems with the British approach to environmental management in Malaysia was that it looked at problems in a piecemeal fashion. For example, there was legislation on Natural Resources, a Mining Code and a Forest Enactment, all with potentially overlapping jurisdictions. The approach also treated the environment as a resource to be exploited for economic gain, rather than as something with intrinsic or conservation value.

Independence hastened both development and environmental degradation. For example, as late as 1974, around 44% of the Langat Basin, just outside the capital city of Kuala Lumpur, was forested, with a further 53% under agriculture, and only just over 2% considered "developed", more than half of which was classed as "shrub land". By 2001, the forested area had fallen to just under 25%, while the "developed area" had risen to almost 15%, only 4% being "shrub land". The percentage of both agriculture and water bodies also increased.[33]

Development brought a shift from forested areas to largely mono-culture plantations,[34] along with the construction of a sophisticated road network, the damming of rivers and the expansion of urban areas. Traditional agricultural and fishery practices gave way to more intensive modern methods, such as trawling, and the use of chemical fertilisers and pesticides. Timber production was a huge revenue generator for the State,[35] particularly for the East Malaysian states. This was complemented by the exploitation (both large and small) of other natural resources, from oil and gas to smaller scale collection of corals and shells for tourist souvenirs.

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[30] Brookfield, Harold, Lesley Potter, and Yvonne Byron, *UNU Studies on Critical Environmental Regions: In place of the forest: Environmental and socio-economic transformation in Borneo and the Eastern Malay Peninsula*, (Tokyo: United Nations University Press, 1995), p. 32.

[31] See, for example, *Capacity building and strengthening of the protected areas system in Peninsular Malaysia: A master plan*, note 28.

[32] Sani, Sham, ed., *The Encyclopaedia of Malaysia, Volume One: The Environment*, p. 97.

[33] Mokhtar, Mazlin B., Shaharuddin, Idrus and Aziz, Sarah, eds., *Ecosystem health of the Langat Basin: Proceedings of the 2003 research symposium on ecosystem of the Langat Basin*, (Kuala Lumpur: Institut Alam Sekitar Dan Pembangunan (Lestari) Universiti Kebangsaan Malaysia, 2004), Table 1: Land Use/Land Cover Change in Langat Basin 1974-2001 in ha., p. 27.

[34] *Capacity building and strengthening of the protected areas system in Peninsular Malaysia: A master plan*, note 28.

[35] Tachibana, Satoshi, "Forest-related industries and timber exports of Malaysia: Policy and structure", paper presented at the Third IGES International Workshop on Forest Conservation Strategies for Asia and the Pacific Region, September 1999.

Alongside these developments, increased air and water pollution occurred, as the pace of industrialisation increased.

Development contributed to a substantial rise in per capita income but, by the early 1990s, it became widely recognised that the lack of environmental protection was having a negative effect on the quality of life and that there was a need to balance economic development with environmental protection. The government did not undergo a major re-ordering of priorities, but conservation began to be seen as being of increasing importance.

2.2. Specific concerns

Protected Areas

In 1995, 11% of Malaysia's total land area was protected to some extent, or proposed for protection as parks or sanctuaries.[36] Since then, major declarations of protected areas, such as the Belum area in Perak and the Sedili Kecil Swamp Forest in Johor, have been made. However, concerns remain regarding the definitions of protection and how well protected areas are.

Malaysia has a variety of definitions of protected areas, with different definitions and legislation in effect in Sabah and Sarawak. Permanent Forest Estates (PFEs), for example, can be degazetted by State governments for a variety of purposes. There has been little dialogue between the Forestry Department, responsible for nearly 90% of gazetted forests, and the Department of Wildlife and National Parks.[37] This lack of dialogue and information exchange is changing due to the 2004 change in the structure of Federal ministries, which brought both departments together under the newly created Ministry of Natural Resources and Environment (NRE). One example of how relations have improved is that there is now an exchange of officers between the two departments.

Unfortunately, however, the rules governing most protected areas do not meet the essential conditions to ensure conservation of ecosystems, namely that protection be long lasting and that the reserves be managed to meet their objectives.[38] For example, most of the protected areas are gazetted under the National Forestry Act 1984, which allows an equal replacement area to be gazetted for every hectare de-gazetted. The Act does not specify that the land must have the same biodiversity or be of equal quality, only of equal size.[39] This can compound problems of fragmentation as well as posing a threat to continuing studies on biodiversity. Within the

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[36] Gregory, Rick, *Incentives for protected areas and biological diversity conservation in Malaysia: A preliminary assessment,* (WWF Malaysia, 1997), Table 3: Areas under protected and protection status in Malaysia, p. 10.

[37] This is well documented in *Capacity building and strengthening of the protected areas system in Peninsular Malaysia: A master plan*, the Executive Summary, note *28*.

[38] *Capacity building and strengthening of the protected areas system in Peninsular Malaysia: A master plan*, Executive Summary, note 28.

[39] *Incentives for protected areas and biological diversity conservation in Malaysia: A preliminary assessment*, note 36, p.22.

category of PFEs, there are eleven further categories, each allowing for different uses, from a protection forest which is gazetted for water catchment purposes, to a production forest, which can be harvested for timber and non-timber forest products.[40]

Another concern is that there are inadequate buffer zones for protected areas, which can suffer environmental degradation due to activities in nearby areas.[41] There are also concerns that not all habitats are adequately represented, such as coastal dipterocarp forests and, more generally, the critically important extreme lowland dipterocarp forests.

Waterways

Both the marine and riparian environments are facing increasing pressure from pollution, over-fishing and withdrawal of fresh water for human needs, exacerbated by dam construction and destruction of water catchment areas. According to a report by Dato' Haji Keizrul Abdullah, Director General of the Department of Irrigation and Drainage:

> From data compiled by the Department of Environment, the overall trend points to a slow but steady deterioration in the water quality of rivers around the country. Of 116 rivers monitored, 42 are rated as clean, 61 slightly polluted and 13 polluted. In terms of heavy metal contamination, 55 rivers have been found to exceed the maximum limit of 0.001 mg/l for cadmium, 44 rivers exceeded the iron limit of 1.00 mg/I, 36 rivers exceeded the lead limit of 0.01 mg/l and 24 rivers exceeded the mercury limit of 0.0001 mg/l.[42]

Coastal erosion has been identified as problematic in terms of the impact it is having on the livelihood of coastal communities, particularly fisher folk, and the cost of preventing further erosion.[43]

A major problem with conserving the integrity of Malaysia's waterways is a lack of enforcement. The Penang Inshore Fishermen's Welfare Association, for example, has mobilised fisher folk to conduct their own monitoring of illegal trawling activities in an attempt to safeguard their own livelihoods. The group has also undertaken activities such as cleaning up polluted waterways and replanting mangroves, a holistic effort that has helped raise the income of the community. Cleaning up the rivers, for example, has helped villagers increase the catch of river lobsters from nothing to two kilogrammes daily, worth RM60 (US$20).[44]

Recent concerns over leakage from landfills, leading to a nauseating ammonia smell in the water supplied to homes in the Klang Valley,[45] also show the extensive problems in the policing of both waterways and water supply. The Bukit Tagar landfill was identified as the source of the pollution, but it was a problem that had been recognised in the landfill's Environment Impact Assessment, which had been passed despite obvious shortcomings and environmental hazards.

Access to clean drinking water and sanitation is one of the key indicators for the Millennium Development Goal (MDG) on environmental sustainability (MDG7). Malaysia's success in

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[40] Ministry of Science, Technology and the Environment, *Assessment of biological diversity in Malaysia*, 1997, p. 64.

[41] See, for example, Swamp Forest Project, *Black Water Jewel: South-East Pahang Peat Swamp Forest,* (Kuala Lumpur: Wetlands International Malaysia, 2004), p. 51.

[42] Dato' Hj Keizrul Abdullah, "Towards realising integrated river basin management in Malaysia" The speech is available at: http://www.water.gov.my/web/river/hyperlink/irbm1.htm

providing clean water and sanitation facilities has been remarkable, with over 80% of the population, and 98% in urban areas, having access to clean water, and over 99% of the population having access to sanitation services.[46] However, as the Bukit Tagar example illustrates, water pollution represents a major challenge to sustaining or increasing this coverage.[47]

Logging

Logging has been one of Malaysia's most high profile environmental problems. A group of environmental groups working on timber and forest-related issues, the Ring of Fire, declared Sarawak the world's worst managed area in terms of forest conservation at a meeting in Kuala Lumpur in 2001.

Malaysia was at the forefront of campaigns against tropical timber harvesting during the 1990's, but has since recognised the importance, both economic and environmental, of eco-labelling of forest products. As of 2003, timber still accounts for 3.4% of GDP and 4.3% of export earnings.[48] There is separate legislation governing timber harvesting in the Peninsula, Sabah and Sarawak. The Peninsula, under the National Forestry Act, licenses timber felling for a much shorter period than in Sabah, for example, around 12 months as opposed to around 100 years. The rationale behind the longer licensing period is that it will encourage the license-holder to engage in sustainable management.

There is no legal requirement for timber certification, though economic incentives exist, in terms of larger export markets and the ability to command higher prices for timber that have been certified as having been harvested in a sustainable fashion. There are two main licensing bodies operating in the Peninsula, the Malaysian Timber Certification Council (MTCC) and the ISO 9000 system. The Forest Stewardship Council (FSC) is being used in Sabah. The MTCC has one representative from the NGO community sitting on its board of trustees, and its certification is recognised in the Netherlands, Denmark, the United Kingdom, New Zealand and France.[49] While it is registered as a company, it falls under the Ministry of Plantation Industries and Commodities.[50]

The process and procedures for certification are publicised by the MTCC and it publishes its reports on its website.

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[43] See, for example, Climate.org "MALAYSIA: Malaysia Awakens to Erosions Threat Along Its Extensive Coast". Available at: www.climate.org

[44] Part of an interview conducted by the author for a series of articles for *The Sun* in April 2004

[45] This was widely reported in March 2006.

[46] United Nations Country Team Malaysia, *Malaysia: Achieving the Millennium development Goals*, UNDP, 2005.

[47] "Dirty water" was also identified as a major challenge for the water industry by the Minister for Energy, Water and Communications at the Malaysia Water Association annual dinner, 24 September 2005.

[48] Wells, Adrian, "Systems for verification of legality in the forest sector: Malaysia: Domestic timber products and timber imports", VERIFOR Case Study No.8. Available at: http://www.verifor.org

[49] From the MTCC website, www.mtcc.com.my

[50] Systems for verification of legality in the forest sector: Malaysia: Domestic timber products and timber imports, note 48, p. 4.

The ISO process is used in all three Malaysian jurisdictions, but relates primarily to procedures, rather than monitoring environmental impact and sustainability in the field.

Lack of knowledge

Malaysia still suffers from a deficit of specialists engaged in research, to the extent that there is still much uncertainty on what the country's natural heritage consists of. Interviews with academics reveal that students are interested in areas perceived as being lucrative. Some efforts have been made to address this problem, with the establishment of institutes such as Lestari (Institute for Environment and Development) at the Universiti Kebangsaan Malaysia. However, more resources are required to fill important gaps in the ecological database.

Box 2: The impact of development and environmental change on female land ownership[51]

The Iban Women's Loss of Land

The building of the Batang Ai hydro-electric dam in Sarawak led to the resettlement of the indigenous Iban community. This in turn brought severe ecological, social, cultural and economic disruption to the people, especially the women who have lost all traditional rights to land and other resources. In traditional Iban custom, men and women work equally in paddy planting, acquire land rights and settlement rights equally and inherit property equally. In the process of resettlement, however, this has changed. Compensation ranging from MR10,000 to MR400,000 (approximately US$4,000 to US$160,000) was mostly given to the men, under the planners' false assumption that the men were the "heads of households".

With the commercialisation of agriculture and SALCRA's (Sarawak Land Consolidation and Rehabilitation Authority) policy of one certificate of ownership per household, women's land rights have been abrogated and a dependency relationship created. One of the most traumatic effects of resettlement is that the women now have no land to plant paddy. Traditionally, women are the custodians of the paddy pun (sacred paddy) and most settlers continued to grow paddy on SALCRA land when they first moved into the area as commercial crops were yet to be planted. However, this is no longer possible as the land is now planted with cocoa and rubber. There is a therefore rising desperation among the women to find land for their paddy pun to be planted every year in perpetuity.

[51] Hew, Cheng Sim and Kedit, Flora, "The Batang Ai dam, resettlement and rural Iban women" in Heyzer, Noeleen, ed., *Women farmers and rural change in Asia: towards equal access and participation*, (Kuala Lumpur: Asian and Pacific Development Centre, 1987), as quoted in Wee, Viviene, "The Gender Dimension in Environment and Development Policy: The Southeast Asian Experience", available at: http://www.nautilus.org/archives/pub/ftp/aprenet/Library/Papers/devseasia

3. The Right to Information: International Standards

3.1. International guarantees

The right to information has been recognised as a fundamental human right and an integral part of the right to freedom of expression. The latter is guaranteed by both the *Universal Declaration on Human Rights* (UDHR)[52] and the *International Covenant on Civil and Political Rights* (ICCPR).[53] Article 19 of the UDHR states:

> (1) Everyone shall have the right to freedom of opinion.
>
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

The UDHR, as a UN General Assembly resolution, is not directly binding on States. However parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.[54]

At the international level, the right to information is also guaranteed under the *International Covenant on Civil and Political Rights* (ICCPR),[55] a treaty ratified by some States.[56] It imposes formal legal obligations on State Parties to respect its provisions and elaborates on many of the rights included in the UDHR. Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found in Article 19 of the UDHR.

The ICCPR is an authoritative elaboration of the rights set out in the UDHR and hence of some relevance in the discussion about the right to information even in countries which have neither signed nor ratified it, such as Malaysia.[57]

The right to information is also protected, as an integral part of the right to expression, in three regional human rights instruments: at Article 10 of the *European Convention on Human Rights*

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[52] UN General Assembly Resolution 217A(III), adopted 10 December 1948.

[53] UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976; By November 2004, this covenant has been ratified by 156 countries.

[54] See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit).

[55] UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

[56] As of November 2006.

[57] Malaysia has only ratified two of the main international human rights treaties, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC). Both were ratified in 1995. Despite the national human rights commission's recommendation, the Malaysian Government has not ratified two key international covenants, the ICCPR and the International Covenant on Economics, Social and Cultural Rights (ICESCR).

(ECHR),[58] Article 13 of the *American Convention on Human Rights* (ACHR)[59] and Article 9 of the *African Charter on Human and Peoples' Rights* (ACHPR).[60]

In addition to being included in the right to freedom of expression, the right to access information has also been founded on other human rights. *In Guerra and Others v. Italy*,[61] for example, the European Court of Human Rights held that Italy had violated the right to privacy and family life (protected by Article 8 of the ECHR) by not providing the applicants with information which would have allowed an assessment of the risks of living in close proximity to a chemical plant. The Court held that the right to family life must be interpreted as granting a right to information about hazardous activities that may have an impact on the environment.[62]

The importance of freedom of expression and information is clear from UN Resolution 59(I), adopted by the UN General Assembly in 1946, which states: "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated."[63] This sentiment has been echoed by the UN Human Rights Committee, which stated: "The right to freedom of expression is of paramount importance in any democratic society."[64]

As a Member of the Commonwealth, Malaysia has affirmed its general commitment to the protection of human rights, the right to freedom of expression and the right to information, specifically through statements issued by the Commonwealth Heads of Government Meetings.[65] In the 2002 Coolum Declaration, the Commonwealth Heads of Government declared that they stood united in their commitment to democracy, the rule of law, good governance, freedom of expression and the protection of human rights.[66]

These provisions are increasingly seen as imposing an obligation on States to enact right to information laws. The United Nations Special Rapporteur on Freedom of Opinion and Expression,[67] for example, has repeatedly called on all States to adopt and implement right to information legislation.[68] In 1995, the UN Special Rapporteur stated:

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58 Adopted 4 November 1950, in force 3 September 1953.

59 Adopted 22 November 1969, in force 18 July 1978.

60 Adopted 26 June 1981, in force 21 October 1986.

61 19 February 1998, Application No. 14967/89. Available at: http://www.worldlii.org/eu/cases/ECHR/1998/7.html

62 Jagwanth, Saras, "The Right to Information as a Leverage Right", see note 11, p. 6.

63 14 December 1946.

64 Communication No. 1009/2001, para 7.3. This document can be accessed at: http://www.unhchr.ch/tbs/doc.nsf/0ac7e03e4fe8f2bdc125698a0053bf66/140844cdffddda67c12571cc00511f56?OpenDocument

65 See the Harare Commonwealth Declaration, Zimbabwe, 1991; Declaration of Commonwealth Principles, Singapore, 1971. On freedom of expression specifically, see the Abuja Communique, 8 December 2003 and the Coolum Declaration on the Commonwealth in the 21st Century: Continuity and Renewal, Australia, 2002.

