The Assessment of the ASEAN Agreement on Transboundary Haze Pollution and the Dispute Settlement Mechanisms on Liability Claims

Samanan Kittijarot

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Abstracts

The objective of this article is to examine the effectiveness of the ASEAN Agreement on Transboundary Haze Pollution (ATHP) and the Dispute Settlement Mechanisms on Liability Claims. In Southeast Asia, transboundary haze pollution, particularly from Indonesia's forest fires created massive transboundary haze pollution and had a devastating effect on biodiversity in the world. ASEAN has initiated several relevant plans to cope with the transboundary environmental crisis. However, the "ASEAN Ways" which referred to a regional style of engagement, dealing on a "consultation" and "consensus" basis, has causing the ATHP to be ineffective. Furthermore, the non-intervention policy of ASEAN member, the domestic politics, the patronage networks and corruption within Indonesia, have caused the ATHP to be ineffectiveness mechanism on its own for dealing with transboundary haze pollution. In this regard, the possible solutions under the ASEAN Charter will be examined.

Keywords: transboundary haze, the ASEAN agreement on transboundary haze pollution

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**LL.M., University of Canterbury, New Zealand.

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1. Introduction

In Southeast Asia, transboundary haze pollution occurs from Indonesia, where most fires and haze problems occur intentionally by human cause. Indonesian farmers have been using fire to clear land for thousands of years.[1] Former Indonesian Forestry Minister Sudjarwo even described it as, "land clearing for free".[2] The expansion of oil palm plantations, along with pulp and paper industries, and industrial timber plantations,[3] are an additional powerful cause contributing to the start of many fires.[4] In addition, in the mid-1990s, former President Suharto's land use policies to turn the million-hectares of peat forest in Kalimantan into rice crop plantations; the Grand Million Hectare Peatland Project have greatly contributed to the 1997-1998 fires disaster.[5] The 1997-1998 Indonesia's forest fires produced huge amounts of smoke spreading thick clouds of haze to neighbouring countries in the Southeast Asia region, affecting more than 70 million peoples.[6] The unofficial estimate was that by mid-1998 the smoke had reached beyond 5 million hectares.[7] Fires devastated widespread forest areas, destroying

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[1]Charles Victor and Barber James Schweithelm, **Trial by Fire: Forest Fires and Forestry Policy in Indonesia's era of Crisis and Reform** (Washington, DC: World Resources Institute Report, 2000), pp. 5 and 7.

[2]Ibid., at 12.

[3]Alan Khee-Jin Tan, "The ASEAN Agreement on Transboundary Haze Pollution: Prospects for Compliance and Effectiveness in Post-Suharto Indonesia," **New York University Environmental Law Journal** 13, 3 (2005): 653-654.

[4]Supra note 1, at 32; Helena M. Varkkey, "Addressing Transboundary Haze Through Asean: Singapore's Normative Constraints," **Journal of International Studies** 7 (2011): 83-101, at 86.

[5]Supra note 3, at footnote 26; S. Tahir Qadri, **Fire, Smoke, and Haze: The ASEAN Response Strategy**, 1st Ed., (Manila: Asia Development Bank, 2001), p. 48.

[6]Supra note 1, at 8.

[7]Mongabay, **The Asian Forest Fires of 1997-1998** [Online], available URL: https:// rainforests.mongabay.com/08indo_fires.htm, 2016 (March, 7).

nearly 10 million hectares.[8] Air quality degenerated over the affected countries including Malaysia, Singapore, Brunei and Thailand.[9] In Singapore, PSI levels reached 226 – a very unhealthy level.[10] In Malaysia. The PSI levels reached over 800, which was considered as a significant harm level in Kuching. The carbon emission released into the atmosphere was estimated at about 206.6 million tons, exceeding emissions from the whole of North America over the same period. In 2015, almost 100,000 active fires were detected on the Global Fire Emissions Database,[11] releasing approximately 1.62 billion tonnes of CO_2 into the atmosphere.[12] Indonesia, hence become the fourth largest emitter of CO_2 in the world in a period of six weeks in 2015.[13] A recent report stated that the daily emissions of CO_2 from forest fires exceeded the average daily emissions from all U.S. economic activity.[14]

To cope with the transboundary environmental crisis, the ASEAN Agreement on Transboundary Haze Pollution (ATHP) was adopted and signed by all 10 ASEAN member states in 2002. Indonesia, as the major contributor to the problem, was the last of the ASEAN countries to ratify the agreement on 14 October 2014, a delay of 12 years. Although, ratification has taken place, massive transboundary haze pollution has recurred almost annually, up to 2015, and this shows that the ATHP is an ineffective agreement in addressing the transboundary haze problem. This essay will examine the effectiveness of the ATHP and identify potential solution. I argue

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[8]Supra note 3, at 656-657.

[9]Supra note 1, at 8.

[10]Supra note 4, at 86.

[11]Brittany Patterson, **Hellish Fires in Indonesia Spread Health, Climate Problems** [Online], available URL: https://www.scientificamerican.com/article/hellish-fires-in-indonesia-spread-health-climate-problems, 2015 (October, 22).

[12]Neo Chai Chin, **Singapore effort to fight haze "almost futile"** [Online], available URL: https://www.todayonline.com/singapore/singapores-fire-fighting-team-went-indonesia-too-late-masagos, 2015 (October, 30).

[13]Ibid.

[14]Nancy Harris, et. al., **Indonesia's Fire Outbreaks Producing More Daily Emissions than Entire US Economy** [Online], available URL: http://www.wri.org/blog/2015/10/Indonesia%E2%80%99s-fire-outbreaks-producing-more-daily-emissions-entire-us-economy, 2015 (October, 16); see also, Supra note 13.

that ATHP has several major weaknesses. One of them is the fact that the ATHP lacks an effective mechanism for settling formal disputes as the ATHP was constructed under the ASEAN Way, causing the ATHP to be ineffective. Furthermore, ASEAN member states are followers of non-intervention, the major principle of the ASEAN Way, which caused the ATHP to be drafted without contributing to genuine cooperation among the member states.

In understanding the ATHP agreement, the "ASEAN Way" will be examined in Part Two. Part Three will analyse the operations of the ATHP regime, its organisation, scope and potential for prevention and remediation of the transboundary haze problem including analysis of its effectiveness from the perspective of international environmental principles. Part Four, the relevant problems which obstruct the region from successfully solving the problem of transboundary haze pollution will be identified. In this part, I argue that Indonesia's failure to cooperate within the country in preventing and controlling the haze can result in the ineffectiveness of the ATHP. Next, the transboundary haze problem, which caused Indonesia to breach an international law of state responsibility, will be examined. The breach of international law leads to a possible solution in Part Five, in which the dispute can be solved under the ASEAN Charter.

Part Five, I argue that the affected states can accuse Indonesia of non-compliance with the ASEAN Charter, of breaching or failure to uphold international law, and they should take their dispute to the ASEAN Summit. Then comes the conclusions and recommendations for presenting the issue to the ASEAN Summit in order to settle the dispute in Part Six.

2. The ASEAN Norm and the "ASEAN Way"

The ASEAN Way is a regional cooperation known as "a code of conduct for inter-state behaviour",[15] as well as a set of procedural norms which embody the spirit of ASEAN.[16] The principles of non-intervention and national sovereignty are the most prominent characteristic of the ASEAN Way, underpinning the relations of ASEAN member states with one another.[17] These norms are embedded in the 1967 Bangkok Declaration, which calls upon ASEAN members to ensure "their stability and security from external interference in any form or manifestation."[18] The ASEAN Way is legally enshrined in the Treaty of Amity and Cooperation 1976 (TAC), and is aimed at addressing intra-ASEAN disputes peacefully and encouraging mutual cooperation. The ASEAN Way is also reaffirmed in the ASEAN Charter, Articles 2 (a) and 2 (e). It could be said that ASEAN will never compromise on issues of national sovereignty and territorial integrity.[19]

2.1 The Acknowledgement of Non-intervention and National Sovereignty Principles

ASEAN's institutions are developed with the concept of uncompromised state sovereignty.[20] This leads to institution building with no decision making authority, nor any enforcement mechanism.[21] Additionally, by virtue of non-

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[15]Amitav Acharya, "Ideas, identity, and institution-building: from the "ASEAN way" to the Asia-Pacific way'?," **The Pacific Review** 10, 3 (1997): 319-346, at 328.

[16]Gillian Goh, "The "ASEAN Way": Non-Intervention and ASEAN's Role in Conflict Management," **Stanford Journal of East Asian** 3, 1 (2003): 113-118, at 114.

[17]Helena M. Varkkey, "Indonesia Perspectives on Managing the ASEAN Haze" **Sarjana** 24, 1 (2009) 83-101, at 83-85.

[18]The Bangkok Declaration, 8 August 1967, the Preamble.

[19]Amitav Acharya, **Corporation Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order**, 3rd ed., (New York: Routledge, 2014), p. 67.

[20]Ibid., at 330.

[21]Ibid.

intervention and national sovereignty, member states can determine the scope and content of a negotiation in order to ensure their national interest.[22] This allows Indonesia to avoid tackling politically sensitive issues, particularly fires and haze problems, at both regional and international level.[23] For instance, Indonesia claimed its sovereignty and the ASEAN Way avoided responding to these issues at the United Nations General Assembly in 2006.[24] Among the ASEAN norms, non-intervention is central to interstate cooperation, with its belief that outside intervention has contributed to internal conflicts.[25] Regarding haze issues, the norms of non-intervention and sovereignty discourage affected neighbouring states from criticizing Indonesia, of its transboundary environmental problems.[26]

The ASEAN Way encourages its members to behave in a manner that does not undermine solidarity,[27] including protection of the "credibility and reputation" of its neighbours when dealing with other regions.[28] Varkkey points out that Indonesia, in response to the ATHP, requested that the position of head of the Panel of Experts, which was established to support the implementation of the ASEAN Plan of Action on Transboundary Haze Pollution, should be reserved for an Indonesian only.[29] As a result, Indonesia could take control of the POE and make sure of non-intervention related to fires and haze issues over their territory, which Indonesia treats as internal issues. It is also arguable that the ASEAN Way focuses on how the member states should behave and socialize with one another rather than

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[22]Helena M. Varkkey, "Regional cooperation, Patronage and the ASEAN Agreement on Transboundary Haze Pollution," **International Environmental Agreements: Politics, Law and Economics** 14, 1 (2014): 65-81, at 68.

