THE IMPACT OF THE ADOPTION OF STATE RESPONSIBILITY FOR TRANSBOUNDARY ENVIRONMENTAL HARM PRINCIPLE UPON INDONESIAN ENVIRONMENTAL LEGAL SYSTEM

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Abstrak

Rencana pemerintah mengadopsi prinsip hukum international yaitu tanggung jawab negara terhadap pencemaran lintas batas dalam revisi UU No 23/1997 tentang pengelolaan lingkungan hidup sebagai konsekuensi peratifikasian ASEAN Agreement on Transboundary Haze Pollution akan berdampak luas bagi sistem hukum lingkungan Indonesia. Prinsip ini memberi kewajiban kepada Negara Indonesia untuk mengontrol kegiatan dalam negerinya sehingga tidak menimbulkan pencemaran terhadap negara lain. Kewajiban ini tentu saja tidak begitu mudah untuk diimplementasikan mengingat banyak persoalan dan ketidakjelasan dalam manajemen pengelolaan lingkungan di Indonesia. Ada tiga persoalan utama yang menjadi tantangan Indonesia yaitu lemahnya UU lingkungan, lemahnya mekanisme penegakan hukum dan buruknya koordinasi antar lembaga yang mengelola lingkungan hidup. Sehingga jawaban untuk persoalan lingkungan hidup di Indonesia adalah menarik semua wewenang pengelolaan dan perlindungan lingkungan hidup pada satu badan yang bertanggung jawab secara penuh untuk membantu agar masyarakat Indonesia menaati hukum dan menegakannya.

Key Words: state responsibility; state sovereignty; transboundary environmental harm; Indonesian environmental legal system; Asean Agreement for Transboundary Haze Pollution

I. Introduction

Transboundary environmental harm has become a significant problem for Indonesian government. Every year smokes from

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Indonesian forest fires in Sumatera and Kalimantan not only affect Indonesian territory but also neighboring countries such as Malaysia and Singapore. The impact of smoke from forest fires and land clearing is huge. It causes damage on human health, the economy and the environment. Children and old peoples are the most vulnerable during the smoke period because of respiratory illness. Economic activities, especially on transportation and tourism sectors are disturbed. Moreover, the loss of biodiversity and species can not be counted.

Smoke or haze pollution from Indonesia has raised great concern from Malaysian and Singaporean government. They request the Indonesian government to address the problem timely and in effective manner. According to the Stockholm Declaration[2] and Rio Declaration Principle 21 and 2, which are considered as Customary International Law, Indonesia government is hold responsible for the forest fires caused by private company and local peoples. It is stated that:

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[3]

Today, the government plans to revise the Management Environment Act No 23/1999 and adopt the Principle 21 of Stockholm Declaration and Principle 2 of Rio Declaration, which is known as "state responsibility for transboundary environmental harm principle." The adoption of this international principle is related to the government plan to ratify the ASEAN Agreement on Transboundary Haze Pollution which contains this principle. This article will examine legal impact on the adoption of state responsibility for transboundary environmental harm on Indonesian environmental legal system. In addition, legal implication on ratification of the ASEAN Agreement on Transboundary Haze Pollution will also be highlighted. What are the obligations of Indonesian government after the adoption of this principle and the ratification on ASEAN Agreement on Transboundary Haze Pollution?

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[2] Principle 21 of Stockholm Declaration is repeated almost exactly as Principle 2 Rio Declaration

[3] Rio Declaration 1992 Principle 2

What are the challenges for Indonesia to the implementation of this principle?

II. The Law in response to Transboundary Environmental Harm issue and its Development

The law regarding the transboundary environmental harm has evolved since 1941.[4] The Trail Smelter Arbitration was the most famous international environmental dispute[5] which developed the customary international law that state had the obligation not to cause transboundary environmental harm. The dispute involved the Canadian Consolidated Mining and Smelting Company versus the Washington State residents. In this case, the fumes of sulfur dioxide produced by The Canadian Smelter Company have damaged the property of apple growers in Washington State. However, the Washington state residents could not bring the lawsuit either in Washington State or in British Colombia, because the polluter was outside the United State boundary. Thus they asked the United States government to act on their behalf. The case was brought to Arbitral Tribunal. The tribunal held that the Dominion of Canada is responsible according to international law for the conduct of Trail Smelter.[6] On the decision the tribunal concluded that:

> "No State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and injury is established by clear and convincing evidence".

