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Followed ***(foll) (diikuti)*** – Principle of law established in annotated case followed, applied or affirmed.

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Distinguished ***(dist) (dibezakan)*** – Principle of law established in annotated case not applied because of distinction in facts or law.

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Malaysia's Biosafety Bill – Throwing Precaution to the Wind?

by

*Kwan Khai Hee**

Introduction

The advent of genetic engineering to agriculture in particular food wizardry has raised a range of challenges including the importance of protecting our bio-environment safety. Proponents of genetically modified organisms/products (collectively known as 'GMO') argue that genetic engineering has boundless benefits for human health, ecological, and economic advantages and therefore will provide greater societal benefits.[1] Opponents see genetic engineering and biotechnology as posing many, varied, known and unknown risks to humans, animals, the environment, and therefore its increasing use invites widespread disaster. Of utmost concern is the lack of a duty of safety regulating such technology seeping into the environment. It is also remarkable that proponents have been claiming no adverse consequences from field releases of GMOs in the United States. At least as early as in 1993, data from the United States Department of Agriculture (USDA) field trials were evaluated to see whether they supported these safety claims. The Union of Concerned Scientists, which conducted the evaluation, found that the data collected by the USDA on small-scale tests had very little value for commercial risk assessment. Many of the reports fail to mention, much less measure, environmental risk or human health risk.[2]

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1. Figures compiled by International Service for the Acquisition of Agri-biotech Applications (ISAAA) claim that over 90 Million hectares of GM corps worldwide with USA leading with half of the world share in 2005.

2. Vandana Shiva, Stolen Harvest (South End Press, Cambridge (MA), 2000) at p. 102.

As a result, most members of the public are rightly confused as to who or what to believe, entrusting elected legislators to consider the economic cost and benefits of protective measures. This paper is an attempt to consider if proposed biosafety safe-guards can meet these challenges in view of the needs of a developing country (namely Malaysia).

The genesis of the Cartagena Protocol (herein 'Protocol') was seeded by The Convention of Biodiversity (CBD). Article 19.3 of CBD provides for Parties to consider the need for and modalities of a protocol on the safe transfer, handling and use of Living Modified Organisms (LMOs) that may have an adverse effect on biodiversity. Its mission is to frame biosafety measures for protecting the environment from unknown and potentially dangerous genetically modified organism (GMO), *albeit* diluting its focus to "living" modified organism only in the Protocol. This is significant as not all GMO must necessarily be "living" and there is no certainty that non living GMO is harmless either.

Cartagena Protocol came into force on 11 September 2003 and Malaysia[3] ratified this on 2 May 2003, obligingly producing the Biosafety Bill (herein "Bill" which is still not in force at time of writing in June 2007). The Bill is divided into at least seven parts comprising Part I being Preliminary, Part II being reserved for the establishment of a National Biosafety Board, Part III is for making an application for release and import of LMO, Part IV is for notification for export, contained use and import for contained use, Part V relates to risk assessment, risk management and emergency response plans, Part VI relates to enforcement, Part VII is labeled as Miscellaneous, ie for matters such as Public Disclosure and Identification and labeling which do not fit elsewhere.

3. See http://www.biodiv.org/world/map.aspx?ctr=my.

Part I

As mentioned, Part I provides the naming of the Bill as Biosafety Act 2006 and is the final authority in the event of any inconsistency with existing written laws.[4] Reflecting the Bill's adherence to the Protocol, Living Modified Organism or 'LMO' is codified under Interpretation[5], word for word similarly defined under art. 3 of the Protocol.

By definition, LMO refers to a novel product of technology.[6] This entails that traditional methods will be exempted even though in theory these could similarly pose the same threat.[7] Adhering to the Protocol, this Bill takes into account only "living organism" as any biological entity capable of transferring or replicating genetic material, including sterile organisms, viruses and viroids.[8] Therefore in this Bill, LMO does not apply to the inanimate products of living modified organisms such as corn cereal or soybean oil that have been made from genetically modified corn or soybeans. In particular, this Bill provides for assessing and managing 'likely' risk of LMO on humans, plant, animal health, the environment and biological diversity.[9] Hence, although pharmaceuticals intended for human use are exempted from the Protocol,[10] this exemption is not expressed in the Bill.

