

IDE Asian Law Series No. 17
Dispute Resolution Process in Asia (Malaysia)

Dispute Resolution Process in Malaysia

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PREFACE

The evolution of the market-oriented economy and the increase in cross-border transactions have brought an urgent need for research and comparisons of judicial systems and the role of law in the development of Asian countries. Last year, in FY 2000, the Institute of Developing Economies, Japan External Trade Organization (IDE-JETRO) conducted legal researches in Asian countries with two main themes. The first theme was to figure out the role of law in social and economic development and the second was to survey the judicial systems and the ongoing reform process thereof. We organized joint research projects with research institutions in Asia and had a roundtable meeting entitled “Law, Development and Socio-Economic Change in Asia” in Manila. The outcomes of the joint researches and the meeting were published in March 2001 as *IDE Asian Law Series No. 1-10*.

This year, in FY 2001, based on the last year’s achievement, we established two research committees: the Committee on “Law and Political Development in Asia” and the Committee on “Dispute Resolution Process in Asia”. The former committee focused on legal and institutional reforms following democratic movements in several Asian countries. Since late 1980s many Asian countries have experienced drastic political changes by the democratic movements with mass action, which have resulted in the reforms of political and administrative system for ensuring the transparency and accountability of the political and administrative process, human rights protection, and the participation of the people to those process. Such reforms are essential to create the stability of the democratic polity while law and legal institutions need to function effectively as designed for democracy. The latter committee conducted a comparative study on availability of the court system and out-of-court systems (namely Alternative Dispute Resolutions), with the purpose of determining underlying problems in the courts. As social and economic conditions drastically change, Asian countries face challenges to establish systems for fairly and effectively resolving the variety of disputes that arise increasingly in our societies. For dispute resolution, litigation in the court is not the only option. Mediation and arbitration proceedings outside the courts are important facilities as well. In order to capture the entire picture of dispute resolution systems, a comprehensive analysis of both the in- and out-of-court dispute resolution processes is essential.

In order to facilitate the committees' activities, IDE organized joint research projects with research institutions in seven Asian countries. This publication, titled *IDE Asian Law Series*, is the outcome of research conducted by the respective counterparts. This series is composed of papers corresponding to the research themes of the abovementioned committees, i.e. studies on law and political development in Indonesia, the Philippines and Thailand, and studies on the dispute resolution process in China, India, Malaysia, the Philippines, Thailand and Vietnam. The former papers include constitutional issues that relate to the recent democratization process in Asia. Studies conducted by member researchers investigated the role of law under those conditions while taking up such subjects as rule of law, impeachment, Ombudsman activities, human rights commissions, and so on. The latter papers include an overview of dispute resolution mechanisms for comparative study, such as court systems and various ADRs, as well as case studies on the dispute resolution process in consumer, labor and environmental disputes.

We believe that this work is unprecedented in its scope, and we hope that this publication will make a contribution as research material and for the further understanding of the legal issues we share.

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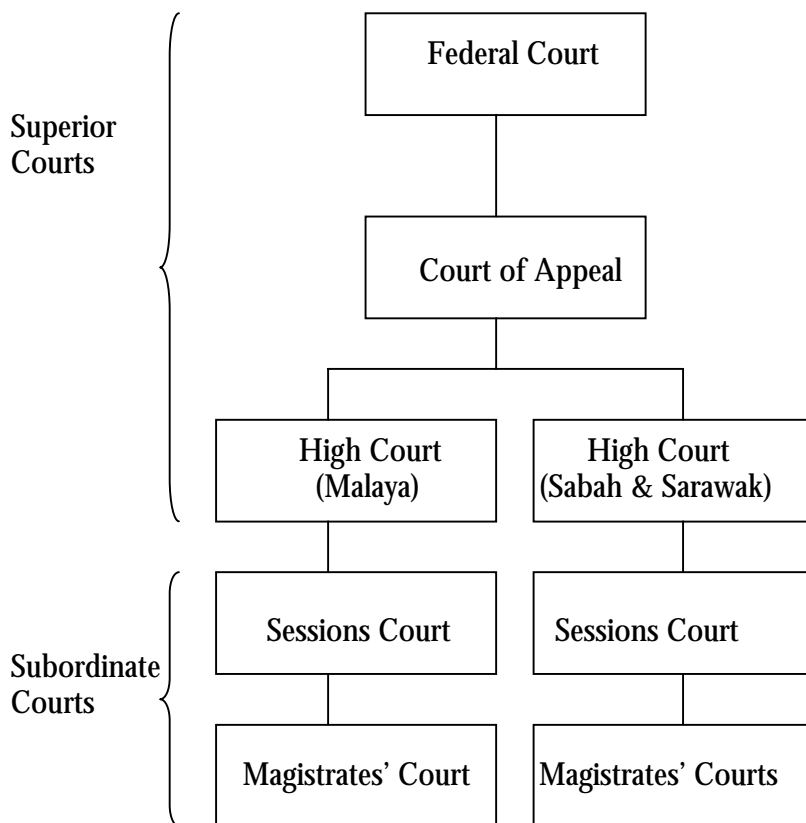
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PART 1
OVERVIEW OF THE
DISPUTE RESOLUTION MECHANISM

I. Overview of the Court System

Malaysia applies the English common law system and its court system is based on the English Judicial hierarchy, with the highest court being the Federal Court. Below it are the Court of Appeal, two High Courts (Malaya, and Sabah and Sarawak), Sessions Courts, and Magistrates' Courts:



The jurisdiction of each Court is clearly defined by statute, as well as the Federal Constitution.¹ In the early years after gaining independence from Britain, Malaysian society was not known for being litigious. However, due to economic expansion and increased education, more and more cases were brought to the courts, either as a result of increased trading and commercial activities resulting in increased contractual duties and responsibilities, or as a result of greater awareness of rights among the citizens. While the number of cases filed in the court registry grew, the number of judges appointed and new courts established did not grow in tandem with the increase in workload. Another problem which arose was delay caused by lawyers or prosecutors in getting their cases ready for trial. Due to frequent postponement of cases, cases which could have been disposed of remained in the court registry files as active cases. Judges and magistrates are subject to transfer, and when this happens many “part-heard” cases emerge. The same Judge needs to be available to continue with his or her case in the old locality while at the same time, he would have to manage the cases which are filed in court in the new locality. Hearing dates therefore are liable to be postponed, and this will prolong the trial process.

Apart from the above problems, the conventional court system also does not lend itself favorably to probable litigants due to the following factors:

- (i) Usage of the courts require strict adherence to Rules of procedure, be it civil or criminal procedure.² Most of these rules are not easily understandable by the common man, and as such, lawyers are required to help the layman to file his case in court; to draw up a statement of claim or defence; to file affidavits; to make sense of the legal language used in most commercial contracts, and finally, to argue the case before the magistrate or Judge.
- (ii) The language of the courts have been for a long time the English Language, and this language continues to be used in the Superior Courts, especially in cases of appeal. In the lower courts, such as the Magistrates’ Courts, the Malay or national language is now widely-used, and there are court translators for those not well-versed in either language. Most written judgments of Judges in the Superior Courts are still written in English,

¹ See IDE Asian Law Series No. 4, *Judicial System and Reforms in Asian Countries (Malaysia)*, p. 4.

² *ibid*, Chapters 6 & 7.

while most commercial documents continue to be made in the English language. To the ordinary man in the street who is not highly educated, resort to the court system therefore becomes “difficult”.

- (iii) Court proceedings are very formal, often time-consuming, and expensive (due to legal costs). The atmosphere is not “friendly” as litigation is adversarial in nature.

Problems of the Court System

The main problem facing the court system is the backlog of cases:

Table 1
Court Statistics as at December 2000

	No. of cases filed		No of cases cleared	No of active cases
Magistrates' Court	299,411	(civil)	140,248	159,163
	1,087,617	(criminal)	749,399	338,218
Sessions Court	155,478	(civil)	71,149	84,329
	7,997	(criminal)	4,876	3,121
High Court	100,047	(civil)	45,812	54,235
	4,068	(criminal)	2,265	1,803
Court of Appeal	3,048	(civil applications)	1,867	1,181
	8,061	(civil appeals)	3,629	4,432
	128	(criminal application)	101	27
	1,010	(criminal appeal)	552	458
Federal Court	584	(civil applications)	421	163
	3,229	(civil appeals)	3,216	13
	63	(criminal appeals)	43	20

Source: Federal Court

However, the backlog is being steadily cleared, and a computerisation project for the courts have been initiated by the government to more effectively monitor the movement of files.

Another problem which has surfaced and has been reported is the increased workload of judges, causing judgments to be delayed.³ The delay consists of a delay in giving a decision after a case had ended, and delay in giving the written judgement after an oral decision had been delivered. According to the report, the main reason for such delay is that judges are terribly hard-pressed, especially those in the High Court and Sessions Court as they handle the bulk of the cases. Most of these judges begin their day by hearing chamber matters and then go on to preside at open court hearings for the full day. The only time available for writing judgments is at home, in the evenings or weekends, or during the annual court vacation or, if a judge is lucky, when a hearing gets postponed! The commercial, appellate and special powers divisions of the High Court are reported to be the most over-stressed.⁴ A retired Court of Appeal judge states that judges probably have to write a “mind-boggling 10-15 judgments a month.”

The above problem is compounded by the fact that judges do not have the best support system, either in the form of equipment or staff. Court of Appeal and Federal Court judges who have to do the most in terms of legal research do not have research assistants.

Judicial Reform

Apart from computerisation of the court system, the other judicial reform which has been implemented to help clear the backlog of cases is case-management. The Rules of the High Court was amended on September 22, 2000. A new Order 34 was substituted for the old, providing for Pre-trial Case Management. Not later than 14 days after the close of pleadings, a plaintiff shall cause to be issued a notice in Form 63 requiring the parties to attend before the judge. If a plaintiff fails to comply, the judge may direct the Registry of the Court to issue a notice in Form 64 to the plaintiff to show cause why the action should not be struck out.

At the “first pre-trial conference”, the judge may –

- (a) direct the parties or any of them to furnish particulars of the claim or defence or other pleadings as the Judge may deem fit;

³ New Sunday Times, November 4, 2001, p. 9.

⁴ *ibid.*

- (b) order the parties or any of them to answer interrogatories on oath or affirmation;
- (c) require the parties to formulate and settle, with the concurrence of the Judge, the principal issues requiring determination at the trial;
- (d) order the parties or any of them to deliver their respective lists of documents that may be used at the trial of the action;
- (e) direct the parties or any of them to deliver their respective lists of documents that may be used at the trial of the action;
- (f) order either party to the action to furnish the report of an expert and fix the time for the delivery of such report;
- (g) require each party to provide a brief summary of that party's case to the Judge in advance of the trial date;
- (h) direct the parties to the action, whenever there is agreement upon all or any of the documents proposed to be relied upon by them or any of them at the trial of the action, to file and exchange a bundle of such documents;
- (i) direct the parties to exchange and file a statement of agreed facts;
- (j) subject to all just exceptions as to privilege, direct the parties to make any disclosure or provide any information which the judge considers relevant to the issues in the action;
- (k) limit the number of witnesses that each party to the action may call at the trial;
- (l) direct the joinder of any party as a party to the action or the removal of any party who is already a party to the action;
- (m) order the addition of a third party to the action and deal with all directions consequent upon such addition;
- (n) fix a date for the hearing of the action;
- (o) deal with all applications for amendments to the pleadings;
- (p) limit the time within which any of the directions given are to be complied with.

The judge may of his own motion or on application by letter by any party schedule and convene as many pre-trial conferences as he may deem necessary for the giving of directions or of such further directions he may deem necessary or for the amendment or variation of any direction already given. (0.34, r.6).

II. Alternative Dispute Resolution (ADR)

Overview of ADR

Specialised tribunals to deal with specific disputes had been established in Malaysia long before the problems with the court system surfaced. These tribunals are established as courts or centres of arbitration. Examples are:

- (a) The Kuala Lumpur Regional Centre for Arbitration, established in 1978.
- (b) The Industrial Court (first established actually in 1948).
- (c) The Public Services Tribunals.
- (d) The Special Commissioners of Income Tax, established under the Income Tax Act, 1967.

Subsequently, as the idea of ADR began to gain ground and it became clear that an alternative to the conventional court system was not only needed but a valuable and practical means for the resolution of a growing number of disputes, particularly in commercial cases, other mediation centres were established to cater for mediation in specific disputes, such as the Insurance Mediation Bureau (1992) and the Banking Mediation Bureau (1997). The latest to join the ever growing list of ADR centres are the Tribunal for consumer complaints (1999), the Bar Council's Malaysian Mediation Centre and the Copyright Tribunal (2000).

Usage of ADR

From statistics available, it appears that society has responded well to arbitration and mediation. For example, the number of cases heard by the Insurance Mediation Bureau rose from 375 in 1998 to 483 in the first 8 months of 1999,⁵ while the Banking Mediation Bureau handled about 144 cases in 1999.⁶ As for the Tribunal for Consumer Complaints, its success is reflected in the growing number of cases it handles in just a short span of time since its establishment.⁷

⁵ The New Straits Times, 12 September 1999.

⁶ *ibid.*

⁷ See Part 2 below.

Recent Developments

Minister in the Prime Minister's Department responsible for law announced recently⁸ that ADR will be implemented in selected civil cases after amendments have been made to the Rules of the High Court and Rules of the Subordinate Courts. The civil cases for which ADR have been identified are disputes pertaining to alimony, disputes within the family or between individuals, and insurance, road accidents and property claims. This move is being implemented to reduce the large backlog of civil cases pending in the courts.

Under the proposed new Rules, civil cases will only be accepted for filing in the High Court and subordinate courts after the parties concerned have exhausted all other avenues of settlement. High Court and sessions court judges and magistrates can also recommend cases before them for ADR, especially those at the preliminary stages of hearing.

⁸ The New Straits Times, February 5, 2002, p. 12.

PART 2
STUDY ON DISPUTE RESOLUTION PROCESS
IN SPECIFIC CASES

III. Dispute Resolution Process in Consumer Protection

A. Outline of consumers' cases

In order to understand the law as well as dispute resolution in consumer cases, it is important to note that a comprehensive statute pertaining to consumer protection only came into being on 15 November 1999. Prior to that date, the law as well as dispute resolution of cases pertaining to consumers were contained in several different pieces of legislation pertaining to different types of product as well as services. The scope of protection as well as the methods and their level of effectiveness tended to vary between the different types of legislation. The use of alternative means of dispute resolution was not greatly encouraged in the earlier legislation, as a result of which disputes were litigated in the ordinary civil courts based primarily on breach of contract as a cause of action.

For example, the Malaysian Sale of Goods Act 1957 is modelled upon the English Sale of Goods Act 1893. However, this Act [i.e., Sale of Goods Act 1893, UK] has been replaced in the UK by the Sale of Goods Act 1979 which greatly enhanced the rights of consumers. Malaysia however continued to lag behind statutory developments in the UK pertaining to consumer protection, as the Malaysian Sale of Goods Act 1957 was never amended to incorporate the changes in the UK Act. For example, in Malaysia the implied term that goods match the description, be of merchantable quality and be fit for purpose, can be excluded by an express term of the contract.⁹ This position remained until the passage of the Consumer Protection Act 1999.

There are specific statutes enacted to govern specific contracts, such as the contracts for the sale of houses developed by private housing developers [Housing developers (Control and Licensing) Rules] ; the Moneylenders Act 1951; the Hire 1 2 Purchase Act 1967; the Pawnbrokers Act 1972; the Contracts Act 1950 is the main enactment of the general principles pertaining to contracts generally, but within it is

⁹ S. 62, Sale of Goods Act 1957.

included provisions pertaining to contracts of indemnity and guarantee, bailment and pledges and principal and agent.

Another important point to note is that until the enactment of the Consumer Protection Act 1999, the law on product safety in Malaysia was likewise covered in different pieces of legislation dealing with different, specific products, for example: Sale of Drugs Act 1952, and the Control of Drugs and Cosmetics Regulations 1984; Electrical Inspectorate Act 1983, and the Electrical Inspectorate Regulations 1984; Pesticides Act 1974; Poisons Act 1952; and the Radioactive Substances Act 1968, to name but a few. Similarly, until the enactment of the 1999 Consumer Protection Act, Malaysia did not have a comprehensive statute on product liability. The law on product liability was expressed in the law of contracts, the common law principles of the tort of negligence, and several statutes, the most important being the Sale of Goods Act 1957. Both common law and statute provide different rights of compensation for loss or damage caused by goods to different classes of people.¹⁰ For a claim based on contractual or statutory liability, only the immediate party to the contract can claim compensation, and other affected persons such as the innocent bystander, a friend or family member who uses or receives the product as a gift has no right to claim. Unless privity of contract is established, no liability arises. These persons are required to base their claims under the tort of negligence. However, in view of the difficulty in proving fault, a claim based on tort would inevitably face in insurmountable complexities.

The Consumer Protection Act 1999 deals with selected areas of the law not yet provided for in other statutes, and it does not seek to repeal or replace existing law. However, by extending its protection only to consumers, it has the effect of differentiating the operation of general law, most significantly the law relating to contracts and the sale of goods.¹¹

The following is a broad overview of the matters covered under the Malaysian Consumer Protection Act 1999:

¹⁰ See S. Sothi Rachagan & Susheela Nair, "Consumer Protection Law in Malaysia", Asia Pacific Consumer Law – <http://www.ciroap.org/apcl/countries/malaysia>

¹¹ S. Sothi Rachagan & Susheela Nair, *op.cit.*

Part II : Misleading and deceptive conduct, false representation and unfair practice, including bait advertising, gifts, prizes, free offers; future services contract and presumption of liability for advertisement.

Part III : Safety of goods and services, including compliance with safety standards, general safety requirement for goods and prohibition against unsafe goods.

Part V : Guarantees in respect of supply of goods, including implied guarantee as to acceptable quality, implied guarantee as to fitness for particular purpose, implied guarantee that goods comply with description, implied guarantee that goods comply with sample, and implied guarantee as to repairs and spare parts.

Part VI : Rights against suppliers in respect of guarantees in the supply of goods.

Part VII : Rights against manufacturers in respect of guarantees in the supply of goods.

Part VIII : Guarantees in respect of supply of services, including guarantee as to reasonable care and skill; guarantee as to fitness for particular purpose; and guarantee as to time of completion.

Part IX : Rights against suppliers in respect of guarantees in the supply of services.

Part X : Product Liability.

Part XI : The National Consumer Advisory Council.

Part XII : The Tribunal for consumer claims.

Part XIII : Enforcement.

As comprehensive as the 1999 Act may appear to be, it is the opinion of experts that the major flaw of the Act is that it excludes from its ambit a number of important matters of interest to consumers:¹²

- (i) Professionals who are regulated by written law (lawyers, doctors, dentists, engineers, architects, nurses) and covered by separate statutes permitting either self-regulation or regulation by an administrative agency are not subject to the Act.
- (ii) The Act excludes any trade transactions effected by electronic means, as such activity is supposed to be governed by the Multimedia Development Commission Act 1999.

¹² S. Sothi Rachagan & Susheela Nair, *op.cit.*

- (iii) The Act does not apply to a person in respect of any defect in agricultural produce if such agricultural produce has not undergone any industrial process. There currently exist no specific legislation to govern genetically modified goods and other biotechnology products.
- (iv) The Act does not provide for public interest groups to bring an action on behalf of an aggrieved consumer, unlike similar provision found in other jurisdictions such as Thailand, India and China. The concept used is based on having *locus standi* or standing in the courts.

B. Organisations/Institutions for dispute resolution

Before the passage of the Consumer Protection Act 1999, all claims pertaining to consumer contracts, sales and product liability were litigated by the civil courts. The passage of the Act, which establishes the Tribunal for consumer claims now provides the public with an alternative to litigation in the civil courts, and this has proven to be beneficial particularly for claims involving small sums of money, such as claims against a laundry operator for damage to clothes sent for dry-cleaning and replacement for damaged goods sold. Such claims would have been too expensive and time-consuming for litigation in the civil courts and could probably have gone unaddressed prior to the establishment of the Tribunal.

1. The Tribunal for Consumer Claims

Membership of this Tribunal consists of a Chairman and a Deputy Chairman from among members of the Judicial and Legal Service, and not less than five other members. All members are appointed by the Minister of Domestic Trade and Consumer Affairs, a newly-created Ministry established to see to the needs and protection of consumers. The five appointed members need not necessarily be lawyers within the meaning of the Legal Profession Act 1976, and they are to hold office for a term not exceeding 3 years and are eligible for reappointment upon expiry of their terms of office, but may not be appointed for more than 3 consecutive terms.

The jurisdiction of the Tribunal may be exercised by any of the following persons sitting alone:

- (a) the Chairman of the Tribunal;

- (b) the Deputy Chairman; or
- (c) any member of the Tribunal selected by the Chairman.

A consumer may lodge with the Tribunal a claim in the prescribed form together with the prescribed fee (RM5/-) claiming for any loss suffered on any matter concerning his interests as a consumer. Currently, the Tribunal's jurisdiction is limited to where the total amount in respect of which an award is sought does not exceed RM10,000/-. The Tribunal does not have jurisdiction in respect of any claim –

- (a) for the recovery of land or any estate or interest in land;
- (b) in which the title to any land, or any estate or interest in land or any franchise, is in question, and
- (c) in which there is a dispute concerning –
 - (i) the entitlement of any person under a will or settlement,
 - (ii) goodwill;
 - (iii) any chose in action; or
 - (iv) any trade secret or other intellectual property.

The cause of action must accrue within 3 years of the claim in order for the Tribunal to exercise its jurisdiction to hear the claim. The Tribunal does not have the jurisdiction to deal with a claim arising from personal injury or death.

Notwithstanding that the amount or value of the subject matter claimed exceeds RM10,000/-, the Tribunal has the jurisdiction to hear and determine the claim if the parties have entered into an agreement in writing that the Tribunal is to have jurisdiction to hear and determine the claim. Such agreement may be made either before a claim is lodged, or where a claim has been lodged, at any time before the Tribunal has recorded an agreed settlement.

The Tribunal shall, as regards every claim within its jurisdiction, assess whether, in all the circumstances, it is appropriate for the Tribunal to assist the parties to negotiate an agreed settlement in relation to the claim. Where the parties have reached an agreed settlement, the Tribunal must approve and record the settlement, and the settlement shall then take effect as if it were an award of the Tribunal.

Where there is a hearing, the Act provides that no party shall be represented by an advocate and solicitor. All proceedings of the Tribunal are public, and for the purposes of hearing, the Tribunal is empowered to –

- (a) procure and receive evidence on oath or affirmation, whether written or oral, and examine all such persons as witnesses;
- (b) require the production before it of books, papers, documents, records and things;
- (c) administer the oath, affirmation or statutory declaration as the case may require;
- (d) seek and receive such other evidence and make such other inquiries as it thinks fit;
- (e) summon the parties to the proceedings or any other person to attend before it to give evidence or to produce any document, records or other thing in his possession;
- (f) receive expert evidence, and
- (g) generally direct and do all such things as may be necessary or expedient for the expeditious determination of the claim.

The Tribunal is to make its awards without delay and where practicable, within 60 days from the first day the hearing before the Tribunal commences.

2. Types of Claims Before the Tribunal

A consumer can lodge a claim with the Tribunal claiming for any loss suffered on any matter concerning his interests as a consumer under the Act arising from, among others:

- (a) a false or misleading representation that –
 - (i) the goods are of a particular kind, standard, quality, grade, quantity, composition, style or model of every good;
 - (ii) the goods have had a particular history or particular previous use;
 - (iii) the services are of a particular kind, standard, quality or quantity;

- (iv) the services are supplied by any particular person or by any person of a particular trade, qualification or skill;
- (v) a particular person has agreed to acquire the goods or services;
- (vi) the goods are new or reconditioned;
- (vii) the goods were manufactured, produced, processed or reconditioned at particular time;
- (viii) the goods or services have any sponsorship, approval, endorsement or affiliation;
- (ix) the person has any sponsorship, approval endorsement or affiliation;
- (x) concerns the need for any goods or services;
- (xi) concerns the existence, exclusion or effect of any condition, guarantee, right or remedy; or
- (xii) concerns the place of origin of the goods.

The word “**quantity**” in the foregoing paragraphs includes length, width, height, area, volume, capacity, weight and number.

