

**ENVIRONMENTAL RIGHTS IN MALAYSIA:
PUBLIC PARTICIPATION UNDER EIA**

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ABSTRACT

The objective of this study are: to examine the right of public participation in decision making under EIA law in Malaysia; to examine the existing limitations of public participation in decision making procedures under EIA; to examine the practice of public participation in EIA procedures; to examine public awareness of EIA and its implementation; to assess the importance of constitutional measures supporting public participation in environmental decision-making; and to examine prospects for law reform and changes in EIA law and planning procedures to improve both the level of public participation in EIA and the quality of decision making. This study adopted qualitative research. This involves at least seven data sources, which are Malaysian planning authorities, Departments of Environment (DoE), public in selected affected areas, Malaysian Non-Governmental Organisations (NGOs), EIA reports, statutes and law cases. The interview method has been used to generate data from the planning authorities, DoE, public and NGOs; and content analysis has been used while examining the EIA reports, statutes and law cases. This study identified significant lack of provision regarding right to access to information, ignorance of the EIA laws as well as its procedures on part of the public, inappropriate structured provision on right to public participation in EIA laws and restricted right to access to justice in environmental matters. It identified five significant limitations to the right to public participation; uncertainty of the EIA procedures and their uncertain legal status, limited access to information on EIA report, strict rule of standing, complexity of federal-state relationship, and lack of awareness among the public in Malaysia. In addition, this study found ignorance of the concept of 'environmental rights' on part of the decision makers and the public. This study concludes by highlighting the issues that need further investigation and proposes practical suggestions to the problems.

DEDICATION

To my husband, my late parents and my children

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In the name of Allah the Compassionate the Merciful

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PART I

INTRODUCTION AND LEGAL

CONTEXT

Chapter 1. The Framework

1.1 Introduction

In Malaysia, as far as environmental protection is concerned, the main legislation is the Environmental Quality Act 1974 (EQA) and subsidiary legislation made thereunder; although Azmi¹ has argued that the Act was designed primarily to control pollution rather than promoting wide aspect of environmental protection. With the insertion of section 34A of the EQA, an Order was enacted under this provision called Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 (the 1987 Order) which took effect on 1 April 1988.. The 1987 Order provides a list of prescribed activities for any person who intends to carry out any such activities. Section 34A of the EQA requires such a person intending to carry out any prescribed activities to submit a report on the impact on the environment (the environmental impact assessment, or EIA) to the Director General, Department of the Environment (DoE) for approval. The DoE on this matter also released a handbook called '*A Handbook of Environmental Impact Assessment Guidelines*' (the EIA Guidelines) which provides procedures for conducting EIA. Among other things, public participation² is one of the requirements under the process³. Public participation as explained under

¹ Azmi Sharom, *Understanding the Environmental Quality Act 1974* in Mimi Kamariah (ed), *Current Legal Problems in Malaysia*, (Kuala Lumpur: University Malaya Press, 1998) at 1.

² The concept of public participation is explained under section 1.4.5 of the EIA guidelines as follows: '*public participation in the environmental impact assessment procedure is an aid to project planning. It enables the project initiator to; (i) monitor community needs and ensure that the direction or emphasis of his project continues to satisfy those needs; (ii) identify both material and psychological impacts of the projects on the community; (iii) measure and promote the social acceptance of the project in the community and avoid costly modifications or abandonment of the project at a later stage; (iv) monitor changing environmental values in the community; and (v) obtain additional environmental information known to the local population. A valid assessment of the impact of a project on the community cannot be made without some form of public participation. However, public participation must be carefully planned to obtain the maximum benefit from it*'.

³ Public participation at preliminary assessment under section 2.3.4, public participation at detailed assessment under section 3.4.4, and public participation at the review process under section 4.7 of the EIA Guidelines.

section 1.4.5 of the EIA Guidelines is a tool to a project so that the project proponent may get additional information about local environment and local needs towards the proposed project. Furthermore, public participation is also a concept which applies the principle of ‘democratisation’ by giving the public a right to express their concerns and views in a proper channel.

1.2 The Concept of ‘Environmental Rights’

An ‘environmental right’ is not expressly provided for under Malaysian law. Fundamental liberties or human rights such as the liberty of a person, freedom of speech, freedom of movement and the right to property are secured under the Malaysian Federal Constitution, and ‘environmental rights’ are yet to be explicitly included as one of the substantive rights. According to Mukherjee⁴, ‘*“environmental rights” have been defined as both individual and collective, both substantive and procedural*’⁵, and the contents of ‘environmental rights’ have been ‘*derived from the existing universally recognised rights, both with regard to substantive rights (such as the rights to life, health and privacy) and procedural rights (namely, access to information and due process of law)*’⁶.

Human and environmental issues have been discussed before. The World Commission on Environment and Development, known as the Brundtland Commission, published a report, *Our Common Future*⁷, which stated that inter alia, ‘*All human beings have the fundamental right to an environment adequate for their health and well being*’⁸. Then, the United Nations Conference on Environment and Development, 1992, also known as the Earth Summit, produced the Rio Declaration on the Human Environment and

⁴ Mukherjee R, *Environmental Management and Awareness Issues*, (New Delhi: Sterling Publishers Private Limited, 2002).

⁵ Mukherjee, see n.4 at 50.

⁶ Mukherjee, see n.4 at 51.

⁷ United Nations World Commission on Environment and Development, *Our Common Future: Report of the World Commission on Environment and Development*, (1987) doc A/42/427.

⁸ Principle 1 of *Our Common Future*

Development (the Rio Declaration)⁹. Principle 1 of the Rio Declaration states that, ‘*Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature*’¹⁰. However, whether the aspirations can be represented as ‘rights’ and incorporated into substantive and/or procedural law is a matter of conjecture.

1.3 The Concept of Substantive Environmental Rights

Despite the above provisions, according to Mukherjee, ‘*universal human rights instrument do not spell out the right to environment as a specific human right*’¹¹. All individuals are entitled to live in an environment adequate for their health and well-being, and the Commission on Human Rights has recognized this assertion¹², but it is yet to be ascertained how this assertion could be implemented.

Anderson¹³ has discussed three approaches to ‘human rights and the environment’: ‘*Firstly, by mobilizing existing rights to achieve environmental ends; secondly, by reinterpreting existing rights to include environmental concerns; and thirdly, by creating new rights of an explicitly environmental character*’¹⁴. However, by creating new rights and giving them a constitutional proclamation does not necessarily indicate that these rights can be enjoyed in practice. Nonetheless, at least it shows ‘*an expression of increasing*

⁹ The Rio Declaration, A/CONF.151/26 (Vol.I). Retrived from <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (last visit on 16 January 2009).

¹⁰ The Rio Declaration, see n.9

¹¹ Mukherjee see n.4 at 51

¹² Mukherjee, see n.4 at 52.

¹³ Anderson M, *Human right approaches to environmental protection: An overview* in Boyle, A & Anderson M (eds.), *Human right approaches to environmental protection*, (London: Oxford, 1996).

¹⁴ Anderson, see n.13 at 4; also discussed in Burger M, ‘Bi-polar and polycentric approaches to human rights and the environment’ (2003) 28 *Columbia Journal of Environmental Law* 371; DeMerieux M, ‘Deriving environmental rights from European Convention for the protection of human rights and fundamental freedom’, (2001) 21(3) *Oxford Journal of Legal Studies* 521-561.

*commitment to recognize, respect, protect and promote them*¹⁵. In circumstances which national legislation does not provide a substantive environmental rights, procedural environmental rights should be strengthened to ensure the effectiveness of public participation in decision-making process in environmental issues.

1.4 The Concept of Procedural Environmental Rights

The UNECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (the Aarhus Convention)¹⁶ seeks to strengthen the role of members of the public and environmental organizations in protecting and improving the environment for the benefit of future generations. These procedural environmental rights are the right to access to information, public participation in decision-making and access to justice in environmental matters, and can help promote the purposes of environmental protection¹⁷, redress environmental degradation, and also prevent environmental degradation¹⁸.

Through its recognition of the citizen's environmental rights to information, participation and justice, the Convention aims to promote greater accountability and transparency in environmental matters. Specifically, it aims to¹⁹:

- *'Allow members of the public greater access to environmental information held by public authorities, thereby increasing the transparency and accountability of government'*.
- *'Provide an opportunity for people to express their opinions and concerns on environmental matters and ensure that decision makers take due account of these'*.
- *'Provide the public with access to review procedures when their rights to information and participation have been breached, and in some cases to challenge more general violations of environmental law'*.

¹⁵ Mukherjee, see n.4 at 51.

¹⁶ The Aarhus Convention entered into force on 30 October 2001. 40 countries (primarily European and Central Asian) and the European Community have become the signatories and it has been ratified by 42 countries (as at 17 December 2008).

¹⁷ Anderson, see n.13

¹⁸ Mukherjee, see n.4 at 53.

¹⁹ <http://www.unece.org/fileadmin/DAM///env/pp/press.releases/01env15e.html>

In the Report of the Joint OHCHR-UNEP Meeting of Experts on Human Rights and the Environment²⁰, Professor Ebbesson²¹ considered that the Aarhus Convention provided *‘an interesting model that could be followed in other countries and regions of the world. This view was shared by several other experts. He recalled that this international agreement is open to the signature of non-UNECE States²²’*.

However, some of the provisions under the Aarhus Convention need stringent and clear procedures to make them more effective. For example, the preamble to the Aarhus Convention *‘emphasises two main concepts: environmental rights as human rights and the importance of access to information, public participation and access to justice to sustainable and environmentally sound development²³’*. Nevertheless, according to Purdue²⁴, Article 6 of the Aarhus Convention *‘is only concerned with proposed activities that may have significant effect on the environment’* which makes it rather limited²⁵. However, *‘both the Aarhus Convention and EC and UK law are rather vague as to how the public is to participate in the decision-making²⁶’*. Purdue further argued that Article 6(7) of the Aarhus Convention simply requires that procedure for public participation shall allow the *‘public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant any comments, information, analyses or opinions that it considers relevant to the proposed activity²⁷’*. Directive 85/337/EEC²⁸ (the 1985 Directive) requiring

²⁰ The Joint OHCHR-UNEP meeting was held on 14 – 15 January 2002. The report was retrieved from [http://www.unep.ch/glo/glo%20pages/hr_env%20experts%20meeting%20report%20\(revised\).pdf](http://www.unep.ch/glo/glo%20pages/hr_env%20experts%20meeting%20report%20(revised).pdf) (last visited on 16 January 2009).

²¹ Ebbesson, Jonas, Stockholm University, Stockholm, Sweden.

²² The report on the Joint OHCHR-UNEP meeting, see n.19 at 6

²³ The Aarhus Convention, retrieved from <http://www.unece.org/env/pp/documents/cep43e.pdf> (last visit on 17 January 2009).

²⁴ Purdue M, ‘An overview of the law on public participation in planning and whether it complies with the Aarhus Convention’, (2005) 17(3) *Environmental law & Management* 107.

²⁵ Purdue, see n.23 at 107.

²⁶ Purdue, see n.23 at 107.

²⁷ Purdue, see n.23 at 107.

environmental assessment states that the public must be informed and be able to express an opinion before development consent is granted²⁹. However, it gives no right to a hearing.

The Aarhus Convention provides a model for this study which will test public participation in decision-making by studying the practice of EIA in Malaysia. Although some arguments had been put on the Aarhus Convention as to its vagueness, so far, the Convention provides a good platform in discussing the right to public participation in decision-making process. It will be used as a benchmark for evaluating public participation in Malaysia.

For the purposes of this study, three areas which will be covered are environmental information, public participation in decision-making processes and access to an independent impartial tribunal for the redress of environmental disputes.

1.4.1 Environmental information

Mukherjee has noted that access to information is the key to ‘environmental rights’. She pointed out that Principle 10 of the Rio Declaration stated the need to ensure access to information in order to enable participation in decision-making.³⁰

The United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities has produced five parts of Draft Principles on Human Rights and the Environment (the 1994 Draft Declaration)³¹. Principle 15 of the 1994 Draft Declaration states that,

‘All persons have the right to information concerning the environment. This includes information, howsoever compiled, on actions and courses of conduct

²⁸ Council Directive of 27 June 1985 on the assessment of the effect of certain public and private projects on the environment, Official Journal No. L 175, 05/07/1985 P. 0040-0048.

²⁹ Article 2(3) of the 1985 Directive.

³⁰ Mukherjee, see n.4 at 53.

³¹ The 1994 Draft Declaration, retrieved from <http://cesr.org/low/draftdeclarationenvironment> (last visited on 16 January 2009).

that may affect the environment and information necessary to enable effective public participation in environmental decision-making. The information shall be timely, clear, understandable and available without undue financial burden to the applicant³².

According to Shad³³, ‘access to information is not simply a matter of permissive or prohibitive laws³⁴ but also of the proper organisation, systemisation, storage and retrieval of information³⁵’.

1.4.2 Public participation in the decision-making process

With regard to public participation in decision-making affecting the environment, the Rio Declaration stated in Principle 10:

‘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 processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided³⁶’.

The 1994 Draft Declaration suggests that:

‘Principle 11:

(a) All persons have the right not to be evicted from their homes or land for the purpose of, or as a consequence of, decisions or actions affecting the environment, except in emergencies or due to a compelling purpose benefiting society as a whole and not attainable by other means

b) All persons have the right to participate effectively in decisions and to negotiate concerning their eviction and the right, if evicted, to timely and adequately restitution, compensation and/or appropriate and sufficient accommodation or land³⁷’.

‘Principle 18:

All persons have the right to active, free, and meaningful participation in planning and decision-making activities and processes that may have an

³² The 1994 Draft Declaration, see n.31.

³³ Shad Saleem Faruqi, ‘Access to information’, [1992] 4 CLJ xxiii

³⁴ Some statutes denied an access to information, for example provisions in the Banking and Financial Institutions Act, 1989 provide for banking secrecy; and section 26 of the Internal Security Act, 1960 forbids importation and possession of ‘subversive publications’.

³⁵ Shad, see n.32 at xxiii.

³⁶ The Rio Declaration, see n.9.

³⁷ The 1994 Draft Declaration, see n.31

*impact on the environment and development. This includes the right to a prior assessment of the environment, developmental and human rights consequences of proposed actions*³⁸.

Provisions for early public participation were provided under Article 6(4) and (5) of the Aarhus Convention. It requires that public participation take place early in decision-making and encourages exchange of information between permit applicants and the public. Article 3(4) of the Directive 2003/35/EC (2003 Directive) that amends article 6 of the 1985 Directive also requires that the public concerned must be given early and effective opportunities to participate and express comments and opinions when all options are open to the decision-making body.

1.4.3 Access to an independent impartial tribunal for the redress of environmental disputes

According to Desgagne³⁹, Article 6(1)⁴⁰ of the European Convention on Human Rights (the ECHR) ‘*appears merely to provide judicial guarantees of a fair determination of a dispute brought before a court*’⁴¹. Furthermore Desgagne has said that, ‘*according to the court, the guarantees offered by article 6 of the ECHR would be meaningless if states could freely prevent access to courts*’.⁴² Thus, procedural rights mostly rely for their effectiveness on the national environmental legal regime through the application of the right to a tribunal.

³⁸ The 1994 Draft Declaration, see n.31

³⁹ Desgagne R, ‘Integrating environmental values into the European Convention on Human Rights’, (1995) *American Journal of International Law* 263.

⁴⁰ Article 6(1) states, ‘in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’.

⁴¹ Desgagne, see n. 39 at 290.

⁴² This was first established in *Golder v United Kingdom* (1975) 18 ECtHR. See Desgagne, n.39 at 290.

1.5 Identification of Research Issues

The EQA and its subsidiary legislation have provided specific mechanisms to exercise the right of public participation. However, based on reviews of the literature, it seems that there have been occasions where such rights to public participation have been infringed by way of amendments made to regulations by the authorities, as illustrated in the case of *Kajing Tubek & Ors v Ekran Bhd & Ors*⁴³ (the Bakun Dam case). In that case, the plaintiff's right to comment on the EIA report was denied because the court held that the EQA was not applicable in Sarawak, and that the Sarawak law does not provide such participatory right to the public. Other limitations to public participation include: the nature of public calls for participation, which may be insufficient and ineffective; the inaccessibility to EIA reports which are unavailable to the public in certain areas; the cost of Detailed EIA Reports which is excessively high; and the technicality of these Detailed EIA Reports which would not be comprehensible to a layman⁴⁴.

Besides the constraints in obtaining and accessing information due to these factors, the nature of jurisdiction between federal and state authorities creates another issue since there is no heading of 'the environment' under the Malaysian Federal Constitution. The Malaysian Federal Constitution gives powers over land use and natural resources management to individual states. As a result of a complicated relationship between the federal and state governments, the legislative framework for environmental management is also complex⁴⁵.

Furthermore, under Malaysian EIA Guidelines, public participation is invited under three avenues, at the Preliminary assessment stage, the Detailed assessment stage, and the Review process stage. The method used to obtain public participation is left to the project initiator to decide, although during the

⁴³ *Kajing Tubek & ors v Ekran Bhd & Ors*[1996] 2 *Malayan Law Journal* 388.

⁴⁴ Kanniah R, 'Public Participation in the Environmental Impact Assessment Process in Malaysia', [2000] 3 *Malayan Law Journal* cxxxiv at cxlii-cxliii

⁴⁵ Ainul Jariah Maidin, *Challenges in implementing and enforcing environmental protection measures in Malaysia*. Paper presented at the 13th Malaysian Law Conference, 17 November 2005.

formulation of Terms of Reference (TOR) the project initiator needs to discuss the method of public participation with the Review Panel. The only formal procedure laid down by the EIA Guidelines is the procedure of public notification and call for comment under the Review process. The wide power of the project initiator to decide on the method to be used without a requirement for consultation with the relevant authority leads to the question of whether the invitation to public participation is a directive or mandatory procedure. The uncertainty of EIA procedures is one of the issues discussed in Chapter 6 of this thesis.

Besides this, if the project proponent believes that, in the ‘public interest’⁴⁶, a Detailed EIA Report should not be made available to the public; an application must be forwarded by the project proponent, through the project-approving authority, for the information to be withheld from public scrutiny⁴⁷.

On the part of the public, the issue of *locus standi* is yet to be resolved. The example of the *Bakun Dam* case shows that interested members of the public are often not allowed to participate owing to the strict rule of standing. Many non-governmental organisations (NGOs) which are actively involved in environmental issues are also not given the right to participate for due to lack of standing or insufficient interest to challenge an environmental breach. The applicability of the principle of *locus standi* in environmental protection becomes an issue because of the court’s definition on the “need to have a sufficient interest in the matter to which the application relates”.

Are there any substantive environmental rights such as right to healthy and clean environment, right to clean air and water provided under the Malaysian Federal Constitution? One way of examining the status of substantive ‘environmental rights’ is by questioning whether the authority has fulfilled

⁴⁶ Black’s Law Dictionary (8th Edition) defines “public interest” in a two-fold manner. Firstly, it is said to mean “the general welfare of the public that warrants recognition and protection”. Secondly, it is defined to mean “something in which the public as a whole has a stake; especially an interest that justifies governmental regulation”.

⁴⁷ Section 3.4.7 of the EIA Guidelines

some basic human rights for its citizen⁴⁸. For example, Article 5 of the Federal Constitution laid down a provision concerning the liberty of a person and some⁴⁹ have argued that right to a healthy environment has been implicitly recognised as one of the components of the right to life under the Article. The issue to be assessed is if there is any Article under the Federal Constitution which supports public participation in environmental decision-making process in Malaysia.

In summary, the substantive issues mentioned above are as follows:

1. Uncertainty about EIA procedures;
2. Limitation to public participation under EIA procedures;
3. Complicated environmental jurisdiction between federal and state governments;
4. Strict rule of standing to bring a case in environmental matters;
5. Lack of explicit provision on substantive 'environmental rights' under Malaysian legislation;
6. Lack of awareness among the public for participating in decision-making procedures in environmental issues.

1.6 Scope of The Research

The main area of this study is the EIA as a case study and public participation as a mechanism (tool) for implementing effective participatory rights in decision-making. Based on Principle 10 of the Rio Declaration, to which Malaysia is one of the signatories, and supported by the Aarhus Convention as a model, this study examines the areas of the rights to access to information, public participation in the decision-making process and access to justice in environmental matters. Examination of these pillars is important to achieve the effective participatory right in decision-making. The Aarhus Convention has

⁴⁸ Miller C, *Environmental rights: Critical perspectives*, (London: Routledge, 1998).

⁴⁹ Abdul Aziz Bari, 'Right to life under the Federal Constitution and environmental issues', (1999)1 *Malayan Law Journal* lx; Abdul Haseeb Ansari, 'Right to a healthful environment as a means to ensure environmental justice: An overview with special reference to India', (1998) 4 *Malayan Law Journal* xxv.

been used as a set of standards to assess public participation in Malaysia. The Aarhus Convention is only open for signature by States members of the Economic Commission for Europe as well as States having consultative status with the Economic Commission for Europe, the number of signatories (39 States) and parties (47 States) shows that the Aarhus Convention is widely accepted and adopted by the member states. Having taken that into account, the researcher chose the Aarhus Convention to be the model for this study.

The title of the thesis itself reflects the intention of the researcher to discuss the concept of 'environmental rights' in general, as discussed in chapters 1 and 2, and to focus on the element public participation in the remaining chapters 4, 5 and 6. All the three pillars under the Aarhus Convention, that is, right to information, right to participate and right to access to justice, are interdependent and one cannot effectively participate in environmental issues if enough information and access to court are not provided. Subsection 1.4 above briefly explained the concept of procedural environmental rights and further discussion is made in chapter 2.

Geographically, Malaysia is divided into the Peninsula of Malaysia and East Malaysia and consists of thirteen states including the federal territories of Kuala Lumpur, Putrajaya and Labuan. Thus it would be cumbersome to conduct a study across the whole country. This study concentrates mainly on Peninsula Malaysia which is divided into four regions which are the northern, central, southern and eastern regions of Malaysia, without totally neglecting the other states in East Malaysia.

1.7 Objectives of the Research

The general objective of this research is to examine the sufficiency and effectiveness of EIA as a tool for implementing effective participatory rights in decision-making. The public participation procedures in the decision-making process for EIA in land use planning will be examined together with the applications of 'environmental rights' under the Malaysian Federal Constitution. The criteria used for such examinations are:

- a. Does the EIA process in Malaysia enable the majority of the public affected by developments likely to have environmentally significant effects to make their views known to the decision-makers and have a meaningful role in the decision-making process?
- b. Does it improve quality of decision-making, which is, by ensuring that all relevant information as to potential environmental impacts is available to the decision-makers? This relevant information includes views of public, NGOs, governmental bodies and the EIA reports.

In detail, the research objectives are as follows:

1. To examine the right to public participation in decision making about major projects under EQA, its regulations and Guidelines.
2. To examine the existing limitations to public participation in decision making procedures under EIA in Malaysia.
3. To examine the practice of public participation in EIA procedures in Malaysia.
4. To examine public awareness of EIA and its implementation in Malaysia.
5. To assess the importance of constitutional measures supporting public participation in environmental decision-making in Malaysia.
6. To examine prospects for law reform and changes in EIA law and planning procedures to improve both the level of public participation in EIA and the quality of decision making in major development projects in Malaysia.

1.8 Research Questions

The above research objectives led to several research questions, as follows:

1. What rights to public participation in decision making are given by EQA and EIA Guidelines?
2. What are the limitations to public participation in decision making under the law governing EIA in Malaysia?
3. What is the level of public awareness and public participation in the EIA process in Malaysia?

4. How would a new constitutional right to greater public participation in decision making in EIA be viewed by the stakeholders?
5. How to improve the effectiveness of EIA as a tool of environmental decision making?

1.9 Methodology

To meet the research objectives and answer the research questions, quantitative and qualitative research methods have been used. Quantitative research is, of course, concerned with the measurement of quantity or amount; and describing behavior patterns in terms of regularities. It uses such methods as interviews or questionnaires and often presents the results in the form of statistical tables and charts. Qualitative, on the other hand, aims at ascertaining opinions, attitudes, behavior, or likes or dislikes. It is concerned with describing how people feel, what they think about a certain issue. Open-ended interview is one of the common types of qualitative research methods.

Research samples using both types of socio-legal research methodology have been used. This involves seven data sources, including the planning authorities, the Departments of the Environment (DoE), the public in selected affected areas, non-governmental organisations (NGOs), EIA reports, statutes and legal cases. Three samples of subjects are selected to represent key actors in the EIA process: decision makers, project proponents and wider public. Representative samples are drawn from:

- a. Planning authorities and the DoE in geographically defined areas;
- b. EIA reports submitted by project proponent are examined;
- c. Members of the public in selected areas affected by EIA development;
and
- d. NGOs.

The interview method is used to generate data from the planning authorities, DoE, the public and NGOs (quantitative and qualitative methods). The other three data sources of EIA reports, statutes and legal cases are critically analysed using content analysis (doctrinal analysis).

The thesis is structured in the following way:

- i. Introductory chapter – Chapter 1
- ii. Literature review on the concept of ‘environmental rights’ – Chapter 2
- iii. Methodology – Chapter 3
- iv. Research question 1 – Chapter 5
- v. Research question 2 – Chapter 6
- vi. Research question 3 – Chapter 6
- vii. Research question 4 – Chapter 2 & 4
- viii. Research question 5 – Chapter 7

Table 1: Summary linking research question and methods

Chapter	Research questions	Data sources and methods	Justification
5	What rights to public participation in decision making are given by EQA and EIA Guidelines?	EQA, EIA Guidelines, case reports: content analysis. DoE, Planning authorities, NGOs & public: interviews EIA reports: content analysis.	Content analysis of EQA, EIA Guidelines and case report to reveal any provision concerning public participation. Interviews with DoE and planning authorities to provide data on how they have handled EIA process, particularly public participation. Interview with public & NGOs to provide data on their view concerning EIA process. Content analysis of EIA reports to provide data on the method used to obtain public participation in EIA process.
6	What are the existing limitations to public participation in decision making under EIA in Malaysia?	EQA, EIA Guidelines, case reports: content analysis. DoE, Planning authorities, public and NGOs: interviews EIA reports: content analysis.	Content analysis of EQA, EIA Guidelines and case report to yield any limitation stated under the provision. Interviews with DoE and planning authorities to provide data on limitation to public participation during EIA process. Interview with public & NGOs to reveal the public constraint in EIA process. Content analysis of EIA

			reports to yield the unavailability of public participation in EIA process.
6	What is the level of public awareness and public participation in EIA process in Malaysia?	DoE, Planning authorities, public and NGOs: interviews EIA reports: content analysis.	Interviews with DoE and planning authorities to yield data on their views on public awareness. Interview with public and NGOs to provide data on public awareness and participation. Content analysis of EIA reports to provide data on practice of awareness and participation among public.
2 & 4	How would a new constitutional right to public participation in decision-making be viewed by the stakeholders?	Federal Constitution, ECHR, Aarhus Convention and case reports: content analysis. DoE, planning authorities, public & NGOs: interviews.	Content analysis to reveal the availability of 'environmental rights' in Malaysian legislations. Interviews with DoE, planning authorities, public and NGOs to show their views on the importance of public participation in decision making and the importance of having a new constitutional right to public participation in decision making.
7	How to improve the effectiveness of EIA as a tool of environmental decision-making?	Malaysian legislations, UK and European legislations, EQA, EIA Guidelines, EC Directive, Aarhus Convention, case reports : content analysis and comparative study.	Content analysis and comparative study of all the documents to provide guidelines to improve the law.

1.10 Conclusion

The EQA and its subsidiary legislation have provided certain provisions pertaining to the right to public participation under EIA, such as an invitation to give comment after the Detailed Assessment has been published and that an aggrieved person can file an appeal if they have an interest to protect. However, broad provisions and uncertainty about their binding nature and effect; the lack of adequate information because of difficulties of access to it and the technical nature of the information itself; the complexity of

relationships between federal and state governments regarding environmental jurisdiction; the behaviour of the public who take environmental issues for granted; and inadequate standing for the public to access the court, have all contributed to the ineffectiveness of the provisions in particular and the whole EIA process in general. This study examines ways to strengthen the legal provisions by taking into account information from the public and decision makers and examining legal cases, statutes and relevant EIA documents. Some comparison is made with United Kingdom EIA law, as one of the signatories and parties to the Aarhus Convention, in order to strengthen the Malaysian EIA law.

Chapter 2. ‘Environmental Rights’: Character, Context, and Relevance

2.1 Introduction

At the international level, the relationship between human development and the environment was given expression in treaty form in the Declaration of the United Nations Conference on the Human Environment (the Stockholm Declaration)

Principle 1 of the Stockholm Declaration declared that, ‘*man has the fundamental right to freedom, equality and adequate condition of life, in an environment of quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations*’¹. Ten years later, the Rio Declaration² addressed states and asked them to balance development and the environment. Principle 1 of the Rio Declaration declared that, ‘*human beings are at the centre of concern of sustainable development. They are entitled to a healthy and productive life in harmony with nature*’. These Declarations became the basis of various legislations, including the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention)³.

¹ The Stockholm Declaration, UN Doc. A/CONF.48/14, 16 June 1972. Retrieved from

<http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503> (last visit on 20 January 2009).

² Rio Declaration on Environment and Development. UN Doc.A/CONF.151/5, 16 June 1992. Retrieved from <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163> (last visit on 20 January 2009).

³ The Aarhus Convention, retrieved from <http://www.unece.org/env/pp/documents/cep43e.pdf> (last visit on 20 January 2009).

In this chapter, the discussion focuses upon the character and context of ‘environmental rights’, in terms of both procedural and substantive rights, and their relevance to EIA procedures in Malaysia and the UK.

2.2 Procedural Environmental Rights

Three pillars are always considered to be fundamental in human ‘rights’ in environmental matters: the right of access to information, the right to participate in decision-making and the right of access to the courts. According to Mason (2010), the Aarhus Convention is drafted in terms of human rights, declaring in its opening article a basic right of every person to a healthy environment. These pillars, which are of a more procedural than substantive nature, are stated in Principle 10 of the Rio Declaration: *‘At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.’*⁴

The Aarhus Convention was adopted on 25th June 1998 in the Danish city of Aarhus at the Fourth Ministerial Conference in the ‘Environment for Europe’ process. The Aarhus Convention links environmental rights and human rights. It acknowledges that people owe an obligation to future generations, and establishes that sustainable development can be achieved only through the involvement of all stakeholders. It links government accountability and environmental protection and focuses on interactions between the public and public authorities in a democratic context, forging a new process for public participation in the negotiation and implementation of international agreements. The subject of the Aarhus Convention goes to the heart of the relationship between people and governments. The Convention is not only an environmental agreement; it is also a Convention about government accountability, transparency and responsiveness. The Aarhus Convention grants the public rights and imposes obligations on parties and public authorities regarding access to information, public participation and

⁴ The Rio Declaration, see n.2.

justice. The Convention entered into force on 30 October 2001 and the progress of its ratification was relatively rapid.⁵

The Aarhus Convention tries to make the general principles in the Rio Declaration more practical, and its preamble makes it clear that improved access to information and public participation in decision making should enhance the quality and implementation of decisions, contribute to public awareness on environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns. The Convention stipulates the three pillars into several Articles concerning access to information (Articles 4 and 5), public participation in decision making (Articles 6 to 8), and access to justice (Article 9).

Other EU legislation has been being implemented to secure these rights. These include Directive 2003/4/EC⁶ on public access to environmental information and repealing Directive 90/313/EEC⁷; and Directive 2003/35/EC⁸ which provides for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending them with regard to public participation and access to justice, also repealing Directives 85/337/EEC⁹ and 96/61/EC¹⁰. The most recent amendment was made to Directive 2011/92/EU of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment which introduce the Directive 2014/52/EU.

⁵ See <http://www.unece.org/env/pp/>

⁶ Retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF> (last visit on 20 January 2009).

⁷ Retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31990L0313:EN:HTML> (last visit on 20 January 2009).

⁸ Retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:156:0017:0024:EN:PDF> (last visit on 20 January 2009).

⁹ Retrieved from <http://ec.europa.eu/environment/eia/full-legal-text/85337.htm> (last visit on 20 January 2009).

¹⁰ Retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1996L0061:20060224:EN:PDF> (last visit on 20 January 2009).

2.2.1 Access to information on the environment

Access to information is important to ensure the effectiveness of other procedural rights of public participation and access to justice. Access to information can be divided into two forms: ‘*passive information provision covered by article 4 of the Aarhus Convention and active information provision contained in article 5 of the Aarhus Convention*’.¹¹

According to Stookes, passive information provision involves information disseminated by a public body upon request from an individual or organisation, or otherwise the public body may decide not to disclose such information¹². Article 4 of the Aarhus Convention includes a requirement that public authorities make information available upon request and supply it, subject to exceptions, within set time limits.¹³ The Aarhus Convention enumerates cases where information may be refused.¹⁴ A refusal shall, in principle, be made in writing, stating the reasons and providing information on the review procedure.¹⁵

Active information provision is where a public body publishes and promotes information generally and makes it easily accessible for all. Article 5 of the Aarhus Convention requires public authorities to collect, possess, and disseminate environmental information, including that on decision and policy

¹¹ Stookes P, *A Practical Approach to Environmental Law* (New York: Oxford University Press, 2005) at 34.

¹² Stookes P, see n.11 at 34.

¹³ Public authorities should respond to a requesting person at least the latest within one month unless the volume and complexity of the information justify extension of this period to up to two months after the request.

¹⁴ Article 4 paragraph 3 states: (a) the public authority to which the request is addressed does not hold the environmental information requested; (b) the request is manifestly unreasonable or formulated in too general a manner; or (c) the request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure. Paragraph 4 states: a request may also be refused if the disclosure would have adversely affected.

¹⁵ Kramer L, ‘The citizen in the environment: Access to justice’, (2000) 5 *Env. Liability* 127.

making¹⁶. These active information provisions include a requirement for authorities to regularly publish a national report providing up-to-date information on the state of the environment, as well as making it available in electronic databases which are easily accessible to the public through public telecommunications networks¹⁷.

The benefits of public access to information may be grouped under five general headings:

- (1) *“It will reassure the public and promote confidence on their part in the action being taken by the government and by industry.”*
- (2) *“It will inform consumer choice, both in the demand for and in the consumption of goods.”* For example, *“information about the causes and consequences of pollution may encourage consumers to limit the use of cars and to reduce waste in the use of energy, water and so on.”*
- (3) *“Increased public scrutiny should encourage industry to take environmental protection seriously.”*
- (4) *“The knowledge that activities will come under public scrutiny should act as a ‘vital discipline’ for environmental protection agencies.”*
- (5) *“It will enable members of the public to play a role in policy formulation and decision making on environmental matters.”*¹⁸

Burton¹⁹ suggests that there are four factors that influence the use made by the public of the registers maintained under the Control of Pollution Act 1974 (COPA). There are awareness, access, cost and comprehensibility. Obviously, if the public are unaware of registers they will not use them. Rowan-Robinson et al²⁰ are of the view that awareness operates at two levels. First, there is a level of awareness of the public body which administer the registers, only then can the public be expected to be aware of the requirement imposed by the public authority to maintain a public register. Second, the public must also be aware of the requirement to maintain a public register if they are to make use of the information it contains. Then, the register must be readily accessible to

¹⁶ Article 5(6) of the Aarhus Convention states that, ‘each party shall, at regular intervals not exceeding three or four years, publish and disseminate a national report on the state of the environment, including information on the quality of the environment and information on pressures on the environment’.

¹⁷ Stokes, see n.11 at 34.

¹⁸ Rowan-Robinson J. et. Al, ‘Public access to environmental information: A means to what end?’, (1996) 8 JEL 19 at 20-21

¹⁹ T.P. Burton, ‘Access to environmental information: The UK experience of water Registers’, (1989) 1(2) JEL 192.

²⁰ Rowan-Robinson J et. al, see n.18.

the public if people are to be encouraged to use it. Accessibility is partly a matter of geographic location and partly a matter of administrative arrangement. Accessibility will not be practical if the authorities impose an excessive amount of charge on the public. However, charging the public for taking copies of material on the register might be acceptable²¹. As to comprehensibility, the complexity of the data might cause problems. According to Rowan-Robinson et al,²² the planning registers were not particularly technical as compared to pollution control registers. However, generally, staffs are available at the Regional Planning Agencies (RPAs) to assist in interpreting data.

Granting access to information is insufficient if such authorities are not obliged to assemble environmental data in order to improve information on the environment. Allowing the citizen to participate in environmental decisions, perhaps, will make public authorities react more positively in this regard.

2.2.2 Public participation in development control decisions

According to Stookes, participation can be divided into six levels: *‘the right to be informed, the right to be consulted, to make representations, to be heard, and the right of appeal and being in a position of direct control of the relevant decision, act, or omission’*²³. However, the most important issue in this context is whether every citizen should be allowed to participate in administrative procedures or if this right of participation should be restricted. This issue leads to the question of whether or not the citizen is ‘affected’; or, more precisely, whether the citizen is ‘directly affected or ‘indirectly affected’²⁴. The general principle for where the citizen is only indirectly

²¹ Article 4(8) of the Aarhus Convention states that, ‘each party may allow its public authorities to make a charge for supplying information, but such charge shall not exceed a reasonable amount. Public authorities intending to make such a charge for supplying information shall make available to applicants a schedule of charges which may be levied, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge’.

²² Rowan-Robinson J et. Al, see n.18.

²³ Stookes P, see n.11 at 37.

²⁴ Kramer L, see n.15.

affected is that he is not allowed to participate in administrative decision-making. However, in environmental matters, this has to be an exception to the general rule. The fact that the environment has no physical boundaries raises doubts about a limitation to directly affected persons. Therefore, it is very difficult to decide who will be affected directly by a decision and should therefore participate in the decision-making and who is only indirectly affected and therefore shall have no right to participate. Moreover, the concept of environmental protection is human-driven. Nobody really knows how much protection the environment needs or, better, how much pollution and impairment the environment can sustain. Public participation in environmental decision-making might benefit not only the authorities in making a better decision but the public themselves by becoming involved in the decision-making.²⁵

Four practical benefits of public participation have been identified.²⁶ First, *‘Members of the public will often have a special knowledge of local conditions and of the practical implications of the proposed activities’*. Additional information given by the public may increase the quality of information, as well as through the careful consideration of alternative solutions. Second, *“the implementation of decisions can be improved where the members of the public who are most interested in the result have been included in the process and have had their concerns considered’*. Therefore, they might give their support to the decision. Third, it contributes to public awareness of environmental matters, and increases public involvement in and potential support for good decisions. Fourth, *‘the opportunity of the public to express its concern is a matter of self-fulfillment that increases confidence in society and in authority generally’*.

The Aarhus Convention covers public participation in environmental decision-making through three separate Articles. Article 6 of the Aarhus Convention seeks to guarantee participation in decision-making that may have potentially significant environmental impacts. Article 7 sets out the need to establish a

²⁵ Rowan-Robinson J et al, see n. 18

²⁶ Jendroska J & Stec S, ‘The Aarhus Convention’, (2001) 9(3) Env. Liability 140.

transparent and fair framework for public involvement in plans and programmes, and Article 8 promotes participation in the preparation of law and rules that may have an environmental impact. Articles 6 and 8 require all signatory states to provide for early public participation, adding that only when all options are open and effective can public participation take place. Public participation is not defined, although the Preamble to the Convention suggests that the values to participation are ensuring that there is a means for the public to assert the right to live in an environment adequate for his or her health and wellbeing.²⁷

The Regional Environmental Center for Central and Eastern Europe (REC)²⁸ published a Handbook²⁹ in 2003 which suggested that there are three categories of procedural errors in public participation:

1. *“Failure to disclose all information to the public relevant to its participation;”*
2. *“Improper procedures for public participation such as timely or adequate notice, opportunity to comment, timeframes, restrictions on ‘administrative standing’ or other conditions; and”*

²⁷ Jendroska J & Stec S, see n.26.

²⁸ The Regional Environmental Center for Central and Eastern Europe (REC) is a non-partisan, non-advocacy, not-for-profit international organisation with a mission to assist in solving environmental problems in Central and Eastern Europe (CEE). The center fulfils this mission by promoting cooperation among non-governmental organisations, governments, businesses and other environmental stakeholders, and by supporting the free exchange of information and public participation in environmental decision making. The REC was established in 1990 by the United States, the European Commission and Hungary. Today, the REC is legally based on a charter signed by the governments of 28 countries and the European Commission, and on an international agreement with the government of Hungary. The REC has its head office in Szentendre, Hungary, and country offices and field offices in 17 beneficiary countries, which are: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, the former Yugoslav Republic of Macedonia, Montenegro, Poland, Romania, Serbia, Slovakia, Slovenia and Turkey. Recent donors are the European Commission and the governments of Austria, Belgium, Bosnia and Herzegovina, Bulgaria, the Czech Republic, Croatia, Denmark, Estonia, Finland, Germany, Hungary, Italy, Japan, Latvia, Lithuania, the Netherlands, Norway, Poland, Slovakia, Slovenia, Sweden, Switzerland, the United Kingdom, and the United States, as well as other inter-governmental and private institutions. See <http://www.rec.org>

²⁹ Regional Environment Center, *Handbook on Access to Justice under the Aarhus Convention*, (Hungary: REC, 2003). see <http://www.rec.org>

3. *“Inadequate response to comments received (failure to take due account), or failure to reveal the reasons or considerations for the decision.”*

In 2002, the Institute of Environmental Management and Assessment (IEMA)³⁰ published guidelines³¹ on participation in environmental decision-making, which aimed to improve participation by demonstrating its importance, offering advice on how to achieve effective participation and providing practical examples of what has been achieved.

2.2.3 Access to courts or tribunals to review development control decisions

Environmental justice can be defined in two ways: that is, access to the law and the courts in order to resolve environmental problems; and to ensure that communities and individuals have the same rights and remedies as corporate and state organisations. Environmental justice can also be referred to as environmental equity, which means ensuring that everyone enjoys a clean and healthy environment and this includes equity between nations and between generations.³²

Procedural rights to access to justice and substantive ‘environmental rights’ (such as the rights to clean drinking water, air quality) are mutually interdependent. Substantive rights have no legal efficiency unless there are adequate and effective procedural rights to challenge governmental or public decisions which implement or fail to implement those rights. For example, the decisions of regulatory bodies to issue or not to issue discharge consents under water pollution legislation, air quality, or planning permission for infrastructure projects. Two issues under this matter are:

- (a) The existence of a procedural right to challenge a decision and to access suitable forum (court, tribunal) to do so;

³⁰ The Institute of Environmental Management and Assessment (IEMA) is a not-for-profit organisation established to promote best practice standards in environmental management, auditing and assessment. Its origins lie in the merger in 1999 of the Institute of Environmental Management, the Institute of Environmental Assessment, and the Environmental Auditors Registration Association. See <http://www.iema.net>

³¹ IEMA, *Perspectives: Guidelines on Participation in Environmental Decision-making*, (Lincoln: IEMA, 2002). see <http://www.iema.net>

³² Stookes P, see n.11 at 39.

(b) Locus standi. Who can exercise this right and when?

(a) Procedural right of access

In terms of procedural rights, access to environmental justice has a more direct definition. It provides the complement to as well as checks and balance on the procedural rights of information and participation, and provides a right of review of administrative actions affecting substantive environmental rights such as the right to a healthy environment. It is important that, if such a right exists, then it must be supported by the rule of law and access to the courts when the right is breached.

Article 9(1) and (2) of the Aarhus Convention provides review procedures for any breach of the access to information and participation provisions contained in Articles 4 and 6 respectively. Article 9(3) requires signatory states to ensure that there is public access to administrative or judicial procedures to challenge acts or omissions by private persons or public authorities contravening national environmental law. The principle of *actio popularis*³³ whereby anyone can sue the government when it acts unlawfully in environmental matters³⁴, regardless of whether they have standing in the strict sense, is said to be consistent with Article 9 of the Aarhus Convention.

One of the critical aspects of the Aarhus Convention is the need to provide a fair review process for any breach of the access to information and participation provisions contained in Articles 4 and 6 respectively. Article 9(4) of the Aarhus Convention provides that, *'the procedure referred to in Article 9 shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible'*.

³³ The right to file genuine public interest law suits.

³⁴ In Netherlands, in administrative proceeding concerning the environment, allows the citizen to participate in that procedure and to raise objection. At the end of that process, the persons who participated in the administrative process may bring the matter before the court if they disagree with the administration's decision. This principle also applies in New Zealand under the New Zealand Resource Management Act 1991.

(b) Locus standi

The term 'Locus Standi' denotes capacity to institute proceedings in a court of law. It is used interchangeably with terms like 'standing' or 'title to sue'. Black's law dictionary defines locus standi as a place of standing; standing in court. A right of appearance in a court of justice or before a legislative body on a given question. The principle that underlies this rule is that only a party who has been actually injured by an act can bring a suit to challenge that illegal act.

In general, the position of standing has been summarised in the Judicial Review Handbook in which it is grouped under six principal themes. Firstly, generally the court takes a liberal approach. Secondly, only seldom, if necessary, does the court take into consideration the financial interest. Thirdly, public interest considerations favour the testing of the legality of executive action. Fourthly, it would be against the public interest if there were a “vacuum” (or “lacuna”) of unchecked illegality for want of a challenger with standing. Fifthly, the courts seek to strike a balance, distinguishing broadly between ‘busybodies’ and those with a legitimate grievance or interest. Sixthly, situation against the claimant whether there is other aggrieved person who is not complaining³⁵.

As far as environmental issues are concerned, the position has remained the same although the courts are aware of its seriousness. In *R (Greenpeace Ltd) v Secretary of State for the Environment, Food and Rural Affairs and another*³⁶, the Court of Appeal encouraged the court, within its proper role and appropriate context, to give the environment ‘a special weight’ by considering the delicate balance of the environment itself. By giving the public a right to standing in environmental issues regardless of whether or not the person is directly affected might help the protection of the environment itself.

