A Comparative Study On Public Participation In Environmental Impact Assessment (EIA) In Malaysia and European Union

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Abstract

The EIA has become an important aspect in helping to protect and also promote a more environmentally friendly development. The EIA was introduced in 1969 as a tool to assess the outcome of development plans in order to avoid further negative impacts to the environment. In EIA, public participation is seen as one of the important aspects in the process. For that reason, this research highlights the participation of the public in EIA process in Malaysia and European Union. The objective of this research is to analyses the differences/weaknesses in Malaysia compared to the European Union in relation to public participation. From the comparison made, Malaysia has a weaker public participation compared to the European Union. Therefore, at the end of this research, a few recommendations are provided in order to improve the public participation in the EIA process in Malaysia by looking at the public participation in the EIA process in European Union.
CHAPTER 1
INTRODUCTION

1.0 Introduction

The Environmental Impact Assessment (EIA) is a procedure to assess environmental impacts that are likely to result from a proposed project or plan. The EIA enables a Local Planning Authority to understand and analyse the environmental effects of a development before making a decision on whether or not the project should continue and if there should be involvement of the public in the process of a detailed EIA. For developers, an EIA represents a decision-making framework for improving an activity to reduce or eliminate the environmental effects identified (Briggs and Hudson, 2013).

Currently, almost all of the countries in the world apply EIA as one of the tools used to monitor and control the impact on the environment resulting from the development projects made in their country. In the domestic legal systems, a provision or set of provisions have been included to make the EIA a compulsory requirement for any developer (Ogola, 2007).

This report provides the results of a comparative research on EIA in Malaysia and the European Union. After a brief background subsection, the problem statement and research question will be formulated. Next, the scope of the research, the research methodology and the significance of the study will be explained.

1.1 Background

1.1.1 Malaysia

In Malaysia, EIA is a requirement under section 34A of the Environmental Quality Act (EQA) 1974. In exercising the powers conferred by section 34A of the statute, the Minister of Natural Resources and Environment, after consultation with the Environmental Quality Council, made an order cited as the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 (EIA Order), which came into force on April 1st, 1988 (Memon, n.d.).
Under Section 34A of the EQA 1974, any person intending to carry out any of the nineteen prescribed activities under the provision is required to submit a report on the environmental impact. This report is based on a study conducted on the proposed land to be used for carrying out the proposed project prior to the making of the assessment report to the Director General of Environmental Quality for examination.

The EIA Order 1987 which was made under powers conferred by section 34A of the EQA 1974 specifies activities that are subject to EIA. Nineteen categories of activities are prescribed, including those related to; agriculture, airports, drainage and irrigation, land reclamation, fisheries, forestry, housing, industry, infrastructure, ports, mining, petroleum, power generation, quarries, railways, transportation, resort and recreational development, waste treatment and disposal, and water supply.

The activities under these nineteen categories are defined and measured in terms of the project size (as area) and capacity (quantum), while others are not defined by any unit of measurement.

It is to be noted that besides Malaysia, there are other countries that have also implemented EIA in relation to their projects. In fact, most contemporaries governing bodies have already done so, a notable example of which is the European Union and its member states.

1.1.2 **European Union**

In European Union (EU), the EIA Directive was first proposed in the Second Action Programme on the Environment (1977) of the European Community. Eight years later in 1985, the first EU EIA Directive, Council Directive 85/377/EEC, was introduced, albeit after many debacles, objections, and problems in the process. It has been amended several times since then and it was amended again in April 2014 (Directive 2014/52/EU). For now, Directive 2011/92/EU is still in use until the new Directive is fully applied and transitions next year on 16 May 2017.

Since the enforcement of the EIA Directive in 1985, the directive has stated a broad range of private and public projects that are defined in Annexes I and II. All the prescribed activities listed in Annex I require the project proponent to submit a report, since it entails a mandatory EIA. Examples of activities under the Annex I are; motorways and express roads, installations for the disposal of hazardous waste,
installations for the disposal of non-hazardous waste, and long-distance railway lines. However, activities listed in Annex II will only need an EIA report performed if the national authorities decide so. This is based on the discretion of the Member State. The activities in Annex II are those that were excluded in Annex I such as railways, waste disposal installations, and other types of activities such as flood-relief works and a wide variety of others (Review of the Environmental Impact Assessment (EIA) Directive, n.d.).

1.2 Problem Statement

The problem of this study is that the participation of the public is seen to be lacking in the EIA legislation and procedure in Malaysia by looking at how Malaysia can be inspired by the European Union ways of handling public participation.

In Malaysia, it has already been stated under Section 34A of EQA 1974 that project developer has to prepare an environmental impact report if the project is listed in the prescribed activities list. A handbook was created specifically on EIA, which helps the developer in guiding the EIA procedure in making a report and planning new project. In addition to this, since the participation of the public is considered as an importance aspect in the EIA process, the provision aims are to inform the public of a project in planning for development so that the environmental problems that affecting the public relating to the planning can be addressed by them, and so that the public can give their suggestions on what to improve before the start of the development. The goal of this is to help save the developer’s time and money.

However, in the ‘Handbook of Environmental Impact Assessment Guidelines, Procedures & Requirement in Malaysia’, it does not specify in detail as to how the public should participate in the EIA procedure. Additionally, the legislation on the EIA is also insufficient when it comes to public participation in EIA process.

So, the information gathered in this study may provide recommendations in order to improve the current situation regarding public participation in EIA in Malaysia by looking at how the European Union conduct its public participation in EIA procedure, while also looking at their weaknesses at the same time.

Therefore, in this research paper, by addressing the problem, the research will be conducted using a qualitative research method, with which I will refer to statutes and
online literatures. I will observe the regulation and procedure of public participation in EIA by looking at the regulation and procedure of EIA in relation to public participation in EU member states in comparison.

1.3 Research Questions

This research attempts to answer two research questions:

1) How has the public participation in EIA been regulated in Malaysia compared to the European Union?

2) How can the public participation in EIA in Malaysia be improved by looking at the public participation in EIA in EU and its legislation?

1.4 Research Objectives

There are two objectives of this research:

1) To highlight how the public participation in EIA in Malaysia and European Union has been regulated.

2) To highlight the strong and weak characteristics of the EIA procedure in Malaysia and the EU, which can increase or decrease the chance of public participation to influence the EIA process.

1.5 Scope and Limitations

The scope of this research is to analyse the laws governing EIA in Malaysia. This research focuses on the issue on how the EIA procedures and the law pertaining to EIA under the Environmental Law in Malaysia, together with references in other countries in EU, are being applied in public participation in EIA projects. The laws that will be analysed include the EQA 1974, Directive 2011/92/EU, etc. The comparative analysis is significant in providing a benchmark of the laws on EIA in Malaysia, as well as learning some lessons from other countries which have successfully implemented such laws, namely the member states of EU. Therefore, this research will eventually provide a wider perspective on the EIA in Malaysia.

Since attaining information and sources of environmental law is not as easily accessible as attaining information on contract or criminal law, additional efforts are
required in obtaining the research materials. These include frequent visits to the public and university library in Tilburg, Netherlands to acquire the books and a visit to the MARA University of Technology in Selangor, Malaysia to get hold of books and case laws. This second visit is due to the fact that most cases pertaining to EIAs in Malaysia are not available online for public scrutiny as they more often than not fall within the lower courts’ jurisdiction. Finally there was also a visit to the environmental library in Putrajaya, Malaysia. The fieldtrips involved in the pursuit of these materials are consuming in reference to both time and financial matters, as I had to use my own funds.

1.6 Research Methodology

Qualitative methods will be conducted in completing this research. A technique of theoretical research or doctrinal approach, such as analysing legal doctrine, will be adopted, which involves primary and secondary sources. For the purpose of this research, documents such as articles, journals and online literatures will be the main sources used to analyse how the public participation in EIA been regulated in Malaysia in comparison to the EU.

In conducting this research, the primary sources will mainly be the statutes, such as the Environmental Quality Act (EQA) 1974, Directive 2011/92/EU, and etc. These will not be the sole primary sources as for the purpose of comparative studies between the countries, national statutes from other countries and jurisdictions, and international law, will also be used too. In addition, secondary sources such as theses, journal articles, books, and online literatures will also be used to provide further helpful and informative research in this matter. In addition to these various resources, online databases such as the Current Law Journal (CLJ), European Commission site, Curia, HeinOnline and Lexis Research for Academics will also be referred to whilst searching for more literatures related for this research. Finally, the information gathered through these methods will later be analysed for conclusion, improvements, and recommendations.

1.7 Significance of Study

The significance of this study is to provide recommendations that may improve the participation of the public in EIA procedure and the legislative framework for EIA in
Malaysia. The research could be added to the extant, but limited, literature. Because the country is somewhat lacking in providing information and environmental conscience regarding the participation of public and the enforcement of the law pertaining to EIA, this study aims to provide more specific literature about the problem regarding the inadequacy of procedures and law on this subject matter.

Current authorities and enforcing bodies that are responsible in enforcing and regulating the provisions may be evaluated and in return, a newly improved practice could perhaps be developed to promote a better practice of public participation in the enforcement of EIA.

The research and recommendations on this matter may help the relevant authorities to improve the procedure in the guidelines on matters involving public participation in order to minimize the loopholes as well as in the handling of the issues pertaining this matter.

Finally, a legal awareness on environmental issues relating to the impact of development projects toward the environment could be created and boosted among the developers, the public, and the relevant authorities.

1.8 Division of Chapters

This document consists of four chapters. The first chapter expands on the framework of this research, its scope and objective, and the outcomes expected from this particular research.

In the second chapter, the coming into being of the EIA in Malaysia and also the procedures and regulations in producing an EIA report are explained. The second chapter also expands on the legal position of EIA in Malaysia, including the legal position of EIA in the governing statute, and the enforcing bodies. The chapter further discusses the implementation of EIA in EU member states.

In chapter three, I will attempt to answer the objective and research questions in highlighting the regulation of public participation in EIA procedure within Malaysia and the member states of the European Union. This chapter also highlights the common problems faced by countries regarding the provision and the implementation of public participation in the EIA procedure.
The focus is on how the existing procedures, laws and regulations work regarding the participation of the public in the EIA procedure and also on how these countries try to overcome the problems that surfaced from it. This research aims to study the existing procedures on public participation, their strong and weak characteristics that may increase or decrease the chance that public participation will have an influence on the EIA process, and also on the law and regulations and as to whether they are adequate or sufficient in handling of the persistently growing complex issues relating to the matters of environment and the present developments that are ensuing at an alarmingly rapid pace. At the end of the chapter, some comparisons are made in regards to the laws and how they work between the countries studied. Comparison between the public participation in the statutes will be looked at, mainly in the Malaysian EQA 1974, European Union Directives (Directive 2011/92/EU), Rio Declaration, and Aarhus Convention.