[23]Helena M. Varkkey, Ibid.

[24]Ibid., at 95.

[25]Paruedee Nguitragool, **Environment Cooperation in Southeast Asia ASEAN's Regime for Transboundary Haze Pollution** (Abingdon, Oxon.: Routledge, 2011), p. 32.

[26]Supra note 24, at 88.

[27]Supra note 17, at 331-332.

[28]Supra note 4, at 91.

[29]Supra note 24, at 71.

focusing on conflict resolution.[30] This can be seen from the case of Singapore, who once reminded its angry public not to criticised Indonesia because the ASEAN Way of non-intervention in the internal affairs of other states, and in particular the sovereign right of Indonesia, was highly regarded.[31] The ASEAN Way has come under wide criticism for its ineffective cooperation and failure in addressing ASEAN's haze problems. Hence, neighbouring states have had to seek their own measures to deal with this problem. For instance, in the case of Singapore, the measures included bilateral projects with the Indonesian government to combat the fires— the Singapore-Jambi master plan –as well as the establishment of the Transboundary Haze Pollution Act in 2014 to impose extra-territorial liability on Singapore companies causing transboundary haze pollution.[32]

2.2 The Dispute Settlement Mechanism based on the Process of Consultation and Consensus

The ASEAN way is also referred to as a dispute settlement mechanism based on the process of consultation and consensus through regional reliance.[33] This is one of the fundamental principles outlined in Article 2 (d) of the TAC, which calls for settlement of disputes by peaceful means. The ASEAN Way is characterised by consultation and consensus building, developed for interaction between its members to ensure peace and stability in the region.[34]

[30]Supra note 18, at 114.

[31]Supra note 4, at 88-89.

[32]Government of Singapore, Government Gazette Acts Supplement, No. 24 of 2014.

[33]Rodolfo C. Severino, **ASEAN Today and Tomorrow: Selected speeches of Rodolfo C. Severino, Jr.** (Jakarta: ASEAN Secretariat, 2002), p. 51.

[34]Ibid.

3. The ASEAN Agreement on Transboundary Haze Pollution (ATHP)

3.1 Assessment of the ATHP: Institutions, Principles and Procedures

3.1.1 ATHP Institutions

1) The ASEAN Coordinating Centre for Transboundary Haze Pollution Control (ASEAN Centre)

Article 5 (2) states that "[t]he ASEAN Centre shall work on the basis that the national authority will act first to put out the fires. When the national authority declares an emergency situation, it may make a request to the ASEAN Centre to provide assistance". This provision reaffirms the principle of state sovereignty which cannot be compromised. Likewise, it limits the authority of the ASEAN Centre, given that the ASEAN Centre has no proactive power to tackle the problem, rather working reactively with a broad description as directed by the Parties.[35] Accordingly, Varkkey suggests that it was agreed by all parties for Indonesia to take control of the ASEAN Centre, including a selection of specialists working in the ASEAN Centre.[36] This all reflects the fact that state sovereignty has priority over the haze mitigation measures.

2) The Secretariat

Under the ATHP, State parties will undertake their relevant obligations at the national level and contribute in accordance with their capabilities.[37] There are no established provisions for the secretariat to proactively monitor and investigate the compliance by states in both procedural and substantive legislative enforcement. Nor are there any provisions to evaluate whether state parties achieve targets in preventing and mitigating haze problems.

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[35] Article 5 (4).

[36] Helena M. Varkkey, op.cit., 24, at 77.

[37] Article 3 (2); see also Koh Kheng Lian and Nicholas A. Robinson, "Regional Environmental Governance: Examining the Association of Southeast Asian Nations (ASEAN) Model," **Global Environmental Governance** (2002): 4-5.

Additionally, there are no enforcement powers to receive complaints nor to adopt a decision on the non-compliance of parties.

3) The ASEAN Transboundary Haze Pollution Control Fund (The Haze Fund)

Article 20 (1), (2), (3) provided for the establishment of the Haze Fund, to be administered by the ASEAN Secretariat under the guidance of the Conference of member states. It identifies possible financial sources and voluntary contributions from its member states or from external international organisations.[38] In 2007, the member states each agreed to contribute an amount of USD 50,000 to the fund.[39] According to Tan, the amount of the contribution is just symbolic, as the major potential donors and affected states such as Singapore, Malaysia and Brunei will not be willing to contribute large amounts of money to combat transboundary haze if it is foreseen to be an ineffective measure.[40] As a result, Jerger indicates that the amount of the money contributed to the fund is problematic because the costs of preventing and mitigating the haze problem out weighs the money contributed.[41] Nurhidayah, Alam and Lipman point out that from Indonesia's perspective, the price of ratification and implementation outweighed the benefit gained from accessing the haze fund.[42] Thus, it could be argued that the Haze Fund would not have been an incentive to motivate Indonesia to ratify the agreement.

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[38]Article 20 (5), (6).

[39]Paruedee Nguitragool, op.cit., 27, at 125; Alan Khee-Jin Tan, op.cit., 3, at 668.

[40]Ibid.

[41]David B. Jerger, Jr. "Indonesia's role in realising the goals of ASEAN Agreement on Transboundary Haze Pollution," **Sustainable Development Law & Policy** 14, 1 (2014): 42.

[42]Nurhidayah, L., Alam, S. and Lipman, Z., "The influence of international law upon ASEAN approaches in addressing transboundary haze pollution in Southeast Asia," **Contemporary Southeast Asia** 37, 2 (2015): 191.

3.1.2 The Principles of International Law in the ATHP

1) The Sovereign Right and the State Responsibility Principle

Article 3 (1) of the ATHP refers to Article 2 of the United Nations Charter and the principles of international law regarding sovereignty and the state responsibility for transboundary environmental harm. It states that:

> The parties have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment and harm to human health of other States.

According to the statement above, the responsibility of the state to ensure that activities within its jurisdiction do not cause damage to the areas beyond the limits of its national jurisdiction is part of the principle of state responsibility. The state responsibility principle for transboundary environmental harm or the principle of *sic uteretuoalienum non laedas* has emerged from the judgment of the *Trail Smelter* Arbitration in 1941.[43] The arbitration award reaffirms the sovereign right of a State to conduct activities within its jurisdiction.[44] However, two obligations must be taken into account. These are “the obligation not to cause environmental harm in other states” or “the no harm principle”, and “the obligation to pay compensation for the damage caused”.[45] Under international law, compensation is also utilised to include non-monetary reparation such as restitution

[43]A. K. J. Tan, “Forest fires of Indonesia: State responsibility and international liability,” **Comparative Law Quarterly** 48, 4 (1999): 834.

[44]Ibid., at 834.

[45]Rebecca M. Bratspies and Russel A. Miller Transboundary Harm in International Law Lessons from the Trail Smelter Arbitration cited by Nurhidayah, L., Alam, S. &Lipman, Z., op.cit., 46, at 183,186.

and satisfaction, either singly or in combination with one another.[46] It is traditionally accepted that territorial sovereignty grants permission to a state to possess and exploit natural resources within its territory.[47] On the other hand, it also obliges the source state not to cause any harm to territories beyond the jurisdiction of any state as well as to pay compensation for the damage caused.[48] This principle has become part of customary law, which plays a significant role in international environmental agreements as well as in the ATHP, as these agreements do not provide practical operation, nor "sharply defined standards of conduct".[49] This feature was reaffirmed in Principle 21 of the Declaration adopted by the United Nations Conference on the Human Environment in Stockholm and Principle 2 of the Rio Declaration.

According to Nurhidayah, Alam and Lipman,[50] the state responsibility principle can "ensure that states do not cause environmental damage to other countries and pay compensation for any damage caused." In this regard, the state responsibility principle can impact state behaviour because it has preventative and deterrent measures.[51] However, the former principle has been explicitly adopted in the ATHP[52], while the latter principle was not adopted. States are reluctant to claim for compensation and prefer instead to settle disputes by consultation and negotiation under the ASEAN Way.[53]

It should be noted that while Indonesia adhere to "the sovereign right", to exploit their natural resources, Indonesia is unable to control the damage within its jurisdiction. Indonesia has failed to fulfil two obligations, namely the obligation not to cause environmental harm and the obligation to pay

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[46]International Law Commission (ILC)'s 1996 Draft Rules on State Responsibility, article 34.

[47]Phoebe N. Okowa, **State Responsibility for Transboundary Air Pollution in International Law** (New York: Oxford University Press, 2000), p. 65.

[48]Phoebe N. Okowa, Ibid.

[49]Ibid, at 60.

[50]Nurhidayah, L., Alam, S. &Lipman, Z., op.cit., 46, at 186.

[51]Ibid.

[52]Article 3 (1).

[53]Article 27.

compensation for the damage caused. Indonesia has breached its state responsibility by failing to fulfil two obligations under the state responsibility principle. In this regard, the "regional attitude of deference towards the internal affairs of one's neighbours", or the ASEAN Way of non-intervention, encourages Indonesia to breach its state responsibility. This is due to the fact that the affected states have never claimed compensation for the damages caused by Indonesia. Lian also argues that the implementation of the state responsibility principle is questionable because state sovereignty is firmly embedded in the ASEAN Charter,[54] and ASEAN's agreements, as well as in the ATHP. It could be said that in ASEAN, the sovereign right contradicts the state responsibility principle. Consequently, in Article 3(1), sovereign right is stated before the state responsibility principle in the same article. It could be argued that in ASEAN, sovereign right is interpreted as prevailing over the state responsibility principle. Moreover, states can exploit their own resources as long as they can control harm within their territory. These all reflect the fact that ASEAN has accepted the unlimited permanent sovereign rights over their natural resources.

