

ARTICLE

Transboundary Civil Litigation for Victims of Southeast Asian Haze Pollution: Access to Justice and the Non-Discrimination Principle

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Abstract

This article examines access to justice for victims of the Southeast Asian haze pollution within the legal system of Indonesia as the source-of-origin state. It argues that bringing civil claims against the polluting companies before Indonesian courts offers a more effective avenue towards justice than relying on resolution at the level of state to state. The article first discusses barriers to resolving the problem through the state-to-state level. It then considers whether, under international law, the source-of-origin state is obliged to provide remedies for victims of transboundary environmental damage. The article then reviews the efficacy of pursuing remedies for transboundary civil claims against polluters through the legal system of the source-of-origin state. Finally, the article considers the limitations of the laws of the affected states, which, as a consequence, mean that transboundary civil litigation in the source-of-origin state may be the most effective avenue for redress.

Keywords: Transboundary litigation, Haze pollution, Non-discrimination, Access to justice, Source-of-origin state

1. INTRODUCTION

This article explores the problem of transboundary haze pollution in Southeast Asia and the availability of remedies for transboundary victims. The article analyzes the potential liability of polluting companies within the legal system of the source-of-origin state. Haze pollution first began in the 1980s¹ and arises mainly from forest fires caused by the practice of slashing and burning by palm oil and pulpwood

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¹ E. Quah & H. Varkkey, 'The Political Economy of Transboundary Pollution: Mitigation Forest Fires and Haze in Southeast Asia' (2013) *The Asian Community: Its Concepts and Prospects*, pp. 323–58, at 323; H. Varkkey, 'The Asean Way and Haze Mitigation Efforts' (2012) 8 *Journal of International Studies*, pp. 77–97, at 77.

plantations on the islands of Sumatra and Kalimantan in Indonesia.² For cultivation purposes, the valuable timbers are slashed and the vegetation is burned to clear the land and prepare it for plantation.³ Despite its adverse impact on the environment, the practice of slashing and burning continues, as it is the easiest and most cost-effective way of converting forest to crop-growing land.⁴ In the past, villagers were blamed for causing intense smoke as a result of the traditional practices of clearing land by fires for relocating cultivation. However, satellite data confirms that approximately 80% of all fires are lit in the area of palm oil and pulpwood plantations.⁵ Therefore, the plantation companies are suspected of playing a significant role in causing the fires.

In 1997, intensive forest fires in Indonesia resulting from planting activities caused transboundary smoke pollution in other Southeast Asian countries.⁶ The smoke catastrophes have not only caused damage to human health,⁷ the economy and social life in the state of origin,⁸ but also to neighbouring states, such as Malaysia and

² D.S. Jones, 'ASEAN and Transboundary Haze Pollution in Southeast Asia' (2006) 4(3) *Asia Europe Journal*, pp. 431–46, at 432; J. Othman, 'Linking Agricultural Trade, Land Demand and Environmental Externalities: Case of Oil Palm in South East Asia' (2003) 20(3) *ASEAN Economic Bulletin*, pp. 244–55, at 244; The World Bank, *Indonesia: Environment and Natural Resource Management in a Time of Transition* (The World Bank, 2011), p. 13; ASEAN, 'Information on Fire and Haze', *Haze Action Online*, 2016, available at: <http://haze.asean.org/about-us/information-on-fire-and-haze>; Government of Singapore, National Environmental Agency, 'Factsheet on Transboundary Haze Pollution', 2014, available at: <http://www.nea.gov.sg/docs/default-source/corporate/COS-2014/transboundary-haze-pollution.pdf>.

³ A.K. Tan, 'The ASEAN Agreement on Transboundary Haze Pollution: Prospects for Compliance and Effectiveness in Post-Suharto Indonesia' (2016) 13(3) *New York University Environmental Law Journal*, pp. 647–722, at 653.

⁴ D. Heilmann, 'After Indonesia's Ratification: The ASEAN Agreement on Transboundary Haze Pollution and its Effectiveness as a Regional Environmental Governance Tool' (2015) 34(3) *Journal of Current Southeast Asian Affairs*, pp. 95–121, at 98. See also C.J.P. Colfer, 'Ten Propositions to Explain Kalimantan's Fires', in C.J.P. Colfer & I.A.P. Resosudarmo (eds), *Which Way Forward? People, Forests, and Policymaking in Indonesia* (Resources for the Future Press, 2002), pp. 309–24, at 310; Jones, n. 2 above; H. Varkkey, 'Patronage Politics, Plantation Fires and Transboundary Haze' (2013) 12(3–4) *Environmental Hazards*, pp. 200–17, at 202.

⁵ P. Dauvergne, 'The Political Economy of Indonesia's 1997 Forest Fires' (1998) 52(1) *Australian Journal of International Affairs*, pp. 13–7, at 14; Quah & Varkkey, n. 1; H. Varkkey, 'Oil Palm Plantations and Transboundary Haze: Patronage Networks and Land Licensing in Indonesia's Peatlands' (2013) 33(4) *Wetlands*, pp. 679–90, at 680; H. Varkkey, 'Patronage Politics as a Driver of Economic Regionalisation: The Indonesian Oil Palm Sector and Transboundary Haze' (2012) 12(3–4) *Environmental Hazards*, pp. 314–29, at 314; Q.M. Ketterings et al., 'Farmers' Perspectives on Slash-and-Burn as a Land Clearing Method for Small-Scale Rubber Producers in Sepungur, Jambi Province, Sumatra, Indonesia' (1999) 120(1–3) *Forest Ecology and Management*, pp. 157–69, at 157; M.S. Islam, Y.H. Pei & S. Mangharam, 'Trans-boundary Haze Pollution in Southeast Asia: Sustainability through Plural Environmental Governance' (2016) 8(5) *Sustainability*, p. 499; C.V. Barber & J. Schweithelm, *Trial by Fire: Forest Fires and Forestry Policy in Indonesia's Era of Crisis and Reform* (World Resources Institute, 2000), p. 32; Tan, n. 3 above.

⁶ S.S.C. Tay, 'South East Asian Forest Fires: Haze over ASEAN and International Environmental Law' (1998) 7(2) *Review of European Community and International Environmental Law*, pp. 202–8, at 202. See also Heilmann, n. 4 above, p. 99.

⁷ Heilmann, n. 4 above, p. 100.

⁸ International Law Commission (ILC), Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, Art. 2(d) (ILC, Draft Articles on Prevention).

Singapore, as well as affecting Brunei, Thailand, and the Philippines.⁹ By October 1997, more than 200,000 people in Indonesia, Malaysia, and Singapore had been treated for haze-related illnesses. During the haze period, there was a significant increase in the number of asthmatics and outpatient cases.¹⁰ It was also reported that the haze raised the mortality rate in Malaysia and lowered the rate of infant and foetal survival in Indonesia.¹¹ Moreover, thousands of schools were forced to close during the haze outbreak, thereby violating the right of children to education.¹² From an economic perspective, Malaysia suffered damage to the value of around USD 320 million (800 Malaysian ringgit (RM))¹³ and Singapore lost at least 97.5 million Singapore dollars (SD) from the tourism and business sectors.¹⁴ In response to these events, Indonesia claimed that the haze crisis was linked to drought as a result of El Niño, although the haze then returned, even in years that were not influenced by El Niño (2005, 2006 and 2013).¹⁵

To date, there have been no significant developments in state-level diplomacy towards resolving the problem. As such, victims continue to bear the sole cost of injury. This article examines the availability of access to justice for the transboundary victims of the haze under the legal system of the source-of-origin state. It argues that bringing civil claims against the polluting companies before Indonesian courts is a more attractive solution than relying on resolution at the level of state-to-state. To support this argument, the article starts by outlining the barriers to resolving the problem at state-to-state level. Section 3 of the article then discusses whether, under

⁹ Dauvergne, n. 5 above. See also J. Mayer, 'Transboundary Perspectives on Managing Indonesia's Fires' (2006) 15(2) *The Journal of Environment & Development*, pp. 202–23, at 203. See also Quah & Varkkey, n. 1 above; T. Forsyth, 'Public Concerns about Transboundary Haze: A Comparison of Indonesia, Singapore, and Malaysia' (2014) 25 *Global Environmental Change*, pp. 76–86, at 76.

¹⁰ J. Othman et al., 'Transboundary Smoke Haze Pollution in Malaysia: Inpatient Health Impacts and Economic Valuation' (2014) 189 *Environmental Pollution*, pp. 194–201, at 195; R. Afroz, M.N. Hassan & N.A. Ibrahim, 'Review of Air Pollution and Health Impacts in Malaysia' (2003) 92(2) *Environmental Research*, pp. 71–7, at 75–6.

¹¹ S. Jayachandran, 'Air Quality and Infant Mortality during Indonesia's Massive Wildfires in 1997', 6th BREAD Conference on Development Economics, 8 Apr. 2005, available at: https://sites.hks.harvard.edu/cid/bread/conf_2005.04.htm; D.J. Lohman, D. Bickford & N.S. Sodhi, 'The Burning Issue' (2007) 316(5823) *Science*, p. 376.

¹² E.S. Heng, 'Haze Forces 4,778 Schools to Close Today; 2,696,110 Students Affected', *The Borneo Post online*, 22 Oct. 2015, available at: <http://www.theborneopost.com/2015/10/22/haze-forces-4778-schools-to-close-today-2696110-students-affected>; D. Armandhanu, 'Asap Memburuk, Malaysia Kembali Tutup Sekolah', *CNN Indonesia*, 19 Oct. 2015, available at: <http://www.cnnindonesia.com/internasional/20151019102509-106-85739/asap-memburuk-malaysia-kembali-tutup-sekolah> (in Indonesian); R. Nofitra, 'Kabut Asap Pekanbaru Berbahaya, Sekolah Kembali Diliburkan', *Tempo.co*, 20 Oct. 2015, available at: <http://nasional.tempo.co/read/news/2015/10/20/206711180/kabut-asap-pekanbaru-berbahaya-sekolah-kembali-diliburkan> (in Indonesian); Ilham, 'Kabut Asap Menebal, Dinas Pendidikan tidak Izinkan Sekolah Libur', *Republika.co.id*, 27 Oct. 2015, available at: <http://nasional.republika.co.id/berita/nasional/daerah/15/10/27/nwvfud361-kabut-asap-menebal-dinas-pendidikan-tidak-izinkan-sekolah-libur> (in Indonesian); Ministry of Education of Singapore, 'New Releases: Haze Condition Worsens, Schools to Close Tomorrow', 24 Sept. 2015, available at: <http://www.nea.gov.sg/corporate-functions/newsroom/news-releases/haze-condition-worsens-schools-to-close-tomorrow>.