In chapter four, based on the study and research completed, I will give my conclusions and provide recommendations to improve on the existing domestic environmental law pertaining to the EIA, with regards to procedure and provision that relate to public participation.
CHAPTER 2
THE LEGAL FRAMEWORK OF EIA IN MALAYSIA

2.0 Introduction

The EIA is a wide-ranging collection of gathered information that is compiled in the form of a report. Agents are hired by developers to carry out the preparation process of the report in order to help the developers in assessing the impacts on the environment which have the possibility to result from the development prepositions. The prospective developers hire agents who are licensed by the domestic planning authority. The EIA report would then be carried out and submitted by the project developers to the relevant domestic planning authority before it can be approved. Approval is given to the developers to carry on with their proposals only after the domestic planning authority gives their nod of approval (Articles Environmental Impact Assessment, n.d).

In a more revised and detailed context, the assessment is said to be an analysis to foresee, recognise, assess and correspond environmental information of a proposed project. It is also to improve the change and mitigation actions and procedures that have to be taken before the act of implementing of these projects are subjected to the consent of the concerned appropriate authoritative town planning group. The intentions of the assessment are to eschew costly oversights in the implementation of the project, be it due to the environmental damages that are likely to emerge during the implementation of the project or due to alterations that may be needed afterward so that the action is environmentally acceptable by all (Articles Environmental Impact Assessment, n.d).

2.1 History of EIA in Malaysia

As early as the Third Malaysia Plan (Rancangan Malaysia Ke-3), EIA have been recognised as an effective tool for environmental protection and management as it is seen as a document that highlighted policies and prospects for development in the period of 1976-1980. For the first time in history, the document is also seen as representing a specific matter that was allocated in a chapter for such plan that concerns environmental issues (Briffett, Obbard & Mackee, 2004).
An EIA procedure was first proposed and introduced at the National Seminar on EIA where it can be seen that there were efforts in formalising EIA in Malaysia and it started somewhere around September, 1977 (Ho, 1990). The procedure that was brought forward was analysed and reviewed by an Ad Hoc Panel that was set up in the Division of Environment, and afterwards the implementation plan was also submitted to the government for the government’s consideration and consent in 1978 (Ho, 1990). The Government’s approval was laid out in the principle subject, along with a preparation of a set of guidelines. The Environmental Quality Council, a body that was set up under the EQA of 1974 to advise the Minister) prepared a draft Handbook on EIA Procedure and Guidelines and it was approved in 1979 (Briffett, Obbard & Mackee, 2004).

Briffett, Obbard and Mackee (2004) stated that since there was an absence in the statutory provisions regarding EIAs, as it was then seen to be implemented under administrative arrangements under the EQA 1974. Later, the EQA was amended and specific provisions were created for mandatory EIAs for prescribed activities and it was inserted under Section 34A in 1985. The inclusion of this section was intended to provide a report on impacts on the environment from the listed 19 prescribed activities including housing development, waste disposal, and many more. The aims of the amendment were to give protection and safety to the environment prior to any development or construction which would occur and gave a great deal of attention to the management and control, to established environmental audit and also introduced an environmental and research fund. Following to the amendment, the EIA was gazetted on November 5, 1987 and it finally became effective from April 1, 1988. On September 30, 1987, a revised guide, the Handbook of Environmental Impact Assessment was launched (Briffett, Obbard and Mackee, 2004).

### 2.2 Legal Position in Malaysia

As a thorough form of legislation enacted by the Federal Parliament in 1974, the EQA 1974 was enacted to avoid, lessen and control the environmental muddles and other related issues that prior to the enactment. This is because before the enactment, any law concerning the environment was an unimportant sub-legislation and was unable to handle the rise of complicated environmental problems (Memon, n.d). Trailing the enactment of the EQA, a main environmental agency, the Department of Environment...
(DOE) was established by the Ministry of Science, Technology and Environment to modulate and implement regulations and relevant procedures relating to all environmental issues at the federal level. It was also intended to retain the preservation of the environment and its uniqueness, quality and variety (Memon, n.d).

In accordance to section 3 of the EQA 1974, a Director-General of the Environmental Quality (DGEQ) is appointed by the ministers from among the members of public service. The DGEQ has quite a role and responsibilities given to him by the statute in carrying out and handling his role as the head and the leader of the department (Mottershead, 2002). The deputy of DGEQ and other authorised officers of the department assist the DGEQ in some duties and sometimes, unless provided otherwise by the EQA, they also may be responsible for duties and functions which are similar to those of the head. The department mainly covers issues that involve air and water quality, industrial waste, noise levels and environmental impact assessment, therefore making the department the main body concerned with industrial pollution and environmental quality as a whole (Mottershead, 2002).

2.2.1 Provision in Environmental Quality Act 1974

In Section 34A of the EQA, the laws and regulations are provided and it also includes the 19 prescribed activities that require developers to file an assessment document. After having consultations regarding the major and significant impacts a project can have on the environment, the Ministry of Resource finally included the prescribed activities (Department of Environment, 1987). Under the Department of Environment (1987), the provision later instructed the prospective developers of the projects that fall within the prescribed activities to submit EIA reports to the DGEQ prior to permission being granted by the relevant body. The EIA report must be in line with the guidelines given by the DOE that state that the report must contain an assessment of the impact on the environment of the activities prescribed as well as the data and information of the proposed measures that shall be taken to improve, avoid and control the diverse impacts on the environment when the project starts and continues.

2.2.2 Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987

Under Section 34A of the EQA 1974, there is a sub-legislation that lays down the type
of activities that must be assigned and subjected for an EIA report and this is the EIA Order 1987.

Nonetheless, the order is unfortunately not applicable to the East Malaysian states (Sabah and Sarawak) in some prescribed activities. Under the Department of Environment Malaysia (1987), it stated that the prescribed activities will be applicable except for item 7(viii) listed in the First Schedule of the Conservation of Environment (Prescribed Activities) Order 1999 published under the Second Supplementary of the Sabah Government Gazette on the 30 August 1999. It is also not applicable to the prescribed activities listed in the First Schedule of the Natural Resources and Environment (Prescribed Activities) Order 1994 published under Part II of the Sarawak Government Gazette on 18 August 1994.

Although there is a limitation, it is stated that items in the Schedule are still applicable to the East Malaysian states but it excludes paragraph 3, which is the prescribed activities listed as Items 2, 5(a) and (b), 8, 9, 10, 12, 13(a), (c) and (d), 15, 16 and 18 in the Schedule, where this paragraph 3 shall continue to be applied in respect by both East Malaysian states (Sabah and Sarawak).

2.2.3 Penalty

The EQA 1974 was amended and it became The Environmental Quality (Amendment) Act 1985 (Hashim & Rainis, 2003). The amendment includes an insertion under section 34A where it stated that any person that intends to carry out any prescribed activities must be required to submit a report on the environmental impact to the Director of Environmental Quality for examination. The amendment was later gazetted on 9 January 1986 and section 34A states as follow:

“34A (8) Any person who contravenes this section 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 to a further fine one thousand ringgit for every day that the offence is continued after a notice by the Director General requiring him to comply with the act specified therein has been served upon him”.

The compounds for offences stated was later increased up until 50 percent from the maximum compounds for offences during the enactment of the Act in 2012 (Asian
Environmental Compliance, 2014). According to Asian Environmental Compliance (2014), currently, the compound has been raised to RM50,000 from RM20,000 if project developers fail to disclose an EIA report and start working on a project without it. Not only that, a penalty of RM10,000 or imprisonment of one year, or both, will also be imposed upon those who are posing as environment enforcement officers.

2.2.4 Activities Subject To EIA

The EIA Order 1987 was made under sway given by Section 34A of the EQA 1974 (Amendment) 1985 and it specifies some activities that require an assessment report to be made on the environmental impacts. There are nineteen categories of activities that are prescribed and many of the activities related to these nineteen categories are divided and defined according to the size of the project (as area), capacity (quantum), while some others are not defined by any unit of measurement (Ministry of Natural Resources, n.d). Nineteen categories of activities are prescribed and these include those related to; agriculture, airport, drainage and irrigation, land reclamation, fisheries, forestry, housing, industry, infrastructure, ports, mining, petroleum, power generation, quarries, railways, transportation, resort and recreational development, waste treatment and disposal, and water supply.

2.2.5 The EIA Procedures

In Malaysia, the EIA procedures adopted consist of 3 important major steps. The steps of the procedure of the EIA can be described as follows (Ministry of Natural Resources, n.d):

- Preliminary assessment or screening process is seen as the initial assessment of impacts due to the activities that are prescribed. This assessment is the stage where the EIA procedure is normally begin with at the pre-workability stage of study of the development of the activity. The options of the projects are identified at this stage and if there is any impacts being seen will be traced and made recognised. The technical committee in the DOE will review the prepared preliminary report and this is done internally within the committee without any disturbance from outside of the committee. In spite of that, if there is lack of expertise being seen within the department,
another way to be resorted is by asking for assistance from other government and non-government agencies (Ministry of Natural Resources, n.d).

- According to Ministry of Natural Resources and Environment (n.d), for projects with more heavier and significant environmental impacts being predicted under the preliminary assessment, the report will have to undertake the detailed assessment and it should be continuous during the project workability. The detailed assessment report will later be submitted for approval by the DGEQ before getting the consent of the relevant Federal or State Government authority for the project implementation. Detailed assessment is conducted based on the specific terms of reference given out by the ad hoc Review Panel appointed by the DGEQ. Then, the prepared EIA report is going to be review by the ad hoc Review Panel which will be lead by the DGEQ.

- For preliminary assessment reports, the review process of the EIA reports is carried out within the committee of the DOE while for detailed assessment reports, an ad hoc Review Panel will be reviewing the EIA reports. Suggestions and recommendations coming out from the review will then be transfer to the relevant project approving authorities for consideration in project making decision. One month is usually allocated as the normal period for a review of the preliminary assessment report while two months is needed for a detailed assessment report. A number of experts will be called upon to review the report and be part of the members of the established Review Panel when it is needed. The experts are called depending on the areas of expertise concerning the environmental impacts that needs to be reviewed (Ministry of Natural Resources, n.d).

Section 34A of EQA 1974 already stated the procedure for the assessment of the EIA report in its handbook for project developers to refer to as their guidelines. There are a few procedural phases that must be followed by the project developer in applying for approval of an EIA report in detailed assessment (Malaysia, 2007). Figure 1 below shows the EIA procedure;
Figure 1: The Procedure for Detailed EIA

THE LEGAL FRAMEWORK OF EIA IN EUROPEAN UNION

EIA is a global mechanism that has been applied by almost every country in the world. One of it is in the European Union and its member states.

2.3 History of EIA in European Union

Germany and France were the first to implement the EIA requirements in their states in 1975 and 1976, in comparison to other European countries which implemented these requirements at later dates. The EIA Directive was opposed strongly by the European Community prior to 1985 where it was first proposed in the European Community’s Second Action Programme on the Environment in 1977. Only after 8 years of debating did the Directive finally come into force and was introduced to many European countries (Watson, 2011).

Referring to European Union (n.d.), the Environmental Impact Assessment Directive (85/337/EEC) came into force since 1985 and is practiced in a broad range of projects, which are private and also public. These projects are stated in annexes I and II. These annexes listed the type of projects that are compulsory or non-compulsory for the developer to produce an EIA report. All projects that are listed in Annex I are likely the ones with the most significant heavy impact upon the environment and thus, require an EIA report to be produced. Examples of projects categorised in Annex I are; express roads and motorways, long-distance railway lines, airports with a basic runway length that is 2100 metres and more, installations for the disposal of hazardous waste, installations for the disposal of non-hazardous waste that is more than 100 tonnes/day, and also waste water treatment plants which is more than 150.000 p.e.