This concept is opposed to the principle of sustainable development as defined by the Brundtland Commission, "[D]evelopment that meets the needs of the present without compromising the ability of future generations to meet their own needs. The reason why unlimited permanent sovereign rights over their natural resources contravene the principle of sustainable development, is pointed out by Horbach: "Conduct that was not prohibited under international law at the time of initiation can now be characterised as contravening a number of

[54]Koh Kheng-Lian, "ASEAN Environmental Protection in Natural Resources and Sustainable Development: Convergence versus Divergence?," **Macquarie Journal of International and Comparative Environmental Law** 4 (2007): 46 cited by Nurhidayah, L., Alam, S. & Lipman, Z., op.cit., 48, at 183.

newly and widely recognised principles and norms of international environmental law".[55]

2) The Principle of Cooperation

Article 3 (2) of the Agreement states that:

> The Parties shall, in the spirit of solidarity and partnership and in accordance with their respective needs, capabilities and situations, strengthen co-operation and co-ordination to prevent and monitor transboundary haze pollution as a result of land and/or forest fires which should be mitigated.

This provision authorises member states to interpret the obligations they are taking according to "their respective needs". In this regard, it can be argued that the ATHP expressly allows states to prioritise their national interests including their domestic affairs over their duty to cooperate with one another in order to combat the fire and haze problem. Moreover, it provides that states shall strengthen their cooperation in accordance with their "capabilities" and "situations". It is also given that the parties have their high discretion to cooperate according to the limits of their capabilities; also the level of cooperation can vary depending on differing internal situations. Even several environmental treaties at the international level regulate the state's duties by relying upon socio-economic capabilities.[56]

Additionally, the parties can either "jointly or individually" develop strategies and response plans to control risks to the environment,[57] as well as "individually or jointly" support scientific and technical research programmes "whenever possible".[58] It could be argued that these provisions discourage the power of cooperation, particularly given the excuse to the developing countries to

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[55]Nathalie L. J. T. Horbach and Pieter H. F. Bekker, "State Responsibility for Injurious Transboundary Activity in Retrospect," **Netherlands International Law Review** 50, 3 (2003): 328.

[56]Phoebe N. Okowa, op.cit., 51, at 66.

[57]Article 10 (1).

[58]Article 17.

refuse cooperation in various situations which they deem unilaterally appropriate. As in the case of Indonesian parliamentarians used to argue that to ratify the ATHP would place a heavy burden on Indonesia as the nation did not have enough funds to support the monitoring systems.[59] As a result, the ratification was withheld for twelve years. Moreover, Okowa points out that ASEAN should have been cooperating and exchanging scientific and technical information at the global level because ASEAN's example "should have been taken from the experience of European states, since it is in these regions that the problem of transboundary air pollution is most acute".[60]

According to Article 12, Nguitragool argues that it has created a formal mechanism which encouraged closer cooperation.[61] This includes developing a resource inventory which allows information sharing in terms of "existing resources for collective action such as airplanes and heavy machines", which did not happen before.[62] On the other hand, Article 12 (3) provides that, if fires arise within its territory and the receiving party needs assistance, assistance may be requested from other states directly or through the ASEAN Centre. Coordination among its members through the ASEAN Centre to put out the fires depends upon the discretion of the receiving party.[63] Also assistance can only be employed upon request, with the consent and under the terms of the receiving party.[64] Only the receiving party may initiate the entry of fire personnel from an assisting party into its territory. Again, the receiving party alone must decide when the fire can no longer be extinguished by national authority and assistance from other parties is needed.[65] In such cases, they can declare an emergency situation. Since there are no clear standards of the

[59]Helena M. Varkkey, op.cit., 24, at 76.

[60]Phoebe N. Okowa, op.cit., 51, at 148.

[61]Paruedee Nguitragool, op.cit., 27, at 76.

[62]Paruedee Nguitragool, Ibid.

[63]Article 5 (2), 12 (2).

[64]Article 12 (2).

[65]Article 5 (2).

minimum level of pollution to declare an emergency, it could lead to inconsistent discretion in determining the emergency situation depending upon domestic political will. As a result, a large measure of discretion of the receiving party has contributed to the ineffectiveness of the mitigation measures in dealing with the haze problems.

Indonesia as a receiving party has refused assistance in relation to the transboundary haze mitigation several times in the past. This includes the delay of entry of the Panel of Experts (POE) into the country in response to the haze problem.[66] Recently, in 2015, Indonesia rejected the offer of assistance from Singapore in suppressing the forest fires before its approval of assistance at later stage. According to Singapore's Minister for the Environment and Water Resources, Masagos Zulkifli, the approval was considered "almost a futile exercise". The haze crisis that year reflected the fact that the provisions which allow a source state to initiate the entry of fire personnel from an assisting party into its territory, without the explicit standard practice on how the source state should declare the emergency situations, can be considered as largely ineffective in preventing and mitigating measures. Moreover, the receiving party can determine the scope and terms of assistance,[67] as well as provide local facilities and service for the effective administration of the assistance "to the extent possible"[68], given that high discretion and inconsistent standards depend upon the internal affairs of the receiving party.

In order to empower the measures to mitigate the fires, emergency declaration standards, including hot spot standards should be explicitly determined. This can also prevent the influence of domestic politics. In particular, in ASEAN haze problem, Indonesia's patronage politics system may obstruct the fires suppression measures. If the emergency declaration standards, as well as the hot spot standards are explicitly determined, when a source state is unable to control the fires and they are beyond permissible thresholds of tolerance, other states

[66]Helena M. Varkkey, op.cit., 24, at 71.

[67]Article 12 (4).

[68]Article 13 (2).

would be legally allowed to assist the source state to suppress the fires without its prior permission.

3) Precautionary Principles

Article 3 (3) of the Agreement states that:

> The parties should take precautionary measures to anticipate, prevent and monitor transboundary haze pollution as a result of land and/or forest fires which should be mitigated, to minimise its adverse effects. Where there are threats of serious or irreversible damage from transboundary haze pollution, even without full scientific certainty measures shall be taken by Parties concerned.

This provision provides for the adoption of the precautionary principle as a voluntary measures. The agreement suggests that parties should take precautionary measures to prevent and monitor transboundary haze pollution, even if the scientific certainty remains unproven. It contains no clear target, nor guideline for parties to be regulated. Tan points out that the use of the word "should" imposes a weaker standard than "shall". Also, it is non-mandatory language which "duly reiterates, as is the management and use of natural resources in an ecologically sound and sustainable manner".[69] Thus, the member states have considerable discretion to determine the appropriate measure.[70] This could lead to inconsistency because the discretion of member states is dictated by domestic political factors, as in the case of Indonesia in particular, as will be discussed in detail in Part Four.

4) Principle of Notification and Information

According to Okowa, in an international environmental treaty, normally the provisions on notification and information will require the source state to give notice to potentially affected states prior to conducting activities that may

[69]Alan Khee-Jin Tan, op.cit., 3, at 661.

[70]Ibid., at 662.

entail considerable risk of pollution.[71] The obligations should include informing the potentially affected states of dangerous activities which may pose a risk to public health, and providing any necessary information relating to the nature of the activity, the risks that might occur, as well as the damage it may cause. But the ATHP provides a different provision for notification and information. Due to Indonesia's domestic political issues, decentralisation of power to regional authorities has weakened the power of its central government. The central government itself is unable to actively control the burning activities occurring at national level, nor at regional level either. It could be argued that this reason has contributed to the ATHP, which was drafted without the above international standards to strengthen it effectiveness.

The obligation to notify and inform is provided in Article 4 (2), which requires the parties that "[w]hen the transboundary haze pollution originates from within their territories, respond promptly to a request for relevant information or consultations sought by a State or States". This is merely a general provision which requires a source state to provide information sought by another state at the time transboundary haze pollution has arisen. It is not wide enough to include information sought by the potentially affected states prior to the occurrence of the haze. Thus, this provision leads to inefficient and ineffective preventive measures. According to Lian and Robinson, ASEAN is "ill equipped" to deal with urgent problems such as fires and haze due to its inappropriate response to the situation.[72] The potentially affected state should be able to access and request any further relevant information prior to the occurrence of transboundary haze, as well as be able to know whether any fire-related risk activities have been initiated in the source state. This will empower the ability of the potentially affected state to collect information on the risks that may occur, and ensure an immediate response to the request of the source state whenever an emergency situation is declared in accordance with Articles 5(2) and 12. This is due to the reason that appropriate

[71]Phoebe N. Okowa, op.cit., 51, at 136.

[72]Koh Kheng Lian and Nicholas A. Robinson, op.cit., at 10.

information and notification could provide early warning and develop related measures to deal with the transboundary pollution problem as an "[e]arly warning is only effective when it leads to early action for prevention."[73]

This provision is consistent with Article 5 which implicitly provides that the ASEAN Centre has no authority to request any fire-related information from the source state. It reflects the prominent characteristic of the ASEAN Way as non-intervention.

5) The Principle of Prevention

Article 3 (2) also provides for a duty to prevent transboundary haze pollution as member states shall strengthen co-operation and coordination to prevent and monitor transboundary haze pollution in accordance with the state's capabilities and situations. Okowa suggests that this provision has implicitly applied state obligations in term of a requirement of due diligence depending on the state's capabilities and situations.[74] He also argues that this standard of due diligence is not enough, as compared to an international performance standard like the Environmental Impact Assessment (EIA).[75]

ASEAN states, in particular Indonesia, are engaged in a political patronage system and in. An EIA public participation process would be unable to hold transparency. In addition, ASEAN states are still far from a response to environmental degradation because they adhere to their absolute sovereign right.[76] As a result, the public participation principle was merely reiterated in Article 3 (5) that member states "should involve, as appropriate, all stakeholders, including local communities, non-governmental organisations, farmers and private enterprises" in order to address

[73]United Nations, **A More Secure World: Our Shared Responsibility, A Report of the High-level Panel on Threats, Challenges and Change** [Online], available URL: www.un.org., 2015 (October, 18).