³⁵ Fordham, M, *Judicial Review Handbook*, 3rd, (Oxford: Hart Publishing, 2001)

³⁶*R (Greenpeace Ltd) v Secretary of State for the Environment, Food and Rural Affairs and another* [2002] I WLR 3304

As far as the rights of non-governmental organisations (NGOs) in environmental matters are concerned, the Aarhus Convention suggests that contracting parties give the public concerned wide access to justice, and that NGOs ‘*promoting environmental protection and meeting any requirements under national law*’ shall be deemed to have a sufficient interest to be concerned with an administrative decision affecting the environment, or ‘*shall be deemed to have rights capable of being impaired*’ where national law so requires.³⁷

Article 3(1) of Directive 2003/35/EC amended Article 1(2) of Directive 85/337/EEC by adding the following definitions;

“the public’ means: one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups”.

“the public concerned” means: the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2); for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest”

In Malaysia, some cases have illustrated the difficulties in establishing locus standi³⁸. It is more difficult to initiate public-interest litigation³⁹. According to Harding, public-interest litigation cannot be very precisely defined. However it involves cases brought by or on behalf of groups of people, usually socially disadvantaged groups, against the government or a powerful interest. This might include environmental cases, and according to Harding, Malaysia has not yet developed a clear growth of public-interest litigation⁴⁰.

³⁷ Article 9 of the Aarhus Convention.

³⁸ *Government of Malaysia v Lim Kit Siang* [1988]1 MLJ 50; *United Engineers (M) Bhd v Lim Kit Siang* [1988] 2 MLJ 12

³⁹ Harding, A. *Access to Environmental Justice: A Comparative Study* in London-Leiden Series on Law, Administration and Development. Vol. II. (England : Brill Academic Publishers, 2007) at 136.

⁴⁰ Harding, A. *Practical human rights, NGOs and the environment in Malaysia*, in Boyle AE & Anderson MR (eds), *Human rights approaches to environmental protection* (Oxford: Clarendon, 1996) at 238.

2.3 EIA Process in Malaysia

The EQA provides for EIA to be carried out for “prescribed activities”. These activities, which are listed in the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 (the 1987 Order)⁴¹ require a report stating the likely impact that a project might have on the environment and what measures are to be taken to limit the said impact⁴². The 1987 Order listed prescribed activities under nineteen headings for which EIAs are mandatory for the whole of Malaysia, with the exception of Sarawak. There are also five additional activities which have been added by consensus by the National Land Council⁴³. Sarawak is the only state in Malaysia to enforce its own legislation on EIA; namely the Natural Resources and Environment Ordinance 1993⁴⁴; Sarawak Natural Resources and Environment (Prescribed Activities) Order 1994⁴⁵; and A Handbook of the Basic Policy and Procedure of Environmental Impact Assessment (EIA) in Sarawak (the Sarawak EIA Guidelines)⁴⁶.

The EIA process consists of three major procedures: preliminary assessment, detailed assessment, and review. The objectives of these procedures are as follows;

1. Preliminary assessment of all prescribed activities.
 - a. *To examine and select the best from the project option available;*
 - b. *To identify and incorporate into the project plan appropriate abatement and mitigating measures; and*
 - c. *To identify significant residual environmental impacts.*⁴⁷

⁴¹ P.U. (A) 362/1987, which took effect on 1 April 1988. retrieved from <http://www.doe.gov.my/v2/files/legislation/pua0362y1987.pdf> (last visit on 20 January 2009).

⁴² Azmi Sharom, *Understanding the Environmental Quality Act 1974* in Mimi Kamariah (ed), *Current legal problems in Malaysia*, (Kuala Lumpur: University Malaya Press, 1998).

⁴³ Kanniah R., ‘Public Participation in the Environmental Impact Assessment Process in Malaysia. *Malayan Law Journal*’, [2003] 3 MLJ cxxxiv

⁴⁴ effective from 1 February 1994

⁴⁵ effective from 1 September 1994

⁴⁶ effective from 27 January 1995

⁴⁷ Section 1.5.3 of the EIA Guidelines

2. Detailed assessment of those prescribed activities for which significant residual environmental impacts have been predicted in the preliminary assessment.
 - a. *'To describe the significant residual environmental impacts predicted from the final project plan;*
 - b. *To specify mitigating and abatement measures in the final project plan; and*
 - c. *To identify the environmental costs and benefits of the project to the community.'*⁴⁸

3. Review of assessment reports.
 - a. *'To critically review the Detailed assessment reports;*
 - b. *To evaluate development and environmental costs and benefits of the final project plan; and*
 - c. *To formulate recommendations and guidelines to the project approving authority relevant to the implementation of the project.'*⁴⁹

2.3.1 Public Participation in the EIA Process in Malaysia

The concept of public participation is mentioned in the EIA Guidelines as follows:

'Public participation in the environmental impact assessment procedure is an aid to project planning. It enables the project initiator to:

- (i) *monitor community needs and ensure that the direction or emphasis of his project continues to satisfy those needs;*
- (ii) *Identify both material and psychological impacts of the projects on the community;*
- (iii) *Measure and promote the social acceptance of the project in the community and avoid modifications or abandonment of the project at a later stage;*
- (iv) *Monitor changing environmental values in the community; and*
- (v) *Obtain additional environmental information known to the local population*

*A valid assessment of the impact of a project on the community cannot be made without some form of public participation. However, public participation must be carefully planned to obtain the maximum benefit from it.'*⁵⁰

Under the EIA Guidelines, there are three avenues for public participation. First, during the Preliminary Assessment stage, some form of public

⁴⁸ Section 15.4 of the EIA Guidelines

⁴⁹ Section 1.5.5 of the EIA Guidelines

⁵⁰ Section 1.4.5 of the EIA Guidelines

participation is required⁵¹ and the project proponent can obtain such participation through the means suggested in the EIA Guidelines⁵². Second, during the Detailed Assessment stage, public participation must be included⁵³ and members of the public are invited to comment on the proposed project after the Detailed Assessment Report has been made public⁵⁴. Third, after the Director General of Environment has made a decision, an appeal can be filed under section 35(e) of the EQA by aggrieved members of the public⁵⁵ who have an interest to protect.

Public meetings, workshops, public opinion sampling and citizens committee are methods of obtaining opinions from the public. Public meetings and workshops are useful as long as they remain an avenue for the free expression of personal opinions. Their value is diminished if they become too formal or if they degenerate to the level of debate. Some members of the public may, however, be reluctant or unable to express themselves publicly and therefore the opinions obtained may not be representative. Then, to obtain meaningful results in public opinion sampling, a single set of questions must be presented to every subject. The questions should not “load” the subject nor should they demonstrate a bias. Regular meeting with a citizens committee can be useful during the planning and development of large projects over an extended period. The committee should be truly representative of the community likely to be directly affected by the project.

During the Preliminary Assessment stage, the project proponent can obtain such participation through the means suggested in the EIA Guidelines, *‘however, public participation must be carefully planned to obtain the maximum benefit from it’*⁵⁶. At this stage, members of the public neither have access to a copy of the EIA Report, nor do they have a right to comment on

⁵¹ Section 1.5.3 of EIA Guidelines

⁵² Some suitable methods are stated under section 2.3.4 of the EIA Guidelines

⁵³ Section 3.4.4 of the EIA Guidelines

⁵⁴ Section 4.7 of the EIA Guidelines

⁵⁵ ‘Any person who is aggrieved by any decision of the Director General under subsection (3) or (4) of section 34A’ may appeal to the Appeal Board which consist of members appointed by a notification in the Gazette by the Minister.

⁵⁶ Section 1.4.5 of the EIA Guidelines

the report. The project initiator is canvassing for public opinion about the proposed project.

During the Detailed Assessment stage, members of the public may send in their submissions to the Director General after the Detailed Assessment Report has been made public. The need for public participation and the form it should take '*should be discussed*'⁵⁷ when the terms of reference for the Detailed Assessment are being formulated. In 1996, the DoE introduced a new dimension into the drafting of the terms of reference where the Terms of Reference (TOR) for all Detailed Assessments were required to be displayed for public comments. This would help to promote the exchange of views at an early stage of the EIA process and these issues could then be addressed in the EIA Report. Section 3.4.7 of the EIA Guidelines states that it is the responsibility of the project initiator to ensure that sufficient copies of the Detailed Assessment have been published for the Review Panel, the approving authority, concerned environmental-related agencies and the interested public. The onus is on the project proponent to notify the Review Panel concerning where the public may obtain copies of the Detailed EIA Report and the cost of each copy.

As soon as the Review Panel receives the Detailed EIA Report, it will require the project initiator to inform the public by publishing public notices stating that the Detailed EIA Report has been received for review, the nature and location of the project, where copies can be obtained and the cost of each copy⁵⁸, and that public representations and comments on the EIA Report should be forwarded in writing to the Review Panel not later than 45 days after the notice⁵⁹.

After the Director General of the Environment has made a decision, aggrieved members of the public who have an interest to protect can file an appeal under section 35(e) of the EQA. The Detailed Assessment Review documents are open for public inspection in order for member of the public who may be

⁵⁷ Section 3.4.4 of the EIA Guidelines

⁵⁸ Section 3.4.7 of the EIA Guidelines

⁵⁹ Section 4.7 of the EIA Guidelines

aggrieved to have access to the grounds for approval before filing an appeal with the Appeal Board.

Harding has pointed out that the Preliminary Environmental Impact Assessment requires no public participation, and in the Detailed Environmental Impact Assessment the public participation is only conducted at the discretion of the Director General. Although the DoE is generally quite keen on public participation, it still depends on those who are invited to sit on the EIA Review Panel who have a real influence on decision-making⁶⁰.

Two cases filed in the Malaysian courts refer directly to EIA⁶¹. In the case of *Abdul Razak Ahmad v Ketua Pengarah Kementerian Sains, Teknologi dan Alam Sekitar*⁶², the court decided that the plaintiff had a right to an EIA Report to determine to what extent the project's impact on the environment would affect him specifically and the residents of Johor Bharu in general and therefore the plaintiff had an interest to protect. In this case the right to information was given to the plaintiff on the basis that the plaintiff was the affected person and he had an interest to be protected.

In the second case, *Ketua Pengarah Jabatan Alam Sekitar & anor v Kajing Tubek & ors and other appeals*⁶³, two matters were decided. Firstly, under Sarawak EIA laws there was no requirement for the respondents to be supplied with copies of the EIA Report, and secondly, the respondents had no locus standi to bring the matters before the court.⁶⁴ In this case, the court seems to have applied the requirement on 'passive information',⁶⁵ as the respondents did not request the EIA report. On the locus standi matter, the court decided to

⁶⁰ Harding, A. see note 39 at 151-152.

⁶¹ Kanniah, see n.43 at cxlv.

⁶² *Abdul Razak Ahmad v Ketua Pengarah Kementerian Sains, Teknologi dan Alam Sekitar* [1994] 2 CLJ 363

⁶³ *Ketua Pengarah Jabatan Alam Sekitar & anor v Kajing Tubek & ors and other appeals* [1997] 3 MLJ 23

⁶⁴ They have no *locus standi* on three issues, that is; they cannot enforce criminal offence, their lives have not been deprived under the Land Code (Sarawak Cap 811) and they did not suffer any special injury over and above the injury common to others, so the respondents were not representatives in character and the other affected persons were not before the court.

⁶⁵ Stookes, see n.11.

follow the sixth principle theme on locus standi that is a '*situation against the claimant whether there is other aggrieved person who is not complaining*'⁶⁶.

2.4 The EIA Process in the United Kingdom

Environmental assessment in the UK originated from the EC Directive on Environmental Assessment 1985, i.e. the Directive 85/337/EEC⁶⁷. However this 1985 Directive has been substantially amended several times. Directive 2011/92/EU of the European Parliament and of the Council, on the assessment of the effects of certain public and private projects on the environment, has harmonised the principles for the EIA of projects by introducing minimum requirements, with regard to the type of project subject to assessment, the main obligations of developers, the content of the assessment and the participation of the competent authorities and the public, and it contributes to a high level of protection of the environment and human health. The 2011 Directive consolidated amendments to the Directive 85/337/EEC; Directive 97/11/EC; Directive 2003/35/EC; and Directive 2009/31/EC. The 2011 Directive has recently been amended by Directive 2014/52/EU of the Parliament and of the Council⁶⁸.

Article 2(1)(d) of the 2014 Directive define 'public' as '*one or more natural or legal persons and, in accordance with national legislation or practice, their association, organisations or groups*'. 'Public concerned' is define as '*the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures.... For the purpose of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest*'. This definition recognise the NGOs legal status in bringing environmental issues.

Annex I of the 2014 Directive list down 24 projects which '*shall be made subject to an assessment in accordance with Article 5 to 10*'; and Annex II list

⁶⁶ Judicial Review Handbook, see n.35.

⁶⁷ OJ L175/40 1985

⁶⁸ OJ L124/1

down 13 projects which ‘*Member State shall determine whether the project shall be made subject to assessment in accordance with Article 5 to 10*’. Article 5 of the 2014 Directive requires the developer to prepare and submit EIA report, which include: a description of the project; a description of the likely significant effects of the project on the environment; a description of the features of the project in order to avoid, prevent or reduce likely significant effect on the environment; a description on the reasonable alternative studied by the developer; a non technical summary of the above information; and any additional information specified in Annex IV. The competent authority shall make its determination, on the basis of the information provided by the developer.⁶⁹

In case *R (Mellor) v SSCLG*⁷⁰, the issue whether reasons are required to be given when an authority adopts a negative screening opinion or the Secretary of State gives a negative screening direction. It is plain on the face of the EIA Regulations that reasons are required when an authority concludes that development is EIA development: reg 4(6)(i). However, there appears to be nothing to support a requirement to give reasons where the authority considers that it is not EIA development.

In January 2008 the Court of Appeal hearing the Mellor case referred the question to the ECJ. Mellor concerned an application to construct a secure hospital unit in Nidderdale, North Yorkshire. Planning permission was granted by Harrogate Borough Council but later quashed by the High Court because of an absence of any screening opinion. On the remitted application, the Council adopted a negative screening opinion which was disputed by the claimant. Partnerships in Care, the developer, wrote to the Secretary of State for a screening direction. In the meantime, Harrogate reconsidered their position and decided that the development was EIA development. However, the Secretary of State subsequently adopted gave a negative screening direction. The claimant challenged that decision. The High Court held that no reasons had to be given for the Secretary of State’s decision or, alternatively, that the

⁶⁹ Article 4(5) of the 2014 Directive.

⁷⁰ [2009] 18 EG 84 (CS)

reasons given were adequate. The claimant appealed and requested the reference.

The question referred to ECJ was whether under Article 4 of Council Directive 85/337/EEC as amended by Directives 97/11/EC and 2003/35/EC Member States must make available to the public reasons for a determination that in respect of an Annex II project there is no requirement to subject the project to assessment in accordance with Articles 5 to 10 of the Directive. The ECJ ruled that the determination itself did not need to contain reasons for the position adopted. However, the following judgment was made by the ECJ:

[57] ...third parties, as well as the administrative authorities concerned, must be able to satisfy themselves that the competent authority has actually determined, in accordance with the rules laid down by national law, that an EIA was or was not necessary.

[58] Furthermore, interested parties, as well as other national authorities concerned, must be able to ensure, if necessary through legal action, compliance with the competent authority's screening obligation. That requirement may be met, as in the main proceedings, by the possibility of bringing an action directly against the determination not to carry out an EIA.

[59] In that regard, effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general, that the court to which the matter is referred may require the competent authority to notify its reasons. However where it is more particularly a question of securing the effective protection of a right conferred by Community law, interested parties must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts. Consequently, in such circumstances, the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request (see Case 222/86 Heylens and Others [1987] ECR 4097, paragraph 15).

[60] That subsequent communication may take the form, not only of an express statement of the reasons, but also of information and relevant documents being made available in response to the request made.

The above judgment shows that although it is not necessary for the competent authority to provide reasons in determining whether it is an EIA project or not, however, the reasons underlying the determination must at least available on request. In this particular case it also shows that any interested parties, including NGOs has a locus standi in requesting for reasons once the competent authority determined the screening decisions.

Article 5(3) of the 2014 Directive also include a new provision which guarantee the completeness and quality of the EIA report. Two cumulative conditions are required; developer shall ensure that the EIA report is prepared by competent experts; and competent authority shall ensure that it has, or has access as necessary to, sufficient expertise to examine the EIA report.

2.4.1 Public Participation in the EIA Process in the United Kingdom

Consultation and participation are officially encouraged at the screening, scoping and environmental statement (ES) stages. However, public participation must only be engaged once the ES has been submitted.

Article 6(2) of the 2014 Directive requires the public concerned be informed electronically and by public notices or by other appropriate means of the matters early in the environmental decision-making procedures or, at least, as soon as information can reasonably be provided. The information are on: the request for development consent; the fact that the project is subject to EIA procedures; details of competent authorities responsible for taking the decision; the nature of possible decision; an indication of the availability of the information; an indication of the times and places in which the relevant information will be made available; and details of the arrangements for public participation.

Article 6 (3) and (4) also provide that the public concerned be informed within a reasonable time-frame; and they shall be given early and effective opportunities to participate in the environmental decision-making procedures. They shall also be entitled to express comments and opinions when all options

are open to the competent authority before the decision on the request for development consent is taken.

To ensure the effectiveness of public participation, the Member State shall take necessary measures to ensure that the relevant information is electronically accessible to the public, through at least a central portal or easily accessible points of access, at the appropriate administrative level.⁷¹

Article 6(6) of the 2014 Directive provide that reasonable time-frames for different phases to be provided (for information and for participation in decision-making); and time-frame for consulting the public concerned on the EIA report shall not less than 30 days.⁷²

2.5 Substantive Environmental Rights

Stokes has defined substantive environmental rights as, *‘those rights that set clear objectives and may be secured without reference to any other rights, for example the right to a clean and healthy environment, and the right to clean, fresh drinking water’*⁷³. This section discusses in brief the applicability of environmental matters in human rights provisions, both in Malaysian legislation and European and UK legislation.

2.5.1 Malaysian legislation

In Malaysia, the Federal Constitution is the supreme law of the land⁷⁴. Part II of the Federal Constitution contains nine Articles on fundamental liberties⁷⁵. To examine the applicability of environmental matters in human rights provision, it is important to look at various official publications related to the

⁷¹ Article 6(5) of the 2014 Directive

⁷² Article 6(7) of the 2014 Directive

⁷³ Stokes, see n.11 at 40.

⁷⁴ Article 4(1) of the Malaysia Federal Constitution states, ‘This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void’.

⁷⁵ Article 5 to 13 of the Federal Constitution

independence of the Federation of Malaya⁷⁶. There are five such publications related to the Federation of Malaya and the draft Constitution. These documents are the Report by the Federation of Malaya Constitutional Conference (The Constitutional Conference)⁷⁷; Report of the Federation of Malaya Constitutional Commission 1957 (The Reid Commission Report)⁷⁸; Constitutional Proposals for the Federation of Malaya (the White Paper)⁷⁹; Federation of Malaya Independence Bill⁸⁰; and Federation of Malaya Independence Bill⁸¹. However the provision on fundamental liberties was neither discussed at the Constitutional Conference nor debated during the reading of the Independence Bills. In the Reid Commission Report and the White Paper, the subject matter on fundamental liberties was only briefly reported.

Abdul Aziz Bari⁸² has argued that the Reid Commission report does not provide exhaustive recommendations on fundamental liberties because the Commission felt that such provisions on fundamental liberties are '*already deeply entrenched in the land*'⁸³. He further argued that the Reid Commission recommended that it is for parliament to determine the extent and scope of rights in the fundamental liberties. Given that the Reid Commission only briefly commented on the provisions concerning fundamental liberties, while criticising the judgment on *Ketua Pengarah Alam Sekitar & anor v Kajing*

⁷⁶ Federation of Malaya comprised of eleven states; namely the two formerly strait settlements of Malacca and Penang and the nine Malay states of Perlis, Kedah, Kelantan, Terengganu, Pahang, Perak, Selangor, Negeri Sembilan and Johore. Malaysia was established in 1963 with the coming of Sabah, Sarawak and Singapore into the Federation.

⁷⁷ Report by the Federation of Malaya Constitutional Conference, held in London in January and February 1956.

⁷⁸ Report of the Federation of Malaya Constitutional Commission 1957 (London: Her Majesty's Stationery Office)

⁷⁹ Constitutional Proposals for the Federation of Malaya (London: Her Majesty's Stationery Office)

⁸⁰ Federation of Malaya Independence Bill, (Deb 12 July 1957) 573 HC 633-715

⁸¹ Federation of Malaya Independence Bill, (Deb 29 July 1957) 205 HL 231-41

⁸² Abdul Aziz Bari, *Malaysian Constitution A Critical Introduction*, (Kuala Lumpur: The Other Press, 2003)

⁸³ Abdul Aziz Bari, see n.82 at 143.

*Tubek & ors and other appeals*⁸⁴ Gurdial Singh Najar⁸⁵ was of the opinion that environmental matters did not even cross the minds of the members of the Reid Commission at the time they drafted the Constitution.⁸⁶

According to Abdul Haseeb⁸⁷ there is no explicit right to a healthy environment under the Federal Constitution. Wing-Cheong Chan⁸⁸ supported this view and further commented that there is no category of the ‘environment’ in the Federal Constitution since the ‘environment’ is itself ‘*a multi-faceted concept depending on the context of its issue for its meaning*’⁸⁹.

Commenting on the White Paper, Abdul Aziz Bari said⁹⁰ that it was just like the Reid Commission’s recommendations. For example, both the Reid Commission report and the White Paper left it for Parliament to deal with the protection of fundamental liberties. No improvement had been made in the White Paper and yet it deleted the provision to enforce the rule of law recommended by the Reid Commission on a basis that ‘*the provision was “unsatisfactory....(and)...impracticable to provide within the limits of the Constitution for all possible contingencies”*’⁹¹.

Although the Reid Commission report did not provide any exhaustive recommendations concerning rights, it did note the importance of

⁸⁴ *Ketua Pengarah Alam Sekitar & anor v Kajing Tubek & ors and other appeals* [1997] 3 MLJ 23

⁸⁵ Gurdial Singh Najar, ‘The Bakun Dam case: A critique’, (1997)3 MLJ ccxxix.

⁸⁶ During the colonisation of British on the Federation of Malaya, among the problems faced by the government was to combat the communist which largely supported by the Chinese community in Malaya. One of the main issues concerned by the Reid Commission was to unite the three main races in Malaya that is Malay, Chinese and Indian. The first election in 1955 which majority won by the Alliance Party which consists of the main races, led to the independency of Malaya. For this matter, while drafting a constitution for a newly independence state, the main issues are how to strengthen the unity among the races, economies stability and national security.

⁸⁷ Abdul Haseeb Ansari, ‘Right to a healthful environment as a means to ensure environmental justice: An overview with special reference to India’, (1998)4 MLJ xxv.

⁸⁸ Wing-Cheong Chan, ‘Environmental Protection in Malaysia: Lessons from the Bakun Hydroelectric project litigation’, (1998) 1Env. Liability 11-17.

⁸⁹ Wing-Cheong Chan, see n.85

⁹⁰ Abdul Aziz Bari, see n.82 at 144.

⁹¹ Abdul Aziz Bari, see n.82 at 144.

*'guaranteeing these rights subject to limited exceptions in conditions of emergency'*⁹². Interestingly, although it was suggested to write *'into the constitution certain principles or aims of policy which could not be enforced by the courts'*⁹³, the Commission felt that it was neither right nor practicable *"to attempt to limit developments of public opinion on political, social and economic policy"*⁹⁴. Recognising the supremacy of the constitution and the independence of the judiciary, the Reid Commission left it to the power and duty of the courts to enforce these rights. The question here is whether or not the courts are willing to adopt a broader interpretation of the provisions of the constitution, beyond its literal meaning, to include environmental matters. However, Gurdial Singh Najar⁹⁵ has said that the judiciary has neglected the issue of the environment, particularly the rights of affected citizens to make representation on such elementary matters as environmental impact assessment.⁹⁶

However, according to Harding⁹⁷, the following rights might have some relevance to environmental matters:

(a) Article 5: Liberty of a person

"(1) No person shall be deprived of his life or personal liberty save in accordance with law.

(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

(3) Where a person is arrested he shall be informed as soon as may be of the ground of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority;

Provided that this clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from Merdeka Day:

⁹² The Reid Commission report, see n.78

⁹³ The Reid Commission report, see n.78

⁹⁴ The Reid Commission report, see n.78

⁹⁵ Gurdial Singh Najar, see n.85

⁹⁶ Gurdial Singh Najar, see n.85

⁹⁷ Harding, A, see n.68 at 230-233.

Provided further that in its application to a person, other than citizen, who is arrested or detained under the law relating to immigration, this Clause shall be read as if there were substituted for the words “without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey)” the words “within fourteen days”:

And provided further that in the case of an arrest for an offence which is triable by a Syariah Court, references in this Clause to a magistrate shall be construed as including references to a judge of a Syariah Court.

(5) Clauses (3) and (4) do not apply to an enemy alien.”

Discussion

Abdul Haseeb⁹⁸ recognised that the right to a healthy environment falls within the ambit of article 5 of the Federal Constitution that guarantees the right to life and liberty. He also believed that there is a move a foot in Malaysia to amend the Constitution to explicitly provide for a right to a healthy environment⁹⁹, and Abdul Aziz supported the idea of mobilising existing human rights to include substantive ‘environmental rights’¹⁰⁰.

However, Article 5(1) provides a general provision on the right to life¹⁰¹. In the case of *Kajing Tubek*¹⁰², Gopal Sri Ram and Mokhtar Sidin JJCA held that the respondents suffered no injury, since the deprivation, as they claimed, was in accordance with the law, that is, the Land Code (Sarawak Cap 81). Since the Court of Appeal in this case held that the Land Code (Sarawak Cap 81) fell within the meaning of ‘in accordance with law’ under article 5(1), then it is arguable whether one can use right to life under article 5(1) to include the right to a healthy environment. It seems that the court took a narrow interpretation of the provision by simply adopting the Land Code (Sarawak Cap 81) to fall within the meaning of “in accordance with law”. The provision in article 5(1) was primarily enacted to protect a person’s life and prevent personal liberty from being arbitrarily deprived by the authorities. In that matter, while

⁹⁸ Abdul Haseeb Ansari, see n.87 at xli.

⁹⁹ Abdul Haseeb Ansari, see n.87 at xli, see also Harding A, n. 68 at 229

¹⁰⁰ Abdul Aziz Bari, ‘Right to life under the Federal Constitution and environmental issues’, (1999)1 MLJ lx.

¹⁰¹ *Che Ani bin Itam v Public Prosecutor* [1984] 1 MLJ 113; *Public Prosecutor v Lau Kee Ho* [1983] 1 MLJ 157, [1984] 1 MLJ 110; *Attorney General, Malaysia v Chiow Thiam Guan* [1983] 1 MLJ 50; *Public Prosecutor v Yee Kim Seng* [1983] 1 MLJ 252.

¹⁰² *Kajing Tubek* [1997] 3 MLJ 23

interpreting the provision, the court should take into full consideration the meaning of “life” and “personal liberty”.

The rest of Article 5 deals with the right to *habeas corpus* (Article 5(2))¹⁰³, the right to know the grounds of arrest as well as the right to legal representation (Article 5(3))¹⁰⁴ and the right to be produced before a magistrate within 24 hours of arrest (Article 5(4))¹⁰⁵.

Item 162 of the Reid Commission Report states that, ‘*we recommend (Art. 5) provisions against detention without legal authority of magistrate*’. This shows that the primary objective of enacting article 5 is to provide for a right to *habeas corpus* rather than a right to life with any broader meaning.

Harding, Abdul Haseeb and Abdul Aziz all believed that article 5 of the Federal Constitution can be mobilised to include a right to a healthy environment. However, this very much depends to the willingness of the court to interpret the article liberally.

(b) Article 8: Equality

“(1) all persons are equal before the law and entitled to the equal protection of the law.

(2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

(3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any State.

¹⁰³ *Abdul Ghani Haroon v Ketua Polis Negara & Anor* [2001] 2 MLJ 689; *Re Datuk James Wong Kim Min* [1976] 2 MLJ 245; *Kok Wah Kuan v Pengarah Penjara Kajang, Selangor Darul Ehsan* [2004] 5 MLJ 193.

¹⁰⁴ *Mohamed Ezam Mohd. Nor v Ketua Polis Negara & Ors* [2002] 4 CLJ 309; *Yit Hon Kit v Minister of Home Affairs* [1988] 2 MLJ 638; *Chong Kim Loy v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1989] 3 MLJ 121; *Lee Mau Seng v Minister for Home Affairs, Singapore & Anor* [1971] 2 MLJ 198; *Ooi Ah Phua v Officer-in-charge, Criminal Investigations, Kedah/Perlis* [1975] 2 MLJ 198; *Ramli bin Salleh v Inspector Yahaya bin Hashim* [1973] 1 MLJ 54.

¹⁰⁵ *Inspector General of Police v Lee Kim Hoong* [1979] 2 MLJ 291.

(4) No public authority shall discriminate against any person on the ground that he is a resident or carrying on business in any part of the Federation outside the jurisdiction of the authority.

(5) This Article does not invalidate or prohibit –

(a) Any provision regulating personal law;

(b) any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion;

(c) Any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service;

(d) any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that State or part, or for voting in such an election;

(e) Any provision of a Constitution of a State, being corresponding to a provision in force immediately before Merdeka Day;

(f) Any provision restricting enlistment in the Malay Regiment to Malays.”

Discussion

This Article goes on to outlaw discrimination on the grounds only of religion, race, descent, place of birth or gender¹⁰⁶. Harding¹⁰⁷ was of a view that this right to equality might in theory be used to ensure that citizens are guaranteed an equally healthy environment. He also said, by way of exceptions, that the article might be defined in such a way as to allow special land rights for underprivileged groups whose habitat might be threatened by development or logging. This is because although the aboriginal peoples of Peninsular Malaysia and the native populations of Sabah and Sarawak have statutorily guaranteed customary land rights or reservations, they are not able to point to specific constitutional rights to enforce them¹⁰⁸. The reinterpretation of Article 8 of the Federal Constitution as suggested by Harding might work only for certain classes of people like the aboriginal and native people because they are protected under the Aboriginal Peoples Act 1954 which is mainly concerned with the land rights of these people.

¹⁰⁶ Article 8(2) of the Federal Constitution

¹⁰⁷ Harding A, see n.68 at 231.

¹⁰⁸ Hooker, ‘The Orang Asli and the laws of Malaysia with special reference to land’, (1991) 18 Ilmu Masyarakat 51.

However, environmental issues under article 8 have never been tested in the courts. Most cases are concerned with the meaning of discrimination.¹⁰⁹ If the courts were willing to interpret article 8 more widely, then perhaps one could claim for equality in terms of a healthy environment such as clean water and air, particularly under article 8(1) concerning equality “...in the administration of any law relating to the acquisition, holding or disposition of property..” or under article 8(2); and as suggested by Harding, in article 8(5)(c).

(c) Article 10: Freedom of Speech, Assembly and Association

“(1) Subject to Clauses (2), (3) and (4) –

(a) every citizen has the right to freedom of speech and expression;

(b) all citizens have the right to assemble peaceably and without arms;

(c) all citizens have the right to form associations.

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

(b) on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order;

(c) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality.

(3) Restrictions on the right to form associations conferred by paragraph (c) of Clause (1) may also be imposed by any law relating to labour or education.

(4) In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2)(a), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.”

Discussion

These rights are of great importance in that they are capable of affording the opportunity for citizens to raise environmental issues publicly.¹¹⁰ However these freedoms come with exceptions¹¹¹. For instance, a police permit is

¹⁰⁹ *Public Prosecutor v Datuk Harun bin Haji Idris* [1976] 2 MLJ 116; *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155; *Johnson Tan Han Seng v Public Prosecutor* [1977] 2 MLJ 66; *Public Prosecutor v Tengku Mahmood Iskandar & anor* [1973] 1 MLJ 128.

¹¹⁰ Harding A, see n.68 at 231-232.

¹¹¹ Article 10(2), (3) and (4) of the Federal Constitution

required for any public gathering of more than five persons;¹¹² societies are regulated by statutes;¹¹³ questioning sensitive issues may result in prosecution under sedition laws;¹¹⁴ and any person can be detained under the Internal Security Act 1950 as a threat to national security without any infringement of a constitutional right to personal liberty. The Reid Commission report recommended that, *‘freedom of speech and expression should be guaranteed to all citizens subject to restrictions in the interest of security, public order or morality or in relation to incitement, defamation or contempt of court’*¹¹⁵. Restrictions imposed by the law have been challenged in several cases¹¹⁶, but none of these cases involved environmental issues. By mobilising the existing provision under Article 10 to include ‘environmental rights’ in the right to the freedom of speech or expression, to assemble peaceably, and to form an association, some room might be given to the public or organisations to express their views on environmental matters.

(d) Article 11: Freedom of religion

Article 11 of the Federal Constitution states that:

“(1) every person has the right to profess and practice his religion and subject to Clause (4), to propagate it.

(2) No person shall be compelled to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own.

(3) Every religious group has the right –

(a) to manage its own religious affairs;

(b) to establish and maintain institutions for religious or charitable purposes;

and

(c) to acquire and own property and hold and administer it in accordance with law.

(4) State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.

¹¹² Section 27 of Police Act 1962

¹¹³ Societies Act 1966

¹¹⁴ Sedition Act 1948

¹¹⁵ The Reid Commission report, see n.78

¹¹⁶ *Madhavan Nair v Public Prosecutor* [1975] 2 MLJ 264; *Mark Koding v Public Prosecutor* [1982] 2 MLJ 120; *Public Prosecutor v Lim Kit Siang* [1979] 23 MLJ 37; *Chai Choon Hon v Ketua Polis Daerah, Kampar* [1986] 2 MLJ 203; *Cheah Beng Poh v Public Prosecutor* [1984] 2 MLJ 225; *DAtuk Yong Teck Lee v Public Prosecutor* [1993] 1 MLJ 295; *Malaysian Bar & Anor v Government of Malaysia* [1986] 2 MLJ 225; *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697.

(5) This Article does not authorise any contrary to any general law relating to public order, public health or morality.”

Discussion

According to Harding, *‘to the extent that environmental concerns may be voiced through religious teachings and religious analyses of the environment are developing¹¹⁷, this particular right is perhaps more promising than the others’¹¹⁸*. This suggestion by Harding is interesting since religious teachings always place emphasis upon the importance of cleanliness. Abdul Aziz Bari and Farid Sufian Shuib¹¹⁹ were of the view that Article 11 of the Federal Constitution provides too narrow a definition and its scope as to the meaning of freedom of religion only includes the right to profess and practice one’s religion. The Reid Commission Report stated that, *‘we recommend (art. 11) that freedom of religion should be guaranteed to every person including the right to profess, practice and propagate his religion subject to requirements of public order, health and morality...’¹²⁰*. Since the Reid Commission suggested that the freedom of religion is subject to the requirement of health, perhaps one could use the provision to propagate a clean environment through religious teachings. When a person practices the aspects of cleanliness specified in his religion and propagates its elements, based on article 11 of the Federal Constitution, no one could stop him from doing so.

(e) Article 13: Rights to property

*“(1) No person shall be deprived of property save in accordance with law.
(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.”*

Discussion

The Reid Commission report stated, *‘that no person shall be deprived of his property save in accordance with law (article 13), and that any law for compulsory acquisition or requisition of property must be provide for*

¹¹⁷ Fazlun Khalid and O’Brien (eds), *Islam and Ecology*, (London, 1992)

¹¹⁸ Harding A, see n.68 at 232.

¹¹⁹ Abdul Aziz Bari & Farid Sufian Shuib, *Constitution of Malaysia Text and commentary*, (Selangor: Prentice Hall, 2004).

¹²⁰ The Reid Commission report, see n.78

*adequate compensation*¹²¹. The right to property is guaranteed in the sense that no person can be deprived of property save in accordance with law, and no law may provide for compulsory acquisition or use of property without adequate compensation¹²². The rights can either be for the benefit of the environment or not. For example, the authorities can acquire land in setting up a reserved area of natural beauty over compensation, or, conversely, for example, acquire land which has natural beauty for the building of a dam. However, in dealing with these issues, the authority always looks into the matters of ‘public interest’ and ‘economic interest’.

In the case of *Adong bin Kuwau*¹²³, the 52 plaintiffs were heads of families representing a group of aboriginal people living around the Sungai Linggi catchment area which also included the tributary Tebak (‘the Linggi valley’). They were seeking relief against the defendants for the declarations: (a) that all the lands acquired by the defendants for the purpose of constructing the Sungai Linggi Dam near Kota Tinggi, Johor, was an aboriginal area or aboriginal reserve; and (b) that the defendants jointly or severally pay to the plaintiffs all the compensation received by them from the government of Singapore or a sum deemed just by the honourable court. The plaintiffs claimed that the lands within the Sungai Linggi were their traditional and ancestral land upon which they depended to forage for their livelihood in accordance with their tradition.

In this case, the court took a wide interpretation of proprietary rights under article 13 and held, inter alia, that “(i) *property includes both real and personal property; (ii) property may signify either the subject matter itself or interest valuable rights attached to it; and (iii) property may include certain rights such as possession, enjoyment etc. The building of a dam was held to have denied the aborigines their rights to enjoy the forest produce and as such the state authority was in breach of the provision in article 13. The court also noted that the plaintiffs had suffered (i) deprivation of heritage land (ii)*

¹²¹ The Reid Commission report, see n.78

¹²² Article 13(1) of the Federal Constitution states that, ‘no person shall be deprived of property save in accordance with law’.

¹²³ *Adong bin Kuwau & Ors V kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 HC; [1998] 2 MLJ 158 CA

*deprivation of freedom of inhabitation or movement under article 9(2) of the Federal Constitution (iii) deprivation of produce of the forest (iv) deprivation of future living for themselves and their immediate family and (v) deprivation of future living for their descendents*¹²⁴. In view of this the court ordered RM26.5 million as compensation.

Although this case is not directly categorised under an ‘environmental’ heading, the fact that it deals with ‘land’ makes it fall under the definition of the environment as defined by section 2 of the EQA, where ‘*Environment*’ means *physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics*’. This case also shows that the court can interpret the provision in the Federal Constitution to include environmental matters without creating a new right under the Federal Constitution.

2.5.2 European and UK legislation

Article II-37 of the draft EU Constitution provides that a ‘*high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development*’.¹²⁵ However, the UK does not recognise any substantive environmental rights for humans.¹²⁶

The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) provides a number of basic human rights for member states and The UK Human Rights Act 1998 (HRA 1998) was drafted to give ‘further effect to the rights and freedoms’ guaranteed under the ECHR.¹²⁷

¹²⁴ *Adong bin Kuwau & Ors V kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418

¹²⁵ Article II-37 of the draft treaty establishing a Constitution for Europe. Retrieved from <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf> (last visit on 22 January 2009).

¹²⁶ Stookes P, see n.11 at 41.

¹²⁷ Stookes P, see n.11 at 41

Neither the Act nor the ECHR provides a specific right to a clean and healthy environment although national and international case law is defining the extent to which the ECHR and its related Protocol can be relied upon to confer rights that provide some form of environmental protection and means of redress. Below are the rights and freedoms that have been found to have some relevance in environmental matters under the ECHR.

(a) Article 2: Right to Life

“1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- a. in defence of any person from unlawful violence;*
- b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
- c. in action lawfully taken for the purpose of quelling a riot or insurrection.”*

Discussion

A relevant article for a substantive environmental right is Article 2, the right to life. The right to life is considered to include physical integrity and well-being. In the case of *Balmer - Schafroth*¹²⁸, the claimant had failed to show that the operation of the power station exposed them to a danger that was serious, specific, and imminent. The court said that the factors needed to establish a claim under article 6 were a serious and imminent danger personal to the applicant who must mean, they are in some sense, relevant to the substantive claim under article 2. This case shows that, if one wants to claim his right under article 2, he must prove that there is a danger to his life which is serious, specific and imminent. In *LCB v UK*¹²⁹, it was held that it is a duty upon a state under article 2 to warn of risks to health from certain state activities and to monitor the health of persons but only where the authorities know for certainty or conclusively of the risk of harm.

¹²⁸ *Balmer - Schafroth* (1997) 25 EHRR 598

¹²⁹ *LCB v UK* (1998) 27 EHRR 212

(b) Article 6: Right to a fair trial

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

- a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
- b. to have adequate time and facilities for the preparation of his defence;*
- c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
- d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
- e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”*

Discussion

The right to a fair trial under Article 6 is a procedural environmental right which is embodied in a substantive environmental right. In *Zander v Sweden*¹³⁰ the claimant's land was adjacent to a waste tip which had polluted the local water supply. When the application to dump more waste on the tip was granted, the claimant's only means of appeal was to the government, who dismissed an appeal that any permit to dump waste must be subject to the waste company taking precautionary measures to avoid further pollution. The government of Sweden argued that to find article 6(1) applicable in that case would result in *‘an obligation for states to introduce a multitude of comprehensive court remedies covering a wide range of environmental matters [and to] deal with complaints about exposure to potential not just*

¹³⁰ *Zander v Sweden* (1993) 18 EHRR 175

actual risk of damage', is indeed a statement about the potential of article 6(1) for creating 'procedural environmental rights'. In *LM & R v Switzerland*¹³¹, the Commission stated that the article embodies the 'right to a court' of which right to access, that is the right to institute proceedings before the courts. This right, however, is not absolute and is subject to limitations.

(c) Article 8: Right to respect for his private and family life

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Discussion

According to DeMerieux¹³², in order to allow substantive environmental claims under the ECHR, only article 8 has so far provided a basis for litigation that can offer protection of environmental quality for an individual claimant. However, this must be proved through a finding of an infringement of that article. Such a finding depends, it is argued, on two factors: firstly, that the court has given a substantive meaning to article 8 of the ECHR, by which the pollution of the applicant's environment constitutes an interference with the applicants' private and family life, for which the state is held responsible; and, secondly, the court has in these cases simply not applied the margin of appreciation¹³³. When the court does apply the margin of appreciation, it in fact declines to take into consideration the complaint made by an individual

¹³¹ *LM & R v Switzerland* (1996) 22 EHRR CD 130

¹³² DeMerieux, M, 'Deriving environmental rights from European Convention for the protection of human rights and fundamental freedom', (2001) 21(3) Oxford Journal of Legal Studies 521-561.

¹³³ Margin of appreciation is a means by which member states are conferred a privilege to balance between the rights of the individual with the rights of the public at large. When there is a conflict between the security of public with the individual human rights then it is for the state to determine whether it is within the margin of appreciation that they can violate that individual's human rights without being held liable for violation.

claimant and this might defeat the substantive meaning given or attributable to the ECHR article concerned.

Miller, while commenting upon DeMerieux, said that,

‘The rights which she (DeMerieux) believes to be derivable from the convention are ‘environmental’ in only a narrow sense – the common factor in the ECHR case law is a recognition of a state’s positive duty to regulate what are certain negative aspects of residential location, attaching the label ‘environment’ to that duty or to those aspects serves little hermeneutic purpose; and the state’s function is no less political than other involving the allocation of resources. The courts may have a role in protecting those who are still obliged to live in circumstances which majority find unacceptable. But a deeper analysis of the case law reveals why that role is unlikely to be more than a residual one¹³⁴’.

In the case of *Rayner v UK*¹³⁵, the Commission said that, *‘as the Convention does not in principle guarantee a right to a peaceful environment, noise nuisance for which a Government can, as in the present case, be held responsible cannot be considered an unreasonable burden on the individuals concerned if they have the possibility of moving elsewhere without substantive difficulties and losses’*. In this case, the court found that the interference of private life from aircraft noise was justified. Here, article 8(2) of the ECHR was applied by the Commission.

In *Hatton v United Kingdom*¹³⁶, the Grand Chamber, in majority, quashed the tentative approaches towards environmental rights under the ECHR, holding categorically that there *‘is no explicit right in the Convention to a clean and quiet environment’*, only that *‘where an individual is directly and seriously affected by noise or other pollution, an issue may arise under article 8’*. Instead they held that environmental protection; *“should be taken into consideration by governments in acting within their margin of appreciation and by the court in its review of that margin, but it would not be appropriate for the court to adopt a special approach in this respect by reference to a special status of environmental human rights. In this context the court must revert to the question of the scope of the margin of appreciation available to*

¹³⁴ Miller, C, ‘Environmental Rights in a Welfare State? A Comment on DeMerieux’, (2003) 23(1) Oxford Journal of Legal Studies 111-125.

¹³⁵ *Rayner v UK* (1989) 9 EHRR 375

¹³⁶ *Hatton v United Kingdom* [2004] 1 All ER 135

*the state when taking policy decisions of the kind at issue*¹³⁷. The court held that the Government policy on night flights at Heathrow airport did not violate the applicants' article 8 rights to respect for private life.

*Lopez Ostra v Spain*¹³⁸ was the first case in which the court declared a breach of article 8 of the ECHR for environmental degradation having harmful effects for an applicant. In this case the applicant complained that a neighbouring waste treatment plant emitting fumes, noise, and strong smells made her family's living conditions unbearable and was causing serious health problems. The court decided that in the circumstances of the case and notwithstanding the margin of appreciation a fair balance had not been struck between the interest in the town's economic well-being and the 'effective enjoyment' of the article 8 right. The court noted that severe environmental pollution could impact on 'private and family life' adversely, even without seriously endangering health¹³⁹. *Guerra and others v Italy*¹⁴⁰ was the second case in which article 8 of the ECHR was successfully invoked in an environmental matter. This case concerned the failure to provide a local community with information about risk and how to proceed in the event of an accident at a nearby chemical factory. The applicants had complained of an omission by the state authority in its failure to act, rather than positive interference. The court held that the potential direct effect of toxic emissions on the applicant's right to respect for their private and family life meant that article 8 of the ECHR was applicable.

