

## Transboundary Haze-Free for Southeast Asian Countries by 2020: A Delusional Vision?

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### Abstract

*The Transboundary Haze-Free ASEAN by 2020 is a vision as a result of the 11th COP AATHP. This vision is followed up at the 12th COP by adopting the roadmap on ASEAN cooperation having eight items used as a strategic, action-oriented and time-bound framework. However, it seems that these steps are far from effective. The will in the agreement is not necessarily accompanied by the willingness and ability of the state in the implementation. Moreover, the absence of a dispute resolution mechanism also becomes the main concern of this agreement. The strategy which has been well designed in its implementation becomes toothless because it collides with the principle of sovereignty, non-interference and domestic policies that cannot be touched by the ASEAN community. This article aims to provide a clear picture of the AATHP after Indonesia is effectively bound by the agreement and provides a critique of the development of the agreement in the COP forum. The study argues that there needs to be an additional protocol especially with regard to dispute resolution mechanisms, so that there will be legal certainty when a country refuses to be bound and ignores this agreement. In the sense that it is not a country that can be prosecuted and sanctioned when land and forest fires occur within their territory, but the reluctance of a country to coordinate and receive assistance from the parties which must be resolved because it is not in accordance with the objectives.*

**Keywords:** ASEAN Countries, Haze Pollution, Land and Forest Fires, Ratification

### 1 Introduction

Land and forest fires in parts of Indonesia are re-occurring this year, 2019. This problem seems to be a non-stop disaster because it repeats every year during the dry season, even though ASEAN has a vision of 2020 free of haze pollution. The most fundamental question is whether there is no preparation or even coordination by ASEAN countries with affected countries to cope with annual disasters that should be avoided. It is getting worse at this time, one year before the vision of the haze-free ASEAN roadmap in 2020 is realized, land and forest fires still occur and have an impact on countries such as Singapore, Malaysia and even Indonesia itself. In fact, some time ago the Malaysian Prime Minister was surprised why Indonesia refused to get help from Malaysia to overcome this problem<sup>1</sup> even though within the scope of ASEAN there is an agreement, the ASEAN Agreement on Transboundary Haze Pollution (AATHP), which give authority to ASEAN countries to work together in dealing with the issue of haze disaster.

The development of AATHP to date has been responded to by annual meetings ranging from the First Meeting of the Conference of the Parties (COP) held on November 11, 2004 in Ha Noi Viet Nam to the recent fourteenth COP in Myanmar in

2018. The COP is an annual forum attended by ministers dealing with environmental issues. In Article 18 (3) of the Agreement, the COP has seven authorities, namely take action to ensure effective implementation, consider reports through the secretariat, adopt protocols within Article 21, adopt any amendment, amend any annexes, establish subsidiary bodies, and undertake any action to achieve the objective of agreement<sup>2</sup>.” The example of take actions in accordance with the purpose of the agreement is as in the twelfth COP in Malaysia adopting a roadmap with the vision of the Transboundary Haze-Free ASEAN by 2020. At the level of theory, this roadmap encompasses excellent strategies regarding on how ASEAN responds to and concretizes haze pollution which still occurs annually. However, at the practical level of the COP it is like walking in a same place and only ends at the negotiating table. There are no concrete and significant steps after this agreement. One reason for this is the stagnation of the policy transformation in national level by the state parties. Indonesia, Malaysia and Singapore have almost the same mechanism, whereby an international agreement must go through transformation process into the domestic law. Only ratification cannot provide a solid basis for an international agreement can be used as a source of law for judges in taking decisions in court<sup>3</sup>.

The national mechanisms of these state parties are protected by the principle of sovereignty and non-intervention which are absolute in nature and cannot be contested. If this continues to happen, it is not impossible that the vision of the Transboundary Haze-Free ASEAN by 2020 will only be a daydream, which will never be realized till any time, until all state parties realize that this dispute resolution mechanism and legal certainty is crucial for the common good of the ASEAN countries.

