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## Deferred Prosecution Agreement: A tool to deter environmental crime by corporations in Malaysia

Muhammad Amry Abdul Hapiz<sup>1\*</sup>, Zeti Zuryani Mohd Zakuan<sup>1</sup>, Anida Mahmood<sup>1</sup>, H. Syafriadi<sup>2</sup>

*\*Corresponding Author*

<sup>1</sup> Faculty of Law, Universiti Teknologi MARA, 40450 Shah Alam, Selangor, Malaysia

<sup>2</sup> Fakultas Hukum, Universitas Islam Riau, Jl. Kaharuddin Nasution, 113 Pekanbaru Riau 28284, Indonesia

amryhz@gmail.com, zeti@uitm.edu.my, anida131@uitm.edu.my, syafriadi@law.uir.ac.id  
Tel: <sup>1</sup> +60106610505

### Abstract

The commission of the corporate environmental crime is on the rise in Malaysia. This may be due to the existing legal system which stipulates minimal punishments and results in crime repetition. This study adopted a qualitative method through doctrinal legal research given the crucial need to assess and benefit from the prevailing implementation of deferred prosecution agreement (DPA) in another jurisdiction. This study aims to explore the suitability of DPA as an alternative tool to deter corporate environmental crime in Malaysia. Findings from the study demonstrated that DPA could effectively prevent corporate environmental crime in Malaysia.

Keywords: Corporate Environmental Crime; Prosecution of Corporate Environmental Crime; Malaysian Legal System; Deferred Prosecution Agreement

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### 1.0 Introduction

In light of the rise of the corporate environmental crimes that sweep across Malaysian soil, the awareness of the importance to safeguard the environment must be raised. The high number of corporate environmental crimes has ultimately impacted society, the country, and nature. The Department of Environment Malaysia (DOE) recorded 30 court cases from January 2022 until April 2022 and approximately 60 court cases in 2021 against corporations for violating various environmental laws. Globally, many countries have employed deferred prosecution agreement (DPA) as an alternative to deal with crimes alongside their existing legal frameworks. DPA has become a part of their efforts to enforce corporate criminal liability. Malaysia is still relying on prosecution as the main regulator for corporate behaviour. While the whole prosecution process and sentencing are essential to regulate and maintain order in the country, there are limitations in the processes. As such, the main purposes of this study are to determine the issues in the existing legal framework concerning corporate environmental crime cases in Malaysia and to explore the suitability of DPA as an alternative tool to deter corporate environmental crime in Malaysia.

#### 1.1 Problem of Study

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The violation of the environmental regulatory framework demonstrates that the predominant motive of corporations is to earn profits and lower costs without considering environmental consequences. For instance, wastes are being dumped into local waterways because it is inexpensive than having to dispose of them properly. Aside from being motivated by the need to maintain profits, corporations commit environmental crimes due to the ineffectiveness of existing laws. The punishments these laws provide are often minimal than the potential damage imputed by the corporations, which subsequently causes crime repetition. Besides, corporations are more likely to settle the fines and repeat the offences if the amount is significantly less than the amassed profits. Thus, forming a more comprehensive legal framework such as DPA to support the existing laws is quintessential to reducing the number of corporate environmental crimes in Malaysia.

### 1.2 Objectives of Study

The objectives of the study are to determine the issues in the existing legal framework concerning corporate environmental crime cases in Malaysia, and to explore the suitability of DPA as an alternative tool to deter corporate environmental crime in Malaysia.

## 2.0 Literature Review

### 2.1 Corporate Environmental Crime

The two components of corporate environmental crime are 'corporate crime' and 'environmental crime'. Corporate crime is a type of white-collar crime described as criminal activity by persons of high social status and respectability who use their occupational position to violate the law (Pearce & Tombs, 2019). Luttenberg & Luttenberg (2017) posited that environmental crime refers to any breach of national or international environmental law that exists to ensure the conservation and sustainability of the world's environment. It poses an enhanced danger for its far-reaching and sometimes camouflaged impact on the people, economy, and geography, especially of developing countries. Theoretically, corporate environmental crime can be defined as the violation of environmental law by corporations through individuals who run the business to save company costs and increase profits. The most popular areas of corporate environmental crime in Malaysia are the illegal emission or discharge of substances into the air, water, or soil; the illegal wildlife trade, the illegal trade in ozone-depleting substances and the illegal shipment or dumping of waste (Scobell, 2019). According to Buell (2022), corporate crime is pursued to maintain profits and lower company costs. From these literatures, it is demonstrated that the impact of corporate environmental crime can be severe. However, when corporations are whacked with fines, there is a probability that they would be settled because the fines are minimal as compared to profits that they amass.