In *Buckley*¹⁴¹, the Commission and court gave a different opinions in which the Commission was of the view that there had been a violation to article 8 of the ECHR whereas the court's finding was that there was none. This resulted from a difference of view as to the application of 'necessary in a democratic society' as required by article 8(2) of the ECHR. In *Tawira and Eighteen*

¹³⁷ Layard, A, 'Human rights in the balance – Hatton and Marcic', (2004) 6(3) ELR 196-203.

¹³⁸ *Lopez Ostra v Spain* (1994) 20 EHRR 277

¹³⁹ DeMerieux M. see n.132

¹⁴⁰ *Guerra and others v Italy* (1998) 26 EHRR 357

¹⁴¹ *Buckley* (1996) 23 EHRR 101

*Others v France*¹⁴², the applicants failed to show that they were the actual victims. This shows the inability of human rights to protect the environment where there is no extant victim. *McGinley and Egan v UK*¹⁴³ shows another aspect of the state's obligation under article 8 of the ECHR; that is, to ensure an effective and accessible procedure for the giving of information where the state's hazardous activities could adversely affect a person's health. This obligation can be considered a form of procedural environmental right.

(d) *Article 10: Freedom of expression*

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Discussion

In *Steel & Morris v UK*¹⁴⁴ the ECtHR held that, in relation to Article 10 of the ECHR, the central issue to be determined was whether or not the interference with the applicants' freedom of expression had been 'necessary in a democratic society'. It noted that, *'the government had contended that, as the applicants were not journalists, they should not attract the high level of protection afforded to the press under article 10. However, in a democratic society even small and informal campaign groups, such as London Greenpeace, had to be able to carry on their activities effectively. There existed a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment'*. In this case, the court recognised the importance of freedom

¹⁴² *Taura and Eighteen Others v France* (1995) 83 D&R 112

¹⁴³ *McGinley and Egan v UK* (1998) 27 EHRR 1

¹⁴⁴ *Steel & Morris v UK* (2005) ECtHR 68416/01,

of expression to environmental NGOs, particularly the right to be able to contribute to the public debate on environmental issues. Perhaps this is a starting point for reconsidering freedom of expression and including it as a substantive environmental right.

(e) Article 1 of Protocol 1: Protection of property

“(1) The right to peaceful enjoyment of a person’s possessions;

(2) Allows the state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest.”

Discussion

The term ‘possessions’ referred to in Article 1 of Protocol 1 is broad and, importantly for environmental matters, includes land and other property¹⁴⁵. The second paragraph permitting the state to take measures in the ‘general interest’ must be construed in light of the principle laid down in the first paragraph of the article – the need to strike a ‘fair balance’ between the demands of the general interest of the community and the individual’s fundamental rights. According to the decision in *Fredin v Sweden*¹⁴⁶, this ‘fair balance’ depends on the margin of appreciation the court allows the state.

In *Aston Cantlow & ors v Wallbank*¹⁴⁷, Lord Hope stated that there were three rules within Article 1, Protocol 1, where:

- (1) the right to peaceful enjoyment of possessions as set out in the first sentence is of a general nature;*
- (2) there are then two forms of interference; the deprivation of possessions that it subjects to conditions, and the control of the use of property in accordance with the general interest;*
- (3) in each case a balance must be struck between the rights of the individual and the public interest to determine whether the interference was justified. These rules are not unconnected, as before considering whether the first rule has been complied with, the court must first determine whether the last two rules are applicable.*

2.6 Conclusion

The Federal Constitution of Malaysia does not provide a specific provision on the environment under the fundamental liberties or any of its lists. The

¹⁴⁵ Stookes P, see n.11 at 47.

¹⁴⁶ *Fredin v Sweden* (1991) 13 EHRR CD 52

¹⁴⁷ *Aston Cantlow & ors v Wallbank* [2003] UKHL 37

examination of the documents prepared for the independence of Malaya shows that the word ‘environment’ was never discussed and currently implementing enforceable ‘environmental rights’ was not the intention of the drafters. The only means to include environmental issues as part of the rights recognised by the Federal Constitution is through interpretation by the courts. However the court, most of the time, interprets the articles of constitution literally. Perhaps it is impracticable to suggest the insertion of the word ‘environment’ under the relevant articles of the Federal Constitution, or the creation of a new constitutional right, as it might ‘*limit developments of public opinion on political, social and economic policy*’¹⁴⁸. The lack of a relevant wording under the constitution does not, however, mean that the court could not take the initiative to make a liberal move and recognise ‘environmental rights’ in the relevant articles of the Constitution.

The provisions of ECHR, taken literally, do not provide room for environmental issues. However, a person for whom his ‘environmental rights’ has been deprived, could bring the matter before the court for it to interpret the rights accordingly. The court’s willingness to interpret the issues in a wider sense could give more room for environmental matters to fall under the provisions of the ECHR. Unlike the provisions of the Federal Constitution, there are only a few cases which have been categorised under the ‘environment’ and the courts restrain themselves from making broad interpretations of the provisions to include environmental matters.

To compare the provisions of the Federal Constitution with those of the ECHR, perhaps the similarities of the provisions can be summarised as follows: (a) Article 5 of the Federal Constitution with Article 2 Of the ECHR, (b) Article 10 of the Federal Constitution with Article 10 of the ECHR, and (c) Article 13 of the Federal Constitution with Article 1 of Protocol 1 of the ECHR. As to other provisions; Articles 8 and 11 of the Federal Constitution do not match any of the other provisions under the ECHR; and provisions in Article 6 and 8 of the ECHR are not embodied in the Federal Constitution. Perhaps if the Federal Constitution had a provision similar to Article 6 of the

¹⁴⁸ The Reid Commission report, see n.78

ECHR, issues of procedural environmental rights might have room in the Federal Constitution.

The Aarhus Convention clearly provides that environmental procedural rights consist of the right of access to information, the right to participate in decision making and the right to access to courts. Although the Aarhus Convention has been criticised for its vagueness, so far it provides the best model for public participation in decision making processes concerning environmental issues.

Defining 'environmental rights' would be incomplete without a discussion of the substantive environmental rights. Since procedural environmental rights need law as a basis for implementation, so substantive environmental rights need procedural elements to make them workable.

PART II
EIA: A CASE STUDY
PARTICIPATORY DECISION
MAKING

Chapter 3. The Methodology

3.1 Introduction

In this chapter, the discussion focuses on the methods used for data collection, particularly the research sampling and selection; the formulation of questions and themes for the interviews; questionnaires and content analysis; and the analysis of data. This data collection was aimed at answering the research objectives of the study. Summary linking of the research questions and methodology was presented in Table 1 in Chapter One. The data collection was carried out between 4th June and 31st August 2007.

3.2 Respondent and Selection

Qualitative and quantitative methodologies were used to gather and analyse data used for the assessment of the effectiveness of EIA in Malaysia in generating greater public participation in decision-making in important development projects. Three methods were used to obtain data in this study: structured and semi-structured interviews, questionnaires and content analysis. The method of collecting data through interviewing respondents is to obtain information on the issues of interest. Both structured and unstructured interviews were conducted face to face. The questionnaires presented a pre-formulated written set of questions to which respondents recorded their answer. In this study the questionnaires were administered personally to the respondents i.e. public at selected affected areas; whereas questionnaires to NGOs were sent through email i.e. mail questionnaire¹. Quantitative research methodology was used in analyzing statistical data from the questionnaires while qualitative research methodology was used in analyzing views of interviewees from interviews; and content analysis was used to analyse legal and policy guidance. Various types of sample selection were used and these are discussed below.

¹ Uma Sekaran *Research Methods for Business: A Skill-Building Approach*, 4th ed, (New York: John Wiley, 2003).

3.2.1 Method 1: Interviews

There are two main samples for interviews. Interviews were conducted with four officers from the planning departments of local authorities in Malaysia (local planning authorities) and one with officer from the Malaysian Department of Town and Country Planning (state planning authorities). In the second sample, interviews were held with five officers from the Malaysian Department of the Environment (DoE) including an officer from DoE headquarters. These two samples are of decision-makers² in EIA related development projects in Malaysia. In selecting the decision-makers for interview, stratified random sampling was used. A stratified random sample is one in which the population is divided into subgroups or ‘strata’ and a random sample is then selected from each group³.

(a) First sample: Planning departments of local authorities and state planning authorities (Planning authorities)

In Malaysia, planning authorities are divided into two levels. Local planning authorities are part of their respective local authorities or local government bodies, whereas the state planning authorities (Department of Town and Country Planning, known as the JPBD) are part of the respective states government. However, both Local Government Department and the Department of Town and Country Planning come under the Ministry of Housing and Local Government⁴. Under the Malaysia Federal Constitution, both federal and state governments share jurisdiction over the subject matter of the planning services⁵. The JPBD headquarters is located in Kuala Lumpur and there are eleven offices in peninsular Malaysia, one each in every state.

² Planning authorities is the approving authority in respect to planning approval within their respective area; see section 1.6.1(f) of the EIA Guidelines. DOE is the approving authority in respect to EIA report; see section 34A (6) of the EQA.

³ Uma Sekaran. See n.1

⁴ Local authorities or Local Government department and Town and Country Planning department are the departments under the Ministry of Housing and Local Government. See the Ministry’s chart at <http://www.kpkt.gov.my/carta/chart.html#>

⁵ See the Concurrent List in The Malaysia Federal Constitution.

For the purpose of this study, interviews were conducted with staff from four local planning authorities and one state planning authority. The sampling was based on region; that is the North, Central, South and East regions. The North region consists of the states of Kedah, Perlis and Pulau Pinang; the Central region consists of Selangor and Perak; the South region consists of Melaka, Negeri Sembilan and Johor; and the East region consists of Terengganu, Pahang and Kelantan. One interviewee was chosen from each region; namely the local planning authorities from Kota Setar City Council (MBKS) representing the North region, the local planning authorities from Kajang Municipal Council (MPKj) representing the Central region, the local planning authorities from Melaka Historical City Council (MBMB) representing the South region, the local planning authorities from Terengganu Municipal Council (MPKT) representing the East region, and the JPBD Kuala Terengganu representing the state planning authorities (see Table 2).

(b) Second sample: Department of the Environment (DoE)

Environmental management in Malaysia became more focused with the gazette of the Environmental Quality Act (EQA) on 14 March 1974. An enforcement agency named Environment Division (which became known as Department of the Environment (DoE) in 1983) was institutionalized in 1975. Presently, DoE is under the Ministry of Natural Resources and Environment, extending its operation through fifteen states offices⁶. The DoE's main role is to prevent, control and abate pollution through the enforcement of the EQA and its thirty-four items of subsidiary legislation⁷. For the purpose of this study, the sampling was divided into the four regions of the North, Central, South and East (see Table 2), and the state offices interviewed were from the DoE Kedah (North region), DoE Selangor (Central region), DoE Melaka (South region), DoE Terengganu (East region) and DoE headquarters at Putrajaya.

⁶ 11 states in Peninsular Malaysia, i.e. Perlis, Kedah, Pulau Pinang, Perak, Selangor, Melaka, Negeri Sembilan, Johor, Pahang, Terengganu and Kelantan; 2 states in East Malaysia, i.e. Sabah and Sarawak; and 2 Federal Territories, i.e. Federal Territory of Kuala Lumpur and Federal Territory of Labuan.

⁷ Retrieved from <http://www.doe.gov.my>

Table 2: Population and samples of decision-makers

No	Decision-makers			
	Local and State Planning authorities (Planning authorities)		Department of Environment (DoE)	
	Population	Sample	Population	Sample
1	JPBD (State planning authorities)	JPBD Kuala Terengganu	Headquarters (Putrajaya)	Putrajaya
2	North (Kedah, Perlis, Pulau Pinang)	MBKS	North (Kedah, Perlis, Pulau Pinang)	Kedah
3	Central (Selangor, Perak)	MPKj	Central (Selangor, Perak)	Selangor
4	South (Melaka, Negeri Sembilan, Johor)	MBMB	South (Melaka, Negeri Sembilan, Johor)	Melaka
5	East (Terengganu, Pahang, Kelantan)	MPKT	East (Terengganu, Pahang, Kelantan)	Terengganu

Source: http://www.epbt.gov.my/html/epbt_online_eng.asp & <http://www.doe.gov.my>

3.2.2 Method 2: Questionnaires

Questionnaires were distributed to two main samples. The first sample included members of the Malaysian public at selected affected areas; and the second sample was the Malaysian Environmental Non-governmental organisations (MENGOs). These samples represent the public in this study.

(a) First sample: Public at selected affected areas

As shown in Table 5, four DEIA reports were approved by DoE in year 2006 (three in Selangor and one in Kuala Lumpur). From these four approved DEIA, two were chosen to represent an urban and a rural area respectively (see Table 3). The approved DEIA reports did provide the number of population living within 5km radius of the proposed development projects. Based on the data provided, the sample selection for this study was based on that number of population. Simple random sampling was used in selecting a sample of the public. For the purpose of distributing the questionnaires, a face to face survey was undertaken in each case. The approved DEIA reports also provided a list of residential areas within that 5km radius of the proposed

development projects. Based on that information, the questionnaires were handed to the respondents at their houses.

Area 1: Semenyih, Selangor (Rural area)

A population of 4175 people live within 5km radius of the proposed development project (refer to Table 3). However, in this study only 201 respondents responded to the questionnaires. Lack of response was mainly due to the scattered houses within that area, unwillingness of the people to respond to the question because of language barrier (the survey was conducted in Malay or English, some old Chinese and Indian people refused to be interviewed by the researcher) and nobody at home during that time (working hours). Besides handing the questionnaires from house to house, the questionnaires were also distributed at school, market, shops, clinic, police station and people in the street; and the interview was done immediately after the questionnaires had been given to the respondents.

Area 2: Kuala Lumpur (Urban area)

The population residing within 5km radius of the proposed development project (refer to Table 3) is estimated to be approximately 262,820. In this study, only 300 respondents responded to the questionnaires. Lack of response was mainly because nobody at home during that time (working hours). To obtain more response, the questionnaires were also distributed at a market, shop and to people in the street; and the interview was carried out immediately after the questionnaires had been given to the respondents.

Table 3: Selected projects, population and sample for public questionnaires

	State	Project	Project proponent	EIA consultant
1	Selangor (rural area)	Thermal Treatment Plant for Solid Wastes, Beroga, Semenyih, Hulu Langat, Selangor – Addendum report for relocation of site ⁸	Department of Local Government, Ministry of Housing and Local Government	Perunding Utama Sdn Bhd

⁸ The first DEIA report on the proposed development project was submitted to the DoE in August 2003 and was approved by the DoE on May 2004. However, during the detailed design stage, a change in plant footprint was

2	Federal Territory of Kuala Lumpur (urban area)	Proposed Development of Solid Wastes Transfer Station at Kg. Bohol, Federal Territory of Kuala Lumpur	CyWaste Sdn Bhd	Perdana Environmental Technology & Services Sdn Bhd
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(b) Second sample: Malaysian Environmental Non-governmental organisations (MENGOs)

There are twenty-two Malaysian Environmental NGOs (MENGO)⁹. Using the purposive or judgmental sampling¹⁰, only eight out of the twenty-two MENGOs were selected as sample based on the nature of their activities that relatively connected with environment, development and consumerism. The eight MENGOs are listed in Table 4 below. The questionnaires were sent by email, and from there, five MENGO responded.

Table 4: Samples of MENGOs related to EIA

No	Malaysian Environmental NGO (MENGOs)
1	Centre for Environment, Technology & Development, Malaysia (CETDEM) 17 Jln SS2/53, 47300 Petaling Jaya Selangor Tel: 603-78757767 Email: cetdem@po.jaring.my Web: http://www.cetdem.org.my
2	Global Environment Centre (GEC) 2 nd Floor, Wisma Hing, No. 76, Jln SS2/72 47300 Petaling Jaya, Selangor Tel: 03-79572007 Email: outreach@gec.org.my Web: www.gec.org.my
3	Consumers' Association of Penang (CAP) 10 Jalan Masjid Negeri, 11600 Penang, Malaysia.

discovered and this addendum to DEIA report was submitted by the project proponent in March 2005 to seek the approval of the DoE for the change in plant footprint.

⁹ Retrieved from <http://www.mengo.org>

¹⁰ Purposive or judgmental sampling was used based on the researcher own knowledge of the population, its elements, and the nature of the research aims, see Babbie E, *The practice of social research*, (8th ed.) (London: International Thomson Publishing Company, 1998).

	<p>Tel: 604 - 829 9511 Fax: 604 - 829 8109 Email: idrismd@tm.net.my, meenaco@pd.jaring.my Web: http://www.cap.org.my</p>
4	<p>Malaysian Nature Society (MNS) JKR 641, Jln Kelantan, Bukit Persekutuan, 50480 Kuala Lumpur Tel: 603-22879422 Email: mns@mns.org.my Web: www.mns.org.my</p>
5	<p>World Wide Fund for Nature (WWF) Malaysia 49, Jln SS23/15 Taman SEA 47400 Petaling Jaya, Selangor Tel: 603-78033772 Email: contactus@wwf.org.my Web: www.wwf.org.my</p>
6	<p>Environmental Management and Research Association of Malaysia (ENSEARCH) 30, Jalan PJU 5/16, Dataran Sunway, Kota Damansara, 47810 Petaling Jaya, Selangor. Tel: 603 - 6156 9807, 6156 9808 Fax: 603 - 6156 9803 Email: ensearch@tm.net.my Web: www.ensearch.org</p>
7	<p>Socio-Economic & Environmental Research Institute (SERI) 10, Brown Road, 10350 Penang Tel: 604 - 228 3306 Fax: 604 - 226 7042 Email: seripg@tm.net.my Web: www.seri.com.my</p>
8	<p>Sahabat Alam Malaysia (SAM) (Friends of the Earth, Malaysia) 9 Solok Emas, 11600 Penang, Malaysia Tel: 604 - 659 6930 Fax: 604 - 659 6931 Email: meenaco@pd.jaring.my, zamashari@yahoo.com Web: www.foe-malaysia.org.my</p>

Source: <http://www.mengo.org>

3.2.3 Method 3: Content analysis

Three types of documents were examined in this study; namely, EIA reports submitted by the project proponents during the EIA process in the years 2005 and 2006, case reports relating to EIA issues, and statutes which include the EQA and EIA guidelines and the Federal Constitution. However, based on the nature of the documents, only EIA reports were sampled for content analysis.

For the statutes, all provisions related to the EIA process and public participation were examined; and for the case reports, all cases related to EIA process and public participation came under the study.

(a) First category of documents: EIA reports submitted by the project proponents

According to Table 5, in 2005 one hundred and eighteen PEIA reports¹¹ were approved as compared with only twenty-four reports in 2006 (as at 14/12/2006). From the one hundred and eighteen PEIA reports in 2005, twenty-one were from the North region, twenty-one from the Central region, forty-one from the South region and twenty-two from the East region of Peninsular Malaysia. The total number of PEIA reports in 2005 from Peninsular Malaysia was one hundred and five, with thirteen from East Malaysia and the Federal Territories. Using simple random sampling, 30% of the PEIA reports from each region were examined; six each from the North, East and Central regions, and twelve from the South region.

In 2006, there were a total of twenty-four approved PEIA reports of which twenty were from peninsular Malaysia. As shown in Table 5, six reports from the North region, three from the Central region, nine from the South region and two from the East region. Applying the same method of sample selection, one report was examined from each of the North, Central and East regions and two from the South region.

There were four approved DEIA reports¹² in 2005 including one from Sabah; and in 2006, there were also four approved DEIA reports including one from

¹¹ PEIA report is the results of preliminary assessment which is reported formally for examination and approval by DoE. See section 1.5.3 of the EIA Guidelines. In practice, all preliminary assessment process is administered at DoE state level, see <http://www.doe.gov.my/en/content/environmental-impact-assessment-eia> (last visit on 13 February 2009).

¹² DEIA report is the result of Detailed Assessment which is reported formally for review and approval by the DoE headquarter; see <http://www.doe.gov.my/en/content/environmental-impact-assessment-eia> (last visit on 13 February 2009).

the Federal Territory of Kuala Lumpur. Seven DEIA reports were examined, excluding the report from Sabah.

Findings from the examination of the EIA reports gave information on the practice on the part of project proponents in handling the EIA process, particularly in terms of public participation. The purpose of examining approved EIA reports was to yield the practice of project proponents in handling the EIA process, particularly public participation process. The examination of approved EIA reports is to answer research question 2, that is, what are the existing limitations to public participation in decision-making process under EIA in Malaysia. In that case, there is no need to refer to the not approved EIA reports.

Table 5: Statistics of approved PEIA and DEIA reports for year 2005 and 2006

States	PEIA report approved 2005	PEIA report approved 2006	DEIA report approved 2005	DEIA report approved 2006
North				
Kedah	10	3		
Pulau Pinang	11	2		
Perlis	0	1		
Central				
Perak	5	2		
Selangor	16	1	1	3
South				
Melaka	5	0		
Negeri Sembilan	5	2	1	
Johor	31	7		
East				
Terengganu	4	1		
Kelantan	6	1		
Pahang	12	0	1	
East Malaysia				
Sabah	1	0	1	
Sarawak	4	3		
Federal Territory				
Kuala Lumpur	0	0		1

Labuan	8	1		
TOTAL	118	24	4	4

Source: <http://www.doe.gov.my> (as at 14/12/2006)

(b) Second category of documents: Statutes (EQA, EIA Guidelines & Federal Constitution)

Based on the nature of the documents, all provisions related to the EIA process and public participation were examined.

(c) Third category of documents: Case reports

There are only two reported cases relating to EIA and public participation in Malaysia, namely, *Kajing Tubek & Ors v Ekran Bhd. & Ors*¹³; and *Abdul Razak Ahmad v Ketua Pengarah Kementerian Sains, Teknologi & Alam Sekitar*¹⁴. Both cases were examined in this study.

3.3 Formulation of Questions and Themes

This section discusses the formulation of questions used in the interviewing and questionnaires and the development of themes for the interview, questionnaire and content analysis. For the purpose of this study, the questions were grouped under several themes based on which detailed questions were asked to generate relevant data. The following section describes the design of the question and themes of the analysis.

3.3.1 Formulation of question for interviews for DoE and Planning authorities

There were two sets of interview question; one for the planning authorities and another for the DoE. The questions were designed to yield both qualitative and quantitative data. As qualitative interviewing design is flexible, iterative and

¹³ *Kajing Tubek & Ors v Ekran Bhd. & Ors* [1996] 3 *Current Law Journal* 96; and the appeal case *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors & Other Appeals* [1997] 4 *Current Law Journal* 253

¹⁴ *Abdul Razak Ahmad v Ketua Pengarah Kementerian Sains, Teknologi & Alam Sekitar* [1994] 2 *Current Law Journal* 363

continuous¹⁵, a semi-structured form of interviewing was used with the decision-makers. The questions asked are set out in Appendix 1.

(a) Questions for planning authorities

There were sixteen questions altogether in these interviews. The questions were divided into several themes (Table 6). The following are the arrangement of the questions based on the themes:

(1) Theme 1: Handling the EIA and public participation processes

Questions 1 to 3 were the general questions on how the planning authorities handled the EIA process. Questions 4 to 5 were about the right to information, which included how information was kept and its accessibility and dissemination. Questions 6 to 8 were designed in order to elicit information from the planning authorities on how they conducted public participation at the planning level and in particular the participation of neighbouring landowners. Question 10 was about access to justice, particularly in appeal cases filed by aggrieved persons and the owners of neighbouring land.

(2) Theme 2: Limitation

Questions 9 and 11 were about the limitations which might be faced by the planning authorities in handling the EIA process.

(3) Theme 3: Views on public awareness

Questions 12 to 14 were about the planning authorities's views on public awareness of the EIA process and any recommendation which they might have.

(4) Theme 4: Views on environmental rights and existing EIA law.

Questions 15 to 16 were designed to elicit views from the planning authorities about their understanding of environmental rights and the sufficiency of the existing EIA law.

¹⁵ Rubin H.J & Rubin I. S, *Qualitative interviewing: The art of hearing data*, (London: Sage Publication, 1995).

(b) Questions for DoE

The set of questions used in interviewing DoE consisted of twenty-three questions. Based on the themes shown in Table 6, the questions were designed as follows:

(1) Theme 1: Handling the EIA and public participation processes

Questions 1 to 2 were designed to get information on how the DoE handled the EIA process, both at the Preliminary assessment and Detailed assessment stages. Questions 3 to 4 were about the right to information, and particularly on how information related to EIA was maintained, and its accessibility and dissemination. Questions 5 to 8 concerned the public participation process which includes the process of calling for public reviews or comments and the form of the EIA report. Questions 16 to 18 were about access to justice, and particularly appeals to the Appeal Board.

(2) Theme 2: Limitation

Questions 9 to 15 were designed in such a way as to investigate whether or not any limitation occurs during the public participation process.

(3) Theme 3: Views on public awareness

Questions 19 to 21 were constructed to elicit the DoE's views on public awareness of the EIA process in general.

(4) Theme 4: Views on environmental rights

Questions 22 to 23 were designed to elicit views from the DoE about their understanding of environmental rights and the sufficiency of the existing EIA law.

3.3.2 Formulation of questions for interviews for public and MINGOs

A single questionnaire was designed for the public and MINGOs. Due to the larger sample of members of the public, structured interviewing was used while conducting the questionnaire with the public instead of unstructured or semi-structured interviewing. The questionnaire is set out in Appendix 1.

There were eighteen questions in the questionnaire. Based on the themes as showed in Table 6, the arrangement of questions was as followed:

(1) Theme 1: Views on the EIA process

Questions 1 and 2 were about the respondent's awareness of the existence of EIA and their understanding of the EIA process. Questions 3 to 5 were about the right to information, and particularly on how the respondents got information on EIA and what their response to the information involved. Questions 6 to 12 were about the public participation process and questions 13 to 14 concerned the public's access to justice.

(2) Theme 2: Limitations to public participation in the EIA process

Questions 7 to 12 were designed to elicit information on whether or not there were public constraints during the public participation process, particularly concerning the accessibility of the location where the EIA report was displayed, the cost of the EIA reports, the sufficiency of notice calling for reviews or comments, and the content of EIA reports.

(3) Theme 3: Public awareness

Question 15 was designed to elicit information on the respondent's awareness of the EIA process.

(4) Theme 4: Public views on the importance of public participation and environmental rights.

Questions 16 to 18 were constructed to elicit the respondent's understanding of and views about the importance of public participation in environmental issues, environmental rights and the sufficiency of the existing EIA laws.

3.3.3 Formulation of themes for interviews and questionnaires

Table 6 shows the themes for interviews and questionnaires which were subject to change and elaboration during the course of interviewing.

Table 6: Themes for interviewing and questionnaires

Sample	Theme
DoE & planning authorities	<ol style="list-style-type: none"> 1. Handling EIA and public participation processes 2. Limitations of the EIA process 3. Views on public awareness 4. Views on environmental rights and existing EIA laws
Public & MINGOs	<ol style="list-style-type: none"> 1. Views on the EIA process 2. Limitations to public in the EIA process 3. Public awareness 4. Public views on the importance of public participation and environmental rights

3.3.4 Themes for content analysis

According to Crano & Brewer¹⁶, it is difficult to define content analysis in a way that would satisfy all social scientists. However, Berelson¹⁷ limits content analysis to manifest content; and Krippendorff¹⁸ defined content analysis as making replicable and valid inferences from the data. Basically, the general processes of content analysis are used to identify a body of text that will provide the data necessary to answer the research questions, then to develop a sampling scheme and decide on a coding system. *‘In content analysis, unit issues of a similar type exist. Usually, however, a distinction is made between the specific unit to be classified (the coding unit) and the context within which its meaning is to be inferred (the context unit). Coding units most commonly employed are the word, the theme or assertion, usually a simple sentence derived from a more complex context’*¹⁹. In this study, themes²⁰ were used to generate findings from the data in order to answer the research questions.

¹⁶ Crano W.D. & Brewer M.B, *Principles and methods of social research*. 2nd ed, (New Jersey: Lawrence Erlbaum Associates, 2002).

¹⁷ Berelson said, *“Content analysis is a research technique for the objective, systematic, and quantitative description of the manifest content of communication”*. See Berelson B, *Content analysis in communication research*, (Glencoe, IL: Free Press, 1952) at 18.

¹⁸ Krippendorff said, *“Content analysis is a research technique for making replicable and valid inferences from data to their context”*. See Krippendorff K, *Content analysis: An introduction to its methodology*, (Beverly Hills, CA: Sage, 1980) at 21.

¹⁹ For further discussion, see Crano & Brewer n.23.

²⁰ According to Berelson theme is, *‘a simple sentence, an assertion about subject matter’*. See Berelson n.24.

Table 7 shows the types of documents to be examined and the themes used for each document.

Table 7: Themes for content analysis

Document	Theme
EIA reports	<ol style="list-style-type: none"> 1. Method used to obtain public participation in the EIA process 2. The existence of public participation in EIA process 3. Public awareness and participation on the proposed EIA development projects based on survey done by the project proponent
EQA & EIA Guidelines	<ol style="list-style-type: none"> 1. Provision concerning public participation 2. Limitations stated under the provision
Case report	<ol style="list-style-type: none"> 1. Provision concerning the EIA process, particularly on public participation 2. Limitations to public participation 3. The status of environmental rights under the Federal Constitution 4. The importance of environmental rights
Federal Constitution	<ol style="list-style-type: none"> 1. The status of environmental rights under the Federal Constitution

3.4 Data Analysis

Data obtained in this study was analysed in three ways. Firstly, data from interviews with Planning authorities, the DoE and NGOs, and the texts of EIA reports were analysed critically and descriptively by way of content analysis based on the themes given in Table 6 and Table 7. Secondly, due to the large samples, the information from the public questionnaire was analysed using the SPSS software package, and then the data was critically and descriptively analysed. Thirdly, all legal documents from the Federal Constitution, EQA, EIA Guidelines and case reports were examined and analysed by way of content analysis as applied in doctrinal legal research. The following are some of the techniques for examining and interpreting legal documents which were used in this study.

3.4.1 Examination and analysis of statutes (Federal Constitution, EQA and EIA Guidelines)

There is no exclusive formula for how to interpret a statute. It should be examined in accordance with the objectives of the research. However,

Chatterjee has identified the following as general guidelines for how to examine and interpret statutes:

1. *“The reason for enacting that legislation;*
2. *Whether the statute was preceded by a Green Paper or a White Paper;*
3. *The proposals and amendments made at various stages of a Bill;*
4. *The differences between the Bill-version and the final version of the statute, and the reasons therefore;*
5. *Distinction, if any, between the statute under examination and former statute on the same or similar subject matter, and a critical analysis of the distinctions;*
6. *The preamble to the statute – it often summarise the purposes of an Act clearly;*
7. *The main headings and sub-headings;*
8. *Ambiguities and weakness in the statute, and how they might defeat the purpose of the statute. Often judicial interpretations of certain words or phrases in a statute may be found in decided cases;*
9. *Whether the statutory provisions are too harsh or unfair or too remote from the socio-economic realities;*
10. *Whether any statutory instrument related to the statute has been published, and whether it deserves any comment;*
11. *The initial interpretation of a statute and whether any comment on that interpretation may be necessary;*
12. *Where a research is meant to be carried out on a comparative basis, then, the legislative and judicial practice should be compared with the corresponding practices in the chosen jurisdiction”²¹.*

3.4.2 Examination and analysis of case reports

Again, there is no definitive technique for analysing the decision of a court. However, it should be mainly in accordance with the purposes of the research. According to Chatterjee, the following are guidelines for how decisions of courts may be analysed and interpreted:

1. *“After identification of the precise legal issues(s), the researcher should endeavour to find the cases in which such or similar issues have been discussed by the courts and decisions given on them.*
2. *Where facts are dissimilar but the legal issues are similar, the researcher should point this out, and justify his reasons for relying upon the decisions on those issues in those cases. In every case, the rationale of the decisions should be identified and dealt with. In the case of contradictory decisions on similar issues, the judicial reasoning for departing from the system of precedence should clearly be brought out and examined carefully.*

²¹ Chatterjee C. *Methods of research in law*, 2nd ed, (London: Old Bailey Press, 2000) at 40-41.

3. *In the event of subsequent legislation requiring a court to depart from the system of precedence, the relevance of discussing the previous case should be justified*
4. *The social and economic factors, if any, which may have prompted a court to depart from a decision should be clearly identified.*
5. *The key words in the substantive part(s) of a decision should be interpreted and their implications explained.*
6. *The dissenting and individual or separate opinions of judges are worth referring to with a view to establishing how the same legal issues in a case could have been alternatively decided. In analysing a decision, it may be revealed that a court felt there were inadequacies or gaps in legislation currently in force. Such revelations give a researcher an added ground or support for criticising a particular legislation, if necessary.*
7. *The pleading of counsel which often appear in the law reports in summary form, may also provide a researcher with new ideas for his research*
8. *Decisions of courts often offer interpretations of statutory provisions*
9. *It may be possible for a researcher to obtain the transcript of an unpublished judgment from the court concerned or from approved transcript providers. With appropriate acknowledgement of the source of information, an analysis of such decisions may be found useful”²².*

3.4.3 Examination and analysis of data on a comparative basis

For the comparative study between Malaysia and UK legislations, this research discusses the views of the Malaysian legislative bodies in enacting the legislation along with the judicial decisions, and compares these with the UK legislation and judicial interpretations of statutes²³.

3.5 Conclusion

This chapter has identified the three methods used in this study of interviews, questionnaires and content analysis. Seven data sources were identified, which comprise the planning authorities, DoE, the public at selected affected areas, environmental NGOs, EIA reports, statutes and case reports. The methods used were; interviewed the staff from the planning authorities and DoE; questionnaires distributed to MINGOs and member of the public; and EIA

²² See Chatterjee, n.28 at 58-62. See also Stott D, *Legal Research* (2nd edn), (London: Cavendish Publishing, 1999)

²³ See Chatterjee, n.28 at 64. See also Zimmermann R and Reimann (eds), *The Oxford Handbook of Comparative Law*, (Oxford: Oxford University Press, 2006).

reports, statutes and case reports examined in accordance with the principles of content analysis. For interviewing planning authorities and DoE staff, the respondents were selected from four regions in peninsular Malaysia representing the North, East, Central and South regions together with the Department's headquarters. MNGOs closely concerned with environment and development issues were also selected. Public questionnaires were carried out at two areas which were affected by EIA developments; one urban and one rural area. All data obtained from interviews and questionnaires was analysed critically and descriptively. To analyse the legal documents from statutes and case reports, a doctrinal legal method of examination and analysis was used.

Chapter 4: Stakeholders' Perspectives on the Importance of 'Environmental Rights' and Public Participation in Environmental Decision-Making

4.1 Introduction

To yield information on the importance attached to 'environmental rights' and public participation in environmental decision-making by members of public bodies, and by the public in areas affected by major infrastructure projects, interviews using semi-structured questionnaires were conducted with the relevant several research samples¹. This chapter presents the findings from the qualitative and quantitative data generated by interviews. The findings will be used to illustrate how new constitutional rights to public participation in environmental decision-making may be viewed by stakeholders.

4.2 An overview of the importance of 'environmental rights' and public participation in environmental decision-making

Discussion on the importance of 'environmental rights' and public participation in environmental decision-making raises a series of debates about whether there is a need to establish new constitutional 'environmental rights' or if they can be derived from existing human rights; and also whether or not existing procedural rights provide an effective platform for public participation in environmental decision-making.

As stated in the preamble to the Aarhus Convention, its signatories have recognised that public participation in environmental decision-making together with access to information will give some benefits to the parties, that is to, *'enhance the quality and implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such*

¹ See chapter 3 for the methodology

*concerns*². The preamble stresses the importance of having an avenue for the public to voice their opinions about environmental issues especially when the issue is closely related to their lives and property.

However, having an avenue for the public to voice their opinions about environmental issues alone is not enough. The right to participate in environmental decision-making process should be optimised to ensure its effectiveness. One of the ways to do this is by allowing, at the earliest opportunity, the public to participate in the decision-making process concerning development proposals. According to Sheate, the provision in the EC Directive on Environmental Assessment (85/337/EEC) about the earliest opportunity for public participation in environmental assessment cannot realistically be achieved without first consulting those who are most likely to be affected by a particular proposal.³ Sheate suggested that one way of encouraging earlier public participation is by improving the environmental impact statement submitted by the developer, so that the information is available to the general public in the most readily accessible form. This suggestion shows not only that public participation is a vital element in EIA procedures; it also stresses the importance earliest opportunity for the public to participate, and early participation requires adequate information from the project proponents and presented in a manner that can be understood by the public. A right to environmental information on the proposed project is important. The recent amendment to 2014 Directive has incorporated this suggestion by providing the public concerned be given early and effective opportunities to participate in the environmental decision-making procedures; and be entitled to express comments and opinions when all options are open to the competent authority before the decision is taken.

Despite the fact that the European Court of Human Rights (ECtHR) has recognised that the protection of the environment is '*an increasingly important*

² Purdue M. 'An overview of the law on public participation in planning law and whether it complies with the Aarhus Convention', (2005) 17(3) *Environmental Law & Management* 107- 114

³ W.R. Sheate, 'Public participation: The key to effective environmental assessment', (1991) 21(1) *Environmental Policy & Law* at 156

*consideration*⁴, a number of cases under the ECtHR provisions show that ‘it is not possible to conclude that any ‘environmental rights’ have been established under the Convention’.⁵ However, Thorton and Tromans’ view is that the protection granted by substantive environmental rights is limited by the wide margin of discretion allowed to states as to how they choose to protect the environment. According to DeMerieux, whether or not ‘environmental rights’ fit into one of the provisions under the ECHR will depend on the initiative of the adjudicating body⁶. DeMerieux’s view is that deriving environmental rights from existing statements of human rights is only ‘a matter of definition, or better, of interpretation of the existing right which the new right is to be established’⁷.

Even with such definitional questions set aside for the moment, according to Anderson⁸, other issues will arise such as, ‘do environmental rights entail a right to the prevention of environmental harm or rather the right to remedy where such harm has already occurred?’. In addition is the question of identifying rights-holders and whether ‘environmental rights’ extend only to individuals or also to groups.

Miller⁹ raised an important issue when he asked, ‘at what point is it meaningful to speak of the existence of an environmental right: when it is first declared by a body like the United Nations; when it is translated into national law; or only when the law has been found to offer an effective remedy after that right has been infringed?’. These are some issues which need to be taken into account when discussing the importance of ‘environmental rights’.

⁴ *Fredin v Sweden* (1990) 13 EHRR 784

⁵ Thorton J and Tromans S, ‘Human rights and environmental wrongs. Incorporating the European Convention Human Rights: Some thoughts on the consequences for UK environmental law’, (1999) 11(1) *JEL* 35 - 57

⁶ DeMerieux M, ‘Deriving environmental rights from the European Convention for the Protection of Human Rights and fundamental freedoms’, (2001) 21(3) *Oxford Journal of Legal Studies* at 521-561

⁷ DeMerieux, see n.6

⁸ Anderson MR, *Human rights approaches to environmental protection: An overview*. In Boyle AE & Anderson MR (eds), *Human rights approaches to environmental protection*, (Oxford: Clarendon, 1996).

⁹ Miller C, *The concept of an ‘environmental right’*. In *Environmental rights: Critical perspectives*, (London: Routledge, 1998).

However, Thorton and Tromans concluded that maybe the procedural rights, such as a right to a tribunal and to access to information, offer a better opportunity for protecting the environment and offer a better route to granting environmental rights to the public. With the view that procedural rights such as right to a tribunal may give more space for the protection of the environment, Lord Justice Carnwath urged judges to play a vital role in the protection of the environment. However, he noted that the cost of court proceedings is a serious obstacle to widening the role of the courts. He suggested that, *'if access to environmental justice is to be widened in a way which benefits the public in general the way ahead is likely to be through building on existing machinery of the local inquiry, and through the development of a new environmental tribunal'*¹⁰.

4.3 Perceptions of the importance of 'environmental rights' and public participation in environmental decision-making

It is commonly agreed that public participation is important, and this includes the elements of procedural environmental rights, that is, the right to information and public participation as well as access to justice. This issue led to research question number four: *"How would a new constitutional right to public participation in environmental decision-making be viewed by stakeholders in Malaysia?"* To draw conclusions the view of (i) Malaysian decision-makers, and (ii) the members of public were sought, and their understanding of 'environmental rights' and the chances of asserting them under the Malaysian Federal Constitution concerned.

4.3.1 The Decision-Makers' Perspectives

Ten decision-makers were interviewed, namely five officers from the Malaysian DoE and five officers from planning authorities (chapter 3 for details of methodology and sampling). The questions asked concerned, first, their understanding of the concept of 'environmental rights'; and second,

¹⁰ Lord Justice Carnwath, *'judicial protection of the environment: At home and abroad'*, (2004) 16(3) *JEL* 315 - 327

whether or not they regarded the law on EIA, and particularly on public participation in environmental decision-making, as fundamental to ‘environmental rights’. The findings from the interviews are as follows.

Table 8: Decision-makers’ understanding of the concept of ‘environmental rights’

Department of Environment	1	The environment is our responsibility. So, it is a shared right.
	2	The department represents the environment and protects it. Individuals have to understand the environment.
	3	Everyone may share and benefit from the environment together.
	4	It is one of the important elements of development planning, from the economic and social perspectives, where the protection of the environment must be sustained and not been violated because of wealth
	5	Under the Aarhus Convention, the elaboration of Principle 10 of the Rio Declaration which stresses the need for the citizen’s participation in environmental issues and for access to information on the environment held by public authorities
Planning Authorities	A	The right to an environment that is not harmful to human health or well being; the right to have the environment protected; the right to equality, and specific measures to overcome unfair discrimination and disadvantage
	B	Do not understand the concept of ‘environmental rights’
	C	Comprises all aspects. Of planning, it involves an ideal development planning.
	D	Environmental protection is our responsibility, not only of the government. If we consider the principles in the Earth Summit, there are three components involved: the public, government and private sectors. Implementation of a local agenda is one of this Local Authority’s aims.
	E	The environment is our responsibility, so the right belongs to us. People cannot do as they like because it will affect others. If there is pollution, not only a person will be affected. So he has to be considerate. There must be a rule. Islam also mentions the relationship between humans and environment, the relationships among human, and the relationship between human and God.

It is interesting to note that from Table 8, out of five interviews with DoE; only one respondent equaled his understanding of the concept of

‘environmental rights’ with procedural environmental right (see respondent no 5). Respondent no 4 referred to the concept of ‘environmental rights’ in terms of development planning, and the other three respondents seemed to relate the concept to a shared responsibility between the department and the public, as well as among the public themselves.

Moreover, the majority of the planning authorities (Table 8) seemed to have a similar understanding of the concept of ‘environmental rights’. Giving general answers, they equaled ‘environmental rights’ to shared responsibility for sustainability without touching upon procedural environmental rights at all. However, one respondent from the planning authorities (respondent A) tried to link ‘environmental rights’ with substantive rights, that is, ‘*The right to an environment that is not harmful to human health and wellbeing; the right to have the environment protected; the right to equality and specific measures to overcome unfair discrimination and disadvantage*’ (see respondent A).

Table 9: Decision-makers’ opinion about law on EIA, particularly on public participation as a fundamental part of ‘environmental rights’

Department of Environment	1	Yes, it is a fundamental law, to protect everybody.
	2	The law on EIA is not enough to consider public participation as a fundamental part of ‘environmental rights’
	3	The law is enough as fundamental law in environmental issues.
	4	Present law on EIA has to be improved because there are a few weaknesses, for instance; <ul style="list-style-type: none"> a. legal action has to be strengthened to the consultant if they gave theory or mitigation action which is not suitable b. Public participation in Preliminary EIA. This is to convinced the public in that area to accept the proposed project c. Give notice to the public about the project which been process by Department
	5	The existing law is enough to consider public participation as fundamental part of ‘environmental rights’
Planning	A	Choose not to answer the question
	B	I think the public are not aware of it. This means it is not enough. Even we did not really know about the EIA procedures. We just see the report during the meeting. There must be a way to make the public aware.
	C	The existing law is enough. The only things which

Authorities		lacks is enforcement and public awareness.
	D	There are too many laws at present. The problem is with the control system, for example in enforcement.
	E	Do not really understand EIA, but I think it is enough because the function of the Department of the Environment is to protect the environment. It is not that the law is not enough; it is just about awareness and enforcement. If we keep drafting laws but the public are not aware, there is no point doing so. The most important thing is enforcement and verdicts.

Table 9 shows that three out of five respondents from the DoE viewed the law on EIA as not enough, particularly on public participation, to be considered as a fundamental part of ‘environmental rights’ (respondent no 2). Another respondent gave a few examples of what should be done to improve the present EIA law (see respondent no 4).

Compared with those from the planning authorities, the majority of the DoE respondents (respondents B, C and E) viewed the present EIA law as sufficient to be considered as a fundamental part of environmental rights. Three of them (respondents C, D and E) pointed out that the problem of enforcement was one of the weaknesses in implementing the existing EIA law.

It is important to note that two of the respondents from the planning authorities confessed that they did not really understand EIA (see respondents B and E).

Discussion

Table 8 shows that the majority of the respondents from the DoE and planning authorities had a general understanding of ‘environment rights’, particularly when they referred to the environmental rights as a responsibility shared among human beings to protect the environment. Only one of the respondents related ‘environmental rights’ to substantive law and another respondent related it to procedural law. Surprisingly, being the relevant authorities for administering EIA processes in development control decisions, both DoE and Planning authorities should have a good knowledge on the concept of environmental rights.

The majority of the respondents (seven out of ten respondents) from the decision-makers viewed the existing law on EIA as sufficient (see Table 9), with the proviso that its enforcement needed to be improved. Given that the planning authority is the approving authority for EIA in development projects, the findings surprisingly showed that two of the respondent from the planning authorities admitted that they did not really understand the EIA procedures. This also shows that some officers from planning authorities have a limited knowledge of EIA procedures.

Comparing Table 8 and 9, the majority of the responses from both groups of decision-makers seem to agree that protecting the environment is a shared responsibility. However, as shown in Table 9, the majority of the respondents from the planning authorities place the responsibility for protecting the environment, and particularly enforcement, more with the DoE. This shows uncertainty as to the focus of EIA measures in terms of which governmental bodies have responsibility. This also indicates a problem in governmental structure dividing jurisdiction in dealing with environmental issues.

