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# ISIS focus

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## Haze Yet Again Polluting the ASEAN Sub-region

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For the more discerning citizens of the Association of Southeast Asian Nations (ASEAN) who have been following the recurring transboundary haze pollution, 2015 was earlier being closely watched with hope and trepidation. With hope because Indonesia finally ratified the ASEAN Agreement on Transboundary Haze Pollution (ATHP), after 13 years, and the region may finally see a breakthrough in solving the problem. The Agreement is legally binding and, at the time of crafting, indicated the pragmatic approach of ASEAN member countries in opting for a hard law — an international agreement — to the more often preferred soft law or cooperative and consensual discussion. The purpose of the ATHP is to gather information and gain a better understanding of what actions member states should take to mitigate the problem. It actually provides a collective framework for dealing with the forest burning and transboundary haze problem within the overall context of sustainable development. After all, the Long Range Transboundary Air Pollution (LRTAP) of 1983 in Europe is one good example on how transboundary pollution has been successfully tackled. Hence, there is no reason why ASEAN cannot emulate the success of Europe.

But there was a feeling of trepidation because the ATHP is reportedly constrained by mechanisms that support the non-intervention norm or ASEAN Way. Assistance, for example, can only be given on mutual consent and subject to direction of the recipient state. Furthermore, the ATHP contains weak non-intrusive parameters ranging from requesting and receiving assistance, monitoring, reporting, exchanging information and conducting research to absence of enforcement and liability provisions. As it stands, ASEAN member countries reportedly cannot sue polluting countries which are responsible for transboundary pollution because of the principle of non-intervention. The Agreement clearly does not contain any rule on state liability to damage although, in general, the Agreement reaffirms the ‘no harm’ principle, which is similar to Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration. The latter states “... *sovereign right to exploit their own resources pursuant to their environmental and development priorities, and the responsibility to ensure that activities within their jurisdiction do not cause damage to*

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*the environment of other States.*” For the ATHP, any dispute between parties shall be settled amicably by consultation or negotiation.

It must also be noted that it is not uncommon for states to hold on to the doctrine of state sovereignty. In many environmental treaties, state liability has been rarely developed. Instead, witnessed more often today is the need to shift and channel transboundary environmental damage from state to civil liability. Interestingly, please note the ATHP and the LRTAP are similar — both impose few concrete obligations on the parties and are drafted to allow for interpretation. The LRTAP, in the same manner, recognises the ‘no harm’ principle and explicitly avoids the rule on state liability.



However, critics have continued to question the effectiveness of the ATHP — partly because the earlier Plans, Resolutions or Accords, beautifully crafted from as early as the 1990s by ASEAN for ASEAN to take action did not manage to stop the transboundary pollution. Why has it been so difficult to put a stop to this problem?

That the problem is linked to land use, land tenure and economic development in Indonesia has long been recognised. Large corporations or companies involved in logging activities and pulp and paper plantations often see palm oil as another opportunity to continue the business of land clearing and starting industrial tree plantations. Small-scale cultivators or local communities welcome the palm oil



*A villager tries to extinguish a peatland fire on the outskirts of Palangkaraya, Indonesia on 26 October 2015. Source: edition.cnn.com.*

plantations with hopes of getting more jobs and generating higher income as smallholders.

Let us recap. Slash-and-burn, to aid soil health and control pests and diseases, has been practiced by Indonesian farmers for hundreds of years, but earlier fires were smaller in area and spread out over time. With the fires of the 1980s, the health and economic implications of the haze problem then were not properly appreciated. But from 1990s until today, 90 per cent of transboundary haze is associated with peatland fires.

ASEAN has about 25 million hectares of peatland or 60 per cent of global tropical peatland resource, of which 70 per cent is found in Indonesia. With depth ranging from 0.5 meter to 10 meters or more and consisting of incompletely decomposed soil, peatland fires are the most difficult to suppress and burning often continues underground. The smoke is high in carbon content thereby increasing the level of greenhouse gas emissions and exacerbating climate change.

While measures are being proposed at the ASEAN level, below are some of the perspectives raised during the uncountable hours of discussions and in the heaps of writing as well as steps needed to move forward:

### **Legal perspective**

International law holds that a state is responsible for transboundary harm that results from activities on its territory, carried out by the state or within its control. The 1941 Trail Smelter case where Canada was held liable for damage done to American crops due to pollution from a smelting operation has often been quoted. However, there are difficulties, as discussed above, in applying the Trail Smelter case and it is unlikely that any of the ASEAN member states will impose state responsibility on Indonesia.

Indonesia's own anti-burning law does exist and the penalties are not inconsequential. However, there is a conflicting application of rules such as Indonesia's Law 32 that allows burning in forests for traditional uses. This raises the

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Heavy haze casts an apocalyptic glow over Tumbang Nusa, Central Kalimantan province, on 25 October 2015. Source: edition.cnn.com.