- (b) a misleading or deceptive conduct as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity, of any good supplied to the consumer;
- (c) a misleading or deceptive conduct as to the nature, characteristics, suitability for a purpose, or quality of the services;
- (d) a misleading indication as to the price at which any goods or services are available;
- (e) a supplier demanding or accepting payments –
 - (i) without intending to supply the goods or services contracted;
 - (ii) intending to supply goods or services materially different from the goods or services in respect of which the payment or other consideration is demanded for or accepted; or

- (iii) without reasonable grounds to believe he will be able to supply the goods or services within any specified period, or where no period is specified, within a reasonable time.
- (f) the cancellation of a future services contract, that is, a contract for consumer services that will be provided on a continuing basis;
- (g) in respect of supply of goods, the failure of any supplier to comply with any of the guarantees implied by the Act –
 - (i) as to title;
 - (ii) as to acceptable quality;
 - (iii) as to fitness for a particular purpose;
 - (iv) that goods comply with description;
 - (v) that goods comply with sample;
 - (vi) that reasonable prices be charged where the price of goods is not, inter alia, determined by the contract;
 - (vii) as to repairs and spare parts.
- (h) the failure of any manufacturer to comply with any express guarantee given by the manufacturer in respect of any good that is binding on the manufacture as to –
 - (i) the quality, performance or characteristics of the goods;
 - (ii) the provision of services that are or may at any time be required in respect of the goods;
 - (iii) the supply of parts that are or may at any time be required for the goods;
 - (iv) the future availability of identical goods; or
 - (v) the return of money or other consideration should the goods not meet any undertaking by the guarantor.
- (i) the failure of any manufacturer to comply with any guarantee implied by the Act in respect of any good –
 - (i) as to acceptable quality;
 - (ii) that goods comply with description;

- (iii) as to repairs and spare parts.

- (j) In respect of supply of services, the failure of any supplier to comply with any guarantee implied by the Act –
 - (i) as to reasonable care and skill;
 - (ii) as to fitness for particular purpose;
 - (iii) that the services will be completed within a reasonable time where the time for the services to be carried out is, inter alia, not determined by the contract;
 - (iv) that reasonable price be paid where the price for the services is, inter alia, not determined by the contract.

For the purposes of the foregoing paragraphs, the term ‘goods’ means goods which are primarily purchased, used or consumed for personal, domestic or household purposes, and includes –

- (a) goods attached to, or incorporated in, any real or personal property;
- (b) animals, including fish;
- (c) vessels and vehicles;
- (d) utilities; and
- (e) trees, plants and crops whether on, under or attached to land or not.

The term ‘**consumer**’ means a person who –

- (a) acquires or uses goods or services of a kind ordinarily acquired for personal, domestic or household purpose, use or consumption; and
- (b) does not acquire or use the goods or services, or hold himself out as acquiring or using the goods or services, primarily for the purpose of –
 - (i) resupplying them in trade;
 - (ii) consuming them in the course of a manufacturing process; or
 - (iii) in the case of goods, repairing or treating, in trade, other goods or fixtures on land.

The term ‘**services**’ includes any rights, benefits, privileges or facilities that are or are to be provided, granted or conferred under any contract but does not include rights, benefits or privileges in the form of the supply of goods or the performance of work under

a contract of service or any services provided or to be provided by professionals who are regulated by any written law (such as doctors, engineers, lawyers and architects) or health care services provided or to be provided by health professionals or health care facilities (such as medical, dental, nursing, midwifery, pharmacy and ambulance services).

At the hearing the Tribunal may make any one or more of the following awards:

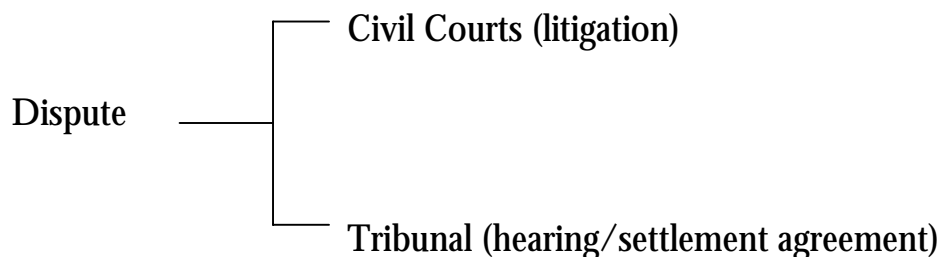
- (a) that a party to the proceedings pay money to any other party;
- (b) that goods be supplied or re-supplied in accordance with the Act or the contract to which the consumer is a party;
- (c) that goods supplied or re-supplied to the consumer be replaced or repaired;
- (d) that the price or other consideration paid or supplied by the consumer or any other person be refunded to the consumer or that person;
- (e) that a party comply with the guarantee;
- (f) that money be awarded to compensate for any loss or damage suffered by the claimant;
- (g) that the contract be varied or set aside, wholly or in part;
- (h) that costs (not exceeding RM200.00) to or against any party be paid;
- (i) that interest be paid on any sum or monetary award at a rate not exceeding eight per centum per annum, unless it has been otherwise agreed between the parties;
- (j) that the claim is dismissed.

Before the Tribunal makes an award, it may, in its discretion, refer to a Judge of the High Court a question of law –

- (a) which arose in the course of proceedings;
- (b) which, in the opinion of the Tribunal, is of sufficient importance to merit such reference, and
- (c) the determination of which by the Tribunal raises, in the opinion of the Tribunal, sufficient doubt to merit such reference.

The Tribunal is to give reasons for its awards. Every agreed settlement recorded by the Tribunal and every award made shall be final and binding on all parties to the

proceedings and shall be deemed to be an order of a Magistrate's Court and be enforced accordingly.



Institutional routes from outbreak to resolution of disputes

3. Statistical Data and Cases

According to its president, Puan Noor Azian Shaari, the Consumer Claims Tribunal had been successful in settling complaints. In 1999, 291 cases were brought to the Tribunal. Out of this, only 5 defendants failed to refund cash or exchange faulty goods to the complainants.¹³ As at December 2001, a total of 1,087 cases had been recorded with the Tribunal. This represents an increase of more than 200% compared with year 2000.¹⁴

The first case registered in the State of Selangor heard by the Tribunal concerned a claim for RM450 against the operator of a dry-cleaning shop for the loss of 4 T-shirts sent for cleaning. This claim was settled through conciliation initiated by the President of the Tribunal and the parties concerned, where as a result of discussion and negotiation, it was agreed that the operators of the shop pay RM200 in settlement of the claim.

Another case, also settled through conciliation and consent of the parties concerned faulty furniture. A furniture company was asked to pay RM4,500/- to a businessman after it was found that the furniture was in unsatisfactory condition. The consent award was made after an hour of negotiation between the parties before the President of the Tribunal.

Examples of claims heard on 23 October 2001

¹³ New Straits Times, 23 October, 2001, p. 2.

¹⁴ New Straits Times, 3 January 2002, p. 7.

- Sumuni Sdn Bhd, the operator of the Kadazandusun Cultural Association hall was instructed to refund RM450/- to Susy Lojimit after she cancelled her booking for the hall. The complainant had paid a RM500/- deposit to rent the hall for her sister's wedding, but cancelled the booking when the wedding was put off. Sumuni Sdn Bhd refused to refund the deposit. The company had failed to inform the complainant that there would be no refund or only partial refund would be given in the event of cancellation.
- Bacho Dahlan failed in his attempt to get a refund of RM300/- from a car dealer. Bacho failed to produce a receipt proving that he had paid RM3,000/-, while the car dealer showed a copy of a receipt stating that the complainant had paid only RM300/-, as a result owing the car dealer another RM2,700/-.

Examples of claims heard on 3 January 2002:

- Edaran Otomobil Nasional Sdn Bhd was ordered to pay compensation and cost of RM1,200/- to a businessman who had complained that his brand new car developed engine trouble a week after he received it, and that there had been no improvement despite several servicing. The company was ordered by the Tribunal to pay RM1,000/- for the cost of renting a car during the period his car was under service and RM200 as general costs.

Table 2
Claims Filed for the period between 1 January 2001 – 30 November 2001

States	No. of Claims Filed	Types of Claim		Claims Settled		Claims With-drawn	Claims Not Settled
		Product	Services	Through Hearing	Through Negotiation		
Perlis	3	3	0	0	2	0	1
Kedah	50	46	4	14	14	6	16
Penang	140	121	19	92	27	6	15
Perak	75	69	6	59	5	3	8
Selangor	137	105	32	67	24	5	41
N Sembilan	22	5	17	14	2	2	4
Malacca	56	41	15	26	9	8	13
Johor	176	145	31	47	19	78	32
Pahang	88	32	56	27	10	11	40
Terengganu	9	7	2	3	2	4	0
Kelantan	14		8	7	2	2	3
Sabah	60	32	28	20	8	22	10
Sarawak	2	2	-	0	1	0	1
Labuan	5	5	-	1	1	3	0
Federal Territory	188	120	68	71	20	38	59
TOTAL	1025	739	286	448	146	188	243

Source: Tribunal for Consumer Claims.

4. Choice of route for dispute resolution – contracts, sales methods, Product Liability

Tribunal for Consumer Claims	Civil Courts
1. Jurisdiction : value of claim or subject matter not more than RM10,000/-.	Magistrate’s court: amount in dispute or value of subject matter not more than RM25,000/- Sessions court : not more than RM250,000/-.
2. Procedure : pay RM5/- and file claim in prescribed form. <ul style="list-style-type: none"> • settlement through negotiation/mediation. • settlement through hearing 	Originating process – by writ, originating summons, originating motion or petition. <ul style="list-style-type: none"> • writ and statement of claim filed by plaintiff • appearance by defendant. • set for trial • requirement of pleadings
3. Time :Awards to be made within 60 days from the first day the hearing before the Tribunal commences	Depends upon court sittings required to complete trial – depends upon court time and lawyer’s handling of cases.
4. Representation : Lawyers not allowed.	Lawyers must be used to bring the case to court.

As can be seen from the table above, for amounts in dispute of more than RM25,000/-, there is really no choice of route – the dispute has to be brought before the Magistrate’s court. There is a choice only if the value of claim or subject matter is RM10,000/- and below.

It is obvious that for such a small amount, the better choice would be to bring the matter before the Tribunal rather than the civil courts. Legal fees alone would probably exceed RM10,000/-, and there is the possibility that there will be delays as the case is taken through the procedures before the civil courts. This probably explains the success of the Tribunal in settling disputes where the amount or value in question is less than RM10,000/-.

There is no difference in the legal meaning of outcomes between a dispute brought before the Tribunal for settlement, and a dispute brought before the civil courts. In both cases, the emphasis is on the legal settlement of disputes and the obtainment of remedies

for the party who has suffered as a result of the failure on the part of the other party. However, in cases brought before the civil courts, there is the avenue of appeal should a litigant be dissatisfied with a judgment handed down by a lower court, whereas in cases brought before the Tribunal, there is no appeal procedure. The only way in which a dissatisfied claimant could have his case “re-heard” would be by way of judicial review. At present, judicial review against Tribunal decisions have yet to be entertained. Given the present small amount of value of claim or subject matter, it would not be worthwhile to have Tribunal decisions reviewed, for judicial review would bring with it the negative elements associated with civil court proceedings, such as the need to employ lawyers and the attendant high legal costs.

IV. Dispute Resolution Process in Labour Disputes

A. Background to Labour and Employment Cases in Malaysia

There are a few main statutes which regulate labour and employment in Malaysia – the Employment Act 1955; the Industrial Relations Act 1967; and the Trade Unions Act, 1959. Apart from these 3 major statutes, there are other statutes which regulate specific matters, such as the Workmen’s Compensation Act 1952, the Employees’ Social Security Act 1969, the Occupational Health and Safety Act 1994, the Factories and Machinery Act 1967, the Employees Provident Fund Act 1991, the Pensions Act 1980, and the Statutory and Local Authorities Pensions Act 1980.

Other legislation pertaining to labour and employment:

- (i) the Children and Young Persons (Employment) Act 1966
- (ii) the Employment (Restriction) Act 1968
- (iii) the Employment (Information) Act 1953
- (iv) the Sabah Labour Ordinance 1949
- (v) the Sarawak Labour Ordinance 1952
- (vi) Wages Councils Act 1947
- (vii) Human Resource Development Act 1992
- (viii) Workers’ Minimum Standards of Housing and Amenities Act 1990.

The agency with primary responsibility for labour and employment generally in Malaysia is the Ministry of Human Resources, headed by its Minister. The basic objectives of the Ministry are:

- (a) to enforce the labour standards prescribed by relevant laws and regulations;
- (b) to generate employment opportunities for citizens and to regulate the employment of non-citizens;
- (c) to equip the unemployed with basic industrial skills and to enhance the skill level of the labour force;
- (d) to register trade unions and union federations and to supervise their activities;
- (e) to foster good employer-employee relations and to promote sound industrial relations; and
- (f) to ensure the safety, health and welfare of employees.

The Ministry is organised along division and departmental lines. (See organisational chart). The divisions constitute the secretariat of the Ministry, while the departments execute its most important function, ie, the enforcement of various laws and regulations as follows:¹⁵

The *Department of Labour Peninsular Malaysia* administers the following laws and regulations made thereunder:

- (1) the Employment Act 1955 (Revised 1981);
- (2) the Children and Young Persons (Employment) Act 1966;
- (3) the Employment (Restriction) Act 1968;
- (4) the Employment (Information) Act 1953 (Revised 1975);
- (5) the Weekly Holidays Act 1950 (Revised 1977);
- (6) the Workers' Minimum Standards of Housing and Amenities Act 1990;
- (7) the Workmen's Compensation Act 1952 (Revised 1982); and
- (8) the South Indian Labour Fund Ordinance 1958.

¹⁵ Ayadurai, D., *Industrial Relations in Malaysia – Law & Practice* (2nd edn) MLJ Sdn Bhd p. 357.

The *Department of Labour Sabah* administers the following laws and the regulations made thereunder:

- (1) the Sabah Labour Ordinance 1949;
- (2) the Employment (Restriction) Act 1968;
- (3) the Employment (Information) Act 1953 (Revised 1975);
- (4) the Wages Councils Act 1947 (Revised 1977);
- (5) the Workmen's Compensation Act 1952 (Revised 1982);
- (6) the Trade Unions Act 1959 (Revised 1981); and
- (7) the Industrial Relations Act 1967 (Revised 1976).

The *Department of Labour Sarawak* administers the following laws and the regulations made thereunder:

- (1) the Sarawak Labour Ordinance 1952;
- (2) the Employment (Restriction) Act 1968;
- (3) the Employment (Information) Act 1953 (Revised 1975);
- (4) the Sarawak Weekly Holidays Ordinance 1956;
- (5) the Wages Councils Act 1947 (Revised 1977);
- (6) the Workmen's Compensation Act 1952 (Revised 1982);
- (7) the Trade Unions Act 1959 (Revised 1981); and
- (8) the Industrial Relations Act 1967 (Revised 1976).

The *Department of Trade Unions* administers only one law, viz the Trade Unions Act 1959 (Revised 1981) and the regulations made thereunder. Similarly, the *Department of Industrial Relations* also administers only one law, viz the Industrial Relations Act 1967 (Revised 1976) and the regulations made thereunder.

The *Department of Occupational Safety and Health* (formerly, the Factories and Machinery Department) administers the following laws and the regulations made thereunder;

- (1) the Occupational Safety and Health Act 1994; and
- (2) the Factories and Machinery Act 1967 (Revised 1974).

The *Department of Manpower* does not administer any law or regulation. But in line with the objective of achieving a more optimal utilisation of the nation's human resources, this department provides vocational guidance, places jobseekers, develops and upgrades industrial skills, and collects, analyses and disseminates labour market information for manpower planning purposes.

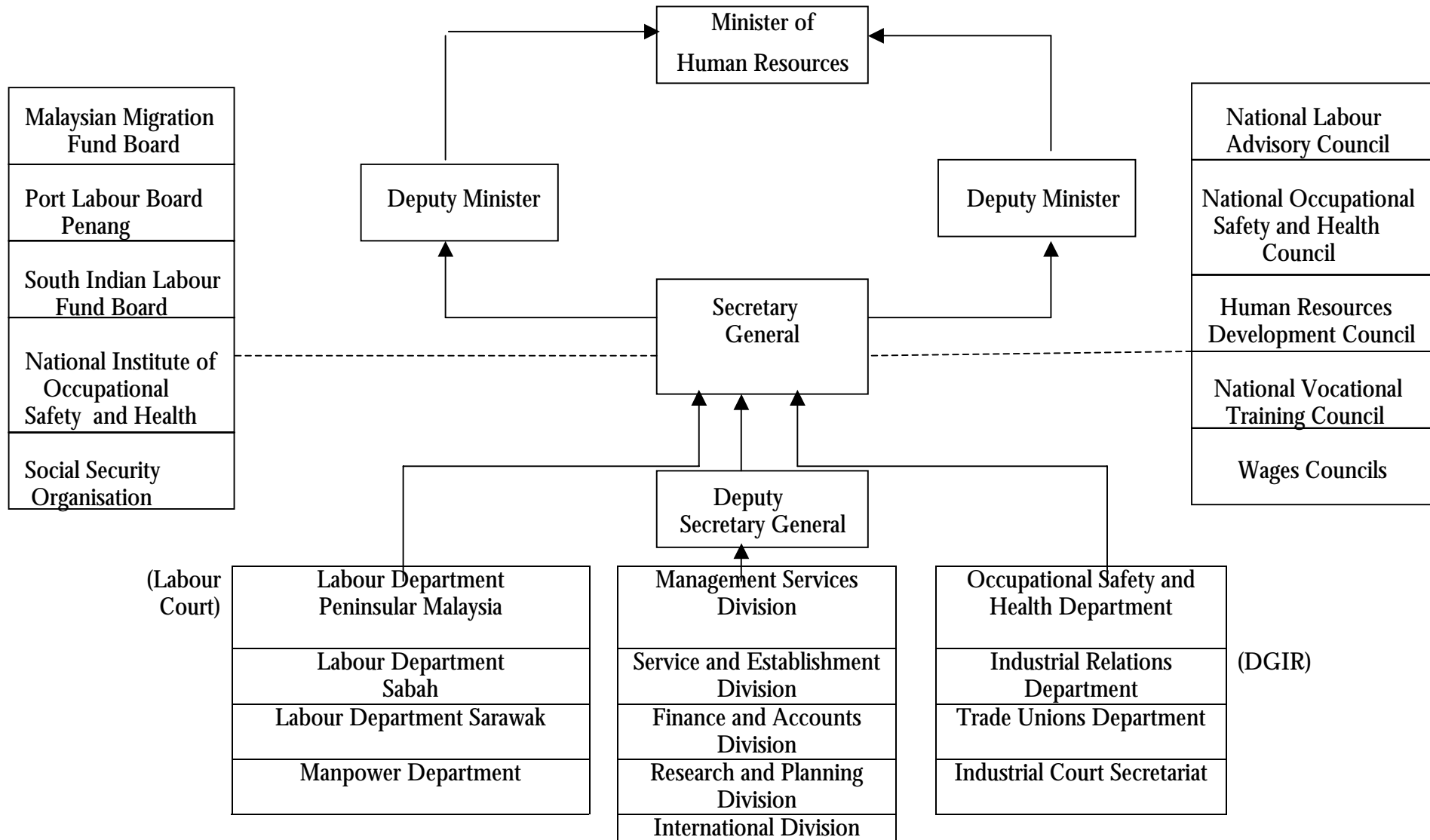
In carrying out its objectives, the Ministry is assisted by five statutory authorities, as follows:

- (1) the Malaysian Migration Fund Board;
- (2) the Penang Port Labour Board;
- (3) the South Indian Labour Fund Board;
- (4) the National Institute of Occupational Safety and Health; and
- (5) the Social Security Organisation.

The Ministry also services the following five councils:

- (1) the National Labour Advisory Council;
- (2) the National Occupational Safety and Health Council;
- (3) the Human Resources Development Council;
- (4) the National Vocational Training Council; and
- (5) Wages Councils (where established).

STRUCTURE OF THE MINISTRY OF HUMAN RESOURCES



‘The *divisions* constitute the secretariat of the Ministry, the *departments* execute its most important function, viz. the enforcement of various laws and regulations.’

B. Organisations/Institutions for dispute resolution

The Ministry of Human Resource administers a broad range of legislation pertaining to diverse fields, which covers trade union, industrial relations, employment, occupational safety and health and social security. However, from the standpoint of specialised institutions created for dispute settlement, there are only two (2) – the “Labour Court”, created under the Employment Act, 1955, and the Industrial Court established under the Industrial Relations Act, 1967.

1. The “Labour Court”

The “Labour Court” is actually not a “court” at all in the usual sense in which that word is understood, but represents a quasi-judicial proceeding of the Director General of Labour. Section 69 of the Employment Act 1955 authorises the Director General of Labour to inquire into and decide any dispute between an employee and his employer in respect of wages or any other payments in cash due to such employee under –

- (a) any term of the contract of service between such employee and his employer;
- (b) any of the provisions of the Act or any subsidiary legislation made thereunder, or
- (c) the provisions of the Wages Council Act 1947 or any order made thereunder.

In pursuance of the Director General’s inquiry, he is empowered to make an order in the prescribed form for the payment by the employer of such sum of money as he deems just without limitation of the amount thereof. The Director General’s order for the payment of money carries interest at the rate of 8% per annum.

Procedure in Director General’s Inquiry

- (a) The person complaining shall present to the Director General a written statement of his complaint and of the remedy which he seeks or he shall in person make a statement to the Director General of his complaint and of the remedy which he seeks.
- (b) The Director General shall, as soon as practicable, examine the complainant on oath or affirmation and shall record the substance of the complainant’s statement in a case book.

- (c) the Director General may make such inquiry as he deems necessary to satisfy himself that the complaint discloses matters which, in his opinion ought to be inquired into, and may summon in the prescribed form the person complained against.
- (d) When issuing a summons to a person complained against the Director General shall give such person notice of the nature of the complaint made against him and the name of the complainant and shall inform him of the date, time and place at which he is required to attend and shall inform him that he may bring with him any witnesses he may wish to call on his behalf, and that he may apply to the Director General for summonses to such persons to appear as witnesses on his behalf;
- (e) when the Director General issues a summons to a person complained against he shall inform the complainant of the date, time and place mentioned therein and shall instruct the complainant to bring with him any witnesses he may wish to call on his behalf and may, on the request of the complainant and subject to any conditions as he may deem fit to impose, issue summonses to such witnesses to appear on behalf of the complainant;
- (f) when at any time before or during an inquiry the Director General has reason to believe that there are any persons whose financial interests are likely to be affected by such decision as he may give on completion of the inquiry or who he has reason to believe have knowledge of the matters in issue or can give any evidence relevant thereto he may summon any or all of such persons;
- (g) the Director General shall, at the time and place appointed, examine on oath or affirmation those persons summoned or otherwise present whose evidence he deems material to the matters in issue and shall then give his decision on the matters in issue;
- (h) if the person complained against or any person whose financial interests the Director General has reason to believe are likely to be affected and who has been duly summoned to attend at the time and place appointed in the summons shall fail so to attend the Director General may hear and decide the complaint in the absence of such person notwithstanding that the interests of such person may be prejudicially affected by his decision;
- (i) in order to enable a court to enforce the decision of the Director General, the Director General shall embody his decision in an order in such form as may be prescribed.

Where the Director General has made an order and it has not been complied with, he may send a copy of the order to the Registrar of a Sessions Court or to the court of a First Class Magistrate, and the said Registrar or court shall cause the copy of the order to

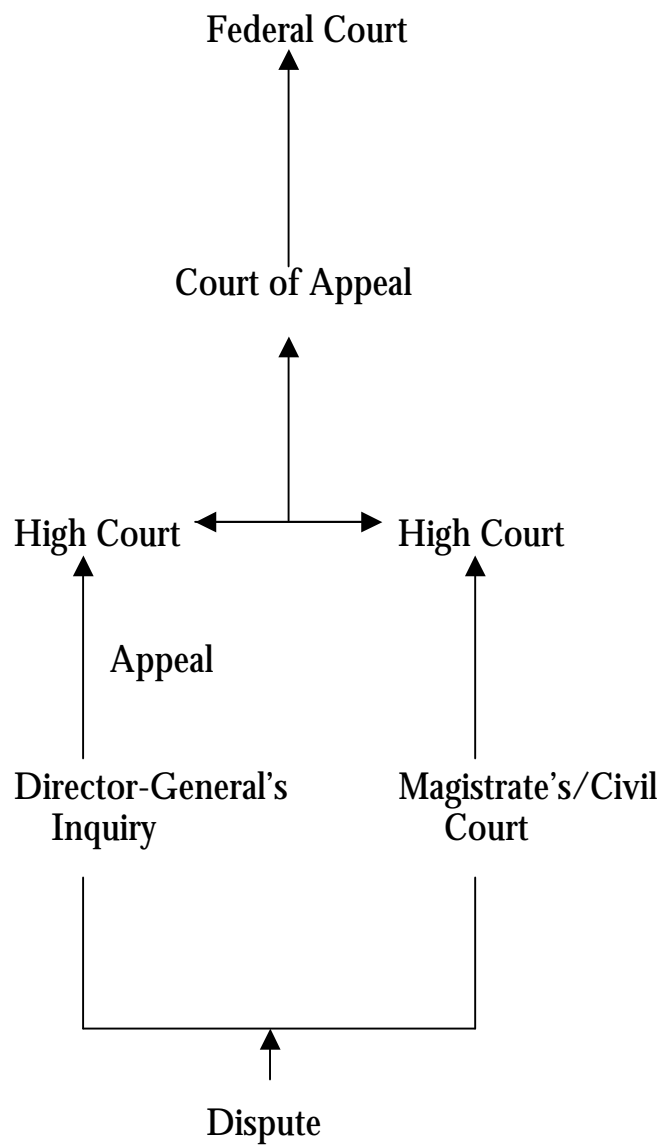
be recorded, and thereupon the said order shall for all purposes be enforceable as a judgment of the Sessions Court or of the Court of the First Class Magistrate.