A central principle from that decision is that a state has the obligation not to cause environmental harm to another state. Basically, the obligation not to cause environmental harm has its origin from a common law principle of *sic utere tuo ut alienum non laedus* (do not use property to harm another). This principle has been confirmed by the

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[4] Trail Smelter Case (United States v Canada), Arbitral Tribunal, 1941, 3 UN Rep.Int'l Arb. Awards (1941)

[5] David Hunter, James Salzman, Durwood Zaelke, International Environmental Law and Policy, Second Edition, p.504

[6] Trail Smelter Case

International Court of Justice (ICJ) decision in the Corfu Channel case[7]. The ICJ held that "every States has an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."

The principle not to cause environmental harm has been elaborated in Article 21 of the Stockholm Declaration. It has been developed significantly in Rio Declaration,[8] and now this principle has been incorporated in a large number of multilateral and bilateral legal instruments such as:

- Protecting particular areas: The 1958 Geneva Convention on the High Seas (Article 24-25), the Outer Space Treaty 1967, UNCLOS 1982, and the Antarctic Treaty 1991;
- Regulating the use of natural resources: UNCLOS 1982, the Vienna Convention on Ozone Layer, The ASEAN agreement on the Conservation of Nature and Natural Resources, the Convention on Biological Diversity 1992, the Convention on the Protection and the Use of Transboundary Watercourses and International lakes, and 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context;
- Addressing specific pollution or dealing with specific sources of pollution: London Dumping Convention, the Convention on Long-Range Transboundary Air Pollution 1979 and Basel Convention on the control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989(Article 4 (1) (2).

[7] This case involved the UK authorities brought an action against Albanian Authorities for the damage of British Warships caused by mines placed in Albanian waters. (UK V Alb.), Merits, 1949 I.C.J Rep 4, 22-23 (Judgment of April 9).

[8] According to Birnie P.W & Boyle, A.E, Rio Declaration contains far more significant principles in concern to transboundary environmental harm issue than the Stockholm Declaration and it has provided a starting point for further elaboration by International Law Commission (ILC) and International Court of Justice on the state responsibility and liability regime.

III. The Assessment on the failure of Indonesia Government in dealing with Forest Fires

It is predicted that every year during the dry season Indonesia faces a big problem on smoke from forest fires. There has been no significant effort from the central and local government to reduce and eliminate these fires. Thus, it is important to assess what are the significant factors which contribute to the failure in handling this problem. According to the study conducted by Minister of State for Environment the fires and haze of 1997-1998 were due to a wide range of factors including:

1. Conflicting roles and responsibility of institutions concern with managing forest land and forest fire especially on mandate, authority, financial, resources and accountability;
2. Indifference of the private sector (industry, large scale agriculture and small holders) to the environmental consequences of large-scale fires; lack of incentive to promote logging technique that lead to sustainable output of production forests and mechanical land clearing;
3. lack of institutional commitment at regional, national, provincial and local levels to make investment in preventing land and forest fires as oppose to mitigation;
4. Indifference of government and private sector to local customary rights, livelihood strategies and tradition that eroded customary law, social cohesiveness among indigenous groups and traditional knowledge regarding prevention and control of fires;
5. Poorly specified property rights that caused conflict among numerous classes of land claimant (government, local resident, transmigrant and industry).[9]

According to that study, there is a problem of institutional deficiencies in environmental governance. Thus, it is important to clarify the role and responsibility of central and local government and various sectoral departments on environment management and environment protection. Furthermore, it is quite clear that some

[9] Minister of state for the Environment, Republic of Indonesia and United Nations Development Program, 1998, Forest and Land Fires in Indonesia, Volume I and II

significant changes should be made to overcome haze pollution which includes: environment legislation, land tenure, and forestry management. It is also quite clear from the study conducted by the Ministry for Environment that recognizing and involving local peoples and its customary law is important point in solving forest fires.

The most important issue that should addressed by the government is the practice of land clearing by the industries or companies and local peoples during dry season.[10] It is reported that in many cases fires are deliberately started by man made activities, for example: plantation, agriculture and settlement.[11] It is clear that companies and local peoples contributed to these fires.[12] Government Regulation No 4/2001 clearly prohibited every person to deliberately set fires on land and forest.[13] However, in practice burning activities still continue. This is due to the lack of law enforcement mechanism. In many cases prosecution of the offenders are rare. For example, in 1997 fires, of 176 companies identified publicly as violators, but only five were brought to court and only one was found guilty.[14] There is an indication that there was a possible collusion between law enforcement agency and the industries. And in some cases the government lacks monitoring capabilities absolutely create difficulties for the prosecutors to obtain strong evidence.

