

## **ADDRESSING LEGAL ISSUES IN THE GLOBALISATION OF ECOTOURISM IN MALAYSIA**

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*Some environmentalists argue that the process of globalisation which has resulted in trade liberalisation, accelerates economic growth and development, and that this promotes polluting activities and speeds the depletion of nonrenewable resources (A. Y Seita, 1999). Since Malaysia is one of the signatories of the General Agreement on Trade in Services (GATS) and ASEAN Framework Agreement on Services (AFAS) which provides equal investment opportunities to foreign investors as domestic service providers including ecotourism, this article explores the legal issues that arise in the globalization of ecotourism.*

*Globalisation, legal issues, ecotourism*

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### **INTRODUCTION**

As with other countries, Malaysia has been weighing her options for future economic growth paths. With the manufacturing sector accounting for more than 30 percent of gross domestic product (GDP), it is not easy to envisage a bigger GDP-growth contribution from manufacturing although in absolute terms the sector is expected to continue expanding. The experience of advanced countries tells that Malaysia has to rely on the services sector for future growth (Sieh, 2003). Currently, the services sector accounts for nearly half of the economy. Future services sector development including services related to tourism in Malaysia will to a large extent depend on the General Agreement on Trade in Services (GATS) negotiations that commenced in January 2000 and ASEAN Framework Agreement on Services (AFAS) where Malaysia are signatories to both of the agreements. Today ecotourism is considered the fastest growing sector of the tourism industry. The tourism industry provides 200 million jobs around the world. In 2010, it is estimated to grow to 250 million as reported by World Travel and Tourism Council (WTTC) (Katz, 2006). Developing countries, including Malaysia look to ecotourism as a way to earn revenue from foreign countries, especially those of the rich developed world. With the increase of emphasis on the service sector in Malaysia, this article explores the legal issues that arise in the globalization of ecotourism.

### **Federalism as the Structure of Government**

According to Wheare (1967), "Federal government is not always and everywhere good government. It is only at the most a means to good government, not a good in itself." With regard to Malaysia, Wheare is probably the first notable analyst to have analysed it as a quasi-federal system:

*"The Federation of Malaya, ... established in 1957, has had a longer life [than the Federation of the West Indies — which Wheare has just discussed] and contemplates adding further territories to*

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*itself. The Constitution resembles that of India in containing emergency provisions [Articles 149-150] which permit the federal system to be converted temporarily into a unitary system if the [federal] government and the parliament are satisfied that a grave emergency exists whereby the security of economic life of the federation or any part of it is threatened, whether by war or external aggression or internal disturbance. These provisions have been invoked on more than one occasion. Added to this the list of powers given to the [federal] parliament exclusively [are] very great, though it must be added that those given to the states exclusively, particularly Muslim law, Malay custom and land are important. On the whole, however, it must be suggested that the Constitution and the government of Malaya come nearer to being quasi-federal rather than strictly federal."*

The analysis above was made as a result of federal-state conflict due to overlaps of jurisdiction where in the actual framework, it could be implied as although the Malaysian Federal Constitution aims at providing powers to the states as to its respective areas of jurisdiction, however, ironically, at the same time, the Federal Constitution also gave way for the Federal government to intervene the jurisdiction of the states. This is evident in Article 80(2) of the Federal Constitution where the executive authority of the Federation extends to matters enumerated in the state list where the federal or the state law confers power on the Federation. However, it should be noted that this unequal power of the federal and state is only confined to the matters within the concurrent list and when such a situation arises, the executive authority of the states can be excluded. Parliament is also authorized by the Constitution to trespass on the legislative jurisdiction of the state governments, firstly, 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 (Article 76(1)(a) of the Federal Constitution), or secondly, for the purpose of promoting uniformity of the laws of two or more states (Article 76(1)(b) of the Federal Constitution) or if so requested by the Legislative Assembly of any State (Article 76(1)(c) of the Federal Constitution). Since under the first and second situation the consent of states is not required, therefore, such sweeping powers pose a threat to the federal principle as they provide the basis for a significant extension of central legislative influence.

It is in this respect that the Malaysian constitution is not entirely compatible with the federal principle because the federal principle implies that neither government is subordinate to the other. In the case of Malaysia, the Federal Constitution clearly provides more power to the centre, with state laws in key areas left only of a subordinate nature. The Federal Constitution of Malaysia is a federal system which only makes a formal division of power between the states and the central authority, where in practice this division is usually adjusted by circumstances "somewhere in a spectrum which runs from what we may call a theoretically wholly integrated society at one extreme to a theoretically wholly diversified society at the other" (Livingston, 1956).

