

HAZE FREE AIR IN SINGAPORE AND MALAYSIA – THE SPIRIT OF THE LAW IN SOUTH EAST ASIA

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Abstract

Air pollution is the presence of solid, liquid or gaseous particles in the atmosphere, which are not generally present, or are present in higher concentration and have no beneficial effect. They are injurious to human beings or other living creatures or plants or environment. Indonesia is one of the major sources of haze pollution in ASEAN (Association of Southeast Asian Nations) region. Transboundary smoke haze from land and forest fires during the traditional dry period between June and October has been a recurrent feature in the southern ASEAN region in the past few decades. Forest fires across Indonesia have caused a smoky haze to shroud Singapore and Malaysia prompting safety fears over pollution. This year the haze index is very high in the neighbouring countries which is under the category ‘hazardous and unhealthy’ for the first time in the country’s history. The law on this transboundary haze pollution in the form of an international agreement focuses much on prevention, control, monitoring and regulating pollution by way of mutual cooperation and understanding. However, cooperation on implementing this treaty is said to have been limited both by ASEAN’s institutional norms, and by the domestic politics of the governments involved. This paper will look into the features of the existing law on this issue and will identify the effectiveness of this law and the remedial action which can be sought in case of breach and how these laws can be improved to have a permanent solution on this issue which is a long felt dream of the civil society.

Keywords: Air pollution, Haze, Transboundary, ASEAN

1. Introduction

Haze is traditionally an atmospheric phenomenon where dust, smoke and other dry particles obscure the clarity of the sky. Haze has been an annual and a serious recurring problem in Malaysia and Singapore since 1980. The first and most publicly identifiable regional environmental crisis in the South East Asia is the Transboundary haze (Elliott 2003). The origination of haze is the smoke from peat and forest fires mostly in Sumatra in Indonesia and becomes transboundary when it travels across national boundaries, monsoon winds blew the smoke eastward, creating negative environmental effects on other South East Asian countries (Mayer 2006). This smoke haze spread, which last for weeks together, causes human health problems in the neighbouring countries. In 1997, the haze had affected business and tourism in Singapore (Fernandez, 1997), with researchers conforming a loss of at least S\$97.5m. More specifically, evidence suggests that oil palm interests took advantage of conducive climate conditions to clear land through burning, contributing to the loss of nearly 5 million hectares of forest and blanketing the region with haze (UNHabitat, 2000; Hansen et

al., 2009). In a study commissioned by the International Development Research Centre (IDRC), it was concluded that the tourism industry in Singapore suffered the heaviest financial losses, at least 84% of the total estimated losses of the year as a result of the haze. Airline losses take up almost 10%, with the remaining attributed to health costs (Hon, 1999). A study in 2006 put estimated losses at \$79 million within just the first hazy month of the year, not least because of the forced closure of Changi airport (Ghani, 2010). Singapore was especially concerned in 2009 about the haze as hazy conditions could affect Singapore's F1 race and the APEC Forum (Gunasingham, 2009). It also caused a measurable 20% increase in the number of patients with haze-related problems. Since then, haze has affected the region on a regular basis: in 2001, 2002, 2003, 2006 and from 2009 onwards (Hamzah, 2012). Through the newspaper reports, it is evident that this smoke haze is quite severe this year as witnessed in 1997. For 2013, Singapore has claimed to suffer from economic losses estimated at \$1 billion a week.

Though Indonesian government responds to the request by the affected governments every year, by way of a routine reply, that most of these fires are man-made and most can be traced back to illegal land clearing activities of commercial, local and foreign oil palm plantations. So what is the law prevalent among these countries to combat haze to have a permanent solution? Who is responsible for these illegal acts and what remedial actions can be taken by the affected nations?