The overlapping authority between The Ministry of forestry and local government also the lack of coordination among central, local and sectoral agencies is indicated as the significant factors to the failure of government to handle forest fires. The Act No. 41/1999 provides that central government continues to retain authority over forest administration and management. The uncontrolled HPH license issued by The Ministry of forestry and local government is indicated as the factors contribute to deforestation, illegal logging and forest fires. To

[10] It is indicated that forest fires caused by industries burning activities has huge impact than on small scale such as by local farmers.

[11] Asian Development Bank, *Fire, Smoke and Haze*, The ASEAN Response strategy, 2001.

[12] Burning is the cheapest and easiest method to clear land.

[13] Government regulation no 4/2001on "the control of damage and pollution in relation to forest and land fires", article 11.

[14] Alan Tan Khee Jin as cited in Legal Action on Forest Fires Down to Earth (Down to Earth London), August 2002

monitor the harvesting practices of the thousand of concession holders spread over millions of hectares of land is enormously a big challenge for central government.[15] Thus, the involvement of local government and local communities is needed in this matter.

IV. State Responsibility and State Sovereignty Regime over Natural Resources

In this regard, it is important to discuss the state responsibility and the state sovereignty[16] in relation to the exploitation of natural resources. This is due to correlation between these two principles are correlated each other in International environmental law context. It has been mentioned above both in principles 21 and 2 the Stockholm Declaration and the Rio Declaration that state has the sovereign right to exploit natural resources. However, state also has a responsibility to ensure and control activities within their jurisdiction not to cause environmental harm to another state. Moreover, DE Fisher[17] in his paper[18] stated:

> "Even though the sovereignty of States over their resources and environment remains the basis of the system in international environmental law, there is however an increasing numbers of restrictions upon the exercise by States of their right of sovereignty."

Regarding the increasing number of restrictions on the exercise of state sovereignty, Fisher also pointed out that now international legal system has the functions as follow:

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[15] Alan Khee Jin Tan, The ASEAN Agreement on Transboundary Haze Pollution: Prospect for Compliance and Effectiveness in Post Suharto Indonesia

[16] State sovereignty is the right of state to exercise the functions of a state within the portion of the globe and to the exclusion of other States. This function includes exercise of jurisdiction and law enforcement.

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[18] DE Fisher, *The Impact of International Law upon the Australian Environmental Legal System*, this article is based on a paper delivered at the 1999 QELA Conference, Thursday, 20 May 1999

- To control extra-territorial activities of States and their citizens;
- To control extra-territorial effects of the territorial activities of States and their citizens;
- To control territorial activities of States and their citizens.

Thus, I will argue that the principle of state sovereignty has been challenged by the international environmental law. It is confirmed by David Hunter et al and his colleagues' statement in their paper[19] that most international environmental treaties by their very nature constrain a state's sovereignty. It is to some extent creates a conflict between state sovereignty and state responsibility. On the one hand, the states enjoy permanent sovereignty over natural resources and the right to exploit these resources pursuant to their environmental and developmental policies.[20] On the other hand, the right of permanent sovereignty over natural resources is not absolute and it is restricted by the duty not to cause environmental harm to other states. Moreover, the duty not to cause environmental harm to another state is extended to the duty not to cause environmental harm to its territory and its citizen.[21] It is clear that the obligation of the States is far more important than its rights.[22] This is due to the reason that damage to the environment is often irreversible.[23] Moreover, the conservation and protection of the

[19] David Hunter, James Salzman, Durwood Zaelke, *International Environmental Law and Policy*, Second Edition, p.379

[20] It can be seen as a compromise to the negotiation between the North who emphasize on the need to environmental protection and the South that require the need to Development.

[21] It can be seen as the latest and most significant development of international environmental law. For example we can see the duty not to cause environmental harm of states to their territory and their citizen in Paris Convention for the protection of the World Cultural and Natural Heritage 1972; Ramsar Convention on Wetlands of International Importance 1971;United Nations Convention on Biological Diversity 1992; Paris Convention to Combat Desertification 1994.

[22] DE Fisher, *The Impact of International Law upon the Australian Environmental Legal System*, this article is based on a paper delivered at the 1999 QELA Conference, Thursday, 20 May 1999

[23] Bearing in mind the common concern of human kind Principle which embodied in Convention on Biological Diversity 1992 as a purpose to conserve and use biological diversity sustainable manner.

environment are essential matters of the public interest[24] and also as a mean to the implement of sustainable development.[25]

Basically, the law on state responsibility is concerned with the incidence and consequences of illegal acts, particularly the payment of compensation for the loss.[26] However, in practice or in environmental cases this law is rarely used,[27] because the claim based on state responsibility for transboundary environmental harm regime faces many disadvantages. This includes: "the adverse effect on the relations between states concerned; the complexity, length, and expense of many international proceedings; technical character of environmental problems; the difficulties of proof which legal proceedings may entail and the unsettled character of the law on this subject".[28]

