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**THE RESPONSIBILITY OF THE STATE ON TRANSBOUNDARY HAZE  
POLLUTION AFTER THE RATIFICATION OF AATHP:  
CASE OF INDONESIA**

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**Abstract:**

*Land and forest fires in Indonesia has resulted the economic and ecological losses caused by opening the land (land clearing) with burning land. Land and forest fires in Sumatra and Kalimantan are now not only a national issue, but also became an international issue because it arise the transboundary haze pollution. Beside the loss in Indonesia itself, the smoke also disrupts neighboring countries, such as Malaysia, Brunei and Singapore. Every year Malaysia and Singapore as countries affected by transboundary haze pollution filed a strong protest to the Indonesian government. Based on the principle of international law of state responsibility, Indonesia should be responsible for the transboundary haze pollution. Because of it has disrupted the environment of other countries. In 2014, Indonesia became the last country to ratify ASEAN Agreement on Transboundary Haze Pollution (AATHP). The type of this research is a normative legal research. By using a qualitative descriptive method, the research aims to describe the responsibility of Indonesian government on transboundary haze pollution after the ratification of AATHP. The result shows that Indonesia cannot be required to pay compensation fully because it was a shared responsibility to prevent the transboundary haze pollution and Indonesia also can avoid lawsuits of international law because of transboundary haze pollution. The Indonesian government have to undertake preventive action, which prevents forest fires that often occur as a result of land clearing. The government also has to educate the farmers on how to open land effectively.*

**Keywords:** International Law of State Responsibility, Ratification, AATHP, ASEAN, Indonesia.

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## 1. Background

Smog problems re-emerged in recent times, land and forest fires in Sumatra and Kalimantan are now not only a national issue, but also an international issue, because this case cause transboundary haze pollution.<sup>1</sup> Transboundary haze pollution is considered one of the major problems in the ASEAN region. It is caused by land/forest fires which mostly derive from Indonesia land and forest fires. The worst forest fire was in 1997-1998 and since then they occur every year with various intensity.<sup>2</sup>

In 2002 the whole ASEAN members agreed to sign the ASEAN Agreement on Transboundary Haze Pollution (AATHP) in Kuala Lumpur, Malaysia. Although at that time Indonesia has not yet ratified. They draft the ASEAN Agreement on Transboundary Haze Pollution (AATHP) and entered into force officially on November 25, 2003 which aims to prevent and resolve the transboundary haze pollution from land and/or forest fires which should be implemented through national efforts, regional, and international intensive.<sup>3</sup>

Indonesia has ratified the ASEAN Agreement on Transboundary Haze Pollution (AATHP) on September 16, 2014. The ratification of the AATHP is the right step taken by Indonesia to demonstrate its seriousness in overcoming transboundary haze caused by land and forest fires. The ratification was done following a discussion by a plenary session of the House of Representatives attended by parliamentary members and leadership, as well as ministers of environment, foreign affairs, justice, and human rights.<sup>4</sup>

Transboundary haze pollution from forest fires is against the principles of international environmental law. One principle is "*Sic utere tuo ut alienum non laedes*" which determines that a State is prohibited from or permitted activities that may harm other

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<sup>1</sup>Yordan Gunawan, *Ekspor Asap dan Ratifikasi AATHP*, Kedaulatan Rakyat Newspaper, Wednesday, November 5, 2014, <http://krjogja.com/liputan-khusus/analisis/3484/ekspor-asap-dan-ratifikasi-aathp.kr> accessed on January 7, 2015 at 2am

<sup>2</sup> Laely Nurhidayah, 2012, *The Influence of International Law upon ASEAN Approaches in Addressing Transboundary Haze Pollution in the ASEAN Region*, NUS-Asian SIL Young Scholars Workshop, NUS Law School, p.2

<sup>3</sup> Teddy Prasetiawan, *Implikasi Ratifikasi AATHP Terhadap Pengendalian Kebakaran Hutan dan Lahan di Indonesia*, Info Singkat, Pusat Pengkajian, Pengolahan Data dan Informasi (P3DI) Sekretariat Jenderal DPR RI, Jakarta, Vol. VI, 2014

<sup>4</sup> Indonesia ratifies ASEAN agreement on transboundary haze pollution, <http://www.antaraneews.com/en/news/95683/indonesia-ratifies-asean-agreement-on-transboundary-haze-pollution>, accessed on February 14, 2015 at 4.30 am

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countries, and the other principle is "*Good Neighborliness*" which basically says that the principle of the sovereignty of the territory of a State shall not be disturbed by other States.<sup>5</sup>

Another principle of international law for the protection of the environment is "*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*".<sup>6</sup>In principle 21 of the Stockholm Declaration in 1972 also stated, "*responsibility to ensure that activities within reviews their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction*".<sup>7</sup>

These principles can be the basis for asking the liability of the state against other state that has committed acts that harm other countries. According to international law, state responsibility arises when the related state harms other countries. In this case, the forest fires in Indonesia have a negative impact on Malaysia and this happens almost every year without any serious follow-up from the Indonesian government.