*Instead of being reactive ... a more pre-emptive regulatory regime resulting in proactive measures being taken may be preferred.*

questions of what are considered ‘traditional uses’ and who or which communities are allowed these practices. Some Malaysians, who are involved in small-scale oil palm plantation in Sumatra and Kalimantan, have raised this issue — the land *Hak Guna Usaha* is very often reduced to only 40 to 70 per cent for planting; the balance is claimed by the communities as their right and burning activities are very much the norm as allowed under the Indonesia’s Law 32. Thus, in addition to lack of enforcement because of Indonesia’s relative poverty and legal shortcomings, Indonesia also faces huge challenges with its decentralised democratic system.

Singapore’s Transboundary Air Pollution Act (TAPA) of 2014, where fines can be imposed on any local or foreign company responsible for haze pollution in Singapore, can only function with strong cooperation from Indonesia. Hence, the ratification of the ATHP by Indonesia was seen as crucial. Singapore is seeking cooperation from Indonesia and Malaysia on information sharing, such as concession maps, but there is a serious constraint because of the Public Information Disclosure Act in Indonesia and the Official Secrets Act in Malaysia. But members of the Round Table for Sustainable Palm Oil (RSPO) saw a resolution on “Transparency in plantation concession boundaries” passed in 2014, making it compulsory for members to share concession maps or have their membership suspended or even terminated. The issue of making concession maps available is contentious and has been severely challenged both in Indonesia as well as in Malaysia.

Calls for Malaysia to take a similar approach — adopt a transboundary pollution act — must be seriously studied because of the implication, amongst others, on extraterritorial reach, which is often regarded as an infringement of the state’s national sovereignty. Instead of being reactive, such as the case for Singapore’s TAPA, a more pre-emptive regulatory regime resulting in proactive measures being taken may be preferred.

### **Economic perspective**

Burning is cheap, quick and efficient. But the health, economic and diplomatic impacts of the haze as well as loss of biodiversity and agriculture productivity, destruction of natural and cultural capitals, disturbance of the natural hydrological cycles/microclimate and consequences for traditional livelihoods can be huge. The



cost of the 1997–1998 fires amounted between US\$4.5 billion and US\$9.3 billion depending on sources taken.

The framework recommended by one ASEAN scholar was the stakeholders' approach to cost-sharing and he argued that the cost of an effective fire prevention and control programme in Indonesia should be shared among the various stakeholders and other interested institutions both inside and outside the country. Interestingly, sharing the burden of costs associated with the development and implementation of an effective land fire prevention and control was analysed and Malaysia's and Singapore's efforts were used as case studies.

Moving forward, efforts by Malaysia (in Riau) and Singapore (in Jambi) must be reexamined so as to address the gaps and get full participation of the target groups, such as the smallholders and the large corporations in future initiatives. Their non-involvement was then associated to trust deficiency while involvement was perceived to reflect guilt.



*Forest fires in Indonesia have caused record pollutants levels in Singapore. Source: Reuters/Edgar Su.*

### Scientific perspective

It is difficult to predict how long the haze will remain or how intense it will be. Many of the variables depend on the number of hotspots — burning activities resulting in haze. A top climatologist indicated that the El Niño–Southern Oscillation or ENSO (El Niño is associated with a dry phase) is more felt in Sumatra and Kalimantan and will be prolonged until March 2016. Will the haze then pollute until this period?

Since ENSO itself is a predictable event, the information is relevant in mitigating the risk of fires and recurrence of haze. Moving forward, research is crucial to study, for example, how ENSO interacting with anthropogenic climate change may change future drought characteristics. Science mediators have a role to use non-scientific language and communicate the information effectively. The public is more discerning and critical and the social media is a powerful tool and hence timely

*... timely information will facilitate better understanding and decision-making.*



*Malaysia's landmark Petronas Twin Towers and other commercial buildings are shrouded in haze in Kuala Lumpur, Malaysia, on 14 September 2015. Source: Bernama images.*

information will facilitate better understanding and decision-making. The reactive mode and flurry of explanations on the differences in Malaysia's Air Pollution readings last year were perceived as not transparent or credible.

Innovative efforts are emerging with mapping software and tools. Technology is also being constantly upgraded and, while many of the technologies have yet to be applied on a wide scale, Indonesia and various international companies have attempted to use special sensors and drones to map burnscars so as to indicate a higher number of real fires.

### **Concluding remarks**

It is important that in addition to regional and intergovernmental efforts, the private sector, finance sector, civil society and academia should collaborate where possible and contribute to sustainability standards and support regional cooperation.

A final point to be highlighted is the element of trust. Warren Buffet once said, "Trust is like the air we breathe, when it's present nobody notices. But when it is absent, everybody notices." Trust, according to a prominent Malaysian medical practitioner, allows us to function in times of uncertainty and there is a need to build that pool of trust. We, the citizens of ASEAN, must build up trust and think in values term and put the values to work to achieve the ASEAN dreams.

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