As for projects that are listed in Annex II, it depends on the member state’s discretion on whether project proponents need to prepare an EIA report for their projects. This discretion by the member states is done by doing a procedure called the “screening procedure”, where the procedure defines the effects of the projects on a case-by-case examination or on the base of the projects’ limits or standards. After that, then the member states can decide whether or not the project proponents may have to produce an EIA report. Nevertheless, there are criteria that need to be taken into consideration by the member states and they are laid down in Annex III (European Union, n.d.).
Directive 85/337/EEC has already been amended three times, in the years 1997, 2003 and 2009. The first amendment is Directive 97/11/EC which brought the Directive into sync with UN ECE Espoo Convention on EIA in a Transboundary Context. This Directive covers a broader range and more types of projects and also the number of required EIA projects in Annex I. Directive 97/11/EC also included new screening criteria in Annex III that is used for Annex II projects and also established a minimum information requirements for EIA (European Union, n.d.).

Furthermore, it is also written in the European Union (n.d.), that the second amendment to Directive 85/337/EEC was seen in Directive 2003/35/EC where this directive focused on aligning the public participation provisions with the Aarhus Convention where this convention focused on the public participation in decision-making and access to justice in environmental matters.

The third amendment was the Directive 2009/31/EC, which amended Annexes I and II by adding more projects linked to transport, carbon dioxide (CO2) capture and storage. Afterward, the 1985 Directive was compiled and codified into Directive 2011/92/EU in December 13, 2011. This Directive was also amended in 2014 by Directive 2014/52/EU but gave time to the Member States to fully transpose and apply the amendment until May 16 2017 (European Union, n.d.). However, according to the transitional provisions stated in Article 3 of Directive 2014/52/EU, Projects for which the screening and scoping was initiated, an EIA report submitted before May 15 2017 shall be subject to the provisions of Directive 2011/92/EU. Therefore, for the purpose of this research, Directive 2011/92/EU will be used as guidance.

2.4 Legal Position in European Union

The scope of the EIA in European Union can be seen in Directive 2011/92/EU. In Article 2(1) of Directive 2011/92/EU, it stated that before a project is approved, the member states should adopt all measures necessary to guarantee that the project should not have enormous consequences on the environment, depending on their size, nature or location and these are made as a requirement to attain the approval for the project development and to be assessed with regard to their impacts. So, Article 2(1) of the EIA Directive is seen to be the main provision regarding this matter and the list of the projects is provided in Annex I and II of the Directive 2011/92/EU. Besides
that, Article 1(1) of the Directive also stated that all private and public projects with the likelihood to cause major effects on the environment shall apply the Directive to get an approval on the projects.

2.4.1 Penalties

Before the amendment of the Directive in 2014, there was no provision to tackle the penalty for non-compliance in EIA. However, since member states are allowed to implement additional rules in their national provision while still following the Directive, they may include penalties for non-compliance of EIA if they think it is necessary. However, the EU member states have a duty under European Law to ensure supervision and enforcement that fulfil certain effectiveness requirements.

2.4.2 Activities subject to EIA

According to Jans and Vedder (2012), although a project is inside the scope of the Directive, it is not necessarily required to have an assessment done. As written in Section 2.4 in the brief history of EIA in European Union, the Directive differentiates the projects between Annex I and Annex II. Article 4(1) of the Directive listed the type of projects that are to be subjected to a compulsory assessment whereas Article 4(2) of the Directive listed the projects that will be determined by the Member States of European Union under their discretion on a case-by-case analysis, and/or by observing the criteria that has already being set by the Member States as to whether or not the project requires an assessment. Under Article 4(3) of the Directive, it is also stated that the suitable criteria in Annex III will be used and taken into account in the screening process whenever there is a case-by-case analysis done by the Member States or even when there is a criteria being set by the Member States for the project.

What Annex III in Directive 2011/92/EU has laid out is that the criteria should include the characteristics of the projects. The size of the project must be considered, as one of the characteristics needs to be taken into account. Other than that, the Member States should also consider the accumulation with other projects, the use of natural resources, the production of waste, pollution and nuisances, and also the risks of accidents. Furthermore, the Member States also have to consider the location of the projects where they should analyse whether it will likely to affect any environmental
sensitivity of the areas by considering the use of the existing land, looking at: the abundance; quality and also regenerative ability of the resources in that area; the ability of absorption on the environment (by paying extra attention to areas such as wetlands, coastal zones, mountain and forest areas, and also areas classified or protected by the Member States’ legislation such as areas reserve for conservation of wild birds and habitats of wild flora and fauna); areas which the environmental quality standards laid down in Union legislation have already been exceeded; areas which are densely populated; and also areas which have landscapes of historical, cultural or archaeological significance.

Lastly, the Directive also states that the Member States have to include the characteristics of any potential and conceivable impact. They must consider criteria which have important impacts on the environment by looking at the extent of the impact based on: the geographical area and size of the affected population, the transfrontier nature of the impact, the magnitude and complexity of the impact, the probability of the impact and also the duration, frequency and reversibility of the impact towards the environment.

In Annex I of the Directive 2011/92/EU, the types of projects that are compulsory for EIA are: crude oil refineries, thermal and nuclear power stations, installations for the reprocessing of irradiated nuclear fuel, integrated works for the initial smelting of casting iron and steel, installations for the production of non-ferrous crude metals, installations for the extraction of asbestos, integrated chemical installations, constructions of lines for long-distance railway traffic and of airports, construction of motorways and express roads, construction of a new road of four or more lanes, inland waterways and ports for inland-waterway traffic, trading ports, piers for loading and unloading connected to land and outside ports, waste disposal installations for the incineration or chemical treatment, groundwater abstraction or artificial groundwater recharge schemes, waste water treatment plants, extraction of petroleum and natural gas for commercial purposes, dams and other installations designed for the holding back or permanent storage of water, pipelines with a diameter of more than 800 mm and a length of more than 40 km, installations for the intensive rearing of poultry or pigs, industrial plants, quarries and open-cast mining, construction of overhead electrical power lines, installations for storage of petroleum, petrochemical, or chemical products, storage sites on the geological
storage of carbon dioxide, and also installations for the capture of CO₂ streams for the purposes of geological storage. However, some of these projects are subject to a threshold and where the threshold is not beyond the setting limit, the project will be covered in Annex II.

As for Annex II, it covers any projects listed in Annex I that have been changed or extended, any kind of projects that are not listed in Annex I, and projects that have already been authorised, executed or are in the process of being executed, that may have significant pugnacious implications on the environment which are not stated in Annex I (Jans & Vedder, 2012).

2.4.3 The EIA Procedure in European Union

In making the EIA report, the project proponents should include a few things in the project information such as a description of the project covering; information on the site, design and also the size of the project, a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects, the data required to identify and assess the main effects which the project is likely to have on the environment, an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects and also a non-technical summary of the information and this can be seen stated in the Directive as Article 5(3).

Member States are given the freedom to carry out the assessment of the EIA report according to their own discretion by referring to the Directive (Jans & Vedder, 2012). According to Raymond and Coates (2001), in the EU EIA Directive, there are a few procedural phases that must be followed in all Member States and these are:

- **Screening**- Subject to Article 4 of the Directive, the competent authority makes a decision on whether a project requires an EIA and whether the project proponent needs to make an EIA report or not. This happens when the competent authority gets a notification for application on development consent. Screening by the competent authority on a project can also happen when the project proponent makes an application for a screening opinion.
- **Scoping**- The Directive specifies that project proponents may request a Scoping Opinion from the competent authority to identify matters to be
covered in the environmental information and also other aspects of the EIA process. The competent authority must consult the relevant environmental authorities in preparing the Scoping Opinion as stated in Article 5(2) of the Directive. This scoping procedure is not mandatory but in some member states, it has been made mandatory,

- Submission of environmental information to the competent authority- the project proponent submits the environmental information and the application for consent to the competent authority. The competent authority must screen a project that falls under Annex I or Annex II if the project proponent submit the application without any environmental information to determine whether the project requires an EIA or not,

- Consultation- The environmental information is to be consulted by the relevant competent authority, other interested parties and the public before making a development consent decision,

- Consideration of the Environmental Information by the competent authority before making development consent decision- According to Article 8 of the Directive, the environmental information and the result of the consultations must be considered by the competent authority in making its decision for approving the EIA report of the project proponent, and

- Announcement of a decision- the decision of the application is made available to the public and it also includes the reasons of the result and description of the measures that will be taken to alleviate and mitigate any adverse environmental effects coming from the project.

There are also few more phases that member states may follow but those phases are not obligatory phases such as review of adequacy of the environmental information, and post-decision monitoring if project is granted consent. This means, these phases only a form part of good practice in EIA. Some member states have formalised these phases but some have not.

2.5 Conclusion

This chapter has discussed the basic legal framework of an EIA in Malaysia and also in the European Union. The focus of this chapter was on the history of EIAs of
Malaysia and the EU, the legal position of provisions, the penalties associated with failures to comply, activities subject to EIAs, and also the procedures in an EIA. The purpose of this chapter is to help give a basic knowledge of how EIA work in both Malaysia and also in the European Union and its member states.
CHAPTER 3
THE INCORPORATION OF PUBLIC INVOLVEMENT IN EIA

3.0 Introduction

Public involvement is an important principle or value of the process in EIA. A successfully completed and appropriate proposal of EIA can be seen to be the result of a well-planned, properly implemented and detailed observation through the involvement of the public in contributing in the process of the EIA (Public Involvement, 2002).

The term public involvement also includes public consultation, public participation that is far more interactive, intense and also engaging between the developers and public (Public Involvement, 2002). Practically, all EIA processes are engaged through consultation and not participation. The least that can be done is that the public involvement should give an opportunity to those who are directly affected by the project to give their opinions and views pertaining to the proposal and its impacts on the environment and also on the people.

Public involvement is organised step-by-step depending on the intensity and participation. The basic form will be the least intense and from thereon, the intensity and interaction goes up and becomes deeper. The starting condition of a public involvement is the process of laying out information and notification to the public. Information disclosure, which stands independently, is not sufficient in public involvement when it comes to a big and major EIA proposal (United Nations Environment Programme, n.d.). Exchange of information in consultation is seen to be more appropriate as this is designated as a survey to investigate the opinions of the participants on the proposal and the impacts. Other than that, in tackling the issues, public participation is seen to be much more fitting as it is a more collaborative and suitable process where there can be a discussion of agreement and disagreement of the proposal in trying to get an agreeable result by the public and the developers. Lastly, there is also negotiation where an alternate dispute resolution mechanism is applied and the stakeholders resolve the problems according to the mutual understanding of
the different interests and also consensus (United Nations Environment Programme, n.d.).

In real life situations, the practice of public involvement is usually based on, and corresponds to, consultation. Nevertheless, participation of the public is seen to be more suitable in cases where, for example, the local people of the area have to be relocated or are heavily affected due to a project being constructed. These types of public involvements are viewed as different to one another and the process is separated too. But, these types of public involvement may be combined if it is seen to be appropriate at different stages of the similar EIA process, such as combining public consultation and also public participation in the same EIA project proposal (Public Involvement, 2002).

