

ASEAN ENVIRONMENTAL POLICIES AND LAWS CONTROLLING TRANSBOUNDARY ATMOSPHERIC POLLUTION*

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ABSTRACT

ASEAN has been very active in convening meetings to negotiate responses to the environmental problems in the region. However, the outputs have been mainly in the form of soft law such as declarations, resolutions, joint communiqués, Joint Press Releases, programs and action plans. ASEAN has potential to experience an increasing economic growth in tandem with degradation and pollution of the environment. One of many obvious threats to the regional environment is the transboundary atmospheric pollution in the form of haze resulting from land and forest fires. ASEAN policy responses to the transboundary atmospheric pollution have been developed since 1978, ranging from the formulation of ASEP I, II and III, the conclusion of several declarations and resolutions, and the establishment of Cooperation Plan on Transboundary Pollution as well as Strategic Plan of Action. The development of ASEAN environmental law dealing with transboundary atmospheric pollution is still far from satisfactory. It can not be expected to fight against transboundary atmospheric pollution in the region. The Treaty on Southeast Asia Nuclear-Free Zone is meant to protect ASEAN environment from nuclear test, which is not significant source of atmospheric pollution at the moment yet.

I. Introduction

ASEAN (the Association of South East Asian Nations) was established by Bangkok Declaration in 1967 with five country members: Indonesia, Malaysia, the Philippines, Singapore and

Thailand. ASEAN has now grown to be a fairly big regional organization with ten member countries, known as the "big ten".¹ The five other countries later joining ASEAN are Brunei, Laos, Myanmar,

¹ This jargon is used by a writer to express a new Asean after being joined by CLM (Cambodia, Laos and Myanmar) countries. (Ranjit Gill, *ASEAN Towards the 21st Century: A Thirty Year Review of the Association of Southeast Asian Nations*, ASEAN Academic Press, London: 1997.

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Vietnam and Cambodia². The expansion of ASEAN makes this regional organization an important player in the Asia Pacific region due to its strong economic performance and its potential to increase the size of ASEAN's GDP.³ Environmental problems, such as atmospheric and water pollution, widespread deforestation, degradation and conversion of agricultural land, poor urban quality, and declining of populations of fish and wildlife,⁴ which are a usual consequence of economic growth, will be even more problematic in the fu-

ture than they are now.

As a regional organization, ASEAN was primarily aimed at improving the economy of the region;⁵ the protection of the environment was not included in the objectives for the establishment of this regional organization.⁶ Issues relating to protection and conservation of the environment were not initially scheduled in the ASEAN co-operation framework. ASEAN has been said to be the least advanced region in terms of environmental protection.⁷ However, the promulgation of the 1972 Stockholm Declaration inspired the ASEAN leaders to develop, through the catalytic support of the United Nations Environment Programme, the ASEAN Environment Program I, better recognized as ASEP I, in 1977. ASEP I, which was later endorsed by the first ASEAN Ministerial Meeting on the Environment, marked the beginning of regional

² Brunei joined ASEAN as a sixth member of ASEAN on 8 January 1984 through Declaration of the Admission of Brunei Darussalam into the Southeast Asian Nations (reprinted in ASEAN Secretariat, *ASEAN Document Series 1967-1988*, Third Edition, ASEAN Secretariat, Jakarta: 1988, p. 45-46); Vietnam was accepted as ASEAN member on July 1995; Laos and Myanmar were on 23 July 1997 while Cambodia on 30 April 1999 (<http://www.aseansec.org> (last visited on 6 July 2000 at 5.35 p.m.)).

³ The statistical data on the ASEAN's economic growth in the past and today and in the future are well documented by the Department of Foreign Affairs of Commonwealth of Australia. See Department of Foreign Affairs, Commonwealth of Australia, *The New ASEANs: Vietnam, Burma, Cambodia & Laos*, East Asia Analytical Unit, Barton, Australia: 1997, p. 309; See also Ashok K. Dutt, *Southeast Asia: A Ten Nation Region*, Kluwer Academic Publishers, London: 1996, p. 28-31.

⁴ See Philip Hirsch and Carol Warren, "The Politics of Resources and Resistance in Southeast Asia," in Philip Hirsch and Carol Warren, Eds., *The Politics of Environment in Southeast Asia: Resources and Resistance*, Routledge, London: 1998, p. 4-7; See also Stuart James Davies, "Tropical Ecosystems: Environmental Impacts," in Ghazally Ismail and Murtedza Mohamed, Eds., *Biodiversity Conservation in ASEAN: Emerging Issues & Regional Needs*, ASEAN Academic Press, London: 1998, p. 23-36.

⁵ The establishment of ASEAN was basically aimed at accelerating the economic growth, social progress and cultural development through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of South East Asian Nations. See *Bangkok Declaration*, reprinted in ASEAN Secretariat, *ASEAN Document Series 1967-1988*, Third Edition, ASEAN Secretariat, Jakarta: 1988, p. 27-28; Colin Ong, *Cross-Border Litigation Within ASEAN*, Kluwer Law International, The Hague: 1997, p. 10-11.

⁶ Ben Boer, Ross Ramsay and Donald R. Rothwell, *International Environmental Law in the Asia Pacific*, Kluwer Law International, London: 1998, p. 43.