[74]Phoebe N.Okowa, op.cit., 51, at 80.

[75]Ibid., at 87.

[76]Nathalie L. J. T. Horbach and Pieter H. F. Bekker, op.cit., 59, at 341.

transboundary haze pollution. It was drafted with voluntary language and no explicit guidelinesfor obligation or compliance.

Article 9 of the Agreement states that "[e]ach party shall undertake measures to prevent and control activities related to land and/or forest fires that may lead to transboundary haze pollution". This can be achieved several ways as stated in Article 9 (a)-(g) of the ATHP, including by encouraging its member states to develop and implement legislative and regulatory measures to promote a zero burning policy. This provision merely provides a "procedural performance standard" as a general guide to regulation.[77] According to Nurhidayah, Alam and Lipman, "it does not directly forbid certain conduct",[78] and contains no rules on state liability for damage.[79] Additionally, the important provisions on how to develop preventive measures and a national emergency response are absent.[80] This leaves it to the discretion of member states to overcome their difficulties in undertaking prevention measures. Additionally, Jerger points out that this provision was defined as a "conditional term".[81] Member states are left to take administrative, legislative and relevant measures to implement their own obligations. Although, the Agreement uses the word "shall" without any supervision mechanism nor coercive measure, it is merely non-mandatory language. Thus, it relies heavily on the responsibility of the source state to implement and comply.

Additionally, in undertaking preventive measures, Article 7(1) and (2) provide that member states are required to take their own measures to monitor forest fires and haze pollution by designating their own National Monitoring Centre to undertake monitoring thereof. Despite the haze problem being a common concern in the ASEAN region, there is no provision for the affected state to jointly

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[77]Ebinezer R. Florano, "Assessment of the "Strengths" of the New ASEAN Agreement on Transboundary Haze Pollution," **International Review for Environmental Strategies**, 4 (1), (2003): 139.

[78]Ibid.

[79]Ibid.

[80]Parudee Nguitragool, op.cit., 356–378 cited by Helena M. Varkkey, op.cit., 24, at 70.

[81]David B. Jerger, Jr., op.cit., at 41.

monitor it. By virtue of the non-intervention principle stated in Article 3 (1), member states are free to interpret and apply the obligations they are taking on. Individual monitoring can be a disadvantage because developing countries may lack experts and technologies. In the ASEAN region, Singapore is best equipped with experts and satellite technology as well as monitoring stations,[82] which can effectively mitigate haze. Hence, joint monitoring is more appropriate in mitigating regional haze.

3.1.3 The Procedures of the ATHP

1) Provision for Settlement of Disputes and the Liability Regime

Article 27 of the ATHP states that "[a]ny dispute between Parties as to the interpretation or application of, or compliance with, this Agreement or any protocol thereto, shall be settled amicably by consultation or negotiation". This provision encourages the parties to settle the dispute in an amicable manner. It explicitly adopted the ASEAN Way of dispute resolution which is based on consultation and consensus.

As discussed earlier, consultation and consensus are traditional ways of regional engagement in dispute settlement. It is not a formal dispute settlement mechanisms; rather it is a matter of quiet diplomacy.[83] According to Florano, this agreement was drafted with the intention to "institutionalise the ASEAN Way of intergovernmental cooperation in the ATHP".[84] It can be argued that this dispute settlement mechanism is not conflict resolution, but conflict avoidance.[85] Acharya also points out that avoiding conflict is just stalling to buy time because the conflict may re-emerge again in the future.[86] Despite the legally binding nature of the agreement, ASEAN member states are encouraged to settle disputes by consultation or negotiation rather than through the formal dispute resolution mechanism. Though the ASEAN Way is claimed to have led ASEAN to succeed with

[82]Helena M. Varkkey, op.cit., 24, at 85.

[83]Rodolfo C. Severino, op.cit., 37, at 51.

[84]Ebinezer R. Florano, op.cit., 84, at 142.

[85]Amitav Acharya and Ebooks Corporation, op.cit., 21, at 67.

[86]Ibid.

several multilateral negotiations, it is limited to matters of common interest which are mutually agreed by every member state.[87] Where the dispute involves a matter of national interest, sovereignty and territorial integrity, then it is most likely that no consensus will be reached and the dispute will remain unresolved.[88]

In the case of ASEAN transboundary haze pollution, many Indonesian elite politicians treat their interests in oil palm plantations as national interests. In this respect, Indonesia's compliance will be inconsistent and will rely on political will and "dominant actors".[89]As a result, the dispute over the transboundary haze problem, which a number of the Indonesian elite politicians consider as an issue of national interest, would not be able to be solely resolved by this informal dispute settlement mechanism under the ATHP. The ATHP does not provide for a solution where the consultation process or negotiation fails to resolve the dispute. Also, there is no institution for settlement of disputes under this agreement. Nor has provision for disputes to be taken to the International Court or Arbitration. Thus, the dispute will remain unresolved. In the words of Djiwandono, the problem is 'swept under the carpet'.[90] The absence of an effective dispute settlement mechanism will lead to other related issues including no civil liability or punitive measures, such as sanctions or suspension, which can be adopted under the agreement. As in the case of the ATHP, the agreement cannot regulate issues of responsibility or liability for damage that might arise in the event of non-compliance with its provisions. This is a significant factor resulting in transboundary haze pollution problems remaining unresolved under the ATHP.

[87]Amitav Acharya , op.cit., 17, at 329-331.

[88]Ibid., at 332.

[89]Alan Khee-Jin Tan, op.cit., 3, at 664.

[90]Amitav Acharya and Ebooks Corporation, op.cit., 21, at 67.

3.2 The Absence of Effective Dispute Settlement Mechanism under the ATHP

Despite all member states of ASEAN acceding to the ATHP as a legally binding agreement, they have resisted regional engagement of the ASEAN Way, and refused a formal dispute settlement mechanism both in theory and practice. The ATHP seemingly takes the form of soft law with voluntary principles and noenforcement measures. It seems that the fires and haze situation cannot be resolved solely with the enforcement of this agreement due to the absence of effective dispute settlement mechanisms and coercive measures. Thus, by itself, the ATHP is an ineffective legally binding agreement.

In addition, the procedures for the parties' obligations in monitoring, preventing and mitigating the haze, do not make any difference from the concept of ASEAN Way. Varkkey points out that the effectiveness of the environmental agreement relies heavily on "the style of regional engagement in practice."[91] It could be said that, while ASEAN puts forward the haze combat measures, it encourages its members to combat the haze to the extent that does not contravene the ASEAN Way of the non-intervention principle. National sovereignty remains uncompromised. This leaves the problem to be solved within the competence and responsibility of the source state. For this reason, the ASEAN failure to address the haze problem under this agreement has been forecasted.[92] Furthermore, the absence of effective dispute settlement mechanisms and coercive measures imposes considerable limits on the development of the agreement as it is solely based on the voluntary compliance of states. The ATHP itself is unable to resolve any disputes which may arise. According to Florano, it can only be optimised if agreement can be reached and if all states are committed to full compliance.[93] Similarly, Tan points out, "[a]n international regime can be said to be 'effective' only when the rules which it prescribes are

[91]Helena M. Varkkey, op.cit., 24, at 70.

[92]Lee Leviter, "The ASEAN Charter: ASEAN Failure or Member Failure?," **International Law and Politics** 43 (1) (2010): 166.

[93]Ebinezer R. Florano, op.cit., 84, at 132.

adequately implemented and enforced, eliciting a high degree of compliance by the target actors."[94] In other words, the effectiveness of the ATHP in addressing the fire and haze problems depends largely on the responsibility of the source state, particularly Indonesia, to implement and comply.

The absence of effective dispute settlement mechanisms and coercive measures for non-compliance have contributed to an ineffective agreement similar to the previous non-binding accords. This was a clear case in 2013, when Indonesia, claiming internal legal barrier, refused to cooperate with Singapore by not sharing concession maps to enable precise location of fires and identification of the plantation companies involved.[95] This led to delays in the haze monitoring system that Singapore has initiated to combat the haze problem in the region. Although Indonesia had not yet ratified the ATHP at that time but Indonesia is a member of the Sub-Regional Ministerial Steering Committee on Transboundary Haze Pollution (MSC), which is similar to the ATHP in respect of the activities that parties are required to take in order to combat the haze.[96] Thus, Indonesia was obliged to cooperate with its neighbours in order to combat the fires in accordance with the MSC, but without the legally binding force of its non-binding accord, with which Indonesia had no actual binding responsibility to comply.

The absence of an effective dispute settlement mechanism and coercive measure led the ATHP to an inefficient and ineffective legally binding agreement. A recurrence of transboundary haze pollution almost annually, causing adverse effects to neighbouring states is clear evidence that the transboundary haze pollution problem cannot be effectively addressed under this agreement. The affected states cannot rely on the ATHP; rather they have to seek other measures. This also can be seen from the case of Singapore, who could not seek cooperation from Indonesia in order to effectively address the problem, and so established its own Transboundary Haze Pollution Act in 2014, to prosecute Singaporean

[94]Alan Khee-Jin Tan, op.cit., 3, at 648.

[95]Nurhidayah, L., Alam, S. &Lipman, Z., op.cit., 46, at 190.

[96]David B. Jerger, Jr., op.cit., 45, at 43.

individuals and companies that contribute to the transboundary haze pollution. Consequently, in 2015, Singapore even issued a Preventive Measures Notice under the Transboundary Haze Pollution Act to warn several Indonesian companies which have offices in Singapore, ordering them to extinguish any fires in the concession areas, or to prevent their spread, and to discontinue any burning activities on such land. For this reason, ASEAN fails to meet the expectations of the affected states by establishing an unenforceable agreement. A possible solution to overcome this situation will be discussed in Part Five: to claim compensation from Indonesia under international law, as Indonesia is under an obligation to compensate for damageit has caused.