2. The Spirit of the Law on Transboundary haze

2.1 History of ASEAN Agreement:

The need for ASEAN agreement originated in the early 1990s by way of a series of dialogue sessions amongst the Ministers of Environment and the administrators of ASEAN States. In subsequent meetings in Singapore in 1992 and Brunei and Malaysia in 1994, the issue was further addressed with the adoption of resolutions reflecting the commitment of ASEAN states to collective action to tackle transboundary air pollution as well as other sources of pollution in the region. At the meeting in Malaysia in 1994, "the Ministers (for the Environment) agreed to enhance cooperation to manage natural resources and control transboundary pollution within ASEAN, to develop regional early warning and response system, and to improve the capacity of member countries in these areas." This led to a meeting on the Management of Transboundary Pollution, held in Kuala Lumpur in June 1995, at which the ASEAN Cooperation Plan on Transboundary Pollution was adopted. Although the plan covered marine pollution and the pollution caused by the transport of hazardous wastes, its main focus was transboundary atmospheric pollution caused by vegetation burning. Following the widespread land and forest burning in 1997, the environment Ministers of ASEAN countries drafted a formal region-wide plan to tackle the problem. This Regional Action Plan was divided into three parts. The first part required member states to draw up their national plans, and indicated the specific measures they "should contain" to monitor, prevent, deter, and mitigate land and forest burning. These included the following:

- formulation of air quality management legislation to prohibit open burning;
- strict enforcement of laws and legislation; implementation of air quality monitoring and reporting regimes, and setting up surveillance on local sources of emissions, both mobile and stationary;
- establishment of national task force/committee to develop strategies and response plans to deal with fires and smoke haze; and
- utilisation of information technology to provide haze-related information to relevant agencies to prevent and control the spread of fire, and to enhance public awareness on the haze situation.

Such national plans should also specify the "guidelines and support services to discourage activities which can lead to land and forest fires" as well as the "operating procedures for the early mobilisation of resources to prevent the spread of fires."

The second part of the Plan, perhaps the most useful part, sought to strengthen the monitoring and anticipation of land and forest fires and increased pollution levels through the ASEAN Specialised Meteorological Centre that uses up-to date meteorological technology and techniques such as satellite imagery, wind charts, and forest fire danger rating indexes.

The third part of the Plan focused upon the enhancement of fire fighting capability by stipulating a requirement that a list of the resources, expertise, and procedures for preventing and fighting fires be drawn up.

2.2 Special features of the Agreement:

In 1997, the ten South East Asian governments (Malaysia, Singapore, Brunei, Myanmar, Vietnam, Thailand, Laos, Cambodia, Philippines and Indonesia) out of increased pressures from the civil society intended to take appropriate steps to deal with haze effectively at the regional, national and international level. To that effect, the Association for South East Asian Nations (ASEAN) met and suggested that the haze issue should be dealt with at the ASEAN level due to its transboundary nature and that leads members of ASEAN to execute an international agreement in the form of an international treaty called "ASEAN Agreement on Transboundary Haze Pollution". This is an environmental agreement established in 2002 between all ASEAN nations to reduce haze pollution in Southeast Asia. While this agreement outlines what members are supposed to do, came into effect in 2003 which contains 32 articles. The only objective of the agreement is well stated, under **Article 2**, as 'to prevent and monitor transboundary haze pollution as a result of land and/or forest fires which should be mitigated, through concerted national efforts and intensified regional and international cooperation'.

Article 3 sets out five principles to be considered by the contracting parties at the time of implementation of the agreement:

- To exercise the sovereign right, in accordance with the Charter of the United Nations and the principles of international law, 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 or of areas beyond the limits of national jurisdiction.
- To 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 in the spirit of solidarity and partnership and in accordance with their respective needs, capabilities and situations,
- To 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, precautionary measures shall be taken by Parties concerned.
- To manage and use their natural resources, including forest and land resources, in an ecologically sound and sustainable manner.
- To involve, in addressing transboundary haze pollution, as appropriate, all stakeholders, including local communities, non-governmental organisations, farmers and private enterprises.

In simple terms, this treaty enshrines sovereignty over natural resources, neighbourliness, international cooperation, the precautionary principle, and sustainable development. It relies on the cooperation of its parties through self-regulation and decentralized operations.