4.3.2 The Public's Perspectives

Semi-structured interviews using questionnaires were undertaken in two case study areas, comprising a rural and an urban area in each case (see chapter 3 for details of methodology and sampling). These questionnaires were delivered to 501 respondents; 201 respondents from the rural area and 300 respondents from the urban area. Three questions were asked; first, whether the respondents thought public participation in environmental issues was important; second, what was their understanding about 'environmental rights'; and third, what would be their opinion if there was a proposal to include 'environmental rights' as one of the fundamental rights under the Federal Constitution. The findings are summarised below.

Figure 1: Public views on the importance of public participation in environmental issues

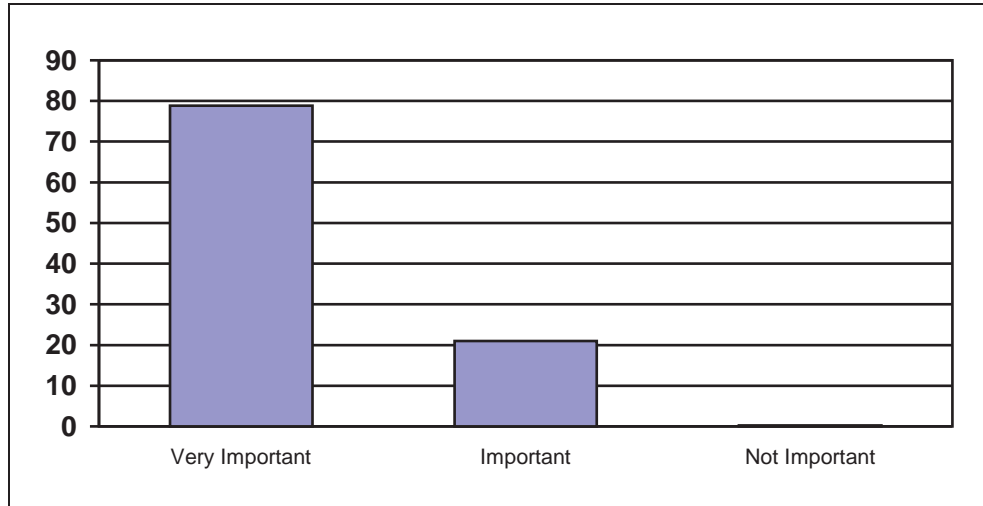
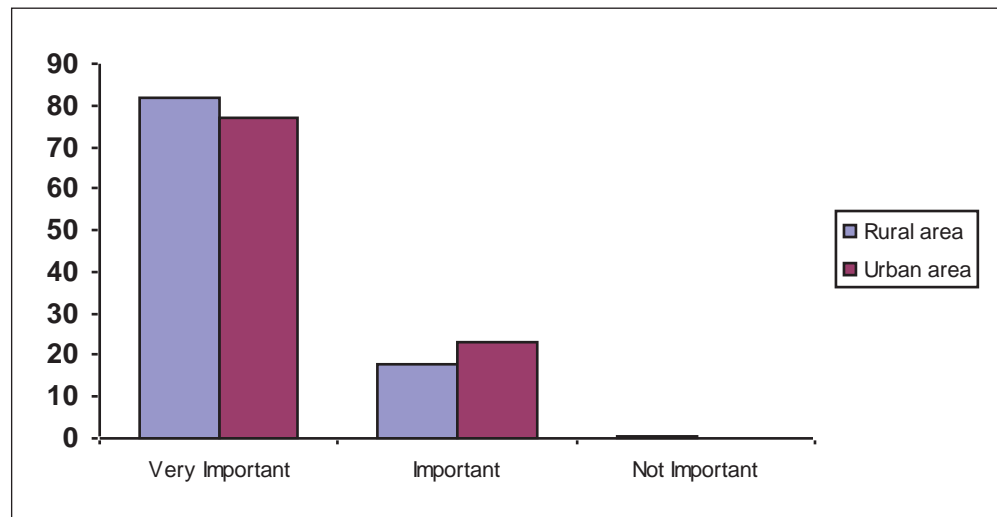


Figure 1 show that 78.8% of the respondents thought that it is important to have public participation in environmental issues. Only 0.2% of the respondents viewed public participation as not important.

Figure 1.1: Public views on the importance of public participation in environmental issues – based on area



Based on area (see Figure 1.1), 81.6% of respondents from the rural area said that it is important to have public participation in environmental issues, as compared to 77% of respondents from the urban area. 23% of the urban respondents as compared to 17.9% of rural respondents were of the view that public participation in environmental issues is important. 0.5% of the

respondents from the rural area thought were that it is not important to have public participation in environmental issues.

Figure 2: Public understanding about ‘environmental rights’

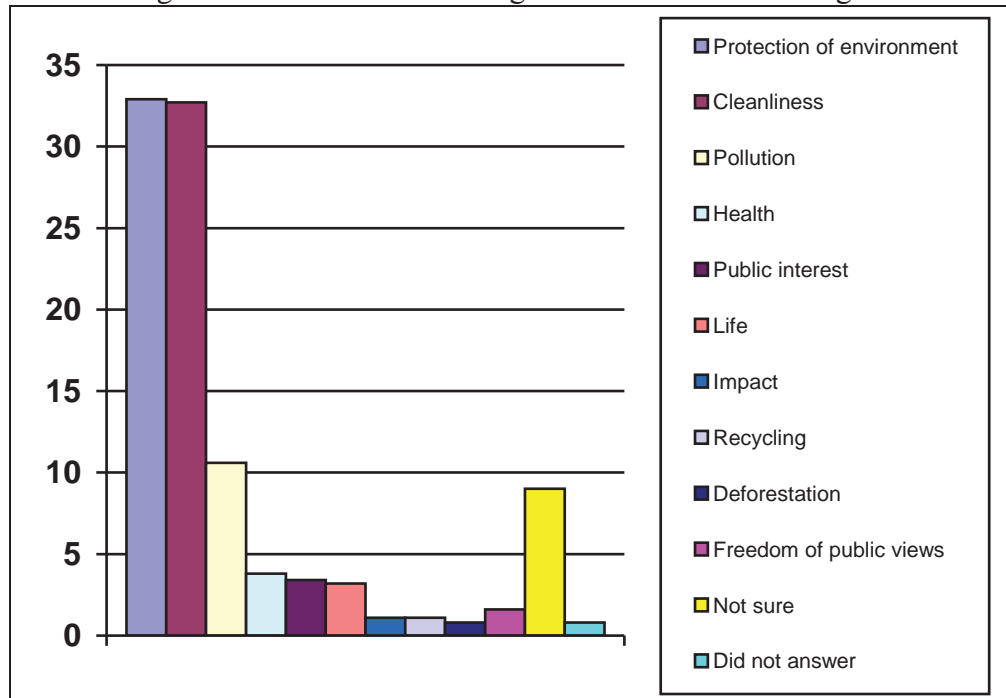


Figure 2 shows the respondents understanding of ‘environmental rights’. 32.9% related ‘environmental rights’ to the protection of the environment, 32.7% related it to cleanliness and 10.6% related it to pollution. Other categories attracted less than 10% agreement, namely: health (3.8%), public interest (3.4%), life (3.2%), impact (1.1%), recycling (1.1%), deforestation (0.8), and freedom of public views (1.6%). 9% of the respondents were either not sure or did not understand or know about ‘environmental rights’. 0.8% of the respondents did not answer the question.

Figure 2.1: Public understanding about ‘environmental rights’ – based on area

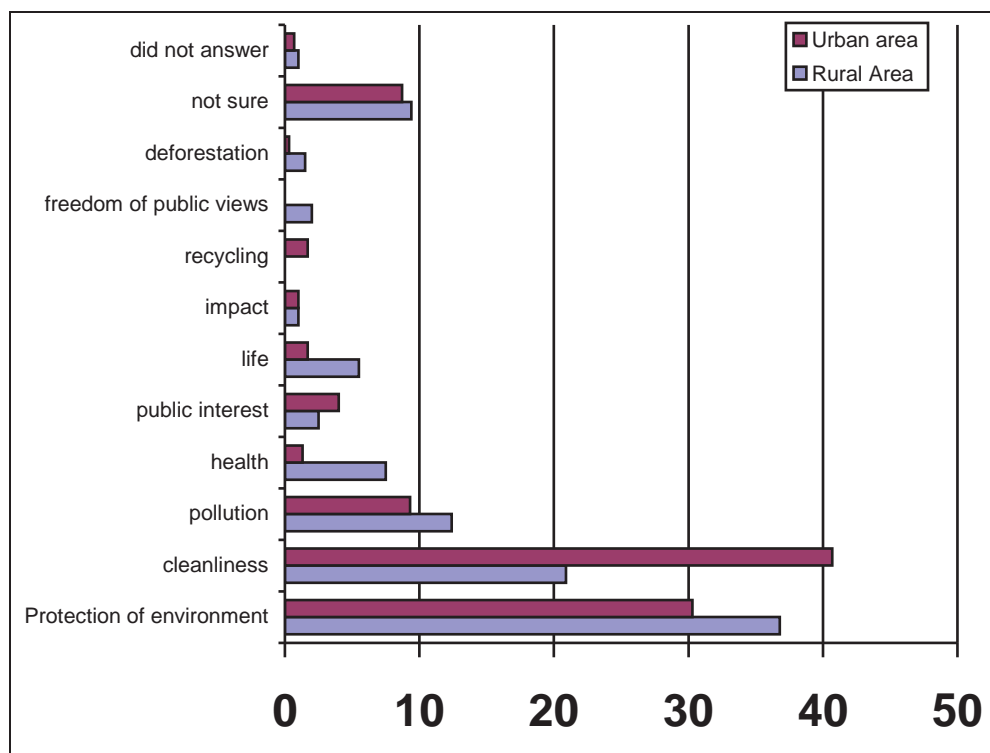


Figure 2.1 shows the understanding of the respondents concerning ‘environmental rights’ based on area. 36.8% of the respondents from the rural area related ‘environmental rights’ to the protection of the environment as compared to 30.3% of the respondents from the urban area, 40.6% urban respondents related it with cleanliness as compared to only 20.9% of the rural respondents, and 12.4% of the latter related ‘environmental rights’ to pollution as compared to 9.3% of urban respondents. 9.5% of the respondents from the rural area were either not sure or did not understand or know about environmental rights as compared to 8.7% of the urban respondents.

Discussion

Figures 1 and 1.1 indicate that a high percentage of the respondents were of the view that public participation is very important in environmental issues regardless of whether they came from urban or rural area. This shows the respondents interest in getting involved in environmental issues. Figures 2 and 2.1 show that the respondents have a general understanding on ‘environmental rights’ as a majority of them equaled ‘environmental rights’ to the protection of the environment, cleanliness and pollution. The respondent’s lack of knowledge of their participatory rights shows that the DoE need to create more awareness and educate the public on their rights to information, participate in

decision-making process and access to justice. As the respondents' view on the importance of public participation is very high, it's easier to convince them to participate in environmental decision-making process.

4.3.3 Malaysian Environmental Non-governmental Organisation (MENGO) Perspectives

The same questions as given to the public were asked of members of the MENGOs. Five MENGOs responded to the questionnaire (see Chapter 3 for details of methodology). On the question of whether or not public participation in environmental issues is important, all the MENGOs answered it as “*very important*”.

Table 10: MENGO's understanding of 'environmental rights'

MENGOs	Response
1	It is the rights that people from all walks of life should enjoy and benefit from 'environmental rights'. Benefit will be in terms of unspoiled environment and natural resources and supported by sustainable development in the sense that the development goes along with the environment and does not compromise economic growth.
2	The right to have access to basic natural resources (like land, water, food, air) which are clean (not polluted)
3	The right to clean air and water. The right to a sustainably managed natural resources base.
4	Right to have a healthy and safe environment
5	Rights of a citizen to a secure, healthy and ecologically sound environment. Thus, advocating public participation in environmental decision-making and access to information and justice in environmental matters.

Table 11: MENGO's view of a proposal to include 'environmental rights' as one of the fundamental rights protected by the Federal Constitution

MENGOs	Response
1	In my opinion, it will be a good idea.
2	I support such a move. Environmental rights are equally as important as basic human rights
3	I would support it.
4	It should if the Constitution have not mentioned about it.
5	Support it and advocate to ensure it is upheld.

Discussion

The respondents from the MENGOs seem to relate environmental rights with human rights and the concept of sustainability. This explanation is in line with

the supports given for the public participation in environmental issues, which were deemed as ‘very important’. They neither categorized the environmental rights as substantive nor procedural rights, except respondent no 5 who indirectly refers to procedural rights. However, responses in Table 11 show that the MINGOs are aware of the lack of substantive environmental rights in the Federal Constitution. Being a civil society which have interest in environmental issues, the MINGOs should adequately be aware and educated on the concept of environmental rights, both substantive and procedural rights.

4.4 Public Views on the Proposal for a New Constitutional Environmental Right in the Federal Constitution

Figure 3: Public view on the proposal to include ‘environmental rights’ in the Federal Constitution

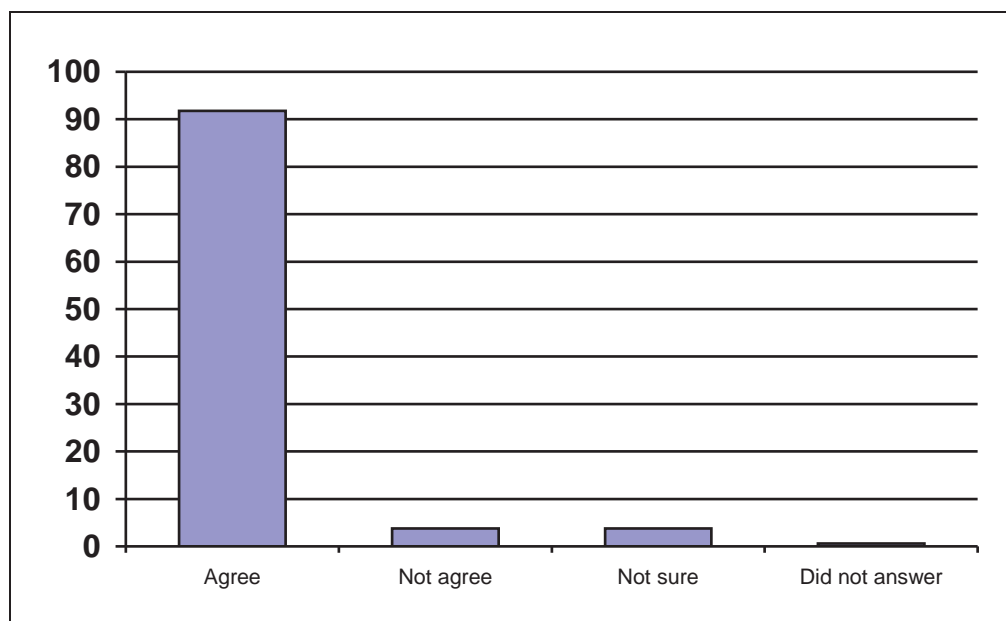


Figure 3 shows that majority of the respondents (91.8%) agreed to the proposal to include ‘environmental rights’ in the Federal Constitution. When asked to elaborate, various answers were given; that is, 82.8% of the respondents gave a general answer as ‘agree’, 0.2% blamed it on the DoE because they did not react properly, 0.2% said they needed a right to speak, 0.2% said that this is to protect the public and increase freedom and 0.2% said that is very good and would give a chance for them to voice their views. Only 3.8% did not agree with the proposal to include ‘environmental rights’ in the Federal Constitution, and they generally focused on the weaknesses of

enforcement, the implementation of the law, the fact that the authority were not serious about environmental issues, while some assert that ‘environmental rights’ would not have any effect and that it’s too late. Another 3.8% of respondents were either not sure or did not understand or know about the proposal.

Figure 3.1: Public view on the proposal to include ‘environmental rights’ in the Federal Constitution – based on area

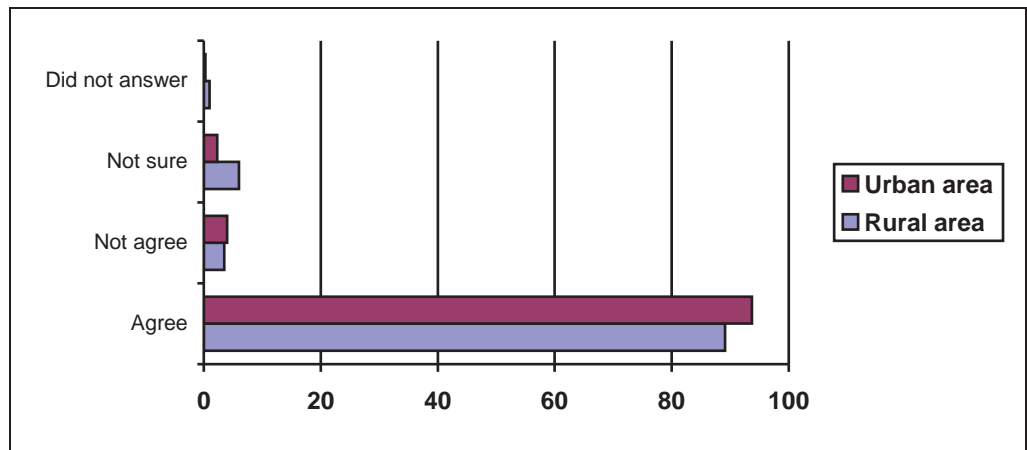


Figure 3.1 shows the public views on the proposal to include ‘environmental rights’ in the Federal Constitution based on area. The percentages of respondents from both areas who agreed with the proposal are slightly different, (93.7% urban and 89% rural). Similarly, 4% of the respondents from the urban area and 3.5% from the rural area did not agree with the proposal. However, more respondents from the rural area (6%) were either not sure or did not understand or know about the proposal as compared to 2.3% of the respondents from the urban area.

Discussion

Surprisingly, even though the respondents hardly understand the concept of procedural and substantive environmental rights, they agree that a provision on ‘environmental rights’ should be inserted in the Federal Constitution. To link it with their earlier responses by associating the ‘environmental rights’ with protection of environment, cleanliness and pollution, indicates they agree to have such provision clearly provided in the Federal Constitution to ensure that their right to clean and healthy environment is substantively secured.

4.5 Conclusion

It is important to note that findings from the interviews with decision-makers show that they had only a limited knowledge of ‘environmental rights’; and especially their procedural relevance and the intended role and function of the EIA as a key tool of participatory decision-making. As the approving authorities for both EIA reports (the DoE) and EIA development projects (Planning authorities), they should, however, have clear knowledge, particularly on the procedural environmental rights which directly concern them. Confusion in their understanding of the concept of ‘environmental rights’ and their support for the argument that the law is sufficient can be seen in the majority of the respondents from the Planning authorities placing responsibility for protecting the environment mainly on the DoE, although earlier they had agreed that there should be a shared responsibility to protect the environment among themselves as well as the public. The lack of understanding on the concept of ‘procedural environmental rights’ as well as on the whole process of EIA by the relevant authorities will affect the effectiveness of decision-making process. A main defect was found when most of the respondents from planning departments confessed that they did not really know about the EIA procedures. This also indicates weaknesses in governmental structure in dealing with environmental issues.

The DoE, being the governing authority for EIA report and process, should play important roles in increasing the level of awareness among the public on EIA process. Information on environmental procedural rights, that is, right to environmental information, public participation in decision-making process and access to justice should be widely disseminated, so that the public will be more aware and educated. Once the public become educated on the EIA process, they will participate more efficiently in the decision-making process relating to the environment.

MENGOs, however, have very good knowledge about the concept of ‘environmental rights’ compared with those in the other two groups of respondents. Being a Non-governmental Organisation which have special

interest in the environmental issue, their good level of awareness and knowledge on the subject matter is not a surprise.

Chapter 5. Environmental Impact Assessment In Malaysia

5.1 Introduction

This chapter aims to answer the first research question, which is, ‘*What rights to public participation in decision-making are given by EQA and EIA Guidelines?*’ The findings were obtained from responses to questionnaires distributed to the Malaysian public and Malaysia Environmental Non-governmental Organisations (MENGOs), and interviews with staff from the Malaysian DoE and planning authorities, and the examination of EIA reports which were approved in the years 2005 and 2006. Two main issues were covered in the questionnaires and interviews: firstly, the respondents’ views on EIA in general; and secondly, their involvement in and views on the three elements in EIA procedures, namely the right to information, public participation in environmental decision-making and access to justice in environmental matters. The findings are presented below in the form of Figures and tables.

5.2 Public and decision-makers’ view on EIA in general

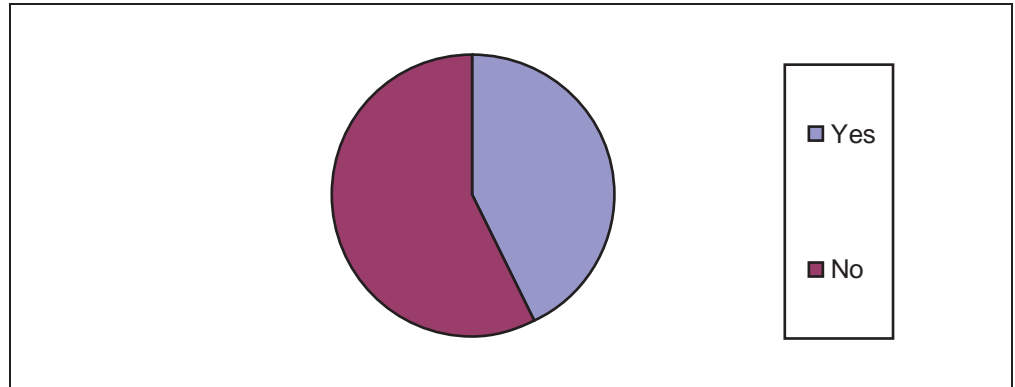
5.2.1 Public and MENGO

Two main questions were asked of the public and MENGO on EIA in general. The first question was whether or not they were aware of the existence of EIA, and the second concerned whether they were aware of the EIA procedure. The findings are presented below.

Q1: Are you aware of the existence of EIA?

Sample 1: Public

Figure 4: Public Awareness on EIA



The respondents were asked to answer 'yes' or 'no' to this question, and only 30.1% were aware of the existence of EIA as compared to 69.9% who were not aware of it.

Sample 2: MNGOs

Table 12: MNGOs awareness on EIA

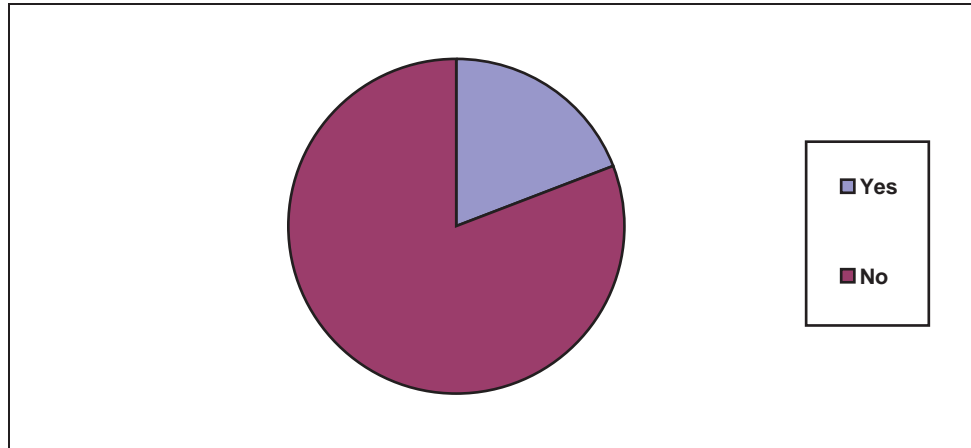
MNGOs	Response
1	Yes
2	Yes
3	Yes
4	Yes
5	Yes

All MNGOs are aware of the existence of EIA.

Q 2: Are you aware of the EIA procedure?

Sample 1: Public

Figure 5: Public Awareness of EIA procedure



The respondents were asked to answer ‘yes’ or ‘no’ to this question. 80.9% of the respondents were not aware of the EIA procedures whereas only 19.1% were aware of them.

Sample 2: MENGO

Table 13: MENGO awareness on EIA procedures

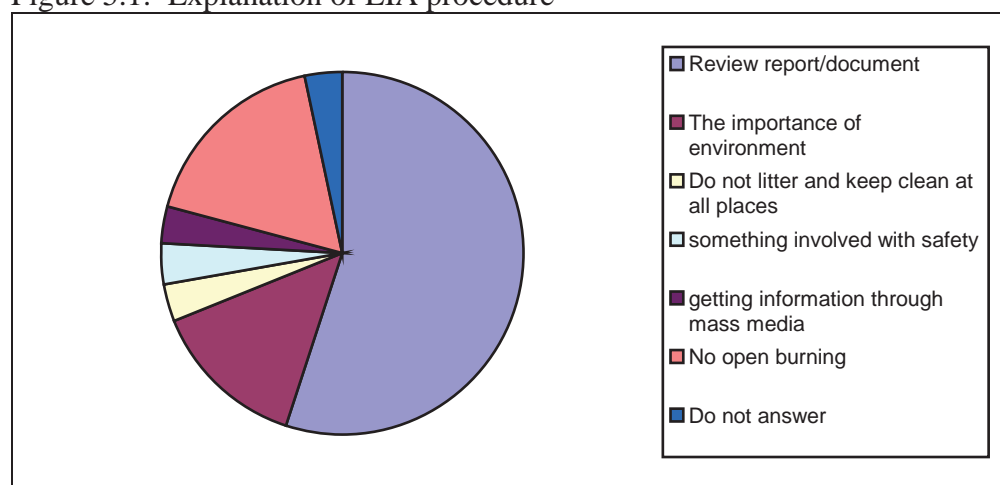
MENGOs	Response
1	Yes
2	Yes
3	Yes
4	Yes
5	Yes

All MENGOs are aware of the EIA procedures.

Q 2.1: If yes, explain briefly

Sample 1: Public

Figure 5.1: Explanation of EIA procedure



This was an open-ended question. The respondents who answered “yes” to Q2 gave various answers when they were asked to explain the EIA procedures. Their answers were categorised into six categories; 57.1% respondents who were aware of the EIA procedures related them with reviewing a report or document, 17.9% thought they concerned ‘no open burning’, 14.3% related the procedures to the importance of the environment, 3.6% related the EIA procedures to ‘do not litter and keep all places clean’, 3.6% thought the procedures were ‘something involved with safety’, 3.6% related the procedures to ‘getting information through mass media’, and 3.6% of the respondents did not answer the question.

Sample 2: MINGOs

Table 14: MINGO explanation on EIA procedures

MINGOs	Response
1	The EIA will involve many steps such as project screening, preparation of scoping note, preparation of Term of Reference (TOR), submission of EIA and finally preparation of agreement of environmental condition (AEC). Approval of each and every stage will be required prior to proceed to the next stage. Once the AEC is signed by the project proponent, then the latter can commence their work.
2	Step 1 – preliminary assessment. Step 2 – detailed assessment. Step 3 – review
3	Project proponent hires accredited consultant to undertake study, later submitted to DOE for approval. Full EIA has public comment period.

4	<p>Before a prescribed project commenced, an EIA must be conducted, commented (by public if it is a detailed or DEIA), and approved by the Dept of Environment. It begins with a TOR of the EIA study. A committee with independent parties and DOE personnel will comment on the TOR. After the revision (s), and approval by DOE, then an EIA will be conducted. The committee will be called to comment on the EIA or even visit the area. If the EIA predicted impacts does not fulfill the criteria, either, further studied or placement of mitigation measures or stringent management systems in place (further study is necessary) until it satisfies the criteria, before the project not be approved or under review or approved. The project cannot be implemented if the EIA is under review. If a DEIA is required, then the public will be briefed and a time period for public comments will be published in the media.</p>
5	<p>A project proponent would have to examine whether the proposed project requires an EIA to be conducted based on the prescribed activities as stipulated in the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987. If it is categorised as a prescribed activity, then an EIA study needs to be conducted and submitted to the Department of Environment for approval. There are two types of EIA reports, i.e. preliminary and detailed. If an EIA is a Preliminary EIA, only the DoE would review and approve it. If the DOE is of the view that a proposed project would cause significant environmental impacts, then it would instruct the project proponent to prepare a Detailed EIA. Once the Detailed EIA is submitted to the DoE, the department would give public notification for the public to review the DEIA and provide feedback within a stipulated time. An EIA review panel would meet to discuss the EIA taking into consideration public feedback and provide inputs. The DoE then either approves or rejects the EIA based on the review. Some EIAs are given conditional approval</p>

All MENGOs have a good knowledge about EIA procedures.

Discussion

Low percentages as reflected in Figure 4 and 5 show that the public are not familiar with the EIA and its procedures. The lack of knowledge on this subject matter definitely will affect the effectiveness of decision-making process as the public are unable to give their input and comments on environmental issues, particularly participating in EIA process. This finding

supports the earlier findings in Chapter 4 on the public’s lack of understanding of the concept of ‘environmental rights’.

The finding on part of MENGO, again, shows their good level of understanding on EIA and its procedures. The fact that most of the MINGOs can explain the EIA process in detail shows their interest in the subject matter. This finding also supports earlier findings in Chapter 4 on their level of understanding on the concept of ‘procedural environmental rights’.

5.2.2 Decision-makers

Two questions were put to the DoE staff during the interviews. The first question concerned the procedure for preparing and submitting the PEIA, and the second question was on the procedure of preparing and submitting the DEIA. Three questions were asked of the Planning authorities staff. The first question was on which law and section governs the EIA procedure, the second question concerned the procedure of EIA, and the third question was the circumstances in which the EIA is required. The findings are as follows.

Sample 1: DoE

D1. Please describe the procedure for preparing and submitting the preliminary assessment report.

Table D1: procedure of preparing and submitting PEIA

DoE Respondent	Response
1	DoE instructs the developer to prepare the EIA report, not the consultant, before the work been approved by the approval authority. Developer can appoint a consultant whom is registered with the DoE. 15 copies of EIA reports are needed to be distributed among the review panel.
2	For projects under the EIA, normally, we receive requests from the state asked for our comment. Detailed EIA is carried out based on instruction from our office, and not all projects need Detailed EIA. Basically, an approval is depends on comments given by the technical departments. From there, the developer can proceed preparing the report by hiring a consultant. Starting from 1 st June 2007, the consultant must be registered with the DOE. They must be a professional and

	<p>sub-professional consultants in a team. They must prepare the report based on the guidelines, the general and specific guidelines. However, not all projects have a specific guideline. The report must be submitted to us by the consultant, including an undertaking letter from the project proponent. This is a new procedure because under a delivery system, the consultant can directly refer and ask us to which technical departments they need to send out the report. Meaning that, they are the one who approach the technical departments, before we proceed and ask for the department's comments. For a speedy result, we aim 5 weeks for the whole processes. The reports are given to the relevant technical departments for their expert opinions. Then, after we received all the comments from the technical departments, we endorse and send it to the state which will call for a meeting. Now, there are two methods, either the consultant sends out the reports directly to the technical departments or we do it. Then, we give the technical departments two weeks to review the report. We call it One Stop Agency (OSA). During the period, the OSA need to decide whether or not to accept the report, or they will ask for further information. Normally the report was prepared based on the guidelines. If there is typing errors, we ask them to do some correction because we consider it as a legal document. Then, we will issue an approval letter to the report. We are not approving the project, we only approve the EIA report.</p>
3	<p>In preparing the EIA report, the project proponents must refer to the general EIA guidelines as well as other specific guidelines. There are 20 guidelines based on activities. At HQ, they are developing more guidelines. Project proponents need submit the report themselves, not initiated by local authority.</p>
4	<p>The EIA reports must refer to 'A Handbook of Environmental Impact Assessment Guidelines' and books of specific guidelines for relevant project.</p>
5	<p>The EIA reports must be based on the guidelines and checklists which published by the DOE</p>

Most of the respondents from the DoE related the PEIA procedure to the EIA guidelines and two of them (respondents 1 and 2) gave a detailed explanation. It is interesting to note that respondents 1, 2 and 3 stressed that the EIA report must be submitted by the developer or project proponent, and according to respondent 2, the consultant hired by the project proponent must be registered with the DoE. This new policy was introduced on 1st June 2007.¹¹

¹¹ See <http://www.doe.gov.my/en/content/eia-consultants-registration-scheme-individual-registration-0>

D2. Please give the procedure for preparing and submitting the detailed assessment report.

Table D2: procedure of preparing and submitting DEIA

DoE respondent	Response
1	No response given because DEIA procedure is handled at DoE headquarter
2	Detailed EIA has two steps. First, the developer have send a Term of Reference (TOR) ¹² for approval. Once TOR is approved, then the developer can proceed with preparing the EIA report. TOR is review by agencies and panels.
3	No response given because DEIA procedure is handled at DoE headquarter
4	No response given because DEIA procedure is handled at DoE headquarter
5	The EIA report must be prepared based on the guidelines and checklists which published by DOE

A majority of the respondents were reluctant to respond to the question as the DEIA procedures are handled by DoE Headquarter. DoE at state levels only process the PEIA. The fact that the respondents refer the DEIA procedures to the guidelines indicate that all procedures stated in the EIA Guidelines must be followed.

Sample 2: Planning authorities

P1. The Town and Country Planning Act 1976 (Act 172) (TCPA) did not clearly provide a provision on EIA under the planning permission process.

a. Which law and section governs the EIA procedure?

Table P1.a: Law that govern EIA procedure

Planning authorities respondent	Response
A	In development control, the planning authority will take into

¹² TOR will detail the purpose of the assessment, itemise the potential environmental impacts that require further assessment, outline the environmental data collection that are required, determine the assessment procedures to be used and identify the appropriate methodologies for impact prediction and assessment

	account the environmental aspect in the preparing the Local Council Plan, giving conditions in planning permission, and in preparing layout plan.
B	There is no EIA procedures in TCPA, nor there is a guidelines. If there is a project on EIA, the process will involve a guideline on hillside. I cannot remember which one but it was issued by the federal government, and its only a guideline on planning. However, it does not mention about EIA procedures.
C	There is no law governing EIA. The process for approving planning permission is done after it is referred to the DOE.
D	The local authority applies section 19 of the TCPA. Before approving any development, we will identify any planning principles. Section 21 provides the procedures needed in planning permission including EIA monitoring rules, which is gazetted by state, but it depends to on other law.
E	TCPA and development plan are applicable. We also need to refer to the National Physical Plan Council. If there is any development related to environment, area which has sensitive environment, then we need to have EIA. At State “E”, we used planning permission for the application for change of use and separation of lots.

Table P1.a indicates that as TCPA governs the application for planning permission in general, a specific provision on EIA procedures is not provided in the Act. However, majority of the respondents have differing views as to which law governs. It shows the insecure legal basis to EIA procedures under the TCPA.

P2. Please give the procedure of EIA.

Table P2: Procedure of EIA

Planning authorities respondent	Response
A	The state planning authorities is the technical department referred by the DoE to review the EIA report.
B	If there is a big development project, the application will go to the state first. The state will decide which project needs to submit for EIA report. Now, if there is any development at island, all must undergo EIA process. Some will come under state direction, some not, depending on the cases. For example, an application to develop island X, it has to submit EIA report. Then only, they can apply for planning permission together with the EIA report, because during the review we will look into the comment on EIA. Then, we bring the matter to the committee. Some of applications came in directly, then only we give conditions to submit EIA report. If the application comes together with the EIA report,

	it will make the process faster because EIA report takes time to prepare.
C	An application for change of use is referred to the technical departments, that is, the DoE. The DoE will decide whether or not EIA report is needed. Based on that EIA report, then only the planning permission will be granted.
D	The EIA project involves 'sensitive environmental plan'. In pre-valuation project, among other things that need to be done are slope and site analysis. If it's identified as area which had slope, local authority will ask the applicant to submit a separate EIA report. When the report is ready, it will be referred to a committee consists of theDOE, The Public Works Institute of Malaysia (IKRAM), the Works Department & Minerals and Geoscience Department (JMG). The EIA report will be prepared if the DoE asked for it. However, for speedy process, applicant may submit it together with planning permission.
E	A checklist is used when people applied for planning permission. We have rules for this development control plan. When there is an application for planning permission, department will confirm whether or not EIA report is needed (more than 50 hectares). If the development is more than 50 hectares, then only we asked for the EIA report. But for other application which may be related to environment, we referred to DOE, not necessarily EIA. Once we receive the application, we check the comments, list down the EIA requirement and do the zoning. The applicants need to comply with conditions stated by the DOE. We will coordinate all the departments and check who is responsible for the comment.

As planning authorities, the respondents responded to the question according to their job description. They did not lay down the EIA procedures in detail, yet they explained the planning permission process which may require an EIA report. Here, while processing of planning permission which requires EIA report, the respondents recognised the existence of DoE and other related government agencies which govern other laws, and coordinate with them before approving or rejecting such planning permission.

P3. Under what circumstances is the EIA required?

Table P3: Circumstances in which EIA required

Planning Department	A	Proposed development projects as listed in the Environmental Quality Act.
	B	That's the normal circumstances, hillside, island is a must. This is the normal case.
	C	Decided by DOE.
	D	Depends on the report submitted by the applicant
	E	50 hectares and above. The 50 hectares is decided by EIA Guidelines

The findings in Table P3 shows an insecure knowledge base for whether EIA is needed or not.

Discussion

There is a gap on level of awareness and knowledge between public and MENDOs on the existence of EIA and its procedures. This gap supported their earlier responses on understanding the concept of environmental rights. The gap also indicates that the public have a lack of interest in procedural EIA issues, as compared with MENDOs, which led to their lack of awareness and knowledge on the subject matter. This lack will lead to serious impact on the environmental decision-making process as public participation is part of the processes. To minimise this lack, continuous information on the importance of environmental right, the concept of EIA and its procedures should be properly disseminated to the public.

In Malaysia, the EIA process provided in the EQA is governed by the DoE, whereas TCPA is governed by the planning authority. The whole process of planning permission, as indicated by the planning authority, may include EIA process as well. Although EIA is not within their jurisdiction, the planning authority should, being the approving authority to the proposed development, at least have a good knowledge about the EIA procedures. Coordination among the planning authority and DoE, together with other relevant agencies is a good move, yet they should be equipped with some basic knowledge about the subject matter.

5.3 The EIA Procedures

The three aspects of the EIA procedures highlighted by this thesis, namely right to information, public participation and access to justice, involving the public, MENGO, DoE and Planning authorities are discussed below.

5.3.1 Right to information

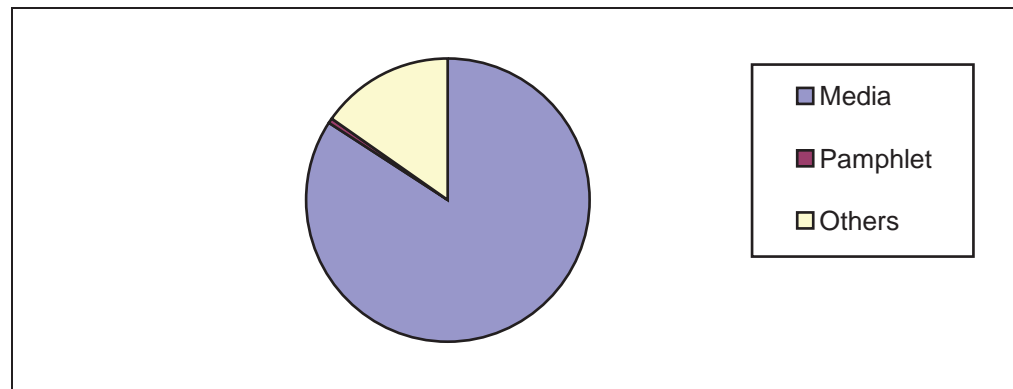
(a) Public and MENGO

Three main questions were asked of the public and MENGO on the right to information. The first question was where they get information from about EIA project proposals, the second question was whether or not they ever searched the DoE's website, and the third question was whether or not they had ever seen a notice calling for public review and comment on an EIA report. The findings from the questionnaires are as follows.

Q 3: Where do you get information about EIA of development proposals?

Sample 1: Public

Figure 6: Getting information about EIA of development proposals



The respondents were given three choices of answer: media¹³, pamphlets¹⁴ or others. 84.1% of the respondents stated that they got information about EIA of

¹³ The Compact Oxford English Dictionary defined media as, 'the means of mass communication, especially television, radio, and newspapers collectively'. See <http://www.askoxford.com/dictionaries/?view=uk>

¹⁴ The Compact Oxford English Dictionary defined pamphlet as, 'a small booklet or leaflet containing information or arguments about a single subject'. See <http://www.askoxford.com/dictionaries/?view=uk>

project proposals from the media, 0.7% from a pamphlet, and 15.2% from other means such as from friends.

Sample 2: MENGO

Table 15: getting information about EIA

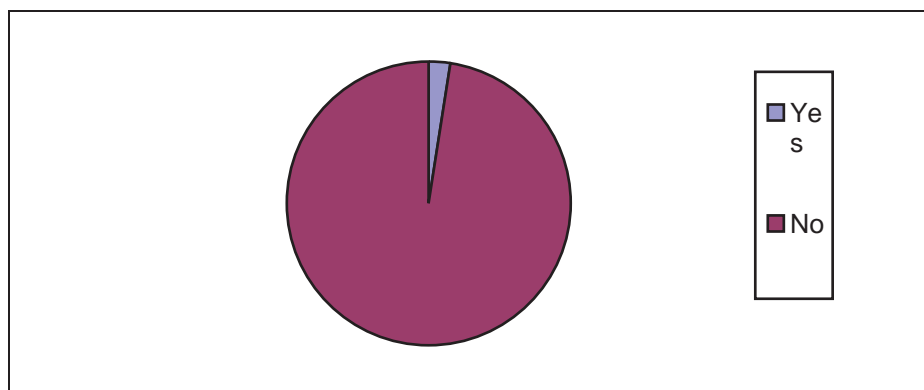
MENGOs	Response
1	Used to work for EIA consultant
2	All (media, pamphlet, internet search)
3	Interaction with DoE/EIA Consultant
4	Media and Committee member
5	Pamphlet

All MENGOs did get the information about EIA of project proposals from reliable sources.

Q 4: Have you ever visited the Department of Environment’s (DoE) website?

Sample 1: Public

Figure 7: Search on the DoE’s website



The respondents were asked to answer ‘yes’ or ‘no’ to this question. Only 2.4% of the respondents had ever visited the DoE’s website as compared with 97.6% who had never done so. Those who answer ‘yes’ gave their reasons below.

Sample 2: MENGO

Table 16: search on DoE’s website

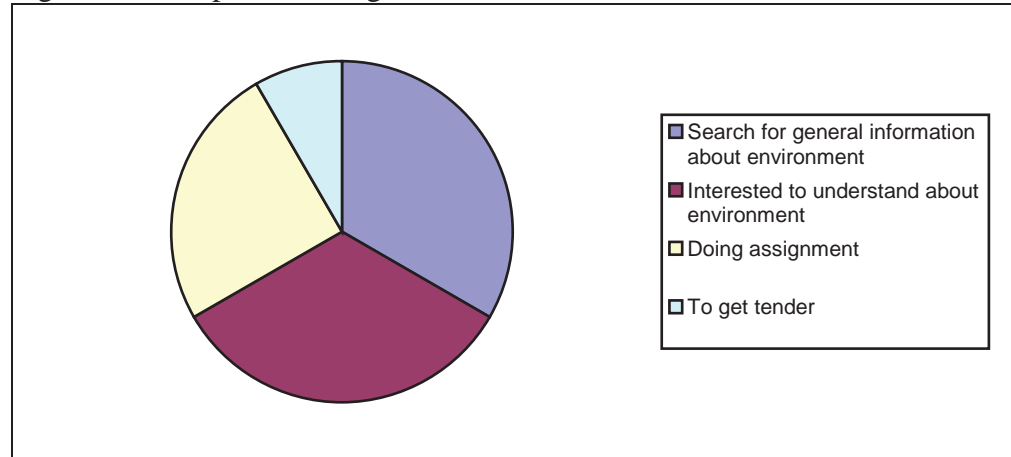
MENGOs	Response
1	Yes
2	Yes
3	Yes
4	Yes
5	Yes

All MENGOs are familiar and use the DoE’s website. Those who answer ‘yes’ gave their answers below.

4.1: For what purpose had you used the DoE’s website?

Sample 1: Public

Figure 7.1: Purpose of using the DoE’s website



This was an open-ended question. Various answers were given by the respondents which were categorised into four categories: searching for general information on the environment, interested in understanding the environment, doing assignments and to get tender. 33.3% of the respondents who had searched the DoE’s website used it to search for general information on the environment, 33.3% because they were interested in understanding the environment, 25% to complete an assignment, and 8.3% to get a contract tender. The finding shows that the public did not search information on EIA. As their level of understanding on EIA is low, this finding is not a surprise.

Sample 2: MENGO

Table 17: purpose of using the DoE’s website

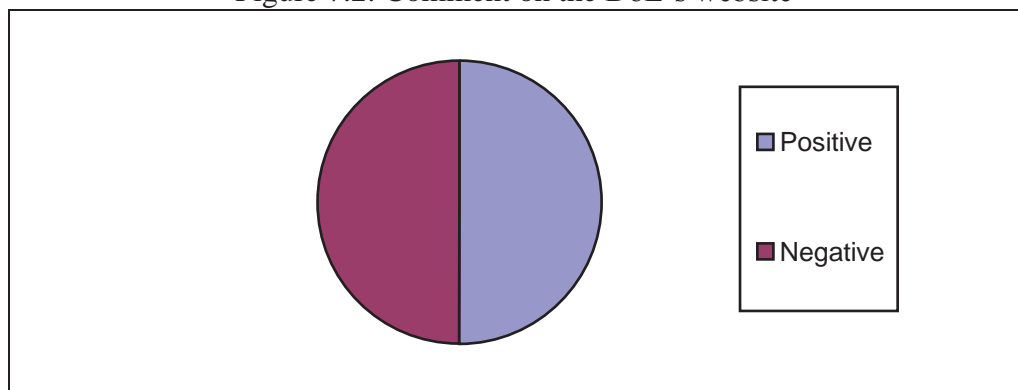
MENGOs	Response
1	To keep watching brief of the EIA submission and the work on the ground. Details about consultant and many more.
2	Information about environment in Malaysia
3	Search for summary EIA, EIA TOR, API, other publication & contact details.
4	Refer to some EIA, look for personnel and new guidelines if any.
5	For information on latest updates, EIAs that have been approved, DEIAs under review, general statistics, laws, addresses etc.