4. Clause 2(2) of Biosafety Bill.

5. Means any living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology.

6. Technology application by (a) in vitro nucleic acid techniques, including recombinant deoxyribonucleic acid (DNA) and direct injection of the nucleic acid into cells or organelles; or (b) fusion of cells beyond the taxonomic family, that overcome natural physiological reproductive or recombination barriers and that are not techniques used in traditional breeding and selection.

7. It is believed that biotechnology processes tend to reduce risk because they are more predictable. (See – Declan Butler & Tony Reichhardt, Long-term Effect of GM Crops Serves Up Food for Thought, 398 NATURE 651, 653 (1999).

8. Clause 3 of Biosafety Bill under Interpretation.

9. Clause 36 of Biosafety Bill.

Part II

In Part II, the Bill provides for a Board, known as the National Biosafety Board[11] and is supported by a Genetic Modification Advisory Committee[12] which consists of experts from various science-based and other relevant disciplines.[13] In practice, this Board determines the acceptable minimal risk measures.[14] The workings of the Bill are expressed in Part III and IV as detailed below.

Part III

Since negotiation began, it has hailed that advance information about the LMO matter coupled with enhanced access to its information will lead to superior decision making regarding any importation which in turn will also lead to better enforcement ensuring bio-safety for the importing country. This interdependence between information and access saw the development of a major key feature of the Protocol in the form of the Advance Informed Agreement (herein 'AIA') procedure. In effect, this requires an exporter to seek consent from an importing country prior to the first shipment of a living modified organism intended for introduction into the environment (eg, seeds for planting, fish for release, and microorganisms for bioremediation).

This AIA procedure is reproduced in Part III of the Bill but without reference to art. 7(1) & 7(2) of the Protocol. These Articles deal with the exclusion of LMOs that are not intended for direct release into the environment but rather are shipped for use as food, feed or processing. In this respect, Malaysia's position is to regulate ALL LMO whether in food, for feed or processing or even pharmaceuticals under the AIA procedure as long as they are within the definition as stated earlier. This contention can be

11. Preamble and Interpretation and cl. 4(1) of Biosafety Bill.

12. Clause 6(1) of Biosafety Bill.

13. Clause 6(5) of Biosafety Bill.

14. Clause 36(3)(b) of Biosafety Bill.

supported as there is nothing in the Bill to specifically separate LMO commodities that are intended for food, feed, or processing similar to art. 11 of the protocol.[15]

Therefore unless explicitly stated otherwise, LMO whether for food, feed or processing or pharmaceuticals intended for human use will be similarly subject to an application under Part III unless an exemption is given by the Minister.[16] This view may be further supported by the requirement of cl. 61 of the Bill which relates to the provision for labeling and identification of living modified organisms, **items** containing living modified organisms and products of such organisms. The word 'item' seems to be broad enough to include food or anything else.

Obviously, labeling is a post importation activity, imposed after having deemed such subject LMO as having no likely risk. Hence, its effectiveness is limited to providing better information to enhance consumer's choices. However, labeling can be an expensive exercise for the direct importer and in some cases difficult to enforce as one does not know at which stage of distribution chain, the GMO food got adulterated without labeling before reaching Malaysia's shores. From a business perspective and if not properly regulated, not only will the increased cost be passed on to the consumers but it could also result in junk-information by using words like "may contain" which is ineffectual.

In sum, Malaysia appears to have unilaterally taken the high mark of imposing a broader requirement when the protocol only requires the labeling of bulk shipments of LMOs intended to be used for food, feed, or processing.[17]

15. Countries like US manage to argue for separate treatment for LMO intended for food, feed or processing ie under art. 11 – in effect provide a special, and in principle simpler, procedure for transboundary movements of LMO-FFPs. Essentially, in contrast to the "bilateral" AIA procedure, art. 11 establishes a multilateral information exchange mechanism for LMO-FFPs, centred around the Biosafety Clearing-House.

