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TRANSBOUNDARY HAZE POLLUTION IN THE PERSPECTIVE OF INTERNATIONAL LAW OF STATE RESPONSIBILITY

ABSTRACT

In recent decades the Southeast Asia Countries have been affected by haze pollution which is caused by human activities in burning land/forest for plantation and/or agriculture. Indonesia is one of the major sources of the haze pollution in the region. The pollution does not stop at national borders only, but also causing transboundary pollution to the neighboring countries such as Malaysia and Singapore. As a reaction of this environmental crisis, ASEAN Agreement on transboundary Haze Pollution was signed. The Agreement recognizes that transboundary haze pollution which resulted from land and/or forest fires should be mitigated through concerted national efforts and international cooperation. As of June 2013, all the ASEAN countries, except Indonesia, have ratified the agreement. However Indonesia hopes to ratify the haze agreement by 2015. The study is normative legal research with Statute Approach and Case Approach. By using the qualitative descriptive method, this study will describe the transboundary haze pollution in details which could be seen in some international laws concerning law of state responsibility as for Draft Articles on State Responsibility and 1997 ASEAN Agreement on Transboundary Haze Pollution. The result shows that Indonesia needs to do the action, not only in term of how to combat the

forest fires with the deployment of personnel from ASEAN, but also preventing issue of it, namely by making the rule of law which effectively penalize the forest burning. Most of these problems can be overcome only if Indonesia ratified the ASEAN Agreement on Transboundary Haze Pollution.

Key Words: Transboundary Haze Pollution, State Responsibility, International Law, ASEAN, ASEAN Agreement on Transboundary Haze Pollution

ABSTRAK

Dalam beberapa dekade terakhir negara-negara di Asia Tenggara telah mengalami kerugian yang sangat besar akibat pencemaran asap batas lintas negara. Polusi asap tidak hanya mengganggu wilayah Indonesia saja, tetapi juga telah merugikan negara-negara di kawasan Asia Tenggara. Sebagai respon dari peristiwa tersebut, pada tahun 2002, Perjanjian ASEAN tentang *ASEAN Agreement on Transboundary Haze Pollution* (AATHP) telah ditandatangani oleh seluruh negara-negara ASEAN. Semua negara kecuali Indonesia. Indonesia diharapkan untuk dapat meratifikasi perjanjian AATHP tersebut paling lambat pada tahun 2015, agar permasalahan pencemaran asap batas lintas negara dapat. Penelitian ini merupakan penelitian hukum normatif dengan menggunakan pendekatan peraturan perundang-undangan dan pendekatan kasus. Dengan menggunakan metode deskriptif kualitatif. Hasil penelitian menunjukkan bahwa Indonesia perlu melakukan tindakan nyata, tidak hanya dalam hal bagaimana untuk mengurangi kebakaran hutan dengan menggunakan segenap sumber daya yang dimiliki, namun Indonesia juga harus mencegah terjadinya kembali pencemaran asap lintas batas negara dengan membuat aturan hukum yang secara efektif dapat diberlakukan dan menghukum pelaku pembakaran hutan. Selain itu Indonesiapun wajib membuat pertanggungjawaban kepada negara-negara yang dirugikan oleh peristiwa pencemaran ini, mengingat kerugian yang dialami beberapa negara tetangga tidak hanya dari sisi kesehatan dan sosial, namun juga terancamnya sistem perekonomian negara lain. Penelitian ini menemukan fakta bahwa sebagian besar permasalahan pencemaran asap ini dapat diatasi hanya jika Indonesia meratifikasi AATHP.