### 2.2 Prosecution of Corporate Environmental Crime in Malaysia

The institution of criminal proceedings of environmental cases in Malaysia is in the name of the Public Prosecutor which follows the procedures of normal criminal cases (Article 145, Federal Constitution of Malaysia). The environmental cases are registered as departmental summons in courts and are brought by the specialised Deputy Public Prosecutors from respective environmental departments. There are at least 34 Acts related to environmental matters and various regulations, rules, and orders passed for environmental protection in Malaysia according to the DOE. Additionally, to mete out punishments, the judiciary ought to follow the rule of thumb where sentences are passed according to law. The trait of a 'lawful sentencing' – as echoed in the wording of the Criminal Procedure Code and re-emphasised in *PP v Jafa bin Daud* [1981] 1 MLJ 315 – is one that a judge passes with adherence to established judicial opinions and accepted judicial opinions.

Baer (2021) posited that corporations are criminally liable for the acts of their employees or agents, committed within the scope of the employment or agency, for the corporation's benefit. The corporation must act with the mental state required by the statute in question, which involves imputing the mental state of individual employees or agents to the corporation (Thomas, 2019). In cases where no corporate employee or agent possesses the requisite mental state, however, criminal liability may be imposed based on the collective knowledge of the corporate employees or agents (Werle, 2019). Despite all these, in theory, Idzam & Mohammed (2020) opined that investigating large-scale and complex cases is lengthy and costly for governments; therefore, DPA may assist in minimising financial or economic losses in a prosecution. Besides, Mahmud (2021) argued that while fines are the main penalty for environmental offences, their relatively low sanctions have given rise to the concern about the effectiveness of criminal law in deterring environmental problems.

### 2.3 Deferred Prosecution Agreement

Werle (2019) opined that criminal law is ineffective in regulating corporate behaviour. However, with DPA, according to Parker & Dodge (2022); and Arlen (2019), whilst also avoiding reputational damage, the corporation has room for rectification without having to possibly take down the company and cost the jobs of innocent employees. Government funds and resources are saved from protracted legal proceedings and can be channelled toward more prominent and egregious wrongdoing (Parker & Dodge, 2022). DPA is an agreement between a prosecutor and a potentially prosecuted corporation to suspend its prosecution for a defined period, provided the corporation meets certain conditions under the supervision of a judge (Werle, 2019 & Arlen, 2019). Several studies have revealed that the prosecutor may offer a deferral of prosecution in return for observance with strict terms and conditions which bind the corporation to give full cooperation with an investigation, admit agreed facts, implement an internal compliance program, and pay a fine or penalty (Arlen, 2019; Lewis, 2018). Moreover, recent evidence suggests that DPA acts as a deterrent because prosecutors are allowed to pursue remedies beyond what would be obtained at a corporate trial (Rorie, 2020; and Arlen, 2019). The implementation of DPAs has an overarching mission for the corporation to accept responsibility for its actions, engage in behavioural remediation of damage and reduce the probability

of committing future offences (Luth, 2021). A number of studies have found that while prosecutors can tailor punishment and remediation measures more accurately, the corporation can avoid the collateral damage of a conviction (Luth, 2021; Mckee, 2018).

Parker & Dodge (2022) further stated that DPAs have characteristics that are exclusive to their jurisdiction. Nevertheless, they share common fundamental features. In corporate context, the DPA is broadly used to resolve allegations of wrongdoing to avoid corresponding damage arising from the corporation pleading guilty to a crime. The corporation in question must agree to certain conditions, including developing or enhancing a corporate compliance program. In some instances, an independent monitor is appointed by regulators to ensure that the corporation complies with the agreed terms. The conclusion of the DPA relies on whether the regulators, often judges, are convinced that the terms are fair, reasonable, and proportionate and that the DPA is in the interests of justice (Parker & Dodge, 2022). Luth (2021) posited that DPA has proven to be capable of producing successful results, taking into consideration that corporations prefer to be its signatory rather than face charges in open courts.