¹³ Dauvergne, n. 5 above.

¹⁴ A. Palanissamy, 'Haze Free Air in Singapore and Malaysia: The Spirit of the Law in South East Asia' (2013) 1(8) *International Journal of Education and Research*, pp. 1–8, at 1.

¹⁵ Forsyth, n. 9 above. For a different version, cf. Dauvergne, n. 5 above; Mayer, n. 9 above, p. 204.

international law, the source-of-origin state is obliged to provide equitable remedies for the victims of transboundary environmental damage. The article then discusses the amenability of the legal system of the source-of-origin state to supporting transboundary civil claims. Finally, the article concludes by discussing the limitations of the laws of the affected states, which make transboundary civil litigation in the source-of-origin state a more meaningful avenue.

2. STATE-TO-STATE LEVEL RESOLUTION

Under general international law, a state is responsible for carrying out due diligence in regulating and controlling activities within its jurisdiction, including private conduct, to refrain from causing significant harm to the territory of other states or areas beyond its own territory.¹⁶ This norm is known as the ‘no harm’ principle and has been recognized as customary international law.¹⁷ The principle has been endorsed by soft law instruments,¹⁸ multilateral environmental agreements (MEAs)¹⁹ and, in particular, by Article 3(1) of the 2002 Association of Southeast Asian Nations (ASEAN) Agreement on Transboundary Haze Pollution (AATHP).²⁰ The importance of the ‘no harm’ principle has also been consistently reiterated by the International

¹⁶ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 Apr. 2010, *ICJ Reports* (2010), p. 14, at 101 (*Pulp Mills*); *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*, Advisory Opinion, 1 Feb. 2011, *ITLOS Reports* (2011), pp. 110–3 (Advisory Opinion on Seabed Activities); Draft Articles on Prevention, n. 8 above, Arts 1–3. See also A. Boyle et al., ‘International Law and the Liability for Catastrophic Environmental Damage’, *American Society of International Law: Proceedings of the Annual Meeting*, 2011, pp. 423–38.

¹⁷ For a discussion of the ‘no harm principle’ see also P. Birnie, A. Boyle & C. Redgwell, *International Law and the Environment*, 3rd edn (Oxford University Press, 2009), pp. 135–64; J. Peel, ‘Unpacking the Elements of a State Responsibility Claim for Transboundary Pollution’, in S. Jayakumar et al. (eds), *Transboundary Pollution: Evolving Issues of International Law and Policy* (Edward Elgar, 2015), pp. 51–80, at 54. See also *Request for an Examination of the Situation in accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, Order, 22 Sept. 1995, *ICJ Reports* (1995), p. 347, Dissenting Opinion of Judge Weeramantry (*Nuclear Tests (New Zealand v. France)*), and International Court of Justice cases discussed below.

¹⁸ Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), adopted by the United Nations Conference on Environment and Development (UNCED), Stockholm (Sweden), 5–16 June 1972, UN Doc. A/CONF.48/14/Rev. 1, Principle 21, available at: <http://www.un-documents.net/aconf48-14r1.pdf>; Rio Declaration on Environment and Development (Rio Declaration), adopted by UNCED, Rio de Janeiro (Brazil), 3–14 June 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I, Principle 3, available at: <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>; Draft Articles on Prevention, n. 8 above, Art. 3; Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on Management, Conservation, and Sustainable Development of all Types of Forests, adopted by UNCED, Rio de Janeiro (Brazil), 3–14 June 1992, UN Doc. A/CONF.151/26 (Vol. III), Principle 1(a), available at: <http://www.un.org/documents/ga/conf151/aconf15126-3annex3.htm>.

¹⁹ United Nations Framework Convention on Climate Change (UNFCCC), New York, NY (United States (US)), 19 May 1992, in force 21 Mar. 1994, Preamble, available at: <https://unfccc.int/resource/docs/convkp/conveng.pdf>; Convention on Biological Diversity (CBD), Rio de Janeiro (Brazil), 5 June 1992, in force 29 Dec. 1993, Art. 3, available at: <https://www.cbd.int/doc/legal/cbd-en.pdf>; United Nations Convention on the Law of the Sea (UNCLOS), Montego Bay (Jamaica), 10 Dec. 1982, in force 16 Nov. 1994, Art. 194(1), available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf; Convention on the Law of the Non-navigational Uses of International Watercourses, New York, NY (US), 21 May 1997, UNGA Res. 51/229, UN Doc. A/51/49, in force 17 Aug. 2014, Art. 21, available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf.

²⁰ Kuala Lumpur (Malaysia), 10 Jun. 2002, in force 2003, available at: <http://asean.org/storage/2012/05/AATHP.pdf>.

Court of Justice (ICJ) in its judgments, such as in the *Pulp Mills* case,²¹ the *Corfu Channel* case,²² *Gabčíkovo-Nagymaros*,²³ and the advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*.²⁴

Since the *Trail Smelter* case in 1941²⁵ the only other transboundary air pollution case that has been brought before any international tribunal is the *Aerial Spraying* case.²⁶ Although this latter case was discontinued before the start of the oral argument, the pleadings illustrate the application of the due diligence obligation to an activity suspected of causing significant transboundary air pollution.²⁷ Ecuador sued Colombia for causing serious harm to human life, crops, livestock, and the environment of Ecuador's frontier territory. The damage was suspected to be the result of aerial herbicide spraying carried out as part of Colombia's plan to eradicate illegal cocaine crops.²⁸ Although the spraying forms part of the Colombian government's programme, under the law of state responsibility the state is considered to have violated international law if the actions or omissions causing the harm are attributable to the state²⁹ or constitute a violation of the international obligations of that state.³⁰ In this case, the act of the aircraft company in itself does not constitute a breach;³¹ rather it is Colombia's failure in carrying out due diligence in enforcing its rules regarding the spraying operating parameters that arguably constitutes a breach of the 'no harm' principle.³²

As with Colombia, Indonesia is also responsible for its failure in regulating and enforcing rules regarding the conduct of palm oil and pulpwood plantations, conduct which has caused significant transboundary damage to Malaysia and Singapore.³³

²¹ N. 16 above.

²² *Corfu Channel (United Kingdom v. Albania)*, Judgment, 9 Apr. 1949, *ICJ Reports* (1949), p. 4, at 22.

²³ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 Sept. 1997, *ICJ Reports* (1997), p. 7, at 53.

²⁴ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports* (1996), p. 226, at 242, para. 29.

²⁵ *Trail Smelter Arbitration (United States v. Canada)*, 3 *Reports of International Arbitral Awards* (1941) p. 1905, at 1965–6.

²⁶ *Aerial Herbicide Spraying (Ecuador v. Colombia)*, Order, 13 Sept. 2013, *ICJ Reports* (2013), p. 278 (*Aerial Spraying*).

²⁷ A. Boyle, 'Transboundary Air Pollution: A Tale of Two Paradigms', in Jayakumar et al., n. 17 above, pp. 233–60, at 235.

²⁸ *Aerial Herbicide Spraying (Ecuador v. Colombia)*, Memorial of Ecuador, 28 Apr. 2009, available at: <http://www.icj-cij.org/docket/files/138/17540.pdf> (*Aerial Spraying*, Memorial of Ecuador).

²⁹ *Phosphates in Morocco*, Judgment, PCIJ Series A/B, No. 74 (1938), p. 28; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, *ICJ Reports* (1986), p. 14, paras 149, 283, 292; *Gabčíkovo-Nagymaros Project*, n. 23 above, p. 38, para. 47; *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 Apr. 1949, *ICJ Reports* (1959), p. 184.

³⁰ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, Art. 2 (ILC, Draft Articles on Responsibility). See also *Case concerning the difference between New Zealand and France concerning the Interpretation or Application of Two Agreements Concluded on 9 July 1986 between the Two States and which related to the Problems Arising from the Rainbow Warrior Affair*, 30 Apr. 1990, *Reports of International Arbitral Awards*, vol. XX, pp. 215–84.

³¹ Advisory Opinion on Seabed Activities, n. 16 above.

³² *Aerial Spraying*, n. 26 above.

³³ G. Handl, 'State Liability for Accidental Transnational Environmental Damage by Private Persons' (1980) 74(3) *American Journal of International Law*, pp. 524–65, at 564–5.

Indonesia has enacted several regulations to control the practices of open burning.³⁴ However, these regulations are arguably vague and inadequately enforced.³⁵ In addition, the laws do not entirely prohibit the practice of open burning for agricultural needs. For example, Article 69(1)(h) of Indonesia's Environmental Protection Act³⁶ and Article 4(1) of the Regulation of Environmental Ministry of Indonesia No. 10 Year 2010³⁷ allow local farmers to clear the land with fires, up to a maximum of two hectares per family, as long as the land is used to plant local varieties. In reality, the burning practices by locals are not sufficiently monitored and the regulations are not enforced as a result of corruption.³⁸

Based on this precedent, there is a strong possibility that Malaysia and Singapore could sue Indonesia before the ICJ based on its negligence. Nevertheless, the absence of compulsory jurisdiction and other factors make this unlikely in practice.³⁹ Firstly, it would not be easy to obtain Indonesia's consent to bring a case before the ICJ. Secondly, the fact that several of the offending companies are businesses based in Malaysia and Singapore⁴⁰ and that some palm oil plantations in Sarawak (Malaysia) are also suspected of starting the fires⁴¹ makes it unethical for both countries to appeal when considering the principle of 'clean hands'. This principle is frequently used by defendants to argue that plaintiffs are not entitled to obtain remedies because of their own unethical acts or because they have acted in bad faith with regard to the subject of the claims.⁴² Thirdly, recalling that the source of origin and the affected states are members of the ASEAN, they prefer to choose non-confrontational avenues, such as

³⁴ Act of Indonesia No. 32 Year 2009 on Environmental Protection and Management (Environmental Protection Act); Act of Indonesia No. 18 Year 2004 on Agriculture; Government Regulation No. 4 Year 2001 concerning Damage and/or Pollution of the Environment Control related to Forest or Land Fires; Regulation of Environmental Ministry of Indonesia No. 10 Year 2010 on Pollution Prevention and/or Environmental Damage Mechanisms related to Forest and/or Land Fires; Presidential Instruction No. 16 Year 2011 concerning Improvement of Controlling Land/Forest Fires.