Kata kunci: Pencemaran Asap Batas Lintas Negara, Pertanggungjawaban Negara, Hukum Internasional, ASEAN Agreement on Transboundary Haze Pollution

I. INTRODUCTION

Major episodes of fire and transboundary haze pollution occurred in the region during the 1980s and 1990s. The blaze of 1997-1998 which affected Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore and Thailand, was among the most damaging in recorded history. More than 9 million hectares of land were burnt, 6.5 million of which were forested areas. A social and economic loss incurred by ecological forest fires is large enough. The losses to be accepted by the Indonesia caused by forest fires in 2014 are estimated 10 trillion rupiah or 70.1% of the GDP of the forestry sector in 1997. In addition, Malaysian also had suffered a loss of \$ 300 million in the sector of tourism and industry, while Singapore experienced a loss of about \$ 60 million in tourism sector. (www.haze.asean.org, last viewed on January 15th, 2014 at 3.13 pm.)

States have the right to exploit their own natural resources and also the responsibility to ensure that the activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction. (Yusof, 2000: 8). Air pollution fires contrary to the principles of international environmental law. One of the principles is "*Sic utere alienum tuo ut non laedes*" which defines that one must use his own so as not to injure others and principles of *good neighborliness* (Murphy, 2012: 129).

Essentially, the principle of territorial integrity of a country should not be disturbed by other countries. Principles of international law for the protection of the environment is general prohibition to pollute principle, the prohibition of abuse of rights, the duty to prevent principle, the duty to inform the principle, the duty to negotiate and cooperate principle, intergenerational equity principle. (Samekto, 2009: 119).

The principles are recognized by international law in the UN Charter (in relation to state sovereign rights), and specifically in the Declaration of the United Nations Conference on the Human Environment 1972, the Declaration of the United Nations Conference on Environment and Development 1992, the 1933 London Convention, the 1971 Ramsar Convention, the 1978 Amazonian Treaty and in the 1983 International Tropical Timber Agreement. (Yusof, 2000: 8.) The consequences of that breach may be the basis of the State to hold the liability to the State who has committed acts that harm other countries. According to international law, the State liability arising in respect of the State concerned harming another State. In this case, a forest fire in Indonesia is having a negative impact towards neighboring countries.

ASEAN as an organization where the parties internationally shelter has the juridical form of international treaties, namely the 1997 ASEAN Agreement on Transboundary Haze Pollution (AATHP). Yet ASEAN countries especially Malaysia and Singapore are not pleased because Indonesia has yet to ratify it so. In fact, all ASEAN countries have ratified the agreement, but not Indonesia.

II. RESEARCH QUESTION

How does the perspective of international law on transboundary haze pollution based on the Law of State Responsibility?

III. RESEARCH METHOD

A. The Type of Research

The type of this research is a normative legal research with the international law and Indonesian law approach through the regulations and conventions that regulate it, especially that related with the issue of transboundary haze pollution. This research would use statute approach, (Ibrahim, 2006, *Teori dan Metodologi Penelitian Hukum Normatif*, Malang: Bayu Media, p. 301) because it would tell some regulations such as ASEAN Agreement on Transboundary Haze Pollution, Draft Articles on State Responsibility and other conventions relating to the issue. This research would also use case approach, (Yusof, 2000: 302) because this research aims to study the norms or regulations in practice pertaining to transboundary haze pollution and state responsibility.

B. Technique of Collecting Data

The methods of collecting data in this research will be done through library research by literature learning. This method will collect data from reading, analyze, and try to make conclusion

from related documents namely convention, laws books, legal journals, and others which related to the main problem as the object of this research.

C. Data Analysis

The data will be analyzed systematically through juridical thinking. Systematically means the research will be analyzed based on international law, especially relating to the issue of transboundary haze pollution and state responsibility. Juridical thinking means it would be connected with the principle of law, conventions, and others related regulations.

IV. RESULT AND DISCUSSION

A. The Definition of Transboundary Haze Pollution

Article 1 (a) of the Convention on Long Range Transboundary Air Pollution (1979) defines air pollution the introduction by man, directly or indirectly of substances or energy into the air resulting in deleterious effects of such a nature as to endanger human health. (O'Brien, 2011: 559.)