The Director General may, if he thinks fit, submit any question of law for the decision of a Judge of the High Court, and if he does so, he shall decide the proceedings in conformity with such decision.

Any person whose financial interests are affected is dissatisfied with the decision or order of the Director General, he may appeal to the High Court.

The Act does not prevent any employer or employee from enforcing his civil rights and remedies for any breach or non-performance of a contract of service by any suit in court in any case in which proceedings have not been instituted before the Director General under section 69 or, if instituted, have been withdrawn.

A complaint by an employee that he has reasonable grounds for believing that his employer, in order to evade payment of his wages, is about to abscond, is to be made to a *Magistrate* under section 78(1) of the Act, and not to the Director General. The Magistrate may then summon such employer and direct him to show cause why he should not be required to give security by bond to remain in Malaysia until such wages are paid.



Possible institutional routes in cases of Labour disputes *except* industrial or trade disputes and disputes pertaining to dismissal

Table 3
Cases Heard and Amounts Ordered By
The 'Labour Court' : 1990-1992

Labour Court Cases	Year		
	1990	1991	1992
Number of Cases Heard	4,911	4,572	5,106
Number of Employees Involved	5,997	5,531	6,114
Amount Ordered to be Paid (ringgit)	5.0 m	5.3 m	6.4 m
Amount Paid by Employers (ringgit)	3.8 m	3.9 m	5.1m

Source: Department of Labour, Peninsular Malaysia

Table 4
Charges Preferred and Persons Prosecuted
Under the Employment Act: 1990-1992

Law Court Cases	Year		
	1990	1991	1992
Number of Charges Preferred in Court	216	180	146
Number of Conviction on Charges	202	158	123
Number of Acquittals on Charges	14	22	23
Number of Persons Prosecuted in Court	254	234	216
Number Successfully Prosecuted	242	207	165
Number Unsuccessfully Prosecuted	12	27	51
Amount of Fines Paid (Ringgit)	73,236	23,332	49, 370

Source: Department of Labour, Peninsular Malaysia.

Table 5**Peninsular Malaysia: Number of Claims, Decisions and Amount Granted by the Labour Court, 1994-1998**

Year	Claims			Decision			Amount of Claims (RM)		
	From Employer	From Employee	Total	In Favour of Employer	In Favour of Employee	Total	From Employer	From Employee	Total
1994	76	9,316	9,392	76	5,669	5,745	7,411	5,746,139	5,753,550
1995	319	11,172	11,491	319	5,574	5,893	163,687	7,686,843	7,850,530
1996	257	10,876	11,133	257	5,508	5,765	116,996	8,650,185	8,767,181
1997	228	12,742	12,970	467	5,980	6,447	137,808	14,152,426	14,290,234
1998	781	10,057	10,838	705	8,539	9,244	140,774	25,201,471	25,342,245

Source: Labour Department Peninsular Malaysia, Ministry of Human Resources.

Table 6**Sabah: Number of Complaints Reported and Settled by the Labour Department and Amount Paid, 1994-1998**

Year	Number of Complaints Reported	Number of Complaints Settled	Amount Paid (RM)
1994	1,079	873	478,174
1995	968	773	453,040
1996	899	832	364,696
1997	1,546	1,401	684,954
1998	2,291	2,165	1,135,468

Source: Labour Department Sabah, Ministry of Human Resources

Table 7

Sarawak: Number of Complaints Reported and Settled by the Labour Department and Amount Paid, 1994-1998

Year	Number of Complaints Reported	Number of Complaints Settled	Amount Paid (RM)
1994	1,945	1,546	497,681
1995	1,328	902	741,701
1996	1,406	869	452,457
1997	1,456	914	579,697
1998	2,731	1,886	1,255,830

Source: Labour Department Sarawak, Ministry of Human Resources

Limitations upon the Director General's Inquiry

The Director General's inquiry is limited to disputes between employees and employers governed by the Employment Act, 1955. An "employee" under the Act is specified under the First Schedule thereto, ie:

Employee

1. Any person, irrespective of his occupation, who has entered into a contract of service with an employer under which such person's wages do not exceed one thousand five hundred ringgit a month.

2. Any person who, irrespective of the amount of wages he earns in a month, has entered into a contract of service with an employer in pursuance of which –

(1) he is engaged in manual labour including such labour as an artisan or apprentice:

Provided that where a person is employed by one employer partly in manual labour and partly in some other capacity such person shall not be deemed to be performing manual labour unless the time during which he is required to perform manual labour in any one wage period exceeds one-half of the total time during which he is required to work in such wage period;

(2) he is engaged in the operation or maintenance of any mechanically propelled vehicle operated for the transport of passengers or goods or for reward or for commercial purposes;

(3) he supervises or oversees other employees engaged in manual labour employed by the same employer in and throughout the performance of their work;

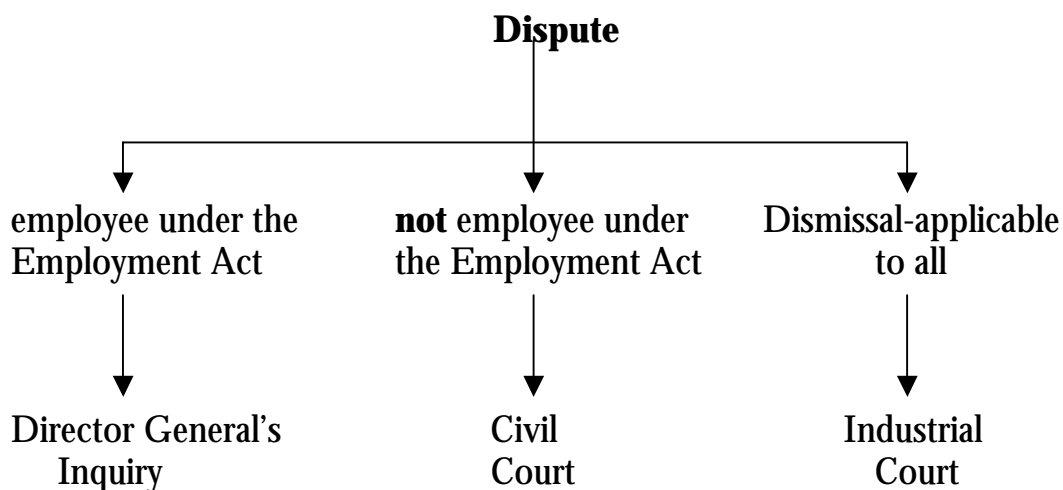
(4) he is engaged in any capacity in any vessel registered in Malaysia and who

–

- (a) is not an officer certified under the Merchant Shipping Acts of the United Kingdom as amended from time to time;
 - (b) is not the holder of a local certificate as defined in Part VII of the Merchant Shipping Ordinance, 1952; or
 - (c) has not entered into an agreement under Part III of the Merchant Shipping Ordinance, 1952; or
- (5) he is engaged as a domestic servant.

Employees who do not fulfil the criteria under the First Schedule cannot utilise the proceedings under the Act. For contract breaches and other problems pertaining to employment, they would have to resort to litigation in the civil courts. The only exception is if they have been dismissed or have their contracts of employment terminated, they may resort to the procedure under the Industrial Relations Act, 1967. Section 69A of the Employment Act 1955 itself makes it clear that the Director General has no jurisdiction to inquire into, hear, decide or make an order in respect of any claim, dispute or purported dispute which, in accordance with the Industrial Relations Act 1967 –

- (a) is pending in any inquiry or proceedings under the Act;
- (b) has been decided upon by the Minister under section 20(3) of the Act, or
- (c) has been referred to or is pending in any proceedings before the Industrial Court.



2. The Industrial Court

The preamble to the Industrial Relations Act 1967 (IRA) states as its objectives, the regulation of relations between employers and workmen and their trade unions, and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom.

A “trade dispute” refers to any dispute between an employer and his workman which is connected with the employment or non-employment or the terms of employment or the conditions of work of any such workman.

A “workman” refers to any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute.

The IRA establishes an Industrial Court consisting of a President appointed by the *Yang di Pertuan Agong* (Head of State) and a panel of persons representing employers and a panel of persons representing workmen, all of whom are to be appointed by the Minister.

In any proceedings before the Court a party may –

- (a) where the party is a trade union, be represented by an officer or employee of the union;
- (b) where the party is an employer, appear himself personally or be represented by his duly authorised employee or by an officer or employee of a trade union of employers of which he is a member;
- (c) where the party is a workman, appear himself personally or where he is a member of a trade union, be represented by an officer or employee of the trade union.
- (d) where the a party is a trade union, or an employer or a workman, be represented with the permission of the President or the Chairman, *by an advocate*, or, by any workman registered in Malaysia.

In any proceedings before it, the Court has the following powers:

- (a) to order that any party be joined, substituted or struck off;
- (b) to summon before it the parties to any such proceedings and any other person who in its opinion is connected with the proceedings;
- (c) to take evidence on oath or affirmation and compel the production before it of books, documents and things;
- (d) to hear and determine the matter before it notwithstanding the failure of any party to submit any written statement whether of case or reply to the court;
- (e) to conduct its proceedings or any part thereof in private;
- (f) after consultation with the Minister, to call in aid one or more experts, and
- (g) to generally direct and do all such things as are necessary or expedient for the expeditious determination of the matter before it.

Where the court is not unanimous on any question or matter, a decision shall be taken by a majority of members, and if there is no majority decision, by the President or Chairman.

The Court is to make its award without delay, and where practicable, *within 30 days* from the date of reference to it of the trade dispute.

In the event of an agreement being reached during the proceedings before the court, the court in making its award, may have regard to the terms of the agreement. In the event of an agreement being reached before the court commences its proceedings, the court may be constituted by the President or Chairman sitting alone for the purpose of recording the terms of the agreement.

Although an award has been made, the court may, in its discretion, on the application of any party to the proceedings, refer to the High Court a question of law –

- (a) which arose in the course of the proceedings;
- (b) the determination of which by the court has affected the award;
- (c) which, in the opinion of the court, is of sufficient importance to merit such reference, and
- (d) the determination of which by the court raises, in the opinion of the court, sufficient doubt to merit such reference.

The High Court shall hear and determine the question referred to it as if the reference were an appeal to the High Court against the award of the court, and may consequently confirm, vary, substitute or quash the award or make such other order as it considers just or necessary.

An award, decision or order of the court is to be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court.

Dispute Resolution Process

There are three (3) main types of dispute which the IRA addresses:

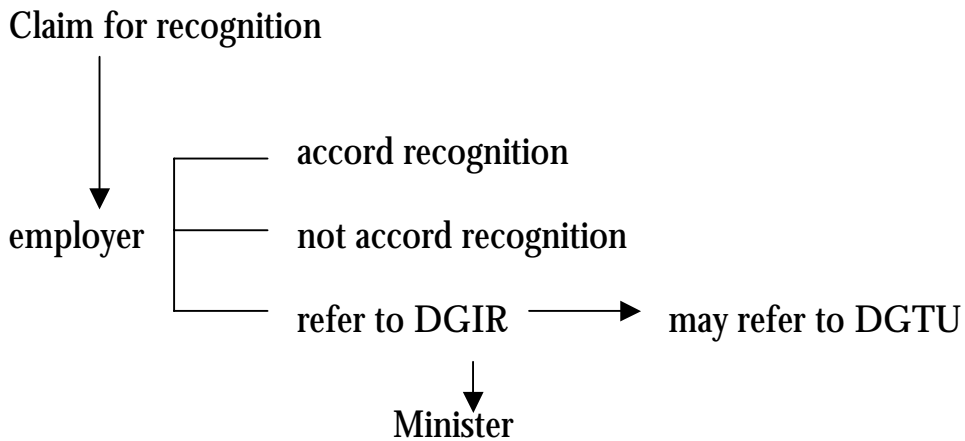
- (a) Recognition disputes;
- (b) Dismissals; and
- (c) Trade disputes generally.

(a) *Recognition disputes*

Before a trade union may begin collective bargaining with an employer, the union must first be “recognised” by the employer concerned. A trade union of workmen may serve on an employer in writing in the prescribed form a claim for recognition in respect of the workmen or any class of workmen employed by such employer.

An employee upon whom a claim for recognition has been served must, within *21 days* after the service of the claim, either accord recognition, not accord recognition or apply to the Director General of Industrial Relations to ascertain whether the workmen in respect of whom recognition is being sought are members of the trade union of workmen concerned. For the purposes of carrying out his function in this regard, the Director General of Industrial Relations (DGIR) may refer to the Director General of Trade Unions (DGTU) for his decision any question on the competence of the trade union concerned to represent any workmen or class of workmen.

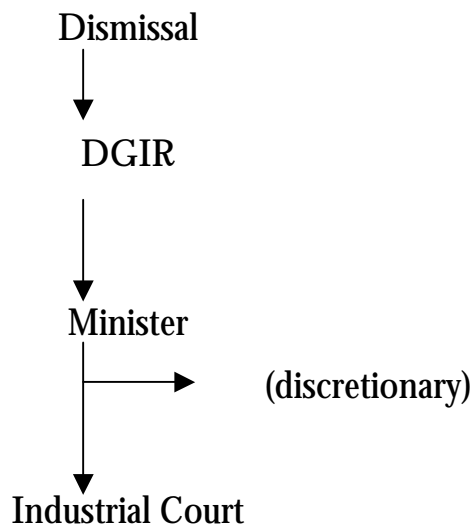
Where the matter remains unresolved, the DGIR is to notify the Minister. The Minister then shall decide the matter. The Minister’s decision is to be final and not open to question in any court.



(b) Dismissals

Where a workman, irrespective of whether he is a member of a trade union or not, considers that he has been dismissed without just cause or excuse, he may make representations in writing to the DGIR to be reinstated in his former employment. Such representations are to be made within *60 days* of the dismissal.

Upon receipt of the representations the DGIR is to take such steps as he may consider necessary or expedient to settle the dispute. If there is no likelihood of the dispute being settled, the DGIR must notify the Minister. Upon receiving the notification of the DGIR, the Minister may, if he thinks fit, refer the representations to the Industrial Court for an award.



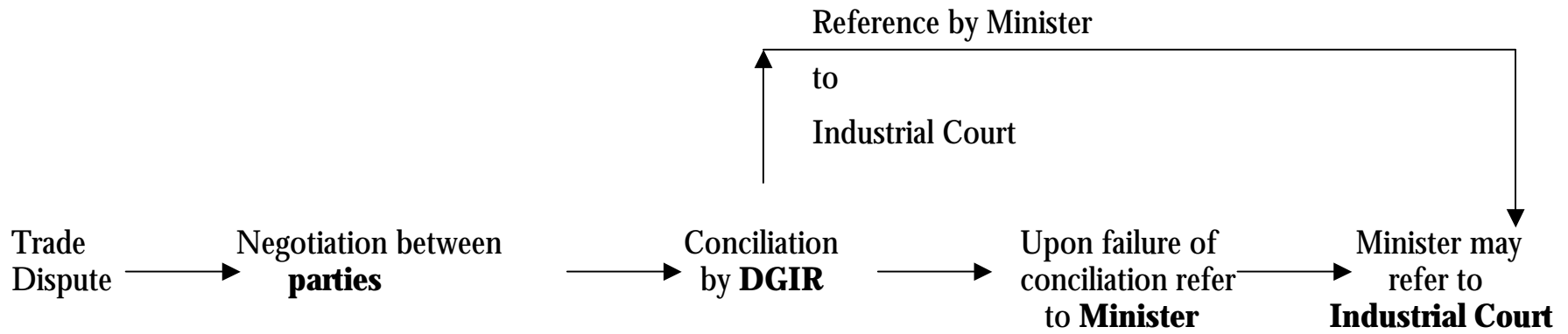
(c) Trade Disputes

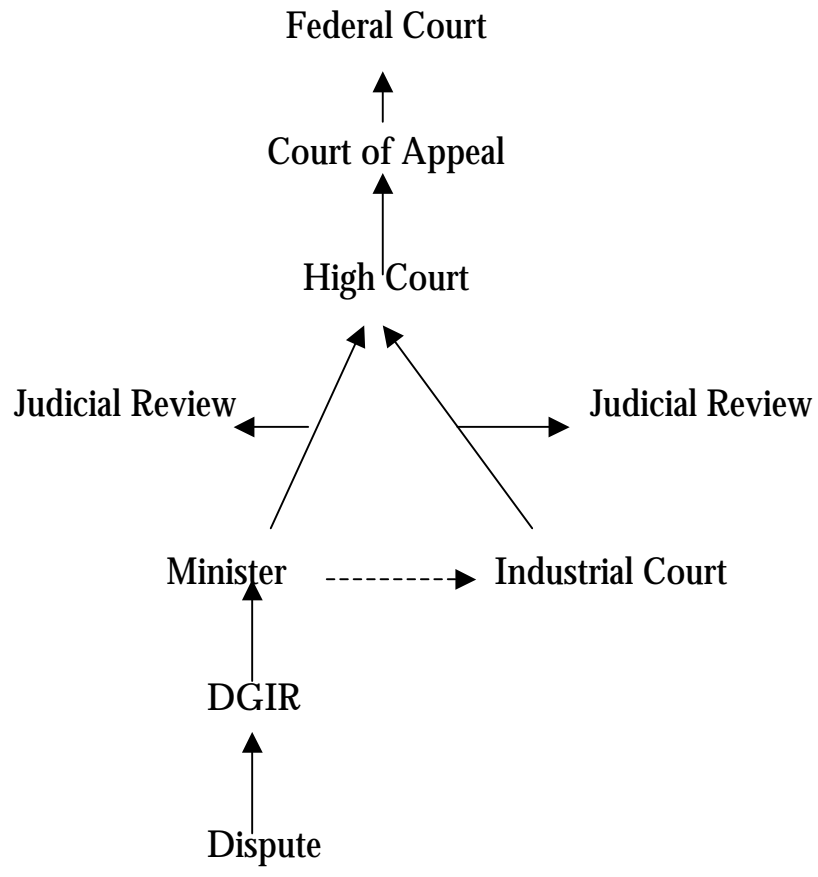
Where a trade dispute exists or is apprehended which is not likely to be settled by negotiation between the parties, the DGIR may take such steps as may be necessary for

promoting an expeditious settlement of the dispute. If the DGIR is satisfied that there is no likelihood of the trade dispute being settled, he is to notify the Minister. Notwithstanding the above, the Minister may, at any time, if he considers it necessary or expedient, take such steps as may be necessary to conciliate in any trade dispute. If the dispute is not otherwise resolved, the Minister may refer the dispute to the Industrial Court on the joint request in writing by the trade union of workmen and the employer who are parties to the dispute. This power of the Minister to refer any trade dispute to the Court may be exercised without the need for the conciliation process to be concluded [section 26(2) IRA].

Although the IRA declares that the Minister's decision in a recognition dispute shall be final and not open to question in any court, and the Industrial Court's decisions are final and not open for review by any civil court, the development of the doctrine of judicial review by the civil courts has meant that the "finality" provisions actually mean little in practice.. The Malaysian judiciary has adopted a pro-active and interventionist approach in judicial review. For example, in *R. Ramachandran v The Industrial Court*,¹⁶ the Federal Court decided that in the exercise of judicial review, the tribunal's decision may be reviewed for substance as well as process, and that should the decision be found to be wrong, the court had the power to mould the appropriate relief and award it to the party concerned instead of remitting the case back to the tribunal for a re-hearing. As a result, although there exist specialised tribunals such as the Industrial Court established for the resolution of trade disputes, the dispute resolution process is not isolated from civil court litigation. In fact, due to the developments in the law pertaining to judicial review, dispute resolution eventually finds its way to the civil courts.

¹⁶ [1977] 1 MLJ 145.





-----> Where Minister has discretion to refer to Industrial Court.

Summary of dispute resolution process in Trade Disputes

Table 8

**Malaysia: Outcome of Claims for Recognition by Trade Unions Handled by the Industrial Relations Department (IR)
by Sector and Mode of Settlement, 1994-1998**

Sector	Mode of Settlement														
	Recognition Accorded Voluntarily					Recognition Accorded by Decision of Minister					Recognition Rejected/Withdrawn/Not Eligible				
	1994	1995	1996	1997	1998	1994	1995	1996	1997	1998	1994	1995	1996	1997	1998
Agriculture, Forestry, Livestock and Fishing	1	-	-	3	3	-	-	-	3	1	3	-	1	1	1
Mining and Quarrying	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Manufacturing	11	7	14	19	7	1	4	8	8	12	4	16	12	25	12
Electricity, Gas and Water	-	-	-	2	2	-	-	-	1	-	-	-	-	1	2
Construction	-	-	-	1	-	-	-	1	-	-	-	-	1	1	1
Wholesale and Retail Trade, Restaurants and Hotels					6				2						4
Finance, Insurance, Real Estate and Business Services	9*	6*	12*	13*	8	2*	0*	1*	4*	-	5*	2*	7*	11*	6
Community, Social and Personal Services					-				2						10
Transport, Storage and Communication	2	3	1	7	3	-	-	-	4	4	2	2	2	3	-
Others	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Total	23	16	27	45	29	3	4	10	20	21	14	20	23	42	36

Source: Industrial Relations Department, Ministry of Human Resources.

* Figures for the years 1994-1997 are inclusive of wholesale and retail trade, restaurants and hotels, finance, insurance, real estate and business services, community, social and personal sectors.

Table 9**Malaysia: Settlement of Claims for Reinstatement by the Industrial Relations Department (IR), 1994-1998**

Settlement	1994	1995	1996	1997	1998
1. Settled Through Conciliation					
a) Reinstatement	221	282	358	270	396
b) Payment of Compensation	1,103	1,207	1,116	1,231	3,085
Amount (RM)	4,483,906	6,260,687	5,411,127	6,796,345	22,428,575
c) Case withdrawn	649	492	498	559	1,346
d) Case Closed (Absent)	-	-	-	-	176
2. Decision of the Minister					
a) Reference to Industrial Court	458	596	393	713	886
b) No Merit for Reference to Industrial Court	452	217	1,043	87	778
Total	2,883	2,794	3,408	2,860	6,667

Source: Industrial Relations Department, Ministry of Human Resources.

Table 10
Malaysia: Type of Cases Arbitrated by the Industrial Court, 1994-1998

Type of Case	1994	1995	1996	1997	1998
Termination Cases					
Constructive	15	26	19	34	58
Misconduct	439	410	366	407	403
Retrenchment	9	4	50	14	17
Non-Termination Cases					
Non-Compliance of Award	15	41	67	60	69
Non-Compliance of Collective Agreement	12	14	16	30	42
Interpretation of Award/Collective Agreement	10	12	10	5	28
Variation of Award/Collective Agreement	7	3	1	2	12
Amendments to Collective Agreement (By Court Order)	-	-	-	-	-
Collective Agreement (Terms and Conditions)	48	30	57	49	26
Questions of Law	14	9	10	9	5
Victimisation	-	-	1	1	4
Total	569	549	597	611	664

Source: Industrial Relations Department, Ministry of Human Resources.

Table 11
Cases Referred and Settled 1999 and 2000

Case	1999	2000	%
Cases brought forward from previous year	972	1,292	32.92
Cases referred in current year	1,072	1,003	-2.34
Cases settled	707	701	-0.85
Cases carried forward	1,292	1,594	23.38

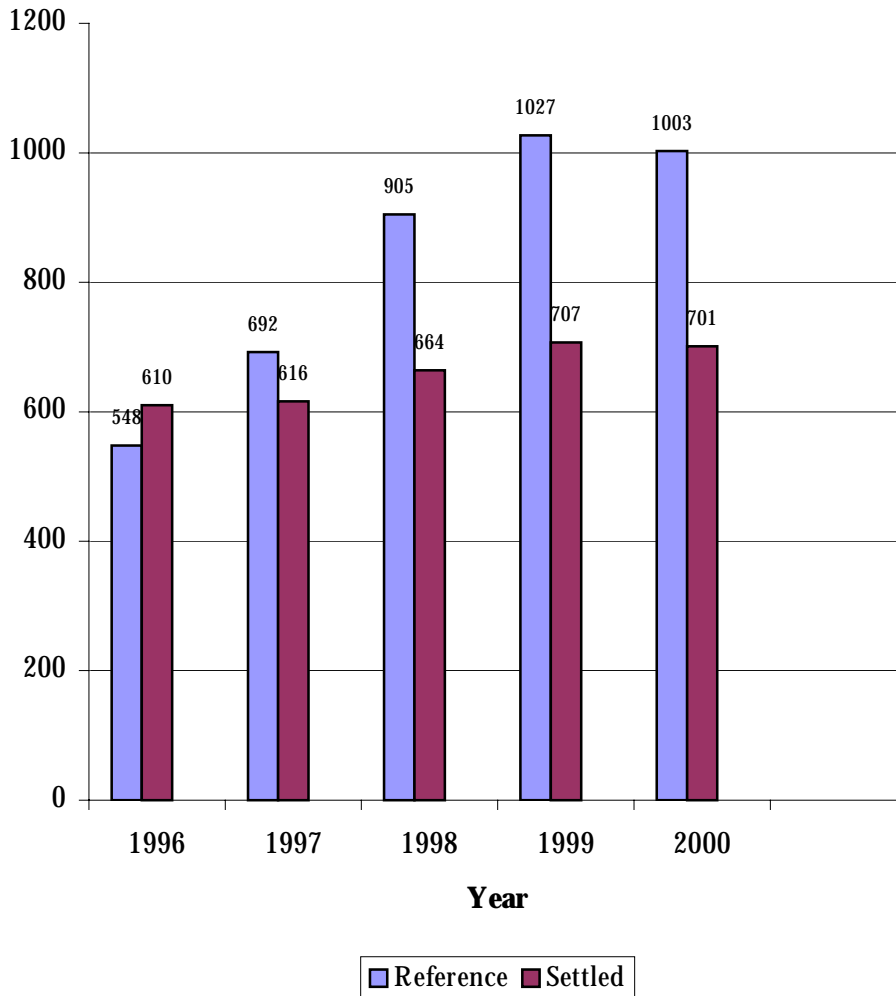
Source: Ministry of Human Resources, Annual Report 2000

Table 12**Non-Dismissal Cases 1999 and 2000**

Case	1999	2000	%
Non-compliance with court decision	73	70	-4.11
Non-compliance with collective agreement	80	54	-32.50
Interpretation of court award and collective agreement	6	7	16.67
Variation of court award and collective agreement	6	5	-16.67
Amendments to collective agreement on court order	1	-	-100.00
Collective agreement (Terms and Conditions)	26	42	61.54
Question of law	12	6	-50
Total	204	184	-9.80

Source: Ministry of Human Resources, Annual Report 2000.