### **Ecotourism within the Framework of Malaysian Federalism**

The division of federal-state jurisdiction in the implementation of ecotourism is transparent firstly and foremost due to the uniqueness of the Federal Constitution where generally, tourism falls (item 25A of List I of Ninth Schedule) under the Federal jurisdiction. In the implementation of ecotourism policies which involves international standards, it is foreseen that treaties, agreements and conventions may be involved and therefore, this is within the jurisdiction of the Federal government as it falls (Item 1 of List I of the Ninth Schedule of the Federal Constitution). Apart from that, the Environment Quality Act 1974 is a Federal statute which applies to the whole of Malaysia. Although from the face value, it seems as though laws in relation to tourism falls under the jurisdiction of the Federal government as illustrated in the above-mentioned statutes, however, it should be noted that the matter is complicated due to the fact that many other legal areas concerning ecotourism for example, parks and forestry falls under the jurisdiction of the State, i.e. under List II of the Ninth Schedule of the Federal Constitution, i.e Item 5(f) and Item 3 respectively. Ironically, National Parks Act 1980,

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contrary to perceptions of the public although is applicable throughout Malaysia (section 7(1) of the act) is not applicable in Taman Negara, the flagship site for Malaysian ecotourism by virtue of (section 7(2) of the act).

Services in ecotourism are also very much related to services of local character and falls under the State List (List II Item 5) and among the aspects which are of significance are boarding houses, lodging houses and places of public amusement. Interestingly, all parks and reserves in Peninsular Malaysia are under the jurisdiction of the Department of Wildlife and National Parks of Malaysia (PERHILITAN) which is under the Federal jurisdiction. Though protection of wild animals and wild birds are in Item 3 of the List III (Concurrent List) of Ninth Schedule of the Federal Constitution, which is joint jurisdiction between federal and state, and may seem to be a practical solution in the conflict of jurisdiction in related areas relating to ecotourism generally, however analysis of the implementation of joint jurisdiction is crucial and solutions in the existing Constitutional framework is important. Hence, the complicated yet unique set-up of the various inter-related laws in Malaysia is important to be addressed and analysed in order to provide a strong foundation in the implementation of policies and practices in ecotourism.

### **Consultative Bodies in Ecotourism Decision Makings**

The composition of a consultative body may help illuminate the intent of the framers of the Constitution as to whether it is to be dominated by the Federation or by the views of the States. In the related areas of ecotourism, in existence, there are consultative bodies created by the Federal Constitution to discuss the different views of the Federation and States, in particular, the National Finance Council (under Article 108) where the council is an important component in the determination of funding of ecotourism projects, the National Land Council (Article 91) and the National Local Government Council (Article 95A). Finance, being a matter that extensively occupied the Reid Report (Para 6) was clearly to be a key component of the Reid Commission's brief to establish a strong central government with machinery for consultation between the central government and the member states, particularly on financial matters. The composition of the National Finance Council, therefore, shows a strong central government bias. Article 108(1) of the Federal Constitution provides that the council consists of the Prime Minister, such other federal ministers as the Prime Minister may designate and one representative from each of the member states governments who are appointed by each state's ruler or Yang di-Pertua Negeri. The representatives from state governments are usually the menteri besar or chief ministers (Abdullah Ayub, 1979).

In the study of federal-state fiscal relationship by Tan (1976), she argues that even though the federal government was obliged to consult the Council on matters related to capitation grants, the tax-sharing scheme and the State Reserve Fund, in practice, the Federal government reserved the right to accept or reject the Council's advice, thus the States had in practice little influence over the federal government regarding fiscal adjustment in Malaysia. She was also able to conclude that the entire system of fiscal adjustment comprising the tax-sharing scheme, capitation grant and grant from the State Reserve Fund had not fulfilled the purpose for which it was intended, while the National Finance Council had also failed to function effectively. If Tan's argument proves to be true, there may be bias in the allocation of fund to ecotourism projects in respective states due to for example, political reasons.