⁷ United Nations, *International Environmental Law: Emerging Trends and Implications for Transnational Corporations*, United Nations Publications, New York: 1993, p. 11.

environmental cooperation in ASEAN.⁸

Environmental law cooperation within ASEAN commenced at the first ASEAN Ministerial Meeting, held in Manila in April 1981. The Meeting enacted the Manila Declaration on the Environment, which was designed to ensure the protection of the ASEAN environment and sustainability of its natural resources so as to eradicate poverty and gain the highest quality of life for the people in the region. The ASEAN environmental law movement was accelerated by the environment friendly conditions of loans imposed by ADB and the World Bank.⁹ These conditions of loans stimulated the ASEAN leaders to more seriously manage environmental degradation during the 1980's and thereby accelerated environmental cooperation in the region.

The Manila Declaration on the Environment plays the same role at a regional level as has the 1972 Stockholm Declaration in international environmental law.¹⁰ As a regional soft law, the Ma-

⁸ ASEAN Secretariat, *ASEAN Strategic Plan of Action on the Environment*, ASEAN Secretariat, Jakarta: 1994, p. 1.

⁹ Since the Asian Development Bank and the World Bank are of some significance to the larger ASEAN states as a source of loans, technical assistance and policy input, the ADB and the World Bank, in line with the reformation of multilateral bank policies and practices, set forth the loan rules which are linked to the efforts of environmental protection and conservation. Both the Asian Development Bank and the World Bank have played important roles by providing technical and financial assistance for large-scale projects in the region; Maria Seda, ed., *Environmental Management in ASEAN: Perspectives on Critical Regional Issues*, Institute of South East Asian Studies, Singapore: 1993, p. 18-29.

¹⁰ The Stockholm Declaration is a soft law of international

nila Declaration has inspired the enactment of domestic laws and regulations. To date, ASEAN has promulgated only three Agreements as hard law for protecting and conserving its environment. These are the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources, the 1995 Treaty on the Southeast Asia Nuclear Weapon-Free Zone and the 2002 ASEAN Agreement on Transboundary Haze Pollution.

ASEAN has, through its Head of States Summits and Ministerial Meetings, been very active in convening meetings to negotiate responses to the environmental problems in the region. However, the outputs have been mainly in the form of *soft law*¹¹ such as declarations, resolutions, joint communiqués, Joint Press Releases, programs and action plans.¹²

environmental law. It does not bind the sovereign states, many international environmental lawyers regard it to bear general legal norms of international responsibility. Thus, it binds the sovereign states in formulating the future law. More discussions on this subject matter can be read in: Philip McNamara, *The Availability of Civil Remedies to Protect Persons and Property from Transfrontier Pollution Injury*, Alfred Metzner Verlag, Hamburg: p. 33; Sukanda Husin, "Penipisan Lapisan Ozon dan Hukum Lingkungan Internasional," (1991) 4 *Hukum dan Pembangunan*, 373-384, p. 376.

¹¹ *Soft law* is defined as "either not yet law or not only law. Soft law is an important innovation in international law-making that describes a flexible process for states to develop and test new legal norms before they become binding upon the international community." David Hunter, James Salzman dan Dunwood Zaelke, *International Environmental Law and Policy*, Foundation Press, New York, 1998, p. 250.

¹² Mas Ahmad Santosa, Sukanda Husin, Sukma Violeta Sani and Andri Akbar, *Possible Legal Instruments Dealing with Transboundary Haze Pollution* (Background Pa-

For example, with regard to the issue of global warming and climate change, the ASEAN response has been insignificant. The ASEAN Cooperation Plan on Transboundary Pollution (1995) is a very lenient legal tool to address a ubiquitous issue such as global warming and climate change. Moreover, this Plan is only "a call for consistent and parallel measures at the national level."¹³ Thus, it does not arrange how the transboundary pollution should be regionally addressed.

II. ASEAN Environmental Policies

The evolution of ASEAN Environmental Policies is described in this Part. Particular emphasis will be placed on the protection of the atmosphere in the ASEAN region. Since the haze pollution has become annual phenomenon of the region, the study, in some detail, focuses on the policies and the regional cooperation launched by the ASEAN.

1. ASEAN Sub-regional Environment Program (ASEP)

Before the Manila Declaration 1981, ASEAN produced a Sub-regional Environment Program, known as ASEP, which expressed broad policies and programs to overcome environmental problems within the region. ASEP has had three phases. ASEP I, covering the period

per), Indonesian Centre for Environmental Law, Jakarta: 1999, p. 11.

¹³ Nicholas A. Robinson, "Forest Fires as a Common International Concern: Precedents for the Progressive Development of International Environmental Law," (2001) 18 *Pace Environmental Law Review* 459, p. 481

of 1978 – 1982 focused on six priority areas and goals, viz., Environmental Management, including Environmental Impact Assessment; Nature Conservation and Terrestrial Ecosystems; Marine Environment; Industry and Environment; Environmental Education and Training; and Environmental Information.¹⁴ ASEP II, for the period 1983 – 1988 extended the unfinished priority areas and activities identified in ASEP I. These were Environmental Management including Environmental Impact Assessment; Nature Conservation; Industry and Environment; and Environmental Education and Training.¹⁵ ASEP III, covering the period 1988 – 1992, emphasized six priority areas: Environmental Management; Nature Conservation and Terrestrial Ecosystems; Industry and Environment; Marine Environment; Urban Environment; and Environmental Education, Training and Information.¹⁶

The program on air quality management in ASEP I fell under the heading of Industry and Environment.