16. Clause 68 of Biosafety Bill.

17. Such shipments must bear a label that says they "may contain" LMOs. See Cartagena Protocol art. 18(2)(a).

The Precautionary Principle[18]

Since the 1980s, the precautionary principle has been widely used in international environmental agreements, including the ground-breaking Rio Declaration, a non-binding agreement created by the international community for the promotion of sustainable development which has become one of the most important texts in international environmental law.[19]

In line with Rio, there is no doubt that the Cartegena Protocol embraces the Precautionary Principle.

Not surprisingly, this progressive principle should be found in the Biosafety Bill,[20] or is it? On the record at least, no other current legislation in Malaysia has gone this far in affirming this principle. Citing from the Bill, cl. 35 is read as follows: "35. The Board or Minister shall not be prevented from taking a decision, as appropriate, under Part III or Part IV, where there is lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of living modified organisms or products of such organisms on human, plant and animal health, the environment and biological diversity and may also take into account socio-economic considerations." As mentioned, Part III deals with Approval for Release and Import and Part IV deals with Notification for export, contained use and import for contained use.

Therefore, cl. 35 could be compared with art. 10(6) of the Cartegena Protocol which reads in full as follows: "Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking

18. Cartagena Protocol art. 10(6).

19. United Nations Framework Convention on Climate Change (9 May 1992) 1771 UNTS 30822, art. 3(3); Rio Declaration on Bio Diversity, (5 June 1992) A/CONF/151/26/REV1; 31 ILM 874, art. 15.

also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of the living modified organism in question as referred to in para 3 above, in order to avoid or minimize such potential adverse effects."[21]

By comparing above, it is glaring that the words "in order to avoid or minimize such potential adverse effects" found at the end of art. 10(6) are conveniently missing from the Bill's cl. 35.

Does this matter? Clause 35 allows an 'appropriate' decision to be made by the Board or Minister even when there is a lack of scientific certainty (ie Precautionary Principle). The issue is, how is "appropriate"ness to be measured? For reasons better known to the legislators, they have deemed that "appropriate" is more relevant to "order to avoid or minimize such potential adverse effects" as per art. 10(6) of the Protocol. This author would speculate that the word imports greater "flexibility" but why when this is a safety issue? Surely it is better to be safe than appropriate.

In arguendo, this could mean the Board or Minister making (or refusing to make) any decision (including potentially harmful but economically pleasing) on the basis there is a lack of scientific certainty. For example, if there is insufficient scientific knowledge to show consumption of a type of genetically modified fish is 'potentially' adverse on human's health, then literally according to cl. 35, a decision to accept an application to import is legal and without punity even if it is proven to be adverse to human health ten years from now simply because it is appropriate to Malaysia's needs then.

21. The level of risk identified in the Protocol is "potential adverse effects", which is significantly lower than the Rio Declaration "threats of serious or irreversible damage", and signals that precautionary action is easily justified under the Protocol. In regards to the level of scientific uncertainty, The Rio Declaration and the Convention on Climate Change each requires "lack of full scientific certainty" for the precautionary principle to be triggered. The Protocol requires only "certainty", suggesting that parties to the Protocol do not need full scientific consensus to trigger the precautionary principle.

If this is the relevancy of substituting "appropriate" in cl. 35, then it is nothing more but a mischaracterization of the Precautionary Principle.[22] The explanatory memorandum provides no guidance and merely parrots "allows a decision to be made even though there is lack of scientific certainty regarding the extent of the potential adverse effects of the living modified organisms or products of such organisms." Besides being "appropriate", cl. 35 also provides such decision may also take into account socio-economic considerations but significantly there is nothing in the Bill requiring a social-economic impact assessment to be produced for the benefit of the Board or Minister.