As a consultative body, The Department of Environmental Impact Assessment (DEIA)- which its members consists of ministers of various port folios, an academician and environmental societies- plays its role in preserving the ecotourism sites. In the controversial issue of heli-logging in Ulu Muda forest in Kedah, the State government could not proceed with its intention of heli-logging

there as the DEIA discovered that logging will disrupt the present ecotourism activities in Ulu Muda area and effectively destroy its future potential as a prime nature tourism attraction in northern Malaysia. The DEIA reported that logging will only provide short-term revenue, i.e. an estimation of RM 6.25 million for the 10-year logging project, while nature tourism can provide direct and indirect benefits to the state for the long term where it is estimated to worth RM 85 million a year and it is expected to increase further if the area is protected as a state or national park. As such, the DEIA advised that the state government do not continue with its intention of permitting heli-logging in Ulu Muda (WWF Malaysia, 2003). However, it should be noted that Federal government (i.e. the Minister of Natural Resources and Environment) has the right to accept or reject the Council's advice and more importantly, the reference to the DEIA is not compulsory, but merely the discretion of the Minister (section 4(1) of the Environmental Quality Act 1974) and as such, the preservation of ecotourism sites in Malaysia is not guaranteed with the establishment of DEIA.

### **Legal Consequences of International Service Agreements on Ecotourism**

Article 76(1)(a) of the Federal Constitution provides that Parliament (federal legislature) may make laws with respect to any matter enumerated in the State List 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. This exceptional power of the Parliament however is limited by Article 76(2) which states that no law shall be made in pursuance of Article 76(1)(a) with respect to any matters of Islamic law or the custom of the Malays or to any matters of native law or custom in the States of Sabah and Sarawak. The same provision also requires that no Bill for a law made under Article 76(1)(a) shall be introduced into House of Parliament until the Government or any State concerned has been consulted.

In Malaysia, the power to enter into any International Service Agreements is within the exclusive jurisdiction of the federal government. Thomson CJ explains in the case of *The Government of the State of Kelantan vs The Government of the Federation of Malaya and Tunku Abdul Rahman Putera Al-Haj* that 'by Article 39 the executive authority of the Federation is vested in the Yang di-Pertuan Agong and is exercisable, subject to the provisions of any federal law and with certain exceptions, by him or by the Cabinet or any Minister authorized by the Cabinet. By Article 80(1) the executive authority of the Federation extends to all matters with respect to which Parliament may make laws which ... includes external affairs including treaties and agreements. In pursuance of its obligation under an international treaty ratified within its legal ability it is important to note that the federal government is empowered to make laws even if the subject matter of the treaty is the state's exclusive domain and this includes for example, parks and forestry as mentioned earlier.

In England a treaty will only be regarded as part of English law if an Act of Parliament is passed so as to convert the terms of the treaty into rules of international law recognizable in England. As emphasized again by Lord Oliver in delivering judgment for the House of Lords in *Maclaine Watson v Department of Trade and Industry*:

*'...the Crown's power to conclude treaties with other sovereign states was an exercise of the Royal Prerogative, the validity of which could not be challenged in municipal courts; but that the Royal Prerogative did not extend to altering domestic law or rights of individuals without the intervention of Parliament and a treaty was not part of English law unless and until it had been incorporated into it by legislation.'*

Malaysia, forming part of the British Commonwealth, naturally lean towards 'dualism', a doctrine which upholds that the rules of the systems of international law and municipal law exist separately and cannot purport to have an effect on, or overrule, the other; a recognition of the fundamentally

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different nature of inter-state and intra-state relations and the different legal regimes used in municipal law and international law. Being separate systems, international law does not as such form part of the municipal law of Malaysia. When in particular instances rules of international law may be applicable in Malaysia, they do so by virtue of their adoption by the internal law of Malaysia, and apply as part of that internal law and not as international law. Thus, in Malaysia, application of an international treaty would commence in the municipal legal regime, on the transformation of such treaties into national legislation. Hence, although Malaysia is one of the signatories to the General Agreement on Trade in Services (GATS) and ASEAN Framework Agreement on Services (AFAS), there is no national legislation which adopted the terms of the agreement and as such the agreement does not form part of the Malaysian law.

### **International Ecotourism Agreements and the Doctrine of Constitutional Supremacy in Malaysia**

In dealing with provisions of international law which deals with agreements that relates to ecotourism and treaties, it should be borne in mind that in Malaysia the doctrine of constitutional supremacy applies. The doctrine, established by Article 4(1) of the Federal Constitution requires all laws passed after Merdeka Day to comply or consistent with the Federal Constitution, otherwise the laws shall be declared void. Hence, any international law or agreement relating to ecotourism which is not converted to national/domestic law, is not applicable in Malaysia. Since Malaysia follows the dualist doctrine as mentioned earlier, any international treaty on ecotourism must be incorporated through the passing of a national law in order to have the binding force. The national law that purports to embody principles or provisions of any ecotourism treaty ratified must comply with the Federal Constitution, otherwise it shall be void due to inconsistency with the Constitution.