¹⁴ "ASEAN Environment Programme (ASEP) Phase I of the Regional Collaborative Programme on Environment of the ASEAN countries", reprinted in K.L. Koh, (Com.), *Selected ASEAN Documents on the Environment*, APCEL Document Series, 1996, p. 89 – 113.

¹⁵ "ASEAN Environment Programme (ASEP) Phase II of the Regional Collaborative Programme on Environment of the ASEAN countries", reprinted in K.L. Koh, *ibid.*, p. 115-156.

¹⁶ "ASEAN Environment Programme (ASEP) Phase III of the Regional Collaborative Programme on Environment of the ASEAN countries", reprinted in K.L. Koh, (Com.), *ibid.*, 157 – 180.

There appeared two goals under this heading. The first goal was to enhance regional capability in pollution control, with emphasis on residue utilization, particularly for those industries which are of significance to the ASEAN region such as agro-industry and mining industries. The second goal was to establish adequate urban air quality monitoring systems.¹⁷ To reach these objectives, ASEAN in collaboration with international agencies, such as UNEP, ESCAP and FAO, proposed three projects. Two projects were completed and one project was uncompleted pending funding.¹⁸ Ironically, the project, which was not completed, was the most important for the management of air quality management.

Since the goals of ASEP I were not fully realized, the priority areas and goals identified by ASEP II were arranged in a way that could facilitate the completion of the unfinished goals. Therefore, the program on air quality management still operated under the same heading as in ASEP I. The goals were a repetition of those in ASEP I.¹⁹

ASEP III had only one goal for air quality management, which was also placed under the heading of Industry and Environment. The goal was to implement demonstration projects in industrial pollution control, with an emphasis on clean technolo-

gies in specific industries. It is not clear whether or not this goal was achieved.

Overall, it can be concluded that ASEP I, II and III did not do much for air quality management. Even if all the goals were achieved, the result would not mean much for air quality management because the goals and projects designed and proposed were more emphasized on capacity building for the country members rather than on the effort to formulate the air quality management system.

2. 1981 Manila Declaration on the ASEAN Environment

The Manila Declaration is not an enforceable legal tool to protect the environment and mitigate the environmental problems in the region since it does not impose any binding obligations on the State Parties. However, it is the first time in its history that ASEAN formally realized the threats to its environment and natural resources, as stipulated in the Preamble and the objective of the Declaration, which says:

"To ensure the protection of the ASEAN environment and the sustainability of its natural resources so that it can sustain continued development with the aim of eradicating poverty and attaining the highest possible quality of life for the people of the ASEAN countries."

3. 1984 Bangkok Declaration on the ASEAN Environment

The 1981 Manila Declara-

tion on the ASEAN Environment has been regarded as very successful in increasing the environmental awareness of the ASEAN members, for two reasons. First, ASEP I, which was endorsed by the 1981 Manila Declaration on the ASEAN Environment is considered to have been satisfactorily implemented. Second, by the end of 1984, all ASEAN countries²⁰ had established national environmental protection agencies,²¹ which initiated programs aimed at implementing feasible protection measures, and developed national capabilities in environmental technology.

The so-called success story of the ASEAN countries led to the pronouncement of the Bangkok Declaration on the ASEAN Environment on 29 November 1984. The Declaration formulates broad environmental policy guidelines, which are clustered into 10 categories of environmental issues faced by the region. These aspects included environmental management, nature conservation, marine environment, urban environment, environmental education, environmental information system, wider involvement in environmental management, environmental legislation and international cooperation.

²⁰ In 1984, ASEAN had only six country members. The other four countries, Vietnam, Myanmar, Lao and Cambodia, were not yet admitted as ASEAN members.

²¹ Indonesia established State Ministry for Population and Environment in 1982, Malaysia erected the Department of Environment (DOE) in 1975, Singapore established Ministry of the Environment in 1971, Philippines established Department of Environment and Natural Resources.

Based on the ten categories of environmental issue listed in the ASEAN Environmental Policy Guidelines, it can be concluded that atmospheric pollution is not considered an environmental priority. As a matter of fact, shortly before the conclusion of the Bangkok Declaration, ASEAN region was chocked by the haze from land and forest fire episode of 1982-1983.²²

4. 1987 Jakarta Resolution on Sustainable Development

ASEAN was convinced that to meet the growing needs of the people in the region, and to improve their quality of life, development must be accelerated. However, it would require that the development process should not damage the environment that is required by future generations to meet their needs. Based on this philosophy, ASEAN pronounced the Jakarta Resolution on Sustainable Development on 30 October 1987.²³

²² See The Environment Ministry of Republic of Indonesia and United Nations Development Programme (UNDP), *Land and Forest Fires in Indonesia: Impacts, Factors and Evaluation*, the Ministry of Republic of Indonesia, Jakarta: 1998; S. Tahir Qadri, *Fire Smoke, and Haze: The ASEAN Response Strategy*, Association of Southeast Asian Nations and Asian Development Bank, Manila, Philippines, 2001; Simon S.C. Tay, "Southeast Asian Fires: The Challenge for International Law and Development," 11:24 *The Georgetown International Environmental Law Review* 241-305 (1999); and David Glover and Timothy Jessup Eds., *Indonesia's Fires and Haze: The Cost of Catastrophe*, Institute of Southeast Asian Studies, Singapore: 1999. All of these reports and articles indicated how serious the effect of haze resulting from land and forest fires in ASEAN region generally and Indonesia especially.