## 2. The History of Transboundary Haze Pollution in Southeast Asia

Forest fire became a global attention as environmental and economic issues, especially after the disaster of *El-Nino*<sup>8</sup> in 1997-1998 scorching 25 million hectares of forest land area all over the world. Fires are considered a potential threat to sustainable development because of direct effects to the ecosystem, contributing to carbon emissions, and its impact on biodiversity.<sup>9</sup>

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<sup>5</sup> Mohammad Naqib Ishan Jan, 2008, *Principles of Public International Law: A Modern Approach*, Malaysia, IIUM Press, p. 322

<sup>6</sup> United Nations (UN), Rio Declaration on Environment and Development 1992, Principle 2

<sup>7</sup> Stockholm Declaration 1972, Declaration of the United Nations Conference on the Human Environment, Principle 21

<sup>8</sup> *El Nino* is a phenomenon of deviations sea conditions characterized by increased sea surface temperature (SST) in the Pacific Ocean around the equator (equatorial pacific) especially in the central and eastern part (around the coast of Peru). Because the ocean and the atmosphere are two interconnected systems, the deviation ocean conditions caused a deviation on the atmospheric conditions that ultimately result in climate change.

<sup>9</sup> Luca Tacconi, 2003, *Kebakaran Hutan di Indonesia: Penyebab, Biaya dan Implikasi Kebijakan*, Bogor, Center for International Forestry Research, p.1

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Since 1982, there have been five major fire outbreaks in Southeast Asia with small fires occurring almost annually. The major fire was in 1997-1998, destroying an estimated land and forest area of more than 9 million hectares (ha) in Indonesia alone.<sup>10</sup> From October through November 1997, fires in Indonesia and the resulting haze made front-page news around the world as the haze spread as far as the Philippines to the north, Sri Lanka to the west, and northern Australia to the south.<sup>11</sup>

In the middle of 1997, forest fires in Indonesia began to affect neighboring countries, spreading thick clouds of smoke and haze to Malaysia and Singapore.<sup>12</sup> Seasonal rains in early December brought a brief respite but soon after, the dry conditions and fires returned. By 1998, Brunei and to a lesser extent, Thailand, Vietnam and the Philippines have also felt the haze. By the year of 1997-1998 fire episode was finally over, some 8 million hectares of land was burned while countless millions of people suffered from the effects of air pollution.<sup>13</sup>

### **3. The Impact of Transboundary Air Pollution in Southeast Asia**

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.<sup>14</sup> In windless conditions haze tends to remain in one location, creating adverse health effects including reduced lung capacity in young people, cardiovascular problems, and reduced life expectancy. People living in areas affected by haze may deal with it for weeks or months at a time, breathing in smoke particulates until a storm system powerful enough to move or dissipate the dense, “hazy” air passes through the affected area.

Tropical peat land fires in Indonesia are generally caused by illegal human activities, including:<sup>15</sup>

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<sup>10</sup>*Ibid.*

<sup>11</sup>The Asian Forest Fires of 1997-1998,

[http://rainforests.mongabay.com/08indo\\_fires.htm](http://rainforests.mongabay.com/08indo_fires.htm), accessed on June 20, 2015 at 10am

<sup>12</sup> David Glover and Timothy Jessup, 2006, *Indonesia's Fires and Haze, The Cost Catastrophe*, Singapore, Institute of Southeast Asian Studies and International Development Research Center, p. 1

<sup>13</sup>*Ibid.*,

<sup>14</sup> Article 1, Point 6, ASEAN Agreement on Transboundary Haze Pollution

<sup>15</sup> Mark E Harrison, Susan E Page, Suwido H Limin, The Global Impact of Indonesian Forest Fires, *Biologist*, London, The Institute of Biology, Volume 56 Number 3, August 2009

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1. *Land Clearing*: the area of peat-swamp forest (PSF) being allocated for plantations and consequently being burned for land clearance is increasing annually and these fires are frequently out of control. Indonesia is the world's largest palm-oil producer.
2. *Use of fires as a weapon in land tenure/use disputes*: Uncertain land tenure and access rights with consequent conflicts can contribute to increase burning. Smallholders can become frustrated at being unable to have their claims heard in a fair and transparent judicial system and resort to the use of fire as a weapon to reclaim land for agriculture.
3. *Fire for resource extraction and other purposes*: this takes many guises (e.g. hunting, burning waste) but is generally of low importance.
4. *Accidental fire*: these are often caused by discarded cigarettes or unprotected cooking fires, following increasing human access into peat land areas along newly-constructed logging tracks and canals.