³⁵ L. Nurhidayah, 'Legislation, Regulations, and Policies in Indonesia Relevant to Addressing Land/Forest Fires and Transboundary Haze Pollution: A Critical Evaluation' (2013) 16(1) *Asia Pacific Journal of Environmental Law*, pp. 215–39, at 238; G.B. Indrarto et al., 'The Context of REDD+ in Indonesia: Drivers, Agents and Institutions', Center for International Forestry Research (CIFOR), Working Paper 92, 2012, p. 24, available at: https://www.cifor.org/publications/pdf_files/WPapers/WP92Resosudarmo.pdf; Tan, n. 3, p. 682.

³⁶ N. 34 above.

³⁷ N. 34 above.

³⁸ See Nurhidayah, n. 35 above; Indrarto et al., n. 35 above; Varkkey, n. 4 above; Mayer, n. 9 above, p. 205; G. Applegate et al., 'Forest Fires in Indonesia', in Colfer & Resosudarmo, n. 4 above, pp. 293–308; Colfer, n. 4 above, pp. 314–5; D. Mosbergen, 'Palm Oil is in Everything – And It's Destroying Southeast Asia's Forests', *The Huffington Post*, 9 Sept. 2015, available at: http://www.huffingtonpost.com/entry/palm-oil-impacts_us_55a4c391e4b0b8145f737dd5.

³⁹ Statute of the International Court of Justice, 26 June 1945, in force 14 Oct. 1945, Art. 36(2), available at: http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf.

⁴⁰ Forsyth, n. 9 above.

⁴¹ *Ibid.*, p. 77; Friends of the Earth, 'Malaysian Palm Oil: Green Gold or Green Wash? A Commentary on the Sustainability Claims of Malaysia's Palm Oil Lobby, with a Special Focus on the State of Sarawak', 11 Oct. 2008, available at: <http://www.foei.org/en/publications/pdfs/malaysian-palm-oil>.

⁴² Although the use of the 'clean hands' principle may be subject to debate because the legal status of the principle, under international law, is uncertain: S.M. Schwebel, 'Clean Hands, Principle' (2015) *Max Planck Encyclopedia of Public International Law*, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e18?prd=EPIL>.

cooperation and diplomacy.⁴³ That is one of the reasons why the AATHP was adopted, although Indonesia took 10 years to adopt it. In practice, the AATHP only places emphasis on the obligation of state parties to strengthen their cooperation in preventing and monitoring the fires, with several weak provisions regarding taking precautionary measures, managing natural resources, and involving the relevant actors, such as private entities.⁴⁴ However, the AATHP has no compliance mechanism⁴⁵ and remains silent on the issues of remedies and access to justice. It is not surprising, therefore, that scholarship on the ‘ASEAN way’ and the AATHP is largely sceptical as to whether regional cooperation really will occur in the near future.⁴⁶

3. ACCESS TO JUSTICE AND THE NON-DISCRIMINATION PRINCIPLE

3.1. *Access to Justice*

Generally, access to justice is seen as a right to obtain remedies before judicial bodies or other authorities.⁴⁷ Under international law, access to justice is documented in several fields of law, such as in the law of state responsibility for injuries to aliens,⁴⁸ in human rights law,⁴⁹ and in environmental law.⁵⁰ Before developing into a human

⁴³ P. Nguitrugool, ‘Negotiating the Haze Treaty: Rationality and Institutions in the Negotiations for the ASEAN Agreement on Transboundary Haze Pollution (2002)’ (2011) 51(2) *Asian Survey*, pp. 356–78, at 358.

⁴⁴ AATHP, n. 20 above, Art. 3(3)–(5).

⁴⁵ *Ibid.*, Art. 3(2).

⁴⁶ Varkkey, n. 1 above, p. 90; L. Tacconi, F. Jotzo & R.Q. Grafton, ‘Local Causes, Regional Co-operation and Global Financing for Environmental Problems: The Case of Southeast Asian Haze Pollution’ (2008) 8(1) *International Environmental Agreements*, pp. 1–16; L.M. Syarif, ‘Evaluating the (In)effectiveness of ASEAN Cooperation against Transboundary Air Pollution’, in Jayakumar et al., n. 17 above, pp. 295–326, at 320–2. Cf. Mayer, n. 9 above.

⁴⁷ F. Francioni, ‘The Rights of Access to Justice under Customary International Law’, in F. Francioni (ed.), *Access to Justice as a Human Right* (Oxford University Press, 2007), pp. 1–56.

⁴⁸ J. Dugard, First Report on Diplomatic Protection (7 Mar. 2000), UN Doc. A/CN.4/506; J. Dugard, Second Report on Diplomatic Protection (28 Feb. 2001), UN Doc. A/CN.4/514; J. Dugard, Third Report on Diplomatic Protection (7 Mar. 2002), UN Doc. A/CN.4/523; J. Dugard, Fourth Report on Diplomatic Protection (13 Mar. 2003), UN Doc. A/CN.4/530; J. Dugard, Fifth Report on Diplomatic Protection (4 Mar. 2004), UN Doc. A/CN.4/538; J. Dugard, Sixth Report on Diplomatic Protection (11 Aug. 2004), UN Doc. A/CN.4/546.

⁴⁹ See Universal Declaration of Human Rights (UDHR), Paris (France), 10 Dec. 1948, GA Res. 217A(III), UN Doc. A/810, 71, Art. 8, available at: <http://www.un.org/en/universal-declaration-human-rights/>; European Convention on Human Rights and Fundamental Freedoms (ECHR), 4 Nov. 1950 (as amended by the provisions of Protocol No. 14), in force 1 June 2010, Art. 13, available at: <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c>; International Covenant on Civil and Political Rights (ICCPR), New York, NY (US), 16 Dec. 1966, in force 23 Mar. 1976, Art. 2(3), available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; American Convention on Human Rights (ACHR), San José (Costa Rica), 22 Nov. 1969, in force 18 July 1978 (ACHR), Art. 25, available at: <http://www.cidh.org/basicos/English/Basic3.American%20Convention.htm>; African Charter on Human and Peoples’ Rights (ACHPR), Nairobi (Kenya), 27 June 1981, in force 21 Oct. 1986, Art. 7, available at: <http://www.achpr.org/instruments/achpr/>; Charter of Fundamental Rights of the European Union (CFREU), 18 Dec. 2000, Art. 47, available at: http://www.europarl.europa.eu/charter/pdf/text_en.pdf; ASEAN Human Rights Declaration, 18 Nov. 2012, para. 5, available at: http://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf.

⁵⁰ Rio Declaration, n. 18 above, Principle 10; Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), Aarhus

right, access to justice emerged from the concept of the rights of aliens.⁵¹ Access to justice covers the right of aliens to be treated equally in a foreign land and the right of individuals to have access to a court of law for injuries suffered.⁵² However, the enjoyment of the alien's right to justice is limited to the condition where the alien suffered injuries in a foreign land. Therefore, this section discusses whether, under international human rights law and international environmental law, Indonesia has a responsibility to provide access to justice for aliens in the case of Southeast Asian haze pollution, even if the damage is suffered abroad.

Access to justice as a human right

Under human rights law, access to justice emerges as an issue when there is a violation of rights or freedoms, whether committed by state officials or private entities. As a duty bearer, the state has a positive obligation of due diligence to provide accessible remedies within its domestic legal systems.⁵³ In this context, access to justice can be used as a tool to ensure the protection of human rights.⁵⁴ Where remedies are not obtainable within a domestic legal system, individuals can bring a communication against the state before an international forum.⁵⁵ The decisions of international human rights bodies or courts may influence the practice of domestic law, particularly for the state parties.

Access to justice was recognized as an important right by the 1948 United Nations (UN) Universal Declaration of Human Rights (UDHR).⁵⁶ Since then, most human rights treaties have acknowledged the significance of this right, although it is

(Denmark), 25 June 1998, in force 30 Oct. 2001, available at: <http://www.unece.org/env/pp/treatytext.html>.

⁵¹ Francioni, n. 47 above.

⁵² See *Case of Mavrommatis Palestine Concessions* [1924] *PCIJ Rep.*, Series A, No. 2 (30 Aug. 1924), p. 12; *The Mallén Case*, General Claims Commission, US and Mexico, Opinions of Commissioners [1927], p. 429; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, 24 May 1980, *ICJ Reports* (1980), p. 3; 'Ruling Pertaining to the Differences between France and New Zealand Arising from the Rainbow Warrior Affair' (1987) 81(1) *American Journal of International Law*, pp. 325–8.

⁵³ ICCPR, n. 49 above, Art. 2(3); ACHR, n. 49 above, Art. 25; ACHPR, n. 49 above, Art. 7; ECHR, n. 49 above, Art. 13.

⁵⁴ See ECtHR, 26 Oct. 2000, *Kudła v. Poland*, Appl. No. 30210/96, (2000) 35 EHRR 198, para. 152; D.J. Harris et al., *Law of the European Convention on Human Rights*, 3rd edn (Oxford University Press, 2014), p. 765; O. De Schutter, *International Human Rights Law*, 2nd edn (Cambridge University Press, 2014), pp. 462–518.

