ISSUE FOCUS
Legal Aspects of Renewable Energy Development
Weidong Yang, Problems and Adjustments of Renewable Energy Legislation in China
Kenji Asano, Enactment and Enforcing Processes of the Japanese Feed in Tariff Law:
Difficulties for Maximizing Renewable’s Diffusion while Minimizing National Burden

ARTICLES
Gary Lilienthal & Nehaluddin Ahmad, Communis Opinio and Jus Cogens:
Yong Wang, China’s Practice in Treaty Reservations since 1949: Legal and Policy Evaluation

NOTES & COMMENTS
Lin Zhang & Lingsheng Zhang, Research and Teaching of International Law in Contemporary China:
A Landscape Sketch
Eric Yong Joong Lee, Will Trump’s Military Option against North Korea Work? Legal and Political Restraints

REGIONAL FOCUS & CONTROVERSIES
International Law and Natural Phenomenon
Indonesia : Natalia Y. Puspita
China : Hao Shen

STUDENT CONTRIBUTION
Yi Chao, Power, Jurisdiction and Admissibility: Reconceptualizing Procedural Legal Issues
in the Interpretative Proceedings under Article 60 of the ICJ Statute

EAST ASIAN OBSERVER

DIGEST

INTERNATIONAL LAWYER
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REVIEW

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1. Introduction

The haze phenomenon is engulfing Southeast Asia. Such a yearly epidemic is primarily originating from fires ravaging the forests of the Indonesian islands. Indonesia, Malaysia, and Singapore are often badly distressed by this environmental anomaly. Thick smog hovers over the airspace of Malaysia, Singapore, Southern Thailand, and, at times, the Philippine islands, causing environmental and health problems for millions of people inhabiting areas across the region. The scarcity of rain often worsens the appalling air quality in affected areas. Nearly every year, the unwanted smoke - brought about by the winds from forest fires in Sumatra and Borneo - hovers over Southeast Asian skies for months, depriving millions their right to enjoy clean air. On October 4, 2015, satellites detected 1,840 hotspots over Sumatra.

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Island and 257 forest fires in Kalimantan. The Indonesian government sent in about thirty-seven hundred police and military personnel to combat the haze, but this was not an easy task indeed. Since 1997, such an annual ‘unwelcomed guest’ has visited Southeast Asia; it was more serious in 1999, 2005, 2006, 2009, 2013, 2015, and 2016.

For almost twenty years, Southeast Asian nations have struggled to overcome this massive transboundary pollution, but things have yet to show signs of improvement. Malaysia and Singapore put the blame on Indonesia, while Indonesia, on the other hand, contends that the haze is caused by plantation companies from Malaysia and Singapore operating on Indonesian soil. The blame game will not do any good for the region. Therefore, it is important for the Association of Southeast Asian Nations ("ASEAN") to come together through the spirit of the 2002 ASEAN Agreement on Transboundary Haze Pollution to overcome this unwanted phenomenon. Unless effective cooperation can be established, the haze will continue to ‘haunt’ the skies of Southeast Asian nations for generations to come. What are the legal options available for Malaysia?

2. Haze: From Indonesia to Southeast Asia

Indonesia is the main contributor to the haze phenomenon that has been choking Southeast Asia. It is primarily caused by slash and burn techniques adopted by farmers in the islands of Borneo and Sumatra, a method extensively practiced as it is the cheapest and easiest means to clear the lands for traditional agriculture. Forest fires created through this technique generate thick smoke. To make matters worse, smog is moving far with scarcity of rain.

In 2013 and 2015, the haze largely affected the southern provinces of Thailand.


4. Id.


8. Id.
namely Yala, Pattani, Narathiwat, Satun, and Surat Thani. Dense pollution caused flight delays in areas popular with tourists such as Phuket and Ko Samui. Among these southern provinces, Narathiwat was the worst hit, with particulate matter levels in that province reaching 129 micrograms/cubic metre, a level considered dangerous to health.  

Meanwhile, the ASEAN Specialised Meteorological Centre (“ASMC”), based in Singapore, detected 1347 hotspots in September 2015, which were scattered mostly in the Indonesian province of Kalimantan Selatan (south Borneo), causing slightly hazy conditions in Brunei and other parts of Borneo. In 2015, the haze from Indonesian forest fires even reached the shores of the island of Mindanao, located more than twelve hundred kilometres from the nearest fires. In October 2015, air transportation were disrupted with dozens of delays and flight cancellations.