Chart 1
No. of references and Cases Settled 1996-2000



Source: Ministry of Human Resources, Annual Report 2000.

In the above mentioned main types of disputes, that is, dismissals and trade disputes generally, the Industrial Court’s jurisdiction to hear the dispute is exercised upon the *reference* of such dispute to the Court by the Minister. In the case of recognition disputes, the Industrial Court does not have jurisdiction as the dispute is supposed to be “finally” settled by the Minister.

There are a few cases where parties may bring their dispute *directly* to the Industrial Court, that is:

- (a) under section 33(1) of the IRA, if any question arises as to the interpretation of any award or collective agreement taken cognizance of by the court, the Minister may refer the question, or *any party bound by the award or agreement may apply*, to the court for a decision on the question; and
- (b) under section 56(1) IRA, any complaint that any term of any award or of any collective agreement which has been taken cognizance of by the Court has not been complied with may be lodged with the court in writing by any trade union or person bound by such award or agreement.

3. Industrial Injury (Workmens' Compensation) – The Social Security Organisation

The Social Security Organisation (SOCSO) was formed as a government department on January 1, 1971 to enforce the Employees' Social Security Act, 1969. It became a statutory authority with effect from July 1, 1985.

SOCSO administers social security schemes which provide protection for workers against several contingencies, namely employment injury including commuting accidents, occupational diseases, invalidity and death. The objective of the social security scheme is to guarantee timely and adequate benefit payments to the worker and his dependants in the event of a contingency. SOCSO also provides medical care, physical and vocational rehabilitation besides promoting accident prevention measures and safety at the work place.

SOCSO ensures the success of its mission based on the following:¹⁷

- Developing staff training programmes on health and accident prevention measures.

¹⁷ SOCSO, Annual Report, 1999.

- Instilling the relevant social values necessary to control the action of an individual, which may jeopardise his personal health and safety.
- Constantly keeping abreast of changing safety standards, health care trends and techniques.
- Regular inspection of office equipment to identify and correct irregularities from the health and safety perspective.
- Reviewing plans for new location including the facilities for the office to guarantee the designing, construction, installation and operation are within the stipulated government guidelines.
- Management's commitment to ensure every person in the organisation understands and accepts that he has a role and responsibility towards his safety and health as well as that of his surroundings.

In order to ensure that the organisation's objectives will be met, SOCSO has drawn up its client's charter:¹⁸

- To pay temporary disablement benefit (first payment) to injured employees within a month.
- To pay permanent disablement benefit (first payment) and constant attendance allowance to all injured employees within 3 months.
- To pay dependant's benefit (first payment) to dependants within 3 months.
- To pay invalidity pension(first payment) or invalidity grant and constant attendance allowance to employees who qualify within a period of 3 months.
- To pay survivor's pension(first payment) to dependants within a period of 3 months.
- To pay funeral benefits to eligible dependants of deceased persons within 15 days.
- To register new employers and employees and inform employer of their code number and employee social security registration number within one (1) month.
- To investigate and provide information on every complaint regarding benefit claims within 2 weeks.

¹⁸ 1999, Annual Report.

Table 14
Registration of Employers and Employees

Activity	1995	%	1996	%	1997	%	1998	%	1999	%
Employer registered	274,017	13.6	305,500	11.5	338,794	10.9	358,543	5.8	385,916	7.6
Employee registered	7,422,191	6.8	7,613,635	2.6	8,252,680	8.4	8,428,589	2.1	8,598,005	2.0
Active Employer	175,455	18.5	210,059	19.7	227,112	8.1	230,027	1.3	239,674	4.2
Active Employee	3,874,691	11.3	4,098,418	5.8	4,183,343	2.1	4,327,254	3.4	4,454,586	2.9

Active is defined where one or more contribution is made in that year.

Social Security Schemes

SOCSO provides 2 social insurance schemes:

(a) *Employment Injury Insurance Scheme*

This Scheme provides protection to an employee against industrial accidents that occur at work or while traveling on a route between his residence and his place of work or between his place of work to a place where he takes his meal during an authorised recess or during a journey which is directly connected to his employment (so long as the accident does not occur during a stoppage or a deviation from the route). The Scheme also provides protection against occupational diseases.

The employment injury insurance scheme provides the following benefits:

- (i) Temporary Disablement Benefit
- (ii) Permanent Disablement Benefit
- (iii) Dependant's Benefit
- (iv) Constant – attendance allowance
- (v) Funeral Benefit
- (vi) Medical Benefit
- (vii) Rehabilitation Benefit
- (viii) Education Loan Benefit

(b) *Invalidity Pension Scheme*

This Scheme provides the employee with a 24-hour coverage in the event of invalidity or death from whatever cause. Under this scheme, the following benefits are provided:

- (i) Invalidity Pension
- (ii) Invalidity Grant
- (iii) Survivor's Pension
- (iv) Constant – attendance allowance
- (v) Funeral Benefit
- (vi) Rehabilitation Benefit
- (vii) Education Loan Benefit.

Every employer employing one or more employee as specified by the Act must register and contribute to SOCSO. The Employment Injury Scheme is currently financed fully through employer's contribution at a rate of 1.25% of employees' monthly wage while Invalidity Pension Scheme is financed through contributions by both employers and employees respectively at a contribution rate of 0.5% of employees' monthly wage.

An employee who earns RM2,000/- or less per month is required to contribute to SOCSO. An employee who has never been registered with or contributed to SOCSO and who is earning more than RM2,000/- monthly is given an option to be covered under the Act with the agreement of his employer. However, once an employee is covered under the Act, he will continue to be covered irrespective of his monthly wage.

Table 15
Enforcement Activities

Types of enforcement & service activities	1999		1998	
	Number	%	Number	%
Enforcement				
1. Number of industries inspected based on scheduled inspection				
• Completed	27,939	32.9	34,609	35.0
• In the process	16,048	18.9	20,345	20.6
2. Number of industries visited other than inspected	2,942	3.5	3,945	4.0
Services				
1. Number of cases investigated				
• Certification of Salary and Dependency	12,371	14.5	13,497	13.7
• Employment Injury	10,628	12.5	8,076	8.2
• Invalidity Pension	2,192	2.6	2,103	2.1
• Investigation	3,555	4.2	9,136	9.3
2. Talks	395	0.4	494	0.5
3. Other visits	8,972	10.5	6,556	6.6
Total	85,042	100	98,761	100

Source: SOCSO Annual Report 1999.

Social Security Appellate Board:

The Social Security Appellate Board is the highest appeal channel for any party under the Employees Social Security Act 1969. A total of 5 Appellate Boards have been established, 3 in Peninsular Malaysia and one each in Sabah and Sarawak. The number of appeal cases received in 1999 totalled 286 as compared to 320 in 1998. The total number of cases settled was 189, an increase of 7 cases when compared to 182 cases in 1998. Until December 1999, 313 cases were not settled by the Boards. Of this, 191 cases were awaiting a date for hearing, 83 cases awaiting compilation of the appellants' records by SOCSO, and 39 cases awaiting the written decision of the respective Boards.

Table 16
Status of SSAB Appeal Cases, 1999

Social Security Appellate Board (SSAB) – Status of Appeal Cases	Peninsular Malaysia	Sabah	Sarawak	Total
Number of New Appeal Cases Received/ Reported in 1999	269	0	17	286
Number of Cases Filed As At 31.12.99	259	1	18	278
Number of Appeal Cases Heard in 1999	636	7	21	664
Number of Appeal Cases Reviewed and Withdrawn 1999	37	0	1	38
Number of Appeal Cases Decided in 1999	176	0	13	189
Number of Appeal Cases Not Settled As At 31.12.99				
i) Awaiting SSAB Decision	39	0	0	39
ii) Awaiting Hearing/SSAB Hearing Date	186	1	4	191
iii) Awaiting Preparation Of Appeal Records By SOCSO	78	0	5	83
Total	303	1	9	313

Source: SOCSO Annual Report, 1999.

Table 17
Prosecution Cases By Type of Offence

No.	Type of Offence	Total Case	Fined By Court (RM)	Back Dated Contribution (RM)
1.	Failed to make contribution	172	229,920	1,715,799
2.	Failed to register company	20	11,300	-
3.	Failed to report accident	11	17,800	-
4.	Failed to submit contribution Schedule	4	400	-
5.	Failed to register employee	5	20,900	-
Total		212	280,320	1,715.799

Source: SOCSO Annual Report, 1999

Table 18
Types of offences under Employees Social Security Act,
1999 and 2000

Types of offences prosecuted	1999		2000	
	Total	% Settled	Total	% Settled
Failure to make contribution	172	81.1	103	77.4
Failure to report accident	11	5.2	13	9.8
Failure to register company	20	9.4	9	6.8
Failure to register employee	5	2.4	2	1.5
Failure to submit contribution schedule	4	1.9	1	0.75
Failure to pay interest on late contribution payments	-	-	5	3.75
Total Settled	212	100	133	100

Source: Ministry of Human Resources Annual Report 2000.

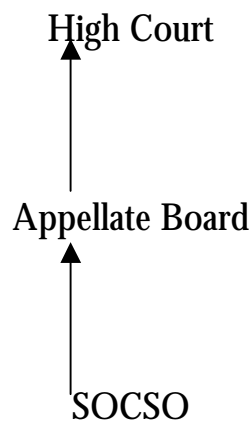
Table 19
Prosecution Cases Settled By Type of Offence and Local Office

No	Local Office	Failed To Make Contribution (RM)		Failed to Register the Industry	Failed to Report Accidents	Failed to Register Employees	Failed to Maintain Register of Employees	Total
1	Kuala Lumpur	64	843,277.75	5	-	-	-	69
2	Johor Bahru	22	331,016.85	1	-	-	-	23
3	Petaling Jaya	32	232,703.00	2	2	-	-	36
4	Ipoh	15	106,207.40	2	-	-	3	20
5	Seremban	4	88,809.20	-	-	-	-	4
6	Segamat	3	33,501.50	-	1	1	-	5
7	Butterworth	2	329.00	-	-	-	-	2
8	Kuantan	2	15,510.70	-	2	-	-	4
9	Sg Petani	5	12,909.20	1	-	-	-	6
10	Taiping	5	11,525.00	6	1	1	-	13
11	Sarikei	2	5,231.00	-	-	-	-	2
12	Kuching	1	4,209.40	-	-	-	-	1
13	Alor Setar	4	4,890.00	-	-	-	-	4
14	Kota Bharu	4	4,219.50	-	-	-	-	4
15	Kuala Kangsar	1	1,441.50	-	-	-	-	1
16	Kuala Krai	1	1,126.10	-	1	-	-	2
17	Tawau	1	659.20	-	-	-	-	1
18	Kangar	1	342.10	-	-	-	-	1
19	Klang	2		3	4	-	-	9
20	Kemaman	-		-	-	2	-	2
21	Tapah	-		-	-	1	-	1
22	Pulau Pinang	-		-	-	-	1	1
Total		172	1,715,799.20	20	11	5	4	211

Source: SOCSO Annual Report, 1999.

The Social Security Appellate Board consists of a Chairman and 2 assessors appointed by the Minister. No civil court shall have jurisdiction to decide or deal with any question or dispute under the Board's jurisdiction or to adjudicate on any liability which, by or under the Act is to be decided by the Board.

Proceedings before the Board are commenced by application, to be made within 3 years from the date on which the cause of action arose. Any application, appearance or act required to be made or done by any person to or before the Board may be made or done by a legal practitioner or by an officer of a registered trade union. The Board may submit any question of law for the decision of the High Court. An appeal lies to the High Court from an order of the appellate board if it involves a substantial question of law.



V. Dispute Resolution Process in Environmental Problems

A. Environmental Law Framework and System in Malaysia

The framework laws are the Federal Constitution and the principal statute for environmental matters namely the *Environmental Quality Act 1974* (EQA). Article 4 (1) of the Constitution provides that it is the supreme law of the Federation and any law passed after Independence Day which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void. There is no specific mention of the environment or of any rights or duties owing to or flowing from the environment. The EQA together with several other statutes provide that the dispute resolution technique is through the medium of the Courts (ie, the civil courts).

The EQA has been amended several times to increase the scope of activities covered by the Act. See for instance, the Environmental quality (Amendment) Act 1985 (Act A636) sections 2 and 3 with effect from 10 January 1986. Section 2 of the *Environmental Quality (Amendment) Act 1996* (Act A953) enlarged the scope of the Act by introducing terms and definitions such as:

‘aircraft’, ‘Committee’, ‘computer’, ‘document’, ‘environmental audit’, ‘environmental management system’, ‘environmental risk’, ‘environmentally hazardous substances’, ‘Fund’, ‘goods’, ‘inland waters’, ‘prescribed conveyance’ ‘prescribed product’, ‘scheduled wastes’ and ‘transit’; ‘occupier’, ‘owner’, ‘pollutants’, ‘premises’ and ‘waste’.

Others include Amendment to the Environment Quality Act 1974 (Act 127) (Amendment 2000) and Delegation of Powers for Open Burning Investigations pursuant to Environmental Quality (Prescribed Activities) (Open Burning) Order 2000.

Act A1030, *Environmental Quality (Amendment) Act 1998* was published in the Gazette on 1 July 1998. It amends Section 29 of the EQA, by inserting after section 29 the following sections:

29A. (1) Notwithstanding anything to the contrary contained in this Act, no person shall allow or cause open burning on any premises.

(1) Any person who contravenes subsection (1) shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both.

(2) For the purposes of subsection (1) –
“Open burning” means any fire, combustion or smouldering that occurs in the open air and which is not directed there through a chimney or stack, but does not include any fire, combustion or smouldering that occurs for such activities as may be prescribed by the Minister by order published in the Gazette;
“premises’ includes any land.

29B. If open burning occurs on any premises-

- (a) the owner; or
- (b) the occupier,

of the premises who has control over such premises shall be deemed to have contravened subsection 29A(1) unless the contrary is proved.

- (a) that the open burning occurred out side his control or without his knowledge or connivance or consent; or
- (b) that he-
 - (i) took all reasonable precautions;
 - or
 - (ii) exercised all due diligence,

to prevent the commission of the offence as he ought to have taken and exercised having regard to the nature of his responsibility in that capacity and to all the circumstances.”.

2. Section 33 was amended by substituting for section 33 the following section:

44. No prosecution shall be instituted for an offence under this Act or the regulations made thereunder without the consent in writing of the Public prosecutor”.

A very recent amendment to the EQA was made ie, the *Environmental Quality (Amendment) Act 2001*, Act A1102, which came into operation on 28 June 2001. This Act amends section 2 of the EQA 1974 by inserting after the definition of “inland waters” a definition on “local authority” which reads as follows:

“local authority” includes any person or body of persons appointed under any written law to exercise and perform the powers and duties which are conferred or imposed on a local authority under any written law.

Section 21 of the EQA is amended by substituting for the words “may specify” the words “may by regulation specify”. The definition of “open burning” in subsection 29A(3) of the EQA is amended by substituting for the comma appearing after the word “stack” a semicolon and deleting all words appearing after the new semicolon. Further, section 29A of the EQA is followed by a new section 29AA which provides for ‘exclusion from open burning’.

Section 29AA

(1) The Minister may by order published in the Gazette declare that any fire, combustion or smouldering for the purpose of any activity specified in that order is not open burning as defined in and for the purpose of section 29A so long as such activity is carried out in accordance with or under such conditions as may be specified in the order and not in the place or area specified in the order.

(2) Notwithstanding that any fire, combustion or smouldering is excluded from the definition of open burning under subsection (1) or that it is for the purpose of any activity specified in an order made under subsection (1), no person shall allow or cause such fire, combustion or smouldering to occur in any area if the Director General notifies, by such means and in such manner as he thinks expedient, -

- (a) that the air quality in the area has reached an unhealthy level; and
- (b) that the fire, combustion or smouldering for the purpose of any activity other than those specified in the notification would be hazardous to the environment.

(3) In addition to the circumstances referred to in subsection (2), the Minister may by order published in the Gazette specify the circumstances in which no person shall cause any fire, combustion or smouldering for the purpose of any activity specified in the order to occur notwithstanding that it is excluded from the definition of open burning under subsection (1) or that it is for the purpose of any activity specified in an order made under subsection (1).

Finally Act A1102 provides for the validity of all subsidiary legislation made under section 51 of the EQA 1974 in the context of acceptable pollution conditions in section 21 of the EQA 1974 before section 21 is amended by Act A 1102.

1. Uncertainty Over Definition of Environment

In *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors* (the *Kajing Tubek Case*) and other appeals, (1997) MLJ LEXIS 291; [1997] 3 MLJ 23, the Court of Appeal held that the expression ‘environment’ was a “multi-dimensional concept that is incapable of having any independent existence. It is a concept that must attach or relate itself to some physical geographic feature, such as land, water or air, or to a combination of one or more of these, or all of them. Any impact upon the ‘environment’ must, in the present context, relate to or be in respect of some activity that is connected with and having an adverse effect upon either land, or water, or the atmosphere or a combination of them. Justice Mokhtar Sidin added that he agreed with the opinion of Senior Federal Counsel that environment per se was an ‘abstract thing’ – “it is multi-dimensional so that it can be associated with anything surrounding human beings. Section 2 of the EQA sets out the

meaning of 'environment' as 'physical factors of the surroundings of the human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics'.

In the instant case, the judge's understanding of the word 'environment' was that it only existed when it affected something of a physical nature, biological or social factors. The environment came into play when something was affected. In the opinion of the Court, the EQA definition was vague. The power to legislate on environmental matters would depend on the specific activity to which the environmental matters related.

2. Issues in Environment Litigation

2.1 Federal Laws vs State Laws

In Malaysia, the Federal Constitution is the supreme law of the land. Under the Federal System, both the Federal Parliament and the State Legislatures have powers to legislate laws. For that purpose, the Federal Constitution provides the distribution of legislative powers. Under the Federal system, the state has powers to legislate upon certain matters, and this is provided under the State List of the Ninth Schedule. However, an examination of the Ninth Schedule shows that the term 'environment' is not found in any of the Lists.

Under the Malaysia Act, the States of Sarawak and Sabah can legislate upon more matters than the other states. On 11 August 1994, the Sarawak Government gazetted the *Natural Resources and Environmental (Prescribed Activities) Order 1994* (the Sarawak State Order).

The distribution of legislative powers between the Federation and the states is, *inter alia*, found in Articles 73-77 which provide as follows:

(73) **Extent of Federal and State Laws:**

In exercising the legislative powers conferred on it by this Constitution –

- (a) Parliament may make laws for the whole or any part of the Federation and laws having effect outside as well as within the Federation; and
- (b) The Legislature of a State may make laws for the whole or any part of that State.

(74) Subject matter of Federal and State Laws:

- (1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).
- (2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List. (emphasis added).
- (3) The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.
- (4) Where general as well as specific expressions are used in describing any of the matter enumerated in the Lists set out in the Ninth Schedule, the generality of the former shall not be taken to be limited by the latter.

(75) Inconsistencies between Federal and State laws:

If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of inconsistency, be void.

(76) Power of Parliament to Legislate for States in certain cases:

- (1) Parliament may make laws with respect to any matter enumerated in the State List, but only as follows, that is to say:

- (a) for the purpose of implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an international organization of which the Federation is a member; or
 - (b) for the purpose of promoting uniformity of the laws of two or more States; or
 - (c) if so requested by the Legislative Assembly of any State.
- (2) No law shall be made in pursuance of paragraph (a) of Clause (1) with respect to any matters of Islamic law or the custom of the Malays or to any matter of native law or custom in the States of Sabah and Sarawak and no Bill for a law under that paragraph shall be introduced into either House of Parliament until the Government of any State concerned has been consulted.
- (3) Subject to Clause (4), a law made in pursuance of paragraph (b) or paragraph (c) of Clause (1) shall not come into operation in any State until it has been adopted by a law made by the Legislature of that State, and shall then be deemed to be a State law and not a Federal law, and may accordingly be amended or repealed by a law made by that Legislature. (emphasis added).
- (4) Parliament may, for the purpose only of ensuring uniformity of law and policy, make laws with respect to land tenure, the relations of landlord and tenant, registration of titles and deeds relating to land, transfer of land, mortgages, leases and charges in respect of land, easements and other rights and interests in land, compulsory acquisition of land, rating and valuation of land, and local government; and Clauses (1) (b) and (3) shall not apply to any law relating to any such matter.

(76)A Power of Parliament to extend legislative powers of States:

- (1) It is hereby declared that the power of Parliament to make laws with respect to a matter enumerated in the Federal List includes power to authorize the Legislatures of the States or any of them, subject to such conditions or restrictions (if any) as Parliament may impose, to make laws with respect to the whole or any part of that matter.
- (2) Notwithstanding Article 75, a State law made under authority conferred by Act of Parliament as mentioned in Clause (1) may, if and to the extent that the Act so provides, amend or repeal (as regards the State in question) any federal law passed before that Act.
- (3) Any matter with respect to which the Legislature of a State is for the time being authorized by Act of Parliament to make laws shall for purpose of Articles 79, 80 and 82 be treated as regards the State in question as if it were a matter enumerated in the Concurrent List.

(77) Residual power of legislation:

The Legislature of a State shall have power to make laws with respect to any matter not enumerated in any of the Lists set out in the Ninth Schedule, not being a matter in respect of which Parliament has power to make laws.

The above articles demonstrate that the State Legislature may make laws with respect to matters enumerated in the State List or the Concurrent List as set out in the Ninth Schedule or where the matter is not enumerated in any of the lists in the Ninth Schedule. In addition to these, the States of Sabah and Sarawak are given additional lists as contained in List III which is supplement to the Concurrent List for States of Sabah and Sarawak. The relevant provision giving this power is Art 95B(1) where it provides:

- (1) In the case of the States of Sabah and Sarawak –
 - (a) the supplement to List II set out in the Ninth Schedule shall be deemed to form part of the State List, and the matters enumerated therein shall

be deemed not to be included in the Federal List or Concurrent List;
and

- (b) the supplement to List III set out in the Ninth Schedule shall, subject to the State List, be deemed to form part of the Concurrent List, and the matters enumerated therein shall be deemed not to be included in the Federal List (but not so as to affect the construction of the State List, where it refers to the Federal List).

2.2 Federal EIA vs State EIA (Environmental Impact Assessment)

It appears that both the Federal Parliament and the State Legislature are competent to make laws in order to control the environmental impact on any activity of which the activity is identifiable with the lists given to them. Industries and regulation of industrial undertakings is a Federal matter which is under List I para 8(1), and therefore Parliament can make environmental laws in respect of industries. Thus, the EQA came into being. On the other hand, when the environmental impact is on rivers, land and forest which are items contained in the State List, the State Legislature is competent to make laws in order to control all works on state land in respect of these items. Thus, state legislatures can pass laws, for example, to control all works on state land including the clearing of forest and building dams across any river.

As can be seen from the above, both the Parliament and the State Legislature are competent to make laws on environmental impact. While there might seem to be a conflict of laws here, none should arise for in each case, one has to look into the activity to which the environmental impact is aimed at. If the impugned activity complained is in the State List, then the State Ordinance shall apply and if the activity complained of is in the Federal List, then the EQA shall apply.