²³ *Jakarta Resolution on Sustainable Development*, re-

¹⁷ ASEP I, see Koh, p. 90-91.

¹⁸ *Ibid.*, p. 109-110.

¹⁹ See ASEP II, Koh, *op cit.*, p. 133.

The Jakarta Resolution is a head of the Rio Declaration, insofar as it reflects the awareness of ASEAN countries of the need to adopt and implement the principle of sustainable development. Accordingly, the ASEAN countries have agreed to establish a regional body on the environment which (a) recommends policy guidelines on the implementation of the principle of sustainable development; (b) facilitates the incorporation of environmental considerations into the programs and activities of ASEAN committees; (c) monitors the quality of the environment and natural resources; and (d) enhances the cooperation on environmental matters.²⁴

5. **1990 Kuala Lumpur Accord on Environment and Development**

The Kuala Lumpur Accord was developed two years before the United Nations Conference on Environment and Development (UNCED). It called on ASEAN to establish a common position towards the need for equitable sharing of responsibilities and the allocation of liabilities in global environmental efforts.²⁵ The Accord is argued to be the embryo of the ASEAN rejection of the concepts of the environment as a global com-

mons and heritage for all human-kind,²⁶ and of the justification for claims of permanent sovereignty over natural resources and development.²⁷

6. **1992 Singapore Resolution on Environment and Development**

The Singapore Resolution on Environment and Development of 1992²⁸ reflects the ASEAN move towards achieving a proper balance between environmental protection and economic development in an effort to reach sustainable development. The Resolution recognizes that ASEAN needs to catch up with international efforts to deal with global environmental issues such as climate change through mutually beneficial effects between developed and developing countries. The Resolution contains statements calling for the support of developed countries to

²⁴ See Simon SC. Tay, "Southeast Asian Fires: The Challenge for International Law and Development," 11:24 *The Georgetown International Environmental Law Review* 241-305 (1999), p. 256-257.

²⁵ The stance has been declared several times. For example, Manila Declaration on Environment and Development takes such stance as stipulated in its objective. On behalf of ASEAN, Malaysian Prime Minister ever delivered a speech which said: "Now the developed countries have sacrificed their own forests in the race for higher standards of living, they want to preserve other countries' rain forests - citing a global heritage - which could indirectly keep countries like Malaysia from achieving the same levels of development." See Simon SC. Tay, *ibid.*

²⁶ "Singapore Resolution on Environment and Development of 1992", reprinted in K.L. Koh., *Selected ASEAN Documents on the Environment*, APCEL Document Series, 1996, p. 69 - 76.

printed in ASEAN Secretariat, *ASEAN Document Series 1967 - 1988*, Third Edition, ASEAN Secretariat, Jakarta: 1988, p. 422-423.

²⁷ *Ibid.*, Resolution IV.

²⁸ See Fauziah Mohd. Taib, *Malaysia and UNCED: An Analysis of A Diplomatic Process: 1989-1992*, Kluwer Law International, London: 1997, p. 42-47.

developing countries in a global effort to resolve the global environmental problems.

There are three headings, which address atmospheric pollution in this Resolution. Under the heading, "Urgent Measures to Combat Climate Change", the ASEAN Ministers of the Environment agree to reduce greenhouse gases if the developed countries provide new and additional funding and technologies.²⁹

The Second Heading is "The Immediate Implementation of the Montreal Protocol Interim Multi-lateral Fund". At this point, the Resolution calls for the expeditious transfer of environmentally sound technologies from developed to developing countries. It also calls for the inclusion of the needs of developing countries in future amendments of the Montreal Protocol.³⁰

Under the third heading, "The Sustainable Management of all Forests", the Resolution recognizes the sovereign right of ASEAN countries to exploit forests in a sustainable way and calls for developed countries to cease all forms of unilateral measures to ban the importation of tropical timber. The developed countries are called upon to take transparent measures to increase their forest cover as part of their global responsibilities.³¹

²⁹ *Ibid.*, p. 73.

³⁰ *Ibid.*

³¹ *Ibid.*, p. 74.

7. **1994 Bandar Seri Begawan Resolution on Environment Development**

In responding to Rio Declaration and Agenda 21, ASEAN regarded necessary to implement those two international soft laws in the region by adopting a strategic plan of action. Therefore, it passed The Bandar Seri Begawan Resolution on 26 April 1994³² which agreed to adopt and implement the ASEAN Strategic Plan of Action, which is primarily aimed at responding to specific recommendations of Agenda 21, introducing policy measures, establishing long term goals on environmental quality, and working towards harmonized environmental quality standards.

8. **1995 ASEAN Cooperation Plan on Transboundary Pollution**

The ASEAN Cooperation Plan on Transboundary Pollution of 1995³³ constitutes the follow-up to the 1990 Kuala Lumpur Accord, the 1990 Singapore Resolution and the 1994 Bandar Seri Begawan Resolution, which highlighted this issue.

The ASEAN Cooperation Plan on Transboundary Pollution is comprised of three Program Areas, viz., Transboundary Atmospheric Pollution, Transboundary Movement

³² ASEAN Secretariat, *Bandar Seri Begawan Resolution on Environment and Development*, Bandar Seri Begawan, 26 April 1994.