All MENGOs generally did search EIA information in the DoE’s website. This indicates that the MENGOs did acquire information on EIA from reliable sources and proper channel. It also shows that the MENGOs are interested in gaining updated information on the subject matter that interest them.

Q 4.2: What is your comment on the website?

Sample 1: Public

Figure 7.2: Comment on the DoE’s website



This was an open-ended question where the respondents who had searched the DoE’s website were asked to comment on it. Equal numbers of positive and negative comments were given. Those who gave positive comments put either ‘good’ or ‘contained lots of information’ or ‘satisfied’ as their answers. Those who gave negative comments put either ‘not satisfied’ or ‘too general’ as their answers. None of the respondents commented on the information given about the EIA.

Sample 2: MENGO

Table 18: Comment on DoE’s website

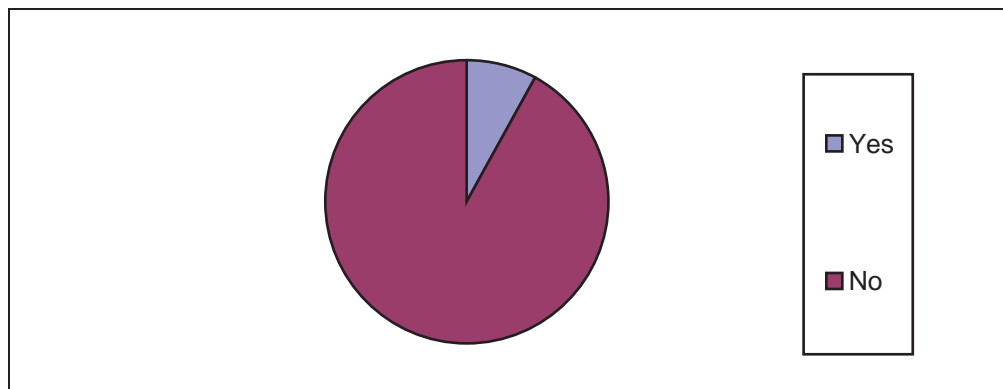
MENGOs	Response
1	No comment. It just need to updated very often.
2	Easy to get information that I need, but speed of access is slow.
3	OK but not so easy to find EIA reports.
4	Much improved now.
5	Better quality now compared to earlier years but still need to be up to date with statistics on essential environmental quality data.

All MENGOs were generally satisfied with information provided in the website. This also indicates that the MENGOs are always look at the website to obtain information on EIA.

Q 5: Have you seen a notice calling for public review and comment on EIA reports?

Sample 1: Public

Figure 8: Seen notice calling for review of EIA report



The respondents were asked to answer ‘yes’ or ‘no’ to this question, and 92.0% of the respondents had never seen a notice calling for public review or comment on EIA report for projects in their area. Only 8.0% of the respondents had seen such a notice; however the notices they had seen were not the actual notices calling for review and comment on EIA reports but rather a notice informing them about a forthcoming project in their area. This indicates that the formal information on EIA project proposals does not reach the public at affected areas, and it also means that they did not actually participate in the process.

Sample 2: MENGO

Table 19: Seen notice calling for review

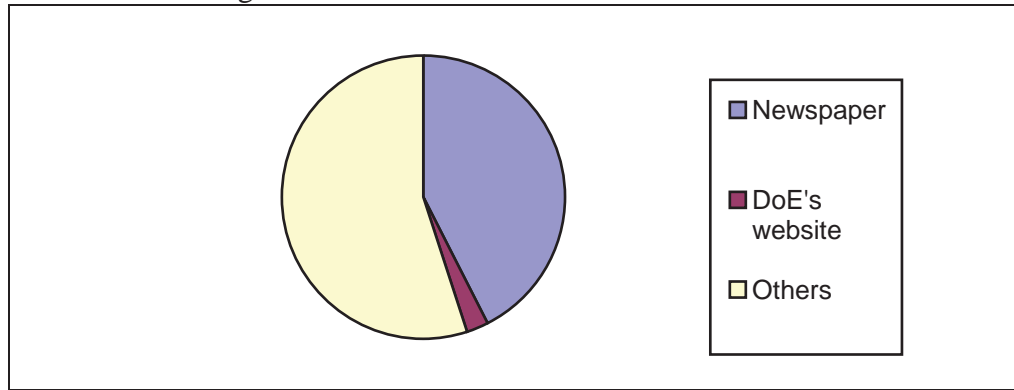
MENGOs	Response
1	Yes
2	Yes
3	Yes
4	Yes
5	Yes

All MENGOs have seen the notice calling for public review and comment on EIA report. The fact that the MENGOs regularly visit the DoE’s website and receive information about EIA project proposals from reliable sources, keep the updated on the incoming projects.

Q 5.1: If yes, where did you see it?

Sample 1: Public

Figure 8.1: Places in which the notice was seen



The respondents who answered ‘yes’ were given three choices of answer to this question: a newspaper, the DoE’s website or others. 42.5% of the respondents who had seen a notice calling for a review of an EIA report saw it in a newspaper, 2.5% had seen it on the DoE’s website, and 55% had seen it in other places such as a cafe, market or shop. As responded earlier, the information obtained by the public is not actually the notice calling for review but rather information or news in the newspaper or website on forthcoming projects in their area.

Sample 2: MENGO

Table 20: Places in which the notice was seen

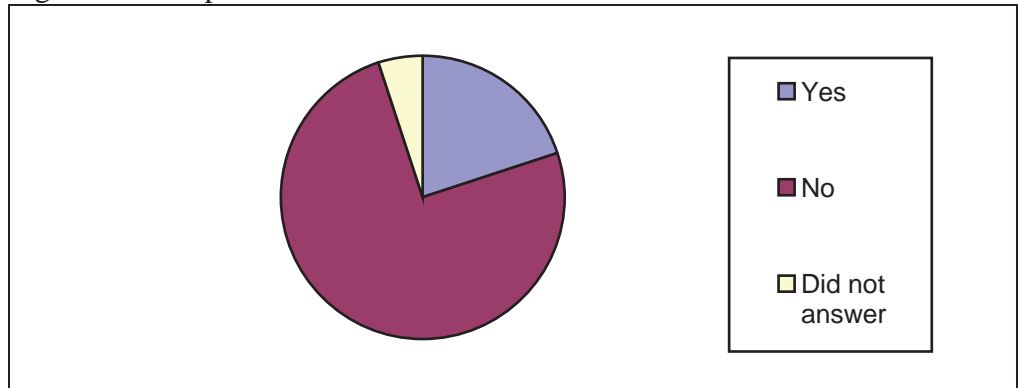
MENGOs	Response
1	Newspaper
2	Newspaper
3	DoE’s website & Email
4	Newspaper
5	Newspaper & DoE’s website

Majority of the MENGOs have seen the notice calling for public review from the newspaper. This finding indicates that newspaper is one of the proper channels to advertise notice calling for review.

Q 5.2: Did you respond to the notice?

Sample 1: Public

Figure 8.2: Responses to the notice



The respondents were asked to answer ‘yes’ or ‘no’ to this question. 20% of the respondents who seen a notice calling for a review of an EIA report responded to it, 75% did not respond to the notice, and 5% did not answer the question. This indicates their low interest in participating in the EIA process.

Sample 2: MENGO

Table 21: response to the notice

MENGOs	Response
1	Yes
2	No
3	Yes
4	Yes
5	Yes

Majority of the MENGOs did respond to the notice calling for public review. This indicates their interest on the subject matter.

(b) Decision-makers

Two main questions were asked of the DoE and Planning authorities staff during the interview. The first question was whether or not they had access to an electronic database of EIA reports, and the second question concerned how they kept information on EIA projects. The findings are shown below.

Sample 1: DoE

D3. Does the department have an electronic database of EIA reports?

Table D3: electronic database of EIA reports

DoE respondent	Response
1	None – only a softcopy submitted by the developer
2	We do have a database. We send out the information about EIA every week to the HQ, EIA is the core business in DoE.
3	Excel database
4	In the form of executive summaries only, not the whole report
5	Yes, the numbers of reports which have been received and which are in process

The finding shows that different officers of the DoE have a variety of mechanisms in keeping the data on EIA reports.

If yes-

- a. What sort of EIA information does the department keep in the electronic database?

Table D3.a: information kept in the database

DoE respondent	Response
1	Report chronology – recorded on computer only
2	Normally we must have the project name, the developer, the consultant, date of receipt, dates of meetings, any additional information because we want to know the latest progress, whether it is finished or not. We do it on a yearly basis. That's why we have an annual report that we can print out. The latest, the HQ is going to publish in the website, summary of the projects. That's why now, if there is a preliminary EIA, at the same time, they have to submit the summary in CD. Executive summary in bilingual, BM and English
3	Based on the 19 categories (no, date of approval, consultant, location, based on which schedule & comment from process officers)
4	Just introduced. Only has executive summary. Introduced by HQ through the website.
5	Yes, numbers of reports which received and in the process

The finding shows that the type of information that has been kept by the DoE offices also varies. It also indicates that only general information on the EIA project proposal is usually kept.

- b. Does the department regularly publish up-to-date information in the database?

Table D3.b: update of information in the database

Department of Environment	1	Yes, it's been updated. Already developed Geographic Information System (GIS)
	2	We have to update because we have to send out to HQ every week
	3	Always update. Instruction from the HQ, we have to submit every week.
	4	Yes, by HQ
	5	Every week in the DoE website

All the respondents said they update the information in the database. This finding shows that the up to date information on EIA project proposals are available on DoE's website. It also indicates that DoE's website is another reliable sources on EIA project proposals.

- c. Is this electronic database accessible to the public?

Table D3.c: accessibility of electronic database

Department of Environment	1	For department use only
	2	We have not received any instruction allowing the public to access. As far as I know, the public can only access the approved project. Based on the website and out annual report. Database cannot be access.
	3	Yes
	4	Yes
	5	Yes

Majority of the respondents agreed that information available on electronic database including DoE's website is available for public access. This indicates that the DoE had provided certain mechanisms to inform the public on the EIA project proposals.

If yes –

- i. Is the information accessible after or before the EIA approval?

Table D3.c.i: when the public can access it

Department of Environment	1	No response because not within their knowledge
	2	No response because not within their knowledge
	3	After the approval
	4	Before, just for public view
	5	Before and after the approval

The finding shows that the time on which the information on EIA project proposal can be accessed varies from one DoE to another. It also indicates that state DoE has discretion whether or not to release the information and makes it available to the public.

- d. Is the existence of the electronic database publicised?

Table D.3.d: publicise the existence of the electronic database

Department of Environment	1	No response because not within their knowledge
	2	No response because not within their knowledge
	3	No
	4	Yes
	5	Before and after the approval

The finding indicates that some of the respondents were not aware whether or not the database is publicised. It also indicates that the state DoE has discretion whether or not to publicise the existence of database.

If yes –

- a. How is it publicised to the public?

Table D3.d.a: method of publicising the electronic database

Department of Environment	1	No response because did not answer 'yes' earlier
	2	No response because did not answer 'yes' earlier
	3	No response because did not answer 'yes' earlier
	4	Website www.doe.gov.my
	5	Website/portal DoE

The respondents who answered 'yes' in the earlier question agreed that the same information on EIA kept in the database is available in the DoE's website.

D4. How does the department keep information on EIA projects?

Table D4: method of keeping the information on EIA project

Department of Environment	1	Based on year, kept in the DoE's library
	2	We have one file for one EIA report, if we have extra, then it will be put in the DoE's library. This is the approved one. The one which yet to be approved, for preliminary, we have not yet receive any instruction for public view.
	3	Filing system & log book
	4	It is a requirement for every project to send out a softcopy. Only the executive summary is accessible to public view
	5	DoE is not an agency which approves the project. Only data on EIA report and post monitoring and when the project begin

The finding shows that the DoE does not have a single system to keep the information on EIA project proposal. Every state DoE has its own way of keeping such information. It supported the earlier finding on variety of database to keep the information on EIA. From observation, most state DoE have a filing system and the approved EIA reports are kept in their library.

a. Is it easily retrieved?

Table D4.a: retrieve the information on EIA project

Department of Environment	1	Yes
	2	Yes
	3	Yes, based on the reference number
	4	Yes
	5	Yes, project proponent will send EMP before the project begin

Regardless of having their own system of filing and keeping the information, all respondents claimed that the information on EIA project is easily retrieved. It indicates that a standard filing system is not an issue as long as the state DoE can update to the headquarter on the EIA project proposals.

b. Is it accessible to the public?

Table D4.b: accessibility of the public to the information on EIA project

Department of Environment	1	Yes in the library
	2	Yes, that one anybody can come
	3	Yes
	4	Yes
	5	Yes

This finding shows that the public is, viewed by the DoE, given a right to access the information on EIA project. Such right is important to the public to understand the whole EIA process.

If yes –

- i. Are the reports accessible after or before EIA approval?

Table D4.b.i: when can the public access the information

Department of Environment	1	After the approval
	2	After the EIA approval
	3	After the approval
	4	Current
	5	Before and after, at the DOE library

Majority of the respondents agreed that the EIA report is only accessible after its approval. It shows that the public can only get the information on EIA reports after the whole process is completed. This practice will undermine the EIA process itself because it restrains the public from getting more information in order for them to participate actively in the decision-making process.

Sample 2: Planning authorities

P4. Does the department have an electronic database on EIA projects?

Table P4: electronic database

Planning authorities	A	Yes, part of the planning control database – review from department on the EIA report
	B	None
	C	No
	D	None. Update in the GIS only
	E	EIA projects and other projects are not separated. We do not have electronic database. We based on layout approval only. We include GIS as well. If we want to trace it we look at the lot no. our information is not update because we lack of equipment, almost none. We do not have suitable software and the expertise. From local authority point, the resource is not there.

As planning authorities, the respondents indicate that they did not have a separate database on EIA projects. All information is kept, mostly, in the Geographic Information System (GIS) which is the database for processing any development project proposals. It finding shows that the detail

information on EIA is only kept by the DoE as the authority who governs the whole EIA process.

If yes –

- a. What sort of EIA information does the department keep in the electronic database?

Table P4.a: type of information kept in the database

Planning authorities	A	List of EIA project – review from technical departments on the EIA report as submitted by DOE
	B	No response
	C	No response
	D	No response
	E	No response

According to respondent A who claimed they have an electronic database, they keep list of EIA project which is reviewed by the technical departments.

- b. Does the department regularly publish up-to-date information in the database?

Table P4.b: update the information in the database

Planning authorities	A	Additional information when there is new application on EIA as submitted by DoE
	B	No response
	C	No response
	D	No response
	E	No response

This finding shows that the respondent is only updating the information given by the DoE.

- c. Is this electronic database accessible to the public?

Table P4.c: accessibility of the public to the electronic database

Planning authorities	A	For applicant only (online) – general review from department on EIA report
	B	No response
	C	No response
	D	No response
	E	No response

This finding indicates that only the applicant to planning permission has permission to access the database, and such access is further restricted to

online general information only. It also indicates that the applicant need to rely on the information provided by the DoE on the status of their application.

If yes –

- i. Is the information accessible before or after the EIA approval?

Table P4.c.i: when it is accessible

Planning authorities	A	Before the EIA approval/ only technical review from the department (online)
	B	No response
	C	No response
	D	No response
	E	No response

This finding indicates a limitation on accessing the information on EIA project proposal through planning authority.

- d. Is existence of the electronic database publicised?

Table P4.d: publicising the existence of the electronic database

Planning authorities	A	Yes and for applicant only
	B	No response
	C	No response
	D	No response
	E	No response

The existence of the electronic database was publicised; however it can only be access by the applicant. This finding supports the earlier finding on its limitation.

If yes –

- i. How is it publicised to the public?

Table P4.d.i: method of publicising the existence of the electronic database

Planning authorities	A	In department website, counter service, enquiry on planning application
	B	No response
	C	No response
	D	No response
	E	No response

According to respondent A, the existence of the electronic database was publicised in the department website, counter service and upon enquiry on planning application.

P5. How does the department keep information on EIA projects?

Table P5: keeping the information on EIA project

Planning authorities	A	Planning control database – only part of information on EIA project – site planning category
	B	We do have some report kept in the files. Filing system only. Some we don't have the report, we just have the comment
	C	Filing system
	D	Filing system. Maybe it is available at state level
	E	We are more on filing system. All are there; if we want to know about EIA then we have to check one by one. It is difficult to know which project related to EIA and which are is not

The finding shows that the planning authority does not has a standard system on keeping the information relating to EIA project proposal. It also indicates that they totally leave the EIA process to the DoE for their consideration.

a. Is it easily retrieved?

Table P5.a: retrieve the information on EIA project

Planning authorities	A	Yes because in form of web base for internal use (detail) and general information (application check) for applicant/ counter enquiry
	B	Easy
	C	Easy because GIS is used
	D	May be retrieved on application only
	E	Quite difficult

Despite not having a standard system to keep the information on EIA, most of the planning authority claimed that such information is easily retrieved. From observation, the information retrieved from the GIS is only a general information on EIA project, not the detail information on EIA procedures.

b. Is it accessible to the public?

Table P5.b: accessibility to the public

Planning authorities	A	Yes
	B	No
	C	No
	D	May check the plan only
	E	No, it is not accessible to public. We allowed relevant people only such as applicant and landlord. If others want to submit an application for neighbouring lot, we only allow them to access our plan, not the EIA.

This finding supports the earlier finding on limitation to access the information on EIA project through planning authority.

If yes –

- i. Is the information accessible before or after the EIA approval?

Table P5.b.i: when is the information accessible?

Planning authorities	A	Only involve department's general technical review that is during the progress of the project
	B	No response
	C	After the approval of planning permission
	D	No response
	E	No response

This finding indicates that the planning authority further restricts the access to information on EIA project.

Discussion

In Malaysia, media particularly television and newspaper plays a vital role in disseminating information on EIA. However this type of media will only be used to inform the public about notice calling for public review on EIA report or reporting news on development progress of an EIA project like the Bakun Dam project. Pamphlet, which is produced by either by DoE or MENGO, is only available at their offices.

This practice does not meet the standard set by the Aarhus Convention. For example Article 4 of the Aarhus Convention provides for passive information which requires public authority to make information available upon request and supply it, subject to exceptions, within set time limits. If the public authority decided not to disclose such information, the refusal shall be made in writing, and stating the reason. Article 5 of the Aarhus Convention then provide a provision on active information where the public authority is requires to collect, possess and disseminate environmental information. These active informations provision include the requirement to up-to-date the information, as well as making it available in electronic database which easily accessible to the public through public telecommunications networks.

As a department which governs EIA procedure, DoE also took the responsibility by providing information on EIA on its website. However, in Malaysia, internet is yet to be considered as another important source of information particularly on EIA. Although the DoE's website do provides a sufficient information on EIA such as the procedures, the Guidelines, list of Detailed EIA reports for public review, list of EIA report under review, list of approved EIA reports and list of not approved EIA report, yet the percentages of respondents who ever searched the website were not encouraging. This shows that both parties, the authority and public, have important roles in disseminating and acquiring the information to ensure the effectiveness of public participation.

Planning authority, on the other part, does not play any role in disseminating information on EIA projects. The lack of transparency in planning departments processes and data is problematic; and it all below the standard set by the Aarhus Convention on right to information.

In summary on the source of information on EIA;

1. Media such as television and newspaper, although commonly viewed or read by the public, does not act as a source of basic information on EIA because it does not disseminate information on EIA procedures, does it provide regular news on EIA development, nor do it in way required by international standards of good practice, for example the Aarhus Convention.
2. Pamphlet, which provides a basic information on EIA, is only available at limited places such as DoE and MENGO offices.
3. DoE's website, which is a very good source of information on EIA, is not commonly used by the public at large. However, planning authority's database do not make information available.

In summary on the right to information provided by the decision-makers;

1. DoE's website provides an updated information on EIA projects.
 2. Planning authorities kept information based on planning application.
- There is no systematic database or filing of information on EIA

Not only a source of information on EIA is important to the right to information, the EIA procedure on notice calling for public review is also an important procedure to the right to information as it does not only invite the public to get some ideas and information about the project, it also opens a venue for the public to participate. Paragraph 1 of Section 4.7 of the EIA Guidelines states that, *'The public is invited to comment on proposed projects which have been subjected to Detailed Assessment, unless it is against the public interest. Public comment must be made in writing and received by the secretariat of the review panel within forty-five (45) days from the first public notification through the advertisement in newspaper'*. The above provision shows that newspaper is the official place of notifying the public about the public review on the EIA report. DoE's website also provides a list of EIA reports for public review. The fact the public's response to the notice calling for review is very low, continuous effort to create awareness and educate the public on the importance of participating are very much needed to ensure the effectiveness of EIA as a tool in development process.

However, the respondent from MNGOs seem to have a very good knowledge and information on EIA. The MNGOs equipped themselves with relevant information on the concept of EIA and its procedures; and rely the information from credible sources. They also participate actively in acquiring information by responding to the notice calling for review. These findings show that MNGO has an interest in protecting the environment particularly participating in EIA procedures.

Here, on the right to information on EIA, two things must be taken into consideration. Firstly, the means of disseminating information on EIA and secondly, the public awareness in obtaining and responding to information on EIA.

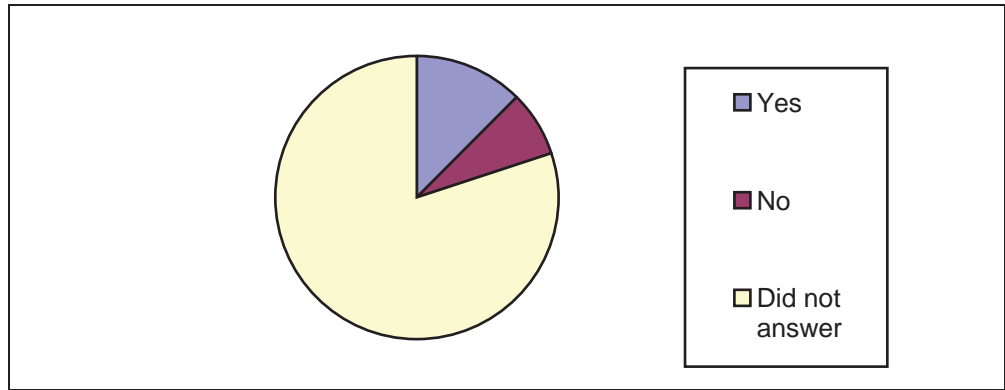
5.3.2 Public participation

(a) Public and MNGO

Q 6: did you go to the location where the EIA report is displayed?

Sample 1: Public

Figure 9: Go to the location where the report is displayed



The respondents were asked to answer ‘yes’ or ‘no’ to this question. 12.5% of the respondents did go to the location where the EIA report was displayed, 7.5% of the respondents did not go the location where the EIA report was displayed, and 80% of the respondents did not answer the question.

Sample 2: MENGO

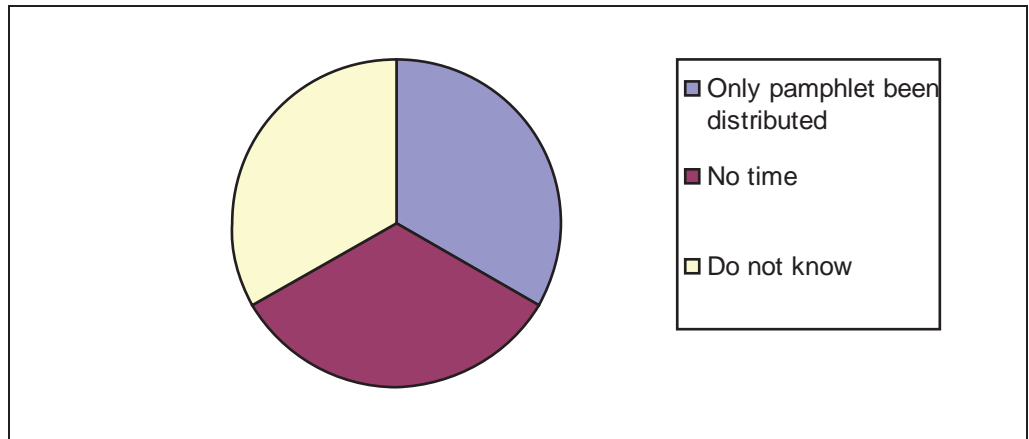
Table 22: go to the location where a report is displayed

MENGOs	Response
1	No
2	No answer
3	No
4	Yes
5	Yes

Q 6.1: if no, why?

Sample 1: Public

Figure 9.1: Explanation why the public did not go to the location



This is an open-ended question. Of those respondents who did not go to the location where the EIA report was displayed, 33.3% of the respondents answered that this was because only pamphlet about the proposed project been distributed to them, not a notice calling for review. 33.3% of the respondents answered they had have no time to go and 33.3% of the respondents answered they did not know that they needed to go to the location where the EIA report was displayed. This finding supported the earlier finding that the respondents had not actually seen the notice calling for review; they just received information on it. This is also the reason why they did not know that they needed to go to the location where the report is displayed.

Sample 2: MENGO - on reason why they did not go to the location where the report is displayed.

MENGO 1: often being called to an EIA meeting

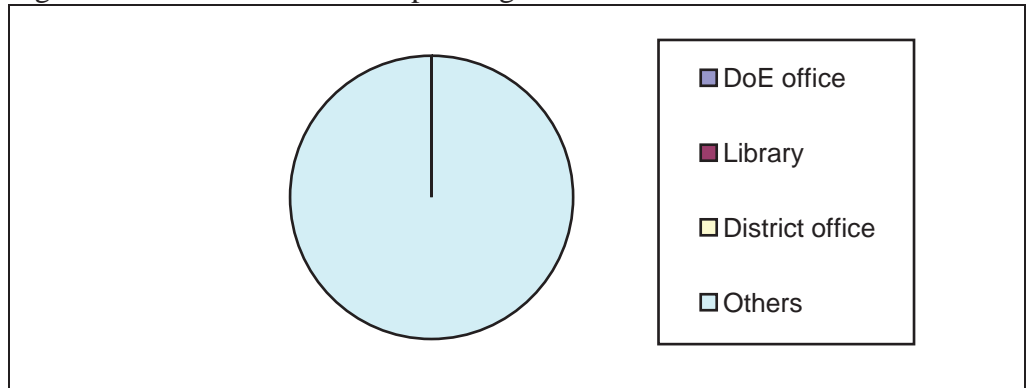
MENGO 3: purchased report

This finding indicates that although the MENGO did not go to the location where the EIA report is displayed, they actively participate in the decision-making process by attending the EIA meeting and purchasing the EIA report.

Q 6.2: If yes, where did you go?

Sample 1: Public

Figure 9.2: Location where the public go to



The respondents were given four choices of answer, that is, DoE office or library or district office or others. Of those who answered “yes”, none of the respondents go to the DoE’s office, library or district office to review on the EIA report. The respondents, who answered ‘others’, informed the researcher a petition to object on the proposed project was brought to them for their signature. They did not see full EIA report themselves.

Sample 2: MENGO

MENGO 4: DoE office, district office, sent to us via post from the DoE

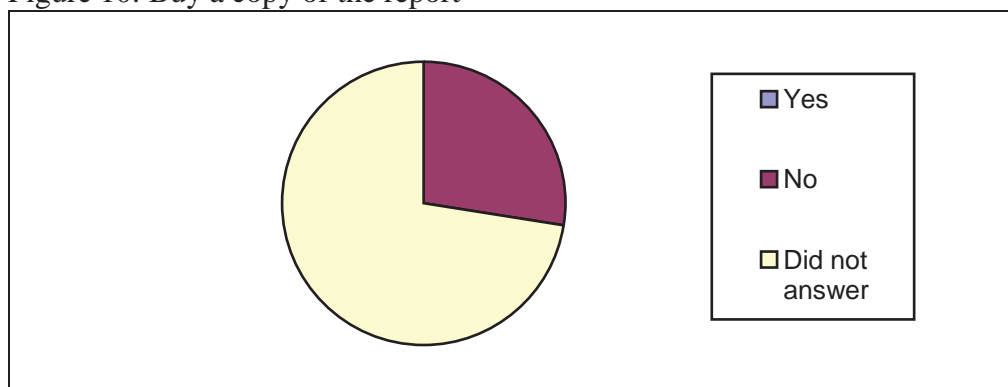
MENGO 5: DoE office

This finding supports the earlier finding on the active participation from MENGO. It also indicates the various designated locations are accessible to the MENGOs.

Q 7: did you buy a copy of the report?

Sample 1: Public

Figure 10: Buy a copy of the report



The respondents were asked to answer ‘yes’ or ‘no’ to this question. None of the respondents answer ‘yes’ when they were asked whether they bought a copy of the EIA report, 27.5% of the respondents answered ‘no’, and 72.5% of the respondents did not answer the question.

Sample 2: MENGO

Table 23: Buy a copy of EIA report

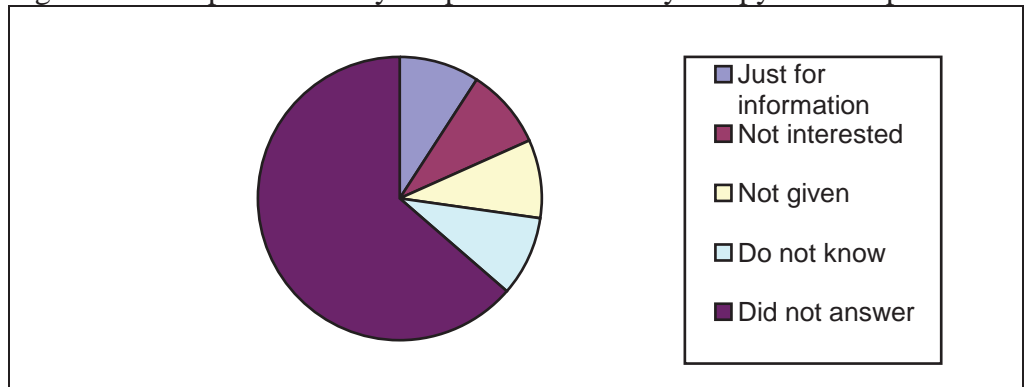
MENGOs	Response
1	No because it is being shared with the organisation as we often get the invite from the state environmental department to be technical member for selected EIA meeting.
2	No answer
3	Yes
4	No because part of the review committee appointed by the DoE
5	Yes

The finding shows that majority of the MENGOs are actively participate in the public participation either by being a member in the technical/review committee or by purchasing the report.

Q 7.1: if no, why?

Sample 1: Public

Figure 10.1: Explanation why the public did not buy a copy of the report

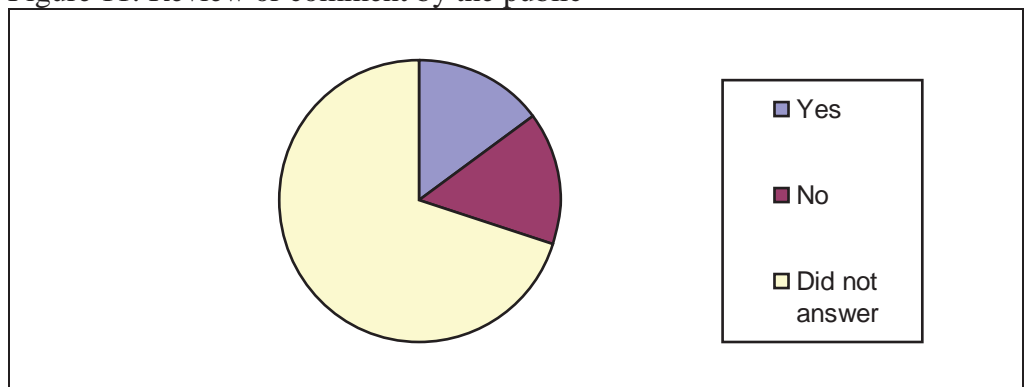


This is an open-ended question. Of those respondents who answered that they did not buy a copy of the EIA report, 9.1% of the respondents said that it was because they had only seen a notice for information, 9.1% of the respondents answered they were not interested with the report, 9.1% of the respondents answered they were not given a copy, 9.1% of the respondents answered they did not know they needed to buy a copy and 63.6% of the respondents did not answer the question. This finding indicates the low level of awareness among the public at the affected areas on the importance of EIA information. It also indicates that the public were not exercising their right to acquire the information (passive information).

Q 8: Did you give any review or comment?

Sample 1: Public

Figure 11: Review or comment by the public



The respondents were asked to answer 'yes' or 'no' to this question. 15% of the respondents answered they reviewed an EIA report, 15% of the

respondents answered they did not reviewed an EIA report, and 70% of the respondents did not answer the question. This finding clearly shows the low level of participation among the respondents at the affected areas on public participation.

Sample 2: MENGO

Table 24 : review and comment the EIA report

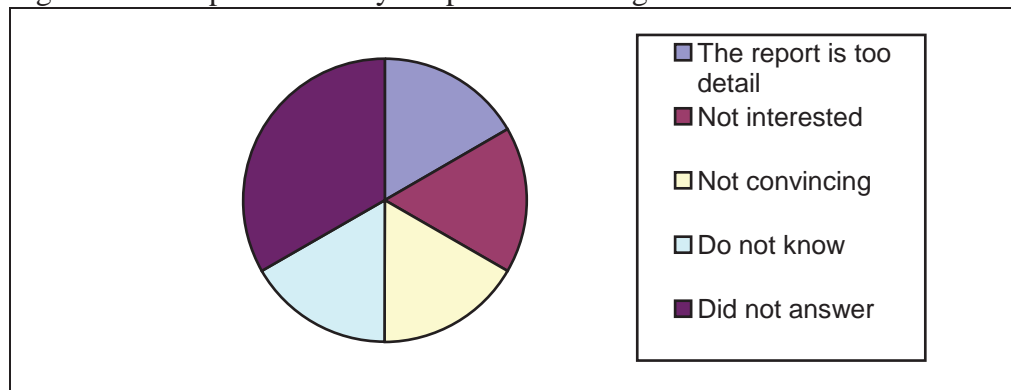
MENGOs	Response
1	Yes
2	No answer
3	Yes
4	Yes
5	Yes

Active participation from the MENGOs is not only in acquiring the information but also in participating the decision-making process.

Q 8.1: If no, why?

Sample 1: Public

Figure 11.1: Explanation why the public did not give their review or comment

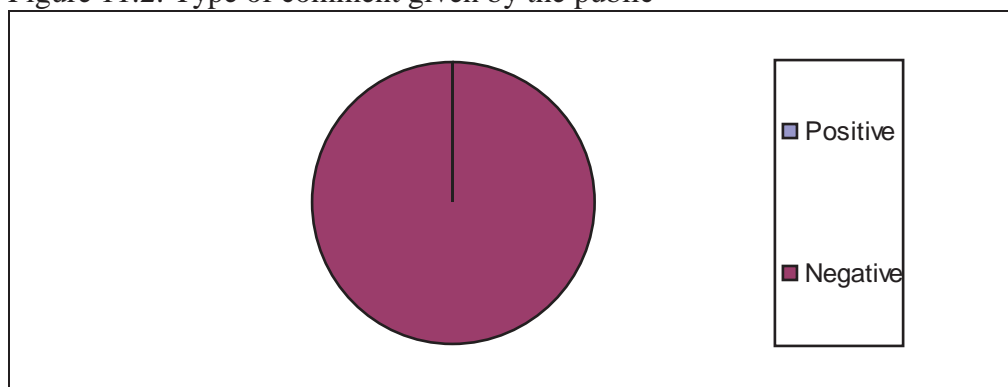


This is an open-ended question. Of those respondents who answered “no” to Q8, 16.7% of the respondents answered they did not gave any review because the EIA report was too detailed, 16.7% of the respondents answered because they were not interested with the EIA report, 16.7% of the respondents answered the report was not convincing, and 16.7% of the respondents answered they did not know that they needed to review the EIA report. 33.3% of the respondents did not answer the question. Again, this finding shows the low level of awareness among the public at the affected areas on the importance of public participation in the decision-making process.

Q 8.2: If yes, what is your comment?

Sample 1: Public

Figure 11.2: Type of comment given by the public



The respondents were asked to answer ‘positive comment’ or ‘negative comment’ to this question. Of those respondents who said they had given a comment or review on the EIA report, all of them (100%) said that they gave negative comments. The negative comments from the respondents indicates that they have been canvassed by the interested parties whom supplied them with the information. The fact that the public did not see the actual report, did not purchase it, and did not go to the location where the EIA report is displayed, supported this argument.

Sample 2: MENGO

Table 25: Comment given on the EIA report

MENGOs	Response
1	Both positive & negative comments
2	No answer
3	Negative comment
4	Negative comment
5	Negative comment

As a body which actively participate in the EIA process, the negative comments from the MENGOs show that some improvements need to be made in the EIA report.

(b) Decision-makers

Sample 1: DoE

D5. The draft Term of Reference (TOR) is required to be displayed for public review and comments.

a. In what form is the TOR made available to the public?

Table D5.a: form of TOR made available to the public

Department of Environment	1	No response
	2	We will be asked to give comment on TOR if the project has connection with the state. They do not have any specific guideline because in TOR we need to refer to the guideline from the EIA handbook or other specific EIA guidelines. There are issues in the guidelines, so we only have to check whether in TOR, the scope is exist or not. TOR will be displayed for public, same with the report. Meaning there must be advertised in the newspaper, in media whether in our website or based on the advertisement in the newspaper, so the public can view at any office.
	3	Display at the foyer in form of report (display in 2 weeks). Depends on the HQ
	4	Written
	5	Yes, EIA report

Three respondents (2, 3 and 5) said that the TOR must be made as the same form as the EIA report. However respondent 4 just gave a brief answer that is in written form. However on 5th October 2007, the DoE announced a release of A Guidance Document on the Submission of TOR for DEIA report.¹⁵

b. Is it in non-technical summary?

- i. Yes
- ii. No

Table D5.b: whether the TOR is in non technical summary form

Department of Environment	1	No response
	2	No
	3	Both, summary & technical
	4	Yes
	5	Technical and non technical form

¹⁵ See <http://www.doe.gov.my/en/content/terms-reference-tor-deia-announcement-5-october-2007> (as on 7th April 2007)

Based on the finding on QD5.b, two of the respondents (3 & 5) said that the TOR was in both form, technical and non technical summary. However respondent 2 said it was constructed in technical summary and respondent 4 said it was in non technical summary.

c. How is it publicised to the public?

Table D5.c: form in which TOR is publicised

Department of Environment	1	No response
	2	Advertisement/ media/website/newspaper
	3	At HQ level, including newspaper. At state level, notice in the office only
	4	Public view at state DOE and advertisement in the newspaper as well as in the website
	5	Announce at the DOE website and local newspaper the place of display the EIA report

Majority of the respondents (2, 3, 4 & 5) said that the TOR is publicising in the newspaper. This finding indicates that newspaper was the medium of publication for TOR.

D6. Does the department give advice to the project initiator to provide for early public participation, for example at the time of applying for a planning permission?

Table D6: advice to the project initiator to provide early public participation

Department of Environment	1	Yes, public survey. At preliminary stage. One of the chapters
	2	TOR is the earliest public participation
	3	Yes, at early site inspection. Between developer and department only
	4	DOE will give advice to the developer to involve public especially in planning permission. For example public participation during the preparation of TOR
	5	In EIA research, among the research that needs to be carried out is socio economic by way of questionnaire, meeting, dialogue or workshop with the residents or public involved with the project. Our public participation requirement is the same as practice in other advance country like UK.

Early participation is one of the standards set by the Aarhus Convention. The finding indicates that the majority of DoE did give early participation to the public. It shows that the practice met the standard set by the Convention.

D7. The detailed assessment report is required to be displayed for public review and comments.

a. In what form is the report made available to the public?

Table D7.a: form in which DEIA is made available to the public

Department of Environment	1	No response
	2	The same form which has been send out to the agencies for their comment, in English only.
	3	No response
	4	In form of report which is display at state DOE counter office for public review
	5	Report. EIA report consists of several volumes, so the report is in form of hardcopy

Two respondents did not respond to the question because DEIA was submitted to the DoE Headquarter. However the finding shows that the DEIA report were available to the public despite its variety of forms.

b. Is it in non-technical summary?

- i. Yes
- ii. No

Table D7.b: whether the DEIA is in non technical summary

Department of Environment	1	No response
	2	Non technical
	3	No response
	4	Yes
	5	Summary in form of executive summary and non technical

This finding indicates that the DEIA report was prepared in non technical summary in form of executive summary. It shows that a non-technical person is able to read and understand the summary of the DEIA report.

c. How is it publicised to the public?

Table D7.c: form the DEIA is publicised

	1	No response
	2	Advertisement/website etc
	3	No response

Department of Environment	4	Display at the counter together with comment paper and public can make a written comment on the paper
	5	Through website and local newspaper

This finding shows that the DEIA report was available to the public in many forms either online or manually at the DoE offices. It also indicates that the DoE did provide active information to the public as set by the Aarhus Convention.

D8. Any comment on the report should be made in writing and forwarded to the secretary of review panel in certain time frame.

a. How many comments have been received from the public in the following years?

- i. 2002 _____
- ii. 2003 _____
- iii. 2004 _____
- iv. 2005 _____
- v. 2006 _____

Only respondent 5 answered question D8.a by saying that DOE do not keep the record and no research has been carried out on numbers of public who came to give comment or review the EIA report. This finding indicates poor managerial on part of DoE as the statistics on number of public who came to give comment or review the EIA report will show the effectiveness of public participation in the decision-making process.

Sample 2: Planning Department

P6. Section 21(6) of TCPA states the local planning authorities shall inform the owners of the neighbouring lands of their right to object only if the proposed development is located in an area in respect of which no local plans exists for the time being.

a. Does the department keep records of the number of owners of neighbouring lands who object to the planning permission?

Table P6.a: keeping record of the number of neighbouring lots who object to the planning permission

Planning authorities	A	No and normally the record can be obtained during application of planning permission to relevant local authority
	B	Till now we do not issue any notice of objection to neighbouring lot. Our areas are covered by 4 local plans. Under the local plan, we don't have to issue the notice. The condition is, if there is no local plan. Now we have the local plan, so no need for that. Other areas are covered by structured plan. Not much on that, so we look at the type of development. So till now, there is none.
	C	None because local plan has been gazetted
	D	No. local plan has been gazetted
	E	Local plan has been gazetted. Structure plan was gazetted long time ago, local plan for other districts are in process. Local plan for E is in 2001 but local plan for district was done before. When the local plan is gazetted, it covers all area in E.

Four of the respondents (B, C, D and E) said that the local plans have been gazetted. As structure and local plans (Development Plans) have been gazetted by the local authorities, the right of neighbouring land to object to a EIA project proposals is no longer available. This finding indicates that under TCPA, there is no room for objection at all.

P7. The owners of neighboring lands will be informed by notice in writing served on them and they are allow to state their grounds of objection within twenty-one days of the date of service of the notice.

a. Within this period of 21 days, are they allowed to scrutinize the application to planning permission?

Table P7.a: scrutinizing the application of planning permission by the owners of neighbouring lot

Planning authorities	A	Supposedly and it is done by relevant local authority. State planning authorities do not involve because of the application of section 5(2)
	B	No problem to that, they can scrutinised it but now all plans has been gazetted
	C	Yes
	D	No response
	E	No response

This finding supported the earlier finding that once structure and local plans have been gazetted, neighbouring landowner has no longer right to object and scrutinise the application of planning permission. Again, the right has been removed under TCPA.

If yes –

- i. Does the department keep records the number of owners of neighbouring lands who scrutinise the application to planning permission?

Table P7.a.i: keeping records of number of owner of neighbouring lot who scrutinize the application to planning permission

Planning authorities	A	No
	B	No response
	C	No
	D	No response
	E	No response

Only two respondents (A and C) answered the question and both of them said that there is no record kept by them.

- P8. Besides the owners of the neighbouring lands, does the department allow the public to scrutinise the application to planning permission?

Table P8: allowing the public to scrutinize the application to planning permission

Planning authorities	A	State "A" planning authorities do not involve because of the application of section 5(2). Refer to local authority – neighbouring lot only
	B	Not the file only the plan
	C	No. the law does not allow
	D	No response
	E	Can not. Only the layout

According to respondents B, C and E, the public is not allows to scrutinize the application to planning permission. This finding indicates that TCPA did not provide any room for the public to scrutinise the application to planning permission. It also indicates that right to passive information as set by the Aarhus Convention was not met.

P9. Once the Director General of Environment approved or disapproved the EIA report, he shall inform the planning authorities of his decision.

a. Does planning authorities have a power to reverse the decision of the DG, in considering the application of planning permission?

Table P9.a: reversing the decision of the DG of DoE

Planning authorities	A	Refer to relevant local authority and approval of EIA report normally will be informed to state planning authorities
	B	We never receive any critical application. Depends on the committee, we look into the case. Before the committee is committee of planning and Development, now referred to One Stop Centre (OSC)
	C	Never because it already discussed at the committee at DOE level
	D	No
	E	There is a few but the case is not big, for example pump station. Based on EIA, DoE's condition to establish a pump station is it must be built 30 metres from the lot. It's the buffer zone. Department will consider such application. We do allow such development with condition that services such as change of oil, car wash are not allowed. Only pump. Then in between the station and a house there must be a wall, for security. That's the only conflict. That's why I said just now, if they cannot comply with the department's condition, they may appeal.

This finding shows that coordination among planning authorities, DoE and other technical agencies has been established. It also indicates that every department and agency is working within its own jurisdiction and there is not overlapping of work among them.