66 *Ibid.*, first paragraph.

67 The Office of the Special Rapporteur on of Opinion and Expression was established by the UN Commission on Human Rights, the most authoritative UN human rights body, in 1993: Resolution 1993/45, 5 March 1993.

68 See, for example, the Concluding Observations of the Human Rights Committee in relation to Trinidad and Tobago, UN Doc. No. CCPR/CO/70/TTO/Add.1, 15 January 2001. 14. The comments of the UN Special Rapporteur on freedom of Opinion and Expression are discussed at length below.

> The Special Rapporteur, therefore, underscores once again that the tendency of many Governments to withhold information from the people at large … is to be strongly checked.[69]

His comments were welcomed by the UN Commission on Human Rights, which called on the Special Rapporteur to "develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications".[70] In his 1998 Annual Report, the Special Rapporteur reaffirmed that the right to information includes the right to access information held by the State:

> [T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems…."[71]

The UN Special Rapporteur was joined in his call for legal recognition of the right to information by his regional counterparts – the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe and the Special Rapporteur on Freedom of Expression of the Organisation of American States – in a Joint Declaration issued in November 1999. The three reiterated their call in December 2004, stating:

> The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.[72]

The right to information has also been explicitly recognised in all three regional systems for the protection of human rights. Within the Inter-American system, the Inter-American Commission on Human Rights approved the *Inter-American Declaration of Principles on Freedom of Expression* in October 2000.[73] The Principles unequivocally recognise a right to access information held by the State, as both an aspect of freedom of expression and a fundamental right on its own:

> 3. Every person has the right to access information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it.
>
> 4. Access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

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[69] Report of the Special Rapporteur, 4 February 1997, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1997/31

[70] Resolution 1997/27, 11 April 1997. 12(d)

[71] Report of the Special Rapporteur, 28 January 1998, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40. 14

[72] 6 December 2004. Available at: http://www.cidh.org/Relatoria/showarticle.asp?artID=319&lID=1

[73] 108th Regular Session, 19 October 2000

In a very recent decision, the Inter-American Court of Human Rights has held that Article 13 of the *American Convention on Human Rights*,[74] which guarantees freedom of expression, specifically includes a right to access information held by public bodies.[75]

The African Commission on Human and Peoples' Rights recently adopted a *Declaration of Principles on Freedom of Expression in Africa*,[76] Principle IV of which states, in part:

> 1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
>
> 2. The right to information shall be guaranteed by law in accordance with the following principles:
>
> - everyone has the right to access information held by public bodies;
> - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
> - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
> - public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
> - no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
> - secrecy laws shall be amended as necessary to comply with freedom of information principles.

Within Europe, the Committee of Ministers of the Council of Europe adopted a Recommendation on Access to Official Documents in 2002.[77] Principle III provides generally:

> Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.

The rest of the Recommendation goes on to elaborate in some detail the principles which should apply to this right. The Council of Europe is presently engaged in preparing a binding treaty on the right to information.[78]

The Commonwealth has also recognised the fundamental importance of the right to information and taken a number of significant steps to elaborate on the content of that right.[79] In March 1999, a Commonwealth Expert Group Meeting in London adopted a document setting out a

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[74] Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978.

[75] *Caso Claude Reyes and Others v. Chile*, 19 September 2006.

[76] Adopted at the 32nd Session, 17-23 October 2002.

[77] Recommendation No. R(2002)2, adopted 21 February 2002.

[78] The Group of Specialists on Access to Official Documents is responsible for this work.

[79] See the *Communiqué*, Meeting of Commonwealth Law Ministers (Port of Spain: 10 May 1999).

number of principles and guidelines on the right to know and freedom of information as a human right, including the following:

> Freedom of information should be guaranteed as a legal and enforceable right permitting every individual to obtain records and information held by the executive, the legislative and the judicial arms of the state, as well as any government owned corporation and any other body carrying out public functions.[80]

These principles and guidelines were adopted by the Commonwealth Law Ministers at their May 1999 Meeting.[81] The Communiqué from the Law Ministers Meeting was forwarded to the Commonwealth Heads of Government Meeting in November 1999, where it was considered by the Committee of the Whole on Commonwealth Functional Co-operation. The Committee's Report, which was approved by the Heads of Government,[82] stated:

> The Committee took note of the Commonwealth Freedom of Information Principles endorsed by Commonwealth Law Ministers and forwarded to Heads of Government. It recognized the importance of public access to official information, both in promoting transparency and accountable governance and in encouraging the full participation of citizens in the democratic process.[83]

Implementation of the right to access to information is also a key requirement imposed on States parties to the UN Convention against Corruption. Malaysia signed this Convention on 9 December 2003, although it has not so far ratified it.[84] Article 13 of the Convention requires that States should "[ensure] that the public has effective access to information".

National right to information laws have been adopted in record numbers over the past ten years, in countries which include India, Israel, Jamaica, Japan, Mexico, Pakistan, Peru, South Africa, South Korea, Thailand, Trinidad and Tobago, and the United Kingdom, as well as most of East and Central Europe. A growing number of Chinese cities and regions have adopted access to information legislation and national legislation is under consideration. These nations join a number of other countries which enacted such laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia and Canada, bringing the total number of States with right to information laws to nearly 70. A growing number of inter-governmental bodies, such as the European Union, the UNDP, the World Bank and the Asian Development Bank, have also adopted policies on the right to information. With the adoption of a strong right to information law, Nepal would join a long list of nations which have already taken this important step towards guaranteeing this fundamental right.

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80 *Ibid.*

81 *Communiqué*, Meeting of Commonwealth Law Ministers (Port of Spain: 10 May 1999), para. 21. See also Annex I.

82 The *Durban Communiqué*, (Durban: Commonwealth Heads of Government Meeting, 15 November 1999), para. 57.

83 *Communiqué*, Commonwealth Functional Co-operation Report of the Committee of the Whole (Durban: Commonwealth Heads of Government Meeting, 15 November 1999), para. 20.

84 See http://www.unodc.org/unodc/crime_signatures_corruption.html

The UN Special Rapporteur on Freedom of Opinion and Expression has laid down a number of general principles regarding the right to freedom of information in his 2000 Annual Report,[85] elaborating nine crucial elements of the right:

> [T]he Special Rapporteur directs the attention of Governments to a number of areas and urges them either to review existing legislation or adopt new legislation on access to information and ensure its conformity with these general principles. Among the considerations of importance are:
>
> - Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which it is stored;
> - Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;
> - As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;
> - A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;
> - All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
> - The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;
> - The law should establish a presumption that all meetings of governing bodies are open to the public;
> - The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;
> - Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.[86]

These nine elements, or principles, are crucial to good freedom of information legislation and the UN Special Rapporteur has recommended that all States should enact legislation in line with these principles.

[85] Report of the Special Rapporteur, Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/2000/63, 18 January 2000, para 42.

[86] *Ibid.*, at para. 44.

3.2. Access to environmental information

The right to access environmental information is a derivative of the general right to information and the public's right to know. Thus, this right is protected in "traditional" human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), as part of the general right to freedom of expression, as well as the rights to private and family life. Access to environmental information has also received special recognition and, indeed, it is well developed in international law. In the last decade, in particular, declarations and treaties, such as the *Aarhus Convention*, have been adopted which specifically guarantee the right to access environmental information.

Rio Declaration and the Aarhus Convention

The 1992 Rio Declaration of the Earth Summit in Rio de Janeiro (Rio Declaration) was adopted at the 1992 United Nations Conference on Environment and Development, signed by 178 States, including Malaysia. The 27 principles of the Rio Declaration, along with Agenda 21, the UN's blueprint for action, set out guarantees of the rights of all citizens to access information, to participate and to access justice (redress and remedy) with respect to matters concerning the environment (also known as the three "Access Principles"). Principle 10 of the 1992 Rio Declaration for Sustainable Development states:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making.[87]

The Rio Declaration was taken as the starting point for a legally binding international treaty on access to environmental information. The result was the 1998 *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*,[88] commonly known as the Aarhus Convention, after the city where the treaty was signed. Although negotiated under the auspices of the United Nations Economic Commission for Europe, the Convention is open to ratification by all UN Member States, as well as by regional economic integration organisations. It is, therefore, of some relevance to this report, although Malaysia has neither signed nor ratified it.

Articles 4 and 5 of the Aarhus Convention place State Parties under a number of important obligations. First, they must keep up-to-date environmental information. The Aarhus Convention recognises that much information relevant to the environment is held by private entities, for example, heavy industry, and Article 5 of the Convention requires States to set up mechanisms to collect this information. Article 5(1) requires States to ensure that public authorities have up-to-date environmental information that is relevant to their functions. This means, for example, that a ministry in charge of exploitation of natural resources must collect

[87] The full text of the Rio Declaration is available at: http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm

[88] UN Doc. ECE/CEP/43, adopted at the Fourth Ministerial Conference in the "Environment for Europe" process, 25 June 1998, entry into force 30 October 2001. The full text of the Aarhus Convention is available at: http://www.unece.org/env/pp/documents/cep43e.pdf

environmental data relevant to oil drilling and that a government department dealing with heavy industry must collect pollution figures from these industries.

Second, the Convention obliges States to make the most important categories of environmental information directly available to the public. Article 5(3) requires States to publish proactively the following information:

> (a) reports on the state of the environment;
> (b) texts of legislation on or relating to the environment;
> (c) policies, plans and programmes on or relating to the environment, and environmental agreements.

As far as possible, this information should be made available online. In addition, Article 5(1)(c) stipulates that, in the event of an imminent threat to human health or the environment, States should provide any information they have which might help the public to take measures to prevent or mitigate the harm arising from that threat.

Article 5(4) requires States to publish national environmental reports at least every four years. Article 5(7) adds that States must also publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals. Article 5(8) goes on to require States to take measures to ensure that product information is available so that consumers can make informed choices. Finally, Article 5(9) requires States to establish pollution registers.

Third, the Aarhus Convention provides that everyone has the right to access environmental information on request, without having to give any reason for their request.[89] This is, in effect, a mini-right to information regime, albeit restricted to environmental information. To this end, States must ensure that public authorities provide information on the kind of information they hold and the process by which it can be obtained, and public officials must support the public in seeking access to information.[90] Requests must ordinarily be responded to within a month.[91] Fees may be charged but must be "reasonable",[92] and access may be refused only in limited circumstances.[93]

Article 9 of the Aarhus Convention requires the establishment of an independent body with the power to review refusals of requests for environmental information. Taken as a whole, the Aarhus Convention provides a strong guarantee for the right to access environmental information.

The Aarhus Convention is binding only on those States which have ratified it; currently the Convention has 39 States Parties,[94] as well as the European Union. By approving the Aarhus Convention, EU institutions but not individual member States became bound by it. Individual

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89 Article 4.
90 Article 5(2)(b).
91 *Ibid.*, Article 4(2).
92 *Ibid.*, Article 4(8).
93 *Ibid.*, Article 4(3)-(7). For more on refusals, see below.
94 *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in International Matters*. The document can be accessed at: http://www.unece.org/env/pp/ctreaty.htm

member States, however, are bound by EU Directives, some of which precede the EU's ratification of Aarhus.[95]

Other relevant international environmental legislation

Malaysia has signed and ratified a number of international conventions. However, none provide especially strong provisions for access to environmental information. Moreover, many cater only for specific environmental issues such as climate change or wetlands and, as such, are limited in scope to these issues.

The ***Convention on Biological Diversity***[96] was signed by 150 government leaders at the United Nations' 1992 Rio Earth Summit and was later ratified by Malaysia in 1994. Article 17(1) of the Convention loosely provides for freedom of information through facilitation of the "exchange of Information from all publicly available sources."

The Convention on Wetlands,[97] signed by Malaysia in 1994, provides the framework for the conservation and wise use of wetlands and their resources. Article 4.3 encourages the "exchange of data and publications." However, it neglects to define how this "exchange of data" should be carried out and it does not make any reference to the options available to civil society in the event of refusals or lack of responses to requests for information. On the other hand, the right of governments to be informed of changes is well protected. Article 3.2 states that information on any changes "shall be passed without delay to the organisation or government responsible for the continuing bureau duties specified in Article 8."

One of the three main aims of the ***United Nations Framework Convention on Climate Change*** is cited as enabling governments to "gather and share information on greenhouse gas emissions, national policies and best practices."[98] To this end, the Convention makes good provision for the exchange of information between States Parties. Article 6(a) specifically safeguards the right of the public to access information:

> Promote and facilitate at the national and, as appropriate, sub-regional and regional levels, and in accordance with national laws and regulations, and within their respective capacities:
>
> (ii) Public access to information on climate change and its effects;
>
> (iii) Public participation in addressing climate change and its effects and developing adequate responses;

Furthermore, Article 4.1h requires States Parties to:

> Promote and cooperate in the full, open and prompt exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate system

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95 The first EC directive that acknowledged the right to environmental information is the European Council and Parliaments Directive No. 313 of 1990 on *Freedom of the Access to Information on the Environment.* Another key document is Regulation No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. After ratifying the Aarhus Convention in early 2005, the EC issued a number of directives, the latest being Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, which deals with public participation. The Directives are available at: http://ec.europa.eu/environment/aarhus/index.htm

96 Available at http://www.biodiv.org/convention/convention.shtml

97 Available at www.ramsar.org

98 Available at http://unfccc.int/essential_background/convention/items/2627.php

> and climate change, and to the economic and social consequences of various response strategies.

However, the Convention does not go so far as to specifically define how this should be carried out and is therefore largely open to interpretation.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora, endorsed by Malaysia in 1978, is fairly limited in that it provides only for – as its name indicates – international trade in flora and fauna defined as endangered. Pursuant to Article 8.7, "Each Party shall prepare periodic reports on its implementation of the present Convention" Article 8.8 provides for access to these reports, but only "where this is not inconsistent with the law of the Party concerned."[99]

The Kyoto Protocol to the United Nations Framework Convention on Climate Change, which came into force in February 2005, includes a number of provisions relevant to environmental information. Under Article 13(c), all parties are required to "Promote and facilitate the exchange of information",[100] while Article 10(e) states that all Parties must "facilitate at the national level public awareness of, and public access to information on, climate change." Article 10(f) obliges parties to "[i]nclude in their national communications information on programmes and activities undertaken pursuant to this Article in accordance with relevant decisions of the Conference of the Parties".

Although the Kyoto Protocol contains comparatively good provisions for access to environmental information, Malaysia does not have any obligations under it, despite having ratified it, as it is considered a developing nation. Much environmental information would also not be included on the convention since it could be argued that the information concerned is not relevant to climate change.

Overall, while most of the international environmental treaties and documents include some provisions on access to environmental information, these are, aside from the Aarhus Convention and the Rio Declaration, for the most part very general in nature and open to wide interpretation. As a result, they are not of great value to individuals or communities trying to gain access to environmental information.

Regional and national approaches

In the Asia-Pacific region, one of the key documents on the environment is the Phnom Penh Regional Platform for Sustainable Development for Asia and the Pacific, adopted in November 2001.[101] By adopting the platform, Asia-Pacific States, including Malaysia, recognised the need to establish an accurate database of environmental information, along with integrated information systems to promote informed decision-making. The document also signals State recognition of the obligation to grant the public access to such information.

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[99] Available at http://www.cites.org/eng/disc/text.shtml#texttop

[100] Available at http://unfccc.int/resource/docs/convkp/kpeng.html

[101] Text of the Phnom Penh Regional Platform is available at: http://www.rrcap.unep.org/wssd/documents/ENR_HRM_WSSD_Platform_23%20Janaury%202002.doc

The Association of Southeast Asian Nations (ASEAN) has issued a number of declarations on environmental protection and sustainable development. Some of them – such as the Yangon Resolution on Sustainable Development 2003 and Resolution on Environment and Development 1992 – have provisions on improving the free flow of environmental information and on public education/awareness regarding the environment. However, these declarations are non-binding and do not specifically guarantee public access to environmental information.[102]

A number of European countries have either adopted special legislation on access to environmental information and/or included provisions on environmental information and participation in other environmental legislation (for example, a law on Environmental Impact Assessment or law on protection of the environment). The United Kingdom, Norway and Denmark are among the first category of countries, and each has special rules on access to environmental information.[103] Bulgaria and Poland are examples of the second group.[104] In the United States, the general responsibility of officials to guarantee the right to know is regulated by the access to information law (known as the FOIA law). A specific law requiring the government actively to disclose information regarding the environment – the Emergency Planning and Community Right to Know Act (EPCRA)[105] – was adopted in 1986, following the Bhopal accident in 1984. Under the community right to know part of the EPCRA, business and industrial facilities must report certain environmental information to federal, state and local authorities, such as the types and quantities of toxic chemicals they release annually into the land, air and water. This information is then entered into the Toxics Release Inventory (TRI), which is publicly available on the websites of the U.S. Environmental Protection Agency (EPA) as well as NGO networks such as the Environmental Defense and The Right to Know Network.[106]

No Asian country has a specific law on access to environmental information, along the lines of those found in the UK and Norway. Nevertheless, provisions relating to access to information on the environment are found in various constitutions and environmental laws. Article II, Section 16 of the 1987 Philippines Constitution, for example, states: "The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."[107] In Thailand, the Enhancement and Conservation of the Natural Environmental Quality Act of 1992 (EQA) has provisions on the right of individuals to information, compensation and redress against violators, and the duty of individuals to assist and cooperate in enhancing and protecting the environment. Bangladesh, India, Pakistan and Sri Lanka all have provisions on access to environmental information in

[102] ASEAN documents on environmental issues are available at: http://www.aseansec.org/4916.htm

[103] The UK adopted the Environmental Information Regulations in 2004; Norway adopted the Environmental Information Act in 2003; and Denmark adopted its Access to Environmental Information Act in 1994.