Today it is clear that dispute avoidance mechanisms[29] or control and prevention mechanism are the most favorable choices to handle environmental problems such as those currently being practiced in ASEAN Region.[30] As Birnie P.W and Alan Boyle pointed out that today "international law is no longer primarily concerned with

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[24] Ibid

[25] Bearing in mind that natural resources are limited and in many cases exhaustible and that proper exploitation determines the conditions of the economic development of the developing countries both at present and in future

[26] Ian Brownlie, op cit at 433 as cited in David Hunter, James Salzman, Durwood Zaelke, *International Environmental Law and Policy*, Second Edition, p.424

[27] For Example, no modern pollution disaster has resulted in the adjudication of an international claim against state concerned, including: Nuclear Chernobyl; Indonesian Fires; Sandoz: this case concern with the chemical spills because of the disastrous fire from the Sandoz Swiss company which polluted Upper Rhine River in Germany which killed almost every fish ; Amoco Cadiz: concern with the oil spills from American Vessel which polluted Britain, France coast.

[28] Birnie P. W & Boyle A. E., *International Law and the Environment*, 2nd Edition, Oxford University

[29] Various practices of dispute avoidance are as follow: 1. Exchange information in general 2. Notification 3. Consultation 4.Prior Informed Consent 5. Transboundary Environmental Impact Assessment 6. Joint Management regimes and institutions such as cooperation

[30] See ASEAN Agreement on Transboundary Haze Pollution. This is absolutely shown that ASEAN still maintain its traditional way to adhere in the principle of non intervention and consensus.

reparation for environmental injury, but focused instead on the control and prevention of environmental harm and the conservation and sustainable use of natural resources and ecosystem.[31]

V. The adoption of the State Responsibility for Transboundary Environmental Harm Principle and its impact on activities within States

The plan of government to adopt state responsibility for transboundary environmental harm in its legislation and ratify ASEAN Agreement on Transboundary Haze Pollution[32] will give significant effect on Indonesian environmental legal system. Indonesia should adhere to the principle embodied in Principle 21 Stockholm Declaration and Principle 2 Rio Declaration and reaffirmed in ASEAN agreement on Transboundary Haze Pollution that is:

> "The Parties have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment and harm to human health[33] of other States or of areas beyond the limits of national jurisdiction".[34]

With the the adoption and ratification of this agreement, Indonesian government consequently should incorporate this principle into its national legal system. The important point of the impact of this adoption is the implementation of the principle of state responsibility for transboundary environmental harm. It means that the government has the obligation to control territorial activities within the state and its Citizen and control of extra territorial effect of these activities.[35] This

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[31] Ibid

[32] Adopted in June 2002, the agreement came into force on November 2003 with the current state parties being Singapore, Malaysia, Brunei, Myanmar, Vietnam, Thailand and the Lao People's democratic Republic.

[33] This agreement add the word harm to human health in this principle with basically the principle embodied in Rio and Stockholm Declaration

[34] Article 3 ASEAN Agreement on Transboundary Haze Pollution

[35] For Example, Indonesian government should establish and implement legislative and other measures to promote zero burning policies and

obligation aims to prevent damage to the environment and human health of other States.

Other crucial impact to the adoption of this international principle is that Indonesia can be sued by other states before the international tribunal for the breach of international obligation, namely breach the duty not to cause damage to another state. If the damage occurs state is liable to make redress or pay compensation of the injury of other states. However, this worse scenario less likely to happen because there was a reluctance of Indonesia's neighours countries such as Malaysia and Singapore to sue Indonesia for the pollution.

The adoption of the principle above into the revision of Environmental Management Act would be beneficial. This is a clear signal that the government has serious attention and goodwill in addressing the transboundary environmental problems. The impact of the adoption of this principle into environmental legal system will be far-reaching. Sectoral legislation such as mining law, forestry law and local autonomy law should adhere to this principle otherwise there will be a conflicting law and regulation. However, I believe that a comprehensive and integral regulation in environmental law is needed to address the transboundary environmental harm.[36] Since currently, there is still a conflicting institutional roles and responsibility that concerned with forestland and forest fire management especially on their mandate, authority and accountability.[37]

After the adoption of this principle the state is automatically has an obligation not to cause environmental harm beyond its jurisdiction. The activities within state are restricted to some extent under this principle. It means that the activities predicted to cause or has a

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ensuring relevant measures to control open burning and prevent land clearing using fire.

