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# An ASEAN Transboundary Haze Court: Why Does it Matter and How is it Possible?

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## Abstract

As a form of state responsibility as required by the ASEAN Agreement Transboundary Haze Pollution (AATHP), Indonesia and Thailand have provided sanctions to be imposed to the perpetrators of the forest and land fires. However, the national laws or legal instruments on this matter work only domestically and fail to overcome the effect of the domestic forest and land fires which potentially produce transboundary haze pollution. This paper proposes that the ideas of soft law of the AATHP and the non-intervention of the ASEAN Way should be reconsidered in dealing with transboundary haze pollution and a special regional court has to be made as a central authority to impose sanction upon the perpetrators of forest and land fires that cause the transboundary haze pollution. Using a comparative case study, this article evaluates the state responsibility and the implementation of the AATHP ideas in Indonesia and Thailand and put forward the arguments and the possibilities for installing a

special court for transboundary haze pollution. The results demonstrate that, due to its regional needs and institutional and legal norms, ASEAN needs a different model of regional court compared to Uni-European's one.

**KEYWORDS** *State Responsibility, Transboundary Haze Pollution, AATHP*

# Introduction

In Southeast Asia, the impact of forest fires has received serious attention with the signing of the ASEAN Agreement to overcome transboundary haze pollution by ASEAN member countries.[1] In 1997-1998, Indonesia became the world's spotlight for its huge forest and land fires.[2] The forest and land fire were even repeated with larger scale in 2015[3] and 2019 causing economic losses and damage with more than IDR 75 trillion[4] of land and with forest area burned 1.592.010,00 (ha).[5] While in Thailand, fires destroyed 2.7 million rain forests in 9 provinces of Northern Thailand in 2005.[6] The National Disaster Management Agency (BNPB) predicts cases of forest and land fires in Indonesia throughout 2023 will be more massive than in 2021 and 2022. This is due to

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1 M Chandra W.Yudha et al., *Satu Visi Satu Identitas Satu Masyarakat*, 22nd ed. (Jakarta: Sekretariat Direktorat Jenderal Kerja Sama ASEAN, Ditjen Kerja Sama ASEAN, Kementerian Luar Negeri, 2017), 71.

2 Charles Victor Barber and Schweithelm James, *Trial By Fire Forest Fires and Forestry Policy In Indonesia'S Era Of Crisis and Reform* (Washington, D.C., 2000), 1.

3 Based on a report by the National Aeronautics and Space Agency, the estimated area of forest and land burned in 2015 reached 2,089,911 hectares (ha) covering 618,574 ha of peatland and 1,471,337 ( ha) of non-peat land. The World Bank also recorded that the total losses caused by the haze disaster reached IDR 221 trillion. Tarigan Mitra, "Riset: Ada 100.300 Kematian Akibat Kebakaran Hutan 2015," tempo.co, September 20, 2016, https://nasional.tempo.co/read/805612/riset-ada-100-300-kematian-akibat-kebakaran-hutan-2015?page_num=1.

4 "Kerugian Kebakaran Hutan Dan Lahan Sepanjang 2019 Capai Rp 75 Triliun," Badan Nasional Penanggulangan Bencana, 2019, https://www.bnpb.go.id/kerugian-kebakaran-hutan-dan-lahan-sepanjang-2019-capai-rp-75-triliun.

5 "Rekapitulasi Luas Kebakaran Hutan Dan Lahan (Ha) Per Provinsi Di Indonesia Tahun 2014-2019," Direktorat PKHL Kementerian Lingkungan Hidup Dan Kehutanan, 2019, http://sipongi.menlhk.go.id/hotspot/luas_kebakaran.

6 Boonpat Tossapol, "Air Pollution Forest Fires Destroy 2.7 Million Rai of Land Whilst Chiang Mai Is Back on Top," The Thaiger, 2019, https://thethaiger.com/hot-news/air-pollution/forest-fires-destroy-2-7-million-rai-of-land-whilst-chiang-mai-is-back-on-top.

changing weather conditions, where the hot season is predicted to be longer in 2023. The government Indonesia is currently prioritizing the handling of forest and land fires in six provinces namely Riau, Jambi, South Sumatra, West Kalimantan, Central Kalimantan and South Kalimantan.[7]

Forest and land fires resulted from the two countries may have an international consequences, especially among ASEAN regions. The ASEAN members have addressed such issue by establishing ASEAN Agreement Transboundary Haze Pollution (AATHP) in which every ASEAN members, according to Article 3, Paragraph 1 of ASEAN Agreement, are obliged 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*".

Haze pollution that is carried into an area under the national jurisdiction of another Member State but whose physical origin is located entirely or partially inside the territory of one Member State is referred to as transboundary haze pollution based on AATHP.[8] Despite the instrument of the AATHP and the national law instruments of each ASEAN country to punish the perpetrator of forest and land fires, the fires have always repeated every year in the respected countries, especially within dry season. For this reason, several perspectives have been offered to address transboundary haze pollution. Some propose that AATHP is the main instrument despite its shortcomings, but could be complemented using other international legal instrument (customary international law). Kexian NG stated that the solution to transboundary haze pollution in ASEAN includes customary international law, the ASEAN Agreement, and Singapore extraterritorial Act. And the ASEAN Agreement as main instrument.[9]

Some agree that AATHP is less effective. Laely Nurhidayah, Shawkat Alam, and Zada Lipman argue that currently, ASEAN is not adequately addressing transboundary haze pollution[10] and Shawkat Alam argues that in international law, especially the principle of state responsibility, it plays an

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7 https://www.cnnindonesia.com/nasional/20230118152821-20-902060/bnpb-prediksi-karhutla-2023-bakal-lebih-masif-dari-2-tahun-sebelumnya.

8 "ASEAN AGREEMENT ON TRANSBOUNDARY HAZE POLLUTION" (2002).

9 Kexian Ng, "Transboundary Haze Pollution in Southeast Asia: The Effectiveness of Three Forms of International Legal Solutions," *Journal of East Asia and International Law* 10, no. 1 (2017): 221–44, https://doi.org/10.14330/jeail.2017.10.1.11.

