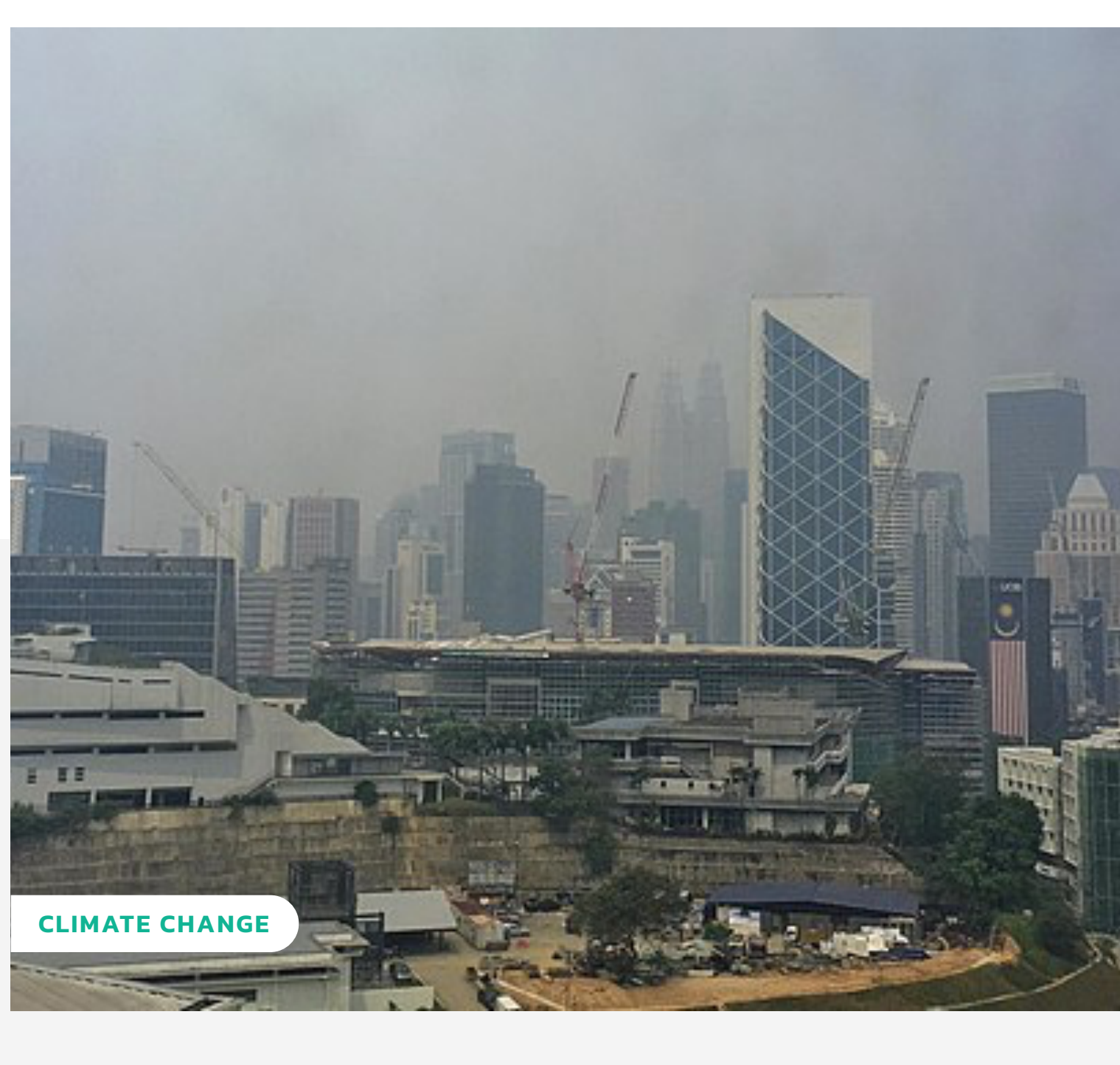


Harsh Mahaseth & Aadya Narain | June 28, 2022

The Indonesia Haze and ASEAN’s Regional Framework: The Way Ahead



SHARE Facebook Twitter LinkedIn

Members of the Association of Southeast Asian Nations (ASEAN) find themselves in the throes of an environmental emergency caused by the Indonesian Haze and the transboundary pollution in neighbouring jurisdictions. Despite the absence of an international environmental convention specifically addressing haze pollution, it falls within the ambit of numerous Multilateral Environmental Agreements focusing on issues of biodiversity, wetlands, and climate change. Frameworks within ASEAN are reflective of these standards regardless of the gap that exists between the law and its implementation. Despite this comprehensive and detailed plethora of legislation, ASEAN countries are unable to hold Indonesia accountable for transboundary pollution.