[36] For Example see Queensland Environmental Protection Act 1994 which consist of almost 540 articles which regulate environment protection in Queensland including environment relevant activity such as mining and petroleum and other relevant activity which affect the environment.

[37] The data is from the Report conducted by Minister of State for the Environment Republic Indonesia and UNDP Program in 1998 under title *Forest and Land Fires in Indonesia*.

potential harm to environmental area irreversibly or high impact or widespread should be prohibited.[38]

VI. The Ratification of ASEAN Agreement on Transboundary Haze Pollution and its implication

The discussion on the ratification of ASEAN Agreement on Transboundary Haze Pollution is underway in House of Representative recently.[39] There are pros and cons in both house of representative and society to the ratification of this agreement. The reluctance of the house of representative to ratify this agreement primarily because this agreement has a direct consequence to the restriction of state sovereignty over natural resources, and they alleged that the ratification will intervene economic and internal affairs of Indonesia. However, many academics and society urge the government to ratify this agreement due to its positive effect in improving the effectiveness of government efforts to overcome haze pollution problem.[40]

It is clear that the ratification not only will give positive effect for Indonesian performance in ASEAN region[41] but also in ensuring the firm commitment of Indonesia to tackle pollution problem in cooperation with other ASEAN countries. However, bearing in mind that it will face many challenges in its implementation due to

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[38] Such as the practice of land clearing and forest burning by company or community.

[39] However, there is indication that the House of Representative will postpone to ratify this agreement due to several reasons this includes: the lack of coordination amongst central, local government and sectoral agencies involve in management of environment.

[40] The academic said that the ratification will give a positive effect to Indonesia. This include the assistant both technical and funding from ASEAN for combating the haze pollution problems. Moreover Hikmahanto Juwono said that with ratification other countris can not bring law suit against Indonesia due to the obligation of combating haze pollution become regional responsibility.

[41] Not become a member or the parties is quite gives a bad image in ASEAN region on the seriousness of Indonesian government to tackle haze pollution since Indonesia is a main source of haze pollution. It is like what Alan Tan Khee Jin stated in his paper that "Quiet noticeably, Indonesia missing from the list of state parties. This presents a particularly acute problem for the region since Indonesia is by far the biggest source of the fires and haze.

Indonesian environmental legal system, the governments, both center government and local government are not ready to implement this agreement.

Now let us see what the obligations are being prescribed by the agreement. First, the objective of ASEAN agreement on Transboundary Haze Pollution is

> "to prevent and monitor transboundary haze pollution as a result of land and/or forest fires which should be mitigated, through concerted national efforts and intensified regional and international cooperation".[42]

It is clear from that provision that the responsibility for preventing and combating haze pollution is borne by regional cooperation not only by the sources state itself. Thus, the duty or obligation contemplated by this provision is simply the duty to co-operate. Nevertheless, if we look to Article 4 on general obligations, it is not only duty to cooperate but also duty to control. It is stated in article 4 that in pursuing the objective of this agreement the parties shall:

1. Co-operate in developing and implementing measures to prevent and monitor transboundary haze pollution as a result of land and or forest fires which should be mitigated, and to control sources of fires including by the identification of fires, development of monitoring, assessment and early warning system, exchange of information and technology, and the provision of mutual assistant.
2. When the transboundary haze pollution originates from within their territories, respond promptly to a request for relevant information or consultations sought by a state or states that are or may be affected by such transboundary haze pollution, with a view to minimizing the consequences of the transboundary haze pollution.
3. Take legislative, administrative and/or other measures to implement their obligations under this agreement.

The duty to control also reaffirmed in article 5 and article 10 on the provision of monitoring, assessment, prevention and response. It is

[42] Article 2 ASEAN Agreement on Transboundary Haze Pollution

suggested that the ASEAN Center[43] shall work on the basis that national authority will act first to put out the fires. When national authority declares an emergency situation, it may make a request to the ASEAN Center to provide assistance.[44] Moreover, it is suggested in article 10 that each party shall undertake measures to prevent and control activities related to land and/or forest fires that may lead to transboundary haze pollution.[45]

It is clear that the ASEAN Agreement focused on cooperation amongst states and the duty to control and prevent transboundary haze pollution from the sources state. There is no provision on law enforcement mechanism such as sanctions or penalty to the member state that do not comply with the obligations.[46] To facilitate compliance and implementation on the member state, the ASEAN Agreement on Transboundary Haze Pollution provides positive compliance measures that are financial cooperation and technical assistant.[47]

VII. The Challenges for Indonesia

If we look at the principles and obligations being prescribed by the ASEAN Agreement on Transboundary Haze Pollution, it is obvious

[43] The ASEAN center is establish for the purposes of facilitating co-operation and co-ordination among the Parties in managing the impact of land and/or forest in particular haze pollution in arising from such fires.