[104] Poland includes provisions on access to environmental information under the Environmental Protection Law 2001. Bulgaria adopted similar provisions in 2002.

[105] The full text of EPCRA is available at: http://www.access.gpo.gov/uscode/title42/chapter116_.html

[106] EPA's website: www.epa.gov/tri; Environmental Defense's website: www.scorecard.org; RTK's website: www.rtknet.org

[107] This provision was for the first time applied in a well-known precedent-setting case: *Minors Oposa v. Sec. of the Department of Environment and Natural Resources*, 224 SCRA 792 [1993]).

their environmental protection laws.[108] However, these laws do not create a general duty on the State to collect or disseminate environmental information.

In some countries, a constitutional right to access environmental information has been developed by the courts. In *Subhash Kumar v. State of Bihar*,[109] the Supreme Court of India interpreted the right to life, guaranteed by Article 21 of the Constitution, to include the right to a wholesome environment. It said: "Right to life guaranteed by Article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life."[110]

Implementation of Access Principles

A 2001 assessment of the implementation of access to information, participation and justice – the three accesses articulated in Principle 10 of the Rio Declaration, and known as the three "Access Principles" – conducted in nine countries shows that there are a variety of systemic weaknesses.[111] Many of these countries improved their laws granting public access to information on the environment held by the government. However, implementation of these laws has been weak and information is either hard to find, difficult to understand or not available in a timely manner.

With regard to access to information, the findings of the assessment were as follows: Access to information is strong in high profile emergencies that threaten public health. For example, the quality and accessibility of information provided to the public after a volcanic eruption in Mexico, cyanide pollution of a river in Hungary, and cholera outbreaks in South Africa and Uganda, were highly rated.

Pilot countries perform well in providing reports on the state of the environment. Most of the pilot country governments have produced such reports regularly over the past decade, providing citizens with data on various environmental trends in a manner that is accessible to the non-expert.

Access to information about air and water quality is mixed. Several governments make air quality information publicly available on a daily basis through the popular press and/or the Internet, but the pilot countries scored less well in providing access to information on water quality.

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[108] In India, this is found in section 20 of Environment Protection Act 1986; in Bangladesh in Rule 15 of the Environment Conservation Rules 1997; in Sri Lanka in the National Environmental Act, 1980 and its 1998 amendment; and in Pakistan, in sections 6 and 12(3) of the 1997 Environment Protection Act.

[109] AIR 1991 SC 420 and 1991 (1) SCC 598.

[110] Razaqque, Jona, "Environmental Human Rights in South Asia: Towards stronger participatory mechanisms", a paper presented at the *Roundtable on Human Rights and the Environment*, Geneva, 12 March 2004. The document is available at: http://www.cleanairnet.org/caiasia/1412/articles-58293_Jona.doc

[111] The assessments were done by local civil society groups in nine countries – Chile, Hungary, India, Indonesia, Mexico, South Africa, Thailand, Uganda and the United States – under the auspices of The Access Initiative, a global coalition of civil society groups seeking to promote public access to information, participation and justice in decision-making affecting the environment.

Access to information about private industrial facilities is particularly weak. In most of the pilot countries, citizens cannot obtain information about the compliance of companies, and especially individual facilities, with pollution emission standards.[112]

3.3 Limits on access to information

There are both public and private considerations that may justify restrictions on the right of access to environmental information. The confidentiality of commercial and industrial information, and the need for equal terms of competition in a national and international context, are considerations that are particularly relevant. In some cases, there may also be a need not to disclose to protect the environment itself. An example might be the nesting sites of threatened bird species. However, in general, the principles of maximum disclosure and limited exceptions should prevail. Any refusal of a request for information is not justified unless the public authority can show that it meets the three-part test derived from Article 19 of the ICCPR:

1. The information relates to a legitimate aim listed in the law.
2. Disclosure would pose a serious risk of substantial harm to that aim.
3. The harm to the aim is greater than the public interest in having the information.

A refusal to release information is legitimate only if all three conditions are met.

The first part of the test limits the purposes for which information may be withheld. The Aarhus Convention makes it clear that access to environmental information may be refused only if absolutely necessary to protect the following interests:

(a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;
(b) International relations, national defence or public security;
(c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;
(d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;
(e) Intellectual property rights;
(f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;
(g) The interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or

[112] Petkova, Elena, *et al.*, *Closing the Gap: Information, participation, and justice in decision-making for the environment*, (Washington: World Resources Institute, 2003). Based on these findings, the assessment method has been further developed and refined and is now available as a web based toolkit at: http://research.accessinitiative.org/. So far, 32 country assessments have been completed.

(h) The environment to which the information relates, such as the breeding sites of rare species.[113]

The Aarhus Convention stresses that these restrictions must be interpreted narrowly, so as to allow for the maximum possible degree of disclosure:

> The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.[114]

The second part of the test requires that disclosure would cause real and demonstrable harm to the protected interest; not that it simply "relates to" the interest or that it would cause hypothetical or minimal harm. The rationale for this is fairly obvious: if disclosure would not cause harm, withholding the information cannot be justified.

The third part of the test, known as the "public interest override", is of particular importance; it ensures that where information causes harm to a protected interest – say, the privacy of a government minister – it must nevertheless be released, for example if it discloses corruption, other wrongdoing or relating to another overriding public interest.[115] This is an important information disclosure safety value, ensuring that, on balance, the overall public interest is the litmus test in deciding information disclosure issues. This principle is explicitly included in the Aarhus Convention, as reflected in the quote from that Convention just above.

Recommendations

In order to guarantee proper access to information regarding environmental concerns, an access to information law which meets international standards[116] should be adopted and implemented. This law should be based on the principal of maximum disclosure and conform to the standards outlined above. This recommendation is key to securing proper access to information in Malaysia.

In the meantime, a policy on disclosure of environmental information should be adopted forthwith, and this policy should, among other things, ensure that information is disseminated to affected communities through a variety of media where projects are being proposed which are likely to have an environmental impact and that information about environmental problems, particularly where they involve potential health risks, is disseminated widely.

The Malaysian authorities should devote considerable effort to raising awareness among civil society and the general public about the right to know and about how to put the legislation noted above to good use to ensure maximum benefit is gained from it. Guidelines on requesting and accessing information should be made widely available.

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[113] *Aarhus Convention*, Article 4(4).
[114] *Aarhus Convention*, Article 4(4).
[115] Such as health, safety, the environment and/or maladministration by public authorities.
[116] See *A Model Freedom of Information Law,* published by ARTICLE 19, available at http://www.article19.org/pdfs/standards/modelfoilaw.pdf

4. Access to Environmental Information: Malaysian Law

Malaysia's environment is subject to a variety of overlapping and potentially conflicting jurisdictions. This chapter provides an overview of the legal framework for the protection of the right to information and the environment in Malaysia, and assesses its impact first on environmental conservation and second on the management of environmental information. It also discusses related laws that do not specifically relate to the environment but that have affected the release of environmental information, such as the Official Secrets Act 1972.

The legislative environment in Malaysia is complicated by the relationship between the Federal and State governments. Under the Federal Constitution 1957, the States retain power over land, water and other natural resources, including timber, while the federal government has responsibility for protected areas and trans-boundary issues, which includes some level of environmental regulation. Water has recently been moved into the Federal jurisdiction, to allow centralised planning for the use of water resources. As noted in a paper by Andrew Harding and Azmi Sharom, the word "environment" does not appear in the Constitution, so it is not designated as a concurrent power, one explicitly shared between the federal and state governments.[117]

It is important to note that despite signing international agreements that call for access to environmental information, the citizen has very little in the way of enshrined rights of access. The right to information is not guaranteed under the Malaysian Constitution, whilst freedom of expression and speech is guaranteed but may be widely restricted. Most laws designed to allow access to information, such as the Companies Act 1965, focus on facilitating investors' access to information. Although this has successfully been used in campaigns against water privatisation, dam building and others, it has serious limitations, discussed below.

4.1. Constitutional guarantees

Part II of the Malaysian Constitution, entitled "Fundamental Liberties", contains nine articles including the right to life and the right to liberty of the person (including habeas corpus), equality under the law and freedom from discrimination, freedom of movement, and freedom of speech, assembly and association. Article 10 of the Constitution guarantees the right to freedom of speech and expression, but this right is subject to a number of overbroad restrictions, set out in Articles 10(2) and (4). As has been noted earlier, the right to information is not explicitly guaranteed under the Constitution.

Article 10(2) provides, in relevant part:

> Parliament may by law impose -
> (a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to

[117] Harding, A. and Sharom, Azmi, *Access to environmental justice in Malaysia*, Kuala Lumpur, unpublished.

> protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;

This leaves the matter of whether a restriction is necessary or expedient up to Parliament, thereby effectively avoiding court scrutiny. Furthermore, expedient is a far lower standard than necessary, which is what is required under international law.

The Malaysian Constitution also does not put any obligation on the State to protect the environment, or provide for other rights that might be used for the protection of the environment and sustainable development, such as the right to property. The Thai Constitution 1997, for example, says that the State should conserve the environment (Section 78), while the Philippine Constitution 1987 puts an obligation on the State to protect and advance the right of the people to a balanced and healthy ecology in accord with the rhythm and harmony of nature (Article II, Section 16). The right to property, which implies that an owner is entitled to non-interference in the enjoyment of his/her property, in particular, non-interference by the government, is also not guaranteed under the Malaysian Constitution. It is however guaranteed in some other Asian countries such as the India, Philippines and Thailand.

The Malaysian Constitution does, however, guarantee the right to life. Article 5 (1) states: "No person shall be deprived of his life or personal liberty safe in accordance with law". In India, as discussed in Chapter 1, the right to a safe and healthy environment has been recognised by the Supreme Court as part of the fundamental right to life. It remains to be seen whether Article 5 of the Malaysian Constitution can be used within this context.[118] However, in a decision in the case of *Pihak Berkuasa Sabah vs Sugumar Balakrishnan*, the Federal Court ruled that the right to life is to be interpreted narrowly, excluding (in this instance) the right to livelihood.[119]

4.2. Regulatory framework for the environment

Jurisdictional responsibility

The regulatory framework for the environment in Malaysia is somewhat convoluted. There is little clear-cut jurisdiction over any particular part of the landscape. For example, the Wildlife Department is responsible for enforcing Malaysia's commitment to preventing the trafficking in endangered species. However, it does not have the power to protect species from extinction due to habitat destruction. It has to work with the Forestry Department and State governments to ensure that its work is effective. These departments in turn have overlapping jurisdictions, complicated by issues such as the classification of land use (for example, whether it comes under mines, irrigation and drainage, water supply, catchments areas and so on).[120]

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[118] For further reading, see Razzaque, Jona "Human Rights and the Environment: the national experience in South Asia and Africa", Background Paper No.4, for the Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, Geneva, 14-16 January 2002, The paper is available at: http://www.unhchr.ch/environment/bp4.html

[119] See, for example, Sarwar, Imtiaz Malik, "Corruption: The Role of the Judiciary", paper by the National Human Rights Society of Malaysia, (HAKAM), 2004.

[120] Jurisdictional overlap and lack of operational coordination among government agencies is one of the most challenging issues facing the protection of environment and management of natural resources around the world,

One of the major concerns has been that the various departments come under different Ministries and often there has been little communication between departments. A report for a project by the Department of Wildlife and National Parks (DWNP) noted:

> The degree to which Protection Forest is really protected is somewhat difficult to establish since data on the exact location, extent and functional class of compartments has not been made available to the present project – in spite of considerable efforts and repeated requests toward that end.

This, however, should have been improved since the 2004 re-designation of Ministries, which combined aspects of the Ministry of Primary Industries with the Ministry of Science, Technology and the Environment under the new Ministry of Natural Resources and the Environment (NRE). The Department of Forestry, which controls around 90% of the country's protected areas, was brought into the same ministry as the Department of National Parks and Wildlife. Despite some positive developments in terms of coordination between agencies,[121] NGOs and departments within the NRE still cite overlapping jurisdiction and the lack of coordination between departments as one of the problems they face when implementing conservation programmes.

Table 1: Departments and Responsibilities

Department	**Area of responsibility**	**Scope of responsibility**
Department of National Parks and Wildlife	Protected areas, wildlife	Confined to national parks and wildlife reserves
Forestry Department (Peninsular Malaysia)	Protected areas	Permanent Forest Estates
State Governments	Land, water	
Department of Fisheries	Aquatic life	Focus on the fishing industry

including in Southeast Asia. See Tan, Alan KJ, "Recent Institutional Developments on the Environment in Southeast Asia – A Report Card on the Region", 2002 *Singapore Journal of International & Comparative Law*, pp. 891-908.

[121] See Tan, Alan KJ, "Environmental Laws and Institutions in Southeast Asia: A Review of Recent Developments", (2004) 8 *Singapore Yearbook of International Law* (SYBIL), pp.177-192.

Department of Irrigation & Drainage	Rivers, drainage, agriculture	Flood control, water supply and management
Department of Agriculture	Land use for agriculture	
Department of Town & Country Planning	Land use decisions, planning	Urban and rural planning (see below)
Department of Environment	Pollution control, conservation and environmental management	Implementation of EQA

The development of environmental legislation

The Protection of Wildlife Act 1972 was a major step forward in terms of the prevailing attitude towards the environment. Rather than viewing the environment in terms of natural resources to be exploited, it viewed wildlife as having intrinsic value beyond what can be realised in monetary terms, and as in need of protection. Unfortunately, it did not link wildlife conservation to the conservation of the natural environment, and only animals, not flora, were protected under the Act, though it did provide for the federal government to set up wildlife reserves, protected areas for the conservation of fauna.

In 1974, in response to an increase in sources of pollution and their effect on rivers and streams,[122] the Environmental Quality Act was passed. This focuses on abating pollution and makes Environmental Impact Assessments mandatory for some types of development. Unfortunately, the Act has been subject to much criticism, for having fines that are too low, for lack of enforcement and for containing perverse incentives through the issuing of contravention licences, which allow companies to pollute or engage in activities prescribed under the Act.[123] There are proposals to amend the Act to remove some of these problems, particularly following media attention on low penalties.

As noted above, Malaysia has signed and/or ratified various international treaties on the environment. To meet these international commitments, various policy documents and assessments have been conducted, primarily the National Policy on Biological Diversity (NBP), launched in 1998. The NBP's policy statement reads: "To conserve Malaysia's biological diversity and to ensure that its components are utilised in a sustainable manner for the continued progress and socio-economic development of the nation."

It consists of 11 principles, which largely focus on a top-down approach to environmental conservation. The role of local communities is acknowledged in principle 7, while the need for

[122] Sahabat Alam Malaysia, *Malaysian Environment: Alert 2001*, p. 94.
[123] *Incentives for protected areas and biological diversity conservation in Malaysia: A preliminary assessment,* note 36, p. 23.

public awareness is recognised in principle 10. However, the language used even in these principles suggests a hierarchical approach. A significant factor, evident in the policy statement above, is the focus on conservation as necessary for long-term economic benefit. The six objectives demonstrate this more clearly, with the first two objectives focusing on economic benefits and food security. The NBP includes only very limited provisions on information; the 15 strategies for implementation include one point on sharing of information locally and internationally.

Malaysia has also implemented Local Agenda 21, based on Agenda 21 of the Rio Earth Summit.[124] Local Agenda 21 (LA21) has officially been adopted locally by various municipal councils, but NGOs and consumer groups have criticised municipal councils, such as Petaling Jaya, for a lack of public consultation and simultaneously approving projects that undermine the stated goals of LA21. Nationally, Malaysia has pointed to its successes in improving health and decreasing poverty as successes in implementing Agenda 21.