³³ "ASEAN Cooperation Plan on Transboundary Pollution of 1995", reprinted in K.L. Koh, *op. cit.*, p. 232-248.

of Hazardous Wastes, and Transboundary Shipborne Pollution. Every program area has objectives, strategies, activities and institutional arrangements through which the program areas will be implemented.

The Program Area on Transboundary Atmospheric Pollution is mainly focused on the haze problem which has become a yearly event in the region over the last five years or so. Atmospheric pollution caused by other sources is not addressed at all. The objectives of this Program Area are to assess the origin, causes, nature and extent of the haze incidents; to prevent the haze; and to develop and implement national and regional emergency response plans.³⁴

In addressing the issue of transboundary haze pollution, three institutions have been established to undertake several duties pertinent to their specialization. These are the ASEAN Specialized Meteorological Center (ASMC), ASEAN Institute of Forest Management (AIFM), and ASEAN Working Group on Forestry.

The Sixth Meeting of the ASEAN Senior Officials on the Environment (ASOEN) held in Bali on 20-22 September 1995 agreed to establish a Haze Technical Task Force (HTTF) to operationalize and implement the measures recommended in the ASEAN Cooperation Plan on Transboundary Pollution relating to the atmospheric pollution.

³⁴ *Ibid.*, p. 234.

The tasks of HTTF were extremely dependent upon specific operational directives. However, such directives were never formulated. Thus, it made the HTTF ineffective. The 1997-1998 ASEAN forest fires were considered to reflect the ineffectiveness of HTTF.³⁵ In responding to its failure to prevent massive forest fires of 1997, HTTF initiated Regional Haze Action Plan (RHAP), which was endorsed by the ASEAN Ministerial Meeting on Haze in December 1997.³⁶

The objectives of RHAP were well drafted but difficult to implement for several reasons. Firstly, the "ASEAN way" hampers the realization of the first objective because ASEAN reluctance to interfere internal affairs of its members, thus it makes ASEAN unable to improve the "omissions of the Indonesian national system".³⁷ Secondly, RHAP was only a non-binding agreement. Thus, the monitoring and state compliance could not be assured. Finally, lack of initiative and resources is another lacuna of RHAP.³⁸ In addition, Prof Robinson believes that RHAP basically constitutes "a call for consistent and parallel measures at the national level." He

³⁵ S. Tahir Qadri, Ed., *Fire, Smoke and Haze, The Asean Response Strategy*, Association of Southeast Asian Nations and Asian Development Bank, Manila, Philippines: 2001, p. 59.

³⁶ *Ibid.*, p. 60.

³⁷ Simon S.C. Tay, "South East Asian Fires and Haze: Law, Responsibility and Cooperation," (1998) *LAWASIA Journal* 39, p. 48. See also Nicolas A. Robinson, *supra*, note 4, p. 481.

³⁸ Simon S.C. Tay, *ibid.*

also concludes that RHAP does not outline the regional effort to prevent and response land and forest fires.³⁹

9. ASEAN Strategic Plan of Action on the Environment 1994 -1998

The fourth Meeting of the ASEAN Senior Officials on the Environment held in Bangkok in 1993 came to conclusion that ASEAN must set up an action plan to implement Agenda 21 adopted at UNCED in 1992. Several major issues were to be taken into account in the formulation of the Plan. Firstly, the need to harmonize the working groups' objectives and the importance of strengthening institutional arrangements must be incorporated into the Plan. Secondly, the importance of identifying priority regional issues, including environmentally related implications of the ASEAN Free Trade Agreement (AFTA), should be incorporated in the Plan. Finally, the Plan should recognize the need to establish ASOEN's position in international forum such as the Commission on Sustainable Development (CSD) and the Intergovernmental Committee on the Convention on Biological Diversity (ICCBD).⁴⁰

There are five objectives in the ASEAN Strategic Plan of Action on Environment. These are:⁴¹

- a. to respond to specific recom-

³⁹ Nicholas A. Robinson, *supra*, note 4, p. 481.

⁴⁰ ASEAN Secretariat, *ASEAN Strategic Plan of Action on the Environment*, ASEAN Secretariat, Jakarta: 1994, p. 2. See also Koh, *op.cit.*, p. 182.

⁴¹ ASEAN Secretariat, *ibid.*, p. 2.

- b. to introduce policy measures, and promote institutional development, encouraging the integration of environmental factors in all developmental processes both at national and regional levels;
- c. to establish long term goals on environmental quality and work towards harmonized environmental quality standards;
- d. to harmonize policy directions and enhance operational and technical cooperation on environmental matters, and undertake joint actions to address common environmental problems; and
- e. to study the implications of AFTA on the environment and take steps to integrate sound trade policies with sound environmental policies.

To implement the aforementioned objectives of the Strategic Plan of Action, ten strategic thrusts and actions were formulated.⁴² Out of ten

⁴² These strategies include: 1) Strategy 1: Support the development of a regional framework for integrating environmental and development concerns in the decision making process; 2) Strategy 2: Promote government-private sector interactions that lead towards the development of policies that mutually support the thrust of each sector; 3) Strategy 3: Strengthen the knowledge and information data base on environmental matters; 4) Strategy 4: Strengthen institutional and legal capacities to implement international agreements on environment; 5) Strategy 5: Establish a regional framework on biological diversity conservation and sustainable utilization of its components; 6) Strategy 6: Promote the protection and

strategic thrusts and actions, only three strategies are closely related to the protection of the atmosphere, i.e., Strategy 3, 4, and 10.