### **Environmentalism vs Trade Liberalization**

The GATS, like many WTO agreements, encourages trade liberalization through such policies as privatization, cuts in government spending, market regulation, and free trade. These trade guidelines give big business and international investors a lot of influence in the development of Third World economies, which some environmentalists believe could be detrimental to the conservation ideals of ecotourism. The issue of privatization of national parks is one particular area in which the principles of ecotourism can clash with the tenants of the GATS. For instance, most environmentalists agree that the conservation efforts required by sustainable ecotourism programs necessitate strict government regulation of national parks. However, government owned parks may not always be economically efficient, leading some trade liberalization advocates to argue that the less profitable protected areas be turned over to the private sector (Fennell, 1999).

Trade liberalization through policies such as privatization, as in the case of *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and Other Appeals* illustrates that such trade liberalization is detrimental to the conservation ideals of ecotourism. In this case, public feedback was not taken in relation to the hydro-electric Bakun project, contrary to the requirement (section 34A of the Environmental Quality Act 1974) and this was the point argued by the respondents. Judges of Court of Appeal, Gopal Sri Ram and Mokhtar Sidin held that since the subject matter of the environment in question is 'land' therefore, by reason of item 2(a) of list II and item 13 of list IIIA of Schedule 9 of the Federal Constitution, the state has exclusive authority to regulate by legislation, the use of it in such manner as it deemed fit. The Environmental Quality Act 1974 thus according to the judges does not apply in this case as the Parliament, when it passed the Environmental Quality Act, did not intend and could not have intended to regulate so much of the environment as falls within the legislative jurisdiction of Sarawak. The court held that since Sarawak has its own Natural Resources Ordinance 1949 which does not require public feedback in relation to the environment impact assessment report,

therefore, the Bakun project could be legally continued. However, it is submitted that if the respondents were to raise the issue of protection of wild animals or birds which is in the concurrent list, then it would appear that it is disputable as to the legislation to be applied. Hence, this case would also illustrate that joint jurisdiction between federal and state government would not solve the conflict of jurisdiction as assuming that the issue of protection of wild animals or birds is raised in this case, both the legislations on public participation on environment impact assessment is different and hence would raise the question of whether to apply the Environmental Quality Act or the Natural Resources Ordinance 1949.

### **The National Treatment Principle vs Local Participation**

Under the national treatment principle of the GATS, member nations must extend equal investment opportunities to foreign investors as domestic service providers. However, to truly keep with GATS regulations would leave local small businesses and the informal economic sector of the tourist industry in danger of extinction and in the context of ecotourism, it would not be in line with the definition and purpose of ecotourism given by World Conservation Union (IUCN) which among others incorporates the element of *environmentally responsible travel and visitation to natural areas, in order to enjoy and appreciate nature (and any accompanying cultural features, both past and present) that promote conservation, have a low visitor impact and provide for beneficially active socio-economic involvement of local peoples.*

Apart from GATS, by opening domestic markets and providing national treatment to ASEAN services suppliers, more foreign investment in the services sector is generated. For Malaysia as a WTO member i.e. being GATS signatories it means commitments that are better than GATS (GATS Plus) or the offer of new GATS (GATS Plus) or the offer of new services sectors not covered under GATS. Tourism is one of the packages of commitments covering progressive liberalization on GATS basis which have been concluded in AFAS. Tourism is also one of the priority integration sectors in the vision of achievement of ASEAN Economic Community (AEC).

The globalization of open market in investments of ecotourism sites has the threat to wipe out plant and wildlife species and entire ecosystems to replace them by completely artificial landscapes and such efforts would be difficult to be controlled as this is part of the pressure caused by globalization. Similar to many other countries, for example India, Malaysia also faces the problem of over rated tourism related employment where local are usually left with low paying service jobs like tour guide, hotel waiters, porters, food and souvenir vendors and this is contrary to the concept of ecotourism where planning and management which involve the local people is essential (Drumm, 1998; Prodyut, 2004; WWF Malaysia, 1996; Weaver, 1998).

The increase of the inflow of foreign tourists may prompt the increase of establishment of luxury hotels, shopping centers and fun plaza in the name of ecotourism. The efforts of bilateral and multilateral development agencies such as USAID, UNDP, UNEP and financial institutions like the World Bank, all of which are significantly involved in influencing ecotourism agendas, are directed towards making Third World countries, where Malaysia is not an exception, compliant though homogenization of policies and standards. Examples are the structural Adjustment programmes and the liberalization of trade and services through the General Agreement on Trade and Tariffs (GATT), which increasingly undermine economic and social progress in Third World countries and result in more destruction of cultural and ecological diversity. (Drumm, 1998).