### **3.0 Research Methodology**

#### *3.1 Research Approach*

This study adopted a qualitative method to achieve the objectives and was conducted using doctrinal legal research. The method was adopted due to the need to assess the issues in the legal framework regulating corporate environmental crime cases in Malaysia and to benefit from the fundamental principles, characteristics, and existing implementation of DPA, which other methods do not provide. This method is vital to identify the anomaly and loophole in the existing legal framework. By employing this method, consequently, three issues were identified in the selected corporate environmental crime cases in Malaysia: the minimality of statutory punishment, the length of the prosecution process, and the uncertain outcome of the prosecution. This method is also significant in evaluating whether DPA is an appropriate alternative to deter corporate environmental crime in Malaysia.

#### *3.2 Research Design*

The study was conducted using a historical and exploratory approach which is crucial to untangle legal problems rooted in the past. The historical approach was used to determine the origin, the underlying principles, and the factors that triggered the initiation of DPA in another country. It allowed the discovery of the fact that criminal law was deemed ineffective to regulate crime, hence the adoption of DPA for a better regulation. Meanwhile, due to the fact that the working of DPA was never defined in Malaysia, the researchers employed exploratory approach to extract information pertaining to DPA from another country, and to determine if it would be suitable as an alternative tool to deter corporate environmental crime in Malaysia.

#### *3.3 Research Process*

In the preliminary stage, literature reviews were conducted through the collection of secondary data in examining the issues in the existing legal framework concerning corporate environmental crime in Malaysia and in exploring the suitability of DPA as an alternative tool to deter corporate environmental crime in Malaysia. The researchers collected secondary data sources in various forms of written laws, reported cases, and decided cases, as well as textbooks and academic journals.

The data collection in this research was library-based and also derived from online sources. The data was analysed using content analysis which employs an analytical and critical approach. The data were then scrutinised for the contents relating to corporate environmental crime, corporate environmental crime prosecution in Malaysia, and DPA. It was through the analysis of the contents that the researchers discovered why DPA was employed in a country, and whether the regime was suitable for Malaysian legal climate.

### **4.0 Findings**

#### *4.1 Issues with the existing legal framework*

The first objective is to determine the issues in the existing legal framework concerning selected corporate environmental crime cases in Malaysia. In evidencing the issues, an assessment was conducted on corporate environmental cases that have occurred in Malaysia. Three issues in the existing legal framework were identified. Firstly, the minimality of statutory punishment in comparison with the actual damages inflicted by corporations. Secondly, the length of the prosecution process. Thirdly, the uncertain outcome of the prosecution can discriminate against the victims of corporate crime.

#### *4.2 The role of DPA in solving these issues*

The second objective of this study is to explore the suitability of DPA as an alternative tool to deter corporate environmental crime in Malaysia. The findings show that financial costs of having to go through long periods of investigation, arrest, charge, litigation up until the final judgment could be astronomical. Through DPA, the prosecutors and the corporations were able to save both time and cost which would otherwise be incurred in the traditional legal process. Apart from avoiding the ignominy of prosecution, corporations would be bound to pay a compensative fine when they become a signatory of DPA.

Table 1. Selected Corporate Environmental Cases in Malaysia

Corporation	Section of the Offence	Maximum Punishment under the Act	Date of Offence	Date of Judgment	Length from the Date of Offence until the Date of Judgment	Punishment Imposed by the Court
P Tech Resources Sdn Bhd	Section 34B(1)(a) of the Environment Quality Act 1974 and rule 3 (1) of the Environmental Quality Regulations (Scheduled Wastes) 2005	Fine up to RM500,000.00 or imprisonment for a term not exceeding 5 years	12 March 2019	The trial is still ongoing.	As at 11 November 2022: 3 years and 7 months	Potential combined fines amounting to RM600,000.00
Kota Kemayan Sdn Bhd	Section 34A(7) of the Environmental Quality Act 1974	Fine up to RM100,000.00 or imprisonment for a term not exceeding 5 years	27 March 2019	25 April 2022	3 years and 1 month	Fine of RM23,000.00
S.P Mega Sdn Bhd	Section 34A(6) of the Environmental Quality Act 1974	Fine up to RM100,000.00 or imprisonment for a term not exceeding 5 years	20 June 2017	25 November 2021	4 years and 5 months	Fine of RM35,000.00
Malaysian Resources Corporation Sdn Bhd	Section 34A(7) of the Environmental Quality Act 1974	Fine up to RM100,000.00 or imprisonment for a term not exceeding 5 years	7 March 2017	16 July 2021	4 years and 4 months	Fine of RM40,000.00
Freestyle Holidays Sdn Bhd	Section 22(1) of the Environmental Quality Act 1974	Fine of RM100,000.00 or imprisonment for a term not exceeding 5 years	7 March 2012	23 February 2018	5 years and 11 months	Fine of RM2,000.00 and in default, 5 months of imprisonment
Sri Ulu Langat Palm Oil Mill Sdn Bhd	Section 16(1) of the Environmental Quality Act 1974	Fine of RM25,000.00 or imprisonment for a term not exceeding 2 years	10 March 2016	14 March 2018	2 years	Fine of RM15,000.00 and in default, 5 months of imprisonment
Lg Recycle Sdn Bhd	Section 22(1) of the Environmental Quality Act 1974	Fine of RM100,000.00 or imprisonment for a term not exceeding 5 years	30 June 2011	13 April 2017	5 years and 9 months	Fine of RM2,100.00
TSH Plantation Management Sdn Bhd	Section 16(1) of the Environmental Quality Act 1974	Fine of RM25,000.00 or imprisonment for a term not exceeding 2 years	19 February 2014	14 March 2017	3 years	Fine of RM15,000.00 and in default, 15 months of imprisonment