The ASEAN Strategic Plan of Action has been criticized to contain soft rules, which have weakness in ensuring its implementation. The Plan is contended to lack monitoring duties and state compliance.⁴³ The other weakness of the ASEAN Strategic Plan is that the Plan is lack of implementing steps.⁴⁴

III. ASEAN Environmental Laws

To date, ASEAN has passed three agreements to deal with atmospheric pollution. Out of three agreements, one is specifically designed protect the atmosphere from anthropogenic sources, especially from land and forest fires. However, ASEAN has not formulated treaties

management of coastal zones and marine resources; 7) Strategy 7: Promote environmentally sound management of toxic chemicals and hazardous wastes, and control of transboundary movement of hazardous wastes; 8) Strategy 8: Develop a system for the promotion of environmental sound technologies; 9) Strategy 9: Promote regional activities that strengthen the role of major groups in sustainable development; and 10) Strategy 10: Strengthen the coordinative mechanism for the implementation and management of regional environment programmes., *Ibid.*, p. 2 - 11.

⁴³ This approach is in line with the ASEAN way, by which the ASEAN countries agree not to interfere another state's domestic affairs, prefer non-binding plans to resolve the problems of the region, and to depend upon national institutions and actions rather than a stronger central bureaucracy. (Simon Tay, *Southeast Asian Fires: The Challenge for International Environmental Law and Sustainable Development*, unpublished paper, 1998, p. 15-16.

⁴⁴ *Ibid.*, p. 19.

dealing with the protection of the atmosphere from industrial sources.

1. ASEAN Agreement on the Conservation of Nature and Natural Resources of 1985

The Agreement⁴⁵ was concluded in Kuala Lumpur on 9 July 1985 and signed by six ASEAN country members: Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Thailand. It is designed to conserve ASEAN nature and natural resources.

Although the Agreement is concerned with the conservation of nature and natural resources, it is indirectly related to the protection of the atmosphere. It is because the Agreement partly regulates vegetation cover and forest resources which in many ways the utilization of which through land clearing by fires can create air pollution and can reduce the forested land which functions as a carbon absorber (carbon sink).⁴⁶

⁴⁵ "Agreement on the Conservation of Nature and Natural Resources", reprinted in *ASEAN Document Series 1967 - 1988*, 3rd Ed., ASEAN Secretariat, Jakarta, p. 409 - 422. This Agreement does not come into force yet because the Agreement has not been ratified by all Contracting Parties. By the virtue of Article 33, the Agreement shall enter into force on the thirtieth day after the deposit of the sixth instrument of ratification. The countries which ratified the Agreement were Indonesia, Philippines and Thailand. Indonesia ratified the Agreement on 10 July 1986, Philippines on 4 September 1986 and Thailand ratified it on 19 May 1986.

⁴⁶ Carbon sink is defined as forests or forested lands, which has the ability to more absorb the carbon emis-

In controlling and minimizing atmospheric pollution resulting from forest-related activities, the Agreement employs *soft rules*, such as those stipulated in Article 6. This Article requires the Contracting Parties to "take all necessary measures to ensure the conservation of the vegetation cover and in particular of the forest cover on lands under their jurisdiction". For that purpose, the contracting parties are required to endeavor to control, within their jurisdictions, all the activities which cause detrimental impact on vegetation and forest lands and to designate protected areas.⁴⁷ In addition, the Contracting Parties agree to expeditiously take all appropriate measures towards air quality management compatible with sustainable development.⁴⁸

Realizing that emissions from other sources other than forest-related activities may cause detrimental impact on natural ecosystem of the region, the Contracting Parties agree to prevent, reduce and control such emissions by reporting the sources of the emissions and the control measures to be undertaken. The Parties are also required to establish national and regional environment quality monitoring program.⁴⁹

sions rather than to emit them. A comprehensive understanding of forests and forested lands as carbon sink can be read in Sebastian Oberthur and Hermann E. Ott, *The Kyoto Protocol: International Climate Policy for the 21st Century*, Springer-Verlag, Berlin: 1999, p. 131-132.

⁴⁷ *Ibid.*, Article 6 (2).

⁴⁸ *Ibid.*, Article 9.

⁴⁹ *Ibid.*, Article 11.

The Agreement is well drafted to include every necessary aspect for protecting nature and natural resources. Article 12, for example, requires the Contracting Parties to expeditiously formulate measures necessary to integrate natural resource conservation into the land use planning process. The other example is Article 14, which stipulates that impact assessment should be taken as a prerequisite condition for every activity which may cause damage to the nature and natural resources.

The Contracting Parties accept the principle of state responsibility. The Parties agree to ensure that the activities within their jurisdiction or control do not cause damage to the environment or natural resources of the other contracting parties or of areas beyond the limits of national jurisdiction.⁵⁰ For the purposes of implementing the aforementioned provision, the Parties shall refrain from actions which result in transboundary pollution, damaging nature and natural resources.⁵¹

Although the ASEAN Agreement on the Conservation of Nature and Natural Resources is a very comprehensive and well drafted treaty, it has not, unfortunately, entered into force. The Agreement was ratified only by three Contracting Parties, i.e., Indonesia, Philippines and Thailand. The other Contract-

⁵⁰ *Ibid.*, Article 20 (1).