The implementation of the public involvement in the EIA process is important and has its purpose. In the assessment procedure, public involvement is seen as a fundamental part and is also believed to raise a much more democratic policy-making, and to render EIA more efficient and successful (Glucker, Driessen, Kolhoff, & Runhaar, 2013). Public involvement is an important source of information in predicting the major consequences that will be caused by the developers. Furthermore, the involvement of the public is also crucial as they discuss the potential mitigation approaches and are also able to provide solutions and alternatives for the EIA project presented by the project developers (United Nations Environment Programme, n.d.). Not only that, the involvement of the public is important in order to ensure the EIA process is disclosed as visible, open, and also arguable and answerable as it possibly can be to the public for analyses, suggestions and comments.

The purpose of the involvement of the public is also to inform the locals regarding the proposal of a project and also its predicted effects towards the site or area of the project. Additionally, public involvement also serves as a form of survey where the public can express their concerns, suggestions, commentaries and also views towards the proposal. Later, the developers can take those views into account and modify the proposals according to various suggestions given in the process of making the final decision.

Other than that, the main objectives of the involvement of the public are to attain
knowledge and information of the area of the project that can be considered as useful in decision-making (What is public involvement?, n.d.). Moreover, the public involvement is viewed as guiding the project proposal in considering mitigating measures, and coming up with alternatives to lessen the negative effects. Additionally, the involvement of the public is to ensure that major impacts will not be overlooked and occur while gaining the utmost benefits from the suggestions of the public. Also, according to Junker, Buchecker and Müller-Böker (2007), the objectives of public involvement are to decrease the number of conflicts and problems in the earlier stage of the process to avoid bigger issues in the process later on and to provide chances for the public to get involved in the project in a positive way and not in a way that will negatively affect the project in the future. It is important to remember that the objectives of the involvement of the public are also that it improves the transparency of the decision-making at the end of the process and also to strengthen the confidence of the public regarding the EIA and its process (Canadian Environmental Assessment Agency, n.d.).

Based on experience in the EIA process, the public involvement does meet the objective and goals of the EIA since it gains a lot of benefits, such as in the improvement of the project designs and also the smoothness of the flow in the procedure of the process (Public Involvement, 2002). Examples of benefits gained from participation of public are that the stakeholders will have more confidence, and their self-esteem will increase since their opinions are valued by the project developers and they would not be afraid to exchange their opinions and suggestions, and taking in views and ideas that are different from theirs too. In other words, they would not be frightened to speak their mind.

In this chapter, I will look at how the public participation in EIA has been regulated in Malaysia compared to the EU by viewing the Rio Declaration and also the Aarhus Convention. The principles in Rio Declaration and the three pillars of rights related to public participation in the Aarhus convention will be viewed to compare the regulation of public participation in EIA in both Malaysia and EU. The strong and weak characteristics of the EIA procedure, which can increase or decrease the chance of public participation to influence the EIA process will also be reviewed as well. For this, the stages of public participation and who are involved in the process will be
looked at and relate to the three pillars of rights in the Aarhus Convention later on in the chapter.

3.1 Public Participation in International Instrument

According to Pickaver and Kreiken (2011), public involvement started to gain recognition internationally post World War II, where the Universal Declaration of Human Rights added several provisions relating to public participation. The public should have the right to be involved in the administrative procedure. The public participation is a way for the local communities, NGOs, interested parties and many more to be involved in the decision-making process, which previously only involved the project proponent, government agencies, proprietor and also the investor.

There was hardly any international law that was concerned with the environment and this is because states have exclusive sovereignty rights on their land resources and they are responsible for taking care of and monitoring their own environment (Pickaver & Kreiken, 2011). However, in the 1960s, the international mindsets started to transform despite the Principle 21 of the Stockholm Declaration\(^1\) still stating that natural resources of a state are still under their own autonomy. Granting all this, there were still very limited binding provisions relating to public participation on development related to environmental matters for the reason that most legislation is considered as “soft law” and the states are not obliged to follow the law as they are allowed to establish their own rules (Pickaver & Kreiken, 2011).

In 1970s, it became more apparent that the development of the environment by states sometimes go beyond their states’ boundaries and as a result, affect other states too. In that event, the states have the responsibility to take care of their states’ and also other states’ environment by ensuring their activities are under control and do not cause any damage to nature (Pickaver & Kreiken, 2011).

Subsequently, due to the increased worldwide awareness towards the environment,

\(^1\) Principle 21- States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.
the United Nations Conference on Environment and Development (UNCED) or in short, Rio Declaration that was held in Rio de Janeiro was seen as a stepping-stone in soliciting public participation as a human right and this declaration is also a method to have the public to participate more in monitoring the environment (Pickaver & Kreiken, 2011).


Internationally, public participation is well known and well recognised in the context of environmental matters. Many international legal frameworks implemented public participation in their provisions where provisions relating to rights are mentioned, such as the right to access information, right to justice, and also right to participate in environmental matters. A more precise framework that focuses on the environment and also the public is known as Rio Declaration. This Declaration focuses on precautionary principle, environmental awareness, participation of the public and much more.

A more specific provision that focuses on public participation is Principle 10 of the Rio Declaration 1992, where it talks about public participation. In Principle 10, it is stated that environmental issues are the most effective to be handled if there is participation of the concerned citizens and at national level; every individual shall have the appropriate access to information regarding the environment, including the information on any hazardous materials and activities and also the chance to participate in the process of decision-making. Plus, in Paragraph 2 of Principle 10 of Rio Declaration, it is also stated that the state ‘shall’ help and encourage the citizens on public awareness and in participating in making decision by providing the information available everywhere. Not only that, in Principle 10, the principle also stated that there ‘shall’ be provided an effective access to judicial and administrative proceedings for the public, including redress and remedy for their situation.

Principle 10 of Rio Declaration 1992 laid out the principle elements on good environmental control and it laid out three rights of access, which are the access to information, access for public participation and also access to justice. For the purpose
of this research, these three rights will be viewed in order to compare the regulation of public participation in Malaysia and also EU.

This declaration is seen as a major progress in enabling the public to be involved in creating awareness for the environment. However, these accesses have been regulated and limited by legal framework of soft-law, where it is seen as a non-binding law unless with a recommendation or suggestion from authority in a country or from political declaration of the country, only then it can become binding (Alam, 2014).

3.2 Public Participation in Regional Instrument

Public participation is considered as a part of an imperative process in environmental development now that consultation of the public and access to information is necessary. Due to this, most EIA schemes added participation of the public in their procedure as it is seen as a fruitful method in maintaining successful EIA laws.

Before 1985, there was no obligation under international law to require EIAs. Eventually, the EC Directive on Environmental Impact Assessment (Directive 85/337/EEC) started to make international law initiate a need for an EIA because directives are a form of “hard” law in the EU. Since it is implemented in EIAs throughout Europe, it is seen as an important motivation that galvanise the public participation to a higher level in environmental development internationally (Pring & Noe, 2002).

The public started to become more alert on environmental problems mainly due to the incident of Chernobyl disaster in 1986. As a result, the Rio Declaration plan of action for sustainable development also included articles on public participation (Pring & Noe, 2002). After the Rio Declaration, there is another expansion on public participation ground in relation to the environmental problems in the EU. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters or Aarhus Convention was adopted in 1998 and entered into force in 2001. This is the first document to associate public involvement in environmental matters as well as the first document in Europe to incorporate human rights and also environmental rights together (Pickaver & Kreiken, 2011). The section below is the brief explanation regarding the Aarhus Convention.
that relates to public participation in EIA.

3.2.1 The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)

Following up to the Rio Declaration 1992, the Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters, or also known as Aarhus Convention, was entered into force on 30 October 2001 in Europe with the exclusive purpose of involvement of the public for environmental protection in creating a better environment for the citizens (Alam, 2014). The Aarhus Convention is one of the two legally binding international legislations that apply Principle 10 of the Rio Declaration (Public Participation, n.d.). The Convention helps in protecting the rights of citizens so that the citizens may live in a very harmonious, adequate and clean environment. This convention specified the three rights of access for the public and they are; the right to access, in which the public should have the right to access information that is under the power of the authorities, the right to public participation, in which the public may actively participate in the process of decision making that affects them and their environment, and lastly the right to judicial access, in which the public may bring forward the environmental issues for a judicial review for redress or remedy.

The parties to the Convention, which is the European Union and its member states, are obliged to apply the provisions listed in the Convention and must take necessary legislative and regulatory measures (United Nation Treaty Collection, n.d.). Not only that, they must also ensure that the public officials and authorities are there to help and give advice to the public regarding their rights to access of information, right in participation in decision-making and also right to access to justice. Furthermore, the Community must also promote to the public environmental education and its awareness, and lastly, they must also provide for recognition of and support to associations or any environmental organisations or groups in the quest for promoting environmental awareness and protection.

The Aarhus Convention also laid down specific rights relating to information access;
these include the deadlines for providing information to the public and also the grounds on which the authorities can refuse information access of a project. The refusal of information can be seen in three cases, which are that the public authority does not hold the information that is requested by the public, the request by the public is too specific or unreasonable and also the request of public where the projects are already in the course of completion. Additionally, the public request may also be rejected and refused on the grounds of confidentiality in matters relating to national defence and public security, proceedings of the public authorities, to respect commercial and industrial information confidentiality, rights of intellectual property, confidentiality of personal data and also third party interests who volunteered the information (Access to information, 2008). Although the authorities can refuse to disclose information to the public, take note that the grounds for the refusal must be interpreted in a very restrictive way. The authority must give their reasons on the refusal and they also have to specify which alternative form that needs to be used for appeal by the applicant. The information kept by the authority must be recent and should be uploaded in electronic databases containing the reports on legislation, national plans and also international provisions used.

Not only that, the Convention also laid down the right for public participation in decision-making process. For EIA report, projects that are listed in Annex I of the EIA Directive 2011/92/EU as mentioned in Chapter 2 are required to have a report and the public have the right to participate in the decision-making process of the EIA project and give their suggestions and comments while doing so, so that there would be no adverse impacts coming from the project in the future. The project proponents must take into consideration the public opinions, suggestions and comments in making the final decision in their EIA report. In the decision-making process of an EIA report, the public should be informed of the matter in which the decision is to be taken, the nature of the decision, the responsible authority involved, the procedure used in the process, and lastly the procedure, ways and options that will be taken by the project proponents in reducing adverse effects. Likewise, suitable time frames must be given to the public to voice-out their opinion and give their comments regarding the EIA project. Also, the Convention also stated that the parties to the Convention should promote public participation in preparing their policies and also legislations that can affect the environment (Access to information, 2008).
Lastly, the Convention also touches on the access to justice in relation to any environmental issues. Anyone who feels like their rights to access to information have been infringed upon, such as being ignored, denied or refused to have access to information regarding a project or such, or are being refused participation in a decision-making process of a project, then they have the right to bring the matter to be reviewed under the national legislation of their country or justice by other means too (Alam, 2014).