4. The Relevant Problems

4.1 Interstate Cooperation between Indonesia, Malaysia and Singapore

1) State Sovereignty in Indonesia and the Non-intervention Principle

Indonesia adheres to the principle of state sovereignty and non-intervention because of its previous long standing experience of external intervention resulting from its history of colonisation.[97] Indonesia was a Dutch colony until the middle of the twentieth century.[98] Besides, Indonesia has gained sovereignty with the shedding of blood.[99] This fact, coupled with the external intervention within Southeast Asian states during the cold war conflict,[100] led Indonesia to suspect and refuse international assistance on most occasions.[101] Indonesia normally treats external assistance as domestic intervention. According to

[97]Paruedee Nguitragool, op.cit., 27, at 146.

[98]Helena M. Varkkey, op.cit., 19, at 88.

[99]Ibid.

[100]Paruedee Nguitragool, op.cit., 27, at 147; Helena M. Varkkey, op.cit., 19, at 88.

[101]Judith Mayer, "Transboundary Perspectives on Managing Indonesia's Fires," **The Journal of Environment & Developmen**t 15 (2) (2006): 205; ParuedeeNguitragool, op.cit., 26, at 146.

Mayer, external assistance was even treated as a "threat to Indonesian sovereignty".[102] This was the precise challenge faced in the early 1980s: Indonesia had received assistance and a plan from Germany in relation to forest fires, but refused to carry it out.[103] Furthermore, in an Intergovernmental Negotiating Committee Meeting for the ATHP in 2001, Indonesia had no trust in external intervention in the form of assistance. This led to the creation of aprovision of the ATHP, which allowed the source state of pollution (Indonesia in particular) to accept or refuse assistance offered by other countries at its discretion.[104]

According to Transparency International the global coalition against corruption's report, Indonesia is one of the world's most corrupt countries. A significant reason behind Indonesia's strong adherence to state sovereignty and the non-intervention principle is the corrupt patronage system in the country, which the Indonesian government does not want to be exposed internationally.[105] Thus they refuse most external assistance which they consider to be domestic intervention.

2) Interstate Cooperation between Indonesia and Malaysia

With Malaysia, Indonesia has had a territorial dispute over the Borneo islands of Litigan and Sipadan, and the country lost these two islands to Malaysia in 2002 under the judgment of the International Court of Justice.[106] The conflicts between these two countries is rooted in political and historical tensions relating to territory, as well as ethnic differences between the Javanese government in Jakarta and the Malay ethno-linguistic group in Sumatra.[107] According to Nguitragool, the Javanese President, Suharto, was firmly convinced that Malaysia was against him.[108] She also indicates that Indonesia suspected that Malaysian assistance was "part of

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[102]Judith Mayer, Ibid.

[103]A. K. J. Tan, op.cit., 47, at 841-843.

[104]Article 12; Paruedee Nguitragool, op.cit., 27, at 146.

[105]Helena M. Varkkey, op.cit., 24, at 77.

[106]Case Concerning Sovereignty Over PulauLitigan and PulanSipadan (Indonesia v. Malaysia) Judgment of 17 December 2002.

[107]Paruedee Nguitragool, op.cit., 27, at 65.

[108]Ibid., at 65.

the conspiracy to tarnish the reputation of the Javanese President" and to exploit this change as an opportunity to become a new ASEAN leader.[109] She indicates that Malaysia once sent 1,200 troops to Indonesia to suppress the fires without authorisation from Indonesia.[110] Indonesia took it seriously as an effort to intervene in its internal affairs and as an effort to embarrass Indonesia internationally.[111]

3) Interstate Cooperation between Indonesia and Singapore

At the beginning of the haze episode, Singapore had seriously kept up with the ASEAN Way of non-intervention in its neighbours' internal affairs, avoiding criticism of Indonesia and leaving Indonesia to handle the situation as its own internal affair.[112] Although, the transboundary haze situation become worse during 1997-1998, and the Singaporean public requested their government to claim for compensation from the Indonesian government for transboundary damages, initially Singapore still firmly upheld the norms of the ASEAN Way.[113] However, because the transboundary haze kept on blanketing the territory of Singapore almost annually, which adversely affected the health of the nation, coupled with the fact that the Indonesian government has not taken the transboundary haze problem seriously,[114] Singapore has had to tackle the problem by other measures of engagement.[115] This includes financial and technical support to Indonesia in the form of aircraft for cloud seeding, satellite images of hot spots and other software and hardware equipment, as well as enabling the cooperation by bilateral agreement. However, Indonesia did not fully appreciate Singapore's assistance. Varkkey points out the dissatisfaction of Indonesia who claimed that Singapore was a barrier to its economic development.[116]

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[109]Paruedee Nguitragool, 65, 147.

[110]Ibid., 65.

[111]Ibid.

[112]Helena M. Varkkey, op.cit., 4, at 88, 89.

[113]Judith Mayer, op.cit., 112, at 208.

[114]Helena M. Varkkey, op.cit., 4, at 88.

[115]Ibid.

[116]Helena M. Varkkey, op.cit., 24, at 93.

Indonesia refused extensive cooperation with Singapore on various occasions.[117] With the problems remaining unresolved, Singapore sought international assistance by raising the issue of transboundary haze at the United Nations General Assembly in October 2006.[118] Indonesia insisted on the ASEAN Way of non-intervention, and avoided discussion on this issue at the International level.[119] As a result, Singapore needed to seek its own national mechanisms including the establishment of the Transboundary Haze Pollution Act in 2014, to prosecute Singaporean individuals and companies that contributed to the transboundary haze pollution.[120]

4.2 Domestic Politics and Corruption in Indonesia Resulting in the Capacity to Comply with the ATHP

In Indonesia, corruption among government agencies, both at central and regional levels, leads to an absence of cooperation in forest fire management measures. Consequently, the prosecutorial and judiciary procedures are also inefficient and ineffective due to the corruption of such authorities. The courts are usually influenced by bribery, resulting in the protection of the plantation interests.[121] According to Tan, the prosecution of illegal logging and burning has become burdensome due to a corrupt Indonesian judiciary.[122] Moreover, the law focuses on punishing individuals rather than the corporate body.[123] In 1997, 176 companies were identified as suspect of violating the law by instigating large scale forest burning, but 19 companies had been indicated as forest burners and only four had been prosecuted.[124] Recently, despite Indonesia's efforts to prosecute a number of perpetrators, the court still imposes lenient punishments by ordering

[117]Helena M. Varkkey, at 88.

[118]Paruedee Nguitragool, op.cit., 27, at 118.

[119]Nurhidayah, L., Alam, S. and, Z. Lipman, op.cit., 46, at 197.

[120]Nurhidayah, L., Alam, S. and, Z. Lipman, op.cit., 46, at 197.

[121]Alan Khee-Jin Tan, op.cit., 3, at 682-683.

[122]Ibid, at 678.

[123]Judith Mayer, op.cit., 112, at 212.

[124]Charles Victor and Barber James Schweithelm, op.cit., 1, at 8.

them to pay small penalties.[125] This leads to ineffective enforcement of fire management legislations.[126]

According to Varkkey, oil palm plantations are the foundation of patronage networks in Indonesia.[127] She points out that the major oil palm plantation companies normally appoint a board of commissioners from retired senior government officials, who are well connected with the ruling elite.[128] Thus, Indonesian elites who have close patronage links with oil palm companies are against the fires management laws because they concern a forest as a major interest and will thus try to protect the interests of the oil palm plantations.

This was one particular response, but repeated on several occasions. In 2006, Indonesia politicians stated that "nothing could be done about the haze except to wait for a change in weather conditions." Moreover, the fact of Indonesia's decision to withhold ratification of the ATHP for twelve years is also prominent evidence. On several occasions the elite politicians succeeded in obstructing the ratification in parliament.[129] It could be argued that they would definitely use their power again in order to protect their own interests.

Thus, interstate cooperation between Indonesia and other countries in addressing the transboundary haze problem, in accordance with the ATHP, would be extremely difficult. Additionally, it could be argued that Indonesia knew from the beginning that the country would lack the capability to effectively cooperate with other ASEAN countries in implementing and complying with the ATHP. This is due to the fact of Indonesian efforts to exclude the coercive measures from the ATHP during the negotiation of the agreement.[130] Moreover, Indonesia cooperates with

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[125]Alan Khee-Jin TAN, op.cit., 104, at 14-15.

[126]Ibid.

[127]Helena M. Varkkey, op.cit., 24, at 67.

[128]Helena M. Varkkey, Ibid.

[129]Helena M. Varkkey, Ibid., 24, at 74.

[130]Alan Khee-Jin Tan, op.cit., 3, at 664-665.

other states under its own established conditions. This has enabled Indonesia to ensure that the haze mitigation measures are under its control.[131]

Furthermore, at the emergency meeting of regional environment ministers in July 2013, Indonesia insisted on not revealing its plantation concession maps giving the precise location of the fires and the concession holders.[132] Likewise, Indonesia has established a condition to establish a new national map to be shared with other member states, which is called "One Map Initiative".[133] In this regard, cooperative sharing of information will not occur until the national map is introduced.[134]

In addition, the ASEAN Way as non-intervention and national sovereignty has empowered the patronage politics system.[135] ASEAN cannot extensively discuss the patronage politics system, forest concessions, or other related issues which are the root cause of fires and haze because these are deemed to be the internal affairs of Indonesia. As a result, Indonesia can hide the real problem behind the forest fires and the resulting haze remains unresolved. In this regard, if the Indonesian patronage politics systems has remained influential, effective enhanced cooperation within the ASEAN region to mitigate the haze in accordance with the ATHP, is still far from accomplished. In conclusion, the transboundary haze pollution that occurs almost annually shows that Indonesia is unable to effectively cooperate with other ASEAN countries. It also shows that Indonesia is not ready to implement and comply with the ATHP in addressing the problem of transboundary haze.