⁵⁵ First Optional Protocol to the ICCPR (n. 49 above), UN General Assembly (UNGA) Res. 2200A (XXI), 16 Dec. 1966, in force 23 Mar. 1976, available at: <https://www.ohchr.org/en/professionalinterest/pages/opccpr1.aspx>; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, n. 103 below), 6 Oct. 1999, in force 22 Dec. 2000, available at: <http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm>; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, New York, NY (US), 10 Dec. 2008, in force 5 May 2013, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&cmdtsg_no=IV-3-a&chapter=4&clang=en; ECHR, n. 49 above, Art. 34. See also Human Rights Committee (HRC), *TK v. France* (220/87), para. 8.3; HRC, *MK v. France* (438/90), para. 8.3; HRC, *Rajan and Rajan v. New Zealand* (820/98), paras 6.2 and 7.2; HRC, *Tănase v. Moldova* (7/08), para. 104; ECtHR, 29 Apr. 2008, *Burden v. United Kingdom*, Appl. No. 13378/05, para. 33; HRC, *Cyprus v. Turkey* (25781/94), paras 75–81; HRC, *Drozd and Janousek v. France and Spain* (12747/87), paras 84–90.

⁵⁶ N. 49 above, Art. 8.

expressed in different terms. The International Covenant on Civil and Political Rights (ICCPR),⁵⁷ the European Convention on Human Rights (ECHR),⁵⁸ and the Charter of Fundamental Rights of the European Union (CFREU)⁵⁹ use the words ‘right to an effective remedy’;⁶⁰ the American Convention on Human Rights (ACHR) adopts the term ‘right to judicial protection’,⁶¹ whereas the African Charter on Human and Peoples’ Rights (ACHPR) defines access to justice as a ‘right to have his cause heard’.⁶² Although employing different terms, these multilateral human rights agreements confirm the procedural character of access to justice, in particular the right to a remedy.

Access to justice is not a free-standing right; it emerges as a consequence of the breach of other substantive enforceable rights and freedoms specified by the law.⁶³ The term ‘enforceable’ is relevant to the distinction between civil and political rights on the one hand, and economic, social and cultural rights on the other. Civil and political rights are enforceable rights before national courts and should be implemented immediately, without delay, by enacting legislation and allocating state officials to enforce the rules. However, not all economic, social and cultural rights are enforceable, in particular, those rights the implementation of which requires funds. That is why the terms ‘progressive realization’ or ‘future-oriented’ are used to allow states discretion in determining priorities in implementing those rights.⁶⁴ Some economic, social and cultural rights that are enforceable before national tribunals, and should therefore be implemented immediately without delay, are: (a) gender equality; (b) minimum wages for workers; (c) freedom to join a trade union for labour; (d) the prohibition of child labour; (e) the right to education; and (f) freedom to conduct research and creative activity.⁶⁵

In dealing with human rights violations, states have discretion to determine the available remedies. While human rights law does not prescribe the manner in which

⁵⁷ ICCPR, n. 49 above, Art. 2(3).

⁵⁸ ECHR, n. 49 above, Art. 13.

⁵⁹ CFREU, n. 49 above, Art. 47.

⁶⁰ ICCPR, n. 49 above, Art. 2(3).

⁶¹ ACHR, n. 49 above, Art. 25.

⁶² *Ibid.*, Art. 7.

⁶³ Francioni, n. 47 above, p. 30. See also HRC, *SE v. Argentina* (275/88), para. 5.3; HRC, *Kazantzis v. Cyprus* (972/01), para. 6.6; HRC, *Faure v. Australia* (1036/01), para. 7.3-4; HRC, *Picq v. France* (1632/07); HRC, *Kibale v. Canada* (1562/07); HRC, *Smidek v. Czech Republic* (1062/02).

⁶⁴ UN Committee on Economic, Social and Cultural Rights, General Comment No 3: The Nature of States Parties’ Obligations (Art. 2, para. 1, of the Covenant) (14 Dec. 1990), UN Doc. E/1991/23, para. 9, available at: <http://www.refworld.org/docid/4538838e10.html>. See also C. Courtis, ‘Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability’, International Commission of Jurists, 22 July 2008, pp. 9–12, available at: <https://www.icj.org/courts-and-the-legal-enforcement-of-economic-social-and-cultural-rights>; A. Eide, ‘Economic, Social and Cultural Rights as Human Rights’, in A. Eide, C. Krause & A. Rosas (eds), *Economic, Social and Cultural Rights: A Textbook*, 2nd edn (Martinus Nijhoff, 2001), pp. 9–28 at 26–7.

⁶⁵ General Comment No. 3, *ibid.*, para. 5; UN Committee on Economic, Social and Cultural Rights, General Comment No. 9: The Domestic Application of the Covenant (3 Dec. 1998), UN Doc. E/C.12/1998/24, para. 10, available at: <http://www.refworld.org/docid/47a7079d6.html>.

access to justice is to be provided, it must be performed in good faith.⁶⁶ Some regimes require an independent court of law, whereas others are satisfied with legislative or executive measures. For example, the UDHR,⁶⁷ CFREU,⁶⁸ and ACHR⁶⁹ specify that an effective remedy can be obtained through competent domestic tribunals. In contrast, the ICCPR⁷⁰ and ECHR⁷¹ provide a wide margin of appreciation for states to determine the appropriate national authorities. Instead of judicial protection, remedies may entail executive measures such as investigation of the alleged human rights violation by competent and independent authorities.⁷² If the national remedy is not given by a judicial body, it should satisfy the criteria of impartiality and produce a binding decision.⁷³

Indonesia is a member state of the ICCPR and a signatory to the ASEAN Human Rights Declaration, both of which (with varying levels of obligation) require state parties to provide remedies for human rights violations. Nevertheless, it is questionable whether the obligation covers human rights violations outside the state's territory. To answer this, it is important to consider Article 2(1) ICCPR, which states that the positive obligation of the state parties under the treaty applies not only to individuals within its territory but also to those within its jurisdiction. The word 'jurisdiction' is then explained in paragraph 10 of General Comment No. 30 of the ICCPR, which asserts that a member of the ICCPR has an obligation to ensure the rights of those living outside its territory when this is under the power or effective control of the state party.⁷⁴ In practice, however, the extraterritorial application of human rights treaties is relevant only to the extraterritorial actions of a state through its agents.⁷⁵

Nevertheless, the case of Southeast Asian haze pollution is arguably within the jurisdiction of Indonesia for several reasons. Firstly, the polluting activities of the companies are within the territory of Indonesia and by its domestic laws Indonesia has the power to effectively control the activities of the polluting companies. Secondly,

⁶⁶ Vienna Convention on the Law of Treaties, Vienna (Austria), 23 May 1969, in force 27 Jan. 1980, Art. 31(1), available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>. See also R.K.M. Smith, *International Human Rights*, 6th edn (Oxford University Press, 2014), pp. 181–3.

⁶⁷ UDHR, n. 49 above, Art. 8.

⁶⁸ CFREU, n. 49 above, Art. 47.

⁶⁹ ACHR, n. 49 above, Art. 25.

⁷⁰ ICCPR, n. 49 above, Art. 2(3).

⁷¹ ECHR, n. 49 above, Art. 13.

⁷² United Nations Human Rights Committee (UNHRC), General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (29 Mar. 2004), UN Doc. CCPR/C/21/Rev.1/Add.13, para. 15, available at: <http://www.refworld.org/docid/478b26ae2.html>. See also HRC, *Benitez v. Paraguay* (1829/08), para. 7.5.

⁷³ *Ibid.*; ECtHR, 6 Sept. 1978, *Klass v. Germany*, Appl. No. 5029/71, Series A No. 28, (1979) 2 EHRR 214, para. 21; ECtHR, 25 Mar. 1983, *Silver v. United Kingdom*, Appl. No. 5947/72, Series A No. 61, (1983) 13 EHRR 582, para. 116; ECtHR, 12 May 2000, *Khan v. United Kingdom*, Appl. No. 35394/97, (2000) 31 EHRR 1016, para. 47; ECtHR, 25 Sept. 2001, *PG and JH v. United Kingdom*, Appl. No. 44787/98, (2008) 46 EHRR 51; ECtHR, 15 Nov. 1996, *Chahal v. United Kingdom*, Appl. No. 22414/93, (1996) 23 EHRR 413, para. 154.

⁷⁴ General Comment No. 31, n. 72 above, para. 10.

⁷⁵ See N. Wenzel, 'Human Rights, Treaties, Extraterritorial Application and Effects' (2008) *Max Planck Encyclopedia of Public International Law*, available at: <http://opil.ouplaw.com/abstract/10.1093/law:epil/9780199231690/law-9780199231690-e819?rskey=7iG6rD&result=2&prd=EPIL>.

under the Indonesian legal system, foreigners are not prevented from filing a civil claim before the national courts.⁷⁶ Thirdly, a civil claim is based on the principle of *actor sequitur forum rei*, which specifies that the choice of jurisdiction or place of the court refers to the domicile of the defendant.⁷⁷ Thus, in this case Indonesia has a positive obligation to ensure the availability of remedies for the transboundary victims of the haze. This proposition is also in line with the 2011 UN Guiding Principles on Business and Human Rights,⁷⁸ which require countries to ensure the availability of remedies for victims of human rights violations conducted by business entities.

Access to justice in environmental matters

Access to justice in environmental matters is an emerging principle of environmental law. In 1982, the UN World Charter for Nature indicated the significance of access to environmental justice, but only for those who have suffered environmental impairment or damage.⁷⁹ The later development of access to justice in environmental matters shows that it is not just a right of access to remedies. Principle 10 of the Rio Declaration acknowledges that access to justice in environmental matters consists of three pillars of rights. These are: (i) the right of access to environmental information; (ii) the right of the public to participate in environmental decision making; and (iii) the right of access to remedies or access to justice in environmental matters. The three pillars are closely linked to attaining environmental democracy, which involves the public in the process of decision making. In order to ensure meaningful participation, it is necessary to make environmental information open and accessible to the public.⁸⁰

The principle of access to justice in environmental matters is codified by Article 9 of the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).⁸¹ This Convention is endorsed by the Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines), adopted by the United Nations Environmental Programme (UNEP).⁸² While it is true that the Aarhus Convention

⁷⁶ See Section 4.3.