According to the recommendations of the OECD, Principles Concerning Transfrontier Pollution in 1974, the definition of air pollution as follows: the introduction by man, directly or indirectly, of substances or energy into the environment resulting in deleterious effects of living resources and ecosystems, and impair or interfere with amenities and other legitimate uses of the environment. Furthermore, ASEAN Agreement on Transboundary Haze Pollution defined the air pollution as smoke resulting from land and/or forest fire which causes deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment.

In terms of discussing the problem of cross-border pollution, especially air pollution can be interpreted as an illustration, explaining that the contamination that occurred in an area of the country but their impact by the media due to pass through the atmosphere or biosphere to another area of the country.

Based on the above explanation, transboundary haze pollution means haze pollution whose physical origin is situated wholly or in part within the area under the national jurisdiction of one Member State and which is transported into the area under the jurisdiction of another Member State. (*ASEAN Agreement on Trans boundary Haze Pollution, 2002*). Thus concluded that the cross-border pollution is the air pollution derived in whole or in part of a country that have an impact in an area that is under the jurisdiction of another country.

B. The Impact of Transboundary Haze Pollution.

Transboundary smoke haze from land and forest fires during the traditional dry season from June to October has been a perennial problem in the southern ASEAN region in the past decade. These fires are caused mainly by land clearing and 'slash and burn' agricultural practices in Indonesia, particularly Sumatra and Kalimantan. The resultant smoke haze from such activities

can be carried over to Singapore and is dependent on factors such as the proximity and extent of the fires, the strength and direction of the prevailing winds, and the incidence and amount of rain.

Transboundary haze pollution affects human health adversely and can also cause significant disruptions to businesses and livelihoods in the countries surroundings. It is a complex issue, and ASEAN continues to adopt a multi-faceted approach to the problem via regional cooperation and domestic measures.

In recent studies, exposure to particulate pollution -either alone or with other air pollutants- has been linked with premature death, difficult breathing, aggravated asthma, increased hospital admissions and emergency room visits, and increased respiratory symptoms in children. People most at risk from exposure to fine particulate matter are children, the elderly, and people with chronic respiratory problems. According to the Economic and Environment Programme in South-east Asia and WWF, the haze of 1997 cost the people of Southeast Asia some USD1.4 billion, mostly in short-term health costs. More than 40,000 persons were hospitalized for respiratory and other haze-related ailments. The long-term impacts on health of exposed children and elderly are unknown. (www.haze.asean.org, last viewed on January 15th, 2014 at 12.30 am)

The haze also has many impacts pertaining to the ecological and environmental damage, such as: (1) The loss of species: forest fire destroys wildlife's habitat as well as a variety of trees in the forest. (2) The threat of erosion: The loss of wildlife caused open land so susceptible to erosion and can no longer hold back the flood. (3) The decline in foreign exchange: declining productivity automatically affect the micro economy which in turn affects the economy of the country. (4). Global warming: transboundary haze pollution also leads to changes in the composition of greenhouse gases in atmospheres, namely the increasing concentrations of greenhouse gases globally resulting in an increase in the average temperature of the earth's surface, which was then known as global warming. (5). Greater transboundary effects are generated by reactions of sulphur, nitrogen, and other substances, with water vapour in the atmosphere, where they form acidic compounds, deposited as acid rain, or create other pollutants such as ozone gas (O₃). (Birnie, *et al*, 2009: 343.)

C. State Responsibility

State responsibility is defined as liability of a state for failure to observe obligations imposed by rules of international law. (Breau, 2012: 135.) Furthermore, good neighborliness and international co-operation are two main principles of international law that are closely connected with the issue of responsibility of states to protect the environment. The United Nations Charter in its Article 74 stated that members of the United Nations also agree that their policy in respect of the territory to which this Charter applies... must be based on the general principle of good neighborliness, due account being taken of the interests and well-being of the rest of the world, in social, economic and commercial matter. (Jan, 2008: 322.) The law of state responsibility is cus-

tomary international law. Unlike state immunity, which has been developed largely by domestic legislation and domestic courts, state responsibility is pre-eminently an area of international law developed by state practice and international judgments, of which numerous examples are referred to in the ILC's Commentary on the Articles. (Aust, 2012: 377.)