## **2 Literature Review**

There are several articles having discussed AATHP, such as article by Yo'el. She analyzes and concludes that the AATHP apparently could not be effective in its implementation in the national laws of the state parties<sup>3</sup>. Then a work by Nazeer and Furuoka. They argue that the AATHP has failed in dealing with the problem of cross-border haze pollution in ASEAN and this failure has a negative impact on public health<sup>4</sup>. Furthermore, Ling in her article believes that in several aspects the AATHP is an excellent agreement to address the issue of haze pollution, however, the most crucial issue in this case is the failure of the AATHP in providing procedures for resolving disputes arising between the state parties connected with Article 27 of the AATHP and Article 23 (1) of the ASEAN Charter.

Although there are a number of previous articles which have discussed the AATHP, the emphasis of this article which is the novelty of previous published works is related to the development and follow-up of the AATHP after Indonesia is effectively bound by this regional agreement. Furthermore, this paper will also be enriched on the grounds that amendments to the AATHP need to be carried out in accordance with Article 22 of the agreement or at least the need for additional protocols, as provided in Article 21 of the agreement, especially with regard to dispute resolution mechanisms so that there is legal certainty when a country refuses to comply with this agreement.

## **3 Method**

The approach used in this research is the normative<sup>5</sup> or doctrinal<sup>6</sup> approach. This approach aims to examine certain development in regional instruments. In this context the concept contained in ASEAN Agreement on Transboundary Haze Pollution and its practice in Conference of the Parties and the implementation by state parties. Roadmap on ASEAN Cooperation Towards Transboundary Haze Pollution Control with Means

of Implementation will also be analyzed to enrich the discussion in this article. Both primary and secondary legal material sources related to the agreement will be analyzed with the descriptive-qualitative data analysis.

## **4 Results and Findings**

### **The Origin of Agreement**

At the beginning of this AATHP negotiation, the choice of words was very important to maintain sensitivity and minimize suspicion between countries. It also to avoid Jakarta's concerns about regional intervention and to avoid the criminalization of Indonesia as well. Therefore, the word "haze" was chosen rather than "smoke." It is because the focus at that time was actually only to anticipate the habit of clearing land by means of burning forests where at that time ASEAN knowledge was minimal about the potential danger of land clearing by such burning. Because of the caution in choosing these words, this agreement was finally signed and entered into force. Until now, all ASEAN countries are parties to this agreement.

The ASEAN Agreement on Transboundary Haze Pollution is an agreement made by countries in the ASEAN region where initially initiated at the 4<sup>th</sup> ASEAN Ministerial Meeting on the Environment (AMME) which was then followed up on AMME in 1995 on "the Management of Transboundary Pollution" resulting the ASEAN Co-operation Plan on Transboundary Pollution (ACPTP)<sup>7</sup>. This collaboration was initially aimed at assessing, preventing and controlling haze at the national and regional levels as well as developing and implementing emergency response plans to tackle the haze disaster.<sup>8</sup> However, it seems that the Co-operation Plan is not working properly due to various reasons behind it such as the failure of ACPTP in preventing forest fires in 1997 where severe fires occurred which disrupted around 11.7 million hectares and 70 million people in Southeast Asia and several states in Australia.<sup>9</sup>

In addition, this also includes the absence of binding legal certainty for Co-operation Plan countries. Finally, in 2002 AATHP was formed. This agreement was entered into force in 2003 after the sixth deposit instrument of ratification by Thailand. Over time, this agreement also receives sharp criticism because this agreement is still overshadowed by the principle of the "ASEAN Way" which is allegedly as the cause of failure of environmental management in ASEAN<sup>9</sup>. ASEAN Way is a principle adopted by ASEAN countries that refers to the decision making process that emphasizes aspects of consultation, consensus and non-interference in relations between countries<sup>10</sup>.

Several scientist argue that the provisions in the AATHP are not much different from the provisions contained in the ACPTP. It is based on the Article 4, 7 and 9 which states that each state party is obliged to make plans, guidelines, and other actions to prevent and monitor fires which could potentially causing air pollution across borders. Moreover, the nuances of the ASEAN Way are very thick in which Article 12 (2) and 27 of the AATHP.<sup>2</sup> This article explores that assistance can only be carried out with the consent of the recipient country. In this clause, even if other countries want to provide assistance to a country regarding forest and land fires in their territory, without the consent of the recipient country the assistance cannot be carried out. The principle of non-intervention is clearly seen in this article even though at Paragraph 4 states that the efforts of several other parties are very visible when they are eager to intervene in land and forest fires which occur in Indonesia<sup>9</sup>. Likewise, in Article 27 regarding Settlement of Dispute<sup>11</sup> which appears vague and lacking in various "hard-law" instruments where there are enforcement mechanisms against countries which violate the agreement<sup>9</sup>.