[44] Article 5 The ASEAN Agreement on Transboundary Haze Pollution

[45] The measures include: 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 from transboundary haze pollution.

[46] However, in practice such measures are taken to force the parties to comply with the agreement such as diplomatic or public pressure, withdrawal of membership benefit, trade measures or other sanctions to enforce the treaty.

[47] This might be the crucial point because financial cooperation is usually become a critical prerequisite for the cooperation and compliance to the agreement. However, Alan Khee- Jin Tan said in his paper *the ASEAN Agreement on Transboundary Haze Pollution: Prospect for compliance and effectiveness in Post-Suharto Indonesia* that without the assurance of immediate and effective measures to curb the fires, it is highly unlikely that the richer states such as Singapore, Malaysia and Brunei will be willing to throw vast amounts of money at the problem.

that many challenges are faced by Indonesia in implementing this agreement. Some of academicians doubt on the capacity and political will of Indonesian government to comply with the agreement. This doubt is absolutely reasonable due to many systemic and complicated factors and problems in Indonesia will hampered Indonesia to comply with the agreement.[48]

The major problem is firstly environmental legislation which is not adequate to response on current environmental problems particularly on transboundary environmental harm. The current law concerning environmental protection is the Act No 23/1997 Environmental Management. This Act provides the legal framework for the whole environmental legal system in Indonesia. I will argue that the underpinning of this legislation is not solely environmental protection but also an exploitation of natural resources. It is obviously can be seen from the title itself that is "Environmental Management Act" and not "Environment Protection Act." In addition, article 3 on the objective of the environmental management stated: "environmental management is performed with a principle of state responsibility, sustainable development and utilization of natural resources."

It is clear that environment degradation in Indonesia is worsening. It can be seen from the impact of this degradation such as floods in Jakarta and many parts of other regions, landslides, forest fires and pollution from industrial activities.The Environmental Management Act can no longer effectively response to such challenges. There is obviously an urgent need to the revision of environmental legislation in Indonesia particularly on transboundary environmental matters;[49] the environmental management authority;[50] the harmonization between

[48] This is the pessimistic view of the author to the effectiveness of compliance of Indonesian government on the agreement.

[49] There is an urgent needs to adopt the principle of state responsibility for transboundary environmental harm in this legislation and provide much details on the obligation of government in implementing this principle.

[50] It is obvious that there is overlapping roles and responsibility of institutions concern with environmental management between the following bodies: The office of the state Ministry of Environment; BAPEDAL (Environmental impact management Agency); Other sectoral agencies especially the Ministry of Forestry and Industry; The Ministry of Trade and Industry; The Ministry of Energy and Mining; The Ministry of Agriculture and the Ministry of Home Affairs; The local authorities especially provincial and

environmental legislation and other sectoral legislations deal with environment protection such as in mining, forestry, natural resources, agriculture and fisheries sectors[51]; and harmonization between national environmental legislation and local autonomy law[52].

Secondly, lack of qualified enforcement institution either incapability of police and court system[53] in handling environmental problems and chronic problems of bribery and corruption are obviously worsening the law enforcement mechanism. In addition, the government as a regulator seems to be unwilling to response adequately and to prosecute the polluters. As it is suggested by Drew Hutton there is a 'regulatory capture' phenomenon that is a situation where regulators do not adequately enforce the law relating to certain industries because they are "captured" by the very industries they are supposedly regulating.[54] The government tends to let the industries or company to

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municipal governments and local bodies such as the police, the army and prosecutor.

[51] There is a complex jurisdictional issues in this matter. For example, in case of forest fires uncertainty arising when talking about which autorities are responsible for tackling pollution due to the institution who give the lisence is ministry of forestry and ministry of agriculture, what about local government responsibility who actually have the jurisdiction in the area forest fires? and how is the responsibility of ministry of environment is still unclear.

[52] The harmonization between national policies and local policies on the utilization and exploitation of natural resources such as forestry and mining is very important due to right now there is a trend of local government use their power to exploit the natural resources in unsustainable manner and there is conflicting roles and responsibility between issuing license and who responsible in handling case for pollution and damage to the environment caused by private company.

[53] In this regard the judges have difficulties in exploring unfamiliar and abstract jurisprudential concepts introduced by environmental law such as "the right to the healthy environment" and "strict liability."