This Convention only applies to countries that are parties to it. There are 47 parties to the convention and among them are Albania, Armenia, Belarus, Bosnia and Herzegovina, the European Union member states, Kazakhstan, and Ukraine (UNTC, n.d.). Nonetheless, countries that are not parties to the Convention may apply the articles of the convention for environmental matters in their countries.

In this paper, Malaysia and the EU member states are the ones that are going to be observed. The EU member states are parties to the Aarhus Convention whereas Malaysia is not a party to it. Therefore, EU member states are obliged to follow the provisions laid under the convention, but not Malaysia. As for Malaysia, it refers to Rio Declaration and the Aarhus Convention, although they are not obliged to do so. Malaysia has the right to decide for itself on whether to apply or not to apply the Rio Declaration and Aarhus Convention because the Rio Declaration is a non-binding law and Malaysia is not a party to Aarhus Convention. It is all depending on the suggestion of the relevant authorities in the country.

Since the Aarhus Convention originates from the idea of Rio Declaration and is more in-detailed on matters involving public participation, the three pillars of rights in the Aarhus Convention will be one of the issues that will be observed in relation to the regulation of public participation in EIA in Malaysia and also the European Union and its member states. The comparison between them can be seen in section 3.5 below. In conjunction with this, the involvement of participants and the stages of public participation in the EIA process will also be observed and be related to the three pillars of rights of the Aarhus Convention.
In consequence, before we look further on the three pillars of the Aarhus Convention that play parts in participation of the public in EIA, the paper will first discuss the issues regarding on the participants involvement in the EIA process and also on the stages of public participation in EIA process in general and in comparison between Malaysia and EU. This is due to these two issues interrelated to the issues in Malaysia and EU regarding to the three pillars of rights, which is the right to information, access for public participation and also right to justice in EIA.

3.3 Who is Involved in the EIA process?

In EIA process, the participants involved include the people who are affected by the project proposal. Examples of these stakeholders are the local people, project developers and the project beneficiaries, non-governmental organisations and interest groups, and also other interested parties like donors, academics, private sectors and many more (Public Involvement, 2002). These stakeholders are seen to be playing an important role in participating in the EIA process.

The first stakeholders are the local citizens, be it individuals or groups, who will be affected by the project (Public Involvement, 2002). These people are those who want to be informed of what is proposed by the project proponent and those that would like to know what the consequences of the project are. They are the people who would want their concerns to be understood and taken into consideration by the competent authority. The citizens would want to know that their opinions would be taken into account and considered. Not only that, the local people also will want the project proponent to address their concerns since the project will be affecting them and their daily life. The public is one of the most important participants in the whole process because the public has to endure the consequences if the development causes detrimental effects to the environment. This is where most of the issues surfaced in the EIA process as the public’s rights seem to not be practiced according to how it should be. The public’s participation is considered as an important aspect in making the environmental development work smoothly without any problems in the future. In both Malaysia and EU, the public does participate in the process. The difference that can be seen in between these two are the stages where the public starts to get
involved. This will be seen in section 3.4.1 and 3.4.2 below where the stages of public participation will be looked at and compared.

The second one to be involved in the process is the project proponent (Public Involvement, 2002). The project proponents prepare the report and try to make the best proposal with various mitigation measures in order for the project proposal to be approved. It tries to create proposals that will be understood and accepted by the public by following the guidelines in preparing the EIA report. Not only that, the project proponents can improve their proposals by adding inputs by the local people as the local people have more knowledge on the specific area. There are also issues that involve project proponents that restrain public participation in EIA process. This issue will be discuss alongside with the issues relating to the three pillars of rights in the section 3.5 below.

Another stakeholder in the EIA procedure is the government agencies (Public Involvement, 2002). These government agencies will want regulatory responsibilities to be present in the impact analysis and also in the mitigation consideration. For the competent authority, the project proposal will be less controversial in the later stages of the EIA process if the public participation has been effective since the beginning. The EIA agency that is responsible will be concerned with whether or not the participation of the public follows the requirements and procedures. In EU, there is an Aarhus Convention compliance committee that monitors the EU member states and other countries that are parties to it to comply with the convention. In the first Meeting of Parties (MoP) that was held in 2002 through decision I/7 Review of Compliance as an arrangement “of a non-confrontational, non-judicial and consultative nature for reviewing compliance” as stated in Article 15 of the convention (Ebbesson, 2016). According to Ebbesson (2016), the purpose of this compliance committee is to promote and improve compliance of the parties in the convention, and also to monitor the parties from not taking any advantage and making any error in the process involving the public. Malaysia on the other hand, also has a compliance committee to monitor on the EIA process but they do not have any Meeting of Parties like they do in Aarhus Convention. They focus more on the process of EIA in general and not in detail on the public participation in the EIA like how Aarhus Convention compliance committee is.
Other than those 3 stakeholders, NGOs and interest groups also are seen to be involved in the EIA process. The NGOs provide useful perspective on the policy of a proposal and their views are often helpful when there are problems which arise that involve the local people of the affected area. However, NGOs and interest groups are seen as a backup in the EIA procedure since they only become involved in the process when they have interests in the project proposal.

Lastly, the stakeholders that are involved in the EIA process are those of other interested groups who are experts in the specific fields that concern the project proposal and able to make important contributions towards the EIA project (Public Involvement, 2002). These are the people who the government agencies go to for advice on specific areas of knowledge, which relate to the project.

3.4 Stages of Public Participation

Looking at the generalised EIA procedure in Figure 2 below, public involvement starts to occur at the scoping phase, where the scoping provides a chance for the public to become involved in determining what factors should be assessed regarding the report. This is done starting at this phase so that there can be an early agreement on the report in order to avoid any issues later on in the process (Environmental Impact Assessment, 2007). It is also stated in Environmental Impact Assessment (2007), that scoping should be an ongoing exercise throughout the whole EIA procedure. The generalised EIA procedure also touches on Consultations. There should be a consultation with the public authority and the stakeholders of a project to make sure that all potential consequences can be spotted.
Additionally, according to Bass, Dalal-Clayton and Pretty (1995), there are four levels of public involvement. The first level would be the informing stage where the information in this stage is a one-way flow where the information comes from the project proponent towards the public. Which means that the proponent only publishes the information to the public without taking any notes or suggestions from them.
Usually, this level of participation is at the screening level, where the competent authority will inform the public about the project in the media. Nowadays, the authority publishes the information at the city council board, newspaper and also on the Internet, where the public can access it easily from home.

Secondly is the consulting phase and this phase involves two-way communication between the relevant authority and also the public, where the public and the relevant consultation bodies have the opportunity to give their criticisms on the project proposal.

Thirdly, there is the participating level and this is the phase where the proponent and the public set a mutual agenda, developing understanding between them, interact and exchange analysis and agree on the proposal and its impacts at the end of the discussion.

Fourthly is the negotiating phase. This requires a face-to-face discussion between the project proponent and also the main stakeholders in creating a consensus in reaching a mutually agreeable resolution regarding the issues at stake, such as having a mitigation effect that has a compensation measures to it.

The stages of public participation in Malaysia and EU will be discussed under Section 3.4.1 and 3.4.2 below so that the difference can be seen as to where and which stages the public are involved in the process of EIA in these two places. From here, the research will recognise as to where there is an involvement of the public when there is an EIA process in Malaysia and in EU. Later, the paper will observe as to how the stages of participation of public in EIA process be related to the issues relating to the rights of the public in accessing the information for the EIA, right of the public to participate and also the right of the public to access justice in section 3.5.2, 3.5.3 and 3.5.4 below.

3.4.1 Stages of Public Participation in Malaysia

In Malaysia, public participation occurs in the detailed assessment procedure only. For preliminary assessment, there is no participation of the public since the committee in the DOE department makes the decision. Here, the stakeholders that are involved
are the government agencies, the project proponents, and also other interested groups. The government agencies will assess whether the project proposal needs to undergo detailed assessment. The government agencies will acquire help from people of other interest groups to analyse the proposal if they were not able to make a decision due to lack of knowledge. The participation of the public starts at the decision-making process where the detailed EIA report is publicly displayed for the public to comment on and give their suggestions. The stakeholders involved here are the government agencies, project proponents, local people, and also NGOs and interest groups. The NGOs that participate are those with similar interests and also those that are affected by the proposals.

The public is also involved at the time of the announcement of a decision. The decision of the application is made available to the public and it also includes the reasons of the result and description of the measures that will be taken to alleviate and mitigate any adverse environmental effects coming from the project.

In some cases, after the announcement of the decision, there will be an ongoing assessment by the competent authority towards the project and the public may get involved in the assessment of the on-going project.

### 3.4.2 Stages of Public Participation in European Union

In European Union, the involvement of the public can be seen since the earliest stage, which is the screening stage of the EIA report. The public participates before, during, and also after the decision-making process. The stakeholders involved in the screening stage consist of the government agencies, project proponents, the local people, and also the NGOs or interested parties. Other interest groups may also be involved if their knowledge on a certain area is needed.

In the screening stage, the screening decision made by the competent authority must be recorded. The recorded decision then will be displayed and made public for the citizens to have information on.

After that, in the decision-making process, there is consultation of the environmental information to the interested parties and the public, by the competent authority before
it makes a development consent decision. The report must be made available for reviewing purposes to those with environmental responsibilities, the general public, and also other interested organisations. These people must be given the opportunity to give their opinions and comments regarding the project and also its environmental effects before any decision on the development is given consent by the competent authority. If there are any transboundary effects likely to occur, the member states that are affected must also be consulted before giving approval consent to the project developer to develop the project. Here, the similar stakeholders as in the screening process also take part to give their opinions, views, and criticisms.

Similar to Malaysia, the public is also involved at the time of the announcement of a decision and the decision of the application is made available to the public with the reasons of the result and description of the measures that will be taken to alleviate and mitigate any adverse environmental effects coming from the project also being included.

In EU, being similar again to Malaysia, provided in some cases, following the announcement of the decision, there will be an ongoing assessment by the competent authority towards the project, where the public may get involved in the assessment of the on-going project development.

All in all, the involvement of stakeholders remains the same in all phases of the EIA process in the EU. The public, the project proponents and also the government authorities play part in the process in the beginning, decision-making and also after the EIA process. NGOs and other interested parties come in when their interests are spiked and when necessary in the process.

**3.4.3 Comparative Review**

After observation is made, Malaysia only starts involving the public in its EIA procedure in the decision-making process, whereas in EU and its member states, the involvement of the public starts at the earliest stage, which is the screening process. This action by the EU is because the public involvement at the screening process can help in preventing serious issues that can occur later in the process. The public will be consulted and if there is any problem or criticism by them, the competent authority
may consider it before proceeding further.

3.5 **Access to Information, Access for Public Participation and Access to Justice**

In this section, the three pillars of rights in the Aarhus Convention will be reviewed for both Malaysia and EU member states. The three pillars of rights have been chosen to be compared regarding issues involving public participation in the EIA process because both Malaysia and EU member states follow the convention. EU and its member states are obliged to follow this convention whereas for Malaysia, it is not obligatory to follow but it is considered as a yardstick when it comes to public involvement in EIA process in the country.

In the subsections below, the cases that were observed are examples of the few cases examined beforehand, which most of them have similar end results. Due to that, only one case for each countries will be looked at in this research to be compared with between Malaysia and European Union. Thus, the conclusions that were drawn are one of the many similar conclusions that have been discovered.