All the ten gave their express consent to the agreement to say that they all agreed to the spirit of the agreement. During negotiations it was foreseeable to the committee that few countries may not ratify the agreement. Philippines ratified the agreement only in the year 2010, as the last among the nine countries. Though Environmental Ministry of Indonesia made several attempts to introduce this agreement in the form of a Parliamentary Bill, taking into consideration the domestic economic interests and various other concerns, Indonesia is the only member of ASEAN that hasn't ratified it. Since there was no ratification made, the agreement even though executed by Indonesia at the initial level will have no legal binding and it has limited the effectiveness of the agreement.

The agreement also recognises and promotes 'zero burning' as the best method to deal with forest fires under **Article 9.a**: "Developing and implementing legislative and other regulatory measures, as well as programmes and strategies to promote zero burning policy to deal with land and/or forest fires resulting in transboundary haze pollution". This means that the agreement does not directly prohibit certain types of conduct, instead merely encourages the parties to promote zero burning policies.

The concept of non-interference is one of the fundamental principles which guide the relations of ASEAN member nations with each other. **Article 12** of the agreement states, 'assistance can only be employed at the request of and with the consent of the requesting Party, or, when offered by another Party or Parties, with the consent of the receiving Party'. It means to say that member states should strictly observe the norm of non-interference and members to practice 'non-interference in the internal affairs of one another' and recognizes 'the right of every state to lead its national existence free from external interference'.

The non-interference principle firstly discourages member states from criticizing or intervening in members' internal affairs. Second, it commits members to deny sanctuary and support to groups seeking to subvert or overthrow the governments of member states. Third, it discouraged members from providing external powers with any form of support deemed subversive to other members (Katanyuu2006).

Article 27 of the agreement states, 'any 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'. It is meant that, even if there is a wilful breach of the clauses in the agreement it will not lead to any national or international liability and that it can be resolved only through friendly cooperation.

3. Global Perspective:

The 1992 Rio Declaration on Environment and Development defines the rights of the people to be involved in the development of their economies, and the responsibilities of human beings to safeguard the common environment. The declaration builds upon the basic ideas concerning the attitudes of individuals and nations towards the environment and development, first identified at the United Nations Conference on the Human Environment (1972). Rio Declaration contains various principles which includes,

- "Nations have the right to exploit their own resources, but without causing environmental damage beyond their borders."
- "The polluter should, in principle, bear the cost of pollution."

- “Sustainable development requires better scientific understanding of the problems. Nations should share knowledge and technologies to achieve the goal of sustainability.”

As a fact, we may admit that it is wise to prevent potential adversity, even if we are not yet sure how serious such adversity may turn out to be. This is the essence of the Precautionary Principle, and defines much of the way we are beginning to respond to the challenges of sustainable development, particularly within the environmental context.

The Precautionary Principle was incorporated into the 1992 Rio Declaration on Environment and Development, stating that, "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

One of the core principles of sustainable development is the "Polluter Pays" Principle. The 'polluter pays principle' states that whoever is responsible for damage to the environment should bear the costs associated with it." (Taking Action, The United Nations Environmental Programme) but when and how much the polluter should pay is often unclear.

4. Present Scenario

Transboundary haze pollution which had caused serious threats this year has affected the neighbouring countries in all aspects which include public health, tourism, air transport, etc. There were various issues raised in Singapore Parliament recently with regard to the serious air pollution encountered this year. A total of 30 parliamentary questions have been filed, ranging from the health effects of the haze that originated from forest fires in Indonesia, to how the Government intends to address the issue of websites spreading false information which may lead to unnecessary alarm.

So at this juncture, what recourse action can be taken by affected nations against the wrong doers involved in this wilful act of burning? If this man-made fire situation occurs within the territorial borders in Malaysia or Singapore, the environmental law will come into play and the wrong doers will be made responsible for such air pollution and be penalised with heavy sanctions (polluter's pay principle would be applied). But now the situation is different. Unless Indonesia comes forward to publish that information, no remedial action can be taken. Even if it happens, it is difficult to seek remedial action as the jurisdiction of the court will be extra territorial.