## **5 The Development of AATHP**

As already stated, the COP is the highest forum for ministers of treaty countries to make decisions regarding the implementation of AATHP. Basically, this COP is not without any progress at all, many developments have been achieved in this forum. But again, the ASEAN Way doctrine is still very strong in influencing policy makers in each ASEAN country.

Following are some of the developments that have been achieved in the COP forum as a follow up to the AATHP. First is the ASEAN Coordinating Center for Transboundary Haze Pollution Control (ACC) where the Center aims to provide cooperation and coordination facilities for state parties in controlling the impact of forest fires, especially haze pollution (Table 1). The second is the ASEAN Transboundary Haze Pollution Control Fund whose function is to raise funds from both state parties and other institutions such as international organizations, regional financial institutions and the international donor community (Table 1). Then the third is the Roadmap on ASEAN Cooperation towards Transboundary Haze Pollution Control with Means of Implementation with the vision of Transboundary Haze-Free ASEAN by 2020 (Table 1).

**Table 1.** The Important Decisions of COP

<b>COP Meeting</b>	<b>Conference venue</b>	<b>Important Decision of COP</b>
Eleventh	29 October 2015, Viet Nam	<ol style="list-style-type: none"> <li>1. Commitment to develop a roadmap to achieve the vision of Haze-Free ASEAN by 2020;</li> <li>2. Endorsed Indonesia's intention to host the ASEAN Coordinating Centre for Transboundary Haze Pollution Control (ACC THPC);</li> </ol>
Twelfth	11 August 2016, Malaysia	<ol style="list-style-type: none"> <li>1. Commitment to establish the ACC THPC;</li> <li>2. Adopted the Roadmap on ASEAN Cooperation towards Transboundary Haze Pollution Control with Means of Implementation. Include the vision of Transboundary Haze-Free ASEAN by 2020.</li> </ol>
Thirteenth	12 September 2017, Brunei Darussalam	<ol style="list-style-type: none"> <li>1. Concerted national efforts and regional cooperation to fully and effectively implement AATHP and the Roadmap;</li> <li>2. Support to Indonesia in hosting the ACC THPC.</li> </ol>
Fourteenth	5 October 2018, Myanmar	<ol style="list-style-type: none"> <li>1. The Ministers welcomed the progress of the implementation of the Roadmap;</li> <li>2. Finalization of the establishment ACC THPC in Indonesia;</li> <li>3. Finalization Large Grant Agreement of the Measurable Action for Haze-Free Sustainable Land Management in Southeast Asia (MAHFSA).</li> </ol>

In table 1 it can be seen that some developments after the entry into force of AATHP. This development can be observed every year in the COP from reports to decisions taken at the forum. However, it seems that this COP forum mostly contains monitoring of what has been done by each country in anticipating and handling haze pollution, not what joint efforts have been made by the state parties in handling and anticipating these forest and land fires.

### **What should be done?**

In general, the involvement of Indonesia by ratifying the AATHP also means that Indonesia is actively involved in its annual meetings and decision-making from the eleventh COP of 2015 to the present, the fourteenth COP. With Indonesia's ratification, as stipulated in the agreement, it means that Indonesia is legally bound to the agreement starting from sixty days after January 20<sup>th</sup>, 2015, the date Indonesia deposited its instrument of ratification. There are at least three state party obligations in the AATHP. The first is regarding the obligation to cooperate with States parties in developing and implementing measures to prevent and control fire sources. The second is regarding the obligation of the state to provide relevant information to the affected country and respond quickly to minimizing the consequences of the transboundary haze pollution. Finally, it is the obligation of the state party regarding an action that is in harmony with the AATHP, including in the process of making legislation and other administrative steps to facilitate the handling of the haze disaster<sup>2</sup>. However, in practice after Indonesia deposited the instrument of ratification, it seems that there has not been any concrete and continuous steps from the Indonesian government in implementing the agreement.