10 Laely Nurhidayah, Shawkat Alam, and Zada Lipman, "The Influence of International Law upon ASEAN Approaches in Addressing Transboundary Haze Pollution in Southeast Asia." Contemporary Southeast Asia 37, No. 2 (2015): 183–210.," *Contemporary Southeast Asia* 37, no. 2 (2015): 183–210.

important role in encouraging States to carry out due diligence. However, the regime of state responsibility and civil responsibility appears to be very difficult to implement in Southeast Asia due to the principle of non-interference in the ASEAN Charter.[11] this view was supported by Sarah Tan Yen Ling, who stated AATHP's main weakness was its failure to provide a successful means of dispute resolution.[12]

Syracuse Mardian Yo'el contends that the lack of a clear implementation mechanism, the low level of party compliance as evidenced by the lack of willingness of the state (the parties) to carry out the AATHP's obligations, and the lack of the formation of third parties with the authority to oversee AATHP implementation are the three factors that have the most influence on the effectiveness of AATHP in its implementation in national law. The absence of positive behavioral and environmental changes after the formation of AATHP further demonstrates its inefficiency.[13]

Dodik offers two legal options as a remedy for AATHP's lack of success. That is, utilize other pertinent international accords that provide efficient mechanisms for dispute resolution and raise international awareness of the need to stop consuming products made from endangered forest species.[14] The greatest strategy to combat land/forest fires, according to Laely Nurhidayah, Shawkat Alam, and Zada Lipman, is to promote local collaboration through capacity building and traditional practices, and Improvement to the agreement's provisions which includes reform of dispute settlement process, develop precise and concrete obligations within specific times [15] and Shawkat Alam stressed that the only practical solution to the issue of smoke pollution is

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[11] Shawkat Alam and Laely Nurhidayah, "The International Law on Transboundary Haze Pollution: What Can We Learn from the Southeast Asia Region?," *Review of European, Comparative and International Environmental Law* 26, no. 3 (2017): 243–54, https://doi.org/10.1111/reel.12221.

[12] Sarah Tan Yen Ling, "The ASEAN Agreement on Transboundary Haze Pollution: Exploring Mediation as a Way Forward," *Asia Pacific Journal of Environmental Law* 20, no. 1 (2017): 138–61, https://doi.org/10.4337/apjel.2017.01.06.

[13] Siciliya Mardian Yo'el, "Efektivitas Asean Agreement on Transboundary Haze Pollution Dalam Penanggulangan Pencemaran Asap Lintas Batas Di Asean," *Arena Hukum* 9, no. 3 (2016): 328–48, https://doi.org/10.21776/ub.arenahukum.2016.00903.2.

[14] Dodik Setiawan Nur Heriyanto, "Resolving Indonesia's Responsibility for Transboundary Haze Pollution in Light of the Toothless ATHP," *Hungarian Yearbook of International Law and European Law* 5, no. 1 (2020): 191–207, https://doi.org/10.5553/hyiel/266627012017005001012.

[15] Nurhidayah, Alam, and Lipman, "The Influence of International Law upon ASEAN Approaches in Addressing Transboundary Haze Pollution in Southeast Asia." Contemporary Southeast Asia 37, No. 2 (2015): 183–210."

to increase cooperation.[16] For this reason, Sarah suggested that a mediation mechanism should be introduced, while the non-interference ASEAN WAY could be redefined in a way that could accommodate the mediation process.[17]

Realizing that this is a very complex issue, this article aims to compare Indonesia and Thailand in terms of state responsibility for preventing land and forest fires. It also tends to discuss the effectiveness of AATHP in helping to mitigate forest and land fires. An argument was then made showing that it might be possible to set up a special court for transboundary haze pollution.

## State Responsibility Over Transboundary Haze

Indonesia and Thailand have ratified AATHP.[18] This means that both countries have been bound by the Agreement according to the principle of the *pacta sunt servanda*. Whereas under Article 2 the purpose of the Agreement is:

> *The objective of this Agreement is 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 co-operation. This should be pursued in the overall context of sustainable development and in accordance with the provisions of this Agreement.*[19]

The AATHP was ratified by all ASEAN member states consisting of Indonesia, Malaysia, Thailand, Philippines, Myanmar, Brunei, Cambodia, Singapore, Timor Leste, Vietnam. The purpose of the ASEAN Agreement is to prevent and monitor the pollution of smog at the borders of countries between ASEAN countries including Indonesia and Thailand. Thus, AATHP can be said to be entry by force applicable to all ASEAN countries. Furthermore, the provisions of Article 11 of the AATHP stipulate that:

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[16] Alam and Nurhidayah, "The International Law on Transboundary Haze Pollution: What Can We Learn from the Southeast Asia Region?"

[17] Ling, "The ASEAN Agreement on Transboundary Haze Pollution: Exploring Mediation as a Way Forward."

[18] "Status of Ratification," Haze Action Online, 2015, http://haze.asean.org/status-of-ratification/.

[19] ASEAN AGREEMENT ON TRANSBOUNDARY HAZE POLLUTION.

> *Each Party shall ensure that appropriate legislative, administrative and financial measures are taken to mobilize equipment, materials, human and financial resources required to respond to and mitigate the impact of land and/or forest fires and haze pollution arising from such fires.*

Furthermore, transboundary haze pollution is the responsibility of states as regulated in the Article 3 Paragraph 3 referred to Article 9. These Articles are base on the Principle 21 of the 1972 Stockholm Declaration and the Principle 2 of Rio Declaration, namely to "ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction". It is also stated in the principle of *Sic Utere Tuo Alienum Non Laedas*[20] that "no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another and that measures of control were necessary."[21] Under the AATHP provisions, the failure to prevent and monitor transboundary haze pollution will require the country a responsibility in international law.[22]

N.L.J.T. Horbach argues that "intended by liability obligations or terms there are more obligations under private law, whereas responsibility is the obligation of the state in public international law.[23] However, there is a question as to which concept is the most effective to be applied related to the state's responsibility due to the transboundary haze pollution over other countries. The international law community has a concept of state responsibility.[24] Some International legal experts explain that the basis of the concept of the state responsibility deals with:

1. the obligations of international law that apply between two specific countries
2. the absence of an act or omission that violates the international legal obligation that gives birth to the responsibility of the state

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[20] Marsudi Triadmodjo, "Anatomi Hukum Lingkungan International: Sistem Generik Penyangga Kehidupan Ummat Manusia," *Mimbar Hukum* 2 (2000): 135.

[21] Melda Kamil, "Prinsip-Prinsip Dalam Hukum Lingkungan Internasional," *Jurnal Hukum & Pembangunan* 29, no. 2 (1999): 118, https://doi.org/10.21143/jhp.vol29.no2.553.

[22] Hingorani, *Modern International Law*, 2nd.ed., Oxford & IBH Publishing, New Delhi, 1984, p. 241.