4.3 Indonesia's Breach of the ATHP and International law

The Indonesian law, which permits land clearing by fires to be continued for plots of land under two hectares,[136] contravenes the ATHP, which prescribes a zero

[131]Helena M. Varkkey, op.cit., 24, at 71-72.

[132]Alan Khee-Jin TAN, op.cit., 47, at 2-4, 17.

[133]Ibid., at 3.

[134]Ibid.

[135]Helena M. Varkkey, op.cit., 24, at 66.

[136]Helena M. Varkkey, Ibid., 19, at 91.

burning policy, as indicated in Articles 9 (a), (d) and (g). In addition, even after Indonesia's ratification in 2014, the haze crisis occurred again in 2015. This shows that Indonesia has failed to comply with the monitoring provision, in accordance with Articles 7 and 9 (e).

Under the state responsibility principle, Indonesia has to be responsible towards those affected states, due to its failure to perform its obligations under a customary international law, the state responsibility which comprises the obligation not to cause any harm to territories beyond the jurisdiction of any state and the obligation to pay compensation for the damage caused. These obligations hold Indonesia responsible for polluting activities, that it causes either directly or indirectly under private control.[137]

State responsibility is engaged if the state fails to perform its obligations with due diligence.[138] To avoid state responsibility, Indonesia would have to prove that its government had taken all necessary steps to prevent or minimise the risk of significant transboundary damage. In this regard, appropriate due diligence must be exercised, as well as a number of preventive obligations imposed on the source state aiming at taking appropriate measures to prevent or minimise transboundary damages need to be established.[139] Indonesia has to take all appropriate measures to prevent and control activities, undertaken within its jurisdiction, from causing transboundary harm.

Considering in detail whether a state has done due diligence to an appropriate standard, Okowa points out that it can be tested against the background of what other reasonable governments would do in the same situation.[140] In this regard, Indonesia refused assistance from other states to suppress the fires several times before accepting the assistance at a later stage: this was clear evidence of an inappropriate level of due diligence. The most recent situation was in 2015, when

[137]Phoebe N. Okowa, op.cit., 51, at 66.

[138]A. K. J. Tan op.cit., 47, at 833; Phoebe N. Okowa, op.cit., 51, at 66.

[139]Phoebe N. Okowa, op.cit., 51, at 66.

[140]Ibid., at 82.

Indonesia rejected an offer of assistance from Singapore to help suppress the forest fires before its approval of assistance at a later stage. This assistance was considered to be almost futile. On the contrary, a reasonable government would rather have welcomed assistance to combat the fires from the first stage.

In addition, a reasonable government would cooperate in good faith and seek the assistance of the international organisation in preventing or minimising the risk of significant transboundary harm,[141] but Indonesia kept the haze issue quiet from other participants at global level. This was a clear case when Singapore raised this issue at the United Nations General Assembly in 2006,[142] where appropriate assistance could have been sought. In this regard, Indonesia has been lacking in its exercise of appropriate due diligence. In addition, due diligence includes other relevant obligations in order to minimise the harm.[143] These obligations include the need to provide the potentially affected states with timely notification of the risk and the assessment,[144] and to transmit the available technical and all other appropriate relevant information,[145] as well as to enter into consultations in order to achieve an agreement on the preventive measures to be taken.[146] It should be noted that several international obligations are not regulated within the ATHP. Thus, Indonesia has breached international standards of due diligence, but not breach the ATHP, in some respects. This is another evidence that the ATHP itself is inconsistent with international standards as it was created under the constraint of the ASEAN Way, which led to its ineffectiveness.

Under the customary international law regarding state responsibility, an affected state has a right to be compensated for all transboundary damage caused

[141]Draft articles on Prevention of Transboundary Harm from Hazardous Activities, article 4.

[142]Helena Varkkey, op.cit., 4, at 95; Paruedee Nguitragool, op.cit., 34, at 118.

[143]A. K. J. Tan, op.cit., 47, at 840.

[144]Draft articles on Prevention of Transboundary Harm from Hazardous Activities, article 8.

[145]Draft articles on Prevention of Transboundary Harm from Hazardous Activities, article 8.

[146]Draft articles on Prevention of Transboundary Harm from Hazardous Activities, article 9.

by Indonesia.[147] Tan suggests that the duration of the breach has "important bearings on theatre and extent of a state responsibility."[148] As long as Indonesia has no further appropriate measures to prevent and punish the perpetrators, it could be said that it has continued to be in breach of customary international law. As a result, the affected states can claim that Indonesia has not complied with the ASEAN Charter by not upholding an international law, and thus they can refer the dispute to the ASEAN Summit for its decision.[149] Rules for reference of the dispute to the ASEAN Summit in relation to non-compliance were adopted under Article 20(4) of the ASEAN Charter and the 2010 Protocol on Dispute Settlement Mechanism (DSMP) which will be discussed further.

5. The Solution: The Dispute Settlement Mechanisms under the ASEAN Charter

While the ATHP is a legally binding agreement, it contains no provision for either a liability regime or the imposition of sanctions. Despite ATHP's fundamental aims to combat transboundary haze pollution, it has no coercive measures to enforce parties to abide by the agreement. When disputes arise, Article 27 of the ATHP requires the disputing parties to settle the dispute by consultation and negotiation. It does not provide any further methods for resolution where the consultation and negotiation has failed to solve the problem. Indonesia is engaging its state responsibility according to international law. Nevertheless, Indonesia will never agree with the affected states to bring the disputes to the International Court of Justice for a judgement. This is due to the fact that Indonesia has recognised its responsibility over transboundary haze pollution, as can be seen from the statements of apology that Indonesia's President has made to its neighbours several times since President Suharto's regime.

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[147]Draft articles on Prevention of Transboundary Harm from Hazardous Activities, article 8 and article 36.

[148]Phoebe N. Okowa, op.cit., 51, at 172

[149]Article 20 (4).

The ASEAN Charter was the effort to form an EU-style regulatory institution; however ASEAN is still disinclined to become involve in a regional regulatory body.[150] This can be seen from consultation and consensus decision making which still adhere to Article 20 of the ASEAN Charter. Even though the ASEAN Way's decision making still adhere to the ASEAN Charter, other formal dispute settlement mechanisms have been added to Chapter 8 of the ASEAN Charter. In addition, other measures for settlement of unresolved disputes have been pointed out, as a significant step toward conflict resolution in ASEAN. As a member of the ASEAN, Indonesia has a binding commitment to adhere to the ASEAN Charter, which is the highest legal constitution of the ASEAN. The affected states have a method for setting disputes with Indonesia over the transboundary haze issue by seeking a decision from the ASEAN Summit.

The dispute settlement mechanism under the ASEAN Charter provides possible solution because the dispute could be disclosed and solved without Indonesia's consent. This is different from resorting to conciliation, mediation or arbitration, which can only be done with the mutual consent of both parties. Therefore, in the case where Indonesia does not comply with the ATHP or international law as state responsibility, resulting in transboundary haze and damage to affected states, the affected states possess the right to refer the dispute to the ASEAN Summit for its decision. This solution will strengthen the ATHP with a formal dispute settlement, which bind both disputing parties. It can be an effective way to tackle the problem.

The Dispute Settlement Mechanisms under the ASEAN Charter

Prior to the signing of the ASEAN Charter in 2007, there had been 40 years where there was no explicit mechanism for settlement of disputes nor an ability to monitor compliance with any regional or international instruments. In 2007, ASEAN members agreed to sign the ASEAN Charter, which created a legal personality for

[150]Amitav Acharya, **Constucting a Security Community in Southeast Asia: ASEAN and the problem of regional order**, 2nd ed. (Routledge: Oxon, 2009), p. 181.

the ASEAN states.[151] ASEAN has therefore become a legal international organisation with the effect of legally binding all its members in the same way that the European Union binds its member states.[152] The ASEAN Charter has been in force since 15 December 2008, equipped with a formal legal structure, norms, rules and values.[153] Most importantly it strengthens compliance among its member states by establishing an overarching dispute settlement mechanism in all areas of cooperation.

After the ASEAN Charter was enacted, a dispute resolution mechanism was formally settled in Chapter 8. This mechanism follows the dispute settlement mechanism of the UN Charter. Additionally, the Protocol on Dispute Settlement Mechanism (DSMP) and its 6 annexes[154] were introduced in 2010 to strengthen the formal dispute settlement mechanism in accordance with Article 25 of the ASEAN Charter. A prominent characteristic of the DSMP can be attributed to the provision which provides for consultation within an exact timeframe,[155] and the "possibility to convene an arbitral tribunal", as well as the potential involvement of a third party.[156] However, to date, the DSMP has not yet been utilised. Hence, at this moment, only the ASEAN Charter is applicable in formal settling of the dispute. The dispute settlement mechanisms under the ASEAN Charter involve an amicable settlement which includes good office, conciliation and mediation, as well as the requirement of a formal tribunal for arbitration. If the dispute cannot be settled and remains

[151]ASEAN Charter, article 3.

[152]Krit Kraichitti, **Dispute Settlement Mechanisms for ASEAN Community: Experiences, Challenges and Way Forward** [Online], available URL: https://www.Aseanlawassociation.org/12GAdocs/workshop5-thailand.pdf, 2015 (June, 11).

[153]Krit Kraichitti, Ibid.

[154]The annexes attached in the DSMP are Rules of Good Offices, Rules of Mediation, Rules of Conciliation, Rules of Arbitration, Rules for Reference of Unresolved Disputes to the ASEAN Summit and Rules for Reference of Non-Compliance to the ASEAN Summit.

[155]Protocol to The ASEAN Charter on Dispute Settlement Mechanisms 2010, article 8 and 9.