⁵¹ *Ibid.*, Article 20 (4).

ing Parties, Brunei, Malaysia and Singapore, have not ratified the Agreement. The Agreement might never come into force. It has been 16 years since its conclusion but there has been no sign that the Brunei, Malaysia and Singapore will deposit their ratification instruments.

2. Treaty on the Southeast Asia Nuclear Weapon-Free Zone

The Treaty was signed by all ten ASEAN Heads of the Government in Bangkok on 15 December 1995.⁵² It was designed to protect the region from environmental pollution and the hazards posed by radioactive wastes and other radioactive materials.

The Treaty is of relevance to the protection of the atmosphere because it deals with nuclear weapon tests, which may bring about air impurities and radioactive debris. *Nuclear weapon* is defined by the Treaty as "any explosive device capable of releasing nuclear energy".⁵³ There have been nuclear-related incidents such as Chernobyl⁵⁴ and

Three Mile Island,⁵⁵ which have caused serious problems to the atmosphere.

The Treaty employs the principle of state responsibility. Therefore, it does not only protect the territories of the ASEAN countries but also those of other countries. Conversely, the Treaty implies that the other countries may not cause damage to the territories of ASEAN States as a result nuclear weapons. The Parties to the Treaty are obliged not to develop, possess, transport or test nuclear weapons or to allow the other countries to develop, possess, transport or test nuclear weapons within or outside the Zone,⁵⁶ which is defined as the area comprising the territories of all ASEAN States.⁵⁷ In addition, the Parties to the Treaty are prohibited to discharge into the atmosphere any radioactive emissions.⁵⁸

For the purpose of effective implementation, the Treaty established the Commission for the Southeast Asia Nuclear Weapon-Free Zone⁵⁹ and the Executive Committee.⁶⁰ The Commission, comprised of each Contracting Parties represented by its Foreign Minister,⁶¹ is

empowered to oversee the implementation of the Treaty and to ensure compliance with its provisions.⁶²

The Executive Committee is the subsidiary organ of the Commission. Its members are senior official of each Contracting Parties.⁶³ The function of the Executive Committee is:

- (a) "to ensure the proper operation of verification measures in accordance with the provisions on the Control Systems as stipulated in Article 10;
- (b) consider and decide on requests for certification and for a fact-finding mission;
- (c) set up fact-finding mission in accordance with the Annex of this Treaty;
- (d) consider and decide on the findings of a fact-finding mission and report to the Commission;
- (e) request the Commission to convene a meeting when appropriate and necessary; and
- (f) carry out such other tasks as may, from time to time, be assigned by the Commission".⁶⁴

The Treaty is very well drafted in relation to enforcement and compliance. Each Party is entitled to ask another State Party for clarification concerning any situation which may be considered ambiguous or which may give rise to doubts about

the compliance of that State Party.⁶⁵ Each State Party may request the Executive Committee to set up a fact-finding mission to investigate the complaints submitted by one State Party concerning the compliance of another State Party.⁶⁶

3. ASEAN Agreement on Transboundary Haze Pollution

After waiting for many years, ASEAN finally found its way to conclude an agreement to curb the haze pollution, which has become a yearly problem in the region since 1982. The ASEAN Agreement on Transboundary Haze Pollution, concluded in Kuala Lumpur on 10 June 2002, is aimed at preventing and monitoring transboundary haze pollution resulting from land and/or forest fires.⁶⁷ According to the Agreement, the mitigation of land and forest fires should be carried out on the basis of sustainable development through concerted national efforts and intensified regional and international cooperation.⁶⁸

The Agreement follows the principles, which are currently being developed in international environmental law. There appear five principles in the Agreement. These include state sovereignty and responsibility, common but differentiated responsibilities, precautionary, eco-

⁵² "Treaty on the Southeast Asia Nuclear-Weapon Free Zone", reprinted in K.L. Koh, *Selected ASEAN Documents on the Environment*, Apcel Document Series, 1996.

⁵³ *Ibid.*, Article 1 (a)

⁵⁴ Chernobyl nuclear power plant is located in the USSR. On April 1986, one of its reactor exploded and brought about disaster not only to the USSR but also to other neighbouring countries. See L.F.E. Goldie, "Pollution from Nuclear Accidents", in Daniel Barstow Magraw, (Ed.), *International Law and Pollution*, University of Pennsylvania Press, Philadelphia: 1991, p. 212; David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy*, Foundation Press, New York: 1998, p. 914 - 922.

⁵⁵ Three Mile Island nuclear accident occurred in the USA in 1979. See Andronico O. Adede, "Overview of Legal and Technical Aspects of Nuclear Accident Pollution", in Daniel Barstow Magraw, (Ed.), *International Law and Pollution*, University of Pennsylvania Press, Philadelphia: 1991, p. 129.

⁵⁶ *Ibid.*, Article 3 (1).

⁵⁷ *Ibid.*, Article 1 (a) and (b).

⁵⁸ *Ibid.*, Article 1 ©.

⁵⁹ *Ibid.*, Article 8.

⁶⁰ *Ibid.*, Article 9.

⁶¹ *Ibid.*, Article 8 (2).

⁶² *Ibid.*, Article 8 (3).

⁶³ *Ibid.*, Article 9 (1) and (2).

⁶⁴ *Ibid.*, Article 9 (3).

⁶⁵ *Ibid.*, Article 12.