[23] N. L.J.T. Horbach, "The Confusion about State Responsibility and International Liability," L*eiden Journal of International Law* 4, no. 1 (1991): 47–74, https://doi.org/10.1017/S0922156500001837.

[24] Daniel M. Bodansky and John R. Crook, "Symposium on the ILC's State Responsibility Articles: Introduction and Overview," *The American Journal of International Law*, 2002, 773–79, https://doi.org/10.2307/3070677.

3. damages or losses as a result of unlawful acts or omissions.[25]

These requirements are often applied in several court rulings relating to state responsibility. In the case of In the Spanish Zone of Morocco claims, Judge Huber states the following "Responsibility is a logical consequence of rights. All rights of international characters involve international responsibility. International responsibility breeds an obligation for indemnity if the obligations that have been clearly not fulfilled are not fulfilled."[26]

Judge Huber, responsibility is the logical consequence of rights. International rights include international responsibilities. The responsibility of giving birth to the obligation to compensate if a country does not meet its obligations. In the case of Chorzow Factory, The Permanent Court of International Justice states "It is already a principle of international law, and even in the conception of higher law, that a violation of an agreement or agreement involves an obligation to indemnity."[27] It can be concluded that this is the principle of international law, and even in any conception of the law, that any violation of the agreement involves an obligation to indemnity.

State responsibility is a complex issue in International Law. In 2001, the International Law Commission (ILC) adopted in the draft Responsibility of States for Internationally Wrongful Acts.[28] Article 1 governs that "Every internationally wrongful act of a State entails the international responsibility of that State." The Definition of internationally wrogful in phosphates in Morocco case, PCIJ affirmend that when a State commits an internationally wrongful act against another State, international responsibility is established "immediately as between the two States".

This is confirmed again in the Corfu Channel case, in the Military and Paramilitary activities in and against Nicaragua case, and in the Gabcikovo-Nagymaros Project case and its advisory opinions on Reparation for injuries

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[25] Sefriani Sefriani, "Pemohon Tanggung Jawab Negara Dalam Hukum Internasional (Studi Kritis Terhadap ILC Draft On State Responsibility 2001)," *Jurnal Hukum IUS QUIA IUSTUM* 12, no. 30 (2005): 193–209, https://doi.org/10.20885/iustum.vol12.iss30.art3.

[26] Malcolm N. Shaw, *International Law*, 5th ed. (Cambridge University Press, 2012), 694, https://doi.org/10.18356/f38e58d3-en.

[27] Shaw, pp. 696-679. *See* Rizky, Fajar, Suhaidi Suhaidi, Alvi Syahrin, and Jelly Leviza. 2020. "State's Responsibility over Forest and Land Fires Causing Transboundary Haze Pollution in the Frame of ASEAN Agreement". *Jambe Law Journal* 3 (1), 65-81. https://doi.org/https://doi.org/10.22437/jlj.3.1.65-81.

[28] Alain Pellet, "The new draft articles of the International Law Commission on the responsibility of states for international wrongful acts: A requiem for states' crime?." *Netherlands Yearbook of International Law* 32 (2001): 55-79.

case and on the case concerning the interpretation of Peace Treaties (Second Phase), in which it stated that "*refusal to fulfil a treaty obligation involves international responsibility*". In the Gabcikovo-Nagymaros Project case and its advisory opinion on Reparation or injuries case and the case concerning the interpretation of Peace Treaties (Second Phase), in which it stated that "refusal to fulfil a treaty obligation involves international responsibility". The arbitral tribunal as well, in the Rainbow Warrior case, stressed that "any violation by a State of any obligation, of whatever origin, gives rise State responsibility".

The Definition of international wrongful in phosphates in Morocco case, PCIJ affirmed what when a State commits an internationally wrongful act against another State, international responsibility is established "immediately as between the two States". Likewise in the International Court of Justice (ICJ), in the Corfu Channel case, in the Military and Paramilitary activities in and against Nicaragua case, and in the Gabcikovo-Nagymaros Project case and its advisory opinion regarding the Reparation for Injuries case and in the case regarding the interpretation of the Peace Agreement (Second Phase), which states that "refusal to fulfil treaty obligation involves international responsibility". "Any breach by a State of any obligation, whatever its origin, gives rise to State responsibility".

Article 2 deals with the conditions of the unlawful actions, i.e. acts of negligence: "(a). is attributable to the State under international law; and (b). constitutes a breach of an international obligation of the State." ((a) such acts or omissions are under international law, (b) a violation of national obligations). These articles are guidance on to well understood the state responsibility.

In ICJ, in the Corfu Channel case, in the military and paramilitary activities in and against Nicaragua case, and ICJ too in the Corfu Channel case, and it the Gabcikovo-Nagymaros Project case and in its advisory opinion, in the Corfu Channel case, in the Military and Paramilitary Activities in and against Nicaragua case, and in the Gabcikovo-Nagymaros Project cas and in its advisory opinions on Reparation for injuries case and on the case concerning the Interpretation of Peace Treaties (Second Phase) in which it stated that "refusal to fulfil a treaty obligation involves international responsibility". In the Gabcikovo-Nagymaros Project case and in its advisory opinions on Reparation for Injuries case and on the case concerning the interpretation of Peace Treaties (Second Phase), in which it stated that "refusal to fulfil a treaty obligation involves international responsibility". The arbitral tribunal as well, in the Rainbow Warrior case, stressed that "*any violation by a State of any obligation, of whatever origin, gives rise to State responsibility*".

There are two elements of International Wrongful Act:

1. Attribution of conduct of the State (Article 2 ILC Draft Articles on State Responsibility (2002): "*There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State law; and (b) constitutes a breach of an international obligation of the State*." Thus, action or omission attributable to State governed by international law is the first element of an internationally wrongful act namely:
   a. Act of States and its official (Art.4: Conduct of organs of State) even those organs are acting in excess of authority (Article 7);
   b. Act of other persons that State must be responsible in some particular cases:
      1) Act under control of State (Article 8: conduct directed or controlled by a State)
      2) Act beyond the competence of State's organ or State's officer (ultra vires) (Article 7: Excess of authority or contravention of instructions)
      3) Act of other person on behalf of State as a de facto act of State (Article 9: conduct carried out on the absence or default of the official authorities)
      4) Approval of an act of other person by State (Article 11: acknowledge and adopted by State as its own)
      5) Exception: personal acts, act of secessionist or rebels but later they control the country as new government of the State concerned (Article 10), and pure private act.
2. Breach of an International Obligation is the second element internationally wrongful act. According to Article 12 ILC Draft stated that: "*There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its original or character*."