3.5.1 **Access to Information**

Regarding the access to information, the public authorities should grant the people access to environmental information. This can be defined as the ability of the public to attain information on the environment, which the public authorities keep so that they are fully informed of what is happening to the environment of the area affected.

Information about air, water quality and soil, and also information concerning unsafe or hazardous chemicals that are stored at a nearby factory are also included under information on the environment. By making the environmental information easily accessible by the public authorities, they are really encouraging the citizens to participate and be more aware and well informed about their environment (Implementation of the Principle 10, 2013). Below are examples of cases related to the right of access to information that is practiced in Malaysia and in EU member state, Hungary.

3.5.1.1 **Malaysia**
• Bakun Dam Sarawak Project Case

In East Malaysia, specifically in Sarawak, the Bakun Dam project was highly controversial and was criticised by the indigenous communities that lived nearby the forest area and also by environmentalists. This was because the project was set to be destroying the rainforest and lead to more than 10,000 indigenous people to be resettled and lose their homes (Yeong & Ten, 2004). The project is on the construction of a large dam that is taking around 700 square kilometers of forest and farmland (Bakun Dam, n.d.). According to Alam (2014), the EIA report on this project was priced at RM150 per copy and the report was in English and those that were affected were indigenous people who are poor and illiterate, hence, they were not able to afford to buy the project copy and also would have a hard time reading the report since it was all written in English.

In this case, the public was denied access to information because the report was not made available to the public free of charge. This is because the project is subjected under the Sarawak EIA procedure. In Sarawak, any matters regarding land are under the state’s authority, instead of the federal authority. Due to this, the Sarawak authority is given the power to restrain the public from requiring the EIA project report. This was laid under Article 95E(2) of the Malaysian Federal Constitution where it stated that the State Government of Sabah and Sarawak shall not be required to follow the policy formulated by the national Land Council or by the national Council for Local Government. On that ground, Sarawak state authority have the power to delegate by-laws concerning forestry, water and land use (Chandran, 2006) and they can also delegate whether or not the public can access the EIA report on any project development plan. At first, the Malaysian High Court declared the project to be invalid due to the restraining of rights of the public and going against their rights by not providing the report free of charge. But later, the case was brought to the Court of Appeal and the court dismissed the previous ruling since there is provisions in the Federal Constitution, that is Article 95E(2) that stated on how Sarawak have the right to delegate the laws involving EIA process however they want to.

3.5.1.2 European Union

• Kecskemet Hazardous Waste Disposal Site Case
A project developer requested a permit from the municipality in Kecskemet, Hungary to buy a land in order to construct a hazardous waste disposal site (Palfi, n.d.). The developer was required to submit a preliminary EIA report to the municipality to receive a permit and to buy the land. The preliminary report made by the developer was then disclosed and published by the municipality to the public through various channels (Schroeder, 2012). The municipality posted it on their notice board for 30 days and also other in local media. Subsequently, signed protest letters by the public were given to the municipality to stop the development of the waste disposal site and there were also articles in the local media protesting on the idea of the construction. The municipality then negotiated with the developing company and proposed that the company buy another area land situated far from the residential area of Kecskemet. Since there was no way for the municipality to change the public’s mind, the developer agreed to follow the suggestion. According to Schroeder (2012), the participation of the public in the early stage of the project has resulted in the location change of the hazardous waste disposal site.

In this case, it is proven that owing to Article 4 and 5 of the Aarhus Convention regarding access to information, the public was able to prevent future damage in the residential area of Kecskemet. How is this so? It is the result of report being published and disclosed by the municipality in the newspaper, at the municipality notice board and also other various channels for the public to know about the development plan. The public have a say in this matter because they were informed early in the process too, due to the public being involved in the EIA process since the very start, which is from the screening process. As a result, the public acted instanteniously in preventing the construction in Kecskemet by requesting the project proponent and the local authority to grant the license for the construction elsewhere.

3.5.1.3 Comparative Review
As seen in the cases above, Malaysia does not really practice the right to access of information stated in the Aarhus Convention whereas Hungary gives the public the right to have access to information on the environment. This is because in Malaysia, the national provision is not bound to follow the convention and therefore, the relevant environmental authority is under no obligation to grant the people access to
their environmental information right. Not only that, the authority also charges the public quite the amount of money if they want to look at the environmental report of the development and the report is in English; this is an obstacle for the citizens involved because most of them do not understand the language. This can be looked at as an oppression to the public involved, as majority of them are poor and illiterate. However, in Hungary, the relevant environmental authority is under the obligation to let the public to have access to the environmental information because it is a party to the Aarhus Convention. Therefore, the public there has no difficulty in attaining environmental information regarding the report because they have the right to access them.

Other than the cases mentioned above, there are other countries in EU that do not comply with the convention like in Malaysia. One of the countries that can be seen as an example is Spain. Spain, similar to the case in Malaysia, was charging fees for the copies of land use and urban planning information at an unreasonable price to the public who inquire about the report of the plan. This was found to be non-complying with the convention in 2011 MoP as this was seen as a barrier for the public in accessing their right to information regarding an EIA report. However, as stated in Section 3.3 above, in EU, there is an Aarhus Convention compliance committee that monitors the EU member states and other countries that are parties to it to comply with the convention. Although Spain stated that it has already taken measures to comply with the convention, the committee opined that “tacit agreement” or “positive silence” technique is not practical and thus, cannot be applied with matters involving access of information to the public (Alge, Andrusevych & Silina, 2011). According to Alge, Andrusevych and Silina (2011), the right of public information can only be satisfied if the public authorities respond actively to the demand of the public and also feed them with information within the required time.

The Aarhus Convention compliance committee monitors the parties from not making any error in the process involving the public. The compliance committee will report to the MoP on general and specific issues regarding non-compliance of the parties to the convention once a year. According to the Report of the First Meeting of Parties (2004), the non-compliance can fall under three categories, which are the general failure, where the party failed to take legislative, regulatory or other measures that is
necessary to implement the convention. Secondly is the failure to meet the requirements of the convention such as failure of legislation, regulations, other measures or jurisprudence. Lastly is the failure to comply with the convention in specific events, acts, omissions or situations.

Although Malaysia also has a compliance committee to monitor on the EIA process in its country, they do not have any Meeting of Parties like Aarhus Convention compliance committee do, which gather at least once a year (Report of the First Meeting of Parties, 2004). The Malaysian compliance committee also focuses more on the process of EIA in general and not specifically on the public as to its participation or rights in the EIA like how Aarhus Convention compliance committee is. Therefore, the compliance committee in Malaysia is still seen as a weak committee compared to the Aarhus Convention compliance committee in letting the public use their rights in EIA process.

3.5.2 Access for public participation

It has already been stated in Rio Declaration and Aarhus Convention that there should be participation of the public in the process of the EIA. The authority should necessitate participation of the public so that they are fully informed and given input on what the project is all about. Plus, they should also be given time to read the report and to give their relevant comments on what consequences that will be affecting them when the development starts. The public gives their suggestions to what and how the project developers can improve before the development of the plan too and the citizens should be involved at the various level of the EIA that have environmental effects that affect them (Implementation of the Principle 10, 2013). Below are examples of cases related to the right of access for public participation that is practice in Malaysia and in EU member state, Estonia.

3.5.2.1 Malaysia

- Bakun Dam Sarawak Project Case

Referring to the same case in Malaysia for access to information. Not only that the public was denied access to the environmental information report for the project, the public was also denied from participating in the EIA decision-making process by the authority because according to the Sarawak Ordinance, the EIA report is not subjected
to be made public because the decision rests on the state and not the federal government (Article 95E(2) of Malaysian Federal Constitution). At first, the Malaysian High Court declared that the project was considered as invalid but later, the decision was dismissed on the ground that there were experts from other countries assessing the project and they already considered all aspects in making advance measures. Due to this, it did not matter whether the public participation brought in many negative comments because the experts already stated that the project was environmentally friendly (Pura, 1996). Not only that, under the Sarawak State Ordinance, there was no statutory requirement for public participation regarding environmental matters at all and thus, the state authority may exclude the public from participating in the decision-making process of the EIA report on this case.

3.5.2.2 European Union

- Taikse Cattle Farm Case

A cattle farm in Taikse, Estonia that had an exposed and weak underground water protection was to be extended by developer, OÜ Estonia (Experience: Environmental, n.d.). Nearby the farm, there are other farms and villages in the range of 100 to 200 meters in radius. In April 2012, the developer submitted the EIA report to the authority but the report was only publicly displayed to the public for 15 days and not only that, the public hearing for the report was done on the last day of it. Although the public did give their opinion on the report, it was seen that the time given to them was not adequate since the public needed more time to give a more detailed opinion on the situation. In the current law in Estonia, according to Section 16(1) of the Estonian Environmental Impact Assessment and Environmental Management Systems Act, the minimum timeframe for an EIA report to be on public display is 14 days. For there to be a full public participation, 14 days would not suffice to express the public’s opinions. Sometimes, to fully understand the whole report, the public might have to consult a lawyer if the report is too complex for laymen to comprehend. This Taikse Project was not a major project in Estonia but the report was about 100 pages long with complicated legal terms and technical wordings and 15 days is not enough for the public to give their suggestions with detailed analysis of it. Afterward, the proceedings took a longer time than it should since the developer did not take the public opinion into consideration. Lastly, the report was displayed longer than the
minimum timeframe and the project was finally approved in May 2013 (Szilágyi, 2013).

3.5.2.3 Comparative Review

On the matter of access for public participation, Malaysia once again refused the public on their rights, when the citizens were not allowed to participate in the decision-making process of the EIA report as seen in the Bakun Dam Sarawak Project Case. Even after the public brought the matter to the court, the authority still refused to let the public to participate in the decision-making process because they already had experts to help in predicting and suggesting measures for the project.

In the Estonian case, we can see that the report was posted publicly for the public for 15 days. Although the authority follows the national EIA Act, the report was too complicated to be understood by the public in the matter of only 15 days. The public asked the court for an extension of participation time frames so that their detailed and important comments and suggestions could be taken into consideration by the developer. Here, it can be observed that the participation of the public is crucial in the decision-making process in Estonia because the public is concern on the environment and they ask for an extension of time to give their honest opinion concerning the report and the court let them.

On another note, we can also see the issue in Malaysia, such as the Bakun Dam Sarawak Project Case occurred because the public was not involved in the development project since the beginning. As stated in Section 3.4.1, the public only starts participating in the EIA process in the detailed assessment, not during preliminary assessment. The government agencies acquire help from people of other interest groups to analyse the proposal if they were not able to make a decision due to lack of knowledge. The participation of the public starts at the decision-making process where the detailed EIA report is publicly displayed for the public to comment on and give their suggestions. This is where the issue starts between the public authorities and also the public. The public, such as the local people of the area selected for a development plan can be considered as people who are experts in that particular place. The local people have more experiences and knowledge on the area that is going to be use for development than any other person. This is due to them
living there for many years and them knowing how the grounds and environment of the place works. Since they have more experiences on the selected place, they should know more about what developers can and cannot do in order to avoid any dreadful impact in the future such as landslides, deforestation, pollution, flood and many more potential catastrophic disasters.