Malaysia has developed various regional relationships for conservation, taking part for example in various ASEAN working groups on the environment. One example of these relationships is the Heart of Borneo Conservation Area, between Indonesia, Brunei and Malaysia, due to be launched shortly, gazetting 22 million ha for conservation. Other ongoing initiatives include the Turtle Islands Heritage Protected Areas with the Philippines and the Trans-boundary Conservation Area with Indonesia.

Malaysia's private sector has been showing more interest in conservation. In the area of climate change, for example, British Petroleum (BP) Malaysia has joined the Malaysian Climate Change Group. Membership involves a commitment to ensuring energy efficient operation through undertaking energy audits at some of the companies' sites across Malaysia. This process has reduced greenhouse gas emissions and costs at the sites audited.

Environmental Quality Act 1974

The Environmental Quality Act (EQA) and related legislation generally govern pollution, rather than all elements of the environment. The Act was prompted by deteriorating air and water quality, according to the President of the Environmental Protection Society Malaysia (EPSM), Mano Maniam.[125] It was first adopted in 1974, but has since been amended several times, with the most comprehensive amendments enacted in 1996 and the latest in 2001. The 1996 amendment introduced detailed provisions on Environmental Impact Assessments.

Both the legislation and the associated guidelines have few provisions that provide for access to information. A typical example is the Environmental Quality (Prescribed Premises) (Raw Natural Rubber) Regulations 1978. The regulations lay out licensing procedures for the discharge of effluents from factories treating natural rubber, requiring a licence for effluent discharge beyond certain parameters. The only provision that could possibly be interpreted as

[124] Agenda 21 is a plan of action formulated to implement the decisions on sustainable development made at the 1992 Earth Summit, combining environmental protection with goals such as combating poverty, improving health and access to basic amenities such as clean water. A key factor in all these areas is public participation and consultation.

[125] Interview, 11 April 2006.

allowing access to information is that the licence holders are required to display their licences and related documents "in a conspicuous position in the principal building of the premises".[126]

The case study of a rubber factory in the Perak village of Kuala Kuang starkly illustrates the pitfalls of this approach. New licences are required when changes are made to premises, if these changes result in changes to the effluent.[127] In Kuala Kuang, the villagers suffered from a series of health problems after a factory expansion. These problems lasted from 1995 until the close and relocation of the factory in April 2005.[128] Although action was taken by the Department of Environment during licensing procedures, no consultation had taken place with local residents, and no information about the changes being made in the quality of the emissions was provided.

The Environmental Quality (Prescribed Premises) (Environmental Impact Assessment) Order 1987 offers limited scope for public participation and access to information. The main limitations are that documents are made available for public comment only after planning has been carried out, that comments have to relate directly to the Environmental Impact Assessment (EIA), that no response is required on comments made and that it is difficult to access the EIAs both in terms of cost and availability. The concerns with this process are articulated more fully in the next chapter.

The Association of Certified Chartered Accountants (ACCA) 2002 report, *The State of Corporate Environmental Reporting in Malaysia,* notes that there are requirements under the Act for owners or occupiers of any vehicle, ship, premises or aircraft to release information to the Director General of the DoE.[129] However, there is no obligation for the Director General to release this information to the general public.

The Town and Country Planning Act 1976

The most progressive provisions for public consultation are in the Town and Country Planning Act (TCPA). The consultation process under the Act has several advantages over that of the Environmental Quality Act (EQA), at least in the area of drafting local plans. Local plans are designed to map out the land use in the area covered, including environmental protection, traffic management, landscaping and the preservation of open spaces. It also provides for cultural and heritage preservation. The plans often also include specifications on population density, allocation for parks and schools and similar provisions.

Section 12A states that consultation and publicity must take place 'before commencing the preparation of a local plan'. This means that free, prior and informed consent is more likely to be achieved, as residents and other affected communities can make submissions before the planning process begins. This is a vital stage in the consultation. Once plans have been drafted, there are incurred costs and in the words of the World Commission on Dams, "momentum

[126] Section 9, Environmental Quality (Prescribed Premises) (Raw Natural Rubber) Regulations 1978, published in *Environmental Quality Act 1974 (Act 127) & subsidiary legislation (as at 10 November 2005),* International Law Book Series, 2005.
[127] *Ibid*., Section 6.
[128] Interview with residents in the *Jawatankuasa Anti-Bau Busuk*, a local committee who had opposed the factory, 6 April 2006.
[129] *Environmental Quality Act 1974 (Act 127) & subsidiary legislation* (as at 10 November 2005), Environmental Quality Act Section 37, International Law Book Series.

behind the project often prevailed over other considerations".[130] While this referred specifically to dams, the same momentum can be seen with other large development projects. Community concerns and interests are further sidelined due to imbalances of power, which tend to favour business or political rather than community interests.

Unfortunately, these provisions in the Town and Country Planning Act do not extend to larger planning processes, such as state-wide structural plans or the national physical plan, which follow a process similar to that for EIAs, pursuant to which the plan is completed, its availability is advertised in the mass media and public comments are invited only then. This does not allow for public input at the beginning of the planning process and "momentum" in favour of what has been proposed is strong.

The legislation has been reinforced by court decisions, such as the decision in a case where local residents took the Petaling Jaya Municipal Council (MPPJ) to court. The court ruled that the council had to pay damages and costs to residents and that 'local authorities must hear views of affected residents before a development order is issued'. In the same article, the judge was said to have 'held that meetings to hear residents' opinions cannot be treated as a formality but instead, should be viewed as a genuine platform for people to voice their opinions'.[131]

However, experience demonstrates that local governments continue to prefer to do their planning in secret. They have also shown contempt for these court rulings, for example in the case of the Kuala Lumpur City Council's "secret plans" to develop the urban jungle reserve of Bukit Gasing. According to an article in online news site Malaysiakini.com in May 2006, residents in nearby areas found out about a proposed development in the sensitive 'green lung' area due to a public relations survey that was conducted; they are still uncertain about details such as the area that is being proposed for development.[132]

Whether the power of the courts can prevail in shedding light on the planning processes in local government, and whether the information necessary to make informed and rational choices about land use will be made available is yet to be explored comprehensively.

A sister piece of legislation, the Federal Territories (Planning) Act 1983, has provisions which allow for those directly adjacent to a project, known as 'neighbours', to make complaints However, there is no requirement for the neighbours to be informed directly of the project, although projects must be advertised in local newspapers. Also the definition of a neighbour is interpreted very narrowly.

National Forestry Policy

Unlike federal legislation, the National Forestry Policy governs the states of Sabah and Sarawak as well as the Peninsula. The policy was revised in 1994 to take into account environmental commitments, including commitments to sustainable timber and non-timber product harvesting, and to ensuring that sufficient areas are protected as Permanent Forest Reserves. The policy

[130] World Commission on Dams, *Dams and development: A new framework for decision-making* (London: Earthscan Publications Ltd, 2000), p. xxxii.
[131] Dass, Maria J, "A citizens' victory", *The Sun*, 24 October 2005.
[132] Theophilus, Claudia "Shockwaves from Bukit Gasing's 'secret' project", Malaysiakini.com, 18 May 2006.

discusses active community involvement and participation in forestry development projects. However, there is no commitment to public participation or information sharing in the Ministry's vision, mission or objectives, safe under the rubric of public education.

Regulations promoting disclosure of information by non-State actors

The Occupational Safety and Health Act

The Occupational Safety and Health Act (OSHA) requires the disclosure of information by employers regarding 'aspects of the manner in which he conducts his undertaking as may affect their safety or health'.[133] This has the potential to allow for access particularly to environmental information from private companies and government agencies, if interpreted broadly. The Act ensures that this information should not only be made available to employees, but should also be made available to all others affected.

As yet, however, there have been no cases where this Act has been used to compel employers to provide information of any kind.

There are also some sections in Regulations under the Act that require the release of information. The Occupational Safety and Health (Control of Industrial Major Accidents and Hazards) Regulations 1996 require that the nearest occupational safety and health office be informed in case of a major accident.[134] There is, however, no requirement that this information be made available to the general public, employees or others who may be affected by the accident.

Schedule Three under these regulations, however, contains a list of items that must be communicated to the public. The aim of releasing these 11 pieces of information appears to be to allow those who could be at risk from a major accident to assess that risk and to ensure that they are aware of what to do in case of an emergency. The Schedule includes the responsibility to make the information available in clear and simple language. This applies if the industrial activity falls under these guidelines (as decided by the Department of Occupational Safety and Health based on a report submitted by the manufacturer).

Accountants Act 1967

In 2002, the Malaysian Institute of Accountants gazetted new bye-laws on professional conduct and ethics.[135] These guidelines focus on the protection of client confidentiality, but have exemptions on the need to exercise confidentiality. These include releasing information due to a "public duty".[136]

Companies Act 1965

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[133] *Occupational Safety and Health Act 1994* (reprinted in 2002), Section 17(2), published online by the Department of Occupational Safety and Health: http://www.ilo.org/public/english/employment/gems/eeo/law/malaysia/dosh.htm

[134] *Ibid.*, Regulation 23.

[135] *Malaysian Institute of Accountants By-Laws (professional conduct and ethics) (revised 2002)*, available at: www.mia.org.my

[136] *Ibid.*, Section A5-2, Explanatory Note (i).

The Companies Act is one of the most progressive pieces of legislation in terms of disclosure of information, underlining the government's commitment to ensuring that Malaysia's financial institutions meet international standards.

Companies have to provide the Registrar of Companies with information upon demand,[137] and this information must be accurate. Under Section 11 of the Act, the Registrar must make information in the registers available to the public, and can only destroy documents under conditions described in that section. There are numerous sections on disclosure of information and penalties are specified for refusing to disclose or disclosing false information.

There is, however, little specifically on the release, or gathering, of environmental information. The Association of Certified Chartered Accountants (ACCA) report, *The State of Corporate Environmental Reporting in Malaysia*, indicates that Section 169 allows for the release of environmental information in directors' reports, but does not require it.[138]

Bursa Malaysia (KLSE) Listing Requirements

There is an increasing trend for companies to disclose environmental information. A 2002 survey of environmental reporting indicated that while there were some pieces of legislation that *could* be progressively interpreted as requiring the disclosure of environmental information, nevertheless the onus was primarily on voluntary disclosure. For example, Section 2-03 of the Listing Requirements says "investors and the public shall be kept fully informed by the listed issuers of all facts or information that might affect their interests...".[139] Environmental information could be included as information that would affect investors' interests, but so far this section has been interpreted more narrowly.

According to the ACCA report, the Companies Act 1965 is "financially oriented, with no reference to environmental information".[140] Nevertheless, an increasing number of listed companies are disclosing environmental information in response to perceived interest from the public. The report indicates, however, that in the period investigated; only one company identified environmental problems (Shell Malaysia). The rest of the reports merely explained the positive impact that their activities were having on the environment. None had their environmental reports audited by a third party. Most focused on positive projects conducted to mitigate environmental effects, rather than addressing environmental concerns.

4.3. Restrictive laws affecting access information

Official Secrets Act 1972

[137] *Companies Act 1965 (Act 125) & subsidiary legislation (as at 25th November 2004)*, Sections 7(11)-(13), International Law Book Services.
[138] Environmental Resource Management Malaysia, *The State of Corporate Environmental Reporting in Malaysia*, (London: The Association of Certified Chartered Accountants, 2002).
[139] KLSE Main Board Listing Requirements, Section 2-03(2).
[140] *The State of Corporate Environmental Reporting in Malaysia*, note 138, Executive Summary, p. 3.

The Official Secrets Act (OSA), which came into force in 1972, and was last amended in 1995, is a broadly worded law that entrenches a culture of secrecy in all matters relating to public administration. It contains broadly framed prohibitions which effectively obstruct the free flow of information from official sources. These prohibitions are backed by severe criminal sanctions and the State has extensive powers which enhance its ability to detect infringements and secure convictions under the Act. Decisions to obstruct access to information are beyond judicial scrutiny.

The Act gives two definitions of information that falls under the OSA. The first is information pertaining to cabinet decisions, State Executive Council documents and documents to do with national security, defence and international relations. Second, any information marked "secret" or similar also falls under the OSA for an unlimited period of time. The Minister can confer the power to mark any document "secret" on any civil servant. The emphasis is undeniably on keeping information out of public hands. Penalties for revealing information that is secret are harsh, ranging from one to seven years imprisonment. There is, however, no penalty for withholding information that is not classified under the Act.

The Act allows for arrest and detention without a warrant, and substantially reverses the burden of proof from the prosecution to the defendant. It states that "until the contrary is proven", any of the proscribed activities will be presumed to have been undertaken "for a purpose prejudicial to the safety or interests of Malaysia" (Section Three).[141]

While environmental information is not one of the areas included under the first definition given in the Act, much environmental information could be covered by the second definition. The first definition, however, does apply to cabinet decisions involving environmental policy. In an interview on department policy on access to information, Saharudin Anan, Principal Assistant Director for the Protected Areas Division, pointed out that while most department documents and research are made available to the public, it is not within their power to release information about policy that emanates from cabinet.[142]

It is difficult to ascertain precisely what information is properly withheld under the OSA, and what information is merely being withheld without any legal requirement to do so. The 1992 study of water supply and demand requirements for Malaysia provides one such example. While local NGOs have been denied access to the study, the Japanese Government was given access, as it was funding a controversial water supply dam. Whether the document officially falls under the OSA, or whether it has been withheld due merely to State reluctance to share information that could cast doubt on the alleged need for a large water supply project, is uncertain.[143]

It is believed that a wide range of environmental information is classified under the OSA. An infamous example of this was the Air Pollutant Index (API), which remained a State secret from the haze crisis of 1997/8 until the haze crisis of August 2005. Even the eventual release of this information illustrated shortcomings with the present system. The day before the information was released; the Deputy Prime Minister was quoted as saying that there was no need to give

[141] Human Rights Watch, *Malaysia - Official Secrets Act*, 21 September 1998.
[142] Personal interview, 16 June 2006.
[143] The existence of this study has been revealed at various times, most recently during a meeting held between dam activists and proponents at the Economic Planning Unit in March 2002.

out the API and that it would not be released. The next day, the Prime Minister overturned this decision. This clearly indicates that the release of information is not based upon the need or right of the public to information, but on personal decisions within the executive. This neither conforms to international standards nor protects citizens from potential abuses of power.

Printing Presses and Publications Act 1984

The Printing Presses and Publications Act (PPPA) primarily restricts freedom of expression, but this undoubtedly also impacts on freedom of information. The prime example of this remains the case against Irene Fernandez, who was convicted of spreading false information about the conditions in a detention camp for migrant workers. Sentenced to a year in prison, her conviction illustrates the punitive penalties that remain for those bringing to light injustice.[144] The PPPA, like the OSA, assumes guilt, so it is incumbent on defendants to prove their innocence. In Fernandez's case, this meant having to prove that each of the ten concerns she had raised where factually accurate, even though some were matters of opinion. She was also denied a public interest defence.

The case illustrates the dangers of publicising information about potential abuses of power within the State system, making it less likely that whistleblowers will come forward to share information. As yet, there have been no similar cases involving environmental information.

Protection of whistleblowers

With a Whistleblowers Protection Act under discussion, Prime Minister Abdullah Badawi has made public his commitment to fight corruption and to protect whistleblowers. While there are advantages to such legislation, there are major drawbacks when the legislative environment remains unclear, and those releasing public information can still be prosecuted under the Official Secrets Act.

To date, there has been little protection for whistleblowers. A recent example was the issue of toxic waste dumping in Johor. The *New Straits Times* ran a series of articles regarding the illegal dumping of toxic waste and the subsequent lack of action on the part of the Department of Environment (DoE). Information about the illegal dumping had come from whistleblowers within the DoE and there were allegations that the dumping had been permitted due to corruption. The DoE said, however, that it did not have jurisdiction over the dumping grounds. The government's response centred on the need to prevent information leaking from the Department. DoE officials were subsequently required to renew their oaths under the OSA. The DoE said that this was a routine reaffirmation, but the timing of the reaffirmation led to a general public perception that this was linked with concerns about Department corruption.

Another case, from October 2002, involved Kuala Lumpur Deputy Fire and Rescue Chief, Mohd Ali Tambi Chik, who alleged that the Director General of the department had misused

[144] See, for example, ARTICLE 19 and SUARAM, *Baseline Study on Freedom of Expression and the Media in Malaysia*, (London: ARTICLE 19, 2005), p. 51. The study is available at: http://www.article19.org/pdfs/publications/malaysia-baseline-study.pdf

State facilities. The Deputy Chief was forced into early retirement.[145] Despite the Abdullah administration's stated commitment to encouraging whistleblowers, he has still not been reinstated or received compensation.