Therefore in this sense, cl. 35 is less of a shield and more of a double edge sword whereby Malaysia (mindful of its developing status) can effectively bar the importation of LMO irrespective of whether there is any scientific basis for the refusal when it deems fit and import the same under the social and economic consideration when it deems fit.

Person Aggrieved By Decision Can Appeal

Once a decision is taken for an application, any one aggrieved can appeal the decision to the Minister as provided in Part III.[23] The significance is found within the words "any person who is aggrieved".

Typically besides the rejected applicant, one would not expect the ordinary man on the street to appeal as (S)he has to show a genuine interest beyond that of a mere busy body to meet the aggrieved element. Hence, the inclusion of 'any person' is perhaps intended for competitors (more likely able to show aggrieved because of either potential economic damage or injury in a practical sense).

22. Clause 35 does not compel the taking of a decision, just that a decision could be taken in the absence of scientific certainty.

23. Decision is appealable to Minister from Board (See cl. 20 of Biosafety Bill).

But is this the real intent to place competitors perhaps armed with substantial knowledge[24] as an unlikely check and balance mechanism? If this is so, with respect, it is doubtful that by merely being a competitor (without any injury) will necessarily meet the aggrieved element. Even if such competitors could indeed have standing to appeal, to place all hopes on profit conscious entities in the belief that rivalry will ensure improved certainty in distilling scientific knowledge may be over-stated.

Without holding to unpredictable appellants, social economic factors or political common sense if any, the better view is to amend cl. 35 by including both the form and substance of the precautionary principle as applied in the Protocol. In this way, despite scientific uncertainty, the Minister or Board is duty and legally bound to direct any decision to avoid adversity ensuring applications are rejected when the LMO's known impacts are uncertain. Having in place the precautionary threshold at the outset combined with the attached right to appeal by the rejected applicants would be ideal as compared to flexing appropriate decision at the outset in the hope of aggrieving any oppositions to re-determine the merits again.

This view can be supported given there is no formal channel to submit any adverse complaint about the LMO once approval is obtained[25] which leaves a huge gap in terms of bio-safety reporting and auditing. The Bill only provides for the Board to review any approval upon obtaining new information or evidence[26] but without specifying the mechanism or how such information is submitted and by whom.

24. Assuming there is scientific certainty, data obtained from field tests in Canada does not necessarily mean the same result in Malaysia, given the two different environments. Therefore, short of a field test in Malaysia it is unlikely any data can be certain at all.

25. For example a LMO may pose no likely adverse danger initially but subsequently to contacting an unknown agent, it poses danger.

26. Clause 18(1) of Biosafety Bill.

Furthermore once the importation is approved, the Board need only to be "satisfied that there is a likelihood of danger posed to human ..."[27], which is a higher threshold of certainty before further action is taken (read as more difficult to oppose). This is in contrast to "where there is lack of scientific certainty due to insufficient relevant scientific information and knowledge" precautionary standard applied during the first importation.

Part IV

Similarly, when it comes to Notification for export, contained use and import for contained use as per Part IV, the Board upon considering recommendation from the Advisory Committee, "the Board may make no order, issue a cessation order, impose such terms and conditions, order the approved person to make rectifications or make any other order as the Board thinks fit in the interest of biosafety"[28] within 90 days from the date of receipt of the notification.[29] Clearly with a hurried time frame, there is the presumption here (*albeit* wrongly) that merely because the LMO is for contained use, it is likely to be less risky. This author would argue that the converse would equally apply otherwise why the need for containment and in regards to safety, should be treated equally as per Part III.

Part IV of the Bill also includes a clause for review of notification upon obtaining new information[30] which mirrors cl. 18(1) in Part III. As to the appeal process[31], this mirrors cl. 20 in Part III, in part allowing any person who is aggrieved to appeal a decision in relation to a notification as discussed above.