⁷⁷ See Section 3.2.

⁷⁸ The document can be seen at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

⁷⁹ UNGA Resolution 37/7 (28 Oct. 1982), 'World Charter for Nature', UN Doc. A/RES/37/7, Principle 23, available at: <http://www.un.org/documents/ga/res/37/a37r007.htm>.

⁸⁰ Rio Declaration, n. 18 above, Principle 10; Aarhus Convention, n. 50 above, Art. 9. See J. Ebbesson, 'Access to Justice in Environmental Matters' (2015) *Max Planck Encyclopedia of Public International Law*, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1589?rskey=zh70g2&result=2&prd=OPIL>; A. Boyle, 'Environment and Human Rights' (2015) *Max Planck Encyclopedia of Public International Law*, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1948?prd=EPIL>; D. Banisar et al., 'Moving from Principles to Rights: Rio 2012 and Access to Information, Public Participation and Justice' (2012) 12(3) *Sustainable Development Law & Policy*, pp. 8–14, at 8; J. Foti & L. de Silva, *A Seat at the Table* (World Resources Institute, 2010).

⁸¹ N. 50 above.

⁸² Adopted by the Governing Council of UNEP in Decision SS.XI/5, Part A (26 Feb. 2010).

was initiated by the United Nations Economic Commission for Europe (UNECE) and is a regional treaty that does not apply worldwide,⁸³ and although the Bali Guidelines constitute a soft law instrument that is not legally binding on states, those legal instruments can be seen as the incarnation of Principle 10 of the Rio Declaration, which was adopted unanimously with the support of all UN member states.⁸⁴

Although not placing a binding obligation on states, the current international legal instruments on access to justice in environmental matters are relevant for at least three reasons. Firstly, in practice, the principle is now widely accepted by states. By 2010, there were 300 environmental judicial bodies regulated by the legislation of 41 states, including developing countries such as India and Malawi.⁸⁵ It is possible, therefore, that in the future there will be a global treaty on access to justice in environmental matters, given that MEAs often reflect existing obligations held under international environmental law, such as in the case of the UN Convention on the Law of the Sea (UNCLOS).⁸⁶ Secondly, the use of ‘shall’ in defining the nature of the obligation, as mentioned in Principle 10 of the Rio Declaration, asserts the lawmaking intention or *opinio juris* character of the principle. Thirdly, the Aarhus Convention can be analyzed in order to find the current international standard on access to justice in environmental matters.⁸⁷ The Convention emphasizes the opportunity for members of the public to challenge a lack of environmental information and any decision or omission that may cause an adverse impact on the environment or the impairment of the enjoyment of rights recognized by domestic regulations.

While the Aarhus Convention allows other UNECE states to become a party,⁸⁸ it is unlikely that countries in other regions – such as Southeast Asia and, in particular, Indonesia – will adopt or become a party to the Convention for cultural and political reasons.⁸⁹ Firstly, producing hard law instruments consisting of obligatory provisions that need to be enforced is not the typical ASEAN way. For example, in asserting its commitment to the protection of human rights, Indonesia and other Southeast Asian countries chose an instrument of declaration instead of establishing a regional treaty regime. Secondly, in addressing severe environmental problems such as haze

⁸³ C. Redgwell, ‘Access to Environmental Justice’, in Francioni, n. 47 above, pp. 153–76, at 154.

⁸⁴ See UNGA Res. 47/190, Report of the UN Conference on Environment and Development (22 Dec. 1992), UN Doc. A/RES/47/190; UNGA Res. 47/191, Institutional Arrangements to Follow Up the UN Conference on Environment and Development (29 Jan. 1993), UN Doc. A/RES/47/191; UNGA Res. 49/113, Dissemination of the Principles of the Rio Declaration on Environment and Development (19 Dec. 1994), UN Doc. A/RES/49/113.

⁸⁵ Banisar et al., n. 80 above, p. 11. See also G. Pring & C. Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative, 2009); G. Pring & C. Pring, ‘Increase in Environmental Courts and Tribunals Prompts New Global Institute’ (2010) 3(1) *Journal of Court Innovation*, pp. 11–21; N.A. Robinson, ‘Ensuring Access to Justice through Environmental Courts’ (2012) 29(2) *Pace Environmental Law Review*, pp. 363–95.

⁸⁶ UNCLOS, n. 19 above.

⁸⁷ Aarhus Convention, n. 50 above, Art. 3(5)–(6).

⁸⁸ *Ibid.*, Art. 19(2). See B. Boer & A. Boyle, ‘Human Rights and the Environment’, 10 Feb. 2014, p. 45, available at: <http://papers.ssrn.com/abstract=2393753>. See also L. Krämer, ‘Transnational Access to Environmental Information’ (2012) 1(1) *Transnational Environmental Law*, pp. 95–104.

⁸⁹ *Ibid.*

pollution, the region has preferred soft law instruments,⁹⁰ although it finally adopted the AATHP in 2002. However, it should be noted that the implementation of the provisions relies solely on national cooperation. The AATHP has no compliance mechanism, and is silent on the issue of access to justice.⁹¹

Access to justice in the context of transboundary environmental damage

According to the law of state responsibility, a state is not liable for transboundary environmental damage if it is not at fault, in particular when that state has regulated the activities, enforced the law and imposed a requirement to use the best available technology for the operation.⁹² That is why, in the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities,⁹³ the International Law Commission (ILC) only requires states to prevent or minimize a risk of causing foreseeable transboundary harm, including by conducting environmental impact assessments (EIAs) and through notification, consultation, and cooperation. Therefore, if a state has complied with its obligations under the Draft Articles, it has no obligation to provide adequate compensation for victims.

In response to the mandate given by the UN Conference on Human Environment in 1972 and the Rio Conference on Environment and Development in 1992 'to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such states to areas beyond their jurisdiction',⁹⁴ in 2006 the ILC adopted the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm arising out of Hazardous Activities.⁹⁵ The Draft Principles address three important points regarding access to justice for the victims of transboundary environmental damage. The first of these is to ensure that the source-of-origin state provides remedies for transboundary victims.⁹⁶ With regard to this provision, Boyle argues that imposing an obligation on the source-of-origin state is more reasonable than shifting the obligation to the affected states. This thinking is based on the fact that the injured states do not benefit from the operation that resulted in the environmental damage and have no authority to control the harmful

⁹⁰ E.g., Jakarta Declaration on Environment and Development, Jakarta (Indonesia), 18 Sept. 1997, available at: <https://cil.nus.edu.sg/wp-content/uploads/formidable/18/1997-Jakarta-Declaration-On-Environment-And-Development.pdf>; ASEAN Cooperation Plan on Transboundary Pollution, (1995) 12(1) *ASEAN Economic Bulletin*, pp. 89–95, available at: https://www.jstor.org/stable/25770582?seq=1#page_scan_tab_contents; Regional Haze Action Plan, Singapore, 23 Dec. 1997, available at: <https://cil.nus.edu.sg/wp-content/uploads/2017/07/1997-Regional-Haze-Action-Plan-1.pdf>.

⁹¹ Syarif, n. 46 above, pp. 309–16.

⁹² *Pulp Mills on the River Uruguay*, n. 16 above; Advisory Opinion on Seabed Activities, n. 16 above.

⁹³ N. 8 above.

⁹⁴ Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972, Part One, Ch. I.

⁹⁵ Stockholm Declaration, n. 18 above, Principle 22; Rio Declaration, n. 18 above, Principle 13.

⁹⁶ Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, *Yearbook of the International Law Commission*, 2006, Vol. II, Part Two, Principle 4, para 1.

activities.⁹⁷ Secondly, the Draft Principles provide that the polluter is strictly liable for its activities.⁹⁸ This means that victims need only prove the occurrence of damage and causal link without having to prove negligence on the part of the polluter. This provision is fundamental in the case of transboundary damage, as commonly victims or plaintiffs have no access to the site where the harmful activities took place. Thirdly, the source-of-origin state must not treat transboundary victims any less promptly, adequately or effectively than domestic victims; an expectation informed by the non-discrimination principle.⁹⁹ This principle is intended to avoid justice being denied to transboundary victims, and has therefore become an emerging principle of human rights law.

The Draft Principles and the Draft Articles were made in the form of soft law instruments that are not binding on states. However, recalling that the task of the ILC was to codify and develop the existing laws regarding international environmental policy, these articles could potentially be used as evidence of *opinio juris* in finding customary international law when judges find that the provisions are supported widely by state practice, such as in the case of the acknowledgement of EIA as customary international law by the ICJ.¹⁰⁰

3.2. The Non-Discrimination Principle under International Law

The non-discrimination principle is a principle of human rights law that guarantees the enjoyment of freedoms and rights without any distinction on grounds such as race, sex, ethnicity, religion, political belief, nationality, or other status.¹⁰¹ Some human rights agreements limit the scope of non-discrimination to the protection of rights guaranteed by the agreement.¹⁰² Others establish non-discrimination as an autonomous right that applies in all types of case and context of discrimination conducted by public authorities or state laws.¹⁰³ The ICCPR is an example of a human rights document that acknowledges both types of non-discrimination. Article 2(1) imposes a positive obligation on states to avoid discriminating against

⁹⁷ A. Boyle, 'Globalising Environmental Liability: The Interplay of National and International Law' (2005) 17(1) *Journal of Environmental Law*, pp. 3–26, at 7.

⁹⁸ Draft Principles on the Allocation of Loss, n. 96 above, Principle 4, para. 2.

⁹⁹ *Ibid.*, Principle 6.