Of greater concern, and still under inquiry, are allegations that a DoE official, Rumie Azzan Mahlie, who had been investigating the case, died under mysterious circumstances, with the death classed as suicide. During the inquest, his wife, Suraida Abdul Lazit, testified that her husband had received death threats two days before his death, and that he had been working on a large case and been offered bribes to drop it.[146]

4.4. Changes in the practice of information disclosure

While the legislative environment has not changed, there has been a change in the way individual departments handle requests for information. The Department of Irrigation and Drainage (DID) provides a model, responding to requests for information by initially sending out a letter with both a reference number and a contact person, and will respond after investigating the complaint or inquiry. The Department of Wildlife and National Parks has also said that they will release any information that they have, as long as it has not been the subject of a Cabinet decision, in which case it is automatically under the OSA.

According to interviews with the Consumers Association of Penang (CAP), the Department of Environment, however, tends to take a longer time in responding to complaints about pollution, for example, and has little by way of institutionalised mechanisms for dealing with public feedback or requests for information.

There has, since Abdullah Ahmad Badawi took office, been a shift in attitude, with officials less concerned about the repercussions of divulging information. However, without institutional and legislative reforms, these are easily reversible and to some extent dependent on the civil servants in charge of departments.

Recommendations

Legislation dealing with environmental matters should be comprehensively reviewed to make sure that it includes strong access to information and participation provisions.

Restrictive laws on freedom of information should be either amended or repealed. In particular, the Printing Presses and Publications Act should be repealed and the Official Secrets Act should be revised so that it is restricted to information that is legitimately classified as secret according to international standards.

[145] See, for example, Jalleh, Martin, "Pak Lah's corruption crackdown charade continues", on Malaysiakini.com, 29 October 2004.
[146] Effendi, Yaacob, "Rumie's death linked to case", *New Straits Times*, 14 April 2005.

The proposed legislation to protect whistleblowers should be adopted as soon as possible so as to provide real protection to whistleblowers.

5. Access in Practice: EIAs

Environmental Impact Assessment (EIA) is potentially a major tool for environmental activists in making major development projects more accountable and responsive to public concerns. However, there are limitations to its effectiveness, due both to the process and to the manner in which legislation and practice regarding EIAs have developed in Malaysia.

5.1. EIA as a mechanism for improving access to information and public participation

The importance of an impartial, independent Environmental Impact Assessment is difficult to overstate. Potentially, it allows for a process of evaluating the non-economic costs and benefits of a project. These non-monetary costs (and benefits) are often spread over a larger section of society than the purely monetary benefits, which tend to accrue to readily identifiable parties, such as contractors or project implementers. The EIA also allows alternatives to the proposed project to be considered.

Malaysia promulgated the Environmental Quality Act (EQA) in 1974, which has a provision that makes an EIA compulsory in certain cases, under Section 34A(2). The activities that required an EIA were substantially expanded in 1987, with the promulgation of the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987. Guidelines have also been developed for different types of EIAs, depending on the type of prescribed (listed) activity or premises. The requirement for an EIA is restricted to large projects which are deemed to have a serious impact on the environment, such as waste management projects, dams and logging projects.

There are sixteen sets of Guidelines for different projects that fall under the EQA 1974. These include coastal resort development projects, dam and/or reservoir projects, mines and quarries, waste disposal projects, the development of tourist and recreational facilities in either national or marine parks, and forestry.

The EIA process

The EIA process has two stages, a preliminary assessment and/or, for prescribed activities and selected projects for which a preliminary EIA has been completed, a detailed assessment (DEIA). In the first stage, various project options are reviewed, allowing for a decision to be made before money has been sunk into a particular project. The project proponent commissions the Terms of Reference (ToR) for the DEIA, which are exhibited for 14 days and then there is a

further week allowed for comment. Local communities can request a public forum at this stage, by written request to the DoE.

The DEIA is commissioned by the project proponent. This includes onsite investigation such as research into the diversity of flora and fauna, the expected impact of the project on flora, fauna and other features (geology, society, and so on), investigation into the cultural importance of the area, a limited social impact assessment and a risk assessment. The exact features vary depending on the type of EIA required. The Guidelines give broad outlines on the standard of research that is expected and the categories that should be covered. For example, when assessing dams and/or reservoirs, consultants are asked to look at mitigation measures for affected fauna, particularly species that are rare or protected. They are warned against mitigation that involves hoping that in the process of clearing the site, animals will automatically move to adjacent areas ("escape and rescue"), a form of "mitigation" that had been used with notable lack of effect prior to the Guidelines being formulated.[147] The Guidelines thus outline the minimum standard of information and research that should be made available to the public through the EIA.

Generally, the Guidelines have high standards of public participation and information gathering. The Guidelines for dams and reservoirs recommend "[i]nteraction between the project proponent with various authorities and public interest groups in providing information and feedback for the planning" and state that public participation should begin before the report is drafted.[148] However the Guidelines are not uniformly followed.

According to the Guidelines, the public must be notified that a consultation is being undertaken, and the Department of Environment (DoE) usually advertises for comments in local newspapers and posts a notice on their website showing the status of each DEIA. They are under no legal obligation, however, to follow specific procedures for notifying the public or affected communities.

Once the DEIA has been completed, it is made available for public comment. The amount of time that the public is given to submit comments to the DoE is not specified in legislation, although public feedback is an integral part of the Guidelines. The DoE, however, exhibits the DEIA for 30 days and allows a further 15 days for comment. Again, as with the ToR, affected communities can request a public forum. This stage, however, is apparently not considered to be an important stage of the EIA process; as described on the DoE website, the process contains no consultation at all.[149]

The department has restricted the comments that it will accept to those relating directly to the EIA, rather than issues or concerns beyond those it deals with.[150] This means that even if a letter addresses environmental concerns that are dealt with in the EIA, unless the letter refers back to the report, it is not taken into account.

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[147] Department of Environment, Environmental Impact Assessment Guidelines for Dams and/or reservoirs projects, p. 8-2, Ministry of Science, Technology and the Environment 1995.
[148] *Ibid.*, pp. 3-2 and 3-4.
[149] See: http://www.doe.gov.my/index.php?option=com_content&task=view&id=42&Itemid=173&lang=en
[150] Oral communication to author, during discussion between a DoE officer who would not give his name and SOS Selangor on the Sg. Selangor dam in March 1999.

Following the process of public feedback/consultation, the EIA is submitted to a review panel. The members of the review panel are not made public, which means that they bear no accountability for their decisions. They cannot substantially influence the decision of the DoE to accept or reject the EIA, but usually have some input on the conditions attached to EIA approval.

The review panel itself is not kept informed of the progress of their comments. Seasoned environmental campaigner Gurmit Singh,[151] for example, sat on the review panel for a waste treatment facility in Bukit Nanas, Negeri Sembilan. As a member of the panel, he was not shown the conditions given to the project proponents when the project was approved after the EIA process was complete. It was only as a member of the Environmental Quality Council that he discovered that the conditions were inadequate. For example, dioxin readings were only required twice annually, due to a lack of local monitoring facilities.

The public can appeal against the decision to accept or reject an EIA, but the appeal must be within 30 days of the announcement of the DoE's decision. The fact that the public have access to an appeal is positive, as very few countries provide such a right.

5.2. Community experience in using the EIA

The EIA has been a major campaigning tool in at least three recent events where civil society was attempting to make the projects accountable and make decision-making more inclusive and transparent: the Sungai Selangor dam project (referred to here as the Selangor dam); the Pahang-Selangor Inter-State Water Transfer Project which included a dam across the Sungai Kelau (referred to here as the Kelau dam); and, most recently, construction of an incinerator just outside Kuala Lumpur, in a town called Broga (the Broga incinerator).

These groups have examined the EIAs of these projects and provided comments, input and criticism. Specialists from various fields have looked at the contents of the reports, and explained shortcomings. These are usually done on a voluntary basis, often by people who wish to remain anonymous. These specialists, ranging from geologists to engineers, are often academics or are employed by government departments.[152] The EIA therefore provides a focus that allows the affected communities or groups concerned about or affected by these projects to have access to information that is customarily only at the disposal of the project proponents.

The committees often bring to light contradictions in the reports themselves. This problem was particularly acute with the EIA for the Selangor dam, and it appears that the government and project proponents ensured that subsequent EIAs, at least for dam projects, met more stringent standards of accuracy.

[151] Interview with Gurmit Singh, 23 June 2006.

[152] Local academics come under the Universities and University Colleges Act which prohibits them from undertaking a large number of public interest activities and they have to make a pledge (the *Akujanji*) of loyalty to the government.

The information in the EIA is also compared to other sources of information. For example, the EIA on the Sungai Selangor dam justified the project, in part, using unreferenced population growth statistics. A comparison with official government figures illustrated inconsistencies in favour of the project. Comparisons can also be made with similar projects commissioned elsewhere. For example, international experts were brought in by the Broga group, to compare information about the proposed incinerator in Broga with similar projects in Japan.

In the case of the Selangor dam, the scrutiny of the EIA helped to establish the credibility of the Save Our Sungai (SOS) Selangor group, which was a coalition of NGOs and concerned individuals who came together specifically to campaign on this issue.

While all these campaigns were hampered by media blackouts, the effective use and criticism of the EIA helped to secure better resettlement for affected peoples in the Selangor dam project, and has delayed both the Broga incinerator and the Kelau dam. The latter dam project is to be funded by the Japanese Bank for International Cooperation (JBIC), which requires the government to engage in public consultation, although this process has come in for severe criticism from the invited NGOs.[153] The points that NGOs raised from the EIA have still not been dealt with by the government, and this raised the possibility that the promised loans for the project would be withheld. The Japanese government came under pressure from Japanese NGOs and opposition parties due to the lack of transparency in the process and concerns over the resettlement of indigenous people who were being relocated due to the proposed dam.

5.3. Shortcomings of the process

An EIA is written by a consultant who is appointed by the project proponent. The project proponent covers the cost of the EIA, and the consultants must be on a list of contractors approved by the DoE. As mentioned above, the EIA is submitted to the DoE, who make it available to the public for consultation. When a consultation is opened to the public, the DoE is under an obligation to inform the public through the mass media, primarily through the press.

Despite the process for public feedback, the project approval process is largely shrouded in secrecy. It is, for instance, not clear how far the process has proceeded before a project proponent seeks a preliminary EIA. The Guidelines suggest "that preliminary assessment be undertaken in parallel with the pre-feasibility study for the project, while detailed assessment, if required, is conducted at the feasibility study stage." However, the Guidelines also note that from 1988 to 1992, 83% of reports submitted "were not in accordance to the project planning schedule recommended in the EIA Guidelines".[154] A list of approved projects (based on EIAs) and those currently under consideration is available on the DoE website, but the reports themselves cannot be downloaded and little further information can be gathered online.

In the case of dams and reservoirs, the EIA Guidelines indicate that the EIA should cover alternatives to the proposed project, including an assessment of the "no project" option. A clear

[153] One of the authors of this report was a member of the NGO delegation for SOS Selangor, in March 2002.
[154] Department of Environment, Environmental Impact Assessment Guidelines for Dams and/or reservoirs projects, note 147, p. 3-1.

example of the limitations of this process is shown through the EIA for the Sungai Selangor Phase Three, a water supply dam across the Sungai Selangor. In the EIA report, the only alternatives to the dam that were examined were other dams, with the "no project" option cursorily examined. The problems of leakage and wasteful use of water were referred to fleetingly, but not examined with the depth that they deserved, given that the Klang valley was using 559 litres of water per person per day. There was, thus, a clear bias towards the proposed project.

The voluntary local group "Concerned for Sungai Selangor", in contrast, produced a comprehensive document looking at the possibility of cutting down use, decreasing leakage and bringing water in from other states as alternatives to a dam.[155] An alternative method could identify the problem (in this case, water supply to the capital), and ask consultants to come up with ways of solving it. A method for such a process is outlined in the report of the World Commission on Dams.[156]

A second problem is that the process of appointing an EIA consultant raises clear conflict of interest issues. In the above case, not only was there a problem in terms of the bias that is an inevitable result of following the paymaster's, i.e. the proponent's, wishes, but the consultant was given an engineering contract for the construction of the dam itself.[157] Given that an EIA is usually the main source of accessible information about proposed projects, this lack of independence is serious.

Third, there is concern that decisions to proceed with projects have been taken long before the EIA process begins. Bakun, Selangor and Kelau dams all seem to have followed this procedure, as did the Broga incinerator. In Broga, for example, the government announced the project before the EIA had been approved.[158] During consultations with those who had submitted comments on the Kelau dam EIA, NGOs were warned that the decision to proceed with the dam had been taken, and that there was little point in "moving backwards".[159] Considering the unsatisfactory manner that comments were dealt with, this was interpreted as a fundamental block to a process of open and fair consultation, and most NGOs withdrew from the consultations.

The manner in which the EIA consultation process is publicised is also open to manipulation. The initial EIA for the Broga incinerator, for example, was publicised in all the mass media. The second EIA, however, for a smaller incinerator, was only publicised in English and Malay, and not Chinese-language, papers. The affected community is largely Chinese-speaking and this was interpreted by the Anti-Incinerator Committee as a deliberate attempt to prevent them from commenting on the EIA.

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[155] As reported in "Alternatives to dams are available", *New Straits Times*, 18 May 1999.

[156] World Commission on Dams, *Dams and development: A new framework for decision-making,* note 130, pp. 266-269.

[157] *The Case Against the Selangor Dam*, SOS Selangor last accessed on 29 June 2006 at: http://www.sos-selangor.org/case-p3.htm

[158] Interview with residents from the Broga Anti-Incinerator Committee.

[159] One of the authors of this report was present at these consultations on behalf of Save Our Sungai Selangor through 2002 and 2003.

There are also problems with access to the report itself. The EIA report is often made available at only two DoE offices, the central office in Kuala Lumpur and the office nearest the affected area. For matters of broader public interest, this can prevent organisations and individuals from having easy access to the document. The cost of obtaining a copy of the EIA is also prohibitive, at nearly RM1,000 (over US$200) for the Sungai Selangor and Kelau dam EIAs. This is beyond the capacity of many affected communities.

Making access even more difficult for affected communities, the EIA is often published in English, with only the Executive Summary translated into Malay, and is rarely translated into other languages that may be spoken in affected communities. "Briefings" with the communities could help to disseminate the report orally, but they tend to include only sparse details, such as the size, scope and rationale given for the project. These "briefings" are not legally required and only occur when there has been public outcry about a proposed project, such as in the case of the Broga incinerator and the Kelau dam. They are not necessarily carried out for the benefit of the affected communities. One exception to this was a well publicised visit by architects to the indigenous community affected by the Selangor dam, which resulted in some changes to the design of the relocation site. Nevertheless, the consultation was conducted primarily with male members of the community, resulting in decisions being made that excluded the needs of the women.

In contrast, the local community affected by the gazetted declaration of the first national park, in Penang, was consulted by the Department of Wildlife and National Parks. The Penang National Park, previously the Pantai Acheh Forest Reserve, stretches one kilometre out from the coast so it affected coastal fishing and aquaculture communities. The local communities were consulted to negotiate continued access to the gazetted areas for the fishing communities and alternatives or relocation for the aquaculture communities. Care was taken to ensure all sectors of the community were consulted. Local NGOs and the Department felt that the exercise was successful and likely to prevent encroachment into the protected area.[160]

The problem of access is compounded when the Executive Summary bears little relation to the research contained in the EIA. The Selangor dam EIA, for example, concluded in the Executive Summary that there was no flora of importance in the area, while the extremely limited onsite investigation had discovered one previously unknown species of magnolia, of which a total of six specimens were found. There were also irregularities in the number of endangered species reported in the Executive Summary and in the report's appendices, the first reporting 20 endangered species, while the appendices identified over 100.

In addition, the amount of time that the report is open for feedback, only one month, often makes it difficult to seek expert advice and opinions. Furthermore, public consultation" is confined to issues raised in the EIA. This allows the consultant to define the major issues surrounding the project. It also means that people who are not able to work through the technical jargon of the EIA are unable to contribute to the process. The limitations of this approach were very apparent with the Sungai Selangor dam, when the DoE ignored over 100 letters against the dam, on the grounds that none of them made direct reference to the EIA.

[160] From interviews with DWNP and the Consumers' Association of Penang.

The issues dealt with in an EIA are often narrowly defined. The impact of a dam on downstream communities, for example is never dealt with, unless there is public outcry, such as occurred with unique, endangered firefly colonies affected by the Sungai Selangor dam. Even in this instance, a study was commissioned by the dam proponent, but it was not released to the public despite repeated requests by members of the public, civil society and affected parties.

