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Research Paper

Towards a legal encounter with dust storms in southwestern Asia using regional versions of international environmental law; the ASEAN 2002 Agreement Case

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Abstract

International law has opened up new legal realms such as environmental law. It has the capacity to regulate practice of states with different formulations from the binding rules to mere recommendations in the form of memorandums of understanding. One of the challenging issues is sand and dust storms that has caused considerable inconveniences for people in affected regions. Only one regional agreement has been made in this regard under ASEAN. In this paper, the agreement is introduced, its strengths and weaknesses are stated and its applicability in southwestern Asia is evaluated using a descriptive – analytical method. The paper reaches the conclusion that the ASEAN agreement is a significant document that can combat haze pollution crisis but suffer from some flaws that should be resolved while formulating new agreements. Imposing definite environmental obligations on parties, establishing compulsory fund and resorting to judicial dispute settlement procedures should be included in new agreements.

Keywords: international environmental law, dust storms, ASEAN, regional agreements.

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1. Introduction

International law like all legal systems tries to regulate relationships between its members in different fields. This system is not comparable to domestic law and has its own characteristics. Most of these rules suffer from lack sanctions and are dependent to states' intentions, although violating these rules is not left without any punishment for the states. Another feature of this system is related to variant normative value of rules in its different fields; classic norms like sovereignty, armed conflicts are protected by strong sanctions and more modern rules such as environmental law have less obligatory effects. Dust storms belong to this area of international law.

In order to legally combat this phenomenon, first of all we have to recognize the rules governing it in international law. In other words, we have to identify conventional and customary rules on this matter. Unlike other air pollutants, there is no universally binding convention in connection with dust storms. There are some non-binding resolutions of the United Nations general assembly, in the light of achieving sustainable development target, in which there are some recommendations to states.[1] Aside from these non-

[1]. In all three resolutions 70/195 adopted 22 Sep. 2015,71/219 adopted 21 Dec. 2016 73/237 adopted 20 Dec. 2018, it has been declared that dust and sandstorms, and the unsustainable land management practices, among other factors, pose a great challenge to the sustainable development of affected countries and regions. It promote all international cooperation to combat sand and dust storms, and invites all relevant bodies, agencies, funds and programs of the United Nations development system, to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, and all other

binding laws, there are some customary rules of international law that are applied on all states.

Based on the prevention principle, states have the responsibility not to cause damage to the environment of other states or to areas beyond national jurisdiction.[1] this norm is rooted in Trail Smelter case, which stated that under the principles of international law.... no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another of the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence. Following the international court of justice's 1996 Advisory Opinion on The Legality of thereat or Use of Nuclear Weapons, there can be no question but that Principle 21 of Stockholm declaration reflects a rule of customary international law, placing international legal constraints on the rights of states in respect of activities carried out within their territory or under their jurisdiction. (Sands & Peel, 2012: 196)

The court in San Juan case linked prevention principle with due diligence[2] principle and declared: "to fulfill its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment." (ICJ Rep, 2015: para.104)

Although we can confirm the existence of the prevention principle as a binding customary rule of international law, it would be better to encourage states to conclude conventions, whether universal or regional, because the obligations of conventional provisions are much clearer in comparison with customary rules and have stronger sanctions. Moreover, proving violations of a treaty provision is easier than confirming violation of unwritten customary rules.

As we said, there is no universal convention on haze pollution or dust storms but a binding regional agreement has been concluded in southeastern Asia on the Association of Southeast Asian Nations (hereinafter called ASEAN[3]) initiative.

After this long but necessary introduction, we will introduce the 2002 convention in part I.Then its strengths and weaknesses are discussed in part II. In the last part, we will analyze how to apply ASEAN model in southwestern Asian area.

Part I) ASEAN initiatives

ASEAN has been pioneer in combating air pollutants. After spreading smoke from forest fires in countries of southeastern Asia, this organization adopted an action plan in 1997 to tackle it.

ASEAN has adopted a binding agreement i.e. ASEAN Agreement on Conservation of Nature and Natural Resources (ACNNR)1985 and several soft law instruments in this field such as ASEAN Cooperation Plan on Transboundary Pollution 1995, Regional Haze Action Plan 1997 (RHAP), Zero Burning and Controlled Burning Policy (1999,2003), ASEAN Peatland Management Initiative 1999 (AP 2MI), ASEAN Peatland Management Strategy (APMS)2005.

Some years later, ASEAN added haze issue to its concerns and asked members to ratify a draft, entitled "trans-boundary haze pollution" (hereinafter called AATHP), 2002. This is the only binding regional agreement on haze pollution in international law. Although the haze in ASEAN is normally associated with fire or large air pollution, dust storms create haze and as AATHP is a legal agreement meant to encounter this phenomenon, it would be useful to examine the pros and cons of this document.

related organizations to address this problem and→ ←contribute to the enhancement of capacity-building, the implementation of regional and sub-regional projects, the sharing of information, best practices and experiences and the boosting of technical cooperation in the affected countries and countries of origin, to improve the implementation of sustainable land management practices and the development of early warning systems as tools to combat sand and dust storms in accordance with their strategic plans. It has been Recognized that sand and dust storms cause numerous human health problems in different regions around the world.