The emergence of state responsibility for environmental based on the existence of the actions or activities committed in the territory of a country or in under the supervision of the country that carry consequences detrimental to the environment without knowing the limits of the state. Under international law, the State's responsibility in terms of international environmental law in particular haze transboundary pollution problems, be arranged in a number of international regulations, such as the Stockholm Declaration of 1972, the 1992 Rio Declaration, the Biodiversity Convention, and the Climate Change Convention, and equipped with the principles of international environmental law which have been mentioned above.

In Draft Articles on State Responsibility adopted by the International Law Commission (ILC), (Draft Articles *Responsibility of States for Internationally Wrongful Acts* International Law Commission, 2001), stated in article 1 that "Every internationally wrongful act of a State entails the international responsibility of that State". So, each acts or omissions prohibited by international law bring international responsibility for the country. ILC draft is not binding as an instrument of international law because it has not been established as a legal product. However, the binding strength of the ILC Draft is not seen as an instrument of its shape, but of their contents. ILC Draft can be used as an additional source and binding as customary law International. (Dixon, 1996: 219.)

In addition, the State liability forms stipulated in the draft articles of the ILC. Compensation or reparation stipulated in article 31. Compensation forms can be:

- a. Restitution (Article 35): the obligation to restore the situation to normal harmed.
- b. Compensation (Article 36): indemnity obligation in the form of material or money
- c. Satisfaction (Article 37): regret, a formal apology.

In the case of transboundary haze pollution, the aggrieved state can be sued by the Government of Indonesia for a number of international conventions have also been ratified by Indonesia, such as the Biodiversity Convention and the Climate Change Convention and the ASEAN Agreement on the Conservation of Nature and Natural Resources, 1985, in which the Indonesian have ratified, which contains a provision that the state may be exploiting their natural resources, but is obliged to ensure that the activity does not cause damage to other countries in the region (state responsibility). Provision has even become customary international law (customary international law) and binds all civilized countries, even been applied since 1941 in the Trail Smelter case (U.S. vs. Canada).

In addition, the above provisions have also been adopted in the Act (Act) No. 32 of 2009 on the Protection and Management of the Environment. Therefore, there is no legal reason that

could liberate Indonesia from liability if the injured sued the state of Indonesia. Indonesian responsibility reinforced by Indonesia's own national law because Law No. 4/1999 on Forestry and Government Regulation (PP) No. 4/2001 on Forest Fire and PP No. 45/2004 on the Protection of Forests expressly prohibits the burning of forests. (Syarif, 2005).

To prove whether or not the Indonesian compensation be held, to be seen as a kind of loss caused by an act of the State which may be active (*an act*) or inaction (*omission*). Active action means action taken deliberately by the State apparatus which later became the responsibility of the State. While the State apparatus acts of omission are not taking any action, but because of the lack of action resulted in a loss for the other country.

Country contaminated by the pollution caused by the haze can certainly hold Indonesia. They must prove that the haze pollution into their territory is the failure of the Indonesian authorities in dealing with the haze. It could have foundered because what happens is instead of letting Indonesian officials (omission) of haze pollution, but because of the inability of authorities in Indonesia to handle completely. The inability of the action is not allowed. The inability of the action is already done but not sufficient.

Since a fairly large forest fires that occurred in 1982 which was then followed by a series of forest fires the next few years, actually has implemented several measures, both anticipatory (the prevention) as well as overcome by Indonesia.