There are problems, as well, with the manner in which Guidelines are followed. For example, the EIA for the Selangor dam said that the mitigation measure for dealing with the problem of wildlife was to clear the area and hope that they would make their way to the surrounding forest (the "escape and rescue" measure mentioned above). The standard of research was poor, with no trappings being carried out to assess the fauna in the area.

Once comments are submitted to the DoE, there is no institutionalised feedback process. For the Kelau dam, those who had submitted comments were invited to a consultation process held by the Economic Planning Unit. The NGOs who were invited to these consultations felt that they were invited to the consultations solely to legitimise the project, rather than to secure genuine feedback and consultation.

During the first meeting, for example, the NGOs were not informed that the meeting was related to their comments on the EIA. At the meeting they were handed written responses to these comments, making analysis or rebuttal difficult. Each of the NGOs being consulted was invited to a separate meeting, and was requested to send just one representative. During the consultation, this person would be sitting with around 40 government and proponent representatives – an intimidating atmosphere. Also, the consultation process was set at one hour, half of which was taken up with a "briefing", which gave out basic project information. There was also ten minutes given to the proponents for a conclusion, thus limiting the time for discussion to 20 minutes. Furthermore, supporting documents were not made available. In particular, studies on water supply and demand were reportedly withheld under the Official Secrets Act, though they were made available to the Japanese government, raising the spectre of the government being more responsive, transparent and accountable to donor agencies than to its own people.

Lastly, the EIA is not always an open document. In the case of the Bakun dam, for example, subsequent to the public consultation process, the EIA has been withdrawn from public scrutiny and, according to some reports; it has been classified under the OSA.[161] If true, this is highly problematic, as it changes the status of the document and people in possession of a copy of the EIA could face heavy fines or prison terms. Such a retrospective move is difficult to justify; if the document threatens the security of the nation or contains other "sensitive" information, it is difficult to understand how it could have been made available to the public in the first place.

Recommendations

The Department of Environment Guidelines regarding EIAs should be followed at all times and penalties applied when they are not.

[161] See, for example, ARTICLE 19 and Suaram, *Freedom of Expression and the Media in Malaysia*, note 144, p. 94.

Civil society and the general public should be provided with effective notice of opportunities to participate in EIA processes, and provided with sufficient information to enable them to do so effectively.

EIAs themselves need to be far more widely disseminated, including for free over the Internet. The cost of obtaining a hard copy of an EIA report should be much lower than it is at present, and should not exceed the actual cost of reproduction. The languages and format of the reports should take into account the needs of affected communities. This includes translating the reports into languages spoken by affected communities and also ensuring that the information is presented in a fashion in which it can be assimilated by those communities.

Key supporting documents should be made available for scrutiny. If they are not made available in their entirety, relevant research should be published so that the public has confidence in the findings of the EIA consultants and in the review process. This is also important to ensure that communities and NGOs can play a meaningful role in helping the government achieve optimal outcomes.

The scope of consultations on EIAs should not be strictly restricted to the content of the document. Rather, any relevant environmental consideration should be allowed to be raised. EIAs should treat the question of alternatives to the proposed project seriously, with a view to ensuring that the proposal really is the most environmentally and economically suitable way of achieving the objective.

6. Access in Practice: Local Communities

There are various levels at which the impact of freedom of information can be felt. One of the most evident is on local communities, particularly communities of indigenous people affected by large development projects.

This chapter examines the role of information in assisting local communities in protecting the environment. The role of local communities and the information that they have access to depends on a number of factors: their geographical area, whether they are urban or rural, the level of education and connectedness of members of the community, and related socio-economic factors. The nature of the proposed development or changes will also have an impact on the amount of information and the channels of communication open to local residents.

To shed light on how these various factors affect access to information, this chapter presents four case studies. The first involves the experiences of a community faced with a large development project, namely the village of Broga faced with a proposal to develop an incinerator. The second is about the experience of a village affected by the expansion of a rubber factory. The villagers fought for over ten years for the factory to be closed due to excessive air pollution, which caused skin and breathing disorders. The third case study involves urban communities protesting proposed developments on green areas and hill slopes. Specifically, the case study looks at the ongoing struggles of residents' associations in Petaling

Jaya, a suburb of Kuala Lumpur which recently started participating in Local Agenda 21. Finally, the experiences of indigenous people relocated due to the ongoing Bakun Dam project in Sarawak are examined.

6.1. Case studies

Broga[162]

Broga is a small community just outside Kuala Lumpur. The village has been chosen as the site for what is believed to be Asia's largest waste incineration project. The community has mobilised against the project, but their struggle has been complicated by official reactions and inhibited by not only a lack of information and consultation, but also by a media blackout of discussion on the issue.

Prior to the decision to build an incinerator in Broga, the proposed project had been targeted for the urban area of Puchong. The Puchong Anti-Incinerator Committee came from an affected area which was politically sensitive, comprising six electoral constituencies, two of which had marginal seats. When residents threatened to use their electoral muscle against the government if the incinerator proceeded, the project was shelved. Initial reports did not state what the alternative would be.

It was only through news reports that the residents of Broga were informed that the project had been relocated to a comparatively sparsely populated and electorally less significant area. Reports in November 2002 stated that the project would be beginning the following year. The decision appeared to have been made before an EIA had been approved.

In response, the community formed a committee (the Broga Anti-Incinerator Committee) and visited the national human rights commission, Suhakam, in late November 2002. The Department of Environment (DoE) officials attended the Suhakam meeting, but did not answer questions.

Pressure was put on the community to prevent them from disseminating information through the media. After a press conference held in the community hall in January 2003, for example, the village head was warned that he was only to release the keys to the hall to those connected with political parties in the government coalition. Shortly after this incident, stories on the issue disappeared from the mass media.

The company that was awarded the contract (without an open tender process) was Ebara Corporation, a Japanese environmental engineering company. Through Japanese contacts, the Committee investigated previous Ebara projects, discovering environmental problems including

[162] This case study is based on interviews held in April 2006, reports from an open meeting on freedom of information and the Broga experience held by the Centre for Independent Journalism (CIJ) in February 2005, and news reports on the issue. Local government officials were contacted for information prior to the CIJ meeting but requests for dialogue and feedback were refused.

a serious dioxin contamination incident,[163] where an important Japanese river was badly polluted. Considering the proximity of the Broga incinerator to important water supply intakes, this was an important link. The Committee also benefited from the research done by Japanese NGOs on emissions from waste incinerators, and was later able to use this information when commenting on the EIA. The Committee compiled clippings on the problems with incinerators and in particular on the company appointed to the project and sent these to elected representatives, the DoE and other relevant government parties.

A series of meetings with elected representatives, the local council and the Department of Environment followed. Yet, none of the questions on health impacts, concerns about air and water pollution and open contracts were answered, either orally or in writing. The refusal to answer questions during public meetings undermines both access to information and public participation.

A journalist from Malaysiakini.com, Claudia Theophilus, helped the Committee by persistently raising questions on Broga with Ministers, but this also failed to produce much in the way of concrete responses. Even during an ongoing court case initiated by the Committee, officials refused to answer questions and used the case as a reason not to release information (see below).

The community obtained a copy of the EIA when it came out, having seen notices calling for comments in the mass media. It cost RM850 (US$230), a not insignificant amount. They looked for online information and worked with local and foreign NGOs to study the report and submit their comments. There was, again, no official response to their comments. Prior to the approval of the EIA, the government commissioned a series of advertisements explaining the benefits of the waste incineration project, which were aired on television and printed in local newspapers. When the EIA was approved, an additional report was called for, due to a slight relocation of the project. The call for comments on this second EIA was only advertised in one English language daily, although the villagers are mainly Chinese or Malay speakers.

The bureaucratic attitude to requests for information was demonstrated when the villagers asked to see the conditions that were attached to the first EIA. The Secretary General for the Ministry of Housing and Local Government, Datuk Lokman Hakim Mohd Jasan, claimed that he could not photocopy the conditions but that he could write them out for the Committee by hand. After they repeatedly requested the promised handwritten copy, he claimed that he had been advised by government lawyers not to release the information, apparently due to the court case brought by the villagers, noted above (which complained about the manner in which land was being acquired for the project).

The only positive experience that the Committee related in terms of their dealings with government was a meeting in 2005 with representatives from the Ministry of Housing and Local Government, one of whom responded in writing to some of the questions raised. The representative sent a letter to the Minister, and copied the letter to the committee.

Kuala Kuang[164]

[163] Documented in Greenpeace, *Corporate Crimes* (Amsterdam: Greenpeace International, 2002), p. 29.
[164] This case study is based on local news reports, interviews with local residents in April 2006, and a report prepared by Theivanai Amarthalingam, legal adviser to CAP and the environmental organisation, SAM.

This case study, involving the residents of Kampung Baru Kuala Kuang, is based on a proposed expansion to an existing rubber processing factory. The village is situated in the district of Chemor, in Perak, a state to the north of the Malaysian capital. It is a rural village, with the majority of the villagers making a living through farming or small businesses.

Residents first started to lodge complaints about the factory, which had been built in the 1970s, in the mid-80s, and these complaints were resolved through the intervention of the DoE. In 1995, the factory expanded, emitting high quantities of hydrogen sulphide, a highly toxic gas. People in the area complained of breathing disorders, itchy skin and other ailments. Later research also showed a high incidence of nasal cancer in the area. Their property was also affected, with the residents having to replace their zinc roofs frequently and finding that clothes left on washing lines overnight would be discoloured.

As a result, the residents of the village formed the Jawatankuasa Anti-Bau Busuk Kuala Kuang (Kuala Kuang Anti Bad Odour Committee) and began to petition the State government, the Department of Environment, the Federal government and, later, NGOs, to solve the problem. In 1999, through these meetings, the State government offered the factory an alternative site and the factory owner agreed to relocate to these new premises within two years. While the Committee was unhappy that they would be exposed to the emissions for a further two years, they agreed to this compromise. However, two years later, the factory had still not moved and the villagers were informed that the two years was to run from the date that plans for the new factory were approved. The DoE told the villagers that the emissions were at a level which they "*boleh tahan*" (could stand).

Unhappy with this re-interpretation of the agreement, the Committee began working more closely with Consumers Association of Penang (CAP) and initiated a lawsuit against the factory. It was only through research carried out by CAP experts that the Committee compiled information that showed the serious health risk that the factory posed; no information was forthcoming from official sources.

Armed with this information, there was little doubt that the factory was violating environmental standards and posing a serious danger to local residents. The owner therefore agreed to an out-of-court settlement. This included stopping the use of sulphuric acid (which caused the hydrogen sulphide emissions) within 21 days and relocation to a new site with improved emissions control within 90 days. It also had to undertake works on the original site to ensure that it would not pose a future health hazard to residents.

Bukit Gasing

Bukit Gasing (Gasing Hill) is an urban green lung, straddling the border between Petaling Jaya, recently granted "city" status, but generally perceived as a suburb of the capital Kuala Lumpur, which lies on the other side of the hill. Altogether, the hill comprises 382 acres; 93.3 acres on the Petaling Jaya side were gazetted as a protected area in 1991. Petaling Jaya is also notable as one of the areas where the Earth Summit's Local Agenda 21 is being implemented. According to "Friends of Bukit Gasing", a group of concerned citizens and NGOs, the NGO World Wildlife Fund (WWF) Malaysia has published a study that indicates that the area is of ecological importance as a sanctuary for rare birds.

Residents in Petaling Jaya have been engaging in campaigns for over 15 years to ensure that the area remains undisturbed, attempting to have the Kuala Lumpur side of the hill gazetted as a green belt. In the Kuala Lumpur Structure Plan, the area is clearly marked as one of the few green lungs for the city but, in 2005, the latest plans for developing the hill were announced.

A continuing concern for residents has been that information that they have been given by government sources on development plans for the area have been inaccurate. In the early 1990s, despite government assurances that the land would not be developed, residents observed earth moving equipment and heavy lorries being moved into the area. Repeated requests for information and access to local and structure plans were ignored by the local council (MPPJ).[165] The Selangor state government, however, rejected proposals to de-gazette the area, and joined residents in their struggle to have the Kuala Lumpur side gazetted as a green belt. In 2002, the Kuala Lumpur Mayor gave a public commitment that the green lung on the Kuala Lumpur side would be gazetted, and that decision was reflected in the Kuala Lumpur Structure Plan 2020.

In 2005, however, the residents received a shock when the Federal Territories Minister announced that 40% of the area would be developed.[166] Most recently, residents have been battling new "secret plans" to develop the area, against a developer who has plans to build luxury lots on the site. The residents' lawyer has pointed out that any such development would be illegal, and residents were concerned that they only found out about the development due to a public relations exercise carried out by the developer.[167] While developers have the duty to inform residents of any proposed development, this can be done through a notice at the site, and is not required during the planning stage of the project.

The residents are among the few groups to have formally included a Freedom of Information Act in their demands to local government, in recognition of the impact that a lack of access to information has had on their campaign.

Land rights in Sarawak

The proposed Bakun dam is just one of the many projects that have eroded native customary rights (NCR) to land in East Malaysia. Sabah and Sarawak are governed by separate legislation on certain issues. Thus, Sarawak has its own Forest Ordinance, Land Code, Wildlife Protection Ordinance and National Parks and Nature Reserves legislation. There has been a persistent belief among indigenous rights activists that changes to these pieces of State legislation have largely been driven by the State government's determination to exploit the forests of Sarawak and, later, to engage in large-scale agriculture (such as oil palm) on NCR land. The methods that have been used are documented in the book *Our Land is Our Livelihood* as being:

(1) Increasingly tight definitions of what constitutes native customary land.

(2) Increasingly limiting procedures for establishment of (new) rights.

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[165] As documented in *Gasing Heights Sdn Bhd vs Aloyah Abd Rahman & Others*, High Court Shah Alam, Judgment of 2 August 1996, by Dato' Mahadev Shankar.

[166] "Isa: Hillslope development may be allowed again", *Star Metro*, 18 June 2005.

[167] Local news reports, May/June 2006.

(3) Increasing possibilities for extinguishing NCR.

(4) Increasing state powers to define the compensation rates and procedures which govern the process of extinguishing NCR.[168]

There is no legislation guaranteeing that communities are consulted or even informed about development projects in their area. One man indicated to one the authors of this report that he had come home one day to find that developers had torn down his house. Illegal encroachment of loggers into NCR land is common and well documented. Often, the communities only discover the logging, rather than having been approached for access to their land. In the late 1990s, the State government announced that a "Konsep Baru" (New Concept) was needed in the approach to NCR land, which would see an increase in joint venture projects between the private sector, government and the communities. This has not yet at least, improved consultation with communities over land use changes.

6.2 Alternative means of access

Given the restrictive legislative environment, researchers and NGOs often rely on an informal network of contacts within the government to help supplement official channels of information. Building these networks takes time and resources, and to some extent explains the differing experiences of older NGOs compared with newer ones, who have not had the time to develop such contacts. For example, the president of Malaysia's oldest environmental NGO, the Environmental Protection Society of Malaysia (EPSM), Mano Maniam, described how the fact that a number of senior officers of the DoE had joined the society when it was founded has facilitated EPSM contact with DOE staff, helping to promote information exchange.

Despite the restrictions on civil servants releasing information to the public, they remain a key source of often anonymous information for campaigners. This can create difficulties. It puts the civil servant in a vulnerable position. The government often tends to focus on discovering the identity of the leak rather than addressing the problem which has been exposed. Furthermore, source anonymity can cast doubt upon the credibility of the information and allows the source to disclose information without taking responsibility for its accuracy.

Information from civil servants is often cultivated through prolonged contact. One researcher from Universiti Malaya related in a personal conversation that she was expected to spend time having coffee and tea with government officials, so that they would be more likely to respond positively to requests for information. It is impossible for rural communities to cultivate contacts in this way.

Another source of information for the public is the media. At the same time, all major media in Malaysia have their headquarters in the Klang Valley, and news generally reflects an urban bias, thus giving civil society in the urban areas an advantage over their rural counterparts. This is reflected in differences between the Broga and Kuala Kuang cases. In the former, despite a mass media blackout, Malaysiakini.com journalist Claudia Theophilus has followed the story since its inception. She has cultivated her relationship with the community and put persistent pressure on

[168] Ideal Times.

all those concerned to answer difficult questions to do with the incinerator, occasionally bringing new information to light as a result of her work.

In contrast, the community in Kuala Kuang have not benefited from similar media attention despite their ongoing concern. Being located about three hours away from Kuala Lumpur, and away from any major urban area, it has been difficult for journalists, particularly journalists outside the mass media, to sustain their interest in the story or to respond to developments with the same immediacy that was evident in Malaysiakini's ongoing coverage of the Broga story.