The Indonesian Haze problem

The Indonesian Haze, caused by [toxic smoke from fires in Indonesia](#), periodically darkens skies across Southeast Asia. Since the 1970s, it has adversely affected public health, investment, and economic development in Indonesia and its neighbouring countries. According to the World Bank estimates, the haze has affected a total of eight provinces in Indonesia leading to a loss of USD 5.2 Billion, which is approximately 0.5% of the country’s total GDP.

The haze is primarily caused by fires on peatlands in Indonesia which comprise of partially decomposed plant matter that act as a [greenhouse gas sink](#). The resultant greenhouse gas emissions are also a significant driver of climate change. In 2019, greenhouse gas emissions from Indonesia averaged 708 million tonnes as compared to 366 and 434 million tonnes recorded in the Amazon and Australia respectively.

These annual fires have negatively affected the health of Indonesians and citizens from neighbouring countries, causing respiratory illness and lung damage. The worse affected are pregnant women and infant children leading to high mortality rates in the region. Additionally, they have led to the extinction of orangutans.

The fires are caused by several meteorological and anthropogenic factors. The Indonesian Meteorological Department’s report posits that meteorological factors that have caused the biggest outbreaks in the past are neutral in 2020. Therefore, the increasing threat is from anthropogenic factors and human activities. Land tenure conflicts, logging and unsound natural resource management have proliferated the outbreak and severity of the fires.

Local communities fighting over land have resorted to setting areas on fire as a means of exerting pressure on the other party. The use of the slash and burn technique, which is the simplest and substantially cheapest means of land clearing, has led to several peatlands being set on fire for palm plantations.

The COVID – 19 pandemics has only exacerbated the crisis. Social distancing, lockdown, and other restrictions put in place to curb the spread of the virus have made the government’s community engagements unfeasible. Most importantly, funds otherwise dedicated towards the haze have been channelled to reinforcing public health facilities. In April 2020, an already under-funded fire-fighting team fund was cut in half, and the fire relief fund was cut by 17% (\$11 million). There is an urgent need for international support to bolster these services within the country to prevent further environmental harm across Southeast Asia.

Regional framework

Motivated by the transboundary pollution resulting from the Indonesian Haze, ASEAN countries have attempted create numerous mechanisms to address it. Transboundary pollution denotes the physical spill over of an environmentally harmful agent from the territory of the jurisdiction it was released into another territory. The [agent travels through a natural medium such as air to another jurisdiction](#). ASEAN began acknowledging the pollution as a regional concern as early as 1985 with the adoption of the Agreement on the Conservation of Nature and Natural Resources which included a reference to air pollution and [trans frontiers environmental effects](#).

Several other regional cooperation initiatives followed. Their limitation, however, was that none of them had a binding effect, and hence there was non-compliance in most instances. They constituted soft law upon which Member States were to draw inspiration for their domestic laws and regulations. The insufficiency of the regional framework propelled the government of Singapore to push for a more binding instrument that governs transboundary haze pollution. The result was the ASEAN Agreement on Transboundary Haze Pollution signed in 2002, which placed binding obligations on ASEAN Member States.

The [Agreement](#) requires Member States to cooperate in developing and implementing measures to prevent, monitor, and mitigate transboundary haze pollution, and institute relevant legal and administrative mechanisms to fulfil these obligations.

The Agreement contains the ‘no harm’ principle in Article 3.’ At the core of international environmental law, this principle confers upon States an obligation not to cause harm or adverse effects to the environment of jurisdictions beyond their own. It is a particularly important limitation in the Indonesian context, where the country’s haze has affected the health and environment in other ASEAN States, and its origin is closely linked to the mismanagement or lack of resources within Indonesia.