In Malaysia, the 'internationalization' of ecotourism is evident with the development of a new tourist town in Wang Kelian, which is presently under construction to replace the existing border market in Perlis State Park which is expected to further limit local participation in business as a result of land and property price inflation. According to the findings of a research (Puad and Baum, 2005) some local

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people already perceive this new development benefits the non-local people as outside monopoly is allowed to increase. The level of external involvement is expected to increase further because the state government has proposed to build a duty-free complex in Wang Kelian. Hence, this is an example of an ecotourism site, which supports Butler's (2004) view that many destination areas manage tourism facilities for the sake of tourists and tourists activities, instead of managing the natural and human environment in a way that permits it to contribute to tourism.

### **Eco-Labeling or Discrimination?**

Eco-labelling of environmentally friendly hotels, restaurants, tour companies, and other businesses associated with tourism are to protect against the "greenwashing" businesses that misuse an environmental label in order to attract ecotourists. Government-run accreditation program that rates hotels, tours, and other travel services by their environmental awareness is one of the ways to avoid "greenwashing" businesses (Fennell, 1999). However, local government-run accreditation programme in Malaysia i.e. the Orchid rating which also classify ecolodges may not be in line with the international accreditation programmes as the Orchid rating was implemented to accommodate lodging accommodations which do not meet the requirements or criteria for any Star Rating in Malaysia. Hence, any international accreditation programmes if it is given higher priority than the local government-run accreditation programme may leave local small businesses of the tourism industry in the danger of extinction.

### **CONCLUSION**

In view of the encouragement of protection of environment by the government of Malaysia which is transparent through the development of ecotourism sites in Malaysia due to its sustainable nature, it is viewed that better co-operation between the Federal government and state government is of utmost important. Hence, incentives should be created by the Federal government for state governments to conserve areas of high biodiversity value. For example, studies could be conducted to explore mechanisms by which the Federal government can compensate state governments on a yearly basis for loss of logging revenue from areas set aside for protection of ecotourism although such incentives is not guaranteed under the Federal Constitution.

The threat of negative impacts of globalization to ecotourism as illustrated in this article is always viewed by some members of the WTO as excuses for protectionism of the less developed countries including Malaysia. Hence, the trade organization has been reluctant to settle disputes over environmental protection, which it believes should be settled within multilateral environmental agreements or other organizations. This reluctance reveals the WTO's desire to remain a primarily trade and economic oriented institution, and leave environmental issues to NGOs. However, with issues of environmental protection becoming further and further entwined in trade and globalization, this may not be a role the WTO can avoid for much longer.

The WTO system allows the establishment of restrictive business practices in international trade as an exception to the most favoured nation (MFN) clause which permits the use of discriminatory trade practised by one member against another. Although it is often feared that foreign direct investment if not controlled due to the cooperation between different countries and may hinder the development of the host country by misdirecting its resources in an investor's interests and it may also compete and completely substitute domestic economic activities, however, it does not mean that the host country cannot lay down restrictions or conditions to ecotourism foreign investors. The traditional rule at international law is that a State is prohibited from expropriating foreign property and if it does so, then the foreign party can seek restitution as illustrated in the Chorzow Factory Case ([http://www.worldcourts.com/pcij/eng/edcisions/1928.09.13\\_chorzow1/](http://www.worldcourts.com/pcij/eng/edcisions/1928.09.13_chorzow1/)). The ecotourism foreign

investor cannot now rely on this rule as the United Nations General Assembly has conceded the sovereign right of a State to nationalise or expropriate foreign property. Thus, Resolution 1803 (XVII) reads:

*“Nationalisation, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or national interests which are recognised as overriding purely individual or private interests, both domestic and foreign. In such cases, the owner shall be paid appropriate compensation, in accordance with the rules enforced in the State taking such measures in the exercise of its sovereignty and in accordance with international law.”* (UN Doc, 1962).

In the light of the above, it would appear that it is not possible to limit a state’s right of expropriation by ecotourism contract as it appears that such a clause could be rendered ineffective if a State could justify the expropriation on the grounds of public utility, security or national interests. Hence, as only the State is able to define what is good for its public, it would indeed be very difficult to uphold a limitation clause against the State subject to guidelines and treaties that provide protection to the foreign investor in terms of defining the standards of practice towards foreign investment for example ASEAN Investment Treaty 1987, the APEC Guidelines including its Non-binding Investment Code, and the OECD Guidelines (Syarifah, 1997). An awareness of these ‘soft law’ governing investment protection would, without doubt be of great help to Malaysia in the implementation of laws and policies relating to ecotourism in the era of globalization.

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