

**STRENGTHENING CAPACITY FOR ENVIRONMENTAL LAW IN
THE ASIA-PACIFIC: DEVELOPING ENVIRONMENTAL
CHAMPIONS**

Siem Reap, Cambodia, 27 November – 1 December 2017

**SESSION 4: Spatial Planning and EIA Law
Case Study: Bakun Dam, Malaysia**

Presented by Amanda Kennedy



The Bakun Dam, Sarawak, East Malaysia

Purpose of this case study - to examine:

- application of EIA laws
- conflicts between federal and state jurisdiction
- public participation and rights of Indigenous peoples
- the development vs conservation dilemma
- good governance /corruption

Materials to be studied :

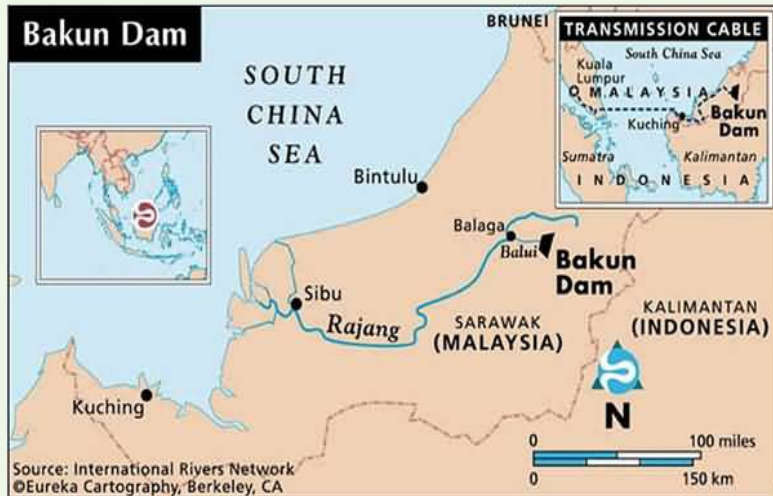
- background information – see

<http://www.internationalrivers.org/campaigns/bakun-dam>

- *Kajing Tubek v Ekran Bhd* case (High Court & Court of Appeal decisions)



The Bakun Dam



Bakun Dam Project

- The construction of the RM15 billion dam is the most expensive privatized project in Malaysia to date
- 207 metres high and 300 metres wide, flooding an area of 700 sq km, Bakun is the largest hydroelectric dam project in Southeast Asia and the second tallest dam in the world
- 10,000 Indigenous peoples from various ethnic groups will be uprooted from their ancestral lands
- Project was proposed in 1970s, shelved in 1990s
- 1994: award of project to Sarawak timber tycoon's company, Ekran Berhad; although neither he nor his company had built a dam before
- Single dam, generating 2400 MW, cost RM13.6 Billion
- Intended to supply power to mainland Malaysia via undersea cables



Controversies

- EIAs were broken into 4 parts (reservoir, dam, transmission lines, undersea cable) so that each component could be separately approved
- First 3 parts were not released to the public (Feb to April 1995)
- Finally released in May 1995 - Critique of Bakun EIA by IRN:
 - failed to explain why the dam was needed
 - failed to adequately consider the 'no dam' alternatives, other sources of energy
 - did not evaluate long term impacts, or interactions between different impacts eg effect of water quality on fisheries
 - did not adequately estimate life span of project
 - technical worries re: cables that deliver power to mainland – how long these will last, how much they cost, how much power will be lost travelling through the cable etc.



***Kajing Tubek v. Ekran Bhd & Ors* [1996] High Court**

- June 1995: Action suing Ekran Berhad, Director General of Environmental Quality and Govt. of Malaysia, claiming breach of the 1974 *Environmental Quality Act* (EQA) in that the EIAs were not made available to the public and they were thus deprived of opportunity to comment on the proposal
- Federal laws - EQA s34A and *Environmental Quality (Prescribed Activities) (EIA) Order 1987* required EIA for large dam projects
- *Sarawak Natural Resources Ordinance 1949* required EIA to be submitted to Sarawak Natural Resource Board for review
- 1994 Sarawak state govt. passed *Natural Resources & Environment (Prescribed Activities) Order* listing dam projects as prescribed activities