Source: List of Court Cases, Department of Environment, Ministry of Environment & Water

## 5.0 Discussion

Table 1 shows the assessment of the selected corporate environmental cases in Malaysia. Based on Table 1, it can be concluded that the prosecution process for corporate environmental cases is lengthy. The average time required to sentence a corporation is at least three years. Cases involving Freestyle Holidays Sdn Bhd, Lg Recycle Sdn Bhd which spent more than five years in court were punished with extremely minimal fines as opposed to the maximum penalty prescribed by the laws. Additionally, cases involving Kota Kemayan Sdn Bhd, S.P Mega Sdn Bhd, and Malaysian Resources Corporation Sdn Bhd spent up to four years in court and ended up being fined for less than half the amounts of the maximum monetary punishment under the laws. Taken together, it shows that while the prosecution in its original nature is lengthy and the prescribed statutory punishments, penalties, or fines for corporate crime is minimal, the outcome of prosecution could be minimal and discriminative towards the victims of the crime.

In the case of P Tech Resources Sdn Bhd which polluted Sungai Kim Kim in Johor Bahru, not only has it been lengthy, but the crime was repeated in 2021 (Devi, 2021). Although it is uncertain if the same corporation committed the repetition, it shows that the existing legal framework fails to act as a deterrent for corporate environmental crime in Malaysia. The then Energy, Technology, Science, Climate Change, and Environment Minister stated that the total cost of operation would be more than RM10 million; and the pollution had caused the hospitalisation of 207 victims and the closing of 111 schools (MalaysiaKini, 2019).

However, under the Environmental Quality Act 1974 (EQA), the offence of illegal chemical dumping is prohibited and punishable under Section 34B of EQA, which carries a fine of up to RM500,000.00 and imprisonment for a term not exceeding five years. Additionally, any attempt to commit the offence under Section 34B of EQA is also punishable under Section 42 of EQA, which provides that any attempt to commit an offence is punishable with the punishment provided for such an offence. The quantum of punishment imposable to the directors upon conviction demonstrates that the damages suffered by the society, the country, and nature due to the pollution caused by the chemical dumping is relatively too large and is irremediable by such inadequate punishment provided under the law.