27. Clause 18(2) of Biosafety Bill.

28. Clause 30(3) of Biosafety Bill.

29. Clause 30(4) of Biosafety Bill.

30. Clause 32(1) of Biosafety Bill (Note compare this to cl. 18(1)).

31. Clause 34 of Biosafety Bill.

Public Participation And Transparency

Although the Protocol stressed the need for public awareness as per art. 23 particularly "... consult the public in the decision-making process regarding living modified organisms and shall make the results of such decisions available to the public, ...", it is clear that this Bill fails in this respect by relegating this to a mere discretionary exercise. For instance, cl. 60(1) of the Bill begins with the words "Subject to the **discretion** of the board the public **may** have access to such information relating to any application for approval, approval granted or notification, ..." (emphasis added).

During the application under Part III, the need for public participation is framed subject to confidentiality requirements, whereby the Director General **may** invite the public for their views on an application in such manner as determined by said.[32] However, even this allowance is doubtful given the applicant could argue commercial secrecy in order to prevent any disclosure.[33]

As to any decision made under this Part III and IV, the Bill provides for such decision shall be available to the public "in such manner as the Board thinks fit."[34] No provision for this "manner" has been provided in the Bill but in the worst scenario, this "manner" could mean a decision that is cryptic at best in order to preserve commercial interest, if sought by the applicant. For example, it could simply be a one liner gazetted as "LMO X1279129 filed by XYZ is approved for importation" buried next to some other announcements. Moreover, this manner is a significant limitation to the appeal process since one cannot be aggrieved to an issue whereby one has limited knowledge about.

32. Clause 14(c) of Biosafety Bill.

33. Clause 59 of Biosafety Bill.

34. Clause 60(2) of Biosafety Bill.

It is clear from the above, not only is there a sanctioned discretion pertaining to accessing information by the public and the controlled manner relating to its release, there is also no desire at all to be open during pre-decision making as compared to the Environmental Impact Assessment 'EIA' requirements under the broader Environmental Quality Act.[35] The author submits that given the application process under Part III[36] and IV[37] already provides for risk reports[38] and emergency response plan,[39] then making such reports (in digital format) available to the public will not pose a heavy burden to the applicants. It would be short sighted for the proponents of this Bill to take a backward step towards minimizing public participation, which incidentally has already achieved notable results in Malaysia by creating awareness and educating the public. In some cases, such awareness managed to reduce the size of a project.[40] It has already been seen that steriled information carries the stigma (rightly or wrongly) that the proponent has something to hide and could easily jeopardize the entire interest.

Therefore, to ensure acceptance of LMO and its derivatives products particularly in the face of increasingly educated consumers, this discretion by the Board should be used sparingly and wisely. Instead, greater information access should be insisted from the applicant in order to find universal acceptance in contrast to distilling information as this will likely convey suspicion. Lastly should there be a practical need for secrecy, despite not

35. Section 34A for EIA. For example it is stated that the public has the right to become involved in decisions regarding development (Appendix 4 of Environmental Impact Assessment Guidelines for Coastal Resort Development Projects by Dept of Environment (5 June 2004).

36. Clause 13 of Biosafety Bill.

37. Clause 22(1) of Biosafety Bill.

38. Clause 36 of Biosafety Bill.

39. Clause 37 of Biosafety Bill.

40. See generally issues relating to Bakun Dam in Sarawak.

having a Freedom of Information Act, it is already common practice in Malaysia for Ministers to seal pertinent information under the Official Secrets Act[41] whenever there is a request for such, particularly when it is commercially sensitive.

Part VI

The Bill under Part VI provides for enforcement[42] and requires obtaining of warrants to search[43] wherein such warrants are issued based on reasonable cause stemmed from written information on oath and inquiry. With respect, what is disturbing about Part VI is that the Bill's proponents appear to take the view that LMO is like any other contraband. The stakes are unknowingly high especially in urban areas to human safety should an operation failed or foiled with the unintended result of deliberate releasing of suspect LMO to avoid discovery. In particular, Part VI made no reference on how the enforcement officers[44] know what type of LMO they will be dealing before crashing behind the doors or warning surrounding neighbors or by-standers should suspect LMO escape. There is no stated emphasis on the presence of scientific/ expert personnel to supervise. As stated in the Protocol[45] it is important for regulatory authority to be able to detect and identify each LMO by applying tests which requires expert interpretation.