D. ASEAN Agreement on Transboundary Haze Pollution (AATHP) and Indonesia

1. Background AATHP

The ASEAN Haze Agreement recognizes that transboundary haze pollution which result from land and/or forest fires should be mitigated through concerted national efforts and international cooperation. The Agreement comprehensively addresses all aspects of fire and haze including prevention, emphasizing the underlying causes, monitoring, and mitigation. An ASEAN Transboundary Haze Pollution Control Fund has been established to implement the Agreement. The Government of the ten ASEAN Member Countries signed the ASEAN Agreement on Transboundary Haze Pollution on 10 June 2002 in Kuala Lumpur, Malaysia. The Agreement is the first regional arrangement in the world that binds a group of contiguous states to tackle transboundary haze pollution resulting from land and forest fires. It has also been considered as a global role model for the tackling of transboundary issues.

The Agreement requires the Parties to the Agreement to:(i) cooperate in developing and implementing measures to prevent, monitor, and mitigate transboundary haze pollution by controlling sources of land and/or forest fires, development of monitoring, assessment and early warning systems, exchange of information and technology, and the provision of mutual assistance; (ii) respond promptly to a request for relevant information sought by a State or States that are or may be affected by such transboundary haze pollution, with a view to minimize the consequence of the transboundary haze pollution; and (iii) take legal, administrative and/ or other

measures to implement their obligations under the Agreement.

The study concludes that there are 7 (seven) of AATHP institutional implications, as follows: (1) human resource capacity building and equipment in disaster management of land and forest fires in Indonesia through a help of mechanisms and technical cooperation, (2) the improvement of information and data of management of land and forest fires in Indonesia are more effective through mechanisms of monitoring, reporting and communication with the ASEAN Centre, (3) the development of clarity of duties and functions of institutions in disaster management of land and forest fires in Indonesia through designation and establishment NFP (National Focal Point), NMC (National Monitoring Centre) and CA (Competent Authorities), (4) AATHP implicated in promoting the manufacture of Disaster Management SOP forest fires in Indonesia, (5) the development of the ASEAN Centre to facilitate cooperation and coordination between the Parties in the disaster relief efforts of forest and land fires in Indonesia, (6) Improvement of the development application Clearing Without Fuel (coal-fired plant) in the absence of guarantee that the Indonesian through legislative, administrative and other relevant measures will be taken to preventing land clearing by burning and technical cooperation between the Parties to further promote coal-fired plant, and (7) promoting a more adequate allocation of funds in disaster management of land and forest fires in Indonesia. (Saraswati *et. al.*, 2010)

2. The Impact of AATHP Ratification for Indonesia

AATHP consists of 32 articles and an attachment. Here are discussed the most important part of the deal that has an influence on Indonesian. (Saraswati *et. al.*, 2010)

1. Article 2: The purpose of this agreement is to prevent and to monitor trans boundary haze pollution caused by forest fires which should be done with the national efforts within regional and international cooperation;
2. Article 3: Principles. The principle of state responsibility, the Preventive Principle, precautionary principle, principles of safe development, and the principle of co-operation with all stakeholders including local communities, NGOs, farmers and private companies;
3. Article 4: General Obligations
 - a. Cooperate in the prevention of transboundary air pollution caused by forest fire monitoring efforts including development, a system of early warning, exchange of information and technology and give each other support,
 - b. When transboundary haze pollution occurs from a state, to respond immediately and inform the state or states affected or will be affected by air pollution is to minimize the consequences.
 - c. Legislative and administrative efforts to implement the obligations under this agreement;
 - d. Article 5: the existence of ASEAN center created to facilitate cooperation and coordination among the parties in managing the impacts of haze pollution. When a country declares a state of emergency, they may request assistance to ASEAN Centre;

- e. Article 16: technical and research cooperation including exchange of information, experts, technology and tools. Provide training, education and awareness campaigns about the impact of the development of air pollution on health and the environment; and