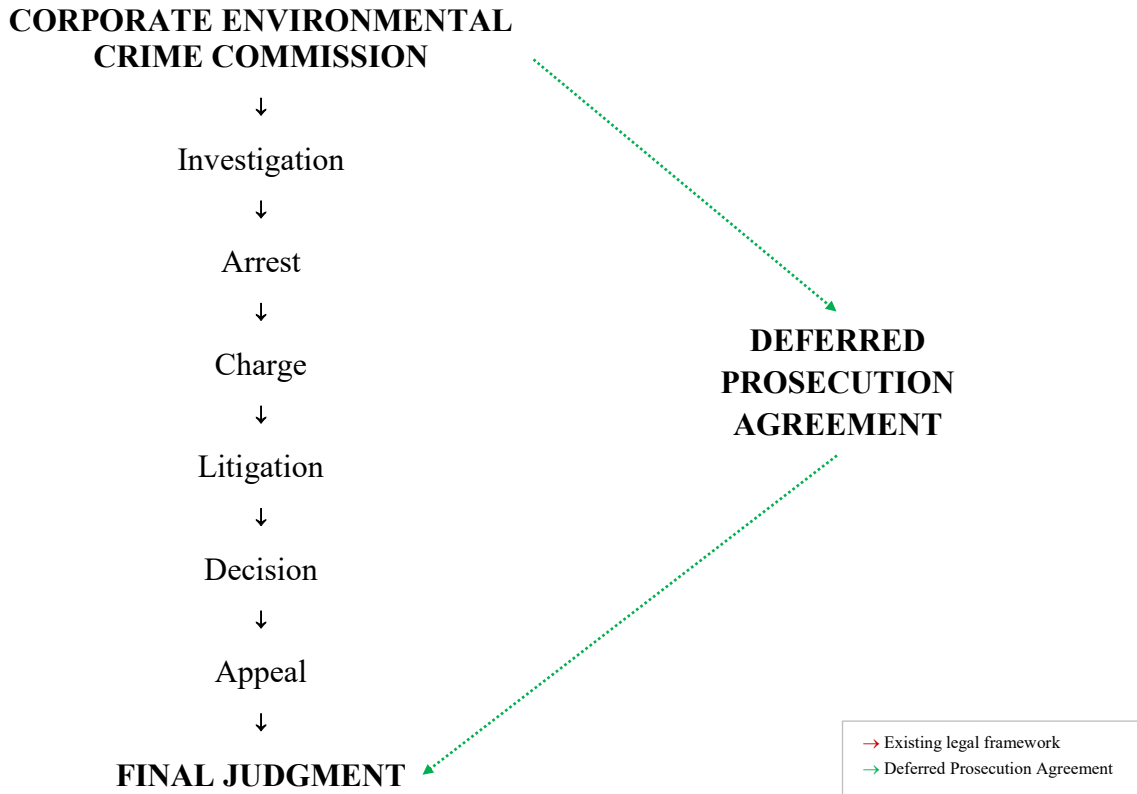


Fig. 1: An illustration of how corporate environmental crime is treated with complexity by the existing legal framework as compared to DPA before reaching a final judgment

Figure 1 shows how corporate environmental crime is treated with complexity by the existing legal framework as compared to DPA before reaching a final judgment. From the date of commission of a corporate environmental crime, parties might have to undergo investigation, arrest, charge, litigation, decision, appeal, and finally, the final judgment. If parties become signatories of DPA, the complexity, length, and magnanimous cost can be avoided. The findings indicate that the implementation of DPA is suitable to overcome the limitations in the existing legal framework; and deter corporate environmental crime in Malaysia. As such, it is clear that the implementation of DPA may function effectively in trimming the staggering numbers of corporate environmental crime in Malaysia.

### 6.0 Conclusion & Recommendations

The major conclusion of this study is that the rise of corporate environmental crime in Malaysia is contributed by the weakness of the existing legal framework. The identified limitations of the existing legal framework are the minimality of statutory punishment in comparison with the actual damages inflicted by corporations, the length of the prosecution process, and the uncertain outcome of the prosecution that may discriminate against the victims of corporate crime.

It can also be concluded that the DPA regime has its own features and characteristics that can overcome the limitations of the existing legal framework. Apart from saving time and cost, it was proven that DPA helps to remedy damages including monetary losses inflicted by corporations; and the outcome of DPA would be more reasonable to the victims of corporate environmental crime in Malaysia. The selected corporate environmental cases in Table 1 demonstrates the missed opportunities to utilise DPA in Malaysia. Hence, this

study recommends that the legal framework be reformed through the employment of a more comprehensive legal framework, such as DPA, to support the existing laws.

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## Paper Contribution to Related Field of Study

This study shows that: the existing legal framework governing corporate environmental crime is burdened with the issues highlighted above, and the implementation of DPA as an alternative tool may help in deterring corporate environmental crime in Malaysia. It is hoped that this study will also contribute to improvement of the law and enforcement of corporate environmental crime in Malaysia so that its impact towards individuals, the society, the economy, and the country can be minimised.

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Anida Mahmood<sup>1</sup>, H. Syafriadi<sup>2</sup>**

<sup>1</sup> Faculty of Law, Universiti Teknologi MARA, 40450 Shah Alam, Selangor, Malaysia 2 Fakultas Hukum, Universitas Islam Riau, Jl. Kaharuddin Nasution, 113 Pekanbaru Riau 28284, Indonesia

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Anida Mahmood 1, H. Syafriadi 2**

1 Faculty of Law, Universiti Teknologi MARA, 40450 Shah Alam, Selangor, Malaysia 2 Fakultas Hukum, Universitas Islam Riau, Jl. Kaharuddin Nasution, 113 Pekanbaru Riau 28284, Indonesia

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