Discussion

Paragraph 3 of section 3.4.7 of the EIA Guidelines states that, *“On submitting a Detailed Assessment report for review, the project initiator must notify the secretariat of the review panel where the public may obtain copies of the report and the cost of each copy”*. Paragraph 1 of section 4.7 of the EIA Guidelines states that, *“the public is invited to comment on proposed projects which have been subjected to Detailed Assessment, unless it is against the public interest. Public comment must be made in writing and received by the*

secretariat of the review panel within forty-five (45) days from the first public notification through advertisement in newspaper”. Paragraph 2 of the same section states, “notification of the receipt of a Detailed Assessment report and the places where copies of the reports may be reviewed or obtained will be given in the public notice/announcement. Copies of Detailed Assessment report subject to public scrutiny are displayed at every office of DoE, public libraries and the relevant district offices”. These sections show that there are envisaged to be three elements to promote effective public participation; (i) ensuring location is clearly identified, (ii) copy of EIA report to be available for public scrutiny, and (iii) public to have opportunity to review the EIA reports.

Low level of awareness among the public at the affected areas can be seen when they did not directly participate in the EIA process. The findings show that the public had not seen the notice calling for review, go to the location where the EIA report is displayed, purchase a copy of the EIA report, nor they participate in giving review or comment to the EIA report. These findings support the earlier findings on low level of awareness on acquiring environmental information. This lack of participation will undermine the EIA process as public participation is an integral part for an effective decision-making process.

On part of MINGOs, they seem to participate actively in the EIA process by going to the location where the EIA report is displayed, purchasing the EIA report or obtained it through EIA meeting, and giving comments on each EIA report. Participation from MINGOs, again, indicates their interest in environmental issues.

In summary on public participation;

1. None of the respondents went to the official location where the full EIA reports is displayed except MINGOs
2. None of the respondents bought a copy of full EIA report except MINGOs.
3. None of the respondent ever seen a full EIA report except MINGOs.

4. No effort on part of the public to know more about the content of the EIA report and the impact of the proposed project to the environment except MINGOs.

Section 3.4.1 of the EIA Guidelines states that, *“For projects which have been determined to require detailed assessment, the project initiator must submit the terms of reference (TOR) in accordance to the format outlined in specific EIA Guidelines. The secretariat to the review panel will examine the TOR to ensure that the project concept does not contradict any policy or decision of the Government of Malaysia prior to further processing. The TOR will detail the purpose of the assessment and itemise the potential environmental impacts that require further assessment. The TOR will outline the environmental data collection that are required, determine the assessment procedures to be used and identify the appropriate methodologies for impact prediction and assessment. The draft TOR for detailed assessment are prepared by the project initiator and to be confirmed by the expert review panel in a Detailed Assessment Brief and are prepared in consultation with relevant environment related agencies and the project initiator. The draft TOR is required to be displayed for public review and comments”*.

The above section states that the TOR must be made in a format as outlined in EIA Guidelines. Findings in Figure D5.a, Figure D5.b and D5.c show that the majority of the respondents claimed that format of TOR is in the same format as the EIA report; there is uncertainty as to the content of the TOR whether it should be in technical or non technical form; and medium of publication of the TOR is varies according to the states, although the common medium of publication is through the newspaper. With the launching of a new Guidance Document on the Submission of TOR for DEIA Report on 5th October 2007, a standard form of TOR has been produced.

Section 3.4.4 states, *“the need for public participation during Detailed Assessment and the form it should take should be discussed during the formulation of TOR for Detailed Assessment. Suitable mechanisms for public participation during Detailed Assessment include; citizen committee, public meetings and workshops, and public opinion sampling”*. This section suggests

that which form of public participation it should take during DEIA should be discussed at TOR level. The findings in Figure D6 shows that there is no standard form set as to when is the earliest public participation, it can be at planning permission stage or it can be at the preparation of TOR stage. This shows that there is no determination in the DoE as to the earliest time for public participation.

As stated earlier in section 4.7 of the EIA Guidelines, the EIA report is required to be displayed for public review and comments. Findings in Table D7.a, Table D7.b and Table D7.c show that the respondents gave different answers about the forms of the report made available to the public, about the technicality of the report and about the forms of publication of the report. Again this variety shows that the procedures very much depend on every state DoE. Moreover the respondents from DoE seem did not keep any record on number of public who came and comment on the EIA report. Lack of standardisation in providing the service for reviewing and commenting might affect the opportunity of public to participate.

On part of Planning authorities, it seems that there is no room for public participation in EIA. Findings in Table P6.a and Table P7.a show that most of the Planning authorities already gazatted their local plans, so the provision on objection by neighbouring lot and scrutinising the application to planning permission is no longer applicable. There is also no room for the public to scrutinise the application to planning permission (see Table P8). This shows that there is no room for public participation at early planning permission stage, including the EIA projects cases. However majority of the respondents from Planning authorities claimed that the application to planning permission including the EIA projects are discussed at committee level. This includes a member from DoE. So the question whether the decision of DG of DoE should be revised do not exist.

In summary of providing public participation on part of decision-makers;

a. DoE:

1. There is no determination as to when is the earliest opportunity for public participation.

2. No standardisation in providing the service for reviewing the EIA report.
3. No record is maintained of numbers of public coming to review and comments or representations on each EIA report.

b. Planning authorities:

1. There is in practice no room for public participation in EIA projects at the planning application stage because:

a. Most of the local authorities already gazetted their local plans.

b. Public are not allow to scrutinise the application to planning permission not even if they are affected by tha application, for example neighbouring landowner.

2. An approval to the application of planning permission is determine at a committee level which consists of variuos departments including the DoE.

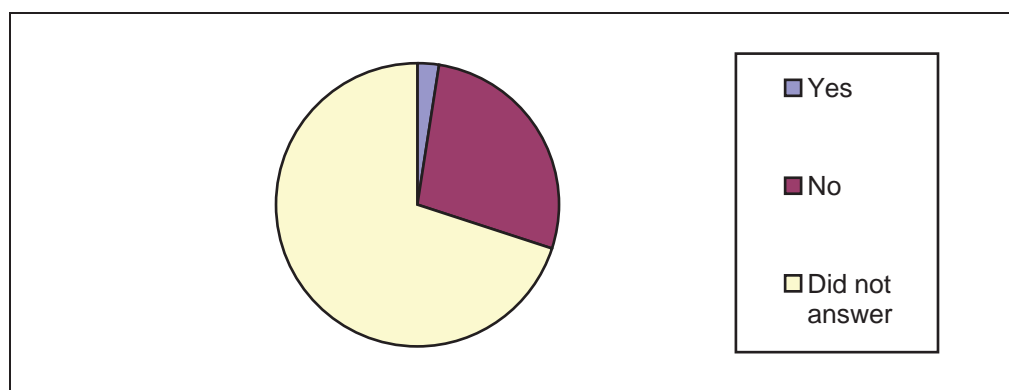
5.3.3 Access to justice

(a) Public and MENGO

Q 13: Have you ever filed an appeal to the Appeal Board on the ground that you are aggrieved by the approval of an report?

Sample 1: Public

Figure 12: File an appeal to Appeal Board



The respondents were asked to answer ‘yes’ or ‘no’ to this question. 27.5% of the respondents answered they never file an appeal to Appeal Board and 2.5% of the respondents answered they had filed an appeal to the Appeal Board on

the ground that they were aggrieved by the approval of the EIA report. 70% of the respondents did not answer the question.

Sample 2: MENGO

Table 26: File an appeal to Appeal Board

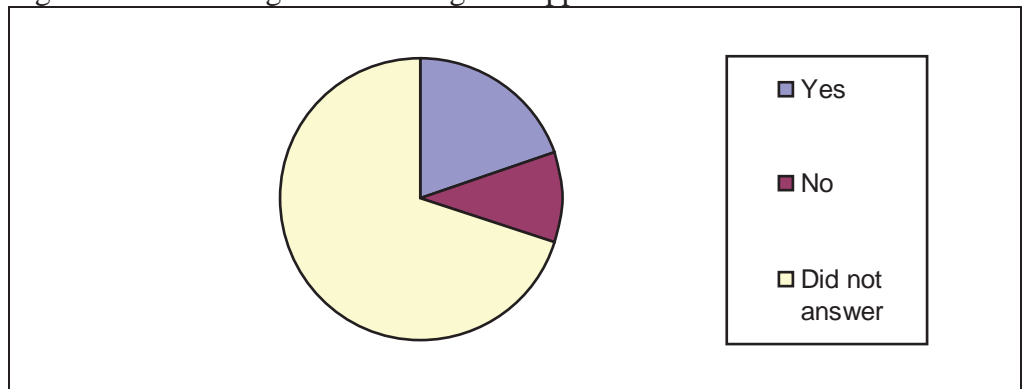
MENGOs	Response
1	No
2	No answer
3	No
4	Yes
5	No

Only one of the MENGOs had filed an appeal to an Appeal Board. This finding indicates that the nature of the appeal that only aggrieved persons has the right to appeal.

Q 14: do you know that you have the right to appeal?

Sample 1: Public

Figure 13: Knowledge about the right to appeal



The respondents were asked to answer ‘yes’ or ‘no’ to this question. 20% of the respondents answered they know about the right to appeal and 10% of the respondents answered they did not know about the right to appeal. 70% of the respondents did not answer the question.

(b) Decision-makers

Sample 1: DOE

D16. Section 34A (8) of EQA states that any person who contravenes section 34A shall be guilty of an offence. Section 34A of the EQA is a provision on EIA report that person intended to carry out any prescribed activity shall submit an EIA report and he shall not carry out such activity until the EIA report required been submitted and approved by the Director General of DoE. The person must also comply with the condition attached to the report.

a. Is it a compoundable offence?

Table D16.a: compoundable offence

Department of Environment	1	No compound
	2	Non-compoundable offence
	3	Non compoundable
	4	Yes
	5	No response

Compoundable offence is a type of offence that can be compromised between the parties. In any compoundable offence, the violater will be given a chance by the authority to pay certain amount of fine. Only if they refused or failed to pay the sum, the violater's case will be filed in the court for prosecution. Table D16.a shows that out of four respondents who answered the question, three of them claimed the offence under section 34A (8) of EQA is not compoundable. However according to respondent 4, it is a compoundable offence.

b. How many cases have been filed to the court by the department in the following years?

Table D16.b: cases filed by the department

Department of Environment	1	No response
	2	2002 1
		2003 5
		2004 3
		2005 3
		2006 1
	3	No response
4	No response	
5	No response	

Table D16.b shows that only respondent 2 answered the question. According to him, in year 2003 there were 5 cases filed by the department, in year 2004 and 2005 there were 3 cases respectively and in year 2002 and 2006 there were 1 case respectively. Other states claimed they did not have records on the

matter. This finding indicates a poor managerial part on DoE as they did not keep a proper record on cases filed to the court

D17. To the department’s knowledge how many cases have been filed by the public?

Table D17: cases filed by the public

Department of Environment	1	No
	2	1 quarry case, compensation
	3	No response
	4	No response
	5	No response

According to respondent 1, there was no case filed by the public. However according to respondent 2, there was 1 quarry case and the defendant paid the compensation. Other respondents refused to answer the question because the matter was not in their knowledge.

D18. Section 35(1) of EQA states any person who is aggrieved by any decision of the Director General under subsection (3)¹⁶ or (4)¹⁷ of section 34A may within such time and in such manner as may be prescribed, appeal to the Appeal Board.

- a. Does the department keep records of the number of appeal cases to the Appeal Board?

Table D18.a: keeping record of number of appeal cases

Department of Environment	1	No appeal at state 1 level
	2	No appeal case yet
	3	No response
	4	No response
	5	No response

¹⁶ Sec 34A (3) – if the DG on examining the report is of the opinion that the report satisfies the requirements, he shall approve the report, with or without conditions attached thereto, and shall inform the person intending to carry out the prescribed activity and the relevant approving authorities accordingly.

¹⁷ Section 34A (4) – if the DG on examining the report, is of the opinion that the report does not satisfy the requirement, he shall not approve the report and shall give his reasons therefore and shall inform the person intending to carry out the prescribed activity and the relevant approving authorities accordingly.

Two respondents (1 & 2) who answered the question claimed that so far there is no appeal case to the Appeal Board. This finding support the earlier finding on low level of awareness on a right to appeal a case to an Appeal Board.

Sample 2: Planning Department

- P10. Section 23 of TCPA states an appeal against the decision of the local planning authorities may be made to the Appeal Board by –
- a. an applicant for planning permission aggrieved by the decision of the local planning authorities to refuse planning permission or by any condition imposed by the local planning authorities in granting planning permission; and
 - b. A person who has lodged an objection to the application of planning permission and is aggrieved by the decision of the local planning authorities in relation to his objection.
 - c.
 - i. Is there any cases filed to the Appeal Board in relation to EIA project?

Table P10.i: cases filed to appeal board in relation to EIA project

Planning Department	A	Till now there are about 10 cases. However the appeal do not involved EIA project
	B	Till now, none. Our appeal board only sat a few times but not on EIA
	C	None
	D	Not sure. None yet
	E	An appeal board case is not referred here. When the planning permission is applied, council will decide, applicant who are not satisfied with the council's decision, whether we approved or disapproved, or we give conditions, they can submit the dissatisfaction to the appeal board. No case related to EIA. Till now, only 1 case at state E. The appeal board just gets into active, last year in 2006. People who are not satisfied may appeal to state planning authorities. We call for technical meeting, called them & discussed. If there is a problem in any application we submit at Planning standing committee. At that time they have a say. But start from this year, OSC was established, they don't have a venue to say anymore because any application referred to OSC, they want it cleared first, no problem at the time of presentation at meeting. The problem supposed to be settled at technical level. When OSC is established, planning standing committee is abolished. At one time we are the middleman. Now if there is a problem regarding EIA, the developer has gone to DOE themselves. During the OSC meeting, developer is not

		allowed to attend; they will receive the decision later. We just call the technical departments.
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Finding in Table P10.i shows that all respondents claimed that so far there is no appeal case to Appeal Board in relation to EIA project. This finding indicates that the planning authority has a clear jurisdiction under TCPA as Planning Appeal Board will not hear any case relating to EIA.

Discussion

Section 35 (1)(e) of the EQA states that, “*Any person who is aggrieved by – any decision of the DG or any officer under subsection (3)¹⁸ or (4)¹⁹ of section 34A, may within such time and in such manner as may be prescribed, appeal to the Appeal Board*”. There is a contradiction of fact between the findings in Figure 13 with the findings in Table D18.a. Figure 13 shows that 2.5% of the respondents claimed that they had filed an appeal to the Appeal Board whereas the records in all DoE’s offices shows that there is no appeal case been filed at the Appeal Board. Perhaps, while answering the question, there is a misunderstanding on part of the respondents between filing an appeal to the Appeal Board with giving comment on the EIA report. However 20% of the respondents claimed that they knew that they have a right to appeal. Although this percentages is small, still it shows a good knowledge on part of the public.

Majority of the respondents from DoE, as shown in Table D16.a, agreed that the offence under section 34A(8) of EQA is non compoundable offence. Under Section 34A(8) of the EQA ‘*any person who contravenes section 34*

¹⁸ Section 34A(3) states, “*if the DG on examining the report and after making such inquiries as he considers necessary, is of the opinion that the report satisfies the requirement of subsection (2) and that the measures to be undertaken to prevent, reduce or control the adverse impact on the environment are adequate, he shall approve the report, with or without condition attached thereto, and shall inform the person intending to carry out the prescribed activity and the relevant approving authorities accordingly*”.

¹⁹ Section 34A(4) of the EQA states, “*if the DG, on examining the report and after making such inquiries as he considers necessary, is of the opinion that the report does not satisfies the requirement of subsection (2) or that the measures to be undertaken to prevent, reduce or control the adverse impact on the environment are inadequate, he shall not approve the report and shall give his reasons therefore and shall inform the person intending to carry out the prescribed activity and the relevant approving authorities accordingly*”.

*shall be guilty of an offence and shall be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a period not exceeding five years or both and further fine of one thousand ringgit for every day that the offence is continued after a notice by the DG requiring him to comply with the act specified therein has been served upon him.*⁷ This means any person who fail to submit an EIA report²⁰; or any person carrying out the prescribed activity without submitting the EIA report and without getting an approved EIA report²¹; or the person carrying out the prescribed activity without complying with conditions attached to the EIA report and the proposed measures to be taken to prevent, reduce or control the adverse impact on the environment as being incorporated into the design, construction and operation of the prescribed activity²², he is contravenes section 34A(8) of the EQA. Although Table D16.b and Table D16.c show that there are a numbers of cases have been filed by the DoE and the public, none of these cases involved EIA project. Moreover, there is no appeal case on EIA matters been filed at the Appeal Board.

On part of Planning authorities, Table P10.i and the following findings show that under the Planning authorities there is not appeal case relating to EIA project being brought to the Appeal Board. It means that not only there is no appeal case at DoE, but also no appeal case at Planning authorities.

In summary on part of access to justice;

1. Although a small percentages of the respondents claimed that they had a knowledge on right to appeal in EIA matters, records show that no appeal case has been filed to the Appeal Board.
2. Majority of DoE did not keep record on number of EIA cases filed to a court.
3. No appeal to EIA case has been filed to the Appeal Board at DoE and Planning authorities levels.

²⁰ Section 34A(2) of the EQA

²¹ Section 34A(6) of the EQA

²² Section 34A(7) of the EQA

5.4 EIA reports

34A(2) of the EQA states that, “*Any person intending to carry out any of the prescribed activity shall, before any approval for the carrying out of such activity is granted by the relevant approving authority, submit a report to the DG. The report shall be in accordance with the guidelines prescribed by the DG and shall contain an assessment of the impact such activity will have or is likely to have on the environment and the proposed measures that shall be undertaken to prevent, reduce or control the adverse impact on the environment*”. Table ER1, ER2 and ER3 below show the samples of PEIA reports approved in year 2005 and year 2006 as well as DEIA report approved in the same years²³. Table ER1 shows that (for year 2005) three PEIA reports from northern region have been examined; 6 PEIA reports from central region have been examined; 2 PEIA reports from eastern region have been examined and three PEIA reports from southern region have been examined. Table ER2 shows that (for year 2006), nine PEIA reports from northern region have been examined; six PEIA reports from central region have been examined; three PEIA reports from eastern region have been examined and one PEIA report from southern region has been examined. Table ER3 show that in year 2005 three DEIA reports have been published, however only two DEIA reports were examined because the third report was taken out from the library because of its confidentiality. For year 2006, four DEIA reports have been published and all reports have been examined.

²³ See chapter 3 for the methodology and sampling exercise.

Table ER1: Samples of PEIA reports approved in year 2005

Region (state)	No of report	Title	Method of public participation
Northern (Kedah)	1	Proposed housing development on part of lot PT 1938, Mukim Padang China, Daerah Kulim, Kedah	No public participation
	2	Proposed Taman Perindustrian 2010, Mukim Mergong, Daerah Kota Setar, Kedah	No public participation
	3	Proposed mixed development comprising a total of 745 units of various types of residential, commercial and industrial units on lots 2, 67, 68, 1072, 1596, 2400 Mukim Jabi, Daerah Pokok Sena, Kedah	No public participation
Central (Selangor)	1	Projek pengitaran semula bahan pelarut industri di Pelabuhan Barat Kelang, Selangor	No public participation
	2	EIA for the temporary housing quarry operation on lot 1524, 1525 & 1746 of Bandar Damai Perdana, Mukim Cheras, Daerah Hulu Langat, Selangor	Interview with residents
	3	Proposed aluminium dross recycling facility on lot PT 3387, 3388 & 3389, Jln Perindustrian Mahkota 7, Taman Perindustrian Mahkota, Beranang, Selangor	No public participation
	4	Proposed commercial and selective logging in compartment 5A:119 HA, Hutan Simpan Bukit Lagong, a productive forest in Selangor	Interview with the aborigine people
	5	PEIA for proposed mixed development at southern precinct, Bandar Sunway, Mukim Damansara, Daerah Petaling, Selangor	No public participation
	6	Proposed mixed development on lot 851, Mukim Ijok, Daerah Kuala Selangor, Selangor	No public participation
Eastern (Terengganu)	1	Kerja "GPP-1. 1 & 2 Rejuvenation & revamp project" (Projek PPR) di Kerteh, Kemaman, Terengganu	No public participation
	2	Cadangan pembangunan ladang kelapa sawit di Hutan Lesong, Terengganu	No public participation
Southern (Melaka)	1	Cadangan 'New 4 feet reversing cold mill' di kawasan perindustrian Ayer Keroh, Daerah Melaka Tengah, Melaka	No public participation
	2	Cadangan pembangunan hotel di Jalan Syed Abdul Aziz (off Jalan Merdeka) seluas 3.0 ekar, Daerah Melaka Tengah, Melaka	No public participation
	3	Cadangan projek perumahan di Mukim Durian Tunggal, Alor Gajah, Melaka	No public participation

Table ER2: Samples of PEIA reports approved in year 2006

Region (state)	No of report	Title	Method of public participation
Northern (Kedah)	1	Proposed chemical containers recycling facility on lot 13, Jalan Hi Tech 3, Phase 1, Kulim Hi Tech Industrial Park, Kulim, Kedah	No public participation
	2	Proposed housing and commercial development on lot PT 5015 (new lot 3989) Mukim Semeling, Daerah Kuala Kedah, Kedah	No public participation
	3	Proposed quarry development at Bukit Forest Reserve, Mukim Padang Peliang, Daerah Pendang, Kedah	No public participation
	4	Proposed housing and commercial development, Mukim Padang Meha, Daerah Kulim, Kedah	No public participation
	5	Proposed precious metal recovery and scrap metal processing facility at Padang Meha Industrial area, Kulim, Kedah	Interviews with residents nearby the site
	6	The proposed mixed development on lot 218, 219 & 22 and 1697 (old lot 229), Mukim Pekula, Daerah Kuala Muda, Sungai Petani, Kedah	No public participation
	7	The proposed residential and commercial development on lot PT 3933, Mukim Sidam Kanan, Daerah Kulim, Padang Serai, Kedah	No public participation
	8	Proposed construction of LKIM complex and jetty on lot PT 1901 at Kuala Kedah, Mukim Rotan, Daerah Kota Star, Kedah	No public participation
	9	Proposed quarry plant on lot 2554 and lot 693, Mukim Tunjang, Kedah	No public participation
Central (Selangor)	1	PEIA for the proposed 150.0 acres of residential and commercial development project on Seksyen U10, Mukim Bukit Raja, Selangor	No public participation
	2	Proposed MPOB Biodesel plant in Carey Island, Mukim Teluk Panglima Garang, District of Kuala Langat, Selangor	No public participation
	3	EIA for the proposed 500,000 centralised sewerage treatment plant (STP) for Bandar Baru Salak Tinggi on part of lot 17499, Mukim Dengkil, Daerah Sepang, Selangor	No public participation
	4	PEIA for the proposed expansion of scheduled waste recovery plant at lots 8, 10, 12, 14,16 & 18 Landpac Industrial Park, Port Klang, Selangor	No public participation
	5	The proposed residential development project located on lot PT 10661, Mukim	No public participation

		Ijuk, Daerah Kuala Selangor, Selangor	
	6	Proposed ISO-Tank cleaning and waste oil and solvent recovery plant on lot 38, Phase 2A, Pulau Indah, Port Klang, Selangor	No public participation
Eastern (Terengganu)	1	Proposed collection, recovery and disposal of empty, used container at Kemaman Supply Base (KSB), Phase II, Kemaman, Terengganu	No public participation
	2	The proposed alluvial gold mining at Sungai Tapah, Mukim Hulu Nerus, District of Setiu, Terengganu	No public participation
	3	Alluvial gold mining at Sungai Tarum, Mukim Hulu Setiu, District of Setiu, Terengganu	No public participation
Southern (Melaka)	1	The proposed housing development on lots 1472 & 1474 in Mukim Ayer Panas, District of Jasin, Melaka	No public participation

Table ER3: Samples of DEIA reports approved in years 2005 and 2006

Year	No of report	Title	Method of public participation	Finding
2005	1	Perlaksanaan projek jalan pos Batau-Lembah Bertam, Pahang. Pakej 4: Kg. Susu/Sg Bertam ke Ringlet	Socio economy survey on 132 respondents Meeting with the inhabitants of Bertam Valley & the orang asli	96% of the respondents aware of the proposed project Main source of information are through friends and relatives 68.5% of the respondents agreeable towards its implementation Perceived positive impacts; enhance job opportunity improve basic facilities appreciation in property and land values increase business opportunities bringing development generate more business to uplift the socio economy status perceived negative impacts; air pollution noise pollution increase number of vehicles social problem
2005	2	The proposed island reclamation at Palm Springs Resort Port Dickson, Negeri Sembilan	Socio economy survey on 358 respondents who live in the study area, the surrounding residential areas and villages within the 5 km radius of the project; and 109 respondents from business operators in the study area Discussion attended by people at	47% of the respondents have heard about the project 97% of the respondents agreed to the project Perceived positive impacts; the town will be more developed more job opportunities increase socio economy status increase land value

			nearby villages, officers from fishery and a member of state assemblyman of Pasir Panjang	
2005	3	Cadangan Projek Incinerator di Broga, Semenyih, Selangor ²⁴⁴	No record	
2006	1	DEIA for proposed of solid waste transfer station at Kg. Bohol, Federal Territory of Kuala Lumpur	Socio economy survey on 487 respondents who live within 3 km radius from the proposed project site.	53.8% of the respondents knew the project as a waste disposal centre and 21.3% of the respondents knew it as a transfer station Main source of information were friends and relatives 54.2% of the respondents did not agreeable to the proposed project. (a) perceived negative impacts; Increase air pollution Increase noise pollution Increase number of vehicles Drop in comfort level Decrease in local economic growth Decrease in property value
2006	2	Direct reduction iron (DRI) plant at kawasan perindustrian Olak Lempit, Tanjung Dua Belas, Kuala Langat, Selangor	Socio economy survey on 200 respondents who live in the villages within the range of 3 km to 5 km from the proposed project site. Dialogue session with the villages nearby attended by local people, representatives from	28.7% of the respondents aware of the proposed project Main source of information were friend and job advertised Perceived negative impacts; noise pollution emission from existing operation damage to agriculture crops

²⁴⁴ Copy of the report is not available in the DoE library

			DoE and local council.	<p>bad condition of village road</p> <p>spillage of scrap metal</p> <p>water pollution</p> <p>limited job opportunities</p> <p>social & cultural conflicts with immigrant workers</p> <p>change in traditional job pattern</p>
2006	3	<p>Proposed thermal treatment plant for solid waste management at Beroga, Mukim Semenyih, Daerah Hulu Langat, Selangor – addendum to DEIA report</p>	<p>No consultation to public participation in the addendum report</p> <p>Method of public participation in the main DEIA report (submitted on 2003):</p> <p>Socio economy survey on 136 households and 73 orang asli who live with a population who live within 5 km radius of the project site</p> <p>Meeting with stakeholders who were deemed to be relevant to the proposed project including all communities within 5 km radius of the proposed site & meeting with interested parties such as developers and NGO in the Klang Valley.</p>	<p>89% of the respondents have heard of the proposed project</p> <p>Main source of information were from the government (42%), community (35%), NGO (32%), media (8%), internet (3%) and consultant (2%)</p> <p>59% of the respondents gave negative response to the project, 28% of them concerned but did not know much, 7% of them did not care and 7% of them gave positive response</p> <p>perceived negative impacts;</p> <p>Environment (78%)</p> <p>Health (77%)</p> <p>Properties value (74%)</p> <p>perceived positive impacts;</p> <p>Job creation (37%)</p> <p>Development (28%)</p> <p>Economic (23%)</p> <p>(c) uncertain impacts</p> <p>Social impact (34%)</p> <p>Economic impacts (27%)</p> <p>If the project proceed;</p> <p>(i) 31% of the respondents will continue oppose</p> <p>(ii) 26% of the respondents will support provided</p>

				<p>guaranteed are met on;</p> <p>Impacts of health (57%)</p> <p>Operation & maintenance performance (15%)</p> <p>Environmental impacts (7%)</p> <p>(iii) 14% of the respondents will support with condition on;</p> <p>Upgrade infrastructure (22%)</p> <p>Compensation (15%)</p> <p>Good operation & management system (7%)</p>
2006	4	The proposed resource recovery centre / waste energy (RRC/WtE) plant in Mukim Semenyih, Daerah Hulu Langat, Selangor	<p>Social survey on 273 respondents who reside within 5 km radius of the proposed project site.</p> <p>Public meeting attended by head of villages, NGO, representative from local authority, representative from residents & a member of state assemblyman of Semenyih.</p> <p>Slide presentation and short exhibition during the public meeting</p>	<p>95% of the respondents did not know about the project at all</p> <p>Main source of information were their respective headmen (45%), local government (2%) and NGO (3%)</p> <p>58% of the respondents gave positive answers although they were not aware of the type of waste disposal and treatment system that will be proposed</p> <p>Key concerned;</p> <p>inadequate information</p> <p>site options</p> <p>environmental impacts</p> <p>public participation</p> <p>further traffic flows</p>

Discussion

Table ER1 shows that 14 PEIA reports have been examined and only two reports stated that public participation have been carried out by the project proponents; both reports came from state of Selangor in central region of Malaysia. Table ER2 shows that 19 PEIA reports have been examined and only one report stated that public participation has been carried out by the project proponent. The only report came from the state of Kedah in northern region of Malaysia. Section 2.3.4 of the EIA Guidelines provides that '*in PEIA some form public participation is essential and the following methods are generally suitable, that is; public sampling opinion, public meetings or workshops, and regular meeting with a citizens committee*'. This finding shows that majority of the PEIA reports did not carry out such public participation as suggested by the EIA Guidelines. The finding also indicates that public participation is not a mandatory requirement at that stage of process. The word '*is essential*' provided under section 2.3.4 of the EIA Guidelines can also be interpreted as optional requirement.

In contrast, section 3.4.4 of the EIA Guidelines provides that, 'public participation must be included in DEIA to benefit the planning of the project'. It further provides that, 'suitable mechanisms for public participation during DEIA include: Citizens Committee, public meetings and workshops, and public opinion sampling.' Table ER3 shows that six DEIA reports have been examined in this research (except report no 3 in years 2005) and the most common method of public participation is socio economy/social survey (all reports stated that socio economy/social surveys have been carried out). The socio-economic surveys were conducted with residents who live within 3 to 5 km radius from the proposed project sites. The second common method, together with the socio-economic survey, was meeting/dialogue/discussion among the residents, interested parties, public authorities and project proponents. Five reports mentioned that this type of public participation has been carried out. Other method is slide presentation/exhibition to the public about the proposed project. This finding shows that public participation during DEIA stage is a mandatory process.

Report no 1 of year 2005 shows that 96% of the respondents were aware of the proposed project. The respondents got the information about the proposed project mainly from friends and relatives. 68.5% of the respondents were agreeable towards the project implementation. The report also indicated that the respondents perceived positive impacts mainly on economic aspects and perceived negative impacts on environmental aspects. In report no 2 of year 2005, only 47% of the respondents have heard about the proposed project. However, most of the respondents (97%) agreed to the implementation of the project. The report only disclosed perceived positive impacts from the respondents and the impacts are mainly on economic aspects.

Report no 1 of year 2006 shows that 53.8% of the respondents knew the proposed project as waste disposal centre and only 21.3% of the respondents knew it as a transfer station. Again, their main sources of information were friends and relatives. 54.2% of the respondents did not agree to the implementation of the project. The respondents perceived negative impacts both on environmental and economic aspects. No positive impact was recorded in the report.

In report no 2 of year 2006, only 28.7% of the respondents were aware of the proposed project and they got the information mainly from friends and job advertisement. Again, the respondents perceived negative impacts resulting from the implementation of the project particularly on environmental, economic and social issues.

Report no 3 of year 2006 shows no public participation was done in the addendum report. However the main report submitted in year 2003 shows that 89% of the respondents had heard about the proposed project and 59% of the respondents gave negative response to the implementation of the project. The respondents received the information about the proposed project from various sources mainly from the government, local community and NGO. The report indicated that the respondents perceived three types of impacts; negative impacts mainly on environment, health and economy aspects; positive impacts on economic aspects; and uncertain impacts on economic and social issues. 31% of the respondents will continue oppose if the proposed project proceeds,

26% of the respondents will support the implementation of the project with certain guarantee provided, and 14% of the respondents will support the implementation of the project with certain conditions.

Report no 4 of year 2006 shows that most of the respondents (95%) were not aware of the proposed project at all. Interesting to note although the respondents were not really aware about the nature of the project, 58% of them gave positive response towards the implementation of the project. While public participation was conducted some key concerns from the public were recorded, basically on inadequacy of information, site options, environmental impacts, public participation and further traffic flows.

5.5 Conclusion

Public knowledge and awareness on EIA in general and EIA procedures is very poor as compared with that of MINGOs. Even if the public are aware of the EIA in general and the EIA procedures, they do not fully understand the nature of EIA and its process. Here, a recommendation has to be made on how to increase the level of awareness and knowledge on EIA and its procedures. On the part of Planning authorities, they relate EIA process very much with planning permission under Town and Country Planning Act 1976 rather than under EQA which is governed by DoE. As an approving authority in EIA development project, the planning authorities has to make sure that, in exercising their decision-making power, they have to widen their knowledge on EIA procedures to include procedures exercised by other department, such as DoE.

Under right of information, the public access to information is also poor. Most of the public did not access the DoE's website and even if they claimed that they seen the notice calling for public review on EIA project, in actual fact what they have seen was just a notice or pamphlet on the proposed project. All the DoE officers claimed that they followed the EIA guidelines in implementing the EIA procedures. They also claimed that the database on EIA do exist although the method of keeping the information in the database and

the accessibility to the database may vary from one department to another. However in planning departments, the filing system and electronic database are mainly based on the application to planning permission. They did not categorise the EIA project separately from other projects. Even the accessibility to the information on the project is very strict. Only applicant to the planning permission and those who are directly involved in the project such as the land owner have access to the information. Some recommendations have to be made:

- (1) To improve the methods of disseminating information on EIA development project besides using the DoE's website.
- (2) To ensure public at a proposed EIA development projects aware about a notice calling for public review on the EIA project.
- (3) To have a standard procedure on how to keep, update and access the EIA information that can be used by the DoE and planning authorities.

On public participation, it seems that public did not really participate in the procedures because the percentage of public who went to the place where the report was displayed is very poor, they not even buy the report and very few of them gave comment on the report. This finding was very much contrast with MENOs who actively participated in the process. On part of DoE, although they claimed that they followed the EIA procedures as stated under the guidelines, their answers show that the procedures on forms of the report made available to the public, about the technicality of the report and about the forms of publication of the report differs depending on the practice of the states. There should not be any differences since the EIA Guidelines already provide a standard guideline on these. Interestingly, all DoE did not keep record on number of public who came and reviewed the EIA reports. Although keeping information on the number of public who came and review the EIA report is not one of the EIA procedures, the outcome from this practice might be useful for DoE to improve their service to the public. In planning departments, most of the local authorities already gazetted their local plans. It means that the provision allowing the neighbouring land owner to object on planning permission is no longer applicable. Not only that, the planning authorities also did not allow public to scrutinise the planning permission. As stated earlier, only applicants and those who are directly involved with the

project have access to it. However the planning authorities claimed that they cooperate with DoE through an established committee which will discuss the application to planning permission as well as EIA projects. To strengthen and improve the EIA procedure on public participation, recommendation has to be made:

- (1) To improve public participation by going to the place where the EIA report is displayed, review the content and give comment on an EIA report.
- (2) To ensure the DoE follows strictly the procedures provided in the EIA guideline, so a standard procedures is follow in every state.
- (3) To ensure the planning authorities, as an approving authority in EIA development project, has a full understanding about the EIA procedures.

On access to justice, the findings show that very small number of public know their right to appeal and ever bring the case to court. Even the MENGO never bring the case before the court. On part of MENGO, this finding was not a surprise since they do not has a locus standi to bring the matter before a court. Interestingly, so far no appeal case has been brought to the Appeal Board. Similarly with planning departments, no case on EIA projects has been brought to court or Appeal Board. Although the findings show that, so far, there is no appeal case on EIA has been brought before the Appeal Board, the fact that the aggrieved person should know their right to appeal should not be denied.

Findings on the examination of EIA reports show that almost all PEIA were done without public participation. In contrast, the findings also show that all project proponents did carry out public participation while preparing the DEIA report. This indicates that public participation is an optional process during PEIA and only become mandatory process in preparing DEIA. Findings show that most of the socio-economy survey were done in order to get the residents view on economic and environmental impact if the project were to proceed at their area. This method was recommended in the EIA Guidelines as public opinion sampling.

Recommendation to address these issues are presented in Chapter 7.

Chapter 6. Limitations To Public Participation In EIA Procedures In Malaysia

6.1 Introduction

There are five limitations to public participation in EIA in Malaysia that were identified in this thesis and which are discussed in this chapter. The limitations are: uncertainty as to EIA procedures in both the public and public officials' minds; limited access to information which can be subdivided into four points, that is, location, time, cost and technicality; strict rule of standing or *locus standi* to bring legal challenge; lack of public awareness of EIA procedures; and the complexity of the federal-state government relationship. The findings on these limitations were obtained from five data sources¹, namely, survey from public in selected affected areas and NGO; interviews with DoE and Planning Department; and case law.

6.2 Uncertainty of procedures

6.2.1 Decision-makers

DoE

D11. Paragraph 2 of section 3.4.7 of the EIA guidelines states if the project initiator believes that, in the national interest or due to proprietary rights, that part of the detailed assessment report should not be made available to the public, he can apply to the Director General for the information to be withheld from public scrutiny.

Section 4.7 of the guidelines states the public is invited to comment on proposed projects which have been subjected to detailed assessment, unless it is against the public interest.

¹ See chapter 3 for the methodology

a. What constitutes ‘public interest’ in this section?

Table D11.a: meaning of ‘public interest’

Department of Environment	1	No answer
	2	No answer
	3	Never use this section
	4	No answer
	5	Any public interest according to Malaysian Federal and State laws

Two respondents answered the question. According to respondent 3 they never used the section and according to respondent 5 they applies the interpretation as mentioned in Malaysian federal and state laws.

b. To department knowledge, how many reports have been withheld from public scrutiny?

Table D11.c: number of report withheld from public scrutiny

Department Environment	1	No answer
	2	No answer
	3	No answer
	4	No answer
	5	Not in record. All are displayed

According to respondent 5 who was the only one answered the question, they do not have the record and claimed that they displayed all the reports. The rest of respondents refused to answer as they have no know knowledge on it.

D12. Section 2.3.4 of the guidelines states that **in preliminary assessment some form of public participation is essential** and the following methods are generally suitable, namely, public opinion sampling, public meeting or workshops and regular meeting with a citizens committee.

Under section 3.4.4 of the guidelines it states that **public participation must be included in detailed assessment** to benefit the planning of the project and the need for public participation during detailed assessment and the form it should take should be discussed during the formulation of TOR for detailed assessment.

- a. Does the department consider the procedure for public participation in the preliminary assessment to be sufficiently clear and structured?

Table D12.a: whether public participation in PEIA is sufficiently clear and structured

Department of Environment	1	There are some weaknesses but it does not reject public participation totally. Public survey been done by the developer
	2	Based on the project. If there is any effect for the long term, then there is a need for public participation. Instruction from HQ only.
	3	For example: quarry 20 meters from residential area need to carry out public participation in the preliminary – depends on the activity
	4	Depends on individual public who involved. Education background and economic status can effect the public participation
	5	No answer

Various answers were given by four respondents. Respondent 1 said there are some weaknesses to public participation procedure in PEIA. Respondent 2 said it depends on instruction given by headquarter. According to respondent 3 it depends on the activity of the project and according to respondent 4 put the responsibility on the public to get themselves involve and participate in the project. This finding shows that public participation during PEIA process is not a mandatory process, and this finding supports the earlier finding on the examination of PEIA reports.

- b. What is the most common method of public participation used under preliminary assessment?

Table D12.b: method of public participation used under PEIA

Department of Environment	1	Public survey by the consultant
	2	Briefing/dialogue/JKKK
	3	Oral – public review Written – public survey/ briefing/ workshop Support from residents through JKKK Sample for public participation will be smaller than in DEIA
	4	Refer to the meeting with technical committee which has been appointed based on the activity
	5	No answer

Various methods are used by consultant. Finding shows that common methods used are public survey (according to respondents 1 & 3), briefing (according to respondents 2 & 3), JKKK (according to respondent 2 & 3). Respondent 3 stressed that the sample for public participation under PEIA is smaller than the sample in the DEIA. This finding indicates that the method used was in line with the methods recommended in section 2.3.4. of the EIA Guidelines.

c. What is the most common method of public participation used under detailed assessment?

None of the respondent answers the question. There are two possibilities why the respondents did not answer this question, either because the answer might be the same as the previous question² (see answers in Table D12.b) or most of the respondents are officers at DoE state level who deals only with PEIA (four out of five respondents are from state level and one from Headquarters).

d. To the department knowledge, is there any assessment done without public participation?

Table D12.d: assessment done without public participation

Department of Environment	1	There is, depends on location and case by case
	2	No answer
	3	At DEIA level, all public participation are conducted
	4	No answer
	5	No answer

Only two respondents answered the question. According to respondent 1 there was case where public participation is not done, however it depends on the circumstances of a case. However according respondent 3 at DEIA level, all public participation are conducted. Again, this finding indicates that public participation is not a mandatory process during PEIA stage, as majority of the respondents refused to answer the question. They refer to earlier answer on Table 12D.a

² Section 3.4.4 of the EIA Guideline proposed some suitable mechanisms for public participation during DEIA which include citizen committee (JKKK), public meetings and workshops, and public opinion sampling.

6.2.2 Case report

In the case of *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals*³, the respondents contended before the Court of Appeal that the project was governed by the EQA and the 1987 Order. They complained that they were not given a copy of the environment impact assessment (DEIA report) on the project and had been deprived of procedural fairness in that they were not given an opportunity to make representation in respect of the impact which the project would have upon the environment, before the decision to implement the project as made. In other words, they claimed that their right to participation in the decision-making process was denied and deprived.

The Court of Appeal in this case had decided on the issue whether or not the EQA applied to the project, and held that the EQA did not apply to the 'environment' that was the subject matter of the case and the respondent had not vested or other interest under the EQA upon which the Amendment Order could have any effect. Gopal Sri Ram JCA while making the judgment relates dams, hydroelectric power schemes, reservoirs and the like that must exist on land, as part of environment. As the land and river on which the project is to be carried out lie wholly within the State of Sarawak, the 'environment' in that case, in fact, referring to environment wholly belongs to the State of Sarawak, thus the Sarawak Natural Resources Ordinance 1949 applies. The decision was made based on Article 74 and the Ninth Schedule of the Malaysian Federal Constitution on the distribution of legislative power between the Federal and state governments.

This decision indicates few things:

1. 'Environment' is a multi-faceted and multi-dimensional concept. If the subject-matter involved land and river, which are under jurisdiction of a state legislative, then the EQA, a federal legislation, does not apply.
2. As EQA does not apply in this particular case, the right of public participation can be deprived, even though in DEIA process.

³ [1997] 3 MLJ 23

3. Paragraph 2 of section 3.4.7 of the EIA Guidelines was indirectly applicable in this case that '*in the national interest or due to proprietary rights, that part of the detailed assessment report should not be made available to the public*'. This case shows that the DEIA report can be withheld from public scrutiny.

Discussion

Paragraph 2 of section 3.4.7⁴ and section 4.7⁵ of the EIA guidelines put an exemption clause to public participation, in favour of public interest, national interest or due to proprietary rights. Paragraph 2 of section 3.4.7 of the EIA Guidelines states that the project initiator can apply to the Director General of Environment to restraint the public from scrutinising part of the EIA report if the project initiator believes the information in the report will affect national interest or due to proprietary rights. Section 4.7 of the EIA Guidelines gives a discretionary power to the DoE to restraint the public from giving any comment on a proposed project if they believes it is against the public interest. This clause seems to limit the public rights to information and participation because the term "public interest" or "national interest" may carry any interpretation in the name of protecting the interest of the public at large. It can be economy, social or even national security reasons. The EIA Guidelines did not state whether the DG of DoE has to give reasons or not if he exercises the exemption clause. Bearing in mind that Malaysia has not been overmuch growth in administrative-control systems such as parliamentary committees, ombudsmen, appeal tribunals and internal control systems within the administration⁶; the available administrative remedies might be certiorari, mandamus and prohibition against the public officials or bodies. However,

⁴ Paragraph 2 of section 3.4.7 of the EIA Guidelines states, 'If a project initiator believes that, in the national interest or due to proprietary rights, that part of the Detailed Assessment report should not be made available to the public, he can apply to the Director General of Environment for the information to be withheld from public scrutiny'.

⁵ Section 4.7 of the EIA Guidelines states, 'The public are invited to comment on the proposed projects which have been subjected to Detailed Assessment, unless it is against the public interest. Public comment must be made in writing and received by the secretariat of the review panel within forty-five (45) days from the first notification through advertisement in newspapers'.

⁶ Harding, A. Law, *Government and the Constitution in Malaysia.*, (Kuala Lumpur: MLJ, 1996)

findings in Table D11.a and Table D11.c show that the exemption clause is never been used by the project initiator or the DoE, the existence of the clause itself limits the right of public to participate in decision making process. Table D12.a shows that the DoE themselves were not sure whether the procedure for public participation in the PEIA to be sufficiently clear and structured. Based on the findings, the procedure of public participation seems very much depends on the initiative of the project initiator, based on the nature of their activities and the willingness of public to get themselves involve in such a project. Although Table D12.b shows that the project initiator did carried out the method of public participation in PEIA as recommended by the EIA guidelines, finding in Table D12.d shows that public participation procedure in PEIA is not stricly followed because it might depends on location and case. However the finding did point out that the procedures in DEIA is strictly followed. These findings support the earlier findings under the examination of EIA reports where limited number of public participation was reported under PEIA as compared with DEIA.⁷

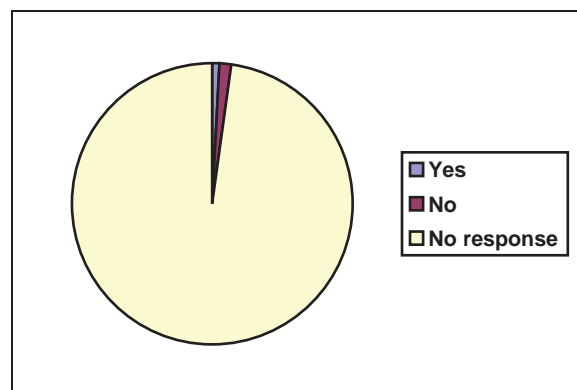
6.3 Limited access to information

(a) Location

Q 9: Did you think the location where the report is displayed was easily accessible?