1. This principle stems from Latin phrase; *sic utre tuo, utalienum non leadas* and It is codified in principle 21 of the Stockholm Declaration (1982) & principle 2 of Rio Declaration (1992).

2. The Court's clarification that the obligation of due diligence in preventing transboundary harm underlies the procedural principles of environmental law is a welcome conceptual development. Another important aspect of the judgment is the elaboration of the sequence of thresholds triggering procedural environmental obligations, starting with a preliminary assessment of whether there is a risk of significant transboundary harm which triggers the requirement to carry out an EIA; the confirmation of such a risk following the EIA triggers in turn the duty to notify and consult the potentially affected state. (Yotova, 2016: 446,447)

3. It is a regional intergovernmental organization comprising ten countries in Southeast Asia, which promotes intergovernmental cooperation and facilitates economic, political, security, military, educational and sociocultural integration among its members and other countries in Asia. it was created on 8 August 1967, when the foreign ministers of five countries: Indonesia, Malaysia, the Philippines, Singapore and Thailand, signed the Bangkok Declaration. One of its important aims and purposes is promoting regional co-operation in Southeast Asia in the spirit of equality and partnership and thereby contribute towards peace, progress and prosperity in the region.

Our effort will be successful especially because AATHP is labeled as a global role model for tackling transboundary issues particularly haze by the United Nations Environmental Program, UNEP. (Abdul Ghani et al., 2017:155)

In this agreement, Haze pollution" means smoke resulting from land and/or forest fire which causes deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment.(art.1) The objective of the Agreement is to prevent from transboundary haze pollution which should be mitigated, through concerted national efforts and intensified regional and international co-operation.(art.2)

Parties shall co-operate in developing and implementing measures to prevent from and monitor transboundary haze pollution including identification of fires, development of monitoring, assessment and early warning systems, exchange of information and technology, and provision of mutual assistance.

Moreover, under co-operation approach of the agreement, the Parties shall, jointly or individually, develop strategies and response plans to identify, manage and control risks to human health and the environment arising from land and/or forest fires and related haze pollution arising from such fires. (art.10)

When the transboundary haze pollution originates from within their territories, they have to 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. States are under the obligation to take legislative, administrative and/or other measures to fulfill their obligations imposed by the Agreement. (art.4) these general obligations on monitoring, assessment, prevention and response has been incurred by other provisions of AATHP.

AATHP has established a voluntary fund to implement the agreement. Some members including Singapore, Malaysia, Brunei and Indonesia have donated some money to it but others have been reluctant to contribute for reasons like their financial situation, different priorities and insignificant effects they seen from haze pollution. (Nurhidaya et al., 2014:11)

Part II) Pros and cons of AATHP

In terms of strengths of AATHP, the most important one is focusing on preventative action rather than compensatory or remedial action*(* Nurhidaya et al., 2014:12) as we know, international environmental law is not a well-established system being able to prevent and even effectively react to environmental disaster. The approach of AATHP is really progressive.

As a weakness, the voluntary nature of the fund has led to inefficiency of the AATHP. (Nurhidaya et al., 2014:11)

Non- intervention norm[1] that is recognized as ASEAN way is another weakness of AATHP. The 'ASEAN Way' is said to be based on, among others, the Malay cultural practices of consultation (*musyawarah*) and consensus (*mufakat*), which stress the notion of brotherhood and sisterhood in managing and addressing problems (Nguitragool, 2011: 29). The main characteristics of this approach include discreetness, politeness, harmony, informality, organizational minimalism, symbolism, inclusiveness, a non-confrontational bargaining approach, and an indirect approach to conflicting situations (Nguitragool, 2011: 29 qtd in Nurhidaya et al., 2014:3)[2]

Based on this concept that stems from the sovereignty principle, other countries can assist affected states just by obtaining the consent of the latter one and under the control and direction of the recipient state. (Abdul Ghani et al., 2017:157) the ASEAN way has been abused by parties and it has made the implementation of the agreement difficult. For example all states parties ratified AATHP during 2002-2004 but Indonesia did so in 2014 and this late approval of Indonesia caused AATHP not to be influential and efficient as it was expected.

Another disadvantage of this agreement is its dispute settlement procedure. (Abdul Ghani et al., 2017:158) Article 27 of AATHP states that any dispute between Parties as to the interpretation or application of or compliance with this Agreement or any protocol thereto shall be settled amicably by consultation or negotiation. As we see it speaks about the political approach which does not oblige governments to resolve the dispute or accept the suggestions of other international actors whether political or judicial.

The most important weakness of AATHP is that protected by any sanction (Abdul Ghani et al., 2017:

imposing more severe punishments on the state party violating the agreements and ensuring a binding dispute settlement mechanism are confirmed by commentators, too (Nurhidaya et al., 2014:2)

1. Article 12(2) provides: Assistance can only be employed at the request of and with the consent of the requesting Party, or, when offered by another Party or Parties, with the consent of the receiving Party.