¹⁰⁰ *Pulp Mills on the River Uruguay*, n. 16 above. See also A. Boyle, 'Developments in the International Law of Environmental Impact Assessments and their Relation to the Espoo Convention' (2011) 20(3) *Review of European, Comparative and International Environmental Law*, pp. 227–31.

¹⁰¹ UNHRC, General Comment No. 18: Non-discrimination (10 Nov. 1989), available at: <http://www.refworld.org/docid/453883fa8.html>. See also HRC, *Vos v. Netherlands* (218/86), para. 1.

¹⁰² See ICCPR, n. 49 above, Art. 2(1); International Convention on Economic, Social, and Cultural Rights, New York, NY (US), 16 Dec. 1966, in force 3 Jan. 1976, Arts 2(2) and 10(3), available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>; Convention on the Rights of the Child (CRC), 20 Nov. 1989, in force 2 Sept. 1990, UNGA Res. 44/25, Art. 2(1), available at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>; ECHR, n. 49 above, Art. 14; ACHPR, n. 49 above, Art. 2.

¹⁰³ See ICCPR, n. 49 above, Arts 14(1) and 26; CRC, *ibid.*, Art. 2(1); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), New York, NY (US), 18 Dec. 1979, in force 3 Sept. 1981, Art. 2, available at: <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>; ACHPR, n. 49 above, Art. 3.

anyone within their jurisdiction when safeguarding civil and political rights; and Article 26 mentions the protection of equality before the law.

When dealing with equality, affirmative action is needed in particular for vulnerable persons, such as women, children, the elderly and those in need. Not all differentiation constitutes discrimination. States are permitted to provide differential treatment if (i) it is reasonable and objective, and (ii) it has a legitimate purpose, as defined by the ICCPR.¹⁰⁴ However, if differential treatment is applied arbitrarily, without any notion of necessity or reason, such an action may constitute unlawful discrimination. In *Adam v. Czech Republic*¹⁰⁵ the Human Rights Committee (HRC) established that any legislation regulating restitution or compensation should not discriminate against victims on the basis of citizenship without reasonable grounds. In this case, the applicant was an Australian who owned a property in Czechoslovakia. The claim concerned the limitation of recovery of property confiscated by the Communist government as applied to Czech citizens and permanent residents as regulated by Czech law which, it was argued, had arbitrarily discriminated against the applicant. Similarly, in *Karakurt v. Austria*¹⁰⁶ the HRC found that the exclusion of a Turkish citizen from being a representative on a work council solely on the basis of nationality was not a reasonable distinction. Hence, it is necessary for the member states of the ICCPR to have reasonable, objective and legitimate aims when providing differential treatment, and in particular to foreign nationals.

Indonesia, as a member state of the ICCPR, has an obligation to provide access to justice or remedies to victims. The national courts of Indonesia have no reasonable, objective or legitimate reason to deny access to justice for the haze victims, including transboundary victims. If Indonesia fails to provide equal treatment to domestic and foreign victims within its courts, such an outcome could violate the non-discrimination principle under Articles 2, 14(1) and 26 ICCPR.

4. COMPANY LIABILITY AND CIVIL CLAIMS

Recalling that the actual polluters are the companies,¹⁰⁷ adopting the ‘polluter pays’ approach and making the companies liable under national law would be the most viable option for securing access to justice for victims of the Southeast Asian haze pollution.¹⁰⁸ Most notably for transboundary victims, the application of equal

¹⁰⁴ General Comment No. 18, n. 101 above, para. 13. See also K. Henrard, ‘Equality of Individuals’ (2015) *Max Planck Encyclopedia of Public International Law*, pp. 27–31, available at: <http://opil.ouplaw.com/abstract/10.1093/law:epil/9780199231690/law-9780199231690-e788?rskey=aRpP5o&result=2&prd=OPL>. See also HRC, *Van Oord v. The Netherlands* (658/95), paras 8.5–6.

¹⁰⁵ HRC (586/94) paras 12.6, 13.1.

¹⁰⁶ HRC (965/2000) paras 8.3, 8.4, 9. Cf. *Van Oord v. The Netherlands*, n. 104 above.

¹⁰⁷ G. Doeker & T. Gehring, ‘Private or International Liability for Transnational Environmental Damage: The Precedent of Conventional Liability Regimes’ (1990) 2(1) *Journal of Environmental Law*, pp. 1–16, at 1; M.N. Shaw, *International Law*, 7th edn (Cambridge University Press, 2014), pp. 623–4.

¹⁰⁸ Rio Declaration, n. 18 above, Principle 16; Organisation for Economic Co-operation and Development (OECD), Recommendation on Guiding Principles concerning International Economic Aspects of Environmental Policies, 26 May 1972, p. 128; OECD, Recommendation on the Implementation of the Polluter-Pays Principle, 14 Nov. 1974, p. 223; OECD, Recommendation on the Application of the Polluter-Pays Principle to Accidental Pollution, 25 July 1989, p. 88; Convention for the Protection of

treatment – the non-discrimination principle – would enable their rights to be enforced. Generally, polluting companies can be sued in the place where (i) the polluting activities are carried out; (ii) the effects of the damage occurred; or (iii) the parent company is domiciled.¹⁰⁹ However, there is no global consensus on how and when companies can be sued for transboundary harm. A national court is likely to hear any case involving transboundary harm if its jurisdiction is the place of the defendant's residence or the place in which the injurious activity took place.¹¹⁰ In the context of Southeast Asian haze pollution, it is important to explore the possibility of conducting transboundary civil litigation against the offending companies in Indonesia as the source-of-origin country.

4.1. *The Applicable Law*

The Indonesian Environmental Protection Act¹¹¹ can be used as a legal basis for victims of environmental damage or nuisance to bring civil claims against polluters. Article 87 encapsulates the 'polluter pays' principle in the form of civil liability.¹¹² It specifies the polluter's obligation to compensate, or make an effort of reinstatement to restore any damage to the environment or persons resulting from its unlawful conduct. Moreover, in order to guarantee the civil rights of each party (the injurer and the injured), the Ministry of Environment of Indonesia has published a ministerial regulation to guide the determination of the amount of compensation payable as a result of environmental damage or pollution. From the ministerial

the Marine Environment of the North-East Atlantic, Paris (France), 22 Sept. 1992, in force 25 Mar. 1998, Art. 2(2)(b), available at: http://www.ospar.org/site/assets/files/1290/ospar_convention_e_updated_text_in_2007_no_revs.pdf; Convention on the Protection of the Marine Environment of the Baltic Sea Area, Helsinki (Finland), 9 Apr. 1992, in force 17 Jan. 2000, Art. 3(4), available at: http://www.helcom.fi/Documents/About%20us/Convention%20and%20commitments/Helsinki%20Convention/1992_Convention_1108.pdf; Convention on Cooperation for the Protection and Sustainable Use of the Danube River, Sofia (Bulgaria), 29 June 1994, in force 22 Oct. 1998, Art. 2(4), available at: <https://www.icpdr.org/main/icpdr/danube-river-protection-convention>; Treaty Establishing the European Economic Community, Rome (Italy), 25 Mar. 1957, in force 1 Jan. 1958, Art. 174, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:11957E/TXT>; *Vellore Citizens Welfare Forum v. Union of India* (1996) 5 SCC 647. See also Birnie, Boyle & Redgwell, n. 17 above, pp. 222, 303; P. Sands, *Principles of International Environmental Law*, 2nd edn (Cambridge University Press, 2003), p. 279.

¹⁰⁹ See respectively *Re Union Carbide Corporation*, 634 F Supp (1986); *Handelskwekerij G.J. Bier BV v. Mines de Potasse d'Alsace*, Case C-21/76, ECLI:EU:C:1976:166, (1976) II *ECJ Reports*, p. 1735; *In re Oil Spill by Amoco Cadiz*, 954 F 2d 1279 (1992). See also Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 22 Dec. 2000, Arts 2 and 5, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001R0044>; Kiev Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, 21 May 2003, not yet in force, Art. 13, available at: https://www.unecce.org/fileadmin/DAM/env/civil-liability/documents/protocol_e.pdf; Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, Lugano (Switzerland), 21 June 1993, not yet in force, Art. 19, available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007c079>; International Law Association (ILA), Resolution No. 6/2006 on Transnational Enforcement of Environmental Law, 4–8 June 2006, rule 4.

¹¹⁰ Birnie, Boyle & Redgwell, n. 17 above, pp. 311–3.

¹¹¹ Environmental Protection Act, n. 34 above.

¹¹² *Ibid.*, Art. 2j and the explanation of Art. 87(3).

regulation it is clear that injuries caused by the haze are compensable, including injuries to human health, property, and income or economic loss.¹¹³

The Environmental Protection Act provides for two types of forum for the resolution of environmental disputes.¹¹⁴ Victims of environmental damage can bring civil claims against polluters before national courts for injuries suffered, or they can agree to have their claims settled outside court by mediation or other method. In the context of Southeast Asian haze pollution, pursuing remedies in court would be the best avenue for redress because the judge may order an amount of money to be paid as a fine (*dwangsom*) for any delay in complying with the ruling.¹¹⁵ Alternatively, and provided the parties in dispute agree to participate, mediation may be effective and could result in a written agreement regarding remediation.¹¹⁶ However, it is doubtful whether, in the case of Southeast Asian haze pollution, the wrongdoers would be willing to participate in mediation. There is always room to deny all public accusations because the burning activities are often conducted across massive areas and involve several actors who operate outside public scrutiny – for example, in the deep forest.¹¹⁷ There is also a long history of companies and local farmers blaming each other for causing the fires. Because of this history and context, it is likely that a court decision would be a more effective means for seeking redress, as a court is able to make a final determination where parties cannot agree.

4.2. *The Court's Jurisdiction*

There are two types of jurisdiction in Indonesia: absolute and relative. Absolute jurisdiction concerns the hierarchy and distribution of court affairs, while relative jurisdiction relates to the choice of jurisdiction or place to sue.