2.3 Section 11A of Sarawak State Order

The Order provides for a Report to be submitted in cases where certain activities may have an impact on environment and natural resources. Those activities listed in section 11A (1) include:

- (a) development of agricultural estates or plantation of an area exceeding the dimension specified in the said Order;
- (b) clearing of forest areas for the establishment of agricultural estates or plantation;
- (c) carrying out of logging operations in forest areas which have previously been logged or in respect whereof coupes have previously been declared to have been closed by the Director of Forests under the provisions of the Forests Ordinance;
- (d) development of commercial, industrial and housing estates of an area exceeding the dimension specified in the said order;
- (e) extraction and removal of rock materials;
- (f) activities which may cause pollution of inland waters of the state or endanger marine or aquatic life, organism or plants in inland waters, or pollution of the air, or erosion of the banks of any rivers, watercourses or the foreshores and fisheries; or
- (g) any other activities which may injure, damage or have any adverse impact on the quality of the environment or the natural resources of the State;

(2) Upon consideration of such report, and having regard to the standards and recommendations of the Council, and after making all necessary enquiries and seeking any further opinion as the Board may deem desirable or necessary, the Board may make such Order or directions as the Board is empowered to do under section 10 or any other provisions of this Ordinance or to undertake such works as may be deemed necessary under section 11.

(3) Nothing in this section shall authorize or deem to have authorized the Board or the Yang di-Pertua Negeri, in the exercise of the powers conferred under section 18, to make any Order, direction, guidelines, rules or regulations in regard to the environment affecting matters over which the State, by virtue of the provisions of the Federal Constitution, has no legislative authority.

As can be seen from the above, there are provisions under the EQA and the State ordinance for a report to be submitted before any activity which has an impact on the

environment can be carried out. The report under the EQA must be approved by the Director General, and under the State Ordinance, by the Board. As can be seen from the provisions of both these sections, there is no requirement for the report to be made public. There is no right for an aggrieved party,

- (1) to be supplied with copies of the EIA report for the project prior to the approval of the EIA; and
- (2) to make comments on the project which will be taken into consideration by the review panel prior to the approval of the EIA.

These sections and the citizen's right to sue seeking a declaration against the federal or state government or a developer on the basis of an EIA report or in the absence of such a report are discussed in greater detail in the case of *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors* and other appeals, (1997) MLJ LEXIS 291; [1997] 3 MLJ 23 (under *case law* below).

2.4 Handbook on Guidelines vs Victims

The Handbook which contains guidelines prescribed by the Director General does not have the force of law. If a federal EIA report is not supplied to natives of a state project where the undertaking is a federal development project, this failure will neither nullify the report nor will non-compliance of it subject the offender to a penalty. The interpretation of Section 34A, in particular sub-s (8), makes it an offence for a person not submitting a report or not complying with the conditions imposed by the Director General or for carrying on the activity without the report being approved. There is no provision under s 34A that the report must be supplied to the public and that failure to do so will nullify the whole activity. Subsection (8) makes it clear that if an activity is not carried out in accordance with the provisions of the other subsection, then the person carrying on that activity is subjected to a daily penalty until he complies with the provisions.

Section 34A of the EQA empowers the Minister to make orders 'whereby he could prescribe any activity which may have significant environmental impact, as prescribed activity'. By virtue of this, the Minister made the 1987 Order. Subsequent to that, the

Ordinance was amended to include s 11A to give the State of Sarawak similar powers and jurisdiction as in s 34A of the EQA.

The Court in the *Kajing Tubek Case* was of the opinion that even if the EQA, in particular s 34A applied to a particular case, there was no requirement under s 34A for the victims to be supplied with copies of the EIA for the project prior to the approval of the EIA and for them to make comments.

It could be argued that the right to be given the EIA is found in cl 3.4.7 of the Handbook where the relevant passages are as follows:

(3) 4.7 the publication of detailed assessment reports

In the normal course of events, detailed assessment reports should be in the form that can be made available to the public and it is the responsibility of the project initiator to provide and distribute sufficient copies to meet the combined requirements of the Review Panel, the approving authority, concerned environment related agencies and the interested public. The number of copies of the report to be made available for each purpose would have been specified in the terms of reference for the detailed assessment. Maximum use should be made of economical duplicating processes to provide the required number of copies. A charge to cover duplicating and postage costs can be made for copies of the report requested by the public.

On submitting a detailed assessment report for review, the project initiator must notify the Review Panel where the public may obtain copies of the report and the cost of each copy. The project initiator at the same time distributes copies of the detailed assessment report to the approving authority and to the appropriate environment related agencies for their consideration. As soon as it receives the report, the Secretariat to the Review Panel puts up public notices as it considers appropriate. The notices state:

- (1) that a detailed assessment report has been received for review;
- (2) the nature and the location of the project;

- (3) where copies of the report can be obtained, the cost of each copy; and
- (4) that any representation or comments by the public or concerned environment related agencies, on the report should be made in writing and forwarded to the Review Panel not more than forty-five (45) days of the notice.

What in effect these provisions mean according to the Honourable Court in the *Kajing Tubek Case* is that an interested member of the public is entitled to the report if he applies for the report to be supplied to him on payment of a certain sum of money as he will not be given the report if he does not ask for it. There is no accrued right that the report must be distributed to the public without the public asking for it.

As mentioned earlier, the Handbook does not have the force of law and failure to comply with the guidelines may render the report to be rejected by the Director General. On the other hand, the second paragraph of cl 3.4.7 clearly provides for a report not to be made public. Thus, non-compliance with the Handbook would not nullify the project which will attract the order of a declaration.

S 34A does not accord any right to the victims of a development project to be supplied with the report. The right will only operate as soon as a request has been made for them.

B. The Environmental Quality Act, 1974 (EQA)

The Ministry responsible for the environment is the Ministry of Science, Technology and the Environmental, headed by its Minister. The Department of Environment is one of the organisations under the supervision of the Ministry, headed by the Director General of Environmental Quality (DG) (see Organisation Chart). The EQA is an Act that relates to the prevention, abatement, control of pollution and enhancement of the environment, and for purposes connected therewith. Central to this act is a definition of the term “pollution” which means any direct or indirect alteration of the physical, thermal, chemical, or biological properties of any part of the environment by discharging, emitting, or depositing environmentally hazardous substances, pollutants or wastes so as to affect any beneficial use adversely, to cause a condition which is hazardous or potentially hazardous to public health, safety, or welfare, or to animals, birds, wildlife, fish or aquatic life, or to plants or to cause a

contravention of any condition, limitation, or restriction to which a licence under this Act is subject. “Pollutants” in turn are defined as any natural or artificial substances, whether in a solid, semi-solid or liquid form, or in the form of gas or vapor, or in mixture of at least two of these substances, or any objectionable odour or noise or heat emitted, discharged or deposited or is likely to be emitted, discharged or deposited or is likely to be emitted, discharged or deposited from any source which can directly or indirectly cause pollution and includes any environmentally hazardous substances.

While the duty of care is entrenched in the laws of tort and negligence, the EQA speaks of practicable measures that may be employed for the efficient maintenance and proper use of a surrounding. Section 2 offers a definition of what is “practicable” and “practicable means”:

“practicable” means reasonably practicable having regard, among other things, to local conditions and circumstances and to the current state of technical knowledge and the term “practicable means” includes the provision and the efficient maintenance of plant and the proper use thereof and the supervision by or on behalf of the occupier of any process or operation”.

Under the EQA “waste” includes any matter prescribed to be scheduled waste, or any matter whether in a solid, semi-solid or liquid form, or in the form of gas or vapour which is emitted, discharged or deposited in the environment in such volume, composition or manner as to cause pollution. “Segment” in relation to the environment means any portion or portions of the environment expressed in terms of volume, space, area, quantity, quality, or time or in any combination.

Grievance under the EQA

The EQA does not offer a definition of a ‘grievance’ that can be suffered by a person. Therefore, it becomes necessary to understand the various spheres of activity covered by the EQA to assess in which sphere a potential grievance could arise which could include a grievance in the atmosphere and on land, inland waters, and territorial waters.

C. Organisations/institutions for dispute resolution

1. Director General and Other Officers

Section 3(1) of the EQA provides for the appointment of a Director General of Environmental Quality (DG) who shall be appointed by the Minister from amongst members of the public service. The DG heads the Department of Environment and is the licensing authority. The powers, duties and functions of the DG shall be-

- (a) to administer the EQA and all regulations and orders made under it;
- (b) to be responsible for and to co-ordinate all activities relating to the discharge of wastes into the environment and for preventing or controlling pollution and protecting and enhancing the quality of the environment;
- (c) to recommend to the Minister the environment protection policy and classifications for the protection of any portion of the environment or any segment of the environment with respect to the uses and values, whether tangible or intangible, to be protected, the quality to be maintained, the extent to which the discharge of wastes may be permitted without detriment to the quality of the environment, long range development uses and planning and any other factors relating to the protection and enhancement of the environment;
- (d) to control by the issue of licences the volume, types, constituents and effects of wastes, discharges, emissions, deposits or other sources of emission and substances which are of danger or a potential danger to the quality of the environment or any segment of the environment;
- (e) to undertake surveys and investigations as to the causes, nature, extent of pollution and as to the methods of prevention of pollution and to assist and co-operate with other persons or bodies carrying out similar surveys or investigations;
- (f) to conduct, promote and co-ordinate research in relation to any aspect of pollution or the prevention thereof and to develop criteria for the protection and enhancement of the environment;
- (g) to recommend to the Minister standards and criteria for the protection of beneficial uses and the maintenance of the quality of the environment having regard to the ability of the environment to absorb waste without detriment to its quality and other characteristics;

- (h) to co-opt any persons or bodies to form panels of experts whom he considers capable of assisting him in relation to special problems;
- (i) to publish an annual report on environmental quality not later than 30th September of the following year and such other reports and information with respect to any aspect of environmental protection;
- (j) to specify methods to be adopted in taking samples and making tests for the purposes of the EQA;
- (k) to undertake investigations and inspections to ensure compliance with the EQA or the regulations and to investigate complaints relating to such breaches;
- (l) to provide information and education to the public regarding the protection and enhancement of the environment;
- (ll) to administer the Fund;
- (m) to establish and maintain liaison and co-operation with each of the State Authorities in Malaysia and with other countries with respect to environment protection, pollution control and waste management;
- (n) to report to the Minister upon matters concerning the protection and enhancement of the environment and upon any amendments he thinks desirable to any law affecting pollution and environment and upon any matters referred to him by the Minister; and
- (o) to promote, encourage, co-ordinate and carry out planning in environmental management, waste management and pollution control.

2. The Environmental Quality Council

Section 4 of the EQA establishes the Environmental Quality Council (EQC) which is an advisory body to the Minister of Science, Technology and the Environment on all matters pertaining to the environment, including issues of law, policy and strategy arising under the EQA and other matters raised by the Minister. This ensures a holistic approach to the environment. The EQC does not have any executive functions under the Act.

The EQC consists of the following members-

- (a) a Chairman who shall be appointed by the Minister;

- (b) the Secretary General, Ministry of Science, Technology and the Environment or his authorized representative;
- (c) the Secretary General, Ministry of International Trade and Industry or his authorized representative;
- (cc) the Secretary General, Ministry of Domestic Trade and Consumer Affairs or his authorized representative;
- (ccc) the Secretary General, Ministry of Agriculture or his authorized representative;
- (d) the Secretary General, Ministry of Human Resources or his authorized representative;
- (dd) the Secretary General, Ministry of Transport or his authorized representative;
- (e) the Director General of Health or his authorized representative;
- (f) one member each from Sabah and Sarawak who shall be appointed by the Minister after consultation with the Governments of the States of Sabah and Sarawak;
- (g) one member who shall be appointed by the Minister from among persons engaged in the petroleum industry;
- (gg) one member who shall be appointed by the Minister from nominations by the oil palm industry;
- (h) one member who shall be appointed by the Minister from nominations by the Federation of Malaysian Manufacturers or if such Federation no longer exists from among persons engaged in manufacture;
- (hh) one member who shall be appointed by the Minister from nominations by the rubber industry;
- (i) one member who shall be appointed by the Minister from among the academic staff of the Universities or Colleges in Malaysia;
- (j) two members who shall be appointed by the Minister from among registered societies knowledgeable and having interests in matters pertaining to the environment.

(1) The Minister may in respect of each member appointed under paragraphs (f), (g), (gg), (h), (hh), (i) and (j) of subsection (2) appoint one person to be an alternate member to attend

in place of the member at meetings of the Council if the member is for any reason unable to attend.

(2) When attending meetings of the Council an alternate member shall for all purposes be deemed to be a member of the Council.

(3) An alternate member shall, unless he sooner resigns or his appointment is sooner revoked, cease to be an alternate member when the member in respect of whom he is an alternate member ceases to be a member of the Council.

3. Environmental Impact Assessment Report (EIA)

Section 34A of EQA reads as follows:

(1) The Minister, after consultation with the Council, may by order prescribe any activity which may have significant environmental impact as prescribed activity.

(2) The person intending to carry out any of the prescribed activities shall, before any approval for the carrying out of such activity is granted by the relevant approving authority, submit a report to the Director General. *The report shall be in accordance with the guidelines prescribed by the Director General and shall contain an assessment of the impact such activity will have or is likely to have on the environment and the proposed measures that shall be undertaken to prevent, reduce or control the adverse impact on the environment (emphasis added).*

(3) If the Director General on examining the report and after making such inquiries as he considers necessary, is of the opinion that the report satisfies the requirements of sub-s (2) and that the measures to be undertaken to prevent, reduce or control the adverse impact on the environment are adequate, he shall approve the report, with or without conditions attached thereto, and shall inform the person intending to carry out the prescribed activity and the relevant approving authorities accordingly.

(4) If the Director General, on examining the report and after making such inquiries as he considers necessary, is of the opinion that the report does not satisfy the requirements of subsection (2) or that the measures to be undertaken to prevent, reduce or control the adverse impact on the environment are inadequate, he shall not approve the report and shall give his

reasons therefore and shall inform the person intending to carry out the prescribed activity and the relevant approving authorities accordingly: Provided that where such report is not approved it shall not preclude such person from revising and resubmitting the revised report to the Director General for his approval.

(5) The Director General may if he considers it necessary require more than one report to be submitted to him for his approval.

(6) Any person intending to carry out a prescribed activity shall not carry out such activity until the report required under this section to be submitted to the Director General has been submitted and approved.

(7) If the Director General approves the report, the person carrying out the prescribed activity, in the course of carrying out such activity, shall provide sufficient proof that the conditions attached to the report (if any) are being complied with and that the proposed measures to be taken to prevent, reduce or control the adverse impact on the environment are being incorporated into the design, construction and operation of the prescribed activity.

(8) Any person who contravenes this section shall be guilty of an offence and shall be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a period not exceeding two years or to both and to a further fine of 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 main activities for the year 2000 were focused on reviewing EIA reports, providing environmental input to development planning, pre-siting evaluation and processing of written permissions for pollution control and fuel burning equipment.

On 23 November 2000, the Department of Environment has enforced a certified standardised procedure for reviewing EIA reports, with the implementation of the ISO 9002 Procedure for Reviewing Detailed EIA Reports and Post-EIA Enforcement. The certification, presented by the Rt Honourable Deputy Prime Minister Dato' Seri Abdullah bin HJ Ahmad

Badawi, recognized and further challenges the Department to continue providing better quality service to their clients.

EIA reports processed

The statistics on the processed EIA Reports show that in the year 2000, the Department of Environment received for review a total of 153 EIA reports and one Risk Assessment. Out of the total of 153 reports, 139 were subjected to the preliminary procedure and 14 were subject to detailed assessment. The detailed reports were for activities relating to construction of dam for hydroelectricity, centralized tankage facility, mixed development involving coastal land reclamation, construction of on-site toxic and hazardous waste incinerator, municipal solid waste incinerator, lead batteries recycling plant, coal-fired power plant, construction of dam for water supply, silicone manufacturing facility, coastal land reclamation, and brown paper mill. The total number of approved projects was a mere eight, one was rejected and another withdrawn. Due to incomplete information four were pending.

Preliminary reports

The year 2000 also saw 32 Preliminary Reports for infrastructure development such as new townships, industrial estates and highways followed by 28 reports relating to the recovery of toxic and hazardous wastes and 21 reports for the development of quarries.

Detailed reports

Eleven activities required detailed EIA reports in the year 2000, similar to those discussed above. These were, construction of dam for hydroelectricity, centralized tankage facility, mixed development involving coastal land reclamation, construction of on-site toxic and hazardous waste incinerator, municipal solid waste incinerator, lead batteries recycling plant, coal-fired power plant, construction of dam for water supply, silicone manufacturing facility, coastal land reclamation and brown paper mill. The Department of Environment did not approve all these activities, for it rejected one and eight were approved. One application was withdrawn while the other four were still pending as the information was incomplete.

The EIA division of the Department of Environment also received seven Terms of Reference for prescribed activities that followed the detailed procedure. These were for solid

waste incineration facility, mixed development involving coastal land reclamation, clinical waste incinerator, coal-fired power plant and brown paper mill.

Enforcement Inspection of EIA Projects

In the year 2000, 586 enforcement inspections were conducted to determine the development and compliance status of EIA projects and consequently, 236 notices and 16 compounds were issued and five cases were taken to court for non-compliance with EIA conditions.

Environmental Management Plan

The Environmental Management Plan focused on following up on post EIA activities particularly those relating to resource development for past experience showed that it was difficult to specify and predict exact requirements for nature conservation. This Plan ensures that all mitigation measures and monitoring requirements in EIA approvals were carried out. Such a Plan would include the final design incorporating mitigation measures, detailed environmental monitoring programme and budget and personnel to implement the Plan. Such Plans are to be submitted at least three months before the project is implemented.

Registration of EIA Consultants

In the year 2000, 28 applications were received from individuals and five from firms for registration, but only 16 individuals and 2 firms were approved. At the close of the year, a total of 265 EIA consultants and 72 EIA consultancy firms were registered.

Environmental Auditing

According to the Handbook of Environmental Auditing Guidelines, the Department of Environment hopes to implement environmental auditing by placing emphasis upon compliance audit for EIA reports and licenses for prescribed activities such as palm oil and rubber factories and toxic and hazardous wastes.

Environmental input to development planning

The Department of Environment provided a total of 99 inputs in the year 2000 for development plans, policies and studies initiated by other agencies and other Divisions of the

Department. The breakdown shows that 61 applications were for registration of sewerage systems and equipment with the Sewerage Services Department. The balance was for plans and policies such as the National Spatial Plan Study, the National Coastal Zone Policy, Local Plans and other studies for flood mitigation, ground water, island monitoring and highland development activities.

Geographical Information System

Geographical information systems have been put in place with thematic maps prepared for EIA projects in the state of Perak, Malaysia. In particular, assistance was given to the Cabinet Committee for the Co-ordination of Development on Highlands and Islands, chaired by the Honourable Minister of Science, Technology and Environment, YB Datuk Law Hieng Ding, by preparing thematic maps for development projects and agriculture activities in the area of Cameron Highlands. The objective of this Cabinet Committee is to monitor and coordinate the development on highlands and islands with the assistance of a Task Force and the Department of Environment as the Secretariat. The Task Force has to recommend strategies and direction for (1) the development of highlands – physical development projects and agricultural activities, (2) establish a suitable mechanism for monitoring activities on highlands, (3) assess the effectiveness of monitoring and enforcement, (4) recommend practical measures to prevent the deterioration of environmental quality, and (5) provide regular reports on monitoring and enforcement activities.

Two officials conducted aerial surveillance and ground investigations on 31 locations. Sustainable development of the Highlands will be carried out once the geo-hazard and terrain mapping is undertaken by the Department of Minerals and Geo Science.

Digital maps were also produced to support the activities of the other Divisions of the Department of Environment.

The Department of Environment has set up an Advisory Services Centre at the Malaysian Industrial Development Authority office which received a total of 67 enquiries

from local and foreign investors on environmental requirements for setting up industrial projects.

Project Pre-Siting Evaluation

The Local Authorities and Land Offices submitted a total of 6, 469 applications for pre-siting evaluation to ascertain the suitability of the site for the development projects that were not subjected to the *Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987*. They were advised to incorporate environmental considerations during decision-making.

Written permission and approval

The Annual Report for the Year 2000 states that the Department of Environment received 7, 243 applications for the constitution of wastewater treatment plants and 810 applications for the installation of air pollution control equipment as required under the *Environmental Quality (Sewage and Industrial Effluent) Regulations 1979* and the *Environmental Quality (Clean Air) Regulations 1978*. The Report further states that other than pollution control equipment, the Department also received 1640 applications for written approvals for the installation of fuel burning equipment, mainly boilers and generator sets.

With regard to non-prescribed premises, 2,924 out of 3460 premises visited, that is 84.5 %, complied with the *Environmental Quality (Sewage and Industrial Effluents) Regulations 1979*. The remaining 536 premises failed to comply with other provisions such as Regulation 4 on factory expansion and creating new sources of effluent discharges and Regulation 16 on effluent discharges not at approved point of discharges. Industries such as food and beverage, metal finishing, electroplating and textile had a compliance record of 59%, 61 % and 66% respectively. The reason for non-compliance was the inability to meet with parameters such as the Biochemical Oxygen Demand, Chemical Oxygen Demand, Suspended Solids, Oil and grease and heavy metals like nickel, cyanide, copper and lead due to inefficient effluent treatment systems and absence of effluent treatment systems for small and medium industries. Currently, the *Environmental Quality (Sewage and Industrial Effluents) Regulations 1979* is under review for purposes of improvement and strengthening the provisions to accommodate developments in technological and socio-economic fields. This

may involve the publication of quarterly reports, institution of compoundable offences, setting specific standards for specific industrial sectors, new control mechanisms and additional parameter standards.

Prosecution of Offences Under the EQA

In the year 2000, 158 premises and companies were brought before the Court and fined a total of RM 3, 506, 800.00. This figure represented an increase 29 % in fines. However, compared to 1999, there was a 49 % decrease in the number of cases. The majority of cases concerned the infringement of Section 25 (1) of the EQA 1974 for pollution of the inland waters. Various premises and companies were issued a total of 1, 645 compounds notices for a variety of offences amounting to RM 2, 560,000.00. Air pollution offences attracted 65 % while the remaining 35 % were offences involving handling of scheduled wastes. In the year 2000, six prohibition orders were issued, as a last resort measure, under section 31A of the EQA 1974. Of the six, two were for inland water pollution from metal-based and rubber-based industries and four for air pollution offences involving wood-based and metal-based industries. Further operations depended upon remedial measures being taken. With respect to public complaints, the Department of Environment received 2,284 complaints, most of which were on open burning at illegal waste disposal sites and dust pollution, which is a decrease of 167 complaints (6.8 %) compared to 1999. State officials of the Department of Environment handled 1,916 complaints while the remaining 368 were outside their jurisdiction and therefore referred to other relevant agencies. On a state by state count, the State of Perak received the highest number of complaints at 329 (14.4 % of the total) followed by Kuala Lumpur at 304 (13.3 %) and Johor at 271 (11.9 %) with the lowest being the State of Perlis at 29 complaints (0.01 %). Of the total number of complaints received, 1690 were air pollution complaints (74 %), 191.6 water pollution complaints (10%) and the rest 5 % being noise pollution complaints. Open burning at waste disposal sites stood at 30% of the 1690 complaints received.

4. Nature of Offences and Dispute Resolution Under the EQA

(a) Prohibition and Control of Pollution

Section 18 provides that prescribed premises are to be licensed. The Minister after consultation with the Council has the power to prescribe premises and a person can occupy or use such premises if he is the holder of a licence issued in respect of those premises. Use or occupation without such a license is punishable under the law. Similarly, the Minister, after consultation with the Council, may by order prescribe the vehicle or ship used for the movement, transfer, placement or deposit of waste and these may be used only by a person who is a holder of a licence issued in respect of the prescribed conveyance. Any person found guilty of this offence shall be liable to a fine not exceeding fifty thousand ringgit or imprisonment for a period not exceeding two years or to both and to a further fine of one thousand ringgit for every day that the offence is continued after a notice by the Director General requiring him to cease the act specified has been served upon him. Before the 1996 Amendment, the penalty figure stood at ten thousand ringgit.

However, these provisions do not apply to three categories of persons until their application has been finally determined: firstly, where a person who, on the date of the coming into operation of this Act, was the occupier of such prescribed premises, and within the prescribed period after that date makes application for a licence in respect of those prescribed premises; second, persons who, where by virtue of any order made by the Minister from time to time amending any previous order made under this section, premises not previously prescribed premises become prescribed premises, is, consequent upon the order, the occupier of any prescribed premises, and who within the prescribed period after the publication of the order in the *Gazette* makes application for a licence in respect of those prescribed premises; finally, those who have made an application for the transfer to them of a licence in respect of any prescribed premises and made the application within the prescribed period after they became the occupiers of those prescribed premises, until their applications have been finally determined.

The Annual Report for the Year 2000 of the Department of Environment states that raw natural rubber factories and crude palm oil mills fall within the term of agro-based premises under Section 18 of EQA 1974 that require a license for use or occupation.