Although Thailand, Brunei, and the Philippines were affected, the haze that engulfed the skies of these countries was just a small fraction of smog that hovered across Malaysia, Singapore, and Indonesia. The Air Pollutant Index (“API”) readings in Malaysia and Singapore hit two hundred points (very unhealthy) during the fourth week of September 2015. The API level in Palangkaraya, a city in Kalimantan Tengah (Central Borneo), soared to two thousand - ten times worse than the readings in Malaysia and Singapore. During the peak of the haze epidemic in October 2015, visibility in Palangkaraya was reduced to below one hundred metres - a manifestation of how bad this man-made disaster was back then.

The haze brings about a number of serious health problems to the affected countries including asthma, upper respiratory infection, and decreased lung function, as well

11 Id.
12 See Air quality in Brunei “good” despite haze, BORNEO BULL. (2015).
15 An API reading above three hundred indicates hazardous air quality standards. See M. COCHRANE, TROPICAL FIRE ECOLOGY: CLIMATE CHANGE, LAND USE AND ECOSYSTEM DYNAMICS 3-10 (2009).
as eye and skin irritation.\textsuperscript{17} As young children are classified the most vulnerable, schooling sessions have been postponed for Singapore and much of Malaysian peninsula's western states in 2015.\textsuperscript{18} Malaysia's multibillion dollar tourism industries - that account for about 6 percent of Malaysia's GDP - could also be adversely affected by haze.\textsuperscript{19} In addition, the haze has influenced on the flora and fauna system of this country. The hazardous particulate in the polluted air affects migratory birds making their annual journey to Malaysia to escape the winter in East Asia.\textsuperscript{20} Other animals would also be hard to find food in the wild because the haze brings ash and a nauseating smell.\textsuperscript{21} Economics experts have opined that a prolonged annual haze phenomenon may affect the ASEAN members' GDP.\textsuperscript{22} Without immediate action, the situation will get worse, deterring many Southeast Asians from their right to clean air and environment. Despite a number of complaints made by Malaysia and Singapore, Indonesia has not yet delivered meaningful measures to stop the haze. Instead, it pledged that three years would be necessary to end smog problems.\textsuperscript{23}

3. "Prosper Thy Neighbour": Jurisprudence of Three Cases

As haze has become a yearly phenomenon, Malaysia should come up with legal


options against those involved. Under the law of torts, e.g., a homeowner who starts a fire, whether on purpose or by accident, would be liable for any loss or damage caused to the neighbours.24 A similar doctrine has been developed in international law as depicted in the 1941 Trail Smelter Dispute, where smoke from a smelter in Canada spread across the border into the United States, causing air pollution there.25 In this case, the arbitral tribunal held Canada responsible for the environmental damage and ordered it to pay for the damages.26

Under international law, a country is required to take extra precautions not to cause injury to the subjects of another sovereign entity. In the 1949 Corfu Channel case, Albania failed to provide due notice of the presence of mines to British war vessels navigating its waters.27 This failure caused deaths and injuries to British troops when their vessels struck the mines. The International Court of Justice (“ICJ”) ordered Albania to pay reparations (GBP 875,000) to the British government for the damage caused to the British military.28

The Land Reclamation Case between Malaysia and Singapore is also a good example of environmental protection under international law. In April 2002, Malaysia lodged a protest against Singapore’s reclamation works around Pulau Tekong and Pulau Ubin, two islets lying on the Straits of Johor, on the grounds that they were causing transboundary environmental harm to Malaysia’s territorial waters.29 Subsequent to an unsuccessful meeting between the parties in 2003, Malaysia initiated proceedings against Singapore at the International Tribunal for the Law of the Sea (“ITLOS”) to refrain from continuation of its reclamation works around these islands.30 Nevertheless, the ITLOS prescribed that both States should cooperate and consult independent experts to undergo specific research to ascertain the effects of such reclamation works.31 Both were recommended to propose measures to overcome

25 Id.
30 Xiong Liangmin, Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), CHINA OCEAN L. REV. 566-70 (2005).
adverse effects of such a project to the environment, if any.\textsuperscript{32}

As shown at these three cases, international law does not allow States to perform any acts that would injure the well-being of others. As nations are sovereign entities, however, other nations would not easily intervene into their essential domestic affairs especially through judicial measures.\textsuperscript{33} While it is possible to bring legal claim for compensation against Indonesia to the ICJ or any international tribunals, Indonesia’s consent is required for this purpose.\textsuperscript{34} In any case, the parties concerned need an agreement to go to a court.\textsuperscript{35}

4. Overcoming the Haze Problem

Despite the failure of the ASEAN to achieve integration by the year 2015 as initially planned,\textsuperscript{36} the ASEAN countries have been successfully working together as a team. This was demonstrated in their effort to combat piratical activities in the Straits of Malacca and Singapore.