There are three hierarchical levels of court in Indonesia. In ascending order, the lower court is *pengadilan negeri* (PN); the court of appeal is *pengadilan tinggi* (PT); and the highest court is the supreme court, *mahkamah agung* (MA).¹¹⁸ In the field of civil litigation, a court judgment is considered to be binding (*inkracht*) if (i) all means of reciprocal actions, which are appeal and cassation,¹¹⁹ have been exhausted; (ii) the time limit for conducting reciprocal actions has passed; or (iii) the court itself in its judgment specifies a requirement of immediate execution, regardless of whether reciprocal actions are conducted by the counterparts.¹²⁰ Civil procedure law does not specify a time limit for reciprocal actions; in practice, judges refer to the time limit set

¹¹³ See the attachment to the Regulation of Environmental Ministry of Indonesia No. 13 Year 2011 on Damages Caused by Pollution and/or Environmental Damage.

¹¹⁴ Environmental Protection Act, n. 34 above, Art. 84. See also D. Nicholson, *Environmental Dispute Resolution in Indonesia* (KITLV Press, 2009).

¹¹⁵ Environmental Protection Act, n. 34 above, Art. 87(3)–(4).

¹¹⁶ Nicholson, n. 114 above, pp. 272–85.

¹¹⁷ Varkkey (2013), n. 5 above, p. 680.

¹¹⁸ See Act of Indonesia No. 48 Year 2009 on Judicial Powers (Judicial Powers Act).

¹¹⁹ Cassation proceedings involve review by the Supreme Court of the (appellate) court's decision.

¹²⁰ *Herziene Inlandsch Reglement* (HIR), Art. 195.

by the law of criminal procedure, which is seven days after publication of the court's verdict for appeal, or fourteen days after the court's verdict for cassation.¹²¹ Each type of court has a determinate substantive jurisdiction and deals with either general, religious, military, or administrative affairs. Civil liability or tort claims fall within the jurisdiction of the general courts.¹²²

With regard to relative jurisdiction, Article 118 of *Herziene Inlandsch Reglement* (HIR) or Article 142 of *Rechtsreglement voor de Buitengewesten* (RBg) provides that the choice of jurisdiction or location of the court is determined by the domicile of the defendant (*actor sequitur forum rei*). When there is more than one defendant, the claimant or plaintiff can choose the domicile of one of the defendants in which to sue.¹²³ A problem arises when the defendants' domiciles are overseas. Article 100 of *Reglement op de Rechtvordering* (Rv) can be used to argue that aliens who are not Indonesian citizens and who do not live in Indonesia can be sued before an Indonesian court if such aliens have a dispute with an Indonesian.

This provision was applied in the defamation case between *Soeharto v. Time Inc. Asia*.¹²⁴ The case concerned news published by Time Inc. Asia – a company not domiciled in Indonesia and with no subsidiary company in Indonesia – that was perceived to be defamatory of the reputation of Soeharto, the former president of Indonesia. In this case, the court declared that the dispute was within its jurisdiction on the basis of Article 100 Rv and decided that the defendants were at fault. During the cassation phase, the Supreme Court revoked its verdict, declaring that the defendants were not at fault because they had provided the plaintiff with an opportunity to respond. However, on the question of jurisdiction, the judges' original ruling was not overturned. On the other hand, in the case of *Richard Bruce Ness v. New York Times*, the District Court considered that the Indonesian court had no jurisdiction over a defamation dispute as the defendants were not living in Indonesia and were not Indonesian citizens.¹²⁵ A key point of difference between this case and *Soeharto* is that, in *Ness*, the plaintiff was not Indonesian either. The pivotal question that arises in relation to the Southeast Asian haze pollution is, therefore, does an alien plaintiff have legal standing before Indonesian courts? The following section addresses this question.

4.3. Foreigners as Plaintiffs

There is no express rule that states the rights of foreigners or aliens to bring civil lawsuits before Indonesian courts. In practice, judges will agree to hear the case when the dispute concerns issues that are regulated in accordance with Indonesian law.¹²⁶

¹²¹ See respectively Act of Indonesia No. 8 Year 1981 on Criminal Procedure Law, Arts 233(2), 234(1), 245(1) and 246(1). See also Act of Indonesia No. 22 Year 2002 on Clemency, Art. 2(1).

¹²² Judicial Powers Act, n. 118, Art. 25(2).

¹²³ See also Decision of Supreme Court of Indonesia No. 604 K/PDT/1984, 28 Sept. 1985.

¹²⁴ Decision of Supreme Court of Indonesia No. 3215 K/PDT/2001, 28 Aug. 2007. See also Decision of Central Jakarta District Court No. 338/PDT.G/1999/PN.JKT.PST, 6 June 2000. Cf. Decision of the Court of Appeal of Central Jakarta Province No. 551/PDT/2000/PT.DKI, 16 Mar. 2001.

¹²⁵ Decision of Central Jakarta District Court No. 181/PDT.G/2007/PN.JKT.PST, 8 Oct. 2007 (*Richard Bruce Ness v. New York Times*).

¹²⁶ *Ibid.*

In *Richard Bruce Ness v. New York Times*, the formal reason why the plaintiff was unsuccessful was not because he was a foreigner. The Central Jakarta District Court refused to examine the case because the defendants (Jane Perlez and The New York Times Company) had no domicile or registered address in Indonesia.¹²⁷ There is no advantage for Indonesian courts to hear cases between foreigners,¹²⁸ unless one party has a link with Indonesia – for example, through a relationship with citizens or entities that are established in Indonesia. After revising its claims, in part by adding to the list of defendants those who were citizens of Indonesia (Evelyn Rusli and Muktita Suhartono) and living in Indonesia, the Central Jakarta District Court agreed to hear the case.¹²⁹ Even though the plaintiff was ultimately unsuccessful, the case illustrates that a foreign plaintiff may sue in an Indonesian court if the defendants have an Indonesian domicile or place of business. Therefore, it could be said that neither the foreign status of the plaintiff nor that of the defendant is, in itself, an insurmountable obstacle, provided that there is a credible connection with Indonesia on the side of either the plaintiff or the defendant.

In the case of Southeast Asian haze pollution, Indonesian courts may have jurisdiction to hear transboundary civil claims against companies that cause severe transboundary smoke pollution because the companies are operating in Indonesia and are registered in Indonesia. The companies have also engaged in burning on Indonesian land. A foreign plaintiff could therefore sue the polluting companies before an Indonesian court.

The Indonesian Environmental Protection Act makes transboundary civil claims easier to pursue by allowing claims to be brought together as a class action.¹³⁰ Only those with the same facts or events, legal bases, and type of claim can bring a class action for environmental damage. This type of lawsuit is beneficial if the number of plaintiffs is large. It is also economically effective and efficient because it avoids repetition of the claims. For example, a class action claim was used successfully by the citizens of North Sumatra Province to obtain compensation of 50,000,000,000 rupiah (equivalent to USD 36,900) for environmental and personal harm suffered as a result of intense haze caused by the defendants.¹³¹ Pursuing a class action would therefore be the best avenue for seeking redress for the victims of Southeast Asian haze pollution, as this would minimize the cost of litigation.

In most cases of a claim of liability for injuries or tort, a plaintiff must prove the element of fault. In order to escape liability the defendant needs only to prove that he or she has taken, at minimum, the legally required level of care. However, in a civil claim for environmental damage, Indonesian law applies strict liability, which means

¹²⁷ Ibid.

¹²⁸ See HIR, n. 120 above, Art. 118.

¹²⁹ Decision of Central Jakarta District Court No 408/PFT.G/2007/PN.JKT.PST, 25 Mar. 2009.

¹³⁰ Environmental Protection Act, n. 34 above, Art. 91.

¹³¹ Decision of Medan District Court No. 425/Pdt.G/1997/PN.MDN, as cited in I. Sugianto, *Class Action: Konsep dan Strategi Gugatan Kelompok untuk Membuka Akses Keadilan Bagi Rakyat* (SETARA Press 2013), pp. 70–6.

that a defendant will be liable for the victims' losses, regardless of the extent of the negligence.¹³²

Moreover, in identifying the defendants, plaintiffs can utilize satellite imagery data, which provides 24-hour surveillance for tracking the location of fire 'hot spots' and observing the impact of changes in wind speed and direction. This information is often provided by non-governmental organizations (NGOs) that specialize in forest fires, such as Global Forest Watch,¹³³ and is also available from the government of the affected states, such as Singapore.¹³⁴ In addition to tracking the location, Global Forest Watch in some cases can identify the name of the company that occupies or has a connection with the land.

5. LAWS OF AFFECTED STATES

The affected states, in particular Malaysia and Singapore, might not have jurisdiction over a Southeast Asian transboundary haze pollution claim. Both states have common law systems that normally refuse to examine cases of transboundary damage on the ground of the doctrine of *forum non conveniens*.¹³⁵ However, this is no longer the case for Singapore, which in 2014 passed new legislation, the Transboundary Haze Pollution Act 2014 (THPA), which is specially designed to hold defendants liable for harmful activities conducted outside Singapore. Nevertheless, arguably the THPA cannot resolve all challenges regarding transboundary litigation in Singapore. Therefore, this section of the article tries to identify the barriers to pursuing access to justice within the laws of the affected states with respect to transboundary environmental damage.

5.1. Jurisdictional Problems in Malaysia

An examination of the law of civil jurisdiction under the Malaysian Court of Judicature Act 1964¹³⁶ indicates that Malaysian courts have no jurisdiction to hear tort claims on behalf of victims of Southeast Asian haze pollution. Malaysian plaintiffs do not have the option of suing in their home country because the defendants' domicile or place of business and the location of the burning are overseas. Under Malaysian law, courts have jurisdiction over civil proceedings only if (i) the cause of action arose in Malaysia; (ii) the defendant resides or has a place of business in Malaysia; (iii) the incident occurred in Malaysia; or (iv) the matter involves disputed ownership of land located in Malaysia.¹³⁷ Perhaps a civil claim for

¹³² Environmental Protection Act, n. 34 above, Art. 88. See also HIR, n. 120 above, Art. 163; and *Burgerlijk Wetboek*, Art. 1365.