[156]Protocol to The ASEAN Charter on Dispute Settlement Mechanisms 2010, article 8 and 13.

unresolved, it will be treated as an "unresolved dispute" and referred to the ASEAN Summit as a last resort.[157]

The ASEAN Summit, a supreme organisation of ASEAN, comprises the heads of state or the governments of its member states,[158] and they possess the right to decide on unresolved disputes or other matters referred to it under Chapters 7 and 8.[159] The ASEAN Coordinating Council (ACC) comprises the foreign ministers of the ASEAN states,[160] who play a significant role in facilitating the dispute settlement mechanisms. The ACC may direct the disputing parties to resolve their disputes through various means, as indicated in the ASEAN Charter.[161]

The dispute settlement mechanisms under the ASEAN Charter have served as an overarching framework. In the case of disputes related to specific ASEAN agreements, Article 24 (1) of the ASEAN Charter provides that it "shall be settled through the mechanisms and procedure provided for in such instruments." In the case of disputes not concerning the interpretation or application of ASEAN agreements, Article 24(2) of the ASEAN Charter provides that it "shall be resolved peacefully in accordance with the Treaty of Amity and Cooperation in Southeast Asia and its rules of procedure". In the case of disputes involving the interpretation or application of ASEAN economic agreements, Article 24 (3) provides that the Protocol on Enhanced Dispute Settlement Mechanism shall be used to resolve the dispute. In a case when appropriate application of the dispute settlement mechanisms was followed, but the dispute remains unresolved, there are further options under the ASEAN Charter to resolve the dispute. For instance, in the case of transboundary haze pollution causing significant harm to affected states, the affected states may claim compensation from Indonesia through the dispute settlement mechanisms as follows:

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[157]ASEAN Charter, article 26.

[158]ASEAN Charter, article 7 (1).

[159]ASEAN Charter, article 7 (2) (e).

[160]ASEAN Charter, article 8.

[161]Protocol to The ASEAN Charter on Dispute Settlement Mechanisms 2010, article 9.

1) According to Article 24(1) of the ASEAN Charter, the affected states shall resolve the dispute through consultation and negotiation in accordance with Article 27 of the ATHP. However, if the process has failed, the dispute will be treated as an "unresolved dispute". The affected states can then refer the unresolved dispute to the ASEAN Charter for its decision in accordance with Article 26 of the ASEAN Charter.

2) The affected states may resolve the dispute by resorting to good offices, conciliation or mediation in accordance with Article 23 of the ASEAN Charter. However, this can only be done with the consent of Indonesia.

3) The affected states may resolve the dispute by establishing an arbitral tribunal in accordance with Article 25 of the ASEAN Charter. However, this also can be done with the consent of Indonesia.

4) The affected states may raise a relevant provision and claim that Indonesia does not comply with the ASEAN Charter. For instance, the affected states may claim that Indonesia does not uphold international law in accordance with Articles 20 (4) and 2 (j) of the ASEAN Charter.

5.1 General Dispute Settlement Mechanisms

1) Consultation and Negotiation

ASEAN member states are required to resolve disputes peacefully through dialogue, consultation and negotiation.[162] Article 24(1) of the ASEAN Charter provides that, where specific ASEAN agreements provided dispute settlement mechanisms, the dispute relating to the agreement should be settled in the manner specified. Hence, in case of the ATHP, parties shall settle the dispute by consultation and negotiation in accordance with Article 27. However, the ATHP does not provide any solution when the consultation process or negotiation has failed to resolve the dispute. Instead, Article 26 of the ASEAN charter stipulates that, if a dispute remains unresolved, after resort to the mechanisms and procedures

[162] ASEAN Charter, article 22.

provided in such agreement, the dispute shall be brought to the ASEAN Summit for its decision.

2) Good Offices, Conciliation and Mediation

Article 23(1) of the ASEAN Charter states that, "Member States which are parties to a dispute may at any time agree to resort to good offices, conciliation or mediation in order to resolve the dispute within an agreed time limit." The process involves the settlement of disputes by a third party with a peaceful mechanism. In this regard, the Parties to the dispute may agree to request the Chairman of ASEAN, or the Secretary General of ASEAN, to provide good offices, conciliation or mediation as a third party.[163]

International conciliation and mediation are recognised as a flexible and non-binding process.[164] The disputing parties are requested to comply with the findings, recommendations or decisions resulting from the conciliation or mediation processes. If the offending party fails to comply, the party affected by non-compliance may refer the issue to the ASEAN Summit for its decision, in accordance with Article 27 (2) of the ASEAN Charter.

However, these dispute settlement mechanisms may lead to an unfair advantage if third parties are "polarized and antagonistic".[165] Furthermore, to resort to these mechanisms, the mutual consent of both parties is required. Thus, without Indonesia's consent, the dispute will remain unresolved.

3) Arbitration

The parties to the dispute may mutually agree to establish an arbitral tribunal to resolve the disputes relating to the interpretation or application of the ASEAN Charter or any other ASEAN agreements. Article 25 of the ASEAN Charter states that, "appropriate dispute settlement mechanisms, including arbitration, shall be established for disputes which concern the interpretation or application of this

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[163]ASEAN Charter, article 23 (2).

[164]Linda C. Reif, "Conciliation As A Mechanism For The Resolution Of International Economic And Business Disputes," **Fordham International Law Journal** 14 (3) (1990): 580.

[165]Linda C. Reif, Ibid., at 586.

Charter and other ASEAN instruments" unless otherwise specifically provided. However, the form of dispute settlement mechanism under this article has not clearly determined.

Whereas the parties are free to agree on the procedure of appointing the arbitrators, the arbitrator is also free from the control of the parties. This is to guarantee the independence and impartiality of the arbitrator. Once the arbitrator has made a ruling, it is final and both parties are bound by the ruling. There is no procedure for appeal through any judicial proceeding. This mechanism allows affected states to claim for compensation from Indonesia. However, this can only be done with the consent of Indonesia.

In the case that the dispute remains unresolved after application of all the appropriate dispute settlement mechanisms, as set forth in Articles 22, 23, 24 and 25 of the ASEAN Charter, the parties to the dispute can refer the dispute to the ASEAN Summit for its decision in accordance with Article 26 of the ASEAN Charter.

Additionally, in a case where Indonesia has agreed to resort to the dispute settlement mechanisms mentioned above, but has not complied with the findings, recommendations or decisions resulting from the said mechanisms, the other party to the dispute may also refer the dispute to the ASEAN Summit for its decision under Article 27 (2) of the ASEAN Charter.

5.2 Dispute Settlement Mechanism concerning Non-compliance or Serious Breach of the Charter

1) Serious Breach of the ASEAN Charter

In the case of serious breach of the ASEAN Charter, Article 20(4) provides that "the matter shall be referred to the ASEAN Summit for its decision." In the case of the transboundary haze pollution that has caused damage to the affected states, they may claim for compensation from Indonesia by raising Article 20(4) together with Article 2 (k), then refer the dispute to the ASEAN Summit for its decision .

Article 2 (k) states that:

ASEAN and its Member States shall act in accordance with the following Principles:

(k) abstention from participation in any policy or activity, including the use of its territory, pursued by any ASEAN Member State or non-ASEAN State or any non-State actor, which threatens the sovereignty, territorial integrity or political and economic stability of ASEAN Member States"

Indonesia must regulate its activities as well as take responsibility for polluting activities directly caused within its jurisdiction. Thus, Indonesia must be responsible for the resulting transboundary haze which directly causes direct damage to affected states. However, in order to legally refer the matter in relation to Article 2 (k) and 20 (4) to the ASEAN Summit, the affected states must claim that the action or the omission of Indonesia, which violates the ASEAN Charter, has led to the threat of their political stability as well as economic stability in both respects.

The haze may impact on many relevant issues. Undoubtedly, the haze crisis has adversely impacted on the economic stability of the affected states. However it is unclear whether it also has a potential impact on their political stability. If the DSMP comes into force in the future, the affected states may refer this vagueness to the ASEAN Summit for its interpretation of this statement, in accordance with Article 2 of the DSMP. (To date the DSMP has yet to be ratified.)

2) Non-compliance with the ASEAN Charter by not upholding International Law of "State Responsibility"

While the DSMP has yet to be ratified or put into force, the affected states may raise Article 2(j) and 20 (4), claiming that Indonesia, by not upholding an international law, does not comply with the ASEAN Charter. Thus the affected state may refer the matter to the ASEAN Summit for its decision.

In the case of non-compliance with the ASEAN Charter, Article 20 (4) provides that "the matter shall be referred to the ASEAN Summit for its decision." Also, Article 2 (j) states that member states shall uphold "the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States". In the case of Indonesia, it can be argued that Indonesia

does not uphold the international customary law of "state responsibility", thus does not comply with the ASEAN Charter. This arises from Indonesia's failure to avoid environmental harm to other states and to pay compensation for the damage it has caused as previously discussed.

The settlement of disputes by referring the issue to the ASEAN Summit under Chapters 7 and 8 of the ASEAN Charter is a diplomatic political concern. Serious cases such as a serious breach of international human rights,[166] threats to sovereignty, territory integrity or the political and economic stability of other member states,[167] which cannot be settled through the regular form of consensus decision-making, can also be referred directly to the ASEAN Summit. While the dispute settlement mechanism is regulated under the ASEAN Charter, the ASEAN member states are not prohibited from having recourse to the modes of peaceful settlement contained in Article 33(1) of the Charter of the United Nations, or any other international legal accords to which the disputant states are parties.[168]

6. Conclusion

Forest fires and the resulting haze have caused considerable transboundary pollution problems affecting the environment at all levels. At the regional level, ASEAN has initiated the ATHP as a legally binding agreement to establish the framework for ASEAN cooperation to address the problem of transboundary haze pollution. Previously, several ASEAN member states have tried to pressure Indonesia into ratifying the ATHP with the hope of creating regional cooperation and solving the transboundary haze problem effectively. However, as discussed in Part Three, the ATHP was created and influenced by the ASEAN Way in two significant respects. These are the non-intervention principle and the settlement of disputes by consultation and consensus mechanism. This makes the ATHP weak, and similar to soft

[166] Article 2 (j) and 20 (4).