2. For ASEAN way see: Achary , Amitav (2001) Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order., New York: Routledge.

Another alleged defect of the AATHP is that it does not impose clear binding legal obligations on the parties. Nguitragool[1] as cited in Nurhidaya argues that the substance of the Agreement is shallow, considering the fact that many regional and national mechanisms such as prevention, monitoring, response and the national action plans have already been established or developed in the Regional Haze Action Plan. (Nurhidaya, 2014:8) This claim can be denied when we consider characteristics of international environmental law, a fairly new realm of international law with the least power to enforce its rules. Mere the concluding a regional agreement is really important and admirable in international environmental law.

Moreover this instrument was regulated in an international organization based on cooperation not integration, so it does not seek to impose obligations on its members.

Part III) Applying the example of ASEAN in Southwest Asia

There are many differences between the haze pollution in ASEAN area and our region and we know such a mechanism should be localized. However, a look at the ASEAN actions in this regard guides us through combating dust storms and we can learn from that experience.[2]

Generally, a binding agreement is concluded when there are intensive international relations between states on a specific subject. In other words, there is always diplomacy behind legal actions. Some steps should be taken to develop a regional environmental diplomacy to encounter sand storms.

First of all, neighboring states should accept the existence of a problem.

The role of academicians, NGOs and environmentalists is so decisive in this phase. They can attract the attention of people and the authorities to seriousness of environmental issues and convince them to make appropriate decisions. In a broader view, countries in international organization take measures to turn the environmental problem into a global issue. Iran proposed the draft of a resolution on combating sand and dust storms to the UN General Assembly (at the 72nd session held in 2017) and finally it was adopted.[3] Also, holding the meeting titled "the International Conference on Combating Sand and Dust Storms: Challenges and Practical Solutions" by Iran's Department of Environment and Ministry of Foreign Affairs is another instance of such efforts.

In the next level, states start negotiations to reach an agreement and try to balance their interests with duties while facing the problem. During these official discussions between the representatives of affected states, the responsibility of each state should be determined based on the role of that party in creating the environmental crisis, their financial resources and other considerations. When states reach this point, the AATHP will be a worthwhile model although some changes are needed:

1-The new agreement should impose definite environmental obligations on parties. As we know, the scope of environmental principles is so broad. The party's commitments and penalty for breaching the agreement should be identified in detail.

2- Compulsory government funds to implement the agreement should be set up. Although voluntary fund facilitates the accession of the state to the treaty, it really undermines the effectiveness and success of it.

3- An effective mechanism of dispute settlement should be considered. Political methods of dispute settlement like negotiation and Mediation does not suffice and some sort of judicial procedures such as resorting to arbitration tribunals should be included in the agreement.

Conclusion

Tackling sand and dust storms is a multidimensional project. Legal capacity should be taken along with other technical measures. The only binding agreement on sand and dust storms was concluded in Southeastern Asia under the Association of Southeast Asian Nations, 2002. Although it suffers from several defects, it has had

1. Nguitragool, Paruedee (2011) Environmental Cooperation in Southeast Asia ASEAN's Regime for Transboundary Haze Pollution. Abingdon, Oxon: Routledge.

2. These flaws stems from ASEAN way. ASEAN places more reliance on prevention and cooperation than establishing a liability regime or adopting legal instruments to protect the environment. ASEAN way emphasises non-interference in other states' domestic affairs, the use of consensus planning and cooperative programs, and a preference for national implementation rather than reliance on a strong region-wide agency or bureaucracy. In addition, the ASEAN preference is for 'soft' rather than 'hard' law(Nurhidaya et al., 2014:2)

3. The UN General Assembly adopted the resolution, which has recognized the negative effects of sand and dust storms on the citizen's health and considered it as an obstacle to achieve sustainable development goals and has called for urgent measures. The resolution has also underlined the need for increased technical support and capacity building for addressing the issue and assign UN Environment Program (UNEP), World Meteorological Organization (WMO) and WHO to provide the necessary support to the affected countries (Tehran times, 2017)

some important achievements that help us to apply that model in our region. It has encouraged neighboring states not to be indifferent towards this kind of environmental pollution. Also, It has recognized environmental principles such as prevention and monitoring and emphasized on encountering haze pollution as a precondition for implementing sustainable development. At the same time, its flaws should be resolved when we want to apply it in southwestern Asia. Imposing definite environmental obligations on parties, allocating compulsory instead of voluntary funds and resorting to judicial dispute settlement procedure such as arbitration tribunals should be included in the new agreement.

Mention should be made of an important point while modeling the ASEAN initiative; concluding an agreement is the last phase of combating haze pollution and sand storms plan. States should meet the requirements to which we mentioned. Enough time should be spent to investigate all aspects of the issue and seek proper responses for the problems in part III. Besides, this kind of necessary action will fail at the very beginning like a number of memoranda of understanding being signed between Iran and Turkey, Iraq, Syria, Qatar and Bahrain nearly all of which have not been efficient. To sum up, legal action without exercising an environmental diplomacy cannot be effective and successful.

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