The Environment Ministers of ASEAN met in Malaysia recently to discuss ways to combat the haze problem and they have recommended the adoption of a joint Haze Monitoring System (HMS). The system, which would be used in tandem with official land-use and concession maps of fire-prone areas, will help to identify which companies or individual farm owner own the plots of land which are on fire. The concession maps show who has the right to plant crops or log a particular tract of land, allowing them to be investigated and prosecuted for fires. This will ease the burden and will be useful as an evidence for enforcement action against illegal burning. It was also asserted that these concession maps will be shared only with the governments and will not be made public and that to this adoption of the Monitoring system is purely subject to approval at the ASEAN Leaders' Summit, which is scheduled in October this year in Brunei. It was reported that this HMS will be used among the five countries involved in the Sub-Regional Ministerial Steering Committee (MSC) on Transboundary Haze Pollution, which are Indonesia, Malaysia, Singapore, Brunei, and Thailand. Apart from the sharing of maps, Singapore sought several outcomes at the meeting.

- getting Indonesia to renew environmental collaboration in Jambi, and possibly other provinces, to promote sustainable farming and haze prediction,
- getting Indonesia to commit to ratifying the ASEAN Transboundary Haze Pollution Agreement expeditiously and
- getting high-level officials from all relevant ministries involved in the MSC process.

According to the Indonesian Environment Minister, "We hope we can ratify the agreement by the end of the year or early next year."

It is important to take note that Jakarta had sought legislators' approval to ratify the haze agreement but the proposal was rejected in 2008.

Responding to an issue raised in the Singapore Parliament, the Law Minister said "We are looking at introducing extra-territorial laws to penalise companies found responsible for contributing to the haze, and the Attorney-General is studying the option and considering "what legal options are available, if credible and usable evidence is received that Singapore-linked companies are involved."

The affected nations has expressed their interest that they still want to focus on cooperation and persuading neighbours to work together to put in place a long term solution.

5. Conclusions and Suggestions

Indonesia remains engaged in ASEAN processes despite its failure to ratify the Agreement on Transboundary Haze Pollution. Ministers from Singapore, Malaysia, Brunei and Thailand praised Indonesia at an ASEAN forum in May 2012 for reducing haze hot spots and for its greenhouse gas emissions targets (ASEAN, 2012). Even this year, the affected nations praised Indonesia's cooperation in, various aspects, accepting the demand of sharing of concession maps and a positive note that they will ratify the agreement at the earliest possible.

As there were various reports published in daily newspapers and internet blogs by the social activists and other public interest groups raising their concerns as Indonesia has not ratified the international agreement and that the governments of Malaysia and Singapore should take steps to force Indonesian government to ratify this agreement for to have a strict compliance of the law. Indonesia fails to ratify this agreement taking into consideration the risk to its domestic economic interests. As per the demands by the affected nations if this transboundary haze pollution agreement likely to be ratified by the Indonesian Parliament and endorsed as a legally binding agreement will not make a big difference. No action would lie against them if they fail to comply with the provisions of the agreement as it lacks strict enforcement provisions. There is another provision which reflects the weakness of the agreement with regard to dispute resolution. Even if there is a wilful breach of the clauses in the agreement it will not lead to any national or international liability and that it can be resolved only through friendly cooperation. So there is no point in urging Indonesia to ratify the agreement and it's high time for affected nations to sort this matter out efficiently, otherwise this smoke haze spread will be a never ending problem. There was an allegation made by the Indonesian government that majority plantation fields situated in Indonesia were owned by the affected nations companies. The affected nations should work out strict laws, in the form of extra territorial laws, criminal provisions with heavy penalty provisions for illegal burning. If such laws are in place, affected nations can well enforce against the plantation owners for illegal activities carried out beyond the territories.

The management of haze episodes is an important public health measure due to the potential for large numbers of people to be adversely affected. As a permanent solution to public and civil society, the affected nations should work out an effective legal framework jointly to combat haze.

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