A decade ago, piratical activities were so rampant in these waters that the Joint War Committee (“JWC”) of Lloyd’s Market Association declared the Strait of Malacca a war-risk area beginning in July 2005. The declaration put the strait on par with other well-known war zones, such as the waters off the war-stricken countries of Somalia, Iraq, and Lebanon.\textsuperscript{37} Realizing the adverse effects of piratical activities, the three littoral States including Singapore, Malaysia, and Indonesia introduced a number of collaborative measures, such as the Tripartite Technical Expert Group (“TTEG”) - both in safety of navigation and maritime security - Malacca Straits Coordinated Patrols (“MALSINDO”), Eyes in the Sky (“EIS”), and the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (“ReCAAP”), in

\textsuperscript{32} Id.


\textsuperscript{34} Mo. Sameh M. Amr, The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations 27-31 (2003).


\textsuperscript{37} C. Raymond, Piracy and Armed Robbery in the Malacca Strait, 62 NAVAL WAR COLLEGE REV. 31-42 (2009).
order to combat piracy and maritime terrorism in the straits.  

Another example of the success of the ASEAN legal cooperation is in relation to overlapping maritime claims in the South China Sea, which are now issues of great concern in this region. On November 4, 2002, Southeast Asian countries and China concluded a Declaration on the Conduct of Parties in the South China Sea, aiming to enhance favourable conditions for a peaceful and durable solution of differences and disputes between themselves. Despite ongoing contentions and conflicts between the ASEAN nations (particularly the Philippines) and China on the South China Sea, the ASEAN had offered a draft framework for a code of conduct ("CoC") for the South China Sea by mid-2017, in anticipation of at least minimizing conflicts that could exacerbate the instability of this region.

In early 2015, Malaysia, Indonesia and Thailand encountered an exodus of Rohingya migrants from Myanmar coming to their shores. These nations were initially reluctant to receive these migrants, leaving them drifting to nowhere in the Andaman Sea. Under the spirit of the ASEAN brotherhood, however, Malaysia, Indonesia and Thailand subsequently decided to open up their borders to these migrants who were desperately in need of humanitarian assistance and host them for a period of one year.

These examples exemplify that the ASEAN members can work together to face and overcome conflicts. The ASEAN could emulate this effective and successful cooperation to overcome the current haze problem. The ASEAN Agreement on


Transboundary Haze Pollution has truly provided a basis of cooperation on this matter, but it has yet to be fully materialised.

5. The ASEAN Way

Ever since its inception in 1967, the ASEAN has made somewhat steady progress toward fostering better cooperation between its ten member States. While the Association has moved toward integration in certain aspects, it has a long way to go in terms of environmental quality enhancement for millions of its people. In 1999, the former ASEAN secretary-general, Rodolfo Severino contended that the ASEAN members, unless consented, could not take legal actions against State parties that should be responsible for committing transboundary pollution. The ASEAN holds firmly to the principle of non-intervention. As such, it is a viable approach to address the matter peacefully and diplomatically in a bilateral discussion and in a regional forum.

The ASEAN Agreement on Transboundary Haze Pollution was signed on June 10, 2002 and entered into force in 2003. Indonesia finally ratified it in 2015. This Agreement mainly provides the grounds for cooperation between the ASEAN countries when an outbreak of haze takes place. In line with the ASEAN way, its provisions do not allow member States to claim damages, reparation, or compensation from the offending State. If this epidemic is developing, however, it is unsure whether or not this Agreement would be effective in combating haze.

6. Conclusion

Haze is a problem that impinges the quality of life for millions of people residing

46 R. Severino, Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General 107-20 (2006).
47 Id.
49 Id.
all across Southeast Asia. As the main cause of haze originates from Indonesia, its central government in Jakarta must do something to bring an end to this manmade environmental disaster. As stated earlier, Indonesia asks three years to put an end to this calamity. However, three years are a long period of time for Malaysia and Singapore to endure. Where is the ASEAN spirit of "Prosper Thy Neighbour?"

Because the ASEAN embraces the principle of non-interference, Malaysia and Singapore cannot directly interfere in the domestic affairs of Indonesia. Nevertheless, should the haze problem be prolonged, the world community should consider putting diplomatic pressure on Indonesia since the thick smog affects not only Southeast Asia but the world as a whole by contributing to global warming and biological diversity destruction. Malaysia does not intend to institute legal action against Indonesia. At the moment, apart from the need for a strong political will from the countries involved, the best way for Malaysia and other ASEAN countries in combating this smog dilemma is to put into practice the long-overdue provisions of the Agreement on Transboundary Haze Pollution. Without strong determination and cooperation, the ASEAN countries may have to brace themselves for haze hazards for many more years to come.