As for the member states in the EU, section 3.4.2 above stated that the public participation started from the screening process, which is the earliest process in a development plan report. In the screening stage, the screening decision made by the competent authority is recorded and the recorded decision then will be displayed and made public for the citizens to have information on. The public is involved in all of the steps in the EIA process because the public have the right to be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner. The public gives their suggestions to what and how the project developers can improve before the development of the plan too and the citizens should be involved at the various level of the EIA that have environmental effects that affect them (Implementation of the Principle 10, 2013). Plus, in Article 6(4) of the Aarhus Convention, it also stated that each party shall provide for early public participation, when all options are open and effective public participation can take place. This means that in EU member states, the public provides the authority with suggestions and options where at this point in the process, the opinions are valued and be taken into consideration if it is suitable before proceeding with the plan any further. Incident that occurred in the Bakun Dam Sarawak Project Case in Malaysia hardly happen in EU due to it having strict provisions when it comes to matters involving the public, thanks to the EU being a party to the Aarhus Convention. Even with experts’ opinions, the public’s suggestions are still valued and included in the EIA report where it is necessary. The public authority do not simply dismiss the public’s opinions because according to the convention, they have the right to participate in the EIA process. This is also why, in the Taikse Cattle Farm Case, the process goes smoothly in the end because the court sees the public’s right and demand where the public should have more time to examine and comment on the report. This is a result of Article 6(3) of Aarhus Convention that stated about the public participation processes, where the public authority shall include reasonable time frames for the different phases, allowing
sufficient time for informing the public and also for the public to prepare and participate effectively during the environmental decision-making. Also, the three pillars of the Aarhus Convention were adopted in the EU Directives in 2003, which means they were to be implemented in the national law of the EU Member States too. Member States have no choice but to follow what the Directives have stated and implemented it into their national provision. By having provision like this, the procedure in the EIA process in EU is more effortless than the EIA process in Malaysia.

According to Chandran (2006), when it comes to the state matters in Sarawak, the Federal Constitution of Malaysia has constraint the Federal Government to have any authority regarding states matter. Under Article 95E(2) of Malaysian Federal Constitution, the State Government of Sabah and Sarawak shall not be required to follow the policy formulated by the national Land Council or by the national Council for Local Government. Sarawak state authority have the power to delegate by-laws concerning forestry, water and land use (Chandran, 2006). By doing such thing, the states may do anything they want, even by denying participation of the public in the decision-making process like how the Sarawak authority did in the Bakun Dam Sarawak Project Case. The weaknesses that can be detected in Malaysia are that there is no specific provision that focuses on the rights of the public relating to EIA process in the national legislation that is uniformed for the whole country, like how the EU delegates the law by implementing the directives in the national legislation of member states. Also, the stages of where the public started to get involved in an EIA process in Malaysia needs to be delved into. There would be fewer problems if the public’s right is heard by the state authority and if the public can get involved in the process from the preliminary assessment stage.

3.5.3 Access to Justice

Other than rights of access to information and access for public participation, the Rio Declaration and Aarhus Convention also stated the right of access to judicial review. The public has the right of access for judicial and administrative measures in order for redresses and remedies. The citizens may also have the ability to turn to impartial, independent and arbiters such as mediators, courts of law, administrative tribunals and others, in helping them to resolve their disputes on matters regarding access to
information and access for public participation in matters that affect the environment, or to correct the harm that is being done to the environment (Implementation of the Principle 10, 2013). Below are examples of cases related to the right of access to justice that is practiced in Malaysia and in EU member state, Germany.

3.5.3.1 Malaysia
- Lynas Malaysia Plant Case

Lynas Corporation Limited, an Australian company, generated a low level radioactive waste plan over the building of the Lynas Advanced Materials Plant (LAMP) in a town called Gebeng in the city of Kuantan, Pahang. Due to the fear of the public in relation to their health and lifestyle, the project was considered very controversial because the project may lead to a negative health and economic consequences when the plant starts to operate (Phua & Velu, 2012). The Malaysian authorities also granted Lynas Malaysia Pvt Ltd a temporary operating license (TOL) but the project was strongly opposed by the indigenous people that live nearby the site. The Malaysian government responded to the concerns of the Kuantan residents by appointing international experts from the International Atomic Energy Agency (IAEA) to review on the safety and health aspects of the project and make suggestions to the government (Phua & Velu, 2012). The experts from IAEA concluded that Lynas had met all the safety standards for radiation by the regulatory authorities, which is the DOE. The standards meet international standards of the IAEA safety standards. The issue was then brought to High Court (Kuala Lumpur) by the NGO for a judicial review because the issue raised an interest to the NGOs in Malaysia, such as Save Malaysia, Stop Lynas (SMSL) (Phua & Velu, 2012). It was argued by the applicant that the residents in nearby residences of the town of Gebeng, where the LAMP is located, who reside in between 2 kilometers to 20 kilometers in radius of the plant claimed that there will be a release of dangerous chemicals from the processing plant and that it would harm the residents and the environment (Phua & Velu, 2012). Not only that, the radioactive wastes from the factory were also worrying the residents of nearby residential areas as the wastes could outflow into the nearby river. The court was in favour of the defendant by saying that Lynas Company has not violated any laws in Malaysia and the injunction against them was dismissed (Alam, 2014). Lynas Company was not violating any provisions of Environmental Quality Act 1974, which are restrictions on pollution of the atmosphere (Section 22), pollution of the soil
(Section 23), pollution of inland waters (Section 25) and also prohibition of discharge of wastes into Malaysian waters (Section 29). The applicant again afterward appealed at the Court of Appeal in Putrajaya but the decision of the court remained the same as the court before, provided that Lynas Company is not allowed to dump any chemical wastes in the nearby river and use a treatment plant instead.

3.5.3.2 European Union

- Coal-fired Power Station, Lünen

The German Case C-115/09, Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg involved a project developer (Trianel) who intended to construct and operate a coal-fired power station in Lünen, Germany. Within 8 kilometers of where the power plant would be constructed, there are 5 areas designated as special areas of conservation within the meaning of the Habitats Directive. Friends of the Earth, an environmental non-governmental organisation initiated a proceeding for the annulment of the construction of the power plan. The court found that the measures do infringe the Habitats Directive. The court also found that, under the domestic law in Germany, environmental protection organisations are not entitled to rely on the infringement because action of challenging on the administrative measure will be admissible only if the administrative measure affect the claimant’s rights, which is an individual public law rights. The court questioned whether the action brought by Friends of the Earth ought not to be allowed on the basis of Article 10a of Directive 85/337. It then referred this situation for a judicial review to the Court of Justice of European Union (CJEU). CJEU follows that the interpretation of this provision must be in the light of Aarhus Convention and that environmental protection organisations are entitled, under Article 10a, to have access to review the procedure before a court of law or any other impartial and independent body established under the law, to challenge the procedural and also substantive legality of decisions, acts, or omissions covered by that article. Therefore, Friends of the Earth have the right for access to justice considering it is included under Article 2(4) and 2(5) of the Aarhus Convention to be considered as public and also public concerned. The public have right to access for judicial review, as stated under Article 9(2)(a) and 9(2)(b) of the Aarhus Convention.

3.5.3.3 Comparative Review
For the right on access to justice, it can be seen that Malaysia and also European Union member states do not have much difference to one another. This is because both Malaysia and EU implement the right to have access to justice. Locus standi is the requirement needed in Malaysia for a party to bring an action to the court (Ansari, 2009). If there is sufficient connection to or harm from the law to the public, they may challenge the action. As for EU, generally, in the environmental conservation field, legislation provides is for protection of nature and does not confer on individual rights (Nature Protection, n.d.). This means, even non-governmental organisations and interest group have the right on access to justice as long as it is not for individual benefit but for benefit for the environmental matter.

Even though both Malaysia and EU member states do implement the right to have access to justice, the ineffectiveness of the access to justice is seen to play a huge part in contributing to the problem relating to participation of public in EIA in Malaysia and also in EU.

Although the public such as the local people and individuals have the right of access for judicial and administrative measures in order for redresses and remedies, they tend to not proceed with it. Why? This is because, for individuals in both Malaysia and member states of the EU, the price of justice is expensive and it involves a lot of administrative work and legislative process, which needs financial monetary expenses. In Austria, for example, the costs are quite pricey when it comes to trials involving EIA issues. For a fruitful result, the partakers have to bring in technical and also legal aid to assist them to win the proceeding. Sometimes, the fees can be up to EUR 15,000 to EUR 20,000, depending on the fees for expert opinions. Even if without the experts, the costs will still be excessive due to legal assistance, which is somewhere around at least EUR 5,000 (Konrad, 2009). Thus, individuals or local people tend to not proceed with judicial process because of financial problems, unless NGOs step in and have interests in the development plan and help in initiating the judicial proceeding for them. Both of the cases stated above were initiated by the NGOs. This is mainly because the majority of the people can be considered poor. In addition to this, illiterate people are also avoiding themselves from going into litigation due to economical cost of the litigation. They are unable to initiate a lawsuit themselves and even if they can, they have to hire experts to assist them in reading
and translating files and documents, which costs a fortune sometimes. Furthermore, the judicial process is also seen as one of the last resorts because the process is a hassle and it involves many administrative processes, which can be cumbersome to some. The people want an immediate result and going to court is not the best option for that as it sometimes can take years for a case to be settled. Also, the public is often scared to initiate a lawsuit towards the authority because they do not want to be abused by them.

All in all, both Malaysia and EU can be seen to have the same weakness in having their rights in access to justice. Surely, the public can initiate proceedings when they have to but due to the expensive legislative process, they tend to stay away from taking any legal action. Usually, a legal proceeding can be done if NGOs or other interested parties join in to take a legal action because the legal fees will be handled by the NGOs and such. But without the NGOs and other interested parties, it will be quite difficult for the public to initiate a proceeding due to monetary restraint. The best way to solve this is by having legal fees that is affordable even for individuals or local people when they want to take a legal action without the help of NGOs and other interested parties. Only then can it be said that the public have the utmost right to have access to judicial review since nothing can restrain them from doing so.

3.6 Challenges and Issues relating in EIA process

In both Malaysia and European Union member states, there are many other issues that relates to public involvement in the EIA process. Most of the challenges relating to the rights can be seen in Malaysia, rather than in the EU because of the non-binding legislation. In the EU, the rights of the public are protected in the Aarhus Convention whereas there is no specific provisions that protected the rights of public in EIA process in Malaysia.

Other than those issues relating to the rights of the public in the EIA process in Malaysia, in the EIA Guidelines, it is also stated that the EIA report must be kept disclosed for the public to read and give their comments and suggestions at the Department of Environment (DOE) office and their suggestions should be given a consideration when concluding the final EIA reports. Although the initiatives are made by the DOE in disclosing the reports, there are only a few people who literally
would show up and give their comments and suggestions regarding the projects. Why is this happening? This happened due to the lack of encouragement by the DOE towards the public. DOE should encourage the public to show up and give their suggestions in the decision-making process of the EIA report because the public is sometimes clueless about this procedure, which makes it harder for them to actually participate. DOE should give their full encouragement to the public to show up and read the reports disclosed at the office and give their suggestions in the hope of making a better project that will not be dangerous and harmless to the public.