***Kajing Tubek v. Ekran Bhd & Ors* [1996] High Court (cont'd)**

- 27 March 1995 – Minister de-prescribed list of activities requiring EIAs from EQA in relation to the State of Sarawak, gazetted on 20 April 1995
- 5 July 1995 – Sarawak Order enacted - the prescribed activities under EQA shall not apply to Sarawak; to be retrospective as from 1st September 1994
- Defendants argued *inter alia*: the 3 plaintiffs had no locus standi as they had not suffered any specific or direct damage which was different from other members of the public
- Held by High Court (James Foong J)
 - (1) Under the Guidelines, public participation re the EIA was mandatory, thus commenting by the public was a right;
 - (2) plaintiffs had *locus standi* as destruction of the forests would uproot and immensely affect their lives; Amendment Order for Sarawak was invalid



Relocation of Indigenous Peoples

- Many Sarawak Indigenous tribes have been relocated to a longhouse settlement – Sungai Asap in Bakun
 - Most of them were subsistence farmers; each family was promised 3 acres of land but many families still have not been compensated
- Basic community problems faced by displaced Indigenous peoples, such as the lack of land areas for farming and hunting, lack of educational, medical, and transport facilities
- Waters are contaminated by industrial activities nearby
- Waters also damaged by rotting timber and vegetation that fell into the waters with destruction of the primary forests



Decision of Court of Appeal

- Deputy PM Anwar Ibrahim stated that the preliminary work on Bakun can go on as planned, despite the High Court's decision, as the court ruling was on technical procedures; it had not directed that work be stopped. Decision whether to stop work or proceed lies with Ekran.
- On appeal: 18 Feb 1997 – **Court of Appeal held:** State of Sarawak had exclusive jurisdiction over its lands, Sarawak had its own environmental laws; Federal Constitution places land as a subject under the States list
 - Since the project related to land and river within Sarawak, it was the Sarawak law and not Federal EQA that applied
- Plaintiffs only had threshold *locus standi*, but not substantive *locus standi*, not representative in character (this was not a class action), they had suffered no special injury
- High Court had failed to consider the public and national interests involved
- Costs to be borne by both parties, as Indigenous people were considered to be “confused” by the laws



Suspension and Revival of Project

- 1997 project suspended – economic crisis; Malaysian government took back the project and paid between RM700 million – 1.1 billion in ‘compensation’ to Ekran
- March 2001 – Malaysian Finance Minister announces that the Dam will proceed, on the same scale, with a capacity of 2,400 megawatts but without cables linking it to the mainland peninsula
- Scaling down of costs from RM13.5 billion to RM9 billion; funding to be tapped from international sources
- The dam would supply electricity to Sarawak, Sabah, Brunei and possibly Kalimantan in Indonesia
- Meanwhile – critique by Swiss activist Bruno Manser (for the Penan, an Indigenous tribe); see replies from Malaysian PM Dr Mahathir “The Pen and The Saw”; Manser disappeared in Feb 2000 and was later declared dead
- Plans for biomass removal in the flood basin – this however never came to fruition



Evaluation

- The Dam has been operating since 2011
- Dam has 8 turbines, each generating 300 megawatts of power but reports say only 6 units in operation, each generating half load (150 mgw) = 900 megawatts
- There are reports it is unsafe, as contractors admitted cutting corners, mixed cement with water, poor quality control, lack of inspections
- The Dam's reservoir submerged some 700 square kilometres of farmland and forests; in its first few years of operation it has experienced high nitrogen loading
- Chemical runoff from nearby palm oil plantations has deposited sediment in the reservoir, corroding four of the turbines installed and causing nearby soil and vegetation erosion
- Sarawak has announced it will be building 12 new dams
- Resettled Indigenous people still struggling to make a living; various lawsuits have been filed to uphold their rights
- Transparency International includes Bakun Dam in its 'Monuments of Corruption' Global Corruption Report



Indigenous perspectives

- The following YouTube documentary highlights some of the Indigenous perspectives on the Bakun Dam development:
<https://www.youtube.com/watch?v=hTomULpa4uQ>



Questions

- What lessons can be learnt from this case study?
 - Should dam projects be undertaken? If so, how best should they be regulated? What safeguards should there be?
 - Have the rights of Indigenous peoples been violated in this case? What rights do they have?
 - How can the laws promote better governance? What laws would you craft?
 - Give arguments for/against the Dam – representing (a) the government (b) the tribes (c) conservation groups



References

- Chan Wing Cheong “Environmental Protection in Malaysia – Lessons from the Bakun Hydroelectric project litigation” [1998]
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- <http://www.cleanbiz.asia/news/sarawaks-bakun-raises-development-corruption-questions>
- Seven sins of dam building
<http://www.wwf.eu/?207987/7-sins-of-dams>
- To Dam or Not to Dam?
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