Article 27: Settling international disputes through peaceful means is a cardinal principle of the law of the United Nations (UN). An international dispute, irrespective of its nature, can be resolved peacefully either by diplomatic means, such as negotiation, use of good offices, mediation, conciliation or by judicial means, such as arbitration or litigation through court of law. (Hamid, 2012: 375). Moreover, one of the purposes of the UN as stated in Article 1 of UN Charter is to bring about peaceful means, and in conformity with the principles of justice and international law. (Hamid, 2012: 375.) States are under an obligation to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. (Wallace and Martin-Ortega, 2012: 333) Various rules of international law can be stated about the principles of international dispute resolution such as the principle of good faith, the principle of the prohibition of the use of violence in settling disputes, the principle of freedom of choice means of dispute resolution, the principle agreement of the parties, and the principles of international law concerning independence sovereignty and territorial integrity of states. (Adolf, 2004: 15-18). Likewise, in international law perspective, the case of forest fires in particular, the best dispute resolution can be used is direct diplomatic path and avoid the use of violence. (Malanczuk, 2007: 275)

Based on the explanation above, by ratifying the AATHP, Indonesia will get the most benefit, as follows: (Malanczuk, 2007: 275)

1. Indonesian human resources and funds can utilize provided under this agreement. Transboundary haze pollution is considered as a problem shared by the members of ASEAN. For Indonesia certainly beneficial considering the limitations and the inability to resolve itself;
2. From the perspective of state responsibility, Indonesia will avoid potential compensation held by neighboring countries. This is because of the haze problem is a problem of all members of ASEAN:

Indonesian budget will be collected from a variety of sources that can be used to cope with forest fires. Without any ratification, we will also release funds to extinguish the fire, but by ratifying the funds that could be used would be greater. With AATHP, fire prevention can be implemented together with other ASEAN countries. Indonesia also benefited because it will be host to a meeting of ASEAN on the agreement as well as being the center of activity for the reduction of haze pollution in ASEAN.

The Indonesian government's first act was to ratify the treaty, because Indonesia is in need of assistance and cooperation of ASEAN countries to extinguish forest fires. From the beginning to the end of the forest fire prevention, Indonesian resources and require substantial funds that he

cannot bear alone. The problem of illegal logging and other environmental issues should be discussed later after Indonesia ratified the treaty.

V. CONCLUSION AND SUGGESTION

A. Conclusion

In international law, state liability arising in that country harming another State, and is limited only to acts that violate international law. When seen, in fact Indonesia has made every effort they can to prevent and mitigate pollution caused by forest fire haze. This is clearly not an act of active state and also cannot be categorized as an act of allowing, given the efforts have been done. In addition, the President has apologized to Malaysia and Singapore as a form of responsibility, though only as a moral responsibility.

Most of these problems can be overcome only, if Indonesia ratified the ASEAN Agreement on Transboundary Haze Pollution is. When seen, the actual ratification of the deal more advantages than disadvantages to the Indonesian national interests and policies. Example Indonesia can benefit from technical assistance and funds in tackling forest fires. And also, Indonesia no longer be prosecuted because it was a shared responsibility of the ASEAN countries, despite the appearance of haze pollution originating from Indonesia.

B. Suggestion

1. The government should provide outreach to the community the importance of maintaining forests both economic and conservation benefits. It should also be emphasized continually that the areas adjacent to the forest during the dry season is very sensitive and prone to fires.
2. Law enforcement indiscriminately for land and forest burning. In other words should be given exemplary punishment for arsonists clear to both individuals and companies. For example, by giving a high administrative penalty, revocation of operating licenses, and so would be expected with such a deterrent effect arsonists make forests and land.
3. The government should also issue a policy on corporate responsibility towards the concession in case of fire. Companies must be responsible and penalized in case of forest fire in concessions.
4. Cooperating with neighboring countries in tackling haze terror. Because of the real terror of haze arising from land and forest fires are not only the responsibility of the Indonesian government.

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