The Internet is also an important source of information. Campaigners against the Sungai Selangor Dam, for example, found statistics on water through the Internet, buried in a section of the Public Works Department website. This information would have been difficult to obtain through liasing with the department directly. The scope for gathering government information that the officials refuse to release, however, has shrunk as government departments have rationalised their websites. The Broga committee also cited the Internet as an important source of information.

New technologies have been essential in building campaigns, building contacts with national and international NGOs and in disseminating information. One of the earliest success stories in the use of the Internet was the SOS Selangor campaign, which networked with the International Rivers Network, Friends of the Earth Japan and others to help put international pressure on the Malaysian government to halt its dam building programme and to access information on water supply and demand projections.

These informal methods of accessing information are also more likely to benefit those with the time and money to spend on cultivating contacts, which not only exacerbates rural and urban disparities, but is also more likely to incorporate gender and income disparities. For example, due to their multiple work and care burdens, women have less free time than men, so are less likely to be able to spend this time cultivating contacts.

7. Access in Practice: An Assessment by Sector

7.1. Conservation and Protected Areas

As noted in the first chapter, Malaysia is one of the world's twelve mega-biodiversity hotspots. Rapid development and land use changes have put stress on this biodiversity. Ecosystems that are particularly vulnerable are lowland and coastal areas. The changes in forest cover over the past half century, and the loss of mangrove and peat swamp areas, have resulted in an estimated one new mammal entering the endangered list every five months, and one new bird every three months.[169]

Problems of forest management in terms of access to information include lack of notification of changes in the status of forests, lack of consultation with affected communities, particularly indigenous communities, and lack of existing documentation and research on the value of forest

[169] *Capacity building and strengthening of the protected areas system in Peninsular Malaysia*, note 28, p. iv.

conservation. However, some of these problems are being addressed due to attempts by government departments to improve their understanding of the central role that local communities play in conservation.

Gazetting protected areas began with the Chior Wildlife Reserve, which was gazetted in 1903. In 1930, a Wildlife Commission was appointed to study possibilities for the conservation of wildlife and its 1932 report laid the basis for a protected areas system, though it was only under the Third Malaysia Plan (1976-1980) that official recognition was given to the need for a comprehensive protected areas system.[170]

There is both Federal and State legislation for the gazetting of Protected Areas. The majority of Protected Areas fall under the Forestry Act, and are gazetted as Permanent Forest Reserves (PFRs). PFRs can be de-gazetted by the state government, although the legislation requires that an equal area is subsequently gazetted. This is not a sustainable practice, however, as there is no requirement that the new area is of the same ecological importance. It also ignores the importance of continuity in protected areas.

Protected areas can also be gazetted under the Protection of Wildlife Act 1972, as wildlife reserves. Unlike PFRs, these fall wholly under Federal jurisdiction and, in theory, require Federal government agreement before they can be de-gazetted or have their status changed. In 1980, the Federal government also passed the National Parks Act. The only area gazetted under this legislation is the Penang National Park, which was only gazetted in 2003. The federal government has also encouraged states to pass their own legislation for the protection of state parks, such as the National Parks (Johor) Corporation Act, under which the Endau Rompin Park and various marine sites have been gazetted. Sabah and Sarawak have also incorporated their own environmental legislation, due to their special status within the Federation.

This complex system of jurisdictions also means that there are different standards of access to information and public participation. Sabah, for example, has instituted the practice of granting 'Sustainable Forest Management License Agreements' which give companies logging rights for 100 years. The agreements include minimal standards of consultation with local communities. They also specify that companies must respect native land rights.

Access to gazetting and de-gazetting of protected areas

Gazette Notifications (GNs) are issued when areas are gazetted, but there remains considerable confusion over which areas are gazetted, and under which legislation, which in turn obscures which department is responsible for the management of the protected areas. A joint study by the Department of Wildlife and National Parks (DWNP) and the Danish Cooperation for Environment and Development (DANCED) refers to the task of identifying which areas were gazetted, and under which regulations, as "detective work", adding that "it seems that the procedure followed (in de-gazetting or gazetting protected areas) is clearly not according to legal principles for declaring, altering and abolishing land use changes."[171]

[170] *Ibid*., p. 23.
[171] *Ibid.*, p. 26.

Since the report has been published, however, the Forestry Department has come under the same Ministry as the DWNP, allowing for some rationalisation of procedures and facilitating the sharing of information.

The Southeast Pahang Peat Swamp Forest project illustrates the challenges of information sharing around protected areas, even within government. Over 40% of the project area has been gazetted as PFR, and the State government has implemented logging controls in the area. However, one of the problems facing the project has been the difficulty in persuading various state and federal departments to cooperate in sharing information and implementing conservation measures.[172] This lack of information sharing could be due to administrative reasons, but greater access to information would help overcome barriers to sharing information between departments and would also increase the amount of information available to the general public.

Consultation with affected communities

Public participation is one of the three pillars of Principle 10 of the Rio Declaration, along with access to information and access to environmental justice (see chapter one). The three are interdependent, with consultation potentially providing an avenue for access to information. Conversely, if communities are not given sufficient information, consultation exercises are rendered meaningless. While consultation with communities affected by the gazetting or de-gazetting of protected areas has traditionally been poor; where it has occurred at all, there are encouraging signs that this has been mutually beneficial.

In *Changing Pathways: Forest degradation and the Batek of Pahang, Malaysia,*[173] Lye Tuck-Po documents the experience of the Batek, the indigenous people who inhabit Malaysia's largest national park, Taman Negara. Changes in land use, the encroachment of logging and development into their traditional lands and the increasing development of tourism facilities within the park have all taken place without the Batek being consulted. He notes: "From the point of view of government officials, there are official channels of communication that anyone can take advantage of... From the point of view of the people, however, these channels either do not work or do not serve their purposes and so they must develop alternative means of advancing their grievances."[174]

While it is unclear what official channels of communication exist in this context, Lye shows how Orang Asli and Orang Asal in Sarawak have created spaces for communication, such as taking advantage of official ceremonies to present demands and concerns, or talking to foreigners and researchers outside the State system to provide a conduit for local demands.

There have been similar concerns with the management of wildlife reserves in Sarawak, where the traditional hunting grounds of indigenous people are now protected areas. When the Mulu National Park was gazetted, for example, the indigenous Berawan people were affected, first by

[172] From interviews and conversations with groups and individuals involved in the project and from *Black Water Jewel: South-East Pahang Peat Swamp Forest*, Forest Research Institute Malaysia (FRIM)-UNDP Global Environment Facility (GEF) Swamp Forest Project and the Pahang Forestry Department, 2004.
[173] Tuck-Po, Lye, *Changing Pathways*, (Strategic Information Research and Development, 2005).
[174] *Ibid.* , p. 21.

the gazetting of the park, then later by the construction of an airport and five-star accommodation in the park itself. An article from the *People's Mirror* on 7 July 1993, quoted in *Our Land is our Livelihood,*[175] quotes the Sarawak Chief Minister Taib Mahmud as saying: "The state government will not hold any meeting with the Berawan. If we are to entertain these greedy people, then it would set a precedent and an encouragement for others to make similar claims." While Mulu National Park, a UNESCO World Heritage Site, is of undoubted ecological importance, free prior and informed consultation with affected indigenous communities is, as mentioned previously, recognised as imperative in sustaining conservation efforts.

The DWNP-DANCED study recognises "that local community involvement can be a very valuable component of efforts directed towards conservation and management of Protected Areas."[176] This emphasis was evident in the implementation of the management plans for the Penang National Park. Two communities were affected when the Penang National Park was gazetted, a community of fisher folk and others engaged in highly polluting aquaculture. The DWNP engaged both communities in a series of onsite consultations about how to both conserve the environment, particularly the marine environment, while also allowing for limited activities for the local communities. Saharudin Anan, Principal Assistant Director for the Protected Areas Division in the DWNP, related in an interview how the process of gazetting the park had involved the Malaysian Nature Society (MNS),[177] the Penang state government and the Federal government. After the process of gazetting the park, the local communities were engaged in putting together a management plan for the park. Relocation for the aquaculture or "cage culture" industries was also negotiated with the communities, to ensure a win-win situation for all involved. While the management plan had not yet been finalised when the interview took place, it was in its final stages and was perceived by local NGOs and the government to have been successful.

It should be noted that while there are no institutional requirements for the department to engage in consultation, the department on its own accord included this as a condition in the terms of reference for the gazetting of the park, recognising the benefits of engaging the community.

Saharudin also commented on continuously applying better methods to improve consultation with the Orang Asli communities in Taman Negara to ensure that they have a representative sample of inhabitants, as opposed to speaking only to the headman (or *Batin*) of a village or group. Methods applied include developing incentives, such as reimbursement for travel and time off work, for those attending the consultation. To ensure broader participation, they have also changed their method of engaging with the people. He related an incident where they conducted "interviews" while swimming, where women in particular felt more comfortable opening up than they had in a classroom.

In Sabah, there have also been recent improvements in the 1997 Sustainable Forest Management (SFM) license agreements. Licensees are required to respect Native Customary

[175] Note 168, p. 70.
[176] *Capacity building and strengthening of the protected areas system in Peninsular Malaysia*, note 28, p. 123.
[177] Interview of 16 June 2006.

Rights (NCR) and to engage in the "implementation of community labour/welfare schemes." There is nothing, however, that relates to consultation or participation of native communities.

7.2. State utilities and environmental information

Part One: Water

Malaysia is one of the world's richest nations for rainfall, with over two metres of rain annually. Yet the capital city is dogged with water problems, ranging from water shortages to water that, literally, stinks as it comes from the taps. This part of the chapter will look at concerns with the secrecy surrounding the management of Malaysia's water resources and the problems with this.

Malaysia's water supply was originally controlled by the State governments, and each had a water supply board (Jabatan Bekalan Air). Privatisation became government policy during the 1980s and the Malaysian government has cited the inefficiency of State agencies as one reason behind this. The first moves towards water privatisation in Selangor began in the early 1990s. Puncak Niaga Sdn Bhd took over 27 water treatment plants in 1994[178] and, by 1999, supplied 70% of the total water supply for Selangor and Kuala Lumpur.[179] Little was revealed in the media during the privatisation exercise. There were no open tenders and no public consultation: the agreements were and remain confidential. With tight control over the media, there was little coverage of the issue, with most information that was released through the press coming through the business pages with a focus on the impact on share prices rather than consumers.[180]

Notwithstanding a claimed efficiency from privatisation, in late 1997/8, Kuala Lumpur suffered an extensive water shortage. The government's response was to look for new sources of water supply and, in 1999, news reports came out that a dam was proposed across the Sungai Selangor, one of the last free-flowing rivers in the state. From the beginning, there was little consultation or transparency surrounding the project. The consultant who was contracted to conduct the EIA, for example, was also contracted as an engineering consultant on the construction of the dam. The consortium building the dam included a company owned by the Selangor state, and was awarded the contract without open tender.

The lack of transparency in the contracts and concessions given to water companies is of serious concern in part because it creates an atmosphere conducive to corruption, as those approving the contracts do not have to justify their decisions on either public interest grounds or efficiency. Furthermore, information and analysis by the Coalition against Water Privatisation (CAWP) indicates that proposed price rises in water are a direct result of concession agreements.[181] They are concerned that consumers are paying a higher price for water than necessary, due to rent-seeking behaviour by the monopoly suppliers. Contract

[178] From "Major Projects Undertaken A. Privatisation cum Concession Agreement (PCCA)", available at http://www.puncakniaga.com.my/contents/07_project/project_001.cfm
[179] *Puncak Niaga Holdings Berhad Annual Report*, 1999, p. 5.
[180] Interview with Charles Santiago, Coalition Against Water Privatisation, 17 April 2006.
[181] As explained by coalition member Charles Santiago, interview, 13 April 2004.

secrecy also means that the public is largely unable to evaluate whether sufficient safeguards, both environmental and social, have been built into these agreements.

There are also concerns about lack of transparency in relation to water pollution. Monitoring of river pollution, which has been worsening nationwide, has been outsourced to Alam Sekitar Malaysia (ASMA) Sdn Bhd since 1995.[182] Despite the obvious public interest in this issue, the results of the monitoring are not made available to the public, although the DoE annual report contains a detailed breakdown of the location of the monitoring stations and the number of actions that have been taken against polluters.

Information is also not released regularly on drinking water quality. Newspapers often run stories of muddy water, showing pictures of the visible contamination of the water supply. Most recently, the water supply to parts of Kuala Lumpur was contaminated with ammonia, giving out a nauseating stench.[183] While the authorities denied that there was any health risk, this was met with scepticism by those affected. Consumers have a right to know about the quality of the water that they are consuming. If the government or the water companies regularly published this information, it would increase confidence in the water quality and engage public assistance in monitoring water quality.

Despite these problems, some departments working on water have a good track record on the release of information to the public. The Department of Irrigation and Drainage has been praised by both the Consumer Association of Penang and SOS Selangor for conducting thorough research and making it available to the public. It has a forum section on its website, although it rarely answers the questions that members of the public pose on the forum.

Part Two: Energy

The energy sector is a hugely important sector in any country, with public policy playing a key role in setting priorities and directions. In Malaysia, there are problems undertaking any sort of analysis of much of the energy sector, due to the lack of sustainable energy indicators. During research, veteran environmentalist Gurmit Singh, attempted to find out what percentage of energy is being sourced from renewable sources, but was unable to obtain the data.

The transport industry is a good example of this. It is impossible to get information on the percentage of the energy consumed by this sector that is used, respectively, by public and private transport. According to Gurmit Singh, this information is comparatively easy to compile but the government is not currently compiling it. This is key for planning purposes for public transport and, without it, it is difficult to plan or assess incentives for improved energy use and consumption patterns.

Another concern is the transparency with which energy policy is formulated. For the most part, this is done behind closed doors with little information being released to the public prior to policy being effectively adopted. However, initiatives such as the collaboration between the

[182] Department of Environment, *2003 Annual Report*, 2004, p. 41.
[183] The major incident took place in March 2006 and was covered extensively in local newspapers.

Federation of Malaysian Consumer Associations (FOMCA) and the Ministry of Energy, Water and Communications on sustainable water management show how government can work with NGOs and other non-State actors for mutual benefit.

Another major problem in assessing both current and future energy needs and resources is the secrecy surrounding the state oil and gas company, Petronas. It reports directly to the Prime Minister's Office, its accounts are not available to the public, and little is known, other than vague reports, about oil and gas reserves in Malaysia. Petronas was recently rated as the most secretive oil and gas companies internationally in a survey on transparency of 15 international oil and gas companies by the Madrid based research company Management and Excellence.[184]

The corporation has been publishing its annual reports online since 2002. The latest annual report has a short section on the environment. This does not contain an environmental audit but tells shareholders about the activities of the company in mitigating environmental impact, such as handing over a decommissioned oil rig to be converted into an artificial reef.

The annual reports of the larger international petroleum companies operating in Malaysia do have sections assessing their environmental impact, although these vary in quality. British Petroleum (BP) Malaysia has been leading the way in forging relationships with NGOs to combat climate change. It has not only released environmental information to the Malaysian Climate Change Group, a coalition of businesses and NGOs, but has also been working with them to reduce BP's own energy needs. Unfortunately, despite repeated attempts, neither the Malaysian electricity utility, Tenaga Nasional Bhd (TNB), nor Petronas have joined the group.

Unlike the transport sector, the oil and gas sector does collect environmental data. According to Gurmit Singh, however, while this corporate information is made available to Petronas, the general public cannot access it.

Malaysia's main electricity supplier is TNB, a corporative company with obligations of universal service provision. It is not, however, the only producer of electricity and has signed contracts with numerous independent power producers (IPPs). This has recently become a matter of significant controversy as the rate that TNB pays the IPPs for electricity is about two and a half times its own generating cost. TNB also is under contractual obligation to buy electricity from the IPPs, regardless of requirement.[185] These contracts were negotiated secretly, and it is only recently that the details have come to public notice.

[184] Management & Excellence (M&E) S.A., *World's Most Sustainable and Ethical Oil Companies* released in February 2006. and M&E Press Release "Shell Again Most Sustainable Oil Company in 2006", available at: http://www.pennwellpetroleumgroup.com/resourcecenter/reports/ethical_report.cfm

[185] While the contracts themselves have not been made public, news stories on electricity price increases have revealed these details.

7.3. Biotechnology policy, safety and information

Government policy puts Malaysia at the forefront of biotechnology. In 2001,[186] the then Minister for Science, Technology and the Environment, Law Hieng Deng, announced that complementary to the Multimedia Super Corridor, Malaysia would be building a biotechnology park, known as Bio Valley. The project has since been shelved and a new, more decentralised Bio Nexus initiative has been launched. Simultaneously, the government announced that it would be drafting a National Biotechnology Policy. The Malaysian interest in biotechnology has been fuelled by its rich biodiversity, which the Government hopes can be tapped by local and foreign pharmaceutical companies leading to the creation of wealth.