There is also issue that can be observed in the EU. For example, the issue on the penalty that is given to the project proponents when they fail to make an EIA report for the development of their plan. In Malaysia, the penalty given to project proponents who failed to create EIA reports is a fine of not exceeding one hundred thousand ringgit or to imprisonment for a period not exceeding five years or both and to a further fine one thousand ringgit for every day that the offence is continued after a notice by the Director General requiring him to comply with the act specified therein has been served upon him. Later, in 2012, the compounds for offences stated was increased up until 50 percent from the maximum compounds for offences during the enactment of the Act in 2012 (Asian Environmental Compliance, 2014). According to Asian Environmental Compliance (2014), currently, the compound has been raised to RM50,000 from RM20,000 if project developers fail to disclose an EIA report and start working on a project without it. Not only that, a penalty of RM10,000 or imprisonment of one year, or both, will also be imposed upon those who are posing as environment enforcement officers. In Europe, Directive 2011/92/EU stated nothing about any penalty or whatsoever for project proponents when they fail to create EIA reports. It all depends on the member states discretion on how much fine they think is necessary. This raised an issue because it is questionable on whether the fine given by the member states is adequate or not since there is no minimum limit or benchmark to how much is the minimum penalty can a member state give. The project proponent would likely take the penalty lightly and proceed with the development without submitting any report because they would not expect the penalty given to them to be heavy.

For both Malaysia and the EU member states, sometimes the challenges do not only
come from the project proponents, but also from the public that is participating. Having involvement of the public in the decision-making process of a project does not mean that the project will immediately get approval consent by the authority after having commented and suggested by the public. Sometimes, the project will get delayed into having a problem due to the disagreement of the public and the project proponent of the EIA report because not the entire participant has a similar opinion in making a decision. Some may have a different opinion against others and this can lead to extension of time in making a final decision due to the variety of suggestions and objections by the public towards the project. Other than that, sometimes the authority has to make a decision that is not agreeable to the local public. They have to look at the bigger picture, which is by looking at the interest of a broader community. The local public is always disputing this act by the authority as it is seen to not be favoring them in the future. Thus, the problem in this matter is relating to the consensus of the public. Even with public participation, they would not be easily satisfied by the end result made by the developers if the outcome is not in favour with their decision.

Moreover, the existence of public participation makes it harder for the project developers to make a final decision on the report. This is due to the unrealistic expectations and demands of the public that their participation in the decision-making process will make everything better quickly (Marzuki, 2009). They expect that by giving their suggestions and comments towards the project it will make the end product much better than before and they expect the project developers to grant every single one of their suggestions and make it into reality in the end. However, not all of the suggestions and comments by the public can be use because some suggestions are simply too unrealistic, absurd and ludicrous (Marzuki, 2009). Even if the project developers do include the suggestions, the situation would not change rapidly and this frustrates the public even more as they are being let down when they thought that everything would be all right in a short time (Marzuki, 2009). That is why public participation is seen to be an issue because the public has the impression that thing would be all right in a short amount of time given to the project developers to implement the suggestions in the report.

3.7 Improvement of Public Participation in EIA
Malaysia
In 2012, the Environmental Quality Act was amended. However, the amendment in Section 34A mainly focused towards the penalty if a person start working on a project without EIA reports. Other than that, there is also implementation of a new section, which is Section 34AA, where the Director General may issue a prohibition order or stop work order where there are activities done without EIA approval and such. The amendments did not include any section relating to public involvement at all and thus, it can be said that the legislation in Malaysia is still in need of an improvement until there is a section dedicated to public involvement in the decision-making procedure of an EIA report in the EQA and its handbook.

European Union
In 2014, Directive 2011/92/EU was amended to Directive 2014/52/EU and the member states were given time to fully transpose their laws and apply the amendment until May 16 2017 (European Union, n.d.). There are transitional provisions stated in Article 3 of Directive 2014/52/EU that projects for which the screening and scoping was initiated, and EIA report submitted before May 15 2017 shall be subject to the provisions of Directive 2011/92/EU.

In Directive 2014/52/EU, it is seen that Article 6 of the Directive, which falls for public involvement was also amended. Article 6(5) of the Directive now stated that the public is to be informed electronically and by public notices and relevant information must be electronically accessible to the public through easily accessible points of access. Other than that, Article 6(6) was also amended as to having reasonable time frames for different phases of decision-making. Lastly, in Article 6(7), it was amended that the time frame for public consultation on EIA report must at least be 30 days.

Another amendment in the Directive is regarding the penalty when a project proponents fail to create EIA report. The newly implemented Article 10a explains about penalties, where “member states shall lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to the Directive. The penalties thus provided for shall be effective, proportionate and dissuasive.”
These amendments in Directive 2014/52/EU can be seen as an improvement to the current Directive in terms of giving the public wider access to the EIA reports in the EIA process and also by giving the public more time in giving their suggestions on EIA reports. There are also other amendments in the Directive and these are also seen as a huge improvement to the current one.
CHAPTER 4

RECOMMENDATIONS AND CONCLUSION

4.0 Introduction

This chapter concludes the research on the analysis of the provision of EIA in Malaysia within Environmental Quality Act 1974, particularly regarding public participation. In this chapter, the focus will be on the improvements and recommendations of the laws relating to EIA so that it will become more practical, accessible and flexible than it is in the current situation. The research question is addressed in this chapter and the recommendations provided are based on the analysis made in previous chapter between Malaysia and European Union. The legislations from Malaysia and European Union member states have provided suggestions that can be used for this chapter. Lastly, this chapter will end with the conclusions of the research.

4.1 Conclusion

This study has managed to help in analysing the legal framework relating to the EIA in Malaysia that is governed by Section 34A of the EQA 1974 and Schedule 7 of EIA Order 1984 concerning the prescribed activities and also the framework in European Union, that is Directive 2011/92/EU. All through the research, legal problems relating to public involvement have been identified, along with the problems faced by European Union in the same context. However, in the end, European Union is seen to have better regulations when it comes to public involvement in EIA. So, Malaysia can improve their legislation, after comparing it with the European Union with the goal to get inspiration and ideas from the European and its member states regarding public participation in the EIA process.

This research also managed to study the initiatives that have been taken by Malaysia and the European Union and its member states in order to face the legal problems concerning participation of the public in EIA process, as seen in the cases in Chapter 3. Several comparisons have also being taken to solve the problems concerning the participation of the public in EIA by giving recommendations in order to have better
laws in Malaysia and EU member states in governing EIA regulations.

All in all, I have highlighted a few recommendations in order for public involvement in EIA in Malaysia and the EU to be improved by giving suggestions that the EIA regulations be revised to fill the lacunae that is currently present. These lacunae are the stumbling blocks in the regulation of public involvement in an EIA process.

4.1.1 How can the public involvement in EIA in Malaysia be improved in comparison to the EU?

Comparing the European Union laws relating to public involvement in EIA with the Malaysian EIA statutes, the Malaysian lawmaker should be embarrassed with the current legislations. Why is this so? It is due to the many lacunae in the provisions on EIA, especially in terms of public involvement, such as access to information, access for public participation, access to justice and many more. Through my observation, the EIA regulation in Malaysia can definitely be improved by incorporating some of the provisions in the EU Directive 2011/92/EU, EU Directive 2014/52/EU, Aarhus Convention and also some provisions in the national legislation of the EU member states. Or better yet, Malaysia may consider itself to be a party to the Aarhus Convention in order to make the public involvement more effective in EIA process.

One of the reasons why the Malaysian EQA 1974 is seen as weak compared to the EU Directive 2011/92/EU is because EQA 1974 was formed due to the absence of environmental provision in the country. The formation was made because Malaysia did not have any specific legislation that focused on the environment and thus, the Act was made with very little attention to detail since it was the first legislation regarding environmental issues. In addition, while making the Act, there was no reference to any other conventions or legislations. The legislators should have taken into account to refer and implement provisions from other countries’ EIA legislations too, so that more detailed and strict provisions could be laid out that would have resulted in no loopholes being present in said provision. Contrary to the Malaysian EQA 1974, by following the Aarhus Convention, which was implemented for countries in Europe, it makes the EU directives better. The Aarhus Convention focuses on the Public Involvement and the three pillars of rights of the public were seen as one of the crucial provisions to be implemented in the EIA Directives.
In Malaysia, preliminary assessment of EIA report is only conducted within the DOE committee, without having interference from outsiders such as the public, NGOs or social activists. Different from Malaysia, the EU member states allow the public to be involved in the preliminary procedure of assessment of EIA report. This can be seen in the Kecskemet case study in Hungary where the municipality let the local residents of the area give their opinions and comments in the preliminary assessment procedure, which in the end, led to a compromise between the developer, municipality and the public by letting the developer buy a plot of land outside of the residential area to develop a hazardous waste disposal site. Malaysia should follow this rule to reduce the dissatisfaction and rage of the public because in reality, a lot of EIA project assessments only allow the public to participate in giving suggestions and comments only after the project is already in development. By this time, their suggestions would not even be considered by the developers since the project have already started and making changes would cost them a lot of money. Appropriate distribution of information must be ensured. The public should be getting access to the information of a project from an early stage, in order to encourage the public to leave their criticisms on the EIA drafts. Not only that, the project developers also should be more considerate and ensure that the consultation of the public be done using the native language so that communication can be strengthen between the proponent and the public (Yang, 2008).

Besides that, the weakness that can be observed in the Malaysian EQA 1974 is that when it comes to states, the state government does not have any obligation to require public comments and this can be seen as a problem to the public. The purpose of having an assessment is to look at how the adverse impacts on the environment can be minimised but if the public cannot give their opinions and comments, the whole process is seen to be as a one sided process on the developers’ side. As for the European Union, the member states adopted the directives and the states must implement it in their national legislation. As a result of the implementation and transposition of the directives in the national legislation, the member states usually would have a better and clearer legislation since the national laws would have to adjust itself to be in accordance with the directives. Public participation is obligatory.
for Annex I activities. Thus, member states are obliged to have the public participate in the decision-making process of EIA report. To be on par with the EU and its member states, the Malaysian legislators should amend the Federal Constitution and implement legislations regarding environmental issues to be under the concurrent list instead of in the state list. A concurrent list is a list in the Federal Constitution that allows both Federal and State authority to take action on a specific matter. Right now, environmental matters fall under the power of state authority when it comes to EIA and such. By listing the environmental matters into the concurrent list instead of just the state list, the federal government may intervene in situations such as described in chapter 3 and give priority to the public to voice out their opinions and give comments, instead of letting the state to govern any matters that seem appropriate to them rather than for the public.

Last but not least, another recommendation that can be given is by ensuring the appropriate public awareness on legislation pertaining to EIA and on environmental issues of the project that is being proposed (Choki, 2015). For there to be an effective public participation, continuous efforts are needed. Public participation can be strengthened by promoting awareness to the participants on the potential environmental effects (Panigrahi & Amirapu, 2012). The public needs to be educated by the competent authority on why they should be involved in the process. They should also be encouraged to voice out their opinion and be convinced that their suggestions do matter in influencing the project proposal’s approval decision (Choki, 2015).
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