The ASEAN Agreement on Transboundary Haze Pollution (AATHP) has led to the prolonged and severe haze season in ASEAN region, while the goal of a haze free ASEAN was far from achievable. Continuing haze points to weakness of law enforcement. Tighter regulation to control the overseas operations of big companies, as it highlighted that contract farming through the subsidiaries of the multinational corporations was a major factor behind the high number of haze hop spots this dry as well as the severe seasonal haze in the north of

ASEAN.[29] Development of International Environmental Law on Transboundary Haze Pollution start from ASEAN Agreement on Transboundary Haze Pollution (AATHP) was signed on 10 June 2002 and entered into force on 25 November 2003. The ASEAN soft law instruments in response to transboundary haze pollution.[30] Here are some reasons why AATHP rules did not work well:

1. There is no provision in the AATHP mentioning liability or responsibility of State who failed to control forest fires and transboundary haze pollution.
2. There is no legal enforcement mechanism for addressing non-compliance with its binding provisions in the AATHP
3. The agreement lacks suitable punishment. It has no provison concerning civil liability, criminal punishment or trade sanction which is quite against Principle 10 of the Rio Declaration by failing to provide for effective access to judicial and administrative proceedings, redress or remedy.

The formulation of Article 21 above concerns with violations of obligations by countries based on binding regulations or principles of international environmental law relating to the use of natural resources (transboundary and/or not) or the prevention or prevention of environmental disturbances (transboundary and/or not).[31] It is understood from the principle of state responsibility that any violation of duty by a state inflicts state responsibility in international law.

Despite the existence of the principles forbidding forest activities which potentially harming other states, the exploitation of natural resources in Indonesia and Thailand continue to contribute to transboundary haze pollution in other ASEAN states. This is indeed contrary to the principle of "*Sic Utere Tuo Alienum Non Laedas* (A person must use his property by not inflicting harm on others)"[32] stating that "no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another and that measures of control were necessary."[33]

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[29] Prasit Aekaputra, *UN Declaration on The Rights of Indigenous People and State Responsibility for Haze Transboundary Pollution*, Paper for International Conference, Faculty of Law Universitas Jambi, 2020, p.6o

[30] Aekaputra,

[31] A'an Efendi, *Hukum Pengelolaan Lingkungan*, ed. Bambang Sarwiji, 1st ed. (Jakarta: Indeks Jakarata, 2018), 117.

[32] Triadmodjo, "Anatomi Hukum Lingkungan International: Sistem Generik Penyangga Kehidupan Ummat Manusia."

[33] Kamil, "Prinsip-Prinsip Dalam Hukum Lingkungan Internasional."

The AATHP is the law instrument for ASEAN member states for transboundary haze pollution issues. This must be obeyed and implemented by every member, including Indonesia and Thailand.[34] The instruments on the state responsibility in the treaty, the Convention on Biological Diversity, and the United Nationals Framework Convention on Climate Change could be the basis for a lawsuit by other countries. This is in line with the decision of the Court Smelter Arbitration case that introduced the principle of international law, "a State owes at all times a duty to protect other states against injurious acts by individuals from within its jurisdiction into international customary law".[35]

Based on the Article 31 of ILC, it is regulated that: "1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a state."

Indonesia's efforts to mitigate the forest and land fires as parts of its responsibilities as ASEAN member subject to the article 11 of the AATHP that "each Party shall ensure that appropriate legislative, administrative and financial measures are taken to mobilise equipment, materials, human and financial resources required to respond to and mitigate the impact of land and/or forest fires and haze pollution arising from such fires." Concerning with this issue Indonesia has issued national laws consisting of:

1. The Law Number 41 of 1999 on Forestry
2. The Law Number 32 of 2009 on Environmental Protection and Management
3. The Law Number 39 of 2014 on Plantation
4. Government Regulation Number 4 of 2001 on Damage Control and or Environmental Pollution Related to Forest and Land Fires
5. Presidential Instruction on Delaying the Granting of New Permits and Improving the Governance of Primary Natural Forests and Peatlands

Article 78 of the Law Number 41 of 1999 on Forestry regulates the perpetrators of forest and land fires that subject to sanctions ranging from 5 to 10 years in prison with maximum fine of IDR 1.5 to 5 billion. Similarly, the the Law Number 41 of 1999, the Article 78 of the Law Number 32 of 2009 and the Law Number 39 of 2014 on Plantation the provision on the

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[34] Another international law instrument preventing states from committing of exploitation and harming other countries can be found in the Article 3 of the CBD and the Preamble of United Nationals Framework Convention on Climate Change.

[35] Dina ST Manurung, "Pengaturan Hukum Internasional Tentang Tanggungjawab Negara Dalam Pencemaran Udara Lintas Batas," *Sumatra Journal of International Law* 2, no. 2 (2014).

perpretrator of land clearing based on a slash-and-burn method is clearly set with the punishment of imprisonment for minimum 3 (three) years and maximum 10 (ten) years and a fine of at least IDR 3.000.000.000 (three billion) and at most IDR 10.000.000.000 (ten billion).

The implementation of the law can be clearly learnt from judge's decision towards the violators. In 2016, Indonesian Court on environment approved lawsuit over lost and damages of forest fires set by corporates.[36] In 2020, the Ministry of Environment of Indonesia won the lawsuit over the forest and land fires committed by the PT. ATGA Jambi. The corporate shall pay for repatriation as much as IDR 430.362.687.500 over 1500 hectares of forest fires in Jambi Province, Indonesia.[37]

Indonesia has fulfilled its responsibility through the national laws by which sanctions are provided to whom commit forest and land fires. However, the regulation has no scope to solve the problem of transboundary haze produced from this country, including the sanction for the violators. Despite the ratification of the AATHP, Indonesian court has never used this Agreement to make decision upon the perpetrators. It is learnt that the AATHP does not work significantly in Indonesia as long as the forest and land fires are concerned.

Unlike Indonesia, Thailand does not have specific legislation for forest and land fire the country. Nevertheless, Thailand has at least 4 general legislations which can be applied to implement the AATHP, especially internal haze and transboundary haze resulting from land and forest fires, namely:

1. Forest Act B.E. 2484 (1941);
2. National Reserved Forest Act B.E. 2507 (1964);
3. The Protection and Development of Forests B.E 2534 (1991)
4. National Park Act B.E. 2562 (2019);
5. The Conserved and Protected Wildlife Act B.E. 2562 (2019).[38]

For example, Forest Act 1941 Section 54 provides violators a fine of not more than Baht 50,000 or 5-year imprisonment. Similarly, the Law on the Protection

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[36] Hukum Online, "5 Putusan Pengadilan Terkait Kebakaran Lahan", https://www.hukumonline.com/berita/baca/lt5767e3c630d27/5-putusan-pengadilan-terkait-kebakaran-lahan/, accessed on December 15, 2020.