Compared to 1999 where the figure stood at 134, the number of raw natural rubber factories that were licensed in the year 2000 under the *Environmental Quality (Prescribed Premises) (Raw Natural Rubber) Regulations 1978* stood at 128, a fall by six. These premises were permitted to discharge treated effluent into watercourses (107), onto land (7), into combined watercourse and land (2) and to effluent recycling (12). In the context of crude palm oil, 343 crude palm oil mills were licensed under the *Environmental Quality (Prescribed Premises) (Crude Palm Oil) Regulations 1977* compared to 1999 when 337 were licensed, an increase of six mills. The licenses were given for discharge into watercourses after treatment (195), onto land (105) and for both watercourses and land disposal (43). The enforcement officers of the Department visited 627 crude palm oil mills and action was taken against 213 mills including court cases for various air and water pollution offences. The overall compliance stood at 38%. For purposes of cooperation with the industry, the Department established a Consultative Committee for the Rubber and Palm Oil Industry for purposes of discussing compliance status and research findings.

The *Environmental Quality (Prescribed Premises) (Scheduled Wastes and Disposal Facilities) Regulations 1989* (PU (A) 141/89) provides that the 'prescribed period' for scheduled waste treatment and disposal facilities is the period ending 31 May 1989. The *Environmental Quality (Prescribed Premises) (Scheduled Wastes and Disposal Facilities) Regulations 1989* (PU (A) 141/89) provides that the 'prescribed period' for scheduled waste treatment and disposal facilities is 14 days.

The procedural requirement and approval of plans is provided for in Section 20. It basically involves two steps, of which the first step is that every application to carry out any work, building, erection or alteration specified in section 19 shall be submitted to the Director General and shall be accompanied by the plans and specifications of the proposed work, building, erection or alteration together with details of the control equipment if any to be installed. This is followed by a lay-out plan indicating the site of the proposed work, building, erection or alteration which will take place in relation to the surrounding areas and the details of the trade, industry or process proposed to be carried on in such premises. Descriptions of waste constituents and characteristics and any other information which the Director General may require. The applicant shall pay the prescribed fee. Before the Director General can

grant an application, the applicant should have obtained planning approval from the competent planning authority. Once this has been done, the Director General may grant such application either subject to conditions or unconditionally and may require the licensee to provide and bear the cost of the control equipment and of a satisfactory monitoring programme.

Section 21 deals with the Ministerial power to specify conditions of emission and discharge. The Minister, after consultation with the Council, may specify the acceptable conditions for the emission, discharge or deposit of [environmentally hazardous substances, pollutants or] wastes of the emission of noise into any area, segment or element of the environment and may set aside any area, segment or element of the environment within which the emission, discharge or deposit is prohibited or restricted.

(b) Contravention of Licenses

**Section 22(1) – Atmospheric Pollution and Section 25(1) –
Pollution of Inland Waters**

Section 22(1) imposes certain restrictions on atmospheric pollution which mean that no person shall, unless licenced, emit or discharge any environmentally hazardous substances, pollutants or wastes into the atmosphere in contravention of the acceptable conditions specified under section 21. Section 22 (2) provides that without limiting the generality of subsection (1), a person shall be deemed to emit or discharge wastes into the atmosphere if-

- (a) he places any matter in a place where it may be released into the atmosphere;
- (b) he causes or permits the discharge of odours which by virtue of their nature, concentration, volume or extent are obnoxious or offensive;
- (c) he burns any wastes of the trade, process or industry; or
- (d) he uses any fuel burning equipment not equipped with any device or control equipment required to be fitted to such equipment.

The penalty for contravention of subsection (1) is a fine not exceeding one hundred thousand ringgit or to imprisonment for a period not exceeding five years or to both and to a further fine not exceeding one thousand ringgit a day for every day that the offence is continued after a notice by the Director General requiring him to cease the act specified therein has been

served upon him. Previously, they read 'ten thousand dollars', 'two' and 'one thousand dollars', respectively.

The *Environmental Quality (Clean Air) Regulations 1978* (PU (A) 280/78 reg 49(2) stipulates that an application for a licence for contravention of acceptable conditions of discharge or emission of any waste into the atmosphere shall be made in accordance with the procedures specified in the *Environmental Quality (Licensing) Regulations 1977* (PU (A) 198/77). The *Environmental Quality (Clean Air) Regulations 1978* (PU (A) 280/78 reg 49 (3) provides for the circumstances where the Director General may grant the application for such a licence.

The Annual Report for the Year 2000 of the Department of Environment states that for air quality monitoring, there were 50 Continuous Air Quality Monitoring Stations in the country. Besides this, Quality Assurance Audit was also carried out nation-wide on all the automatic air monitoring stations. Continuous action is being taken to ensure that air quality meets set standards. The haze episode of 1999 triggered a Haze Study for Malaysia in December 1998 with assistance from the Australian Government through the Commonwealth Scientific and Industrial Research Organisation. This organization also assists in analysis and data interpretation. The Malaysian Meteorological Services also assisted the Department of Environment in monitoring air quality stations in two towns, namely Gombak and Petaling Jaya. The last sampling was taken on 16 December 2000 and the report should have come in by June 2001.

The Annual Report for the Year 2000 of the Department of Environment also points out that 67 % of the 2454 air pollution sources visited complied with the *Environmental Quality (Clean Air) Regulations 1978* with the following breakdown: edible and petroleum refineries achieved 100% compliance; paper and textiles sector at 88% and food and beverages industry at 83%. Inefficient or ineffective air pollution control equipment gave rise to dust pollution which in turn made compliance amongst the non-metallic sector difficult, hence their compliance rate was low. As far as other premises such as small and medium sized industries were concerned, some committed offences involving (1) the

installation of fuel-burning equipment or chimney without a prior written approval (2) open burning of industrial wastes, and (3) emission of black smoke from chimneys exceeding the allowable limit. The Department of Environment also instructed large scale industries such as cement plants, iron and steel mills, petroleum refineries, and power plants to install continuous emission monitoring systems and to submit monthly monitoring results to the Department. Such installations were already in place for the cement, petrochemical and chemical industries, crude oil terminals, liquefied natural gas plants and power plants.

Section 25 (1) states that unless a licence has been obtained, no person shall emit, discharge or deposit any environmentally hazardous substance, pollutant or waste into any inland waters in contravention of acceptable conditions under section 21.

The Annual Report of the Department of Environment for the Year 2000 states that in accordance with the provisions of Section 22(1) and 25 (1) of the EQA 1974, the number of applications for licenses increased to 101 (38.4 %) from 73 in 1999; 94 applications (93.1%) in respect of Section 25(1) and 7 applications (6.9 %) for Section 22 (1). Of these applications, 78 were approved (77.2 %) while the remaining 23 (22.8 %) were rejected.

Applications for contravention licenses under Section 25(1) were also received from Indah Water Konsortium Sdn Bhd. which is responsible for managing sewerage treatment plants under a privatization agreement. In the year 2000, the number of applications increased to 3140 from 2475 in 1999; 2777 (88.4%) licenses were for renewal purposes, while 363 (11.6 %) were new applications.

On motor vehicle emission, the Annual Report for the year 2000 of the Department of Environment, states that according to emission load calculations, atmospheric pollutants from the 10.6 million vehicles would consist of 2.04 million metric tonnes of carbon monoxide; 190,293 metric tonnes of oxides of nitrogen and 15, 954 metric tonnes of particulate matter.

The control of gaseous emissions from motor vehicles such as carbon monoxide, hydrocarbon, oxides of nitrogen and particulates are controlled under the *Environmental Quality (Control of Emission from Diesel Engines) Regulations 1996* and the *Environmental*

Quality (Control of Emission from Petrol Engines) Regulations 1996. These regulations provide that all new models of motor vehicles introduced on or after 1 January 1997 would have to comply with the requirements of 91/441/EEC for motorcars, 93/59/EEC for light commercial vehicles, and ECE R 49-02 (EURO 1) for heavy vehicles. From 1 January 2000 onwards, all new models of vehicles would be required to comply with 94/12/EC emission standard. On the control of black smoke emissions from diesel vehicles, in the year 2000, a total of 946 Area Watch and Sanction Inspection enforcement operations were carried out throughout the country. Approximately 108,017 diesel vehicles were inspected of which 3,542 were summoned for failing to comply with the 50 Hartridge Limit and 960 were issued prohibition orders. They were considered roadworthy again only after rectification and retesting by DOE. Fifty-five drivers and vehicle owners were prosecuted in court for failure to settle compound fines. On the control of carbon monoxide and hydrocarbon gas emissions from petrol vehicles, in 2000, a total of 1, 089 petrol vehicles were tested for these emissions and only 845 vehicles (77.6 %) complied with the limits. There is a plan to establish government controlled testing centers for the year 2001, to enable vehicle owners to test and repair their vehicles. On unleaded petrol, the government directive to use unleaded petrol was implemented by petrol companies with the result that there was a 100 % sale in unleaded petrol in the year 1999 and all petrol stations in the country were selling unleaded petrol.

(c) Section 23 – Restrictions on Noise Pollution

The restrictions on noise pollution are set out in section 23 which state that no person shall, unless licenced, emit or cause or permit to be emitted any noise greater in volume, intensity or quality in contravention of the acceptable conditions specified under section 21. Those found guilty of an offence shall be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a period not exceeding five years or to both and to a further fine not exceeding five hundred ringgit a day for every day that the offence is continued after a notice by the Director General requiring him to cease the act specified therein has been served upon him.

According to the Annual Report for the Year 2000 of the Department of Environment, the control of noise from motor vehicles was enforced under the *Environmental Quality (Motor Vehicle Noise) Regulations 1987*. Curbside enforcement campaigns tested a total of

3,522 motorcycles of which 565 were compounded for exceeding the noise limits. Compliance was at 84% which is considered to be an improvement of 6.2 % over 1999. In the year 2000, 2,847 new motorcycles of different models were randomly tested and the compliance was found to be at 100%. Further, schools and hospitals were chosen as sensitive areas where noise monitoring was carried out. The results showed that the noise level at schools and hospitals in the capital city exceeded the recommended limit set by the World Health Organization.

(d) Section 25 – Restrictions on Pollution of Inland Waters

Similar restrictions are placed on pollution of inland waters. No one is allowed, unless licensed, to emit, discharge or deposit any environmentally hazardous substance, pollutant or waste into any inland waters in contravention of the acceptable conditions specified under section 21. A person shall be deemed to emit, discharge or deposit wastes into inland waters if-

- (a) he places any wastes in or on any waters or in a place where it may gain access to any waters;
- (b) he places any waste in a position where it falls, descends, drains, evaporates, is washed, is blown or percolates or is likely to fall, descend, drain, evaporate or be washed, be blown or percolated into any waters, or knowingly or through his negligence, whether directly or indirectly, causes or permits any wastes to be placed in such a position; or
- (c) he causes the temperature of the receiving waters to be raised or lowered by more than the prescribed limits.

The penalty for this offence is a fine not exceeding one hundred thousand ringgit or to imprisonment for a period not exceeding five years or to both and to a further fine not exceeding one thousand ringgit a day for each day that the offence is continued after a notice by the Director General requiring the offender to cease the act specified therein has been served upon such person.

Rivers fall within the definition of inland waters. The Annual Report for the Year 2000 of the Department of Environment states that the Department implemented the River

Water Quality Monitoring Programme in 1978. There are 901 stations located within 120 river basins. Besides these, there ten automatic continuous monitoring stations at Sungei (River) Perai, Sungei Perak, Sungei Selangor, Sungei Klang, Sungei Linggi, Sungei Melaka, Sungei Skudai, Sungei Kuantan, Sungei Terengganu and Sungei Sarawak. Water samples were collected and the parameters used for deriving the water quality index are as follows:

- Biochemical Oxygen Demand
- Chemical Oxygen Demand
- Ammoniacal Nitrogen
- PH
- Dissolved Oxygen
- Suspended Solids

The current Project on Biological and Bioindicator Monitoring, started in 1999 at six rivers was completed in 2000. These rivers were Sungei Sarawak, Sungei Linggi, Sungei Liwagu, Sungei Sedili Besar, Sungei Pahang and sungei Kedah. It is now hoped that the Project will be extended to other rivers as well. The Project uses aquatic organisms such as bacteria, fish, macroinvertebrates as indicators to assess the quality of the water.

The Programme on River Monitoring in Areas Affected by the Japanese Encephalitis (JE) Outbreak which was started in April 1999 made use of 10 stations to detect changes in water quality that arise from the disposal of pig carcasses at the affected areas, namely, Negeri Sembilan, Malacca and Perak. There were 4 stations in Negeri Sembilan, 4 in Malacca and 2 in Perak.

(e) Section 27 – Prohibition of Discharge of Oil into Malaysian Waters

Oil pollution of the territorial sea is also covered under the EQA.

Section 2 offers a definition of “oil” to include-

- (a) crude oil, diesel oil, fuel oil and lubricating oil, and
- (b) any other description of oil which may be prescribed by the Minister;

“mixture containing oil” means a mixture with such oil contents as may be specified by the Minister or, if such oil content is not specified, a mixture with an oil content of one hundred parts or more in one million parts of the mixture;

“ship” includes every description of vessel or craft or floating structure;

“transit” means the continuous passage from one border to another border through Malaysian territory and waters without storage.

Section 27, like the previous sections, permits pollution under certain conditions. No person is permitted, unless licensed, to discharge or spill any oil or mixture containing oil into Malaysian waters in contravention of the acceptable conditions specified under section 21. The fine for this offence exceeds five hundred thousand ringgit or to imprisonment not exceeding five years or to both.

The Annual Report for the Year 2000 of the Department of Environment states that the Marine Water Quality Monitoring Programme was started for Peninsula Malaysia in 1978 and for Sabah and Sarawak in 1985. This was done to achieve three objectives, namely, (1) to establish an island marine water quality baseline database, (2) to monitor marine water quality changes around the islands and (3) to utilize the baseline database for the protection of the island marine environment such as providing guidelines for development.

The monitoring mechanism involved establishing 213 monitoring stations at estuaries and coastal areas given the beneficial uses of these areas for recreation, fishing and designation as marine parks. A total of 993 samples were collected.

The Island Marine Water Quality Monitoring Programme which began in July 1998 was set up after the island monitoring network in Malaysia, with 85 stations at 71 selected islands categorized into Marine Parks(38), Resorts (25), Protected Islands (5) and Development Islands (3). Samples were taken six times a year for Development Islands, while only four samples were collected for the others. Thus, a total of 728 samples were collected altogether. Such monitoring includes measurement of *in-situ* parameters, for

example, temperature, pH conductivity, salinity, dissolved oxygen, and turbidity. The parameters for laboratory analysis were, total suspended solids, *Escherichia coli*, nitrate, total organic carbon, oil and grease, and heavy metals like mercury, cadmium, chromium, copper, lead, and arsenic. Tarball samplings on beaches were conducted too.

(f) Section 28 – Special Defences

There are five special defences available to a person charged under the EQA 1974 as follows:

It shall be a defence to prove that such discharge or spillage was –

- (a) for the purpose of securing the safety of the vessel;
- (b) for the purpose of saving human life;
- (c) the result of damage to the vessel and that all reasonable steps were taken to prevent, to stop or to reduce the spillage;
- (d) the result of a leakage, which was not due to want of care, and that all reasonable steps have been taken to stop or reduce the leakage; or
- (e) the result of an effluent produced by operation for the refining of oil, and that all reasonable steps had been taken to eliminate oil from the effluent and that it was not reasonably practicable to dispose to the effluent otherwise than by discharging or spilling it into the Malaysian waters.

(g) Section 29 – Prohibition of Discharge of Wastes Into Malaysian Waters, Section 29A – Prohibition Against Open Burning Activities and Section 30A – Power to Prohibit Use of Any Material or Equipment

Only licensed persons can discharge environmentally hazardous substances, pollutants or wastes into the Malaysian waters in contravention of the acceptable conditions specified under section 21. A contravention of this section attracts a fine not exceeding five hundred thousand ringgit or to imprisonment not exceeding five years or to both.

The Minister after consultation with the Council may by order published in the Gazette-

- (a) prohibit the use of any materials for any process, trade or industry;
- (b) prohibit whether by description or by brand name the use of any equipment or industrial plant,

within the areas specified in the order.

With regard to open burning activities in section 29A, the Annual Report for the Year 2000 of the Department of Environment states that the Department stepped up enforcement action against these as daily ground surveillance of fire prone areas and aerial surveillance were carried out with the cooperation of the Police Air Wing. Besides these, the Department held constant dialogue with the concerned organisations, government agencies, plantation owners and operators. This was possible as the *Environmental Quality (Delegation of Powers) (Investigation of Open Burning) Order 2000* came into force on 21 August 2000 whereby powers for investigation of open burning offences under section 29A of the EQA were delegated to several agencies namely, the Fire and Rescue Services Department, the Royal Malaysian Police, the Health Ministry and the local authorities including Kuala Lumpur City Hall and the Labuan Municipality. Besides delegation of powers, the Department of Environment also instituted Standard Operating Procedures (SOPs) as a guide for investigating officers and personnel. Further, there were several courses of short duration, conducted for the benefit of the relevant agencies under the “training the trainers” concept. These were then extended to and conducted in the States. The entry into force of the *Environmental Quality (Prescribed Activities) (Open Burning) Order 2000* on 21 August 2000 enabled the exemption of 15 prescribed activities which could only be carried out under specific conditions found in the Order. There was a total prohibition on open burning in peat soil.

Statistics indicate that in the year 2000, 1801 cases of open burning were detected and investigated *via* satellites. There were 582 cases of open burning detected in plantations, 387 in bushes, and due to hot and dry weather conditions, 514 generally in the month of July, 276 in August and 185 in March. Since, the nationwide launch, on 8 April 1998, of the operation to prevent open burning till 31 December 2000, 1098 cases had been compounded which

amounted to RM1, 628, 600. 00 and 105 cases prosecuted in court and fined a total of RM931,700.00.

(h) Sections 30A, 30B and 31 – Certain Powers of Control, Specification and Requirement

The power to control use of substance and product and to state environmental labelling is provided in Section 30A. According to this section, the Minister, after consultation with the EQCI, may by order published in the Gazette-

- (a) prescribe any substance as an environmentally hazardous substance which requires the substance to be reduced, recycled, recovered or regulated in the manner as specified in the order; and
- (b) prescribe any product as a prescribed product for sale and that the product shall contain a minimum percentage of recycled substances and to carry an appropriate declaration on its recycled constituents, method of manufacture and disposal.

Such an order may specify rules on the use, design and application of the label in connection with the sale of the substance or product which claims to be environmentally friendly. Failure or refusal to comply with the order will attract a fine not exceeding fifty thousand ringgit or imprisonment for a period not exceeding five years or both.

Section 30B lays down the power to specify rules on deposit and rebate schemes. The Minister, after consultation with the EQC, may specify the guide-line and procedures on deposit and rebate schemes in connection with the disposal of products that are considered environmentally unfriendly; or causing adverse constraint on the environment. This is to enable collecting the product efficiently in order to ensure that the recycling or disposal of the products is done in an environmentally sound manner.

The terms of Section 31 state that where any environmentally hazardous substance, pollutant or waste is being or is likely to be emitted, discharged or deposited from any vehicle, ship or premise irrespective of whether the vehicle, ship or premise is prescribed under

section 18 or otherwise, or from any aircraft, the Director General under Section 31 may by notice in writing require the owner or occupier of the vehicle, ship or premise, or aircraft, to –

- (a) install and operate any control equipment or additional control equipment;
- (b) repair, alter or replace any equipment or control equipment;
- (c) erect or increase the height of any chimney;
- (d) measure, take a sample of, analyse, record and report any environmentally hazardous substances, pollutants, wastes, effluents or emissions containing pollutants;
- (e) conduct a study on any environmental risk;
- (f) install, maintain and operate monitoring programme at the expense of the owner or occupier; or
- (g) adopt any measure to reduce, mitigate, disperse, remove, eliminate destroy or dispose of pollution.

within such time and in such manner as may be specified in the notice.

The Director General is also empowered to direct the owner or occupier of any vehicle, ship, or premise, or aircraft to emit discharge or deposit environmentally hazardous substances, pollutants or wastes during such periods of day as he may specify and may generally direct the manner in which the owner or occupier shall carry out his trade, industry or process or operate any equipment, industrial plant or control equipment.

The punishment for a violation of this section is a fine not exceeding twenty-five thousand ringgit or imprisonment for a period not exceeding two years or both and a further fine not exceeding one thousand ringgit a day for every day that the offence is continued after notice has been served upon him to stop.

(i) Section 31A – Prohibition Order and Section 32 – Owner or Occupier to Maintain and Operate Equipment

Section 31A (1) provides that the Minister, after consultation with the EQC, may by order published in the Gazette specify the circumstances whereby the Director General may issue a prohibition order to the owner or occupier of any industrial plant or process to prevent

its continued operation and release of environmentally hazardous substances, pollutants or wastes either absolutely or conditionally, or for such period as he may direct, or until requirements to make remedy as directed by him have been complied with. Under subsection 2 of this section the Minister, in circumstances where he considers that the environment, public health or safety is under or likely to be under serious threat, may direct the Director General –

- (a) to issue an order requiring a person to cease all acts that have resulted in the release of environmentally hazardous substances, pollutants or wastes; and
- (b) to effect and render any machinery, equipment, plant or process of the person inoperable.

(3) Any person who contravenes subsection (1) or (2) shall be guilty of an offence and shall be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a period not exceeding two years or to both.

Section 32 provides that the owner or occupier of any vehicle, ship or premises irrespective of whether the vehicle, ship or premises are prescribed under section 18 or otherwise, or aircraft shall maintain any equipment or control equipment installed on the vehicle, ship or premises, or aircraft in good condition and shall operate the equipment or control equipment in a proper and efficient manner.

**(j) Section 33 – Power to Prohibit or Control Licensed Persons
From Discharging, etc of Wastes in Certain Circumstances**

According to this section, where several persons are licensed under this Act to emit, discharge or deposit environmentally hazardous substances, pollutants or wastes into the same segment or element of environment and appears to the Director General that each of such persons is complying with the conditions of the licence but nevertheless the collective effect of the aggregate of such wastes is likely to cause a worsening of condition in that segment or element of the environment such as to affect the health, welfare or safety of human beings, or to threaten the existence of any animals, birds, wildlife, fish or other aquatic life, the Director General may, by notice serve on each of the licensees, requiring each of them to abate such emission, discharge or deposit in the manner and within the period

specified in the notice. A contravention of this section attracts a fine not exceeding fifty thousand ringgit or to imprisonment not exceeding five years or to both and to a further fine not exceeding one thousand ringgit a day for every day that the offence is continued after service on him of the notice specified in subsection (1).

(k) Section 33A – Environmental Audit

The provision on environmental audit empower the Director General to require the owner or occupier of any vehicle, ship or premises, irrespective of whether the vehicle, ship or premises are prescribed under section 18 or otherwise, to carry out an environmental audit and to submit an audit report in the manner as may be prescribed by the Minister by regulations made under this Act.

To carry out an environmental audit and to submit a report thereof, the owner or occupier must appoint qualified personnel who are registered under subsection (3). To this end, the Director General is required to maintain a list of qualified personnel who may carry out any environmental audit and submit a report thereof.

(l) Section 34B – Prohibition Against Placing, Deposit etc of Scheduled Wastes

Part IV A which contains a single provision namely, section 34B – Prohibition against placing, deposit, etc of scheduled wastes was introduced pursuant to Malaysia's accession, on 8 October 1993, of the *1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, to provide for the control of transboundary movement of scheduled/hazardous wastes. It came into force on 6 January 1994.

Section 34B provides that no one is allowed to place, deposit, or dispose any scheduled wastes on land or into Malaysian waters except on prescribed premises. Scheduled wastes can only be received, sent, or transited in or out of Malaysia with the prior written approval, conditionally or unconditionally, of the Director General. Any one who receives, or sends, or transits any scheduled wastes through an approval obtained through falsification, misrepresentation or fraud or which does not conform in a material way with the relevant documents commits an offence. The punishment for contravention of this section is a fine

not exceeding five hundred thousand ringgit or imprisonment for a period not exceeding five years or both.

The Annual Report of the Department of Environment for the Year 2000 states that a total of 14 Written Permissions were given by the Director General for purposes of constructing prescribed premises to treat and dispose scheduled wastes of which 3 were issued to metal-based off-site recovery plants, 4 to chemical off-site recovery plants, 5 to scheduled waste incinerators, 1 to secured land-fill and 1 to off-site storage. With regard to licensed scheduled waste transporters, there was an increase from 96 in the year 1999 to 101 in the year 2000 of which 22 transported wastes to off-site treatment and disposal facilities, 63 transported wastes that were either exported or imported for recovery purposes and 16 transported wastes for reutilisation at approved facilities. Besides these, 203 licenses were issued to both existing and new facilities for off-site recovery, off-site storage, incinerators, land treatment, off-site treatment, secured landfills and others. With regard to import and export of scheduled wastes, the Annual Report states that a total of 4, 878.02 tonnes of scheduled wastes were exported in 2000 which comprised principally of spent industrial catalysts and metal hydroxide sludges from 25 waste generators. The sludges were to be recovered in foreign countries. Seven approvals were granted to import 125,875 tonnes of wastes to be used as raw materials in various processes.

(m) Sections 35 and 36 – Dispute Resolution.