41. Under s. 2 Official Secrets Act 1972:"Official secret" means any document specified in the Schedule and any information and material relating thereto and includes any other official document, information and material as may be classified as 'Top Secret', 'Secret', 'Confidential' or 'Restricted', as the case may be, by a Minister, the Menteri Besar or Chief Minister of a State or such public official appointed under s. 2B.

42. Clause 38 of Biosafety Bill.

43. Clause 40 of Biosafety Bill.

44. Schedule 3 fails to provide a permanent specialist team of biotechnologist equipped to handle LMO. It is clearly doubtful that enforcement officers plucked from different agencies on demand are equipped at all with the necessary knowledge and training for such enforcement.

45. Annex III Risk Assessment — Methodology

The bill provides for the following deterrents: The importer is fined (a maximum of RM1.0 Million[46] for any person or RM2.0 Million for a corporation) or imprisonment or both if failed to seek prior approval from the Board.[47] The Bill also provides for Directors, Managers or Secretaries of companies involved to be equally prosecuted.[48] Similarly, the same for offences committed by partners, agents or servants.[49] Furthermore, given the high technical nature of the subject LMO, enforcement may be difficult[50] at best and little has been done to equip enforcement officers with the necessary skills to protect the environment.

Notwithstanding the strict liabilities, if damages should occur will there be any compensation for the victims (for example whose properties have been exposed to the above illegal or legal importation leading to economic loss)? For example, is there any requirements for importers and makers of LMO to be insured? The Bill provides no answer here, presumably these victims will need to pursue civil action against the importer on their own where available and provided the convicted importer is not bankrupt or imprisoned. With this in mind and to encourage acceptance, it would be practical to consider setting up a compensatory fund which is funded by the various participants or importers in the industry.

46. Exchange Rate currently stands at US1.0 to RM 3.4, therefore RM1.0 Million is roughly US294,000.

47. Clause 12 of Biosafety Bill.

48. Clause 64 of Biosafety Bill.

49. Clause 65 of Biosafety Bill.

50. As reported in New Straits Times Sept 12-2006, the United Nations Development Programme and MNRE launched a four-year, US$5.2 million (RM19.5 million) biosafety project to strengthen laws and regulations, help staff of the future board assess and manage risk, and prepare manuals on the obligations of private companies. The accompanying press release (undated) was point blank in addressing the inadequacy of the proposed legislation. (downloadable http:// www.undp.org.my/uploads/files/UNDP-GEF-GOM%20Biosafety%20project%20-%20Press%20Kit1.doc).

Conclusion

For a country that is used to being a technology licensee and exporting unadulterated natural products, this Bill is nothing short of a dilemma. If Malaysia bans or control risky or suspect products/organisms, then countries like US, Canada, Australia and even China may bring action under Trade Agreements like WTO or proposed USFTA, which are not subordinate to the Cartagena Protocol.[51]

The dilemma is how to strike a balance between the immediate needs to fuel biotechnology as a desirable investment and the immediate needs for safety always by limiting only the safest LMO? On the other hand, without a biosafety regime (even a mediocre one which is good for investment[52]) then it is very likely in the future for Malaysia to see its natural exports being restricted.[53]

As suggested above, there is considerable flexibility in the current Biosafety Bill where "appropriate", such flexibility should be fettered to provide increased certainties to the stakeholders whose livelihood and health are dependent on the various unadulterated natural resources. Even if the legislators believe (rightly or wrongly) in maintaining a high degree of flexibility in the Bill, however by merely improving public participation as suggested, these efforts by

51. For general analysis of trade-environment linkages in the WTO, see Biermann, Frank 2001. The Rising Tide of Green Unilateralism in World Trade Law: Options for Reconciling the emerging North-South Conflict. Journal of World Trade 35 (3):421-448.