[54] Drew Hutton Mining and the Environment in Queensland: where the law begins and enforcement fails –regulatory capture and implementation failure, The Australian Journal of Natural Resources Law and Policy (Vol 6 No 2 1999). See also J Hawkins and J Thomas (eds) Enforcing regulation (1984) Kluwer Nijhoff, Boston; M Mitnick, The political Economy of Regulation (1980) Colombia University Press New York; P Sabatier,"Social movements and regulatory agencies: towards a more adequate and less pessimistic-theory of clientele capture" (1995) 6(3) Policy Science 301-342.

pollute without giving adequate administrative sanction or criminal sanctions[55].

Civil enforcement mechanism available under Environmental Management Act 1997 is not adequate to meet the needs of its citizen to claim for remedies for the damages caused by the polluters especially those of industries or companies. The plaintiffs face many difficulties and disadvantages in bringing the case to court. For example, significant procedural difficulties[56]; substantial difficulties in gathering evidence[57]; expensive cost of litigation process and burden of proof; litigious cases usually take along time[58] and the possibility to win the case is very low especially if the defendant is powerful business[59].

Thirdly, there is a problem of conflicting roles and responsibility of institutions in managing the environment and natural resources both at central and local government.[60] Alan K J Tan[61] has identified it as complex jurisdictional issues. He stated that at central level there is uncertainty in respect to jurisdiction between the state minister for the environment and BAPEDAL[62] (the environmental Impact Management Agency). State Minister for the Environment has a duty to formulate, coordinate and monitor policy and initiate

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[55] For example in Buyat people v Newmont Minahasa Raya Case; Local Amungme People v Freeport Mining Company Government fails to protect the environment and health of its citizen from toxic waste from mining activities.

[56] Alan K.J Tan, Preliminary Assessment of Indonesia's environmental law, National University of Singapore

[57] Ibid

[58] Ibid

[59] Ibid

[60] Minister of State for the Environment Republic Indonesia and United Nations Development Programme, 1998, *Forest and Land fires in Indonesia*, Volume I and II. It is already recognized that there is conflicting roles and responsibility between state minister for environment, minister for forestry, mining and energy department, ministry of agriculture, and local government in relation to environmental protection matters. Recently, there is conflicting laws and policy on environment protection in national park between

[61] He is currently work as associate professor of Asia Pacific center for Environmental Law (APCEL) Faculty of Law NUS

[62] Now this agency was no longer available. It has merged with the Ministry of Environment in 2002.

environmental law reform, and Bapedal has a responsibility for EIA (Environmental Impact Assessment) and law enforcement. However, in practice there is still overlapping roles and responsibility between state minister for environment and BAPEDAL. In addition, institutional tensions and rivalries exist between these two bodies. "Institutional deficiencies" in environmental management is obviously one of the factors to the failure of enforcing environmental law legislation, as it is stated by Alan Tan Khee Jin. He pointed out that "the anomalies in the structure of environmental institution accounted for much of Indonesia's failure to deal with the fires."[63]

The conflicting roles and responsibility on environmental management also exist between The State minister for Environment and other sectoral agencies such as The Ministry for Forestry, The Ministry of Energy and Mining and The Ministry of Agriculture.[64] The conflicting role arises when sectoral agencies issued policies and regulations which constraint environmental protection. For example, there is policy inconsistency on the management of national park between the Act No 41/1999 on Forestry Law and the Act No 19/2004 on Mining in national park. Forestry law explicitly prohibited open mining in national park. However, the Act No 19/2004 obviously allows mining in national park area. It is clear that the government and the house representative do not consider environmental protection as their first priority. They choose to maintain the well-being of the industries and gain short term economic profit or economic growth rather than sustainability.

Furthermore, the uncertainty on roles and responsibility on management of natural resources also appear between central and local government.[65] This condition has bad impact on the environment.[66]

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[63]Alan Khee Jin Tan, The ASEAN Agreement on Transboundary Haze Pollution Prospect of Compliance and effectiveness in Post Suharto Indonesia, N.Y.U Environmental law Journal, Volume 13, 2005

[64] The fact that every sectoral agencies create their own policies which given the advantages for its sector without paying attention on environment protection. The discreation of making laws and regulation usually creating a sideline or conflicting laws or regulation.

[65] There is a contradiction on laws and regulation between the Act No 41/1999 on Forestry law and the Act No 22/1999 on Regional autonomy law. Acoording to the Act no 41/1999, Central governments particularly ministry of forestry still hold the power on the management of forestry including issuing

A related problem that remains unresolved that is the security of land tenure also contributes on environment degradation. Poorly specified property rights that caused conflicts among numerous classes of land claimant (government, local resident, transmigrants and industry) makes hard to find who is responsible for the damage cause to the environment.[67]

In my view, there are major weaknesses on current environment legislation, particularly on which authorities are responsible in administering environment protection. There is no single authority explicitly appointed by the act to administer environment protection. For example in Queensland, Australia Environment Protection Agency is appointed by Environment Protection Act as enforcement and compliance assurance agency. EPA help the Queenslanders comply with the law and to enforce it.