When there is a question whether Indonesia must do something to prevent and deal with this problem, the answer is absolutely yes. But it does not mean that Indonesia is doing it alone. There must even be openness from the Indonesian government by following the procedures set out in the agreement, including coordinating and receiving assistance from state parties through the ACC THPC and the ASEAN Transboundary Haze Pollution Control Fund. This is because there is wide potential for affected countries to seek compensation for the losses suffered by them due to this annual smoke pollution. AATHP has provided enough flexibility for Indonesia to deal with this problem so use this space to be able to resolve and anticipate forest fires so that they will not be repeated in the future.

To get to Transboundary Haze-Free ASEAN by 2020, in fact the state parties have established eight strategies contained in the Roadmap on ASEAN Cooperation towards Transboundary Haze Pollution Control with Means of Implementation. This roadmap has been adopted at the 12<sup>th</sup> Meeting of the Conference of the Parties held in Kuala Lumpur, Malaysia. This roadmap is not only used as a strategy but also as an action-oriented and time-bound framework. In general, there are eight strategies that are the main points of this roadmap, including:

“1) Implementation of the AATHP; 2) Sustainable management for peatland fires prevention; 3) Sustainable management of agricultural land fires prevention; 4) Strengthening Policies, Laws, Regulations and their Implementations in accordance with Article 16 (f) AATHP; 5) Enhancing cooperation, exchange of information and technology, and strengthening of capacity of institutions at all levels; 6) Enhancing public awareness and stakeholders participation; 7) Securing resources for transboundary haze prevention; and 8) Reducing health and environmental risks and protection of global environment.”

When discussing international environmental provisions, basically the AATHP is not the only agreement that addresses environmental issues. There is the U.N. The Conference on Human Environment (the Stockholm Declaration) which first addressed this issue in 1972, where in Principle 21 declares that “states have sovereign right to exploit their own resources, and responsibility to ensure that activities do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

In theory, according to this article, Indonesia can be sued for providing compensation for environmental damage<sup>12</sup> suffered by other countries where everyone has a right to a healthy environment and a healthy environment has a positive contribution to productivity.<sup>13</sup> This is because Indonesia actually knows the risk of forest fires carried out by the perpetrators, namely land and forest companies, whereas in fact the land and forest are under the country's full effective control. This means that based on international law Indonesia must "take concrete and effective measures to prevent transboundary harm" before it happened<sup>14</sup>.

Then, what must be done by the state parties so that the vision of the Transboundary Haze-Free ASEAN by 2020 can run well? this needs to be strengthened by amending the AATHP or at least the need for additional protocols, especially with regard to dispute resolution mechanisms<sup>15</sup> so that there is legal certainty when a country refuses to comply with the agreement<sup>16</sup>. Provisions regarding amendments and protocols in this agreement have been given space, namely in article 22 and article 21 of the AATHP. In my opinion, although this agreement requires an amendment to the provisions on dispute resolution mechanisms to better guarantee legal certainty, it does not mean that a country can be sued and sanctioned when land and forest fires occur in their territory, however, the focus of this amendment is the reluctance of the state to coordinate and receive assistance from the parties to the agreement which must be resolved, because this is not in accordance with the objectives of the AATHP.

I would more strongly agree that this step must be taken by the state parties to strengthen the agreement so that it can be implemented by the state parties although it must slightly rule out the ASEAN Way principle, at least only limited to this haze pollution problem. If not, it is not impossible that the vision of the Transboundary Haze-Free ASEAN by 2020 will only be a mere delusion that will never be realized.

## **6 Conclusion**

As the title above, the author in this case is more likely to choose the middle ground which is either a vision of delusion, it can also be reality. It depends on how the state party deals with the existing provisions. There are two things that need to be done by the state parties to support this haze pollution handling. First, Indonesia, as a country whose territory is a source of forest and land fires, must be open and willing to cooperate in good faith with other parties according to the procedures set out in the agreement, including coordinating and receiving assistance from States parties through ACC THPC and the ASEAN Transboundary Haze Pollution Control Fund. Second, amendments or additional protocols are needed for the agreement, especially with regard to the dispute resolution mechanism so that there is bound for the state parties to comply with this agreement. It should be underlined that the emphasis of this amendment or protocol is the reluctance of a state party to coordinate and receive assistance from organizations rather than imposing sanctions on countries where land and forest fires occur.

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