52. Singapore is not even a signatory of the Protocol and has heavily invested in biotechnology. Whether Singapore is actually benefiting from all this investment is another issue but being at the doorstep of Malaysia, its competitive nature could influence foreign investment in this field. But Singapore is a minor biodiversity player, so it has nothing substantial to protect except for its dynamic population.

53. By EU countries which is hostile to GMO and supporter of Precautionary Principle. See for example New Straits Times, Wednesday, 6 September 2006 titled "Opinion: Operating in ignorance with no biosafety rules" also found at http:// www.nbbnet.gov.my/BioArticle/2006(Sept12).htm.

itself would not upset the current arrangement. Conversely, this will not only provide greater transparency to the entire process but also directly raising confidence in support of the 'appropriate' decision made, which is obvious when dealing with the unknown and often secretive commercial products.

Lastly, there are no laws governing the domestic application of would be local GMO creators. It is unknown why the government should distinguish between foreign imports from locally made GMO. While the Bill (when in force) makes it possible for Malaysia to force foreign exporters to meet the local expectation of responsible reporting, there is nothing similarly required of those who are working with or developing GMOs within Malaysia. There is state legislation such as in the State of Sabah (Environment Protection Enactment 2002) which prohibits the introduction of GMO into the environment.[54] On closer look, say at cl. 34 of the Enactment, its safety trigger is much higher "being likely to have a significant adverse effect on the environment" which obviously may be in conflict with the precautionary standard which is only found in the Bill's preamble.

Admittedly, overall this is not a flattering response to our legislators' maiden attempt to legislate biosafety but when there is only one environment to safeguard, their commendable task must be to formulate not only what is appropriate for the present, but also for coming future generation of Malaysians, so they can inherit what we are so blessed with now.

54. Clause 28 states "No person shall use any land in a manner which has or is likely to have a significant adverse effect on the environment." and cl. 34 states "No person shall introduce any genetically modified organism or plant or animal which has or is likely to have a significant adverse effect on the environment."

SAUL HAMID PAKIR MOHAMAD

v.

INSPEKTOR ABDUL FATAH ABDUL RAHMAN & ANOR

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ MOHAMAD JCA
MOHD GHAZALI YUSOFF JCA
ZULKEFLI MAKINUDIN JCA
[CIVIL APPEAL NO: P-01-61-1999]
20 JULY 2007

CRIMINAL PROCEDURE: *Arrest - Validity - Arrested for offences under ss. 323 and 390(2) Penal Code - Whether arrest lawful*

POLICE: *Arrest - Validity - Conflicting police reports lodged - Investigating officer chose one over the other - Whether officer's grounds on reasonable suspicion justified - Whether arrest under ss. 390(2) and 323 Penal Code lawful*

This appeal arose from the learned judge's dismissal of the appellant's claim against the respondents for wrongful arrest, wrongful detention and malicious prosecution (See High Court case [1999] 1 LNS 83; see also [1987] CLJ 967 (Rep)/[1987] 2 CLJ 257). The main issue for determination was whether the appellant's arrest by the 1st respondent for alleged offences under ss. 392 and 323 of the Penal Code ('PC') was lawful. The facts showed that two conflicting reports were lodged by one Sukah Singh ('SS') and the appellant in relation to an incident wherein SS claimed he was assaulted and robbed by the appellant whilst the appellant claimed otherwise. The 1st respondent who was the investigating officer chose to believe SS's version over that of the appellant and arrested and detained the appellant for investigations. The appellant had since been acquitted and discharged of the said offences. Hence, the appellant's claim against the respondents.

Held (dismissing the appeal):
Per Abdul Aziz Mohamad JCA (now FCJ)

(1) The acts alleged against the appellant constituted one incident or transaction. It was arguably a robbery. The allegation of