Sample 1: Public

Figure 14: Whether the location where the report displayed is easily accessible



⁷ See findings in EIA reports at chapter 5 for further discussion.

1.4% of the respondents said the location is not easily accessible and 0.8% of the respondents said the location is easily access. A small percentage of respondents who responded on the question supported the earlier findings in Chapter 5 on the lack of awareness and knowlede amongst the public on the importance of public participation and EIA process.

Sample 2: MENGOs

Table 27: whether the location where the EIA report displayed is easily accessible.

MENGOs	Response
1	No
2	Not applicable
3	Not applicable
4	Yes
5	No

Two out of three MENGOs claimed that location where the EIA report displayed was not accessible.

ii. DoE

D9. The guidelines states that as soon as the review panel receives the report, the secretary to the review panel will require the project initiator to inform the public through advertisement in both major Bahasa Malaysia and English newspaper, three times weekly lapse (intervals). The advertisement should state;

- a. That a detailed assessment report has been received for review;
- b. The nature and the location of the project;
- c. Where the copies of the report are available for review and comments and where they can be obtained and the cost of each copy;
- d. The duration of the display for a period of 30 days; and
- e. That any representation or comments by the public or concerned environmental related agencies, on the report should be made in writing and forwarded to the secretariat of review panel not more than forty-five (45) days from the date of the first notice or within the time specified in the advertisement.

a. Where will the report be displayed?

Table D9.a: location of EIA report display

Department of Environment	1	State DOE & HQ for reference and library
	2	State departments, public libraries
	3	No answer
	4	Utusan Malaysia (advertisement) & website
	5	At HQ DOE library, at state DOE library and public library where the project will be carried out.

Finding shows that the EIA report was display at DoE headquarter office (according to respondent 1 & 5), DoE state office (according to respondent 1, 2 and 5), public library (according to respondent 2 & 5) and through advertisement and DoE website (according to respondent 4). This finding indicates that a variety of methods are used in how the EIA reports displayed.

b. Does department keeps record the number of public who come and see the report?

Table D9.b: keeping record the number of public who come and see the report

Department of Environment	1	No record
	2	Register at the counter only (manually)
	3	No answer
	4	No answer
	5	DOE do not have any record

From five respondents from DoE only three respondents answered the question. Two respondents (1 & 5) said they did not have any record of number of public who come and see the EIA report. According to respondent 2, they did ask the public to register at the office counter, however he did not mention about keeping the record properly. This finding indicates a poor managerial practice on part of DoE in keeping record the number of person who come and review the EIA report.

c. Where can the public get the copy of the report?

Table D9.c: getting a copy of report by public

Department of Environment	1	Write to the developer
	2	None
	3	No answer
	4	Copy is available at HQ DOE and charge will be imposed depends on the report
	5	No. because copyright, report belongs to the developer, based on the copyright law. Report is only for reading.

Only four respondents answered the question. Three of them said they did make the copy available for sale, however, according to respondent 1 if the public need a copy of the report he may write to the developer. According to respondent 5, copy of report which is available at the department is for reading only, not for sale. However, according to respondent 4, public can get a copy of report at DoE headquarter and charge will be imposed depending on the report. This finding indicates that the DoE practices both active and passive informations as set by the Aarhus Convention. Active information by making the EIA report available at DoE headquarter, and passive information by making the EIA report available upon request; and subject to the developer's consent of selling and charges.

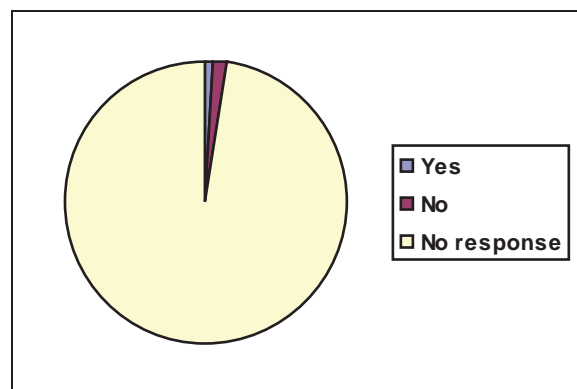
(b) Time

Section 3.4.7(iv) & (v) of the EIA Guidelines provides that the DEIA report will be displayed for a period of 30 days, and any representation or comments by the public or concerned environmental agencies, on the report should be made in writing and forwarded to the Secretariat of Review Panel not more than forty-five (45) days from the date of the first notice or within the time specified in the advertisement.

Q10: Did you think the duration of time given by the notice for you to review and comment on the report was adequate?

Sample 1: Public

Figure 15: Whether the duration of time to review the report is adequate



Finding shows that from 2.4% of the respondents who answered the question, 1.2% of the respondents agreed that the duration of time given for the public to review the report is adequate and 1.2% of the respondents said the duration of time given is not adequate. A small percentage of respondents who responded on the question supported the earlier findings in Chapter 5 on the lack of awareness and knowledge amongst the public on the importance of public participation and EIA process.

Sample 2: MINGOs

Table 28: whether the duration of time to review the EIA report is adequate

MINGOs	Response
1	Yes
2	Not applicable
3	No
4	No
5	No

Majority of the MINGOs responded that the duration of time given by the notice for public review and comment was inadequate. No further explanation give as they were only yes or no answer.

DoE

e.Does the department allow any oral representation besides written comments from the public?

Table D9.e: allowing oral presentation besides written comments from the public

Department of Environment	1	No answer
	2	No answer
	3	No, written only
	4	Not sure
	5	No answer

The question was answered by two respondents only (3 & 4). Respondent 3 said only written comment is allowed and respondent 4 is not sure about the status. Majority of respondents did not answer the question because State DoE does not handle DEIA process.

- f. There is a note under section 3.4.7 of the guideline states the time frame specified above are subject to change from time to time. However, adequate notice will be given.
- i. What constitutes an adequate notice under this section?

Table D9.f.i: adequate notice

Department of Environment	1	45 days
	2	No answer
	3	Depends on the Director General – based on the difficulty
	4	No answer
	5	Notice for display the EIA report is 30 days never been extend or reduce. Will be informed.

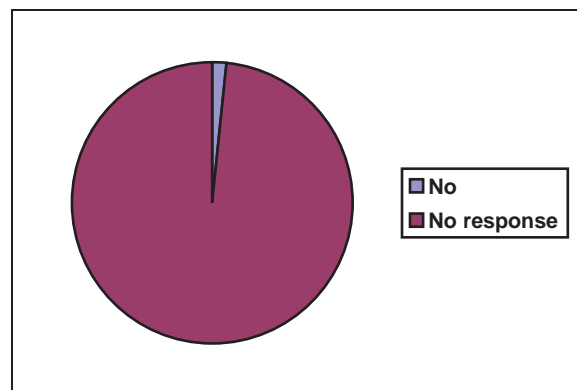
The answers given was varies. According to respondent 1, it is 45 days, however according to respondent 5 it is 30 days and never been extended or reduced before. Respondent 3 said it depends on the DG because it may differ from case to case. This finding indicates that the adequate time set by EIA Guidelines is subject to further extension.

(c) Cost

Q 11: Did you think the cost of a copy of EIA report was reasonable?

Sample 1: Public

Figure 16: whether the cost of a copy of the report is reasonable



Only 1.8% of the respondents answered the question and all their answers are the cost is not reasonable. A small percentage of respondents who responded on the question supported the earlier findings in Chapter 5 on the lack of awareness and knowledge amongst the public on the importance of public participation and EIA process.

Sample 2: MENGOS

Table 29: whether the cost of a copy of the EIA report is reasonable

MENGOS	Response
1	No
2	Not applicable
3	Yes
4	No
5	No

Majority of MENGOS claimed that the cost of a copy of EIA report was unreasonable. This indicates that the price of the EIA report is high.

DoE

d. The guidelines allow the project initiator to charge the detailed assessment report to cover printing and postage costs.

i. How much is the charge?

Table D9.d.i: charge of the report

Department of Environment	1	No answer
	2	No answer
	3	RM10,000 paid to the consultant. Charge to the public, minimum RM200
	4	No answer
	5	All cost is bear by the developer. DOE do not keep record of the cost, and with that developer may impose any charge to anyone who needs the report.

Only two respondents answered the question. According to respondent 3, the developer will pay about RM10000 to the consultant for preparing the report and the developer will charge the public, at minimum, RM200 per copy. This finding supports the earlier finding when majority of MENGOS responded that the cost was unreasonable.

ii. Has the department ever advised or been asked to advise on the cost?

Table D9.d.ii: advise the developer on the cost

Department of Environment	1	No answer
	2	No answer
	3	No
	4	No answer
	5	Not relevant

Two respondents answered the question and both of them said they did not advise the developer on the cost of copy of EIA report (respondent 3) and according to respondent 5 it is not relevant to do so. This finding indicates that the developer can charge a copy of an EIA report at any rate.

iii. Is there any guideline on limitation of the cost?

Table D9.d.iii: guideline on limitation of the cost

Department of Environment	1	No
	2	No answer
	3	None – will be controlled in term of the consultant professionalism including cost, etiquette etc
	4	No answer
	5	Not relevant

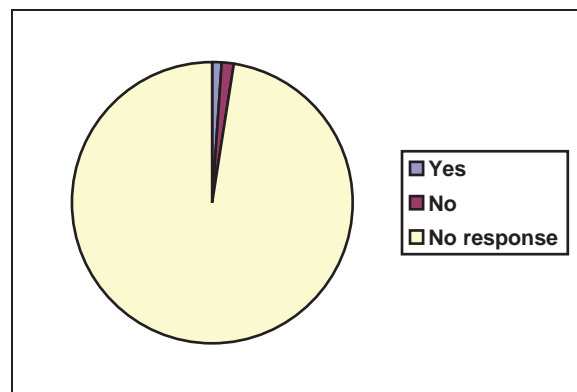
Finding from three respondents who answered the question is there is no guideline to limit the cost of copy of the EIA report. According to respondent 3 the limit of cost is controlled in term of the consultant professionalism.

(d) Technicality

Q 12: Did you understand the contents of the report?

Sample 1: Public

Figure 17: Understand the content of the report



When the respondents were asked whether they understood the contents of the EIA report, 1.2% of the respondents said they understood the contents and 1.2% of the respondents said they did not understand the contents.

Sample 2: MENOs

Table 30: understand the content of the EIA report

MENOs	Response
1	Yes, seek expert to understand the content.
2	Not applicable
3	Yes
4	Yes. Seek expert help to understand the content.
5	Yes & no in certain aspects. Yes seek expert help to understand the content.

Q 12.1: If no, did you seek any expert help?

Sample 1: Public

Figure 18: Seeking expert help to understand the contents

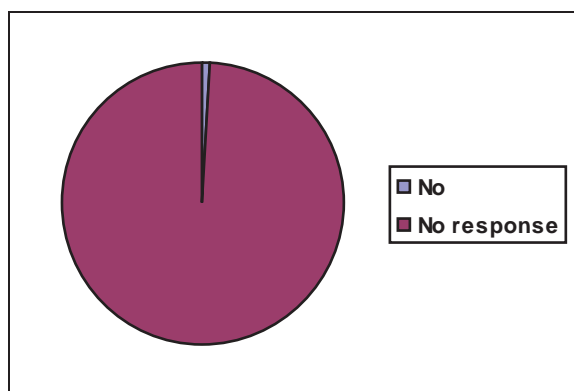


Figure 24 shows that the respondents (1.2%) who said they did not understand the contents of EIA report did not seek any expert help to make them understand it. A small percentage of respondents who responded on the question supported the earlier findings in Chapter 5 on the lack of awareness and knowledge amongst the public on the importance of public participation and EIA process.

DoE

D10. The report submitted by the project initiator is more on technical data.

b. Has the department ever advised the project proponent to submit non-technical summary?

Table D10.a: advice the developer to submit non technical summary

Department	1	Executive summary - yes
	2	No answer
	3	Did not advice. Executive summary only. In form of CD – starting June 2007

of Environment	4	Yes, depends to whom the review will be given
	5	Yes, in executive summary it is non technical report. EIA report is a prediction research using mathematical, modelling, even socio-economic survey requires statistical analysis.

Finding shows that executive summary of the EIA report was prepared in non-technical summary form. This finding indicates that public might be able to understand the summary of the EIA report.

6.3.1 Case Report

In the case of *Abdul Razak Ahmad v Ketua Pengarah Kementerian Sains, Teknologi & Alam Sekitar*⁸, Abdul Razak commenced an action to seek a declaration to grant him the right to view the EIA report in respect of a development in Johor Bahru. Haidar J held that as a citizen of Malaysia and as a resident of Johor Bahru, the plaintiff had a right to the EIA report to determine to what extent the projects impact on the environment would affect him specifically, and the residents of Johor Bahru in general. Therefore, the plaintiff had an interest to protect. The judgment in this case shows that the right to information has been given to the plaintiff as a reason that the project was directly affected him. It also shows that a wide view of ‘interest’ and locus standi to challenge the refusal of access.

However, in the case of *Ketua Pengarah Jabatan Alam Sekitar & anor v Kajing Tubek & Ors and other appeals*, Mokhtar Sidin JCA stated that, ‘*The report under the EQA must be approved by the Director General; and under the Ordinance, by the Board. As can be seen from the provisions of both these sections, there is no requirement for the report to be made public*’. The provision in EQA, however, was further regulated with the EIA Guidelines but no such guideline or handbook exist under the Ordinance. The judge decided that as the Ordinance shall apply and since there is no requirement for the report to be made public, the respondents have no cause of action in the appeal case. Furthermore, according the judge, ‘*Even if section 34A of the EQA applied, the respondents would only be given copies of the report if they had*

⁸ [1994] 2 CLJ 363

asked for it. There was no accrued right that the report must be distributed to the public without the public asking for it. It indicates that the Court of Appeal in this case applied only right to passive information as set by the Aarhus Convention.

Discussion

There are four limitations to right to information; the location where the report is displayed, the duration of time given for public to participate, the cost to purchase a copy of the report and the technicality of the content of the report.

Section 4.7 of the EIA Guidelines provides that copies of DEIA subject to public scrutiny should be displayed at every office of the DoE, public libraries and the relevant local authority offices. The finding from DoE shows that the EIA report was displayed at DoE headquarter, all state DoE and public library. Surprisingly, MENGO being a NGO which actively participated in the EIA process, viewed that these location was not easily accessible. It indicates that more locations should be added so that public can easily review an EIA report.

Section 3.4.7 of the EIA Guidelines also provides 30 days duration of time for displaying the advertisement calling for review, and 45 days duration of time for representation or comment. According to the EIA Guidelines and DoE, these time frames are subject to change from time to time. MENGOs viewed that this time frame was inadequate. Perhaps the time frame set by the DoE could be subjected to a location where an EIA report is displayed. For example, if the EIA report is displayed at a remote area where accessibility become an issue, more time should be given to the public to review such EIA report.

Section 3.4.7 of the EIA Guidelines also provides that, *'on submitting a DEIA report for review, the project initiator must notify the Secretariat of the Review Panel where the public may obtain copies of the report and the cost of each copy'*. This provision indicates that a copy of the EIA report is only available to the public upon request, and it subject to certain charges. Article 4 of the Aarhus Convention, on passive information, requires a public body to make information available upon request and supply it. However, this

provision only applies to public bodies. The finding shows that the DoE has no control over the cost of EIA report. This indicates that the DoE should find a mechanism to disseminate the information contained in the EIA report without incurring so much cost.

The technicality of the content of the report is another limitation to the right to information. Chapter 6 of the EIA Guidelines provides a set of guidelines for preparing DEIA reports. Section 6.2 (i) states that, *'the preparation of Executive summary is a critical part of the report, because it is a part that summarised the relevant issues pertaining to the project'*. The finding from DoE reflected that the executive summary was submitted in non-technical form. It indicates that the public should be able to understand the summary of the DEIA report. However, expert opinion should be obtained for a better understanding on the EIA content, as practiced by the MENGOs.

It is important to note here that the findings from the public were very discouraging. The responses were very small and there were no effort to acquire further explanation and information on the EIA report by asking an expert opinion. These findings, again, show the lack of awareness and knowledge among the public on the importance of public participation and the EIA process.

The law cases indicate two main points: (1) a person has a right to EIA report only if the EIA proposed project affected him specifically and he has interest to protect; (2) Right to EIA report is a right to passive information that a person may requests to the authority. It also indicates that if the public has lack of knowledge on acquiring EIA information, such information will not be supplied to them.

6.4 Strict rule of standing

6.4.1 Decision-makers

DoE

D14. There is no definition of public under the EQA or the guidelines. However section 3.4.7 of the guidelines states the public or concerned environment related agencies can make representation or comments on the report.

a. Please confirm how the department interprets the word ‘public’.

Table D14.a: Interpretation of ‘public’

Department of Environment	1	Those who are not involve in the development. Including NGO
	2	Anybody including NGO. Review panel – one of the committee members is NGO
	3	Public who may receive the impact either directly or indirectly including the NGO
	4	No answer
	5	No answer

The finding indicates that NGO can be considered as part of the public. This finding was very interesting because the case law in *Abdul Razak Ahmad* laid down a principle that only those who are ‘affected specifically’ and ‘has interest to protect’ in an EIA proposed project to be given a right to EIA report.

b. Please list down those agencies or bodies from whom the department allow representation.

Table D14.b: agency or body from whom the department allows representation

Department of Environment	1	Any agencies or organisations
	2	Depends on type of project. For example, in constructing a dam wildlife department may involved
	3	Neighbouring factory can object
	4	Not sure
	5	No answer

This finding shows that environmental related agency or body may include any agency. However, the respondents did not specifically mention NGO as part of the organisations allowable to make such representation.

6.4.2 Case report

The Court of Appeal in the *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors & Other Appeals*⁹ gave a more restrictive interpretation of the locus standi of objectors in EIA cases, restricting access to the court to challenge decisions. In that case, there were about 10,000 natives in occupation of that EIA proposed project area. The respondents were three such natives and they and their ancestors had, from time immemorial, lived upon and cultivated the land in question. While the project had deprived them of their livelihood and their way of life, all those affected by the project had been resettled by the state government and their customary rights had been extinguished in accordance with the Land Code (Sarawak Cap 81).

Allowing the appeal, the Court of Appeal held on the locus standi issue that, *'there were persons, apart from the respondents, who were adversely affected by the project. There was no special injury suffered by the respondents over and above the injury common to others. The action commenced by the respondents was not representative in character and the other affected persons were not before the court'*. It was established that since the respondents were three natives out of about 10,000 natives in occupation of the land, the respondents had no locus standi to represent the rest of the native peoples who did not bring the case before the court.

The principle established above shows that, although the respondents were directly affected by the proposed EIA development project, the fact their number was smaller as compared to the whole population who were affected by the development project meant that the respondents could not consider themselves as representative of the whole community. This also indicates that, while anyone can review and comment on an EIA report, only those who have locus standi in this narrow sense have the right of access to the courts to seek judicial reviews.

⁹ [1997] 4 CLJ 253

Discussion

Findings in Table 14.a shows that ‘public’ can be anyone including the NGO. Table D14.b shows various departments or agencies which can make representation and give comment on the report. However, decision by the Court of Appeal shows that only those who has locus standi can have access to justice in the court. It seems that although the DoE allows the public (including NGO and various agencies) to participate in makin representation and comment on the EIA report, their rights are limited. They cannot subsequently challenge the decision in the court.

6.5 Lack of public awareness

6.5.1 Public and MENO

Sample 1: Public

Q 15: how many times have you give your review and comment on EIA report?

Figure 19: Frequency in reviewing and commenting the report

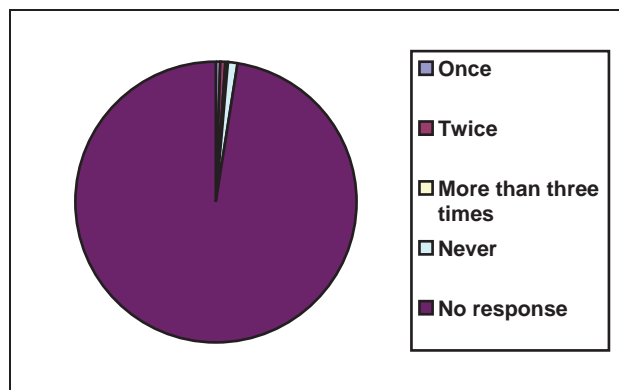


Figure 27 shows that 1.0% of the respondents never reviews and comment an EIA report, 0.6% of the respondents had reviewed a report once, 0.4% of the respondents had review a report twice and 0.4% of the respondents had review a report more than three times. This finding indicates poor public participation in EIA process. This also supports the earlier findings on lack of awareness on the importance of public participation and EIA process.

Sample 2: MINGOs

Table 31: frequency in reviewing and commenting EIA reports

MINGOs	Response
1	More than three times
2	Not applicable
3	More than three times
4	More than three times
5	More than three times

All MINGOs have reviewed the EIA reports more than three times. This finding also supports the earlier findings on MINGOs participation in EIA process as well as good knowledge on EIA process.

6.5.2 Decision-makers

DOE

D19. Do you consider the public awareness of EIA to be satisfactory?
(Please explain)

Table D19: level of public awareness on EIA

Department of Environment	1	There is public awareness. At state A the level is high
	2	Not satisfactory. Most of people do not know the purpose of EIA. The approach is not complete on part of DOE themselves.
	3	Lacking, just to approve the project, not reviewing the environment itself. Developer used EIA just to get the project approved. Public do not aware about EIA & its limitation
	4	Lacking. Because only when the project is operating or done, only the public can feel the impact to the environment and people. Report which has been displayed is only for reading. They are not critical enough to think about the impact of the development.
	5	No answer

Findings show that out of four respondents who answered the question three agreed that there is a lack of awareness among public on EIA issues. This indicates that the DoE is alert to the low level of awareness among the public on EIA.

D20. Do you consider the level of public participation generated by the law to be satisfactory?

Table D20: level of public participation generated by the law

Department of Environment	1	Enough but the public does not know how to use it
	2	Not enough/not satisfied
	3	Enough for now. It just lack of the awareness
	4	No. public need to be more exposed to EIA procedure particularly for high risk project. Then, they have to give some input because they are the receptors to the project.
	5	No answer

The finding shows that even though a few of respondents viewed that the law is sufficient yet awareness became the issue. This finding also indicates that more information on EIA process should be given to the public to educate them and to create awareness among them.

D21. Do you have any recommendations that the department wishes to make to enhance or restrict public participation in EIA?

Table D21: recommendation to enhance or restrict public participation

Department of Environment	1	Invite public to get involve in certain events or occasions
	2	Approach agency and high learning institutes – give briefing on EIA
	3	In EIA context, public view is very important at PEIA. No need to submit a thick report, the important thing is the control is there. EIA is not important, what is important is the document which can control the environmental impact.
	4	Present it to the public. Publish in the DOE website & newspaper
	5	No answer

Suggestions made by the DoE show that public participation is a very important process. All parties must get involve in ensuring the effectiveness of public participation as a tool in EIA process, that is, DoE should deliver clear message on EIA process to relevant agencies and higher learning institutions (respondent 2), public participation during PEIA stage should be mandatory process (respondent 3), and information on EIA should be more accessible, for example through DoE website (respondent 4). It must be some proactive actions taken by the DOE in enhancing public participation.

Planning Department

P12. Do you consider the public awareness of EIA to be satisfactory?

Table P12: satisfactory level of public awareness in EIA

Planning Department	A	Lacking
	B	Looked at burning of rubbish. Lack of awareness. If we take into account other pollutions; the noise, smell control, water discharge, all are need for EIA. For example, people who are operating 'batik' at residential area, the water will discharge to a drain. That's why we said public are not aware about these things. After all it affects the environment.
	C	Awareness among technical people is good. Public only aware when the project affected them.
	D	Public are more aware now. The level of awareness is high. When the level is high, it makes the job easy.
	E	Two types of public; people or company? On part of developer, they take it as a burden; preparing the report, complying with the conditions. On part of public, it is very lacking. Sometimes they just passed by without looking. No awareness at all. The mentality is not there. Our publicity is also lacking.

The findings show that most of the planning authorities agreed that there were low level of awareness among the public on EIA. This findings support the earlier findings on view given by the DoE and level of public participation in representing and commenting the EIA reports.

P13. Do you consider the level of public participation generated by the law to be satisfactory?

Table P13: satisfactory level of public participation generated by law

Planning Department	A	In the context of Act 172, it consists of; - level of preparation of plan - level of planning permission – neighbouring lot - level of appeal board
	B	I'm don't know about the procedure, whether it open to objection or not. If we refer to the report, it's more on the environment itself, about the water, sometimes I didn't understand the EIA report because the term used are different. If they presenting the report, yes, they will call us. Sometimes I do understand, sometimes not. We only consider our part, technical part from planning context. For planning, for example hillside, we refer to environment. Public are not aware, sometimes the owner himself does not know. We put condition on what we need, what are the conditions on EIA part, we do not know. If a developer apply for planning permission and bring together the approved EIA report,

		we will not conduct any public objection. We leave it to DOE.
	C	Enough at the level of structure plan & local plan
	D	At early planning stage, the avenue was provided, especially at the stage of structure plan and local plan. At the stage of TOR, there is also an avenue. At development stage, the same process is given including development of lots.
	E	Lacks of publicity in public awareness. The chances are there. Only the publicity is lacking. Although the period for objection is one month, we do extend it because we want them chances to object. The awareness is low.

The responses given by the planning authorities were mainly based on their Act, that is, TCPA. However, a few of them agreed that the TCPA provides a satisfactory provisions on public participation at local and structure plans, as well as in planning permission process and appeal procedures. This finding also indicates that the planning authority did not exercise overlap jurisdiction as provisions on EIA process is totally under DoE's concerned.

P14. Do you have any recommendations that the department wishes to make to enhance or restrict public participation in EIA?

Table P14: recommendation to enhance or restrict public participation in EIA

Planning Department	A	Participation through internet/e-publicity
	B	An EIA report is normally prepared for that particular lot of land only. For example an EIA report for area "A", they will make the report for that area only. However the impact might not only occurs on that plot of land. It would be better if the EIA report could reflects the impact on neighbouring lots as well.
	C	A program called Council with people, involving assemblyman, will give a chance to people to get involve in local council activities
	D	Enough
	E	I think DOE need to play their roles. All this while DOE did not really play their roles in dealing with public. Maybe their can increase the public awareness & participation.

This findings support the earlier views from DoE that all parties should be involved in ensuring the effectiveness of public participation. Suggestion to allow public participation through online is a good one. However, leaving the responsibility to create awareness and educate a public only to one department

is not a good suggestion as ‘environment’ itself is a common asset shared by all people.

Discussion

Lack of awareness among the public can be seen from the low percentage who participated in representing or commenting on the EIA reports. The views from DoE and planning authorities also support this argument. It also relates to the earlier findings on low level of awareness on the importance of public participation (Chapter 4) and EIA process (Chapter 5). This will affect the effectiveness of EIA process, particularly in decision-making process.

6.6 Complexity of federal-state government relationship

6.6.1 Decision-makers

D15. Department of Environment and planning authorities come under different ministries.

b. How do the departments coordinate with each other?

Table D15.a: coordination among the departments

Department of Environment	1	Through One Stop Agency (OSA). It ss a coordination amongst technical agencies including JPBD (the planning authorities)
	2	One Stop Centre (OSC) meeting
	3	DOE is the standing committee in OSC
	4	Through one stop agency/meeting which discuss matters relevant to the report. Decision on the approval of the report will be informed to the agencies which attended the meeting
	5	No answer

This finding indicates that there was a centre/agency established to coordinate the works not only between planning authority and DoE, but also other technical agencies involved in the application of planning permission. This finding also indicates the establishment of these departments under different ministries was not an issue. The set up of OSA/OSC will speed up the EIA development projects.

Table P11.a: coordination among ministries/departments

Planning Department	A	Not relevant because section 5(2) is not applicable
	B	Under the committee I mentioned earlier. DoE is one of the technical departments. The one who making decision on planning application is the local authority. Actually, OSC was just started. Before, it comes under The Committee of Planning and Development.
	C	At one stop centre level (OSC). OSC only manage the planning application process. The final stage of approval is local authority
	D	Because of the technical requirement, DOE will review the EIA report. However, there is a committee of sensitive environment (coordinate by state) and it is chair by state secretary
	E	At OSC. OSC will ask the applicant to settle it with relevant departments. OSC only receive a clear application, a complete one. From that they will decide. Project related to EIA, they will refer to the DoE for approval.

This finding supports the earlier finding on coordination between DoE and Planning authority through One Stop Centre or One Stop Agency.

c. Which other ministries are usually involved in environmental management?

Table D15.b: departments/ ministries involved in environmental management

Department of Environment	1	Drainage department, Ministry of transportation, Ministry of Housing & Local government, Ministry of Health, and other relevant departments
	2	Local council, Economic Planning Unit
	3	Almost all departments under Ministry of Natural Resources & the Environment
	4	Ministry of Natural Resources and the Environment, Ministry of Health, Ministry of Science, Technology and Innovation, and local authority
	5	No answer

This finding shows that various departments and agencies are involved in making decision in development process. It also indicates that the establishment of OSA or OSC help them to coordinate with each other.

Table P11.b: departments/ministries involved in environmental management

Planning	A	No answer
	B	A lot. Ministry of Works, Electricity, Sewerage department, state planning authorities, Department of Land and Mineral, Drainage Department
	C	13 technical departments. Among others are; state planning authorities, Ministry of Works, Drainage

Department		Department, department of Electricity, Telecommunication etc
	D	4 departments involved directly including DOE
	E	OSC have their list of committees. We just amend it a bit. At state E, we changed Department of Agriculture to MADA. Others, like Ministry of Works, state planning authorities, Ministry of Health, Drainage Department, Department of Land & Mineral, DOE, telecommunication, sewerage department & water department.

This finding supports the earlier finding on the good coordination among the departments and agencies.

c. Does the variety of ministries affect the environmental management?

Table D15.c: whether variation of departments/ministries affect the environmental management

Department of Environment	1	Cooperation among each other
	2	It does have effect. It brings problems to DOE. Limitation of DOE – lack of manpower. For example, in state 2, there is only one officer and an assistant
	3	Positive and negative impacts
	4	Yes. This will give input how to improve the environment and make the developer more observe about their responsibility
	5	No answer

This finding indicates negative and positive effects. On negative side, the DoE claimed that they were lack of manpower to be involved in the OSA or OSC meetings. On positive side, cooperation was established and developer became more observed. This finding also indicates that the establishment of OSA or OSC reduces the complexity of the federal-state relationships.

Table P11.c: does the variation of departments/ministries affect the environmental management

Planning Department	A	No answer
	B	No effect
	C	Coordination by OSC, to reach an agreement
	D	Before the establishment of OSA, it takes 30 days for the departments to give their comment.
	E	We do see some overlapping in the reviews, for example for constructing a road, Works department gave their comment, Drainage Department will also give their comment. However, after discussion, we the local authority will decide.

This finding indicates that importance of OSA or OSC in coordinating the comments from various technical departments. However, planning authority pointed out that the final say in deciding whether or not to approve the development plan is their decision.

Discussion

Article 74 and Ninth Schedule of the Malaysia Federal Constitution divides the legislative power between the federal and state governments. Such division includes executive powers as well. Such demarcation of powers, previously, caused a delay in decision-making in development application process, particularly if it involved EIA proposed projects, because various technical agencies were involved in giving their technical comments. However, this issue was reduced with the establishment of OSA or OSC, which coordinate all technical agencies. It also shows that the complexity relationship between the federal-state governments on that matter had been reduced.

6.7 Conclusion

Earlier in the introduction of this Chapter, five limitations to public participation in EIA in Malaysia were identified, which were: uncertain EIA procedures, limited access to information, strict rule of standing, lack of public awareness, and complexity of the federal and state government relationship. However, the findings show that the complexity of the federal and state government relationship has been reduced with the establishment of OSA or OSC. Other limitations can be divided into three aspects; (1) legal, (2) management, (3) social. The legal aspect mainly involves the uncertainty of law on public participation in PEIA process, and the principle of locus standi laid down by the Court. The management aspect involves limited access to information mainly on accessibility to the location where the EIA report is displayed, duration of time for representation and comment, as well as the cost of a copy of EIA report. The social aspect involves the task of creating more awareness and educating the public on EIA, so that they can effectively participate in the decision-making process.

PART III

CONCLUSION

Chapter 7. Conclusion And Recommendations

7.1 Introduction

There were five research questions posed by this research project. The first question is what rights to public participation in decision making are given by EQA and EIA Guidelines? The second is what are the existing limitations to public participation in decision making under EIA in Malaysia? The third is what is the level of public awareness of and public participation in the EIA process in Malaysia? The fourth is how would a new constitutional right to public participation in decision making be viewed by stakeholders? Finally, the fifth question is how might one improve the efficiency of EIA as a tool of environmental decision making and environmental management in Malaysia?

This thesis was structured around these research questions, and the findings are discussed in the following chapters.

Chapter 2 presents the literature review on the concept of ‘environmental rights’, and addresses research question 4.

Chapter 3 presents the details of research methodology.

Chapter 4 presents stakeholders’ perspectives on the importance of ‘environmental rights’ and public participation in environmental decision making, and addresses research question 4.

Chapter 5 presents environmental impact assessment in Malaysia, and addresses research question 1.

Chapter 6 presents limitation to public participation, and addresses research questions 2 and 3.

This chapter presents the conclusions and recommendations of the study, and addresses the fifth research question of how the efficacy of EIA as a tool of environmental management can be improved in the Malaysian context.

For EIA to be an effective tool of environmental management, it should be iterative, engaging public participation at every stage from the initial preparation of the development proposal, to its consideration and revision during the development control process, and through to the decision on planning permission and beyond. It should also be looking forward, facilitating the design and refinement of project management both during the development control stage, and beyond that into the life of the development itself. It should facilitate the prediction of development outcomes and problems, and allow the reshaping and structuring of development to provide solutions and mitigate environmental concerns such as through the use of planning conditions and agreements. The research questions were designed to enable the present research project to evaluate the extent to which EIA as applied in Malaysia achieves these objectives.

The conclusions in this chapter are divided into two parts: (i) specific answers to the individual research questions; and (ii) overall conclusions leading to specific recommendations for reforms to Malaysian law and planning practice.

7.2 Rights to Public Participation in Decision Making Provided in the EQA and EIA Guidelines (RQ1)

The issues raised by RQ1 were discussed in chapter 5. These conclusions are presented under five subheadings: (1) current knowledge and practice on EIA, including public and decision makers' responses on EIA in general; (2) the right to information, including source of information on EIA and right to information provided by the decision makers; (3) the right to public participation, including public and decision makers' responses on the right to public participation; (4) the right to access to justice; and (5) an examination of EIA reports.

7.2.1 Knowledge and practice of EIA in general

(a) Public's response on EIA in general

Data from the survey of members of the public in Malaysia showed that there is a lack of knowledge on their part about the existence of EIA and its procedures (Figure 1); and for those who were aware of the existence of EIA (Figure 1), most could not explain the nature of EIA (Figure 1.1). The majority of the public in Malaysia also have little knowledge of EIA procedures (Figure 2). However, the majority of those who claim to have a knowledge of EIA could explain the relevant procedures fairly accurately (Figure 2.1).

(b) Decision-makers' responses on EIA in general

The DoE claimed that both PEIA and DEIA processes were carried out in accordance with the EIA Guidelines (Tables D1 and D2). The main focus of Planning authorities was on the development project as a whole and any matter pertaining to EIA would be passed on to the DoE for their comments and approval (Tables P1.a, P2 and P3). Interviews with respondents from decision makers show that the DOE is the approving authority for EIA reports and the Planning authorities is the approving authority for the whole development project, including the EIA (Table P2).

7.2.2 Right to information

(a) Sources of information on EIA

Data from the survey showed that information on EIAs does not reach the public in Malaysia. Media such as television and newspaper, although commonly viewed or read by the public (see Figure 3), cannot effectively act as a source of basic information on EIAs because the media only report on current developments in certain projects and related issues. Pamphlets (Figure 3) which provide basic information on EIA are only available at a limited number of places such as the DoE and MENGO offices; and

although the DoE's website which is a very good source of information on EIA, it is not commonly used by the public (see Figure 4).

(b) Right to information provided by the decision-makers

According to the DoE, the information on EIA of individual development projects is regularly updated on their website, and each state's DoE needs to send the latest information every week to DoE headquarters (Table D3.b). However, as approving authorities for the whole development project, planning authorities only keep information on the development project based on the planning application and not information relating to the EIA carried out on a development project prior to development consent being given (see Tables P4, 4.a and P4.b). There is no systematic or central database or filing of information on EIA (see Tables P5 and P5.a).

7.2.3 Right to public participation

(a) Public's response on the right to public participation

The public in Malaysia did not actually exercise their right to public participation. Data from the respondents of the public affected by development projects show that none of the public in the affected areas went to the official location where the full EIA reports were displayed (Figure 6.2); none of them bought copies of full EIA report (Figure 7 and & Table 7.1); none of the public had ever seen a full EIA report (Figure 6.2); and there was no effort was made by the public to find out more about the content of the EIA report and the impact of the proposed project on the local environment. 15% of the respondent, who claimed they had reviewed the report (see Figure 8) actually did not see the full EIA report, did not go the the official location where the report was displayed, and did not buy a copy of the report. Their viewing of the 'EIA report' was actually based upon the objection petition which was brought to them for their signatures by other interested parties such as NGOs (Figure 6.2). The majority of the public did not view the reports because they were considered to be too detailed, or the public were not interested in the

report, were not convinced by the report or did not know that they needed to view them (see Figure 8.1).

(b) Decision-makers' responses on the right to public participation

Department of Environment (DoE)

Although the DoE claimed that both PEIA and DEIA processes were conducted in accordance with the EIA Guidelines (Tables D1 and D2), the findings from interviews with the respondents of decision makers show that there was no standardisation in publicising the DEIA reports (see Table D7.c) which may have been in newspaper and on the website or displayed at the counter for the public to comment. The DEIA process involved monitoring and control at the federal level; and both federal and state DoE offices are supposed to follow the EIA Guidelines strictly. The DoE also did not record the numbers of the public who came to review and comment upon the EIA reports (see Table D8.a).

Planning authorities

Under the Town and Country Planning Act 1976, there is no room for public participation in a project at the planning application stage, because most local authorities have already gazetted their local plans (Table P6.a). Also the general public are not allowed to scrutinise applications for planning permission, with the exception of those who have a direct interest in the application, that is, the applicants themselves (see Table P8). However, the approval of an application for planning permission is determined at the level of a committee which consists of officers from various departments, including the DoE. At this stage, the views of the DoE must be taken into account before any decision concerning project is made (see Table P9.a).

7.2.4 *Right to access to justice*

Although some members of the public in Malaysia who were interviewed claimed that they had knowledge of the right to appeal in EIA matters (see

Figure 14), DoE records show that no appeal case had ever been filed with the Appeal Board (see Table D18.a). Although records from the DoE showed that there were planning cases that had been filed by the department and the public with the courts, none of these cases involved an EIA (see Tables D16.b and D17); and no appeal had yet been filed with the Appeal Board at Planning authorities level either (see Table P10.i).

7.2.5 Examination of EIA reports

Under the EIA Guidelines, PEIA procedures do not require any public participation. However, from the findings on the examination of EIA reports, a number of project proponents who carried out public participation in preparing PEIA reports restricted engagement with the public to interviews only (see Tables ER1 and ER2). The findings also show that all of the project proponents who did in fact carry out public participation while preparing the DEIA reports, merely referred to the parent report (see Table ER3). The findings further show that most of the socio-economic surveys undertaken by developers were conducted in order to discover the residents' views on the economic and environmental impacts if the project were to proceed in their area, and did not gather views on whether the public were in favour of a project being executed or not (see Table ER3). However, the findings also show that most residents gave positive comments about economic development but also identified clear and negative impacts on the environment (see Table ER3).

7.3 Limitations to Public Participation in Decision Making Under EIA in Malaysia (RQ2)

The research findings and discussion of RQ2 can be found in chapter 6. There are five limitations to public participation in practice. First, there is uncertainty about the relevant procedures and whether or not the EIA Guideline is enforceable. There is also limited access to information as well as overly strict rules of standing to allow challenges to be made to

planning decisions in the courts on the part of the public. Fourthly, the relationship between federal and state governments with regards to EIA is very complex, and fifthly the public lack of awareness of EIA and the relevant planning procedures. This latter limitation of a lack of public awareness is discussed in section 7.4 below.

7.3.1 *Uncertainty inherent in EIA procedures and EIA law*

Paragraph 2 of section 3.4.7 and section 4.7 of the EIA Guidelines provide exemption clauses to the right to public participation due to the ‘national interest’ or ‘public interest’. However, the decision-makers in the planning system were found to either have no knowledge, or to consider that they had no jurisdiction to answer such questions and were uncertain as to the EIA procedures on exemption clauses (Tables D11.a and D11.c). The public participation process for PEIA is also unclear and unstructured and it not compulsory, whereas the public participation process for the DEIA is mandatory (Table D12.a). The EIA Guidelines had only been published and have never been gazetted (Table 13.a). If all proponents of project ethically comply with the EIA Guidelines, then they are sufficient as ‘guideline’, but if any project proponent refuses to comply with any or all of the provisions in the EIA Guidelines, then there is no action which can be taken against them since these guidelines lack the force of law.

7.3.2 *Limited access to EIA reports*

Four types of limitations to effective public access to EIA reports in Malaysia were identified. The involved locations where the reports are displayed, the duration of time given to review them, the cost of copies reports and the technical nature of the reports. The DoE has followed the EIA Guidelines on the locations where EIA reports should be displayed (Table D9.a) as well as those on the duration of time for displaying the reports and for receiving reviews and comments from the public. However, members of the public thought that the locations were not easily accessible (Figure 9) and the duration of time inadequate (Figure 10).

These public perceptions on the inaccessibility of location and inadequate time show that the law on these matters is insufficient. The DoE admitted that it has no control over the cost charged by project proponents for the purchase of EIA reports (Tables 9.d.i, D9.d.ii and D9.d.iii). As to the technical nature of EIA reports, the requirement to submit a non-technical summary applies only to the executive summary of EIA reports. The full EIA report is always submitted in technical form (Table 10.a).

7.3.3 *Strict rule of standing (locus standi)*

Section 3.4.7 of the EIA Guidelines provides that the public can make representations or comments on the report. The DoE defined the ‘public’ as anyone, including an NGO (Table 14.a). This means that everyone can make representations or comments on the report regardless of whether or not the proposed project has a direct impact on them.

7.3.4 *Complexity of the relationship between the federal and state governments*

A central meeting to coordinate and decide on an application for development project was set up to solve the problem of coordination among federal and state departments in dealing with environmental management (Tables D15.a, P11.a, D15.b, P11.b, D15.c and P11.c).

However, in the case of *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors & other appeals* it was decided that, although both Parliament and the Sarawak state legislative assembly had concurrent power to make law regulating the production, supply and distribution of power, since the ‘environment’ in question lay wholly within the legislative and constitutional jurisdiction of the state of Sarawak (state land), that state had exclusive authority to regulate the use of it as it deemed fit. So, the EQA was not applicable to the state of Sarawak and the respondents had no vested or other interest under the EQA. Under the Sarawak laws (the Environmental Quality (Prescribed Activities)

(Environmental Impact Assessment) (Amendment) Order 1995 and the Sarawak Natural Resources and Environmental (Prescribed Activities) Order 1994), the right to public participation in decision making was limited as there was no provision giving the public an entitlement to a copy of the EIA report or to make comments on EIA reports to the review panel before approval was given. This lacuna in the Sarawak Orders is definitely a loophole affecting the right to public participation in the environmental decision-making process.

7.4 Level of Public Awareness and Public Participation in the EIA Process in Malaysia (RQ3)

The relevant research findings and a discussion of public awareness and of public participation in the EIA process can be found in chapters 5, related to research question 1 and 6, related to research question 2. The overall conclusion concerning the level of public awareness and participation derives from answers to research question 3, that is: ‘What is the level of public awareness and public participation in the EIA process in Malaysia?’.

The research findings show that the level of public awareness and public participation in the EIA process in Malaysia is very low. The research findings in chapter 6, show that, in total only 1.4% of the respondents had reviewed a relevant EIA report either once, twice or three times or more (Figure 15).

This finding was supported by data from the respondents of decision makers (Tables D19 and P12). Nevertheless, the decision-makers expressed the view that the law on public participation was sufficient and effective although they did not articulate clearly why they thought this to be so (Tables D20 and P13).

7.5 Stakeholders' Views on Asserting a New Constitutional Right to Public Participation in Decision Making (RQ4)

The research findings and discussion of the context and relevance of 'environmental rights' (RQ4) can be found in chapter 2 and on the stakeholders' perspectives on the importance of 'environmental rights' in chapter 4.

Three main points can be concluded from the analysis of statutes (the Malaysian Federal Constitution, the European Convention on Human Rights (ECHR) and The Aarhus Convention) as discussed in chapters 2 and 4. Firstly, the Malaysian Federal Constitution does not provide a specific provision conferring "environmental rights" under fundamental liberties or any of its other provisions. Secondly, the ECHR does not provide a provision on "environmental" issues either, but the European Court of Human Rights has shown its willingness to interpret "human rights" issues in a wider sense so that "environmental" issues might in some circumstances fall under the provisions of the ECHR. Thirdly, the Aarhus Convention provides the best model for introducing and enforcing environmental rights of a procedural nature, including, for example, the rights to information, public participation in decision making and access to justice. These are key issues for improving public participation in EIA decision making in Malaysia.