⁶⁶ *Ibid.*, Article 13.

⁶⁷ See Article 2 of the ASEAN Agreement on Transboundary Haze Pollution.

⁶⁸ *Ibid.*

logically sound and sustainable use of natural resources and public participation.⁶⁹

Like many international environmental treaties, the Agreement also imposes very general obligations upon the Parties. The agreement mainly provides for cooperation for developing and implementing measures, prompt response by the State Parties where the fires originate, and the obligation to take legislative and administrative measures.⁷⁰

With regard to the prevention of land and forest fires, the Agreement obliges the States to undertake measures, which include:

- a. "Developing and implementing legislative and other regulatory measures, as well as programs and strategies to promote zero burning policy to deal with land and/or forest fires resulting in transboundary haze pollution;
- b. Developing other appropriate policies to curb activities that may lead to land and/or forest fires;
- c. Identifying and monitoring areas prone to occurrence of land and/or forest fires;
- d. Strengthening local fire management and firefighting capability and coordination to prevent the occurrence of land and/or forest fires;
- e. Promoting public education and awareness-building cam-

paigns and strengthening community participation in fire management to prevent land and/or forest fires and haze pollution arising from such fires;

- f. Promoting and utilizing indigenous knowledge and practices in fire prevention and management; and
- g. Ensuring that legislative, administrative and/or other relevant measures are taken to control open burning and to prevent land clearing using fire".⁷¹

For the purpose of facilitating coordination among the parties to manage the impact of land and forest fires, the Agreement establishes the ASEAN Coordinating Center for Transboundary Haze Pollution Control. (hereinafter cited as the ASEAN Center)⁷² The ASEAN Center is comprised of representatives of the national authorities of the Parties.⁷³ The Agreement provides that it is the duties of the State Party, in which the land and/or forest fires occur, to put out the fires. In case, the National Authority declares an emergency situation, the ASEAN Center may provide assistance upon the request of the concerned Party.⁷⁴

The Agreement respects the principle of State Sovereignty very much including in an emer-

⁶⁹ *Ibid.*, Article 9.

⁷⁰ *Ibid.*, Article 5 (1).

⁷¹ *Ibid.*, Article 5 (3).

⁷² *Ibid.*, Article 5 (2).

gency situation. It can be seen in one of the provisions of the Agreement which provides that the assistance to put out the fires from any other Party can only be employed with the consent of the receiving Party. Further, the Agreement provides that in an emergency situation, each Party that needs assistance to put out the fires may request assistance from any other Party either directly or through the ASEAN Center.⁷⁵

Evaluation and implementation of the Agreement is under the responsibility of the Conference of the Parties. The main duties of the Conference of the Parties are : (a) To execute necessary action to ensure effective implementation of the Agreement; (b) to consider reports and other information submitted by any Party; (c) to adopt protocols; (d) to amend the Agreement; (e) to review and adopt amendment to any Annexes of the Agreement; (f) to erect subsidiary bodies for the purpose of implementing the Agreement; and (g) to take additional action necessary to achieve the objective of the Agreement.⁷⁶

Dispute settlement mechanism provided for in the Agreement reflects the ASEAN spirit. The Agreement does not give mandate to settle disputes arising from interpretation and implementation of the Agreement to any tribunal or to International Court of Justice. The Agreement

merely obliges the contracting Parties to settle the disputes through an amicable way.

IV. Conclusion

As a regional economic cooperation with ten member countries, ASEAN has potential to experience an increasing economic growth in tandem with degradation and pollution of the environment. One of many obvious threats to the regional environment is the transboundary atmospheric pollution in the form of haze resulting from land and forest fires.

ASEAN policy responses to the transboundary atmospheric pollution have been developed since 1978, ranging from the formulation of ASEP I, II and III, the conclusion of several declarations and resolutions, and the establishment of Cooperation Plan on Transboundary Pollution as well as Strategic Plan of Action. However, the programmes, declarations and resolutions are proven ineffective. They are all very lenient legal tools to deal with such an acute transboundary haze issue.

Additionally, the ASEAN environmental programmes, co-operations and plans of action were not specifically emphasized on the efforts to regionally control atmospheric pollution. The individual country is still the key actor in controlling the transboundary atmospheric pollution in the region.

The development of ASEAN environmental law dealing with transboundary atmospheric pollution is still far from satisfactory. It is true that ASEAN has concluded two agreements. But one of which still does not and will never come into force, notably the ASEAN Agreement of the Conservation of Nature and Natu-

⁷⁵ *Ibid.*, Article 12 (1).

⁷⁶ *Ibid.*, Article 18.

⁶⁹ *Ibid.*, Article 3.

⁷⁰ *Ibid.*, Article 4.

ral Resources. Thus, it can not be expected to fight against transboundary atmospheric pollution in the region. The Treaty on Southeast Asia Nuclear-Free Zone is meant to protect ASEAN environment from nuclear test, which is not significant source of atmospheric pollution at the moment yet.

If the reluctance of ASEAN country members to formulate hard law to deal with the problem is "Asean spirit" or "Asean diplomacy," ASEAN then must find another way of resolving the issue. The formulation of hard law is a must since the problem is threatening the environment and the people health. In order that, the hard law will not damage the ASEAN spirit, the agreement may forget the use of traditional adjudication to ensure compliance. It can employ another model such as managerial model to lure the compliance of the parties.

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