¹³³ See Global Forest Watch website at: <http://fires.globalforestwatch.org/home>.

¹³⁴ See Meteorological Service Singapore at: http://wip.weather.gov.sg/wip/c/portal/layout?p_l_id=PUB.1003.1.

¹³⁵ The doctrine is commonly used in the common law system. It states that a court has discretion to refuse to hear a case within its jurisdiction if there is another court that can more conveniently hear the case: see *Re Union Carbide Corporation*, n. 109 above; *Aguinda v. Texaco Inc.*, 142 F.Supp.2d 534 (S2001).

¹³⁶ Court of Judicature Act of Malaysia 1964, 1 Aug. 2014, available at: <http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Courts%20of%20Judicature%20Act%201964%20%5BAct%2091%5D.pdf>.

¹³⁷ *Ibid.*, Art. 23. See also *Yü Chee Ming v. Teo Ah King & Anor* [2001] 6 CLJ 494.

transboundary pollution could be made on the ground of the defendant's residence or place of business, as referred to in the second requirement, and/or on the ground of where the incident occurred, as mentioned in the third requirement, this being the pollution. Nevertheless, it does not mean that a Malaysian court will hear the case.

Although the polluter may have a parent company in Malaysia, with the consequential damage occurring in Malaysia, bringing a tort claim against the parent company in Malaysia would be difficult. Case law establishes that a parent company can be sued for a tort conducted outside the country if denying the victim the right to sue would amount to a denial of justice.¹³⁸ Here, however, the relatively more flexible Indonesian procedural provisions might actually hinder rather than further access to justice for Malaysian victims.¹³⁹ The recognition of civil liability for environmental damage in Indonesia means that Malaysian victims could theoretically sue the offending companies before an Indonesian court. As such, the denial of justice ground cannot be used to force Malaysian courts to consider the claim.

Moreover, the case of *Salomon v. A. Salomon & Co. Ltd* held that a parent company may be held liable for its subsidiaries' actions overseas only in certain limited situations, such as when the parent company has demonstrated an intention to ignore the subsidiary's compliance with its duty owed to the plaintiff.¹⁴⁰ In the case of Southeast Asian haze pollution, the 'subjective' involvement of the parent company in causing the harm would be hard to prove because of the plaintiffs' limited ability to obtain evidence from overseas operations. Furthermore, the legal status of a Malaysian-based company operating in Indonesia might prove to be difficult to categorize as a subsidiary. This is because, for all practical purposes, the company has established itself as a new company, with a registered address within the territory of Indonesia. This situation stems from the law relating to foreign investment in Indonesia, which requires a foreign company to be registered before carrying on business in Indonesia.¹⁴¹ Thus, the company is a legal entity (*rechtspersoon*) and may be held liable before an Indonesian court. For the above reasons, in the present case it can be concluded that an Indonesian court is the *forum conveniens* for Malaysian haze victims to pursue remedies or access to justice.

5.2. *The Singapore Transboundary Haze Pollution Act 2014: The Problem of Enforcement*

In contrast to Malaysian victims who have no legal recourse in their home country, this option is open to Singaporean haze victims. This arises from the enactment of the THPA on 25 September 2014. It has an ambitious extraterritorial scope and seeks to regulate agribusiness companies that conduct forest fires outside the country and thereby cause intense smoke pollution in Singapore. The enactment of the THPA was triggered by Singaporean anger at forest fires from Indonesia, which occur nearly

¹³⁸ *Lubbe v. Cape plc* [2000] 1 WLR 1545.

¹³⁹ Indonesian law is highly influenced by the Dutch civil law system, which does not acknowledge the doctrine of *forum non conveniens*.

¹⁴⁰ [1896] UKHL 1; [1897] AC 22.

¹⁴¹ Act of Indonesia No. 25 Year 2007 on Investment, Art. 5(2).

every year and affect the quality of life of Singaporeans. The legislation was introduced just after an unprecedented level of smoke occurred in 2013, which was reported to be almost double the level of that of the 1997 haze crisis.¹⁴²

Under the THPA, any business that carries out or supports another entity or person in carrying out open burning practices outside the country can be held liable under both civil and criminal law if the burning contributes to haze pollution in Singapore, even if the company is not based in Singapore. The offenders may be fined an amount not exceeding SD 100,000 per day for causing the haze¹⁴³ and SD 50,000 for failing to comply with a notice given by the authorities.¹⁴⁴ Victims in Singapore can bring civil claims against wrongdoers for injuries suffered as long as they can prove (i) there is intense smoke in Singapore; (ii) during the same period of time, a land or forest fire located outside Singapore was burning; and (iii) the availability of satellite images showing the wind velocity and direction heading towards Singapore. In addition, the amount of compensation for injuries – whether mental or physical, damage to property, loss of profits – will be decided by the court.¹⁴⁵ However, the defendant may challenge the claim on the basis of causation – namely, that on the balance of probabilities, the defendant’s actions did not cause the pollution – albeit that such a defence would be subject to restrictions listed in section 7 THPA.

In practice, the THPA could be used only to regulate Singapore-based companies, as they are domiciled and have assets within the territory of Singapore. Meanwhile, companies based in Malaysia and Indonesia would escape responsibility under the THPA if they have no assets or property in Singapore and the employees are forbidden to visit Singapore.¹⁴⁶ If haze victims in Singapore were to bring civil actions before Singaporean courts against Indonesian-based companies, it is doubtful whether the judgments of the Singaporean courts could be enforced in Indonesia. This is because Article 436 Rv does not allow the execution of foreign judgments, except under certain conditions specified by the law.¹⁴⁷ Judgments of Singaporean courts can be enforced in Indonesia if the Singaporean government and the Indonesian government so agree. In the absence of such agreement, the Indonesian court remains the best avenue for victims in order to obtain effective and enforceable remedies, particularly when the offending companies are based in Indonesia or Malaysia.

6. CONCLUSION

The Southeast Asian haze pollution is a problematic transboundary environmental issue. Indonesia, as a source-of-origin state, is failing to carry out its due diligence

¹⁴² A.K. Tan, ‘The “Haze” Crisis in Southeast Asia: Assessing Singapore’s Transboundary Haze Pollution Act 2004’, National University of Singapore Law Working Paper 2015/002, Feb. 2015, available at: http://law.nus.edu.sg/wps/pdfs/002_2015_Alan%20Khee-Jin%20Tan.pdf.

¹⁴³ Act of Singapore on Transboundary Haze Pollution 2014, 25 Sept. 2014, s. 5(1)–(4).

¹⁴⁴ *Ibid.*, s. 5(2)(b) and 5(4)(b).

¹⁴⁵ *Ibid.*, s. 6.

¹⁴⁶ *Ibid.*, s. 10(2) and 10(5).

¹⁴⁷ See Codex of Commercial Law of Indonesia, Art. 724.

obligation under international law and could therefore be sued before the ICJ for fault-based negligence. In practice, however, this is very unlikely as a result of jurisdictional problems, the ASEAN way of non-confrontation, and the clean hands doctrine.¹⁴⁸ To address these barriers, victims should pursue ‘transboundary civil litigation’, which would involve using Indonesian domestic law to pursue a civil claim for environmental pollution under the Indonesian Environmental Protection Act. Suing companies within the framework of the Indonesian legal system arguably would be the most effective option for obtaining access to justice for the extraterritorial victims of haze pollution.

Indonesian courts are the most appropriate venue for victims of Southeast Asian haze pollution to bring an action. This is especially so for those from Malaysia, because suing defendant companies in Malaysia for transboundary environmental damage caused by activities conducted overseas is very difficult. Singaporean victims have a choice of suing either in their home country (Singapore) or in Indonesia because recent Singaporean legislation is specifically designed to hold defendants liable for harmful activities conducted outside Singapore. However, if the company suspected of causing the pollution is Malaysian, or the company is Indonesian with no assets in Singapore, suing in Singapore could be meaningless because the verdict of a Singaporean court cannot be enforced abroad if there is no enforcement cooperation between the countries involved. As such, if the alleged polluters are not based in Singapore, it would be better for Singaporean victims of the haze to sue in Indonesia rather than in Singapore.

Theoretically, cross-boundary victims could bring an action before Indonesian courts because, in the case of Southeast Asian haze pollution, the cause of action arises within the territory of Indonesia and the polluters have a place of business in Indonesia. This supposition is strengthened by the fact that Indonesian civil procedure adopts the principle of *actor sequitur forum rei* (bringing a civil action based on the domicile of the defendant) in determining whether a court has jurisdiction over the case.¹⁴⁹ As such, if Indonesian judges refuse to hear civil lawsuits brought by transboundary victims suffering from Southeast Asian haze pollution, it could be argued that they have unreasonably discriminated against aliens. This would violate Indonesia’s obligation under the ICCPR not to discriminate within its jurisdiction on the ground of nationality.¹⁵⁰

Pursuing civil claims for environmental damage before Indonesian courts is not as difficult as filing a tort claim in a common law country because polluters are strictly liable under Indonesian law.¹⁵¹ This means that victims need only prove damage and a causal link between the damage and the actions or inactions of the defendant. At present, the adequacy of compensation provided by a court has not been analyzed. Further discussion on the determination of adequate compensation for

¹⁴⁸ See Section 2.

¹⁴⁹ HIR, n. 120 above, Art. 118; RBg, Art. 142.

¹⁵⁰ ICCPR, n. 49 above, Arts 14 and 26.

¹⁵¹ Environmental Protection Act, n. 34 above, Art. 88.

transboundary victims of Southeast Asian haze pollution is needed. Moreover, it is also recognized that bringing a civil lawsuit against polluters is not a long-term solution to resolving issues relating to haze pollution. It is doubtful whether a lawsuit would directly change the behaviour of the offending companies, as the lack of law enforcement and economic issues remain common problems in Indonesia. Therefore, greater efforts should be made to ensure that Indonesian companies comply with the restrictions on burning.