Under Articles 7, 9 and 12, members are obligated to cooperate in firefighting and mitigating the effects of the outbreak, routed through the ASEAN Coordinating Centre.

The dispute resolution clause under Article 27 provides only for amicable consultation or negotiation. There are no penalties for failing to comply with the provisions of the Agreement. The burden is upon individual member states to hold offenders responsible through national legislation. The prosecution of offenders being left to domestic courts or tribunals is particularly problematic in member countries with weak regulatory frameworks, of which Indonesia too is example. Singapore is the only ASEAN member to institute an Act that attaches extra territorial liability for causing fires that cause harm within its borders. The Transboundary Haze Pollution Act, 2014 provides for criminal and civil liability of companies that use fire for land clearing in Indonesia, if they cause adverse effects to the environment and health of Singaporeans. However, even the effectiveness of the Act has not been established. The lack of a robust dispute settlement mechanism is not a mere oversight on the part of the negotiators. Rather, a litigious attitude towards the forest fires is understood as antithetical to [ASEAN values of non-intervention and sovereignty](#).

It is further argued that most companies investing in Indonesian oil palm plantations originate in Singapore and Malaysia. Therefore, holding the Indonesian government accountable through the principle of state responsibility is unsustainable for these States. This explains the lack of registered complaints against Indonesia’s failure to prevent harm beyond its jurisdiction. Thus, the absence of practicable penalties for offending States has been a major cause of the Agreement’s ineffectiveness.

Recommendations

Firstly, ASEAN member states must strike a balance between the principle of state responsibility, and their policy of non – intervention. Indonesia’s historic lack of proactivity can be substantially attributed to a lack of international pressure to adhere to its obligations to prevent transboundary harm.

Secondly, absence of the Polluter Pays Principle, a cornerstone of international environmental law is a surprising absence from both the soft law and the binding agreement proposed by ASEAN. Incorporating it within the regional framework would provide that the party responsible for pollution must compensate the victims as a mitigating measure. Indonesia should compensate the victims of the transboundary haze pollution within the ASEAN community. The principle is important to ensure compliance with the provisions of the existing framework. Even if it is argued that Indonesia cannot compensate the victims, it would ensure that it [complies with the duty to exercise due diligence](#).

In addition, the dispute settlement mechanism must be revised to ensure effective redress. A provision must allow affected States to lodge complaints against the offending state in international forums such as the International Court of Justice. Some of the regulatory weaknesses in Indonesia appear deliberate. In 2019, the government of Indonesia relaxed guidelines on the protection of peatlands. The deregulation Bill scales down the liability of companies and the scale of prosecution. Further, it seeks to absolve concession holders from the obligation to protect peat landscapes, therefore easing business and promoting investment in Indonesia. However, if such a bill is passed into law, it can potentially exacerbate the Indonesian Haze problem. If there is an international forum that affected States could lodge complaints and Indonesia is held accountable, that could compel the government to give address the problem with the vigour it deserves.

Indonesia has been consistently citing lack of human resources and funding as a hindrance to the successful prevention of haze pollution. In 2013, 23,000 military and police personnel were deployed at the height of the haze to perform fire-fighting duties, yet they [remained outnumbered](#). This problem has only increased in severity during the global pandemic. There is therefore need for ASEAN members to cooperate and mobilise funds to help Indonesia put in place proactive measures against the outbreak.

[Photo by Benjy8769]

Harsh Mahaseth is an Assistant Professor and Assistant Dean (Academic Affairs) at Jindal Global Law School, and the Assistant Director of the Nehginpao Kipgen Center for Southeast Asian Studies, O.P. Jindal Global University, India. Aadya Narain is a Research Assistant at the Nehginpao Kipgen Center for Southeast Asian Studies, and a law student at Jindal Global Law School, O.P. Jindal Global University, India.

The Northern Irish Headache

AUSTYN CLOSE – JUNE 26, 2022

Is Britain Sabotaging European Unity?

SYED ZAIN ABBAS RIZVI – JUNE 25, 2022

Why are Cryptocurrencies Becoming Popular in Cuba?

IAN KANE – JUNE 25, 2022