The respondents among the decision makers in the Malaysian DoE and Planning authorities had only limited knowledge of the concept of 'environmental rights', which they tended to relate to 'shared responsibility to protect the environment' rather than referring it to the elements of rights to information, public participation and access to justice (Table 1). It is interesting to note that, although the majority of respondents from the DoE and some from the Planning authorities thought that the existing EIA laws provide a sufficient law on public participation as 'environmental rights', at the same time some of the respondents from

Planning authorities admitted that they themselves did not fully understand the nature of EIA and its processes (Table 2). These are contradictory findings, as they agreed that the EIA laws are sufficient law on ‘environmental rights’ yet they did not understand the nature of ‘environmental rights’, the EIA processes. Clear understanding and knowledge of EIA and its processes is necessary for officers who are in charge of making decision about development projects.

The public in Malaysia also had a very limited knowledge of the concept of ‘environmental rights’, which they only related to the general protection of the environment and such factors as cleanliness and pollution (Figure 2). Despite this limited knowledge of the nature of ‘environmental rights’, the majority of the respondent considered that public participation in environmental issues was important (Figure 1) and supported a proposal to include a new constitutional chapter of ‘environmental rights’ in the Federal Constitution (Figure 3).

7.6 Key Conclusions

7.6.1 Research question 1: What rights to public participation in decision making are given by the EQA and EIA Guidelines?

1. The EQA and EIA Guidelines do not specifically provide a right to information on EIA to the public. The EIA Guidelines only provide provisions inviting the public to give their comments on DEIA report during specified period of time at places which have been identified in the notification. However, the fact that the public need to purchase the EIA report, if they wish, restricts wider access to the information contained in the EIA report to the public.
 - a. The public in Malaysia lacked of knowledge of EIA generally because;

- i. Such information on EIA did not reach them because disseminating information on EIA through printed media as the main source is no longer suitable;
 - ii. The public did not search for the information
2. The right to public participation is available in theory but not appropriately structured in the EQA and EIA Guidelines in a manner that is effective.
 - a. According to the EIA Guidelines:
 - i. In the PEIA process, public participation is not compulsory.
 - ii. In the DEIA process, public participation only plays a small role in the whole EIA process. The method of gathering the view of the public while preparing the EIA report is mostly conducted by way of socio-economic surveys by the project proponent who can, in practices, shape the survey questions in favour of their interests.
 - iii. The EIA report is too technical in nature and the requirement to submit a non-technical report only applies to the executive summary.
 3. The EQA provides for a right of access to justice in a court of law and the Appeal Board, but this right is restricted to those who have *locus standi* only.
 - a.** *Locus standi* restricts the right to inspect the planning permission file held by the planning department.
 - b.** *Locus standi* is restrictively interpreted by the courts in Bakun Dam case applicable only to those who are directly affected by the development and the number of plaintiff filing a case in the court must reflect the number of total population affected by such development.

7.6.2 Research question 2: ‘What are the existing limitations to public participation in decision making under EIA in Malaysia?’

There are five types of limitations to public participation in decision making, and lack of awareness is discussed in relation to research question 3;

1. Uncertainty about the EIA procedures and their legal status.
 - a. Public participation is not compulsory in the PEIA process;
 - b. Provision for public participation in the DEIA process is inadequate in a number of respects. For example the DG of the DoE can cancel the right to public participation if he believes that the information in the EIA report will affect the national interest or on the grounds of proprietary rights. Furthermore, the DoE has no control over the cost charged for EIA reports.
2. There is limited access to information on EIA report.
 - a. The full EIA report is in technical form, and there is no mandatory provision for a non-technical summary.
 - b. The EIA report is the project proponent’s document. The cost of purchasing the report is, sometimes, expensive, and EIA reports are not deposited with public bodies for the public to access and inspect other than through the DoE.
3. Strict rule of standing;
 - a. Access to a court of law and Appeal Board is restricted to those who have *locus standi*, and the courts adopt a strict and limited view of standing that excludes the majority of the public with no direct financial or property interest but who are affected by the proposed development from bringing a case before the court of law or appeal board.

4. Complexity of federal-state relationship;

a. EIA projects are mainly the concern of the DoE, and the planning authorities rely on the DoE to give comments and approval of EIA project. This means that some Planning authority's officers ignore EIA procedures.

Being two separate departments and under two separate ministries, the coordination between the DoE and the Planning authorities is loose, particularly in terms of allowing the public to inspect planning permission applications held by the planning department; and sharing data or information on EIA projects.

7.6.3 Research question 3: 'What is the level of public awareness and public participation in the EIA process in Malaysia?'

There was a lack of awareness among the public in Malaysia and they did not exercise their right to public participation. This is attributable to the following factors:

1. Lack of knowledge of the existence of EIA and its procedures;
2. Lack of knowledge of the nature of EIA;
3. Lack of information on EIA, which does not reach the public and no effort is made by them to search for it on the relevant websites;
4. The public did not exercise their right to public participation because they did not go to the official locations where full EIA reports was displayed, did not buy copy of the full EIA report, had never ever seen a full EIA report, made no effort to understand the content of EIA report, and rarely reviewed the reports.

7.6.4 Research question 4: 'How would a new constitutional right to public participation in decision making be viewed by the stakeholders?'

1. The decision makers exhibited a lack of knowledge of the concept of 'environmental rights', and some of them, in fact, admitted that they did not really understand the EIA procedures.

2. The public in Malaysia lacks knowledge of the concept of ‘environmental rights’, yet they support the insertion of a new constitutional right to public participation in decision-making.

7.7 Recommendations

1. The DoE should invest in education initiatives and devote public resources to raising awareness of EIA, EIA procedures and their relevance to local communities in taking “ownership” of their environment and the use of land for development.

2. The DoE should publish a special column in mainstream newspapers, for example in every Sunday editions, to briefly explain the EIA procedures and elements of ‘environmental rights’ in general and to discuss EIA issues concerning any type of proposed EIA development project regularly.

3. The local authority, with the help of representatives of the local community, should invite the public to participate in environmental campaigns locally, for example in tree-planting campaigns to build ‘environmental citizenship’, awareness of environmental issues of a local nature. An appointment as ‘Environmental Champion’ at local authority level who would have responsibility to attract the local community to participate in such events, and at the same time the local authority can educate the public by explaining the importance of public participation in the EIA process and elements of ‘environmental rights’ such as the rights to information, public participation and access to justice.

4. The EQA should define the ‘public’ more widely to include “anybody who can review an EIA report also has a right of standing in the courts and Appeal Board”. Article 2 of the Aarhus Convention defines ‘the public’ as “one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or group”; and ‘the public concerned’ as “the public affected or likely to be affected by, or

having an interest in, environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirement under national law shall be deemed to have an interest”. This should be adopted and integrated into a revised EQA in Malaysia.

5. The EIA Guidelines should be revised to stress the importance of public participation by the following means:

a. Making public participation mandatory in the PEIA process so that the public will have the opportunity of early participation.

b. Requiring the project proponent to conduct a survey of public views on environmental impact separately from any social or economic survey. The proposed separate survey of public views on the environmental impact will help decision-makers to identify the public’s opinion on the proposed development project at an earlier stage, whereas the socio-economic survey which more concerned with the public’s opinion on the social and economic impact of the proposed development project.

c. Requiring the project proponent to submit a non technical summary of the full EIA report and make it available at reasonable cost to the public.

d. Gazetting the EIA Guidelines to make them binding on all parties, including the DoE, the Planning authorities and project proponent, while conducting the EIA process.

6. The DoE should adopt the principles in the Aarhus Convention and apply them in the EIA Guidelines. Article 1 of the Aarhus Convention states, ‘In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each party shall guarantee the rights to access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this convention’. Malaysia is not a party in the Aarhus Convention but is a party to the Rio Declaration 1992. Principle 10 which provides a general

principle on public participation in environmental decision-making process¹². Since Malaysia is not a signatory to the Aarhus Convention, yet a signatory to the Rio Declaration, by comparison of the wording in both Convention and Declaration, it should apply the same principles as stated in the Aarhus Convention in the EQA 1974 so that the DoE can enforce such principles through EIA Guidelines, particularly the following provisions:

- a. Article 4 of the Aarhus Convention on access to environmental information;
- b. Article 5 of the Aarhus Convention on the collection and dissemination of environmental information
- c. Article 6 of the Aarhus Convention on public participation in decisions on specific activities;
- d. Article 7 of the Aarhus Convention on public participation concerning plans, programmes and policies relating to the environment;
- e. Article 8 of the Aarhus Convention on public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments; and
- f. Article 9 of the Aarhus Convention on access to justice.

¹ Principle 10 Of Rio Declaration, “*Environmental issues are best handled with the participation of all concerned citizen, 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 opportunities to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided*”.

7. The DoE should conduct regular courses or seminars to the Planning authority's staff to ensure that they adequately understand the EIA process.

8. The DoE and Planning authorities should set up a central database of EIA projects. As the DoE is the approving authority for EIA reports, it should be responsible for maintaining and updating such a database.

9. Important information from the database should be accessible to members of the public and NGOs both online and in person at the relevant DoE and Planning department. This should include a list of approved and proposed EIA projects, notice calling for public review and non-technical summaries of the EIA reports,.

10. Project proponents should exercise their social responsibility by reducing the price of EIA reports and ensuring that they are affordable for the public to purchase. The DoE should control the cost levied by developers by imposing a fixed maximum price determined by reference to the numbers of pages.

11. The DoE should request the project proponent submits a non-technical summary of the full EIA report. This non-technical summary of the full EIA report should be published on the DoE website, and it should be made available and accessible at all state DoE and local Planning departments.

7.8 Conclusion

There are three actors involved in this thesis: the law concerning EIA, which provides the provisions and guidelines for the EIA procedure; the decision-makers who administer the EIA processes and are the approving authority; and the public, who would be affected by proposed development projects. As to the law, this thesis has sought to benchmark EIA procedures in Malaysia against international standards and practices, and in particular against the standards set out in the Aarhus Convention for public participation in decision making on environmental matters. The Malaysian

EIA laws need some refinement because important rights to information are not specifically provided by law. The law also makes provision for a right to public participation, but this is not structured in a manner that is effective, neither is it implemented appropriately in planning practice. Finally, rights of access to justice are very limited by the narrow interpretation of the right of standing (“*locus standi*”) applied by the Malaysian courts and legislation. Malaysia is not a signatory to the Aarhus Convention, but its principles have been widely adopted internationally and they implement Principle 10 of Rio Declaration to which Malaysia is a party. They should be adopted in Malaysia and the recommendations set out above would, if followed, go some way to achieve this. If a sufficiently well-structured law was promulgated, it would be the duty of the decision-makers to implement the law effectively and to ensure that they were equipped with reasonable knowledge of the EIA laws and processes. And, as for the public, continuous efforts to educate them is necessary, not only to create greater awareness but, most importantly, to encourage them to participate in the environmental decision-making process.

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Appendix A (i): DoE's set of question

1. Sila nyatakan prosedur untuk menyediakan dan mengemukakan laporan penilaian awal.

Please give the procedure of preparing and submitting the preliminary assessment report.

2. Sila nyatakan prosedur untuk menyediakan dan mengemukakan laporan penilaian terperinci.

Please give the procedure of preparing and submitting the detailed assessment report.

3. Adakah jabatan mempunyai pengkalan data elektronik yang menyimpan laporan-laporan EIA?

Does the department have an electronic database on EIA reports ?

Jika tidak, sila ke soalan 4 (If no, go to question 4)

Jika ya (If yes) -

a. Apakah jenis maklumat EIA yang disimpan oleh jabatan di dalam pengkalan data elektronik tersebut?

What sort of EIA information does the department keep in the electronic database?

b. Adakah jabatan mengemaskini maklumat dalam pengkalan data tersebut secara berkala?

Does the department regularly publish up-to-date information in the database?

c. Adakah pengkalan data elektronik tersebut boleh diakses oleh orang awam?

Is this electronic database accessible to the public?

Appendix A(i): DoE's set of question

Jika ya (*If yes*)

- i. Adakah maklumat tersebut boleh diakses sebelum atau selepas kelulusan EIA?

Is the information accessible after or before the EIA approval?

- d. Adakah kewujudan pengkalan data elektronik tersebut dimaklumkan kepada orang awam?

Is the existence of the electronic database publicised?

Jika ya (*If yes*)

- a. Bagaimanakah ianya dimaklumkan kepada orang awam?

How is it publicised to the public?

4. Bagaimanakah jabatan menyimpan maklumat berkenaan projek-projek EIA?

How does the department keep information on EIA projects?

- a. Adakah maklumat tersebut mudah dikesan?

Is it easily retrieved?

- b. Adakah laporan-laporan tersebut boleh diakses oleh orang awam?

Is it accessible to the public?

Jika ya (*If yes*)

- i. Adakah laporan-laporan tersebut boleh diakses sebelum atau selepas kelulusan EIA?

Are the reports accessible after or before EIA approval?

5. Draf Terma Rujukan perlu dipamerkan untuk orang awam menyemak dan memberi komen.

The draft TOR¹ is required to be displayed for public review and comments.

¹ TOR will detail the purpose of the assessment, itemise the potential environmental impacts that require further assessment, outline the environmental data collection that are required, determine the assessment procedures to be used and identify the appropriate methodologies for impact prediction and assessment

Appendix A(i): DoE's set of question

a. Dalam bentuk apakah Terma Rujukan tersebut perlu disediakan kepada orang awam?

In what form is the TOR made available to the public?

b. Adakah ianya dalam bentuk ringkasan bukan teknikal?

Is it in non-technical summary?

i. Ya (*Yes*)

ii. Tidak (*No*)

c. Bagaimanakah ianya perlu dimaklumkan kepada orang awam?

How is it publicised to the public?

6. Adakah jabatan memberi sebarang nasihat kepada pemaju projek supaya mereka menyediakan peluang kepada orang awam untuk menglibatkan diri dari awal lagi, contohnya di peringkat permohonan untuk mendapatkan kebenaran merancang?

Does the department give advice to the project initiator to provide for early public participation, for example at the time of applying for a planning permission?

7. Laporan penilaian terperinci hendaklah dipamerkan supaya orang awam boleh menyemak dan memberi komen.

The detailed assessment report is required to be displayed for public review and comments.

a. Dalam bentuk apakah laporan tersebut perlu disediakan kepada orang awam?

In what form is the report made available to the public?

b. Adakah ianya dalam bentuk ringkasan bukan teknikal?

Is it in non-technical summary?

i. Yes

ii. No

Appendix A(i): DoE's set of question

c. Bagaimanakah ianya dimaklumkan kepada orang awam?

How is it publicised to the public?

8. Sebarang komen terhadap laporan tersebut hendaklah dibuat secara bertulis dan diserahkan kepada setiausaha Panel Semakansemula dalam tempoh waktu tertentu.

Any comment on the report should be made in writing and forwarded to the secretary of review panel in certain time frame.

a. Berapa banyak komen yang diterima dari orang awam dalam tahun- tahun berikut?

How many comments received from the public in the following years?

- i. 2002 _____
- ii. 2003 _____
- iii. 2004 _____
- iv. 2005 _____
- v. 2006 _____

9. Garispanduan menyatakan bahawa sebaik sahaja Panel Semakansemula menerima laporan, setiausaha Panel Semakansemula akan menghendaki pemaju projek untuk memaklumkan kepada orang awam melalui iklan dalam akhbar utama Bahasa Malaysia dan Bahasa Inggeris, tiga kali selang seminggu. Iklan tersebut hendaklah menyatakan:

a. Laporan penilaian terperinci telah diterima untuk semakan;

b. Bentuk dan lokasi projek;

c. Di mana salinan laporan tersebut disediakan untuk semakan dan komen dan di mana ianya boleh diperolehi serta kos untuk setiap salinan;

d. Tempoh masa pameran adalah 30 hari; dan

e. Sebarang perwakilan atau komen oleh orang awam atau agensi alam sekitar yang berkaitan terhadap laporan tersebut hendaklah dibuat secara bertulis dan dikemukakan kepada setiausaha Panel Semakansemula tidak lebih dari empat puluh lima (45) hari dari tarikh notis pertama atau dalam tempoh masa yang ditetapkan di dalam iklan.

Appendix A(i): DoE's set of question

The guidelines states that as soon as the review panel receives the report, the secretary to the review panel will require the project initiator to inform the public through advertisement in both major Bahasa Malaysia and English newspaper, three times weekly lapse (intervals). The advertisement should state;

- a. That a detailed assessment report has been received for review;*
- b. The nature and the location of the project;*
- c. Where the copies of the report are available for review and comments and where they can be obtained and the cost of each copy;*
- d. The duration of the display for a period of 30 days; and*
- e. That any representation or comments by the public or concerned environmental related agencies, on the report should be made in writing and forwarded to the secretariat of review panel not more than forty-five (45) days from the date of the first notice or within the time specified in the advertisement.*

- a. Di manakah laporan tersebut dipamerkan?

Where will the report be displayed?

- b. Adakah jabatan menyimpan rekod bilangan orang awam yang datang untuk melihat laporan tersebut?

Does department keeps record the number of public who come and see the report?

Jika ya (*If yes*)

- i. Berapa ramaikah yang datang untuk melihat laporan tersebut dalam tahun-tahun berikut?

How many of them come and see the report in the following years?

1. 2002 _____
2. 2003 _____
3. 2004 _____
4. 2005 _____
5. 2006 _____

Appendix A(i): DoE's set of question

c. Di manakah orang awam boleh mendapatkan salinan laporan tersebut?

Where can the public get the copy of the report?

d. Garispanduan membenarkan pemaju projek untuk mengenakan caj ke atas laporan penilaian terperinci bagi mendapatkan semula kos penerbitan dan pengiriman.

The guidelines allow the project initiator to charge the detailed assessment report to cover printing and postage costs.

a. Berapa jumlah bayaran yang dikenakan?

How much is the charge?

b. Adakah jabatan pernah atau diminta untuk memberi nasihat dalam menentukan kos berkenaan?

Has the department ever advised or been asked to advise on the cost?

c. Adakah wujud sebarang garispanduan untuk menghadkan kos yang dikenakan?

Is there any guideline on limitation of the cost?

e. Adakah jabatan membenarkan perwakilan secara lisan selain daripada komen bertulis daripada orang awam?

Does the department allow any oral representation besides written comments from the public?

Jika ya (*If yes*)

a. Berapa jumlah perwakilan secara lisan yang dibenarkan dalam tahun- tahun berikut?

How many oral representations were allowed in the following years?

- i. 2002 _____
- ii. 2003 _____
- iii. 2004 _____
- iv. 2005 _____
- v. 2006 _____

Appendix A(i): DoE's set of question

b. Dalam bentuk apakah perwakilan secara lisan tersebut dibenarkan?

In what form was the oral representation allowed?

i. Oleh orang yang membuat bantahan dengan kehadiran pemaju projek

(by the objector in present of project initiator)

ii. Dalam siasatan awam (*In public inquiry*)

iii. Lain-lain (*Other*) _____

f. Terdapat satu nota di bawah seksyen 3.4.7 garis panduan yang menyatakan bahawa tempoh masa tertentu yang disebut di atas adalah tertakluk kepada perubahan dari semasa ke semasa. Bagaimanapun, notis yang munasabah hendaklah diberikan.

There is a note under section 3.4.7 of the guideline states the time frame specified above are subject to change from time to time. However, adequate notice will be given.

a. Apakah yang dimaksudkan dengan notis yang munasabah di bawah seksyen tersebut?

What constitutes an adequate notice under this section?

10. Laporan yang dikemukakan oleh pemaju projek lebih berbentuk data teknikal.

The report submitted by the project initiator is more on technical data.

a. Pernahkan jabatan menasihati pemaju projek untuk mengemukakan ringkasan bukan teknikal?

Has the department ever advised the project proponent to submit non- technical summary?

11. Perenggan 2 seksyen 3.4.7 garis panduan menyatakan jika pemaju projek percaya bahawa, untuk kepentingan nasional atau atas alasan hak pemilikan, sebahagian daripada laporan penilaian terperinci tidak sepatutnya didedahkan kepada orang awam, beliau boleh memohon kepada Ketua Pengarah supaya maklumat tersebut tidak dibenarkan untuk semakan oleh

orang awam.

Appendix A(i): DoE's set of question

Paragraph 2 of section 3.4.7 of the guidelines states if the project initiator believes that, in the national interest or due to proprietary rights, that part of the detailed assessment report should not be made available to the public, he can apply to the Director General for the information to be withheld from public scrutiny.

Seksyen 4.7 garis panduan menyatakan bahawa orang awam dijemput untuk memberi komen kepada cadangan projek yang mana ianya tertakluk kepada penilaian terperinci, kecuali jika ianya bertentangan kepentingan awam.

Section 4.7 of the guidelines states the public is invited to comment on proposed projects which have been subjected to detailed assessment, unless it is against the public interest.

a. Apakah yang dimaksudkan dengan 'kepentingan awam' dalam seksyen tersebut?

What constitutes 'public interest' in this section?

b. Adakah wujud sebarang garis panduan bagi pengecualian ini?

Is there any guideline for this exemption?

c. sepanjang pengetahuan jabatan, berapakah jumlah laporan yang tidak dibenarkan untuk semakan oleh orang awam?

To department knowledge, how many reports have been withheld from public scrutiny?

12. Seksyen 2.3.4 garis panduan menyatakan bahawa **di dalam penilaian awal beberapa bentuk penglibatan awam adalah perlu** dan berikut adalah metod yang secara amnya sesuai, iaitu sampel pandangan awam, perjumpaan awam atau bengkel dan perjumpaan berkala dengan jawatankuasa penduduk.

*Section 2.3.4 of the guidelines states that **in preliminary assessment some form of public participation is essential** and the following methods are generally suitable, namely, public opinion sampling, public meeting or workshops and regular meeting with a citizens committee.*

Appendix A(i): DoE's set of question

Di bawah seksyen 3.4.4 garis panduan dinyatakan bahawa **penglibatan awam hendaklah dimasukkan di dalam penilaian terperinci** untuk memberi kebaikan kepada perancangan projek dan keperluan untuk penglibatan awam semasa penilaian terperinci dan bentuk bagaimana ianya perlu dilakukan hendaklah dibincangkan semasa pembentukan Terma Rujukan untuk penilaian terperinci.

*Under section 3.4.4 of the guidelines it states that **public participation must be included in detailed assessment** to benefit the planning of the project and the need for public participation during detailed assessment and the form it should take should be discussed during the formulation of TOR for detailed assessment.*

a. Adakah jabatan merasakan prosedur untuk penglibatan awam dalam penilaian awal sudah jelas?

Do the department consider the procedure for public participation in the preliminary assessment to be sufficiently clear and structured?

b. Apakah metod penglibatan awam yang biasa digunakan dalam penilaian awal?

What is the most common method of public participation used under preliminary assessment?

c. Apakah metod penglibatan awam yang biasa digunakan dalam penilaian terperinci?

What is the most common method of public participation used under detailed assessment?

d. Sepanjang pengetahuan jabatan, wujudkah sebarang penilaian yang dibuat tanpa penglibatan awam?

To the department knowledge, is there any assessment done without public participation?

13. Seksyen 34A(2) Akta Kualiti Alam Sekeliling (EQA) menyatakan mana-mana orang yang berniat untuk menjalankan aktiviti yang telah

Appendix A(i): DoE's set of question

ditetapkan hendaklah, sebelum sebarang kelulusan untuk menjalankan aktiviti tersebut diberikan oleh pihakberkuasa berkenaan, mengemukakan satu laporan kepada Ketua Pengarah. **Laporan tersebut hendaklah selaras dengan garis panduan yang telah ditetapkan oleh Ketua Pengarah** dan hendaklah mengandungi satu penilaian terhadap kesan alam sekitar yang akan atau mungkin timbul akibat aktiviti tersebut dan cadangan tindakan yang perlu diambil untuk mencegah, mengurang atau mengawal kesan tersebut ke atas alam sekitar.

*Section 34A (2) of the Environmental Quality Act (EQA) states any person intending to carry out of the prescribed activities shall, before any approval for the carrying out of such activity is granted by the relevant approving authority, submit a report to the Director General. **The report shall be in accordance with the guidelines prescribed by the Director General** and shall contain an assessment of the impact such activity will have or is likely to have on the environment and the proposed measures that shall be undertaken to prevent, reduce or control the adverse impact on the environment.*

14. Definisi orang awam tidak dinyatakan dalam EQA atau garis panduan. Bagaimanapun seksyen 3.4.7 garis panduan menyatakan bahawa orang awam atau agensi alam sekitar yang berkaitan boleh membuat perwakilan atau komen ke atas laporan.

There is no definition of public under the EQA or the guidelines. However section 3.4.7 of the guidelines states the public or concerned environment related agencies can make representation or comments on the report.

a. Sila sahkan bagaimana jabatan menterjemahkan perkataan 'orang awam'.

Please confirm how the department interpret the word 'public'.

Appendix A(i): DoE's set of question

b. Sila senaraikan agensi atau badan yang mana jabatan membenarkan perwakilan.

Please list down those agencies or bodies from whom the department allow representation.

15. Jabatan Alam Sekitar dan pihakberkuasa perancang berada di bawah kementerian yang berasingan.

Department of Environment and planning authority come under different ministries.

a. Bagaimanakan jabatan membuat penyelarasan di antara satu sama lain?

How do the departments coordinate with each other?

b. Kementerian yang mana lagikah biasanya terlibat dalam pengurusan alam sekitar?

Which other ministries are usually involved in environmental management?

c. Adakah kepelbagaian kementerian ini memberi kesan kepada pengurusan alam sekitar?

Does the variety of ministries affect the environmental management?

16. Seksyen 34A (8) EQA menyatakan mana-mana orang yang melanggar seksyen 34A adalah melakukan satu kesalahan.

Section 34A (8) of EQA states that any person who contravenes section 34A shall be guilty of an offence.

a. Adakah kesalahan ini boleh dikompaunkan?

Is it a compoundable offence?

b. Berapakah bilangan kes yang telah difailkan ke mahkamah oleh jabatan dalam tahun-tahun berikut?

How many cases have been filed to the court by the department in the

following years?

- i. 2002 _____
- ii. 2003 _____
- iii. 2004 _____

Appendix A(i): DoE's set of question

- iv. 2005 _____
v. 2006 _____

17. Sepanjang pengetahuan jabatan, berapakah jumlah kes yang telah difailkan oleh orang awam?

To the department knowledge how many cases have been filed by the public?

18. Seksyen 35(1) EQA menyatakan mana-mana orang yang teraniaya akibat keputusan Ketua Pengarah di bawah subseksyen (3) atau (4) seksyen 34A boleh dalam tempoh masa dan cara yang telah ditetapkan, merayu ke Lembaga Rayuan.

Section 35(1) of EQA states any person who is aggrieved by any decision of the Director General under subsection (3)² or (4)³ of section 34A may within such time and in such manner as may be prescribed, appeal to the Appeal Board.

a. Adakah jabatan menyimpan rekod jumlah kes rayuan ke Lembaga Rayuan ?

Does the department keeps record the number of appeal cases to the Appeal Board?

Jika ya (*If yes*)

i. Sila berikan jumlah kes rayuan yang telah difailkan oleh pemaju projek dalam tahun-tahun berikut.

Please give the number of appeal cases filed by project initiator in the following years

- (1) 2002 _____
(2) 2003 _____
(3) 2004 _____

² Sec 34A (3) – if the DG on examining the report is of the opinion that the report satisfies the requirements, he shall approve the report, with or without conditions attached thereto, and shall inform the person intending to carry out the prescribed activity and the relevant approving authorities accordingly.

³ Section 34A (4) – if the DG on examining the report, is of the opinion that the report does not satisfy the requirement, he shall not approve the report and shall give his reasons therefore and shall inform the person intending to carry out the prescribed activity and the relevant approving authorities accordingly.

Appendix A(i): DoE's set of question

- (4) 2005 _____
(5) 2006 _____

ii. Sila berikan jumlah kes rayuan yang telah difailkan oleh orang awam dalam tahun-tahun berikut.

Please give the number of appeal cases filed by the public in the following years

- (1) 2002 _____
(2) 2003 _____
(3) 2004 _____
(4) 2005 _____
(5) 2006 _____

19. Adakah anda merasakan kesedaran awam terhadap EIA memuaskan? (Sila terangkan)

Do you consider the public awareness of EIA to be satisfactory?(Please explain)

20. Adakah anda merasakan tahap penglibatan awam yang disediakan oleh undang-undang memuaskan? (Sila terangkan)

Do you consider the level of public participation generated by the law to be satisfactory? (Please explain)

21. Adakah anda mempunyai sebarang cadangan yang mana jabatan boleh anjurkan untuk meningkatkan atau mengurangkan penglibatan awam dalam EIA?

Do you have any recommendations that the department wishes to make to enhance or restrict public participation in EIA?

22. Apakah yang anda faham dengan konsep 'hak alam sekitar'?

What do you understand by the concept of 'environmental right'?

Appendix A(i) DoE's set of question

23. Adakah anda beranggapan undang-undang EIA berkaitan penglibatan awam dalam membuat keputusan adalah asas kepada 'hak alam sekitar'? (Sila terangkan)

Do you regard the law on EIA particularly on public participation in decision making is fundamental to 'environmental rights'? (Please explain)

Appendix A (ii) - Planning authority set of question

1. Akta Perancangan Bandar dan Desa 1976 (Akta 172) (TCPA) tidak menyatakan dengan jelas peruntukan berkenaan Kesan Penilaian Alam Sekitar (EIA) di bawah proses kebenaran merancang.

Town and Country Planning Act 1976 (Act 172) (TCPA) did not clearly provide a provision on EIA under planning permission process.

a. Undang-undang dan seksyen manakah yang terpakai dalam prosedur EIA?

Which law and section governs the EIA procedure?

2. Sila nyatakan prosedur EIA.

Please give the procedure of EIA.

3. Dalam keadaan bagaimanakah EIA diperlukan?

Under what circumstances the EIA is required?

4. Adakah jabatan mempunyai pengkalan data elektronik berkenaan projek-projek EIA?

Does the department have an electronic database on EIA projects?

Jika tidak, sila ke soalan 5 (If no, go to question 5)

Jika ya (*If yes*) -

a. Apakah bentuk maklumat EIA yang disimpan oleh jabatan dalam pengkalan data elektronik tersebut?

What sort of EIA information does the department keep in the electronic database?

b. Adakah jabatan mengemaskini maklumat dalam pengkalan data tersebut secara berkala?

Does the department regularly publish up-to-date information in the database?

c. Adakah pengkalan data elektronik tersebut boleh diakses oleh orang awam?

Is this electronic database accessible to the public?

Jika ya (*If yes*) -

i. Adakah maklumat tersebut boleh diakses sebelum atau selepas kelulusan EIA?

Is the information accessible before or after the EIA approval?

Appendix A (ii) - Planning authority set of question

- d. Adakah kewujudan pengkalan data elektronik tersebut dimaklumkan kepada orang awam?

Is existence of the electronic database publicised?

Jika ya (*If yes*) -

- i. Bagaimanakah ianya dimaklumkan kepada orang awam?

How is it publicised to the public?

5. Bagaimanakah jabatan menyimpan maklumat berkenaan projek-projek EIA?

How does the department keep information on EIA projects?

- a. Adakah maklumat tersebut mudah dijejaki?

Is it easily retrieved?

- b. Adakah maklumat tersebut boleh diakses oleh orang awam?

Is it accessible to the public?

Jika ya (*If yes*) -

- i. Adakah maklumat tersebut boleh diakses sebelum atau selepas kelulusan

EIA?

Is the information accessible before or after the EIA approval?

6. Seksyen 21(6) TCPA menyatakan pihakberkuasa perancang tempatan hendaklah memaklumkan kepada pemilik tanah bersebelahan tentang hak mereka untuk membantah hanya jika cadangan pembangunan tersebut terletak di kawasan di mana pelan rancangan tempatan belum wujud ketika itu.

Section 21(6) of TCPA states the local planning authority shall inform the owners of the neighbouring lands of their right to object only if the proposed development is located in an area in respect of which no local plans exists for the time being.

- a. Adakah jabatan menyimpan rekod bilangan pemilik tanah bersebelahan yang membantah kebenaran merancang?

Does the department keep records the number of owners of neighbouring lands who object to the planning permission?

Appendix A (ii) - Planning authority set of question

Jika ya (*If yes*) -

- i. Berapakah jumlah kes bantahan yang telah difailkan dalam tahun-tahun berikut?

How many cases of objections filed in the following years?

2002 _____

2003 _____

2004 _____

2005 _____

2006 _____

7. Pemilik tanah bersebelahan akan dimaklumkan secara bertulis yang diserahkan kepada mereka dan mereka dibenarkan untuk menyatakan alasan kepada bantahan tersebut dalam tempoh dua puluh satu hari dari tarikh serah notis.

The owners of neighbouring lands will be informed by notice in writing served on them and they are allow to state their grounds of objection within twenty-one days of the date of service of the notice.

- a. Dalam tempoh 21 hari, adakah mereka dibenarkan untuk menyemak permohonan kebenaran tersebut?

Within this period of 21 days, are they allowed to scrutinise the application to planning permission?

Jika ya (*If yes*) -

- i. Adakah jabatan menyimpan rekod jumlah pemilik tanah bersebelahan yang menyemak permohonan kebenaran merancang tersebut?

Does the department keep records the number of owners of neighbouring lands who scrutinise the application to planning permission?

Jika ya (*If yes*) -

1. Berapakah jumlah mereka yang datang untuk menyemak permohonan dalam tahun-tahun berikut?

How many cases of them who come and scrutinise in the following years?

a. 2002 _____

b. 2003 _____

Appendix A (ii) - Planning authority set of question

- c. 2004 _____
- d. 2005 _____
- e. 2006 _____

8. Di samping pemilik tanah bersebelahan, adakah jabatan membenarkan orang awam menyemak permohonan untuk kebenaran merancang?

Besides the owners of the neighbouring lands, does the department allows the public to scrutinise the application to planning permission?

Jika ya (*If yes*) -

- a. Adakah jabatan menyimpan rekod jumlah orang awam yang datang untuk menyemak permohonan kebenaran merancang?

Does the department keep records the number of public who come and scrutinise the application to planning permission?

Jika ya (*If yes*) -

- i. Berapakah jumlah mereka yang datang untuk menyemak permohonan kebenaran merancang dalam tahun-tahun berikut?

How many of them who come and scrutinise the application to planning permission in the following years?

2002 _____

2003 _____

2004 _____

2005 _____

2006 _____

9. Sebaik sahaja Ketua Pengarah Alam sekitar meluluskan atau tidak meluluskan laporan EIA, beliau akan memaklumkan keputusannya kepada pihakberkuasa perancang.

Once the Director General of Environment approved or disapproved the EIA report, he shall inform the planning authority of his decision.

- a. Adakah pihakberkuasa perancang mempunyai kuasa untuk memberi keputusan yang bertentangan dengan keputusan Ketua Pengarah ketika mempertimbangkan permohonan kebenaran merancang?

Does planning authority have a power to reverse the decision of the DG, in considering the application of planning permission?

Appendix A (ii) - Planning authority set of question

10. Seksyen 23 TCPA menyatakan bahawa rayuan terhadap keputusan pihakberkuasa perancang boleh dibuat ke Lembaga Rayuan oleh –

- a. Pemohon kebenaran merancang yang teraniaya dengan keputusan pihakberkuasa perancang tempatan yang menolak kebenaran merancang atau syarat yang diletakkan oleh pihakberkuasa perancang tempatan dalam meluluskan kebenaran merancang; dan
- b. Seorang yang memberi bantahan kepada permohonan kebenaran merancang dan beliau teraniaya dengan keputusan pihakberkuasa perancang tempatan berkaitan bantahannya itu.

Section 23 of TCPA states an appeal against the decision of the local planning authority may be made to the Appeal Board by –

- a. *an applicant for planning permission aggrieved by the decision of the local planning authority to refuse planning permission or by any condition imposed by the local planning authority in granting planning permission; and*
- b. *a person who has lodged an objection to the application of planning permission and is aggrieved by the decision of the local planning authority in relation to his objection.*

i. Adakah wujud sebarang kes yang difailkan ke Lembaga Rayuan berkaitan projek EIA?

Is there any cases filed to the Appeal Board in relation to EIA project?

Jika ya (*If yes*) –

1. Berapakah jumlah rayuan yang telah difailkan oleh pemohon dalam tahun-tahun berikut?

How many appeals have been filed by the applicant in the following years?

2002 _____

2003 _____

2004 _____

2005 _____

2006 _____

2. Berapakah jumlah rayuan yang telah difailkan oleh pemilik tanah bersebelahan dalam tahun-tahun berikut?

Appendix A (ii) - Planning authority set of question

How many appeals have been filed by the owners of neighbouring lands in the following years?

2002 _____

2003 _____

2004 _____

2005 _____

2006 _____

11. Pihakberkuasa perancang dan Jabatan Alam Sekitar berada di bawah kementerian yang berasingan.

Planning authority and DoE come under different ministries.

- a. Bagaimakah jabatan mengadakan penyelarasan antara satu sama lain?
How do the departments coordinate with each other?
- b. Kementerian yang mana lagikah biasanya terlibat dalam pengurusan alam sekitar?
Which other ministries are usually involved in environmental management?
- c. Adakah kepelbagaian kementerian ini memberi kesan kepada pengurusan alam sekitar?
Does this variety of ministries affect the environmental management?

12. Adakah anda merasakan kesedaran awam terhadap EIA memuaskan? (Sila terangkan)

Do you consider the public awareness of EIA to be satisfactory? (Please explain)

13. Adakah anda merasakan peluang penglibatan awam yang disediakan oleh undang-undang memuaskan? (Sila terangkan)

Do you consider the level of public participation generated by the law to be satisfactory? (Please explain)

14. Adakah anda mempunyai sebarang cadangan yang jabatan ingin anjurkan untuk meningkatkan atau mengurangkan penglibatan awam dalam EIA?

Do you have any recommendations that the department wishes to make to enhance or restrict public participation in EIA?

Appendix A (ii) - Planning authority set of question

15. Apakah yang anda faham tentang konsep 'hak alam sekitar'?
What do you understand by the concept of 'environmental right'?

16. Adakah anda beranggapan undang-undang EIA tentang penglibatan awam dalam membuat keputusan adalah undang-undang asas kepada 'hak alam sekitar'? (Sila terangkan)
Do you regard the law on EIA particularly on public participation in decision making is the fundamental law to 'environmental rights'? (Please explain)



Tajuk (*Title*):

**Environmental Rights in Malaysia: Public Participation under
EIA**

Penyelidik (*Researcher*):

**Haslinda Mohd Anuar
PhD Student**

Law School Newcastle University

Sebarang komen atau data yang anda berikan semasa proses temubual akan dimasukkan ke dalam penerbitan kajian dan tesis saya, bagaimanapun ianya akan dijadikan anonymous dan tidak dikaitkan dengan nama anda bagi melindungi identiti anda.

Any comments or data you provide during the interview process may be included in my published research and thesis, but it will be rendered anonymous and not attributed to you by name in order to protect your identity.

Appendix B: Public & MENGOs' set of question

Latarbelakang (*Background*):

- A. Nama (*Name*):
- B. Alamat (*Address*):
- C. Jantina (*Gender*):
 - a. Lelaki (*Male*)
 - b. Perempuan (*Female*)
- D. Umur (*Age*)
 - a. 17 tahun ke bawah (*17 years old and below*)
 - b. 18 – 44 tahun (*Between 18 – 44 years old*)
 - c. 45 tahun ke atas (*45 years old and more*)
- E. Pendidikan (*Education*) :
 - a. Tiada pendidikan rasmi (*No formal education*)
 - b. Sekolah (*School*)
 - c. Universiti (*University*)

Sila bulatkan jawapan anda (*Please circle your answers*)

1. Adakah anda sedar kewujudan Kesan Penilaian Alam Sekitar (EIA)?

Are you aware of the existing of Environmental Impact Assessment (EIA)?

- a. Ya (*Yes*)
- b. Tidak (*No*)

Jika tidak, sila ke soalan 4 (*If no, go to question 4*)

Jika ya (*If yes*) –

- i. Apakah yang anda faham tentang EIA?

What is your understanding of the nature of EIA?

2. Adakah anda tahu tentang prosedur EIA?

Are you aware of the EIA procedure?

- a. Ya (*Yes*)
- b. Tidak (*No*)

Appendix B: Public & MENGOs' set of question

Jika ya, sila terangkan dengan ringkas (*If yes, explain briefly*) –

3. Di mana anda mendapat maklumat berkaitan dengan EIA secara am?

Where did you the get the information about EIA in general?

- a. Media (*Media*)
- b. Pamphlet (*Pamphlet*)
- c. Lain-lain(*Other*) _____

4. Adakah anda pernah melayari lamanweb Jabatan Alam Sekitar?

Have you ever search the Department of Environment's (DoE)website?

- a. Ya (*Yes*)
- b. Tidak (*No*)

Jika ya (*If yes*) –

i. Apakah tujuan anda melayari lamanweb Jabatan Alam Sekitar?

For what purpose had you used the DoE's website?

ii. Apakah komen anda tentang lamanweb tersebut?

What is your comment on the website?

5. Adakah sebelum ini anda pernah melihat notis panggilan untuk orang awam menyemak dan memberi komen terhadap laporan EIA?

Have you seen a notice calling for public review and comment on EIA report before?

- a. Ya (*Yes*)
- b. Tidak (*No*)

Jika ya (*If yes*) –

i. Di manakah anda melihatnya?

Where did you see it?

1. Akhbar (*Newspaper*)
2. Lamanweb Jabatan Alam Sekitar (*DoE's website*)
3. Lain-lain(*Others*) _____

Appendix B: Public & MENGOs' set of question

ii. Adakah anda memberi maklumbalas kepada notis tersebut?

Did you response to the notice?

1. Ya (*Yes*)
2. Tidak (*No*)

Jika tidak, sila ke soalan 16 (*If no, go to question 16*)

6. Adakah anda pergi ke lokasi di mana laporan itu dipamerkan?

Did you go to the location where the report is displayed?

- a. Ya (*Yes*)
- b. Tidak (*No*)

i. Jika tidak – kenapa?

If no – why?

ii. Jika ya – di mana anda pergi?

If yes – where did you go?

1. Pejabat Jabatan Alam Sekitar (*DoE office*)
2. Perpustakaan (*Library*)
3. Pejabat Daerah (*District office*)
4. Lain-lain(*Others*) _____

7. Adakah anda membeli salinan laporan tersebut?

Did you buy a copy of the report?

- a. Ya (*Yes*)
- b. Tidak (*No*)

i. Jika tidak – kenapa (*If no – why*)?

8. Adakah anda menyemak atau memberi komen?

Did you give any review or comment?

- a. Ya (*Yes*)
- b. Tidak (*No*)

Appendix B: Public & MENDOs' set of question

- i. Jika tidak – kenapa?
If no – why?
 - ii. Jika ya (*If yes*)
 1. Komen positif (*Positive comment*)
 2. Komen negatif (*Negative comment*)
9. Adakah anda fikir lokasi di mana laporan tersebut dipamerkan itu mudah dilawati?
Did you think the location where the report is displayed was easily accessible?
- a. Ya (*Yes*)
 - b. Tidak (*No*)
10. Adakah anda fikir tempoh masa yang diberikan di dalam notis supaya anda boleh menyemak dan memberi komen terhadap laporan tersebut mencukupi?
Did you think the duration of time given by the notice for you to review and comment on the report was adequate?
- a. Ya (*Yes*)
 - b. Tidak (*No*)
11. Adakah anda fikir harga sebuah salinan laporan EIA tersebut berpatutan?
Did you think the cost of a copy of EIA report was reasonable?
- a. Ya (*Yes*)
 - b. Tidak (*No*)
12. Adakah anda faham isi kandungan laporan tersebut?
Did you understand the contents of the report?
- a. Ya (*Yes*)
 - b. Tidak (*No*)

Jika tidak (*If no*) -

Appendix B: Public & MENGOs' set of question

i. Adakah anda meminta nasihat pakar?

Did you seek any expert help?

1. Ya (*Yes*)
2. Tidak (*No*)

13. Adakah anda pernah memfailkan rayuan ke Badan Rayuan atas alasan bahawa anda teraniaya akibat kelulusan laporan tersebut?

Have you ever filed an appeal to the Appeal Board on the ground that you are aggrieved by the approval of the report?

- a. Ya (*Yes*)
- b. Tidak (*No*)

14. ¹Adakah anda tahu bahawa anda berhak untuk membuat rayuan?

Do you know that you have the right to appeal?

- a. Ya (*Yes*)
- b. Tidak (*No*)

15. Berapa kali anda pernah menyemak dan memberi komen terhadap laporan EIA?

How many times have you give your review and comment on EIAreport?

- a. Sekali (*Once*)
- b. Dua kali (*Twice*)
- c. Lebih dari tiga kali (*More than three times*)
- d. Tidak pernah (*Never*)

16. Adakah anda fikir penglibatan awam dalam isu-isu alam sekitar penting?

Do you think public participation in environmental issues is important?

- a. Sangat penting (*Very important*)
- b. Penting (*Important*)
- c. Tidak penting (*Not important*)

¹Terpakai kepada orang awam sahaja (*Applicable to public only*)

Appendix B: Public & MENOs' set of question

17. Apakah yang anda faham tentang 'hak alam sekitar'?

What do you understand about 'environmental rights'?

18. Apakah pandangan anda, sekiranya ada cadangan untuk memasukkan 'hak alam sekitar' sebagai salah satu daripada kebebasan asasi yang dilindungi di bawah Perlembagaan Persekutuan?

If there were a proposal to include 'environmental rights' as one of fundamental rights protected by the Federal Constitution, what would be your opinion?

Terima Kasih (Thank You)