It is suggested in the Act No 23/1997 that several authorities in central and local governments are responsible to monitor and give administrative sanctions. In central level, ministry who has a duty to manage the environment was assigned by the act to monitor the implementation of this act. This statement is vague. This is because the Ministry for environment is not explicitly assigned by this act to monitor its implementation. Then, a question arises to which ministries actually do have a duty to monitor? Is the Ministry for Environment or other ministries such as forestry, agriculture and mining, those involved in the management of environment? In local level, governor of the

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HPH license and local government only receive the share of the benefit from the exploitation of these resources. On the other hand the Act No. 22/1999 gives the advantages on local governments a power to manage natural resources in their area.

[66] The transfer of power from central to local government does not give a significant improvement on environmental protection in local region but it gives more pressure on environmental degradation especially because of uncontrolled exploitation of natural resources by local government to gain much economic profit and revenue.

[67] Minister of State for the Environment Republic of Indonesia and United Nations Development Programme, 1998, Forest and Land Fires in Indonesia. Basically, the notion of land ownership is remain uncertain with the state often claiming ultimate rights over land in priority over customary or adat rights. Most land use conflict in Indonesia was arising due to the absence of proper demarcation of land tracts for different uses by different stakeholders.

province and city mayor are given task by this act to monitor and impose administrative sanction. Overall, there is no powerful institution to manage environmental protection neither the Ministry for environment and BAPEDAL or BAPEDALDA. These two bodies only have a limited power and limited jurisdiction. The power of these two bodies is only to control and help the citizen to comply but not to enforce it. The power of enforcement authority is on police which actually dos not have enough capacity to enforce environmental cases. However, in several cases a government official also has a power to investigate. For example, Ministry for forestry has a power to investigate in the cases of illegal logging and forest fires. Ministry of Fishery has an authority to investigate illegal fishing.

VIII. Conclusion

The impact to the adoption of state responsibility for transboundary environment harm principle upon Indonesian legal system is far-reaching. It will influence and change the entire environmental legal system in Indonesia. The positive effect to this adoption is to improve the effective measures to protect the environment and prevent transboundary haze pollution.

The intention of the government to adopt this principle on the revision of Environment Management Act is a clear signal that the government has a serious attention and goodwill in dealing with transboundary haze pollution. The adoption of this international principle is related to the plan of the government to ratify the ASEAN Agreement on Transboundary Haze Pollution which contains a guided principle namely "state responsibility for transboundary haze pollution" on its provision. However, there is a pessimistic view to the adoption of this principles and the ratification of the agreement. This is due to many challenges faced by Indonesia in implemented the obligations. It is clear that many systemic and complicated factors and problems make difficult for Indonesia to comply with the agreement. These include: inadequate environmental legislation; inadequate law enforcement mechanism; and complex jurisdictional issue. A changes and reform to environmental legislation is absolutely an urgent need. An intention of the government to revise environmental management act at least give a little hope that it will improve environment protection in Indonesia and solve transboundary environment problem.

There are so many homework and tasks in the future for the policy makers includes: to make comprehensive and integral environmental protection legislation; strengthening law enforcement mechanism; and to clarify the conflicting roles and responsibility of central, local government and sectoral departments involving in environment governance.

Zero burning policies as it is suggested on the ASEAN Agreement on transboundary haze pollution, Government Regulation 4/2001 and the Act No 41/1999 must be implemented fully by the governments. Otherwise, the problems of haze pollution will continue to occur every year. In reality ineffective of this regulation is due to lack of enforcement mechanism in local level. Local government fails to enforce this regulation. The argument was land clearing using fires is unavoidable mechanism in an agrarian economy like Indonesia. Thus, some incentive and alternative method of land clearing is needed to prevent the industries and local peoples in practicing burning activities.

Community involvement in preventing and controlling forest fires are recognized as an important factor in giving a significant contribution to the effectiveness of haze pollution control. International community has recognized the importance of role local people in conserving biodiversity such as suggested in the Convention on Biodiversity. "Local community is the key to the survival of forest through integrating indigenous knowledge, conservation values and sustainable livelihoods."[68] Thus, the government should empower the community in controlling forest fire and provide education and alternative method for land conversion without using fires.

Finally, I believe the answer for all of environment problems in Indonesia is establishing the powerful environment protection agency to help Indonesian comply with the law and enforce it.

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