The provisions on dispute resolution are found in Part V entitled Appeal and Appeal Board. Part V consists of two sections, sections 35 and 36, of which section 35 on Appeal provides that where a person is aggrieved on any of the following six grounds, an appeal may be lodged with the Appeal Board set up under section 36. Before the *Environmental Quality (Amendment) Act 1985* (Act A636), there were only four grounds (1) to (4), with grounds (5) and (6) being inserted by the latter amendment which came into force on 10 January 1986. The terms of Section 35 stipulate that an aggrieved person is someone affected either by a licence issue or by a decision of the Director General.

These six grounds of grievance are:

1. a refusal to grant a license or transfer of a licence
2. the imposition of any condition, limitation or restriction on his licence

3. the revocation, suspension or variation of his licence
4. the amount which he would be required to pay under section 47
5. any decision of the Director-General under subsection (3) or (4) of section 34A and
6. any decision of the Director General or any officer under subsection (2) or (5) of section 48A.

However, the EQA *per se* does not offer a definition of an ‘aggrieved person’, which is an essential feature of dispute resolution. The closest definition is found in Section 35(1).

The aggrieved person is allowed to appeal to the Appeal Board within such time and in such manner as may be prescribed. Under section 35(2), upon hearing the Director General and the appellants, the Appeal Board may make such order as it deems fit. Such a Board has not been constituted yet. This does not mean that no other mechanism for dispute resolution is open to an aggrieved person. Whoever suffers from a decision of the Director-General or the Minister under this Act can also apply to the High Court under Order 53 of the Rules of the High Court for an application of any of the following writs, namely, mandamus, prohibition, certiorari or habeas corpus.

The composition of the Appeal board is provided for in Section 36 and is set out below:

(1) For the purpose of this Act there shall be appointed an Appeal Board Consisting of three members, one of whom shall be the Chairman (hereafter in this section referred to as the Chairman).

(2) There shall also be a Deputy Chairman of the Appeal Board (hereafter in this section referred to as a Deputy Chairman) who shall only serve in the Appeal Board if the Chairman is unable to exercise his functions owing to illness, absence from the Federation or for any other cause whatsoever; and when the Deputy Chairman is to serve in the Appeal Board under the aforesaid circumstances he shall exercise the functions of the Chairman.

(3) The Chairman and the Deputy Chairman shall be persons nominated by the Chief Justice from amongst persons who for the seven years preceding the nomination have been Advocates and Solicitors of the High Courts in Malaysia or have been members of the judicial and legal service of the Federation and who shall be appointed by a notification in the Gazette by the Minister for a period not exceeding three years; and any person so appointed shall be eligible for reappointment.

(4) (a) The Chairman may call upon to serve on the Appeal Board any two members from a panel of persons appointed by notification in the Gazette by the Minister.

(5) A member shall be entitled to such remuneration or allowances as may be determined by the Minister.

(n) Sections 37 to 51 – Dispute Resolution Miscellaneous Matters

Part VI on Miscellaneous matters covers 23 very significant provisions of the law with regard to dispute resolution, from sections 37 to 51, an overview of which is given below:

Section 37 deals with the duty of an owner or occupier to furnish information, section 38 covers the power to stop, board, search, etc, section 38A describes the power to examine persons acquainted with case, and section 39 deals with the service of notices.

Section 40 is on Evidence, section 41 on Penalty for offences not otherwise provided for, section 42 on Attempts and abetments, section 43 on Offences by bodies of persons and by servants and agents, section 44 on Who may prosecute, section 45 on Compounding of offences, section 46A on Power to seize vehicle or ship, section 46B on Power of forfeiture and disposal, section 46C on Seizure and forfeiture of vehicle or ship, section 46 D on No costs or damages arising from seizure unless seizure made without reasonable cause, section 46E on compensation for loss or damage to property, section 47 on Power of recovery of costs and expenses, section 48 on Power to detain and sell vehicle or ship, section 48A on

Power to test and prohibit use of vehicle, section 48B on Assistance, and section 49 on Delegation.

Sections 50 and 51 deal with Secrecy and Regulations respectively.

Section 37(1) gives a discretionary power to the Director General to require by notice, the owner or occupier of any vehicle, ship, premises or aircraft to furnish to him within the period as may be specified in the notice information in relation to –

- (a) the ownership of the vehicle, ship, premises or aircraft;
- (b) the use of raw materials, environmentally hazardous substances or any process, equipment, control equipment or industrial plant found on the vehicle, ship, premises or aircraft;
- (c) any environmentally hazardous substances, pollutants or wastes discharged or likely to be discharged; or
- (d) any environmental risk that is likely to result from the use of the raw materials, environmentally hazardous substances or process.

Section 37(2) states that any person who, when required by the Director General to answer any question or to furnish any information, fails to answer such question or to furnish such information as is required or gives any answer or information that is false or misleading in any material respect shall be guilty of an offence and shall be liable to a fine not exceeding two thousand ringgit or to imprisonment not exceeding six months or to both.

Section 38 in effect sets out additional powers or civil and criminal jurisdiction of the office of the Director General. The term ‘etc’ shows that additional powers may follow in addition to the present terms set out as follows:

- (1) Where the Director General or any officer duly authorized in writing by him is satisfied, or has reason to believe that any person has committed an offence under this Act, he may, if in his opinion it is necessary to do so for the purpose of investigating the offence, without a warrant, stop, board and search any vehicle, ship or aircraft, or

enter any premises, irrespective of whether the vehicle, ship or premises are prescribed under section 18 or otherwise, and may-

- (a) inspect, examine, seize or detain any equipment, computer, or industrial plant;
- (b) inspect, examine, seize or detain any book, record, licence, permit, certificate or document relating to –
 - (i) the performance or use of the equipment or industrial plant;
 - (ii) environmentally hazardous substances, pollutants or wastes; or
 - (iii) any matter required to be carried on board a vehicle, ship or aircraft under this Act or under any other written law;
- (c) inspect, examine, seize or detain any scheduled wastes or environmentally hazardous substances and any vehicle or ship used in the conveyance of the scheduled wastes or environmentally hazardous substances;
- (d) make such enquiries and physical inspection of the ship, equipment, gear, stores and cargo as may be necessary;
- (e) make copies of, or take extracts from, any book, record or documents so seized and detained;
- (f) inspect, examine or take a sample of any substances, material or matter used, or which is likely to be used or usually used in any trade, industry or process carried on in or on the vehicle, ship, premises, or aircraft; or
- (g) take a sample of any environmentally hazardous substances, pollutants or wastes that are emitted, discharged or deposited, or are likely to be emitted, discharged or deposited, or are likely to be emitted, discharged or deposited from the vehicle, ship, premises, or aircraft.

The Director General or any officer authorized by him has the power to examine orally any person who is acquainted with the facts and circumstances of the case and pursuant to this they are required to reduce into writing any statement so made. The person so questioned is bound to answer all questions relating to the case put to him by the Director General or such officer. The only ground on which such a person may refuse to answer any question is when it will have a tendency to expose such person to a criminal charge, and/or penalty of forfeiture. Such person is also legally bound to state the truth, whether or not the statement is made wholly or partly in answer to questions. These sections of the law, which are tantamount to rights of the interrogated, shall be communicated to the person mentioned above by the Director General.

The section finally states that a statement made by a person under this section shall, be reduced into writing and signed by the person making it or affixed with his thumb-print after it has been read to him in the language in which he made it and after he has been given an opportunity to make any corrections. Where the person examined refuses to sign or affix his thumb-print on the statement, the Director General or any duly authorized officer shall endorse this fact of refusal and the reason for it, if any.

All notices, orders, summonses or documents that fall within the scope of the EQA 1974 may be served on the person concerned in any one of the following three ways:

- (c) by delivering the same to such person or by delivering the same to some adult member or servant of his family;
- (d) by leaving the same at the usual or last known place of abode or business of such person in a cover addressed to such person; or
- (e) by forwarding the same by registered post in a prepaid cover addressed to such person at his usual or last known place of abode or business.

A notice, order, summons or document is deemed to be properly addressed if addressed by the description of the “owner” or “occupier” of such premises without further name or description.

Finally, the section provides that a notice, order, summons or document required or authorized by the EQA or regulations be served on the owner or occupier of any premises by delivering the same or a true copy to some adult person on the premises or, if there is no such person on the premises to whom the same can with reasonable diligence be delivered, then by affixing the notice, order, summons, or document to some conspicuous part of the premises.

The general law is that the contents of any document prepared, issued or served for the purposes of the EQA shall until the contrary is proved be presumed to be correct and the production of any book purporting to show the licenses issued under the EQA shall be *prima facie* proof of the issue, lack of issue or date of expiry of such licenses. A certificate, for the purpose of establishing a person as the occupier of any premises or prescribed premises, signed by the Collector of Land Revenue shall unless the contrary is proved be evidence of any facts stated therein. The section concludes by stating that in any proceeding for offences against the EQA or the regulations where it is necessary to prove, *inter alia*, that any person was or was not licenced on a certain date or for a certain period shall be prima facie evidence of the facts stated therein and the Director General shall not be cross-examined on the contents of such certificate unless he has been served with ten days' notice stating the intention to do so and further stating the particulars which are intended to be challenged.

Section 43 covers persons not defined under the EQA, for it refers to directors, managers or other similar officers, but described under section 4(1)(1) of the Companies Act 1965 (Act 125). However, it is uncertain whether the Court will use the Companies Act to interpret these terms. "Due diligence" is an essential feature of this section which in turn is a question of fact. Section 43 is given below:

(1) Where an offence against this Act or any regulations made thereunder has been committed by a company, firm, society or other body of persons, any person who at the time of the commission of the offence was a director, manager, or other similar officer or a partner of the company, firm, society or other body of persons or was purporting to act in such capacity shall be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he had exercised all such diligence as to prevent the commission of the

offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

(2) Whenever it is proved to the satisfaction of the court that a contravention of the provisions of this Act or any regulations made thereunder has been committed by any clerk, servant or agent when acting in the course of his employment the principal shall also be held liable for such contravention and to the penalty provided thereof unless he proves to the satisfaction of the court that the same was committed without his knowledge or consent or that he had exercised all such diligence as to prevent the same and to ensure the observance of such provisions:

Provided that nothing in this section shall be deemed to exempt such clerk, servant or agent from liability in respect of any penalty provided by this Act or regulations made thereunder for any contravention proved to have been committed by him.

The earlier law on section 44 states that prosecutions in respect of offences committed under the EQA 1974 or the regulations may be conducted by the Director General or any officer duly authorized in writing by him or by any officer of any local authority to which such power has been delegated. This has now been amended to provide that a prosecution by the Director General or his duly authorized officer, whether under the EQA 1974 or regulations, can only be instituted if the written consent of the Public Prosecutor has been obtained. The amended section is within the mandate of Article 145(3) of the Federal Constitution. The principle of law that the conduct of prosecutions by a person other than the Federal Public Prosecutor is unconstitutional and a nullity was stated in *Repco Holdings Bhd v Public Prosecutor* [1997] 4 CLJ 740 and was recently endorsed in the case of *PP v Lee Ming & Anor* [1999] 1 CLJ 379. The case of *Quek Gin Hong v Public Prosecutor*, [1998] 4 MLJ 161, was decided before the Minister could gazette the effective (date for entry into force) of the amendment to section 44. In this case, the accused was acquitted of the offence of allowing open burning of certain vegetable wastes without a license for two principal reasons: (1) there was no requirement of a written authorization from the Public Prosecutor and (2) the law in section 44 was *ultra-vires* Article 145(3) of the Federal Constitution and to the extent of that inconsistency, it was void.

Section 45, like many of its earlier counterparts, is self explanatory and reads as follows:

- (1) The Director General or any Deputy Director General, or any other public officer or any local authority to whom the Director or General has delegated such power in writing, may compound any offence under this Act or the regulations made thereunder which is prescribed by the Minister to be a compoundable offence by accepting from the person reasonably suspected of having committed the offence a sum of money not exceeding two thousand ringgit.
- (2) The Minister may make rules to prescribe the method and procedure for compounding such offences.

For compounding such offences as already prescribed by the Minister, see:

- (i) the *Environmental Quality (Control of Lead Concentration in (ii) Motor Gasoline) Regulations 1985* reg13;
- (ii) the *Environmental Quality (Motor Vehicle Noise) Regulations 1987* reg 9;
- (iii) the *Environmental Quality (Scheduled Wastes) Regulations 1989* reg 13;
- (iv) the *Environmental Quality (Prescribed Premises) (Scheduled Wastes Treatment and Disposal Facilities) Regulations 1989* reg 9;
- (v) the *Environmental Quality (Control of Emissions from Diesel Engines) Regulations 1996* reg 21;
- (vi) the *Environmental Quality (Control of Emissions from Petrol Engines) Regulations 1996* reg 20; and
- (vii) the *Environmental Quality (Clean Air) Regulations 1978* reg 58.

Section 46 provides that notwithstanding any written law to the contrary, a Sessions Court in West Malaysia or a Court of a Magistrate of the First Class in East Malaysia shall have jurisdiction to try any offence under this Act and to award the full punishment for any such offence.

5. Case Law

Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals, (1997) MLJ LEXIS 291; [1997] 3 MLJ 23, was a case that, among others, addressed the issue of an EIA report that went in appeal from the High Court at Kuala Lumpur [1996] 2 MLJ 388, to the Court of Appeal. The appeal was heard by Gopal Sri Ram JCA, Ahmad Fairuz JCA and Mokhtar Siddin JJCA JCA.

Appellants

There were five appellants namely, the Director General of Environmental Quality, the Natural Resources and Environment Board of Sarawak, the Government of Malaysia, the Government of Sarawak and a public listed company – Ekran Berhad entrusted with the construction of the Bakun Hydroelectric Project (the Bakun Dam Project).

The impugned project

The Bakun Dam Project was to be carried out upon native customary land occupied by approximately 10, 000 natives under customary rights, near Belaga in the Kapit Division of the State of Sarawak. The respondents were three independent natives. They did not institute a class action on behalf of the other 10,000 natives.

High Court: *Kajing Tubek v Ekran Bhd* [1996] 2 MLJ 388

In *Kajing Tubek v Ekran Bhd* [1996] 2 MLJ 388 natives from three longhouses in Belaga, Uma Daro and Batu Kalo sought a declaration that the Bakun Dam Project was approved without adhering to the procedures set down in environmental legislation and guidelines. They sought a declaration from the Court that the Bakun Dam Project was governed by the provisions of federal law and not state law and that there was a violation of the provisions of the federal law and for compliance with certain procedural rules of fairness.

In the High Court, the plaintiffs alleged that the EIA Report of the developmental project made under section 34A of the EQA 1974 was not communicated to them. The State of Sarawak had a legislation known as the '*Natural Resources Ordinance 1949 (Cap 84)*', which is different from the section in the Guidelines made pursuant to this section. The rule

in the Guidelines entitles the public to a copy of the Environmental Impact Assessment and the subsequent public comments to the review panel before an approval can be granted by the Director General. The *Sarawak Natural Resources Ordinance 1949* (Cap 84) does not contain such provisions. This in turn propelled the defendants to call into question the applicability of the EQA 1974 to the Bakun Dam Project. According to the defendants, if the EQA 1974 was declared inapplicable to the Bakun Dam Project, no question of the publicity of the EIA report on it would arise. The High Court granted the declaration ruling that the plaintiffs had *locus standi* to sue for a declaration as being natives to the land affected by the said project, they would suffer much more loss than any other member of the public on the basis that the EQA 1974 was applicable to the Bakun Dam Project. So the defendants appealed.

Court of Appeal

There were three appeals and the appellants were the Director General of Environmental Quality, in the second appeal were the Natural Resources and Environment Board of Sarawak and the Government of the State of Sarawak. The third appellant was 'Ekran Berhad' ('Ekran').

The respondents were the three individual natives who appeared in the High Court and who were not representing the rest by class action.

Procedural start of the appellate dispute resolution mechanism:

Three appeals arose from a single judgment of the High Court. The subject matter was the same, the appellants were different and the respondents were common in all the three appeals. For this reason, the procedure adopted for the hearing decided to seek consent of counsel to hear the appellant in each appeal and then the counsel for the respondents was heard. The appeals were not heard in the manner in which they were filed but according to a perceived logical sequence of the arguments as they were raised and argued in the court below. Senior Federal Counsel, Gani Patail, who appeared for the appellants in the first appeal made the first appearance, followed by the Attorney General for the State of Sarawak and En Muhammad Shafee Abdullah who appeared for the second and third appeals respectively. After the Court had heard the counsel for the appellants, the Court then invited

Mr. Gurdial Singh Nijar, counsel for the respondents in all three appeals, to respond to each of the arguments advanced by the appellants.

The appeals were heard on 17 February 1997. They were allowed.

Issue in the Court of Appeal

In the Court of Appeal, the basic issue was concerned with the applicability of the following federal legislation namely, the EQA 1974, ss1(1) and 2, 34A, *Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987* Schedule 13 (b), *Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995*, and the *Federal Constitution* articles 4(4), 5(1), 8 (1), 128, 73-77, 95B(1), Ninth Schedule. The state ordinances pressed into issue by the defendants were the *Sarawak Land Code* (Cap 81), the *Natural Resources Ordinance 1949* (Sarawak Cap 84), s 11A, and the *Natural Resources and Environmental (prescribed Activities) Order 1994*.

These legislation cut across several issues of constitutional law, administrative law and principles of statutory interpretation.

Since the High Court had dealt thoroughly with the facts, chronology of events and the history of the of the relevant legislation, the Court of Appeal did not repeat the same but merely confined itself to the salient features of the case as essential to the appeal.

The construction of the Bakun Dam Project involved the inundation of a very large tract of land, the creation of a reservoir and a water catchment area. The ownership of the entire land vested in the State of Sarawak and there was no dispute regarding this fact. Approximately 10,000 natives occupied the said land area under customary rights. The three respondents have from time immemorial lived upon and cultivated the said land. Two facts were common ground

- (i) that the ancestral and customary native rights of livelihood and their way of life would be extinguished under the existing Sarawak Land Code (Cap 81) ;
and

- (ii) that the government of the State of Sarawak would resettle those affected.

Respondents arguments

The respondents rested their case upon the argument that they were not given a chance to give their 'input' on the Bakun Dam Project that fell within the terms of the EQA 1974 read with the *Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987* made under the EQA 1974 and which took effect from 1 April 1988. Their main contention was that they were not given a copy of the EIA report on the said project and had been deprived of procedural fairness as they were not given an opportunity to make representations on the impact that the project would have upon the environment before the decision to implement the project was made. The respondents conceded that Sarawak had its own environmental legislation but argued that the appellants were under an obligation to follow the stricter requirements of the EQA 1974. The respondents therefore claimed both threshold and substantive *locus standi* in the case. Further, on 20 April 1995, the day on which the summons was filed, the Director General of Environment and the Government of Malaysia published in the Gazette the *Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1995* (the Amendment Order) retrospectively, excluding the operation of the 1987 Order to Sarawak. They argued that this order was invalid as section 34A did not authorize the making of retrospective orders and that they had a vested right under the EQA 1974 to receive procedural fairness so that the Amendment Order could not operate retrospectively to terminate that right.

Appellants arguments

Mr. Gani Patail, who appeared for the appellants in the first appeal, but not before the High Court, raised the argument that though section 2 of the EQA 1974 applied throughout Malaysia, it did not extend to the impugned activity, as the land in question belonged to the State of Sarawak with respect to which Parliament had no legislative authority. The enumerated powers doctrine found in article 74 of the Federal Constitution read with the Ninth Schedule places land as a legislative subject in the State List. The subject of 'environment' is not mentioned in any of the three Lists, the Federal, the State and the Concurrent. As the impugned activity which concerned a piece of land and a river, both

which were situated in the State of Sarawak, it was the Ordinance and not the EQA 1974 that applied. The presumption that operated in favour of the Parliament was that it did not intend to encroach upon the legislative powers of the State of Sarawak when the EQA 1974 was drafted or upon the Executive when the 1987 Order was made. On the contrary, it was to make clear that the 1987 Order was published. The applicability of the Act or the Ordinance to a particular activity within the State of Sarawak depended upon the facts of each case. The first argument rested upon the ground that the EQA 1974 did not apply to the impugned project, and that the respondents had no right to procedural fairness. Consequently, there was no deprivation of any such right under the Amendment Order.

Datuk Fong argued that the respondents lacked the requisite *locus standi* and that this was not a representative class action. Further, the respondents lacked substantive *locus standi* for they suffered no injury in law. In respect of the fundamental rights of the natives, they were being compensated in accordance with the law. Issues regarding the fairness of compensation had to be dealt with elsewhere. The High Court judge had erred when the Court did not decide the issue that lay at the heart of the case, namely whether the EQA 1974 applied to the impugned activity. Further, the Court also erred when it ruled that the Amendment Order formed the core of the case and the Court should not have granted the relief claimed.

Mr. Shafee drew attention to the fact that the respondents sought to enforce a penal law against Ekran. The litigation, counsel claimed, was a private law action to enforce a penal law against it which meant that the respondents lacked the requisite *locus standi*.

Summary of issues

The Court of Appeal found it convenient to consider the submissions in relation to the two main issues that they raised which are as follows:

1. Whether the EQA 1974 applied to the impugned project?
2. Whether the respondents had *locus standi* in point of relief?

Judgment

Applicability of the EQA 1974 to the impugned project:

It was assumed by all that the EQA 1974 applied to the impugned project for there were no arguments raised before the High Court judge on that point. Relying on the doctrine of separation of powers and the provisions of the EQA 1974, sections 1 and 34A and particularly on para 13(b) of the 1987 Order, the Court of Appeal ruled that EQA 1974 did not apply to the present case. The Court of Appeal held:

“Dams, hydroelectric power schemes, reservoirs, and the like must exist on land, which of course, is part of the environment, as is the very air that we breathe. Admittedly, the land and river on which the project is to be carried out lie wholly within the State of Sarawak and are its domains”.

Based on this understanding, the Court ruled that the ‘environment’ referred to by the respondents wholly belonged to the State of Sarawak, subject to those customary or other rights recognized by its laws. The Court endorsed Gani Patail’s’ definition of the term ‘environment’ as a multi-faceted and multi-dimensional concept. The EQA 1974 only applied to limited environment in the State of Sarawak, that is, the environment within the State of Sarawak which may fall outside its legitimate and constitutional control and within that of the Federal Government.

In the present case, the environment referred to is the water and land area within the State of Sarawak upon which the project would have an impact and this environment by reason of Item 2(a) of list II and Item 13 of List IIIA of the Federal Constitution fell wholly within the legislative and constitutional province of the State of Sarawak, and by that fact that state has exclusive authority to regulate, by legislation, the use of it in such manner as it deemed fit. It was said that in the appeal, the activities complained of were related to matters in the State List, thus the Ordinance applied.

The Court of Appeal used settled principles of construction in this dispute to advance its judgment when it ruled that the EQA 1974 was in harmony with the Ordinance and

Parliament could not have intended the EQA 1974 to regulate so much of the environment that fell within the State of Sarawak.

The Court of Appeal ruled in favour of the appellants for the following reasons:

1. The relevant statute that regulated the use of the environment in relation to the project was the Ordinance and not the EQA 1974.
2. Since the EQA 1974 did not apply, the respondents did not acquire any vested rights under it. The validity of the Amendment Order was therefore wholly irrelevant to the case and the first declaration ought not to have been granted.
3. In any event, the respondents lacked substantive *locus standi*, and the relief sought should have been denied because:
 - (i) the respondents were, in substance, attempting to enforce a penal sanction. This was a matter entirely reserved by the Federal Constitution to the Attorney General of Malaysia in whom resided the unquestionable discretion whether or not to institute criminal proceedings;
 - (ii) the complaints advanced by the respondents amounted to deprivation of their life under art 5(1) of the Federal Constitution. Since such deprivation was in accordance with the law, the respondents had on the totality of the evidence, suffered no injury. There was therefore, no necessity for a remedy;
 - (iii) there were persons, apart from the respondents, who were adversely affected by the project. There was no special injury suffered by the respondents over and above the injury common to all others. The action commenced by the respondents was not representative in character and the other affected persons were not before the Court; and
 - (iv) the judge did not take into account relevant considerations when deciding whether to grant or to refuse declaratory relief. In particular, he did not have sufficient regard to public interest. Additionally, he did not consider the interests of justice from the point of view of both the appellants and the respondents. (see pages 18 and 19 of judgment).

In a separate judgment, Judge Mokhtar Sidin in this case, pointed out that there were two sets of laws that applied to the environment, namely the EQA 1974 that applied to the Malaysia as a whole and in general and for the State of Sarawak the *Natural Resources Ordinance of Sarawak of 1949*. The *Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987* was made under s34A of the EQA 1974 and came into force on 1 April 1988. Under section 34A, the Director General was empowered to draw up Guidelines in respect of a report made to the Director General. Under the terms of section 34A, and by the Guidelines drawn up by the Director General, where the EQA 1974 applied to a project, and where a person requested for that report, it must be made known to the affected persons under that project. It was a genuine complaint if the public had requested for a copy of the report in such circumstances and none were given before the project was approved. This could amount to a violation of the 1987 Order for failure to follow the Guidelines of the Director General purportedly made under the 1987 Order. On 27 March 1995, an amendment order was made to amend the 1987 Order and this was to take effect on 1 September 1994. The state order came into force on the same day. (See page 20 of judgment). The effect of the Amendment Order was that effective, from 1 September 1994, the Order was not applicable to Sarawak and consequently the Guidelines issued by the Director General were inoperable in Sarawak. The 1987 Order encroached upon activities reserved for the State and the Minister made the Amendment to clarify that the Order did not apply to these activities because Sarawak had its own laws in respect of those activities. The State List, List II, covers land, forest and water and State List, List IIIA, covers the production, distribution and supply of water power and of electricity generated by water power.