[167] Article 2 (k) and 20 (4).

[168] ASEAN Charter, article 28.

law or non-binding agreements in the past. As a result, the ATHP is unable to successfully solve the transboundary haze pollution problems in the region.

The absence of enforcement and monitoring measures as well as an effective dispute settlement mechanism lead to non-compliance, and result in the failure of the ATHP. This is evident in the transboundary haze pollution that has recurred almost annually, for more than 30 years. Although Indonesia ratified the ATHP on October 14, 2014, it has not seemed to tackle the problems any better since ratification. This is because Indonesia had already implemented a zero burning policy and other forest fires prevention measures in its country since President Suharto's regime. Even some Indonesian parliamentarians once expressed their view that the ratification would make no difference as Indonesia has already implemented the law prohibiting illegal burning.[169] It could be said that the absence of effective dispute settlement mechanisms and coercive measures have caused the problem of transboundary haze pollution to remain unresolved. The affected neighbouring states are unable to claim compensation for damages caused by Indonesia under the ATHP. The situation which cannot claim for civil liability makes the ATHP inefficient and ineffective in preventing the environmental crimes because it will not deter the perpetrator's behaviour. If the affected states call for Indonesia to be responsible for the damage it has caused by referring the dispute to the highest organ of the ASEAN: the ASEAN Summit, they can claim that Indonesia did not comply with the ASEAN Charter by not upholding international law; breaching the state responsibility principle because Indonesia was under due diligence in preventing and controlling the activities in its territory. As a result, the transboundary haze pollution problem will not be kept quiet or "under the carpet".[170] But rather it will be brought out to the regional level. In this regard, other member states considered as having a "substantial interest" can also join the case as a third party, in accordance with Article 13 of the DSMP. However, there is yet to be established an explicit framework on how the ASEAN Summit will proceed after the dispute is

[169]Helena M. Varkkey, op.cit., 24, at 74.

[170]Amitav Acharya and Ebooks Corporation, op.cit., 21, at 67.

referred to it for its decision.[171] Woon suggests that the ASEAN Summit is not a judicial body, but that the dispute could be forwarded to international arbitration or to the International Court of Justice for its judgment.[172] In this regard, the involvement of the ICJ would mean that the global community has to acknowledge the problem and to solve it through the ICJ which represents a global organisation.

It could be argued that the ASEAN Summit may settle the dispute by consultation and consensus, as indicated in Article 20(1) of the ASEAN Charter, but, as such, the problem may still remain unresolved. However, whatever dispute settlement mechanism will be used by the ASEAN Summit, it is hoped that Indonesia will comply with the decision resulting from the ASEAN summit, because non-compliance is a serious breach of the ASEAN Charter. In addition, there is also a hope that the Indonesian President, as a member of the ASEAN Summit, would save his face and show his leadership and responsibility at the regional level by accepting responsibility for compensation to some degree. This hope arises from the fact that Indonesia is committed in its state responsibility towards affected states and Indonesia can be seen to have adopted this state responsibility principle because Indonesia's President has publicly apologised several times to the affected states, as mentioned earlier.[173] Therefore, if the affected states claim compensation at the ASEAN Summit, and the others ASEAN member states all agree that Indonesia should be liable for the damages, then Indonesia might show responsibility and compensate for damage it has caused. Moreover, the dispute relating to transboundary haze pollution, which has been raised at the ASEAN Summit, gives hope that it might enhance the effectiveness of the ATHP in some respects – either by the amendment of the ATHP itself, or by additional protocols to be adopted later. Thus, it could be said that an effective dispute settlement mechanism would lead to compliance and regional cooperation, as well as strengthening the ATHP in the end

[171] Walter Woon, op.cit., at 4-5.

[172] Ibid.

[173] Charles Victor and Barber James Schweithelm, op.cit., 1 at 8; Qadri, S. Tahir, op.cit., 8, at 158-159.

Bibliography

Acharya, Amitav. “Ideas, identity, and institution-building: from the “ASEAN way” to the ‘Asia-Pacific way’?.” **The Pacific Review** 10, 3 (1997): 319-346, at 328.

_____. **Constucting a Security Community in Southeast Asia: ASEAN and the problem of regional order**. 2nd ed. Routledge: Oxon, 2009.

_____. **Corporation Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order**. 3rd ed. New York: Routledge, 2014

Brittany Patterson. **Hellish Fires in Indonesia Spread Health, Climate Problems** [Online]. Available URL: https://www.scientificamerican.com/article/hellish-fires-in-indonesia-spread-health-climate-problems, 2015 (October, 22).

Case Concerning Sovereignty Over PulauLitigan and PulanSipadan (Indonesia v. Malaysia) Judgment of 17 December 2002.

Florano, Ebinezer R. “Assessment of the "Strengths" of the New ASEAN Agreement on Transboundary Haze Pollution.” **International Review for Environmental Strategies**, 4 (1), (2003): 139.

Goh, Gillian. “The “ASEAN Way”: Non-Intervention and ASEAN’s Role in Conflict Management.” **Stanford Journal of East Asian** 3, 1 (2003): 113-118, at 114.

Harris, Nancy, et. al. **Indonesia’s Fire Outbreaks Producing More Daily Emissions than Entire US Economy** [Online]. Available URL: http://www.wri.org/blog/2015/10/
indonesia%E2%80%99s-fire-outbreaks-producing-more-daily-emissions-entire-us-economy, 2015 (October, 16).

Jerger, David B., Jr. “Indonesia’s role in realising the goals of ASEAN Agreement on Transboundary Haze Pollution.” **Sustainable Development Law & Policy** 14, 1 (2014): 42.

Kraichitti, Krit. **Dispute Settlement Mechanisms for ASEAN Community: Experiences, Challenges and Way Forward** [Online]. Available URL: https://www.aseanlawassociation.org/12GAdocs/workshop5-thailand.pdf, 2015 (June, 11).

Leviter, Lee. “The ASEAN Charter: ASEAN Failure or Member Failure?.” **International Law and Politics** 43 (1) (2010): 166.

Lian, Koh Kheng. “ASEAN Environmental Protection in Natural Resources and Sustainable Development: Convergence versus Divergence?.” **Macquarie Journal of International and Comparative Environmental Law** 4 (2007): 46

_____. and Nicholas A. Robinson, “Regional Environmental Governance: Examining the Association of Southeast Asian Nations (ASEAN) Model.” **Global Environmental Governance** (2002): 4-5.

Mayer, Judith. “Transboundary Perspectives on Managing Indonesia’s Fires.” **The Journal of Environment & Developmen**t 15 (2) (2006): 205.

Mongabay. **The Asian Forest Fires of 1997-1998** [Online]. Available URL: https:// rainforests. mongabay.com/08indo_fires.htm, 2016 (March, 7).

Neo Chai Chin. **Singapore effort to fight haze ‘almost futile’** [Online]. Available URL: https://www.todayonline.com/singapore/singapores-fire-fighting-team-went-indonesia-too-late-masagos, 2015 (October, 30).

Nguitragool, Paruedee. **Environment Cooperation in Southeast Asia ASEAN's Regime for Transboundary Haze Pollution**. Abingdon, Oxon.: Routledge, 2011.

Nurhidayah, L., Alam, S. and Lipman, Z. “The influence of international law upon ASEAN approaches in addressing transboundary haze pollution in Southeast Asia.” **Contemporary Southeast Asia** 37, 2 (2015): 191.

Okowa, Phoebe N. **State Responsibility for Transboundary Air Pollution in International Law**. New York: Oxford University Press, 2000.

Reif, Linda C. “Conciliation As A Mechanism For The Resolution Of International Economic And Business Disputes.” **Fordham International Law Journal** 14 (3) (1990): 580.

Severino, Rodolfo C. **ASEAN Today and Tomorrow: Selected speeches of Rodolfo C. Severino, Jr.** Jakarta: ASEAN Secretariat, 2002.

T., Nathalie L. J., Horbach and Pieter H. F. Bekker. “State Responsibility for Injurious Transboundary Activity in Retrospect.” **Netherlands International Law Review** 50, 3 (2003): 328.

Tahir, S. Qadri. **Fire, Smoke, and Haze: The ASEAN Response Strategy**. 1st ed. Manila: Asia Development Bank, 2001.

Tan, Alan Khee-Jin. "Forest fires of Indonesia: State responsibility and international liability." **Comparative Law Quarterly**, 48, 4 (1999): 834.

_____. "The ASEAN Agreement on Transboundary Haze Pollution: Prospects for Compliance and Effectiveness in Post-Suharto Indonesia." **New York University Environmental Law Journal** 13, 3 (2005): 653-654.

United Nations, **A More Secure World: Our Shared Responsibility, A Report of the High-level Panel on Threats, Challenges and Change** [Online]. Available URL: www.un.org., 2015 (October, 18).

Varkkey, Helena M. "Addressing Transboundary Haze Through Asean: Singapore's Normative Constraints." **Journal of International Studies** 7 (2011): 83-101, at 86.

_____. "Indonesia Perspectives on Managing the ASEAN Haze." **Sarjana** 24, 1 (2009) 83-101, at 83-85.

Varkkey, Helena M. "Regional cooperation, Patronage and the ASEAN Agreement on Transboundary Haze Pollution." **International Environmental Agreements: Politics, Law and Economics** 14, 1 (2014): 65–81, at 68.

Victor, Charles and Barber James Schweithelm. **Trial by Fire: Forest Fires and Forestry Policy in Indonesia's era of Crisis and Reform**. Washington, DC: World Resources Institute Report, 2000.

Draft articles on Prevention of Transboundary Harm from Hazardous Activities.

Government of Singapore, Government Gazette Acts Supplement, No. 24 of 2014.

International Law Commission (ILC)'s 1996 Draft Rules on State Responsibility.

Protocol to The ASEAN Charter on Dispute Settlement Mechanisms 2010.

The Bangkok Declaration, 8 August 1967, the Preamble.