[37] KLHK Apresiasi Majelis Hakim Pengadilan Tinggi Jambi yang Tolak Banding PT. ATGA, https://www.menlhk.go.id/site/single_post/3096/klhk-apresiasi-majelis-hakim-pengadilan-tinggi-jambi-yang-tolak-banding-pt-atga, accessed on December 15, 2020.

[38] Thanes Sucharikul, "How Thailand Implement the ASEAN Agreement on Transboundary Haze Pollution Standards in the Case of Forest Fires and How Can the ASEAN Member States Make the Agreement on Transboundary Haze Pollution More Effective." Paper presented at the International Seminar: A Better Environment for All, Faculty of Law Universitas Jambi, Indonesia, August 4, 2020.

and Development of Forests 1991, Article 20, includes prohibition upon activities of destroying and burning the forests. Article 22 states that forest owners must apply measures to prevent and fight forest fires and shall be responsible for the fires they cause.[39] In additon, related laws can be found in the Wildlife Conservation and Protection Act 2019, Section 55; National Park Act 2019, Section 19(i); National Reserved Forest Act 1964, Section 14, the provisions of which considers offences to fires started within specified areas only such as PFE, wildlife sanctuaries, national parks and national reserved forests.

Thailand has tried, through law instruments, to promote preventive action rather than mitigation. The Decree Number 22 of 1995 on the Regulation on the Prevention and Fight Against Forest Fires regulates certain responsibilities of agencies such as the Forest Protection Department, People's Committees and the Fire Brigade in combating forest fires. It also addresses management, activities, funding and specific prevention measures to be taken for different types of forests. Interestingly, Thailand recognise the role of the indigenous people to whom the status of forest ownership is given and the responsibility of protecting the forest is vested upon.

The Thai government has also assigned the Pollution Control Department to act as "Competent Authority and National Focal Point" which would comply with the AATHP to cooperate with the ASEAN Centre in order to exchange information, identify, and map forest fires within Thailand. The Department may impose precautionary principle to support its preventive actions by predicting some areas where likely tend to be burned in the future even though it would still have less scientific certainty.

Despite the absence of specific legaislation on forest, Thailand has also demonstated commitment to protect domestic environment from burning. Nevertheless, both Indonesia and Thailand have not paid attention on the transboundary haze. Rather they focus only on mitigating and protecting their respective forests.

# The Effectiveness of the AATHP

[39] Azrina Abdullah, *A Review and Analysis of Legal and Regulatory Aspects of Forest Fires in South East Asia Prepared by A Review and Analysis of Legal and Regulatory Aspects of Forest Fires in South East Asia* (Jakarta: Project FireFIght South East Asia, 2002). *See also* Secondio Apristyan, and Tri Kurnia Agung Fidhata. "Discourse of the Implementation of International Principles in Cases of Forest Fires in Indonesia." *Indonesian Journal of Environmental Law and Sustainable Development* 2, no. 1 (2023): 151-168

AATHP is an international agreement in the field of environment. International agreements are "*one of the sources of international law*".[40] The definition of an International Agreement itself is an agreement entered into between members of a community of nations and aims to result in certain legal consequences.[41] To ensure human welfare and peace as well as overcome problems that arise, the preparation of international agreements that regulate the joints of human life is an effective and efficient means.[42]

International agreements which are a source of international law cannot automatically apply at the level of national law. Usually, international agreements regulate the mechanism for how to bind oneself in the contents of the agreement.[43] AATHP regulates in Article 28 that:

> *This Agreement shall be subject to ratification, acceptance, approval or accession by the Member States. It shall be opened for accession from the day after the date on which the Agreement is closed for signature. Instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.*

This means that ASEAN members are obliged to ratify this agreement, in order to be subject to and provide binding force for its application to these countries. The flow of dualism and monism is a theory of international legal relations and national law which is able to explain the theory of the enactment of international agreements to become national law. These two classical theories were formed due to differences of opinion about the binding basis for international law, especially the voluntary and objectivist theories.[44]

The dualism theory assumes that national law and international law are two different legal systems. Triepel, stated the fundamental differences between the two legal systems, namely:

a. The subject of national law is an individual, while the subject of international law is the state

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[40] J.G Starke, *Pengantar Hukum Internasional*, Sepuluh, t (Jakarta: Sinar Grafika, 2015).

[41] Mochtar Kusumaatmaatmadja & Etty R. Agoes, *Pengantar Hukum Internasional* (Bandung: Alumni, 2015).

[42] Kusumaatmaatmadja & Agoes.

[43] Andreas Pramudianto, *Hukum Perjanjian Lingkungan Internasional* (malang: Setara Pers, 2014).

[44] Melda Kamil, "Kedudukan Hukum Internasional Dalam Sistem Hukum Nasional," *Jurnal Hukum Internasional* 5, no. 3 (2008).

b. The source of national law is the will of each country, while international law is the common will of countries
c. The basic principle underlying national law is the basic principle/norm of the country's constitution, while international law is based on the principle of agreement which is binding.[45]

In addition, supporters of the Monism School argue that national law and international law are part of a single unit of legal science. All law is a unit consisting of binding rules, whether it is against the state, individuals or other subjects other than the state. Therefore, both national law and international law are part of a single science of law that regulates human life.[46]

There are three main methods used by countries to implement international agreements related to dualism and monism schools, namely: adoption theory, incorporation theory and transformation theory.[47] Therefore, the practice of applying international agreements to become national law varies in each ASEAN member country.

Indonesia from a theoretical point of view uses the flow of monism with primacy of national law, and the flow of dualism. So that in practice the application of international law in the national legal system is carried out either through incorporation, transformation, and adoption.[48] The implication is that international agreements must first be transformed into national regulations so that they can apply to society or be used as a legal basis for judges to give decisions in court.

In Thailand, international treaty provisions must be converted into Thai law first, according to the opinion of Thanes Sucharikul. "*Thailand is a civil law country. Moreover, it is a dualist state whereby international law or provisions of treaties which it is a party can be applicable to the Thais only by means of Thai Laws. The provisions of treaties must be transformed into Thai laws first.*"[49]

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[45] Kamil.

[46] Kamil.

[47] Ololade O Shyllon, "Monism / Dualism Or Self Executory : The Application Of Human Rights Treaties By Domestic Courts In Africa By Advanced Course On The International Protection Of Human," 2009.