All of them knew that according to the Handbook, before the project could commence, a detailed assessment report must be given and approved by the appropriate authority. Thus, when the project was commenced, the respondents should have known that the reports had been submitted to the appropriate authority but they did not request for the report to be supplied to them with the stipulated conditions that they were willing to pay the costs of providing the report. The right in this case, it appears to me, is only a conditional right which must be exercised by the person concerned: see *Kong Chung Siew & Ors v Ngui Kwong Yaw & Ors* [1992] 4 CLJ 2013. It appeared that there was certainly no provision for the public to be supplied with the reports when there was no request for the reports. The provisions of the

Handbook as a whole show that it is not really a right but a privilege to have a copy of the report if the person so requests: see *Director of Public Works v Ho Po Sang & Ors* [1961] 2 All ER 721.

Under the EQA 1974, an “environmental audit” refers to a periodic, systematic, documented and objective evaluation to determine –

- (a) the compliance status to environmental regulatory requirements;
- (b) the environmental management system; and
- (c) the overall environmental risk of the premises;

while an “environmental management system” comprises an organizational structure with its responsibilities, practices, procedures, processes and resources for implementing and maintaining the system relating to the management of the environment.

Environmental risk is defined as any risk, hazard or chance of bad consequences that may be brought upon the environment. Environmentally hazardous substances refer to both natural or artificial substances. This would include raw material, whether in a solid, semi-solid or liquid form, or in the form of gas or vapor, or in a mixture of at least two of these substances, or any living organism intended for any environmental protection, conservation and control activity, which can cause pollution.

Result of Appeal

The result of the appeal was that the three appeals were allowed and the judgment of the High Court was set aside and the respondents originating summons was dismissed. On the order for costs, the Court of Appeal accepted the contention of counsel for the respondents that they only instituted their action in the first place because all parties had believed that the EQA 1974 applied to the facts and, therefore, no order for costs should be made against the respondents. The Court of Appeal accepted the merit of this argument and ruled that no order for costs be made either in the Court of Appeal or in the High Court below. Counsel for the appellants were also agreeable to this suggestion and did not press for costs. The Court also ordered that the deposit paid into court by *Ekran* be refunded to it.

Conclusion

The main path for dispute resolution is through the judicial court system. It is the recognized and perhaps preferred channel given the common law background of the nation state for environmental dispute resolution. These sources in themselves contribute to the general awareness of the population on environmental matters. However, these are not the only sources, for the awareness programmes of the Department of Environment together with the newspapers, television media and the non-governmental agencies stand shoulder to shoulder to play their part in environmental preservation and conservation of natural resources. There are several activities undertaken by the Department of Environment in this regard.

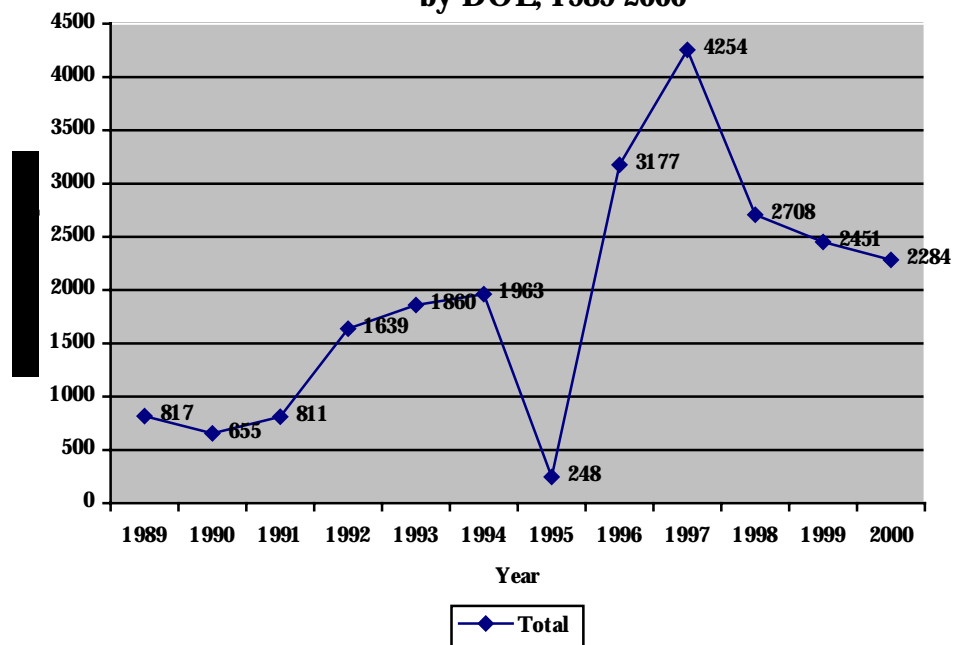
The *Kajing Tubek Case* is a landmark decision that adjusted the roles played by section 34A of the EQA 1974, the 1987 Order, the Sarawak Ordinance of 1949 and the Federal Constitution. There are very few administrative actions that the Department of Environment undertakes in environmental management, the principal one being the issue of notices and followed by prosecution under sections 25, 31 and 37. The body of environmental law is growing and like every other developing nation, this is a testing time for Malaysia. It is a difficult task for enforcement officers to catch the start of a big fire, very often they arrive in time to see the ashes only. The strict liability nature of the offences is due to the inability of prosecutors to catch offenders in the process of committing a violation and the draconian penalties are a reflection of the tussle within the Department to uphold environmental standards and at the same time discourage environmental pollution. Thus the burden of proof is shifted on to the occupier or owner.

Table 20
Department of Environment: River Quality Monitoring Stations, 1995-2000

Types of Monitoring	<i>Year</i>					
	1995	1996	1997	1998	1999	2000
Manual monitoring						
River Basin	115	116	117	120	120	120
Number of Monitoring Stations	821	909	909	900	902	902
Automatic Continuous Monitoring						
River Basin	2	4	6	8	10	10
Number of Monitoring Stations	2	4	6	8	10	10

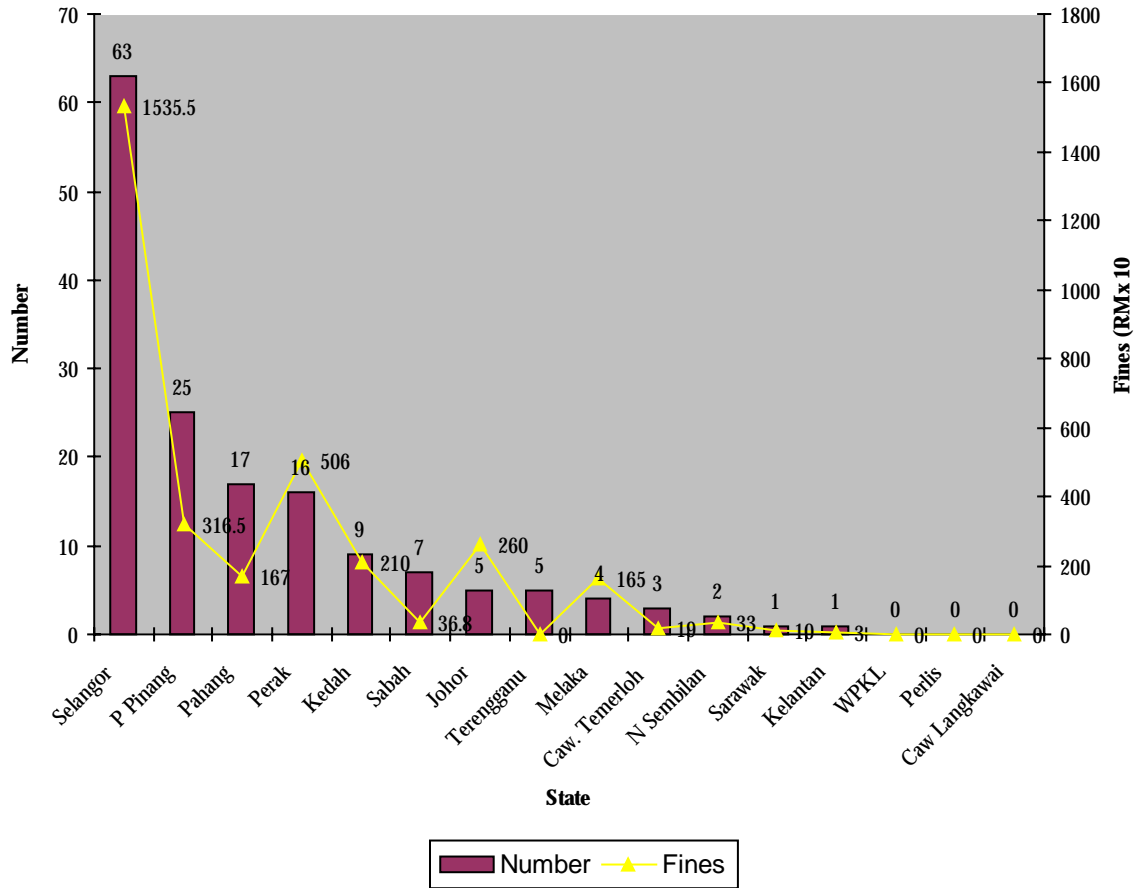
Source: Department of Environment, Ministry of Science Technology and Environment, Annual Report 2000.

Chart 2 : Department of Environment: Complaints Received by DOE, 1989-2000



Source: Department of Environment, Ministry of Science Technology and Environment, Annual Report 2000

Chart 3 : Department of Environment: Cases Prosecuted and Fines Imposed, 2000

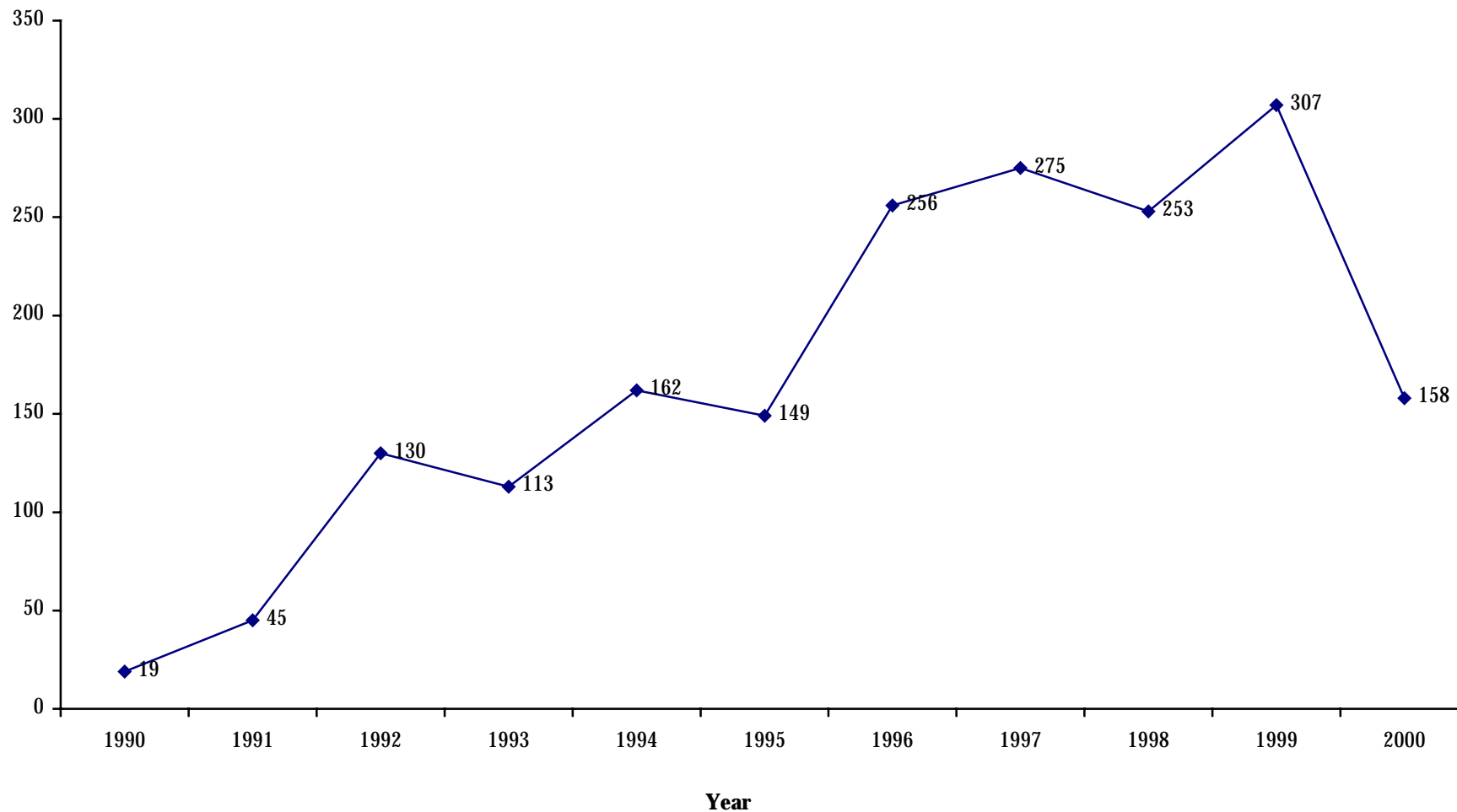


Source: Department of Environment, Ministry of Science Technology and Environment, Annual Report 2000.

RULES AND REGULATIONS MADE PURSUANT TO THE ENVIRONMENTAL QUALITY ACT 1974 (ACT 127)

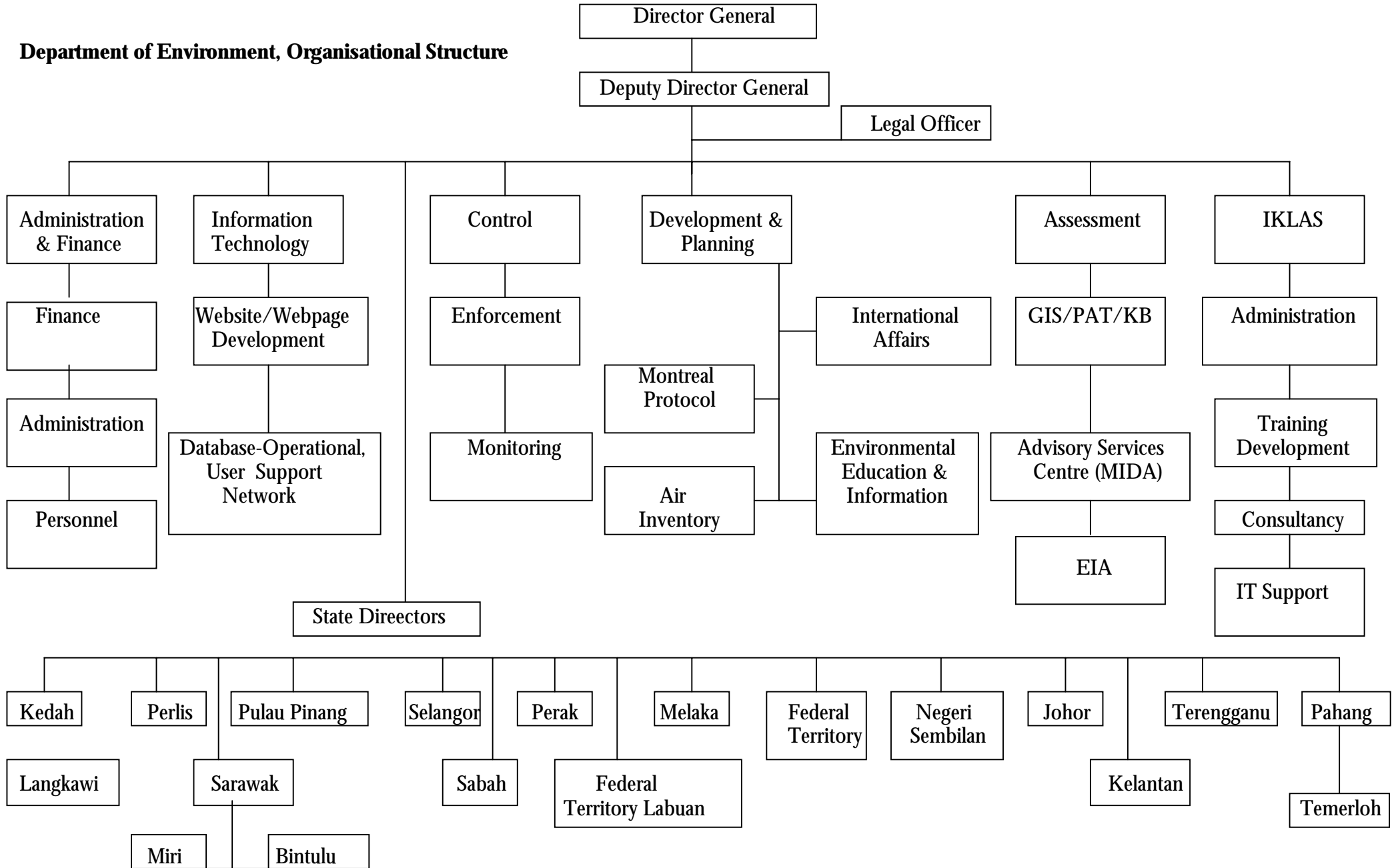
1. Environmental Quality (Licensing) Regulations 1977
2. Environmental Quality (Prescribed Premises) (Crude Palm Oil) Order 1977
3. Environmental Quality (Prescribed premises) Crude Palm Oil) Regulations 1977
4. Environmental Quality (Prescribed Premises) (Raw Natural Rubber) Order 1978
5. Environmental Quality (Clean Air) Regulations 1978
6. Environmental Quality (Compounding of Offences) Rules 1978* (see below)
7. Environmental Quality (Prescribed Prescribed) (Raw Natural Rubber) Regulations 1978
8. Environmental Quality (Sewage and Industrial Effluents) Regulations 1979
9. Environmental Quality (Control of Lead Concentration in Motor Gasoline) Regulations 1985
10. Environmental Quality (Motor Vehicle Noise) Regulations 1987
11. Environmental Quality (Prescribed Activities) (environmental Impact Assessment) Order 1987
12. Environmental Quality (Scheduled Wastes) Regulations 1989
13. Environmental Quality (Prescribed Premises) (Scheduled Wastes Treatment and Disposal Facilities) Order 1989]
14. Environmental Quality (Prescribed Premises) (Scheduled Wastes Treatment and Disposal Facilities) Regulations 1989
15. Environmental Quality (Delegation of Power on Marine Pollution Control) Order 1993
16. Environmental Quality (Prohibition on the Use of Chlorofluorocarbons and Other Gases as Propellants and Blowing Agents) Order 1993
17. Environmental Quality (Delegation of Powers on Marine Pollution Control) Order 1994
18. Environmental Quality (Prohibition on the Use of Controlled Substance in Soap, Synthetic Detergent and Other Cleaning Agents) Order 1995
19. Environmental Quality (Control of Emission From Diesel Engines) Regulations 1996
20. Environmental Quality (Control of Emission From Petrol Engines) Regulations 1996
21. Environmental Quality Amendment Act 1998
22. Environmental Quality (Halon Management) Regulation 1999
23. Environmental Quality (Refrigerant Management) Regulation 1999
24. Environmental Quality (Delegation of Powers) Order 1999
25. *Environmental Quality (Compounding of Offences) (Amendment) Rules 1999

Chart 4 : Department of Environment Number of Court Cases 1990-2000



Source: Department of Environment, Ministry of Science, Technology and Environment Annual Report 2000.

Department of Environment, Organisational Structure



SUMMARY OF REPORT

In Malaysia, resort to alternative means of dispute resolution has been pursued in earnest in the last few years mainly due to acute problems pertaining to backlog of cases in the civil courts. As such, alternative dispute resolution can be said to be still in its infancy, and its effectiveness remains to be tested over time.

In the resolution of consumer disputes, the Tribunal for consumer claims has proven to be effective in the settlement of “small claims” of not more than RM10,000/-. Settlement is mostly through conciliation and agreement of both parties, and although hearing does take place, the procedures involved are much less cumbersome and has been simplified for the benefit of consumers. The time taken for resolution of disputes is thereby reduced, and costs involved are minimal due to the absence of lawyers. There is no appeal from the decision of the Tribunal, making it the “final” and binding arbiter of the dispute in question.

Labour disputes, on the other hand, has had the benefit of a much longer history compared to consumer disputes, as the court of arbitration for industrial or trade disputes pre-dates Independence. When the first Industrial Court was established (FMS Enactment No. 12 of 1940), the system of arbitration was voluntary in nature in that it was left to the parties themselves (employer and employee) to decide whether or not they wish to refer their dispute for arbitration. If they did, then implicit in such a choice would be the agreement to be bound by the decision of the Court. However, as the nation continued to be beset by strikes, particularly in the civil service, a different concept of arbitration was pursued, that is, compulsory arbitration based on the Australian model. The Court which took over from the 1940 Industrial Court practiced this system from 1965 until the present time.¹⁹

Several key features of compulsory arbitration form the basis of the Malaysian Industrial Relations Act, 1967. First, that parties no longer have the choice of whether or not to refer their dispute to an institutionalised body, but that they *must* refer such dispute or risk having the Minister interfere in order to have the dispute referred. Secondly, parties

¹⁹ Essential (Arbitration in the Essential Services) Regulations 1965, established the Industrial Arbitration Tribunal, subsequently re-named the Industrial Court.

are *legally bound* to accept the decision of, either the Minister or the court, to which the dispute has been referred. Once the dispute has been put through the compulsory arbitration mechanism, all strikes and lock-outs are prohibited by law.

Although the Industrial Relations Act provides for conciliation and other procedures, such as fact-finding and investigation, in practice it may be argued that the most important feature of the system is *adjudication*, and the impact of precedents established primarily through awards handed down by the Industrial Court. Although technically the Industrial Court is not bound by its own awards, it becomes a normal practice for Industrial Court chairmen to refer to earlier decisions based on the same or similar facts. This system of precedents has resulted in both positive as well as negative aspects. For example, in cases of terms and conditions in collective agreements and disputes pertaining to terms and conditions, this system of precedent has stifled the growth of free collective bargaining, in the process making it rigid and inflexible. For example, the principle applied by the Industrial Court in cases of wage increments by pegging such increments to the rise in the Consumer Price Index without taking into account the productivity factor has had a negative impact on industry.²⁰ In cases pertaining to dismissal of employees on the other hand, Industrial Court precedents have been most helpful in maintaining security of tenure in employment by providing that no one shall be dismissed unfairly and without adhering to proper procedures.²¹

Adjudication assumes greater importance in the resolution of industrial disputes due to the ever widening scope of judicial review exercised by the civil courts over decisions made by the executive, such as the Minister, as well as the Industrial Court. In 1995, the Court of Appeal handed down its judgment in the case of *Syarikat Kenderaan Melayu Kelantan v Transport Workers' Union*.²² The significance of the case lies in the establishment of principle that an inferior tribunal or other decision-making authority, whether exercising quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law, regardless whether such error of law constitutes jurisdictional error of law or not. Thus, all errors of law are reviewable. There is then no

²⁰ See, among others, *Malaysia Shipyard & Engineering Sdn Bhd, Johor v Kesatuan Sekerja Pekerja-Pekerja MSE Sdn Bhd* [1989] 2 ILR 7; *Woodard Textile Mills Sdn Bhd v Pg. & S. Prai Textile & Garment Indus. Employees Union* [1987] 2 ILR 370; *E & O (1951) Sdn Bhd v NUHBRW* [1990] 1 ILR 337; *Art printing Works Sdn Bhd v Printing Indus. Employees Union* [1987] ILR 469; *Dah Yung Steel (M) Sdn Bhd v MIEU* [1990] 1 ILR 350.

²¹ *Cleetus v Unipamol (M) Sdn Bhd*, I.C. Award No. 66/1975.

²² [1995] 2 MLJ 317.

difference between a review and an appeal, and this paves the way for the civil courts to actively engage in the review of Industrial Court wards,²³ thus increasing the legalism surrounding industrial adjudication.

In cases pertaining to the environment, there is no ADR mechanism. The issues are not really centred on “disputes”, but more on “enforcement”, for matters pertaining to the environment are made the subject of offences against the environment, for which prosecution will ensue. These fall more under the realm of criminal matters as opposed to civil matters. Offenders are liable to be fined and even imprisoned for committing any of the offences against the environment as prescribed under the EQA.

On the whole, formal dispute resolution mechanisms remain as the centrepiece in the landscape of dispute resolution in Malaysia, with ADR in the fringes. It remains to be seen to what extent ADR will alter this landscape in the future.

²³ *R. Rama Chandran v The Industrial Court* [1997] 1 MLJ 145; *Harris Solid State (M) Sdn Bhd v Bruno Gentil* [1996] 3 MLJ 489; *Amanah Butler v Yike Chee Wah* [1999] 2 AMR 1653.

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