Access to information about biotechnology and biosafety has been very variable in Malaysia and has largely depended on informal contacts and benefits. The draft National Biotechnology Policy remains a secret, protected under the Official Secrets Act, and is not available to NGOs or members of the public. There has also been virtually no information disseminated on official discussions on biotechnology, and its pros and cons.

More openness has attended the drafting of a National Biosafety Policy and Biosafety Bill. The then Minister for Science, Technology and the Environment reported in early 1999 that a biosafety bill was being drafted and that it would be finished within three months.[187] In 2000, a public consultation was held on the Bill although the Consumer Association of Penang (CAP), which attended, said that little information was released during the consultation. One of the issues highlighted by the media, in particular by a writer employed by the Malaysian Biotechnology Information Centre which is closely linked with industry, was that the Biosafety Bill contained more stringent controls over genetically modified organisms (GMOs) than the Cartagena Protocol, which Malaysia ratified in 2003.[188]

Both the (secret) National Biotechnology Policy and the National Biosafety Policy are overseen by the National Biosafety Council, which includes a representative from Third World Network (TWN), an international NGO based in Kuala Lumpur dealing with issues including biotechnology. As the organisation notes, this gives them privileged access to information on both the policies and they cannot share this information with other organisations. However, due to negative perceptions of NGOs by many Council members, TWN has had to rely on building up informal relations with individuals within government and corporations to help supplement its supply of information. Even TWN does not have access to the National Biotechnology Policy, despite its position on the Council.

Furthermore, access, even for TWN, has not been so forthcoming in relation to information held by companies. Many of the companies that submit proposals stamp documents "confidential", on the grounds of commercial security, and these restrictions are accepted by the Council without question. In the absence of guidelines on what constitutes legitimate grounds for commercial confidentiality and what is being withheld to influence public debate

[186] Sharmi, P., "Three new biotechnological R&D institutes", *New Straits Times,* 14 August 2001.
[187] "Panel given three months to draft law on bio safety", *New Straits Times*, 29 March 1999.
[188] See Yee Ai, executive director for the Malaysian Biotechnology Information Centre, who was writing a monthly column for *The Star.*

(or the lack of it), it is impossible to bring vital information on possible health or environmental impacts to the public.

CAP has also been vigilant in the campaign for stringent biosafety standards. The organisation wrote to the then Ministry of Science, Technology and the Environment requesting access to a copy of the national policy, but there was no response. CAP is concerned that the lack of response to some of their queries on biosafety could be because the government does not have the information.

CAP has nevertheless found that some government departments have been cooperative. Mageswari Sangaralingam from CAP cited the example of correspondence with the Malaysian Agricultural Research and Development Institute (MARDI), requesting information in 2004 on genetically modified (GM) rubber trees. They received a response eight days after the letter was sent. However, with no institutional framework for the release of information, any response depends on the issue in question and on the informal guidelines and working environment in the department involved. Even with MARDI, the organisation still relies on informal methods of gathering information. They were, for example, given information that MARDI was growing GM papaya in an open field. MARDI had not provided this information to the general public, even those living in the surrounding area who could be affected personally or whose own fruit trees could be affected. Their experience with the Malaysian Palm Oil Board (MPOB) has also been positive. After requesting information, the MPOB called a meeting with CAP and gave the organisation details on the GM work that they were carrying out, in a contained field. CAP was given access to the field.

7.4. Environmental disasters

During the management of a crisis, it is often tempting to clamp down on sources of information. Frequent references to "preventing a panic" indicate that the authorities believe that if the general public have access to information, this could lead to a worsening of already critical situations.[189]

This chapter examines this myth through one major case study, namely the recurring problem of the haze. It argues that better information management would have helped to improve the government's ability to cope with emergency situations, and that similar experiences in the field of disease outbreaks reinforces these assertions.

Brief analyses of two additional case studies, namely the Japanese Encephalitis virus episode and the 2006 Tsunami, are also used to demonstrate that governments habitually respond to crises by denying access to information, which in turn perpetuates an atmosphere of uncertainty and panic.

[189] See Jiang, Yu-Hang, "SARS: Nobody's buying Malaysia's silence", *Asia Times,* 10 April 2003, available at http://www.atimes.com/atimes/Southeast_Asia/ED10Ae02.html

The haze

The haze has long been an irregular visitor to Malaysian shores. However, it is only in the recent past that the haze has graduated to an almost annual occurrence. The latest manifestation was in March 2006, though this was a comparatively mild episode compared with the severity of the haze of late 2005, when a state of emergency was declared.

The recent episodes of the haze in Malaysia, Singapore and Indonesia have been attributed to slash-and-burn agriculture, the clearing of land for oil palm plantations and a build-up of ambient pollutants due to industry and transport. From August 1997, the haze blanketed parts of Malaysia, particularly Sarawak, for around three months, with levels of pollutants reaching extreme concentrations.[190] An emergency was declared in affected parts of the country, the government monitored the situation, a task force was set up to ensure that the haze was tackled effectively and root causes were investigated.

Initially, newspapers and websites gave daily reports on the Air Pollutant Index (API). There were concerns, however, regarding the quality of information that was being disseminated to the public. There was little available in terms of quantitative data. A numerical reading was given, and this was classified as "Good", "Moderate" and so on up to "Hazardous". However, the action required once the haze reached the "Hazardous" level was uncertain. Initial reports were that this would require emergency action by the government, but little was done in Sarawak even once the upper limit of the "Hazardous" category had been reached. Initially the readings were on a scale of 0-500, with anything above 300 considered "Hazardous". However, by mid-September, the readings in Sarawak were breaching the 800 mark.

It was also not made clear how these figures were calculated, what substances were being measured and how they were weighted in the index. There were also concerns raised about where the measurements were taking place, due to geographical variations in haze levels.

These concerns led the public to ask questions about the dangers to public health, as well as a lack of confidence in official sources of information. What is clear from the monitoring of unfiltered online discussion forums, such as Sangkancil and soc.culture.Malaysia, was that people were worried about the impact of the haze on their health and concerned by the paucity of official information available. These concerns were strengthened by rumours of evacuations among groups who were perceived to have access to more accurate information, such as diplomatic staff.

This was exacerbated when the government declared that the API figures were henceforth to be classified. While those with Internet access were able to view Singaporean figures for the API, the localised figures necessary for informed decision-making were not available. The ban was only lifted during the 2005 recurrence of the haze, ironically a day after the Deputy Prime Minister had announced that there was no reason to reveal the API figures.[191]

Some viewed this as symptomatic of the government's new general policy of openness and transparency. However, there were serious limitations regarding the standard and scope of

[190] Particularly evident in reports by late journalist MGG Pillai in his reports for his Sangkancil newsgroup.
[191] Najib, "No plans to make API public", *New Straits Times*, 9 August 2005.

information released. First, the public remained ignorant of what the figures meant. The cocktail of pollutants, the manner in which they are measured and the weighting given to different pollutants were not made public. It was therefore difficult to assess the real threat to health posed.

Second, it was difficult to assess the government's response to the haze. If, as appeared to be the case, there was little or no scientific warning of the haze, the government would understandably be surprised. However, if there were indications that the haze was likely to recur, then mitigation measures, such as the issuing of masks to vulnerable segments of the population, could have been undertaken. Given that the need for early warning systems was mooted in 1997, it is difficult, particularly without the relevant information, to make a clear judgement on the government's response or to make recommendations that could lead to an improved response when the haze recurs.

Third, the implementation of the state of emergency appeared hasty and in itself caused some panic among segments of the population. It was unclear whether it meant that the people in the affected areas would be evacuated, whether martial law was in place to ensure that people remained indoors or whether it was merely an indication of how seriously the authorities viewed the crisis. Clarification came via newsgroups and the Internet long before the information was available through official sources.

Finally, there were concerns voiced privately by specialists that the number of deaths and both the long and short-term impacts of the haze had been underreported. If this is correct, it makes meaningful evaluation of the social and economic impacts of the haze difficult. This also renders the formulation of a comprehensive action plan for the future difficult.

The first of these problems has since been rectified, as the DoE has published comprehensive information on how the API is reached on their website. The second is also being addressed, with the daily publication of API figures on the DoE website continuing, even though the emergency is over.

Implications

A number of informational implications may be drawn. First, those who did have access to some forms of information – for example due to Internet access or because of special contacts – were clearly in a privileged position. Given that Internet penetration in Malaysia in 1997 was relatively low,[192] these asymmetries of access to information cleaved along lines of economic privilege. Thus, the poor were worst affected by the lack of information. The asymmetry also has a gender dimension, as women are less likely to have access to the Internet and less likely to have the time to spend looking for information due to their extensive commitments caring for elderly dependents, housework and child care alongside paid work.

[192] Internet penetration reached 7% in 1998. Cited in Hao Xiaoming and Chow Seet Kay, "Factors affecting Internet Penetration: An Asian Survey", First Monday Issue 9, 2004. Available at: www.firstmonday.org/issues/issue9_2/hao/index.html

Second, the public's confidence that the government was acting in the best interests of those affected was undermined. Public statements that the API figures were being concealed to ensure that there was not a drop in tourism arrivals exacerbated this problem.

Third, the lack of access to information prevented the government from dealing with the crisis in the most effective manner possible. To maximise the possibility of achieving optimal results, there needs to be an open, two-way exchange of ideas between the government and the public, particularly in affected areas. Such a two-way exchange depends on access to information. For example, by making information available to a wide group of people, it is more likely that somebody will be able to sound a warning that the haze is recurring and put forward ideas on how to deal with the problem in future.

Supporting case studies

The government's handling of the haze crisis was not the first time the Malaysian government had withheld information from the public in times of crisis. The following two case studies – of the Japanese Encephalitis/ Nipah virus episode and the 2006 Tsunami – provide other examples of this phenomenon.

Japanese Encephalitis

In 1999, over 100 people died in Malaysia due to a new virus. The Malaysian government refused to release information as the death toll mounted. Instead, it engaged in a campaign to wipe out the virus by the mass slaughter of 900,000 pigs, a sound approach to combat the comparatively well-known Japanese Encephalitis virus. However, the official diagnosis was mistaken and the cause of the deaths was instead a new virus, named the Nipah virus. An article in the *Asian Wall Street Journal* catalogued how the lack of dissemination of information hindered attempts to handle the crisis.[193]

In contrast, the handling of the SARS outbreak was comparatively well-managed in Malaysia. Information was made available from a centralised location by officials. Daily press conferences were held. However, the government suffered from a credibility gap and online discussion forums indicated that people simply did not believe the official sources. This was exacerbated when it appeared that doctors and staff of government hospitals were not allowed to talk to the media. While this move may have ensured that only officially verified information was released, it led to people believing that the government was hiding something. While SARS did not reach crisis levels in Malaysia, it is easy to see how government efforts at containment would have been hampered by a sceptical population, had emergency measures been necessary.

The Tsunami of 26 December 2004

When the *tsunami* struck Southeast Asia, televised images of destruction sped around the world prompting swift responses from governments internationally, whether from affected countries or not. Malaysian viewers saw images on BBC and CNN, and found updates on web diaries

[193] Pura, Raphel and Rick Brooks, "How a virus in Malaysia became a national emergency", *Asian Wall Street Journal*, 27 April 1999.

known as "blogs", (informal diaries which led the way in reporting the situation in the northern peninsular states). Malaysian free-to-air television and radio, however, reported nothing until the evening after the disaster. This was exacerbated by a mix of repressive laws on freedom of expression and informal constraints on the release of information.

The reasons behind this silence remain unclear, but there has been much speculation that it was to prevent panic and to ensure that the tourist business was unaffected. The uncensored responses in online forums indicates that there was widespread belief that this was not done in the public interest. The government's credibility in its handling of the *tsunami* and its victims was affected from the very beginning of the crisis and this damage is still evident in recurrent concerns about the manner in which relief funds were disbursed.

Recommendations

All departments and government agencies should share information and consult with local communities regarding environmental issues, including changes to land status, the activities of utility companies, and energy and biotechnology policy. Malaysians have a particular right to know about activities which may affect their livelihoods or health. It is especially important to ensure a free flow of credible information to the public in times of crisis. To this end, formal guidelines should be established regarding the timely release of information to communities and the manner of engaging them in consultation prior to decision-making.

More research is needed to understand Malaysia's natural heritage.[194] Studies should be encouraged and the results published openly, helping to build a foundation for future research and better understanding of our common heritage. The government should make greater efforts to collate important environmental data to ensure that policies are implemented effectively.

Information on contracts, demand and supply studies, and related matters should be made available to the public to ensure that politicians are held accountable for how natural resources and public utilities are used.

Community participation in the management of protected areas should be encouraged through proper dissemination of information. This, in turn, enables the public to keep abreast of developments, request further information where necessary and stay actively involved in the implementation of plans which affect their local environment.

All statistics relating to water and air quality should be released, as is currently the practice for the Air Pollutant Index (API).

The public should be consulted on the making of energy and water policy, with policy documents being made available sufficiently in advance to allow for proper consultation.

A Biosafety Bill, incorporating stringent disclosure requirements for both government research departments and private corporations, should be adopted as a matter of urgency. In the meantime, the National Biosafety Council should adopt more stringent disclosure rules.

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[194] See Ministry of Science, Technology and the Environment, *Malaysia Country Report on Biodiversity: Assessment of Biological Diversity in Malaysia* (1997), particularly Chapter 7, Recommendations, pp. 151-155.

Information systems are not something that can be put in place hurriedly in times of crisis. Measures need to be put in place in advance that will, first of all, help to prevent crises and, second, ensure that crises, once they occur, are handled as smoothly as possible and effects mitigated. For example, information that could show an impending crisis should be released on an ongoing basis, and in a form in which the public can understand and assess it. In a context of regular crises, ideas should be sought from the public as to possible means of redressing them.

ARTICLE 19 takes its name and purpose from Article 19 of the Universal Declaration of Human Rights.

> *Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*

ARTICLE 19's mission statement:

> ARTICLE 19 promotes, protects and develops freedom of expression, including access to information and the means of communication. We do this through advocacy, standard-setting, campaigns, research, litigation and the building of partnerships. We engage global, regional and State institutions, as well as the private sector, in critical dialogue and hold them accountable for the implementation of international standards.

ARTICLE 19 seeks to achieve its mission by:

- strengthening the legal, institutional and policy frameworks for freedom of expression and access to information at the global, regional and national levels, including through the development of legal standards;
- increasing global, regional and national awareness and support for such initiatives;
- engaging with civil society actors to build global, regional and national capacities to monitor and shape the policies and actions of governments, corporate actors, professional groups and multilateral institutions with regard to freedom of expression and access to information;
- promoting broader popular participation by all citizens in public affairs and decision-making at the global, regional and national levels through the promotion of free expression and access to information; and
- applying a free speech analysis to all aspects of people's lives including public health, poverty, the environment and issues of social exclusion.

ARTICLE 19 is a non-governmental, charitable organisation (UK Charity No. 327421). For more information please contact us at:

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The **Centre for Independent Journalism**, Malaysia (CIJ) is a non-profit media organisation that aspires towards a democratic and responsible media by empowering communities to claim and protect their information and communication rights. Established in 2001, CIJ seeks to :

- Empower communities through training and capacity building on communication and communication rights;
- Use and expand existing space innovatively for independent media projects;
- Support community-based media initiatives;
- Support and defend journalists in maintaining their professional standards and conduct;
- Advocate legislative changes to promote and protect media freedom, freedom of expression and freedom of information; and
- Secure local financial support and not compromise on our independence and integrity.

CIJ works on various projects, including:

Radiq Radio

Radiq is a unique attempt to legally circumvent broadcasting legislation through the Internet. The first Bahasa Malaysia radio news service over the Net, it started out broadcasting 15 minutes of news daily. It has evolved into a community-based, narrow-casting Internet station, open to communities, NGOs and individuals, with two full-time editorial staff.

Training sessions – journalists

CIJ organises a variety of training and briefing sessions open to all journalists, on issues such as legislation, radio production, gender issues and investigative journalism.

Training sessions – non-journalists

CIJ trains non-governmental organisations in the use of the media, communication rights and radio production. It also works with marginalised communities, such as indigenous people, factory workers and urban poor.

Advocacy

CIJ plays a significant role in numerous communication rights initiatives, such as the National Coalition for a Freedom of Information Act and the Article 10 coalition, supporting the Constitutional right to freedom of expression.

Research

CIJ monitors violations of communication rights and conducts research into the media industry in Malaysia, ranging from how the media is used to research into corporate ownership.

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