[48] Firdaus, "Kedudukan Hukum Internasional Dalam Sistem Perundang-Undangan Nasional," *Fiat Justisia* 8, no. 1 (2015): 36–52.

[49] Thanes Sucharikul, "How Thailand Implement the ASEAN Agreement on Transboundary Haze Pollution Standards in the Case of Forest Fires and How Can the ASEAN Member States Make The Agreement on Transboundary Haze Pollution More Effective," in *"THE BETTER ENVIRONMENT FOR ALL" :Toward ASEAN Haze-Free Region*, 2020, 1–6.

Currently, all ASEAN member countries have ratified the AATHP. This means that every country that has ratified is willing to commit to solving the transnational haze problem that occurs in the ASEAN region. According to Kenneth W. Abbott, to find out the effectiveness of an international agreement, in this case AATHP, is legalization. Legalization refers to a particular set of characteristics that institutions may (or may not) possess. These characteristics are defined along three dimensions: obligation, precision, and delegation".[50]

Obligation mean that a state or other actor is bound by a rule or commitment or by a set of rules or commitments. In particular, it means that they are legally bound by a rule or commitment in the sense that their behavior under it is subject to scrutiny under the general rules, procedures and discourses of international law, and often also of national law. Precision means that the rules describe the behavior they require, authorize, or disallow. Delegation means a third party has been given the authority to implement, interpret and apply the rules; to settle disputes; and (possibly) make further rules.[51]

An international law can be said to have a low level of legalization if the three dimensions of legalization (obligation, precision, and delegation) are low, but conversely, if the three legalizations are high, the level of legalization of an international law will also be high. At least the obligation and delegation dimensions are high. However, these three dimensions cannot be combined into one unit that determines the form of legalization, because each dimension of legalization has both low and high levels independently.

An international treaty can be defined as hard law or soft law based on all legalization factors taken together. A treaty that imposes on its signatories legally binding (O) obligations that are fully disclosed (P) is referred to as "hard law" and the parties involved are given exclusive jurisdiction (D) over its implementation and interpretation. Strong legalization generally results in high levels of compliance with the law, but on the other hand, the negotiation process is usually protracted and challenging. Soft law, on the other hand, is an international agreement that has weaknesses in these three areas (O, P, D). However, soft rules would be easier to agree on, less harmful to sovereignty, and certainly allow for more uncertainty on the part of the participants.[52]

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[50] Kenneth W. Abbott et al., "The Concept of Legalization," *International Organization* 54, no. 3 (July 9, 2000): 401–19, https://doi.org/10.1162/002081800551271.

[51] Abbott et al.

[52] Sidiq Ahmadi, "Prinsip Non-Interference Asean Dan Problem Efektivitas Asean Agreement on Transboundary Haze Pollution," *Jurnal Hubungan Internasional* 1, no. 2 (2018): 187–95.

We can categorize AATHP including soft law. The question on the effectiveness of the AATHP has to do with the analysis of the nature of its authority to enforcement and the nature of ASEAN way. The AATHP relies on the kind of soft law (*delege ferrenda*) which may not be legally enforceable. To apply sanctions and enforcement, the nature of the AATHP is considered a weakness since there is no legal efforts that can be applied to force the perpetrators of the transboundary haze to be punished. In the same tone, the practice of ASEAN way whereby all kinds of decisions must be made by means of consultation and consensus is also believed to have exacerbated the weakness of the AATHP.[53]

Despite being a legally binding agreement, the ATHP lacks any effective enforcement mechanisms to ensure signing parties' compliance. Furthermore, there is no distinct entity tasked with carrying out the Agreement's enforcement. Instead, disagreements between or among the parties will be settled by recognized ASEAN diplomatic techniques, namely friendly consultation and/or negotiation. The legal certainty of ATHP implementation has been and remains hampered by the lack of coercive enforcement methods. It seems unlikely that the parties will follow the ATHP because no significant regional action has been made to address the haze problem.[54]

This opinion was also agreed upon by Linggar, who stated that AATHP became toothless due to the norms in ASEAN itself, namely the principle of non-intervention and the principle of consensus in the ASEAN Way. Not only that, in the ASEAN AATHP there are no clear regulations regarding penalties or sanctions against countries that do not comply with or commit to this agreement. Also, there are no clear and specific regulations regarding the root causes of forest fires that produce the haze, because this is left to the country concerned.[55]

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[53] Sucharikul, "How Thailand Implement the ASEAN Agreement on Transboundary Haze Pollution Standards in the Case of Forest Fires and How Can the ASEAN Member States Make The Agreement on Transboundary Haze Pollution More Effective." *See also* Daniel Heilmann, "After Indonesia's ratification: The ASEAN agreement on Transboundary haze pollution and its effectiveness as a regional environmental governance tool." *Journal of Current Southeast Asian Affairs* 34, no. 3 (2015): 95-121; Sukanda Husin, "ASEAN Environmental Policies and Laws Controlling Transboundary Atmospheric Pollution, *Jurnal Hukum International* 2, no, 1 (2003): 34-51.

[54] Nur Heriyanto, "Resolving Indonesia's Responsibility for Transboundary Haze Pollution in Light of the Toothless ATHP."

[55] Ligar Yogaswara, "ASEAN Agreement on TRansboundary Haze Pollution: Effective?," *Jurnal Hubungan Internasional*, no. 1 (2021): 175–87.

Even so, according to Sucharikul, the above view may be true from the perspective of sanction and enforcement. The effectiveness of a treaty does not depend solely on sanction. In the international arena, especially in the ASEAN context, whereby sovereignty and non-intervention in internal affairs of other states reign supreme, good faith coordination and cooperation as well as determination to tackle and resolve issues of common interest may be more effective than harsh sanction and consultation and consensus maybe the only solution.[56]

AATHP is more accurately described as a combination of rules that are legally binding and also politically binding.[57] Rules are said to be politically binding when the parties concerned must agree on a rule by consensus and if there is a violation it can still be negotiated through political activity.[58] This is very commonly found in international agreements that regulate environmental issues. Although Indonesia continues to send haze pollution that blankets cities in Singapore and Malaysia, the two countries have never held Indonesia formally accountable for the harm it has done to both countries.[59] In fact, since the formation of the Agreement on the Conservation of Nature and Natural Resources in 1985, it is possible for Singapore and Malaysia to bring this case to the International Courts of Justice and win a lawsuit against losses created by Indonesia as a result of violating existing regional laws. One of the reasons why Indonesia is still free to violate this agreement is the fact that companies from Malaysia that are close to important officials of the country are the largest investors in palm oil in Indonesia, a sector that contributes a lot to forest fires, so that Indonesia has the political power to persuade Malaysia not to demands that Indonesia follow existing regional laws.[60]

In this article, however, it is argued that the effectiveness of the AATHP in preventing potential and future transboundary haze pollution resulted from forest and land fires is to exclude the this issue from the idea of soft law of the AATHP and non-intervention ASEAN way. As a consequence, the special court

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[56] Sucahrikul, "How Thailand Implement the ASEAN Agreement on Transboundary Haze Pollution Standards in the Case of Forest Fires and How Can the ASEAN Member States Make The Agreement on Transboundary Haze Pollution More Effective."

[57] Miftahul Choir, "Kesesuaian ASEAN Agreement on Transboundary Haze Pollution (AATHP) Dengan Norma ASEAN," *FOREIGN POLICY* 1, no. 1 (2020): 68–80, https://doi.org/10.26593/sentris.v1i1.4157.68-80.

[58] Nick Flynn and Nicola Peart, "The Role of Political Agreement in a Legally Binding Outcome" (UK, 2010).

[59] Ahmadi, "Prinsip Non-Interference Asean Dan Problem Efektivitas Asean Agreement on Transboundary Haze Pollution."

[60] Ahmadi.

is needed as a central authority to impose sanction on violation of a treaty and on any wrongfull in forest and land fires resulted in the transboundary haze pollution within ASEAN countries. Why ASEAN need to sets up ASEAN Court because the present day the haze pollution is getting worse and continue to be global problem, though domestic laws in order against forest fires have enough sanctions against the wrongdoers.

All ASEAN members have domestic regulation like Malaysia has conducted National Forestry Act Year 1984 which is amended by Act 1993 and stated "No person make fire or leave fire burning unless authorized in the permanent forest a manner as to endanger the permanent forest. The Sentence are fine and five-year prison. Meanwhile there are Singapore's transboundary Haze Pollution Act/2014, Bill Number 18/2014. Thailand National Park Act 1961 and Enhancement and Conservation of National Environmental Quality Act 1992. In Section 16 (1) of National Park Act states that if anyone violate the prohibition on clearing forest by burning, the wrongdoer will be sentenced to prison. Brunei Darussalam has regulated by Forestry Law/1984 that if anyone who lets a fire burn, either inside or outside the protected forest, which can endanger the forest is punished by a fine and six months prison.

In other ASEAN countries Loa PDR, based on Article 8 Forestry Law/1996 "*individual and organization have obligations to protect and converse forest and forestland according to regulations and to develop measures necessary to prevent forest fire and contribute to prohibiting activities which will destroy forest*". The Forest Law of Myanmar year 1992 have regulated in Article 40 and Article 42 the act prohibits consists of carry fire or leave any fire which may set fire to the forest will be fined or 2-year imprisonment. The same as other, Philippine Forestry Code/1975 Section 79 formulate that "*Any person who sets fire in any forestland or grazing land, shall upon conviction be fined in an amount five hundred pesos and twenty thousand pesos, or imprisoned between six months to two years*".

The forest fire case that brought to court occurred in Indonesia. The haze caused by forest and land fires in Sumatera and Kalimantan became increasingly disturbing, illustrating the suffering of the people, from hampered transportation due to limited visibility to health problems, such as upper respiratory tract infections. The impact of the fire spread to surrounding countries. Using the citizen lawsuit mechanism, several citizens sued the President of Indonesia, the Minister of Environment and Forestry, the Minister of Agriculture, the Minister of Health, the Governor of Central Kalimantan, and the Regional People's Representative Council of Central Kalimantan.

In their lawsuit, the community sued the defendant for unlawful acts that harmed citizens. Palangkaraya District Court trough Decision Number

118/Pdt.G.LH/2016/PN.Plk granted some of their demands. The government as the defendant continues to take legal action up to the point of cassation at the Supreme Court. Acting as the last bastion of justice, the Supreme Court rejected the government's cassation request. With the rejection of the cassation request, the Palangkaraya Court's Decision became a source of law that the defendants had to obey. This article reviews the contents of the decision. The decision becomes a binding legal source for the parties and described what the losing party should do. In this decision, the panel of judges stated that the government and regional parliament were proven to have committed unlawful act and punished then with the focus of establishing law, returning to the original state, and accountability to the public.[61]

The Judges decided, first, in term of legal formation, the President was ordered to issue implementing regulation for Law Number 32 of 2009 concerning Environmental Protection and Management, especially in preventing and controlling forest and land fires by involving the community. Then, The President is ordered to make a Government Regulation or Presidential Regulation regarding the formation of a joint government team whose faction is to review and revise forest and plantation management business permits, enforcing civil, criminal, and administrative environmental laws against companies whose land is burned, create an early prevention roadmap, countermeasures, and recovery of the forest fire victims.

The Judges also stated that The Minister of Environment was ordered to immediately revise the National Level Forestry Plan. The Minister of Agrarian Affairs must form, train, provide equipment and support a special forest and land fire prevention team consisting of community members. He and the Governor of central Kalimantan were ordered to form regional regulation regarding the protection areas.

Based on the Indonesia Court Decision refer to Article 9 AATHP that:
"*Each Party shall undertake measure to prevent and control activities related to land and/or forest fires that may lead to transboundary haze pollution which include.*"
Furthermore, it is emphasized that "*Developing and implementing legislative and other regulatory measures, as well as programmes and startegies to promote zero burning policy to deal with land and/or forest fires resulting in transboundary haze pollution.*"
"Ensuring that legislative, administrative and/or other relevant measures are taken to control open burning and to prevent land clearing using fire."

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[61] Laras Susanti, "Putusan Pengadilan Dan Penanggulangan Kebakaran Hutan," *Tempo.Co*, September 19, 12019, https://kolom.tempo.co/read/1249566/putusan-pengadilan-dan-penanggulangan-kebakaran-hutan#google_vignette.

In other side, Judge's practice shown a total of nine civil lawsuits on forest fires filed by the Ministry of Environment and Forestry during the 2015-2019 period were declared invalid by the court. Director General of Law Enforcement Affairs Ratio Ridho Sani explained the nine cases has a lawsuit value of Rp. 3.15 trillion. Of this value, only Rp 78 billion was paid by the corporation, namely PT. BMH whose concession located in Ogan Komering Ilir Regency, South Sumatera. Meanwhile, Director of Law Enforcement Environment Affairs Ratio Ridho Sana revealed that there were five lawsuits that were included in the trial process. The Lawsuit was filed wih PT ATGA with a lawsuit value of Rp590 billion, PT KU Rp. 25 billion, PT KLM Rp. 299 billion, PT AUS Rp359 billion, and PT RAJ Rp199 billion. The Ministry of Environment and Forestry has also registered three lawsuits on behalf of PT SARI with a claim value of Rp405 billion, PT PG Rp238 billion, and PT APL Rp273 billion.

Why ASEAN needs to set up ASEAN Court as new standard to solve the problem because the current situation of the haze pollution continues to be global problems. After 21 years, ASEAN transboundary haze pollution law still not forthcoming to overcome forest fires. [62] The area of forest and land fires in 2023 reached 1,16 million hectares.[63]

ASEAN nation can develop a framework for regional legal environmental liability by regional court. The Court is only to pursue foreign-based companies contributing of the transboundary haze pollution by forest fire. This alternative proposes after review ASEAN Agreement (AATHP).

This opinion is also supported by Ahmad Adi Fitriyadi and Fikry Latukau who stated that ASEAN has a drawback, namely the absence of a separate legal dispute resolution institution that is capable of accommodating all legal issues in the region that arise from, for example, there are obstacles in carrying out the goals and focus of ASEAN itself. Therefore, a regional international legal dispute resolution institution is needed in ASEAN which is able to provide legal certainty for ASEAN member countries. The institution is the ASEAN Court of Justice.[64]

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[62] Mohamed Hanipa Maidin, "After 21 Years, ASEAN Transboundary Haze Pollution Laws Still Not Forthcoming," *Thejakartapost.Com*, August 2, 2023, https://www.thejakartapost.com/opinion/2023/08/01/after-21-years-asean-transboundary-haze-pollution-laws-still-not-forthcoming.html.%0A%0A%0A.

[63] Agoeng Wijaya, "Tanda Tanya Dibalik Meluasnya Karhutla," *Koran Tempo*, 2024, https://koran.tempo.co/read/lingkungan/486931/kebakaran-hutan-dan-lahan-2023-tembus-1-juta-hektare.

[64] Ahmad Adi Fitriyadi and Fikry Latukau, "Urgensi Pembentukan Association of Southeast Asian Nations Court of Justice (Pengadilan Asean) Sebagai Lembaga Penyelesaian

The establishment of an ASEAN regional court on transboundary haze pollution is very important considering that the state responsibility model and AATHP are not effective in overcoming transboundary haze pollution. The powerlessness of AATHP is caused by:

1. The tendency to avoid legal channels in solving transboundary haze pollution problems; and this is caused by the principle of non-intervention and the ASEAN Way in resolving ASEAN regional problems.
2. The problem of haze pollution involves many actors, not only within the country but also between countries. Forest fires can be started by local people, but those who own the company are citizens of neighbouring countries.
3. If the legal process is handed over to each country, then the problem is that the courts of one country cannot try citizens of another country who carry out arson in their territory whose smoke has migrated to the country concerned. And this is what finally led Singapore to make its own laws that could convict citizens of other countries who carried out arson in other areas in their courts, even though this was considered inappropriate because it violated the principle of non-intervention.

For this reason, the establishment of an ASEAN regional court on transboundary haze pollution is the key to solving the problem of the ineffectiveness of AATHP. The urgency regarding the establishment of an ASEAN regional court on transboundary haze pollution can actually be pursued based on article 25 of the ASEAN Charter 2007 which in principle the article provides opportunities in terms of establishing a judicial institution for dispute resolution, and it is not impossible regarding the urgency of establishing this institution. As emphasized by Sefriani that "*it is not impossible, if in the future we will witness the birth of an ASEAN judicial body through the provisions of Article 25...*"[65]

Based on the theory of New Heaven as a theory of contemporary international law, if it is associated with the urgency of establishing the ASEAN regional court on transboundary haze pollution, then the establishment of the dispute settlement institution is formed in the framework of desiring a universal world order of human dignity, which in turn In turn, it will provide guarantees for the enjoyment of individuals, so that if the decision of the ASEAN Court is

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Sengketa Hukum Internasional Regional Untuk Menanggulangi Berbagai Sengketa Di Asia Tenggara," *Tahkim* 16, no. 2 (2020): 161–77.

[65] Sefriani, *Peran Hukum Internasional Dalam Hubungan Internasional Kontemporer* (Jakarta: Rajawali Pers, 2016).

not obeyed, it will result in more harm to the interests of themselves or their country.[66]

In terms of authority, the ASEAN regional court on transboundary haze pollution can resolve disputes arising from the occurrence of obstacles in carrying out the objectives of the AATHP by the parties of ASEAN member countries. Therefore, the establishment of a dispute resolution institution in ASEAN in the form of the ASEAN regional court on transboundary haze pollution is very urgent to provide greater opportunities for ASEAN as a regional international organization in the Southeast Asian region so that ASEAN is no longer ignored in handling transboundary haze pollution cases.

# Conclusion

Indonesia and Thailand are two ASEAN countries to have share similar experience as long as the state responsibility for transboundary haze pollution is concerned. Both countries have provided certain provisions to impose sanction upon those who set forest and land fires in the respected country. However, both countries have not applied the very idea of the AATHP, yet they have ratified the treaty. Therefore, the transboundary haze pollution within ASEAN continues to happen since there is no special sanction to be imposed upon those who committed forest and land fires which lead to transboundary haze.

The AATHP lacks suitable punishment. There is no formulation in the Agreement mentioning liability or responsibility of State who failed to counter and control forest fire and transboundary haze pollution. Besides that, there is no legal enforcement mechanism for addressing non-compliance with its binding provisions in the AATHP. Overall, it can be said that it has no provision concerning civil liability, criminal punishment, or trade sanction which is against Principle 10 of the Rio Declaration by failing to provide for effective access to judicial and administrative proceedings, redress or remedy. To achieve the effectiveness of the AATHP in tackling transboundary haze pollution, a breakthrough has to be made by creating a special court (ASEAN Court) specially to impose sanction upon the perpetrators of the transboundary haze pollution resulted from the forest and land fires. The court is the exception of the idea of soft law of the AATHP and the non-intervention of ASEAN way.

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[66] Fitriyadi and Latukau, "Urgensi Pembentukan Association of Southeast Asian Nations Court of Justice (Pengadilan Asean) Sebagai Lembaga Penyelesaian Sengketa Hukum Internasional Regional Untuk Menanggulangi Berbagai Sengketa Di Asia Tenggara."

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