Besides, the land and forest fires in Indonesia also generally caused by peat land fires, peat land fire is the most contribute factor caused the haze pollution, since it contains the high level of carbon.

#### **4. Indonesia Ratification of the ASEAN Agreement on Transboundary Haze Pollution**

The ASEAN Agreement on Transboundary Haze Pollution (AATHP) is a regional treaty signed by 10 ASEAN countries (Brunei, Cambodia, Laos, Malaysia, Myanmar, Singapore, Thailand, Vietnam and Indonesia) that came into force in 2003. Indonesia only ratified the treaty on 16 September 2014.<sup>16</sup>The agreement requires parties to develop and implement prevention, monitoring and mitigation measures, respond to information requests made by affected states, and take legal or other measures to implement obligations under the agreement.

The objective of this agreement is to prevent and monitor the 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 co-operation. This should be

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<sup>16</sup>Southeast Asia's Transboundary Haze: Health Risk Liabilities, <http://earthsecurity.org/earth-security-index/south-east-asias-transboundary-haze-health-risk-liabilities/>, accessed on July 4, 2015 at 2.50pm



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pursued in the overall context of sustainable development and in accordance with the provisions of this agreement.<sup>17</sup>

The Agreement is the first regional arrangement in the world that binds a group of affected states to tackle transboundary haze pollution resulting from land and forest fires. It has also been considered as a global role model for the handling of transboundary issues. The ASEAN Agreement on Transboundary Haze Pollution (AATHP) is a legally binding environmental agreement signed in 2002 by all ASEAN nations to reduce haze pollution in Southeast Asia.<sup>18</sup>

On September 16, 2014, Indonesia ratified the Association of Southeast Asian Nations (ASEAN) Agreement on Transboundary Haze Pollution (Haze Agreement), initially signed in 2002. It was the last of the ten signatory nations to ratify the pact; the other participants are Brunei Darussalam, Burma, Cambodia, Laos, Malaysia, the Philippines, Singapore, Thailand, and Vietnam.<sup>19</sup> After ratifying the agreement, Indonesia will receive several benefits;<sup>20</sup>

1. Playing an important role in making decisions and taking active part in directing ASEAN policies on combating land and/or forest fires;
2. Protecting the Indonesian community from the impact of land and/or forest fires detrimental to human health;
3. Protecting land and forests from land and/or forest fires; and
4. Contributing to the control of land and/or forest fires which lead to transboundary haze pollution.

## 5. Indonesian Government's Policy toward Transboundary Haze Pollution in Southeast Asia

The Indonesian government did ban using fire to clear land in 1995, but this ban has not been effectively enforced due to Indonesia's relative poverty and the fact that slash-and-burn agriculture is a traditional land-clearing technique believed to create more fertile land.<sup>21</sup>

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<sup>17</sup> Article 2, ASEAN Agreement on Transboundary Haze Pollution

<sup>18</sup> ASEAN Agreement on Transboundary Haze Pollution, [http://haze.asean.org/?wpfb\\_dl=32](http://haze.asean.org/?wpfb_dl=32), accessed on June 25, 2015 at 2pm

<sup>19</sup> ASEAN; Indonesia: Regional Haze Agreement Ratified, [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_1205404126\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_1205404126_text), accessed on July 3, 2015, at 4.29pm

<sup>20</sup> RI ratifies ASEAN agreement on transboundary haze pollution, <http://www.antaraneews.com/en/news/95689/ri-ratifies-asean-agreement-on-transboundary-haze-pollution>, accessed on July 4, 2015 at 8.40pm

<sup>21</sup> *Ibid.*, p.36

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The efforts that have been undertaken by the Ministry of Forestry in land and forest fire control, among others: spread the maps of forest fire in prone provincial level; urges the Governor in Kalimantan, Sumatra and Sulawesi in order to be ready to face land and forest fires in 2014 and attempts to anticipate the *El Nino*; and conducted simulations, technical guidance and patrol extinguishing forest fires in fire-prone provinces.<sup>22</sup>

The government through cooperation between the ministries and authorized body has conducted several measures, among others: first, the extinguishing against the land and forest fires; second, the extinguishing in the air through water bombing and weather modification techniques; and Third, socialization and law enforcement.<sup>23</sup>

Some steps have already been taken by Indonesia Government, in 2009, Law Number 32 of 2009 on Environmental Protection and Management was enacted in Indonesia imposing a maximum fine of Rp.10 billion (approximately US\$800,000)<sup>24</sup> and up to ten years in prison for individuals or corporations engaging in land burning activities. This has led to a number of successful prosecutions in the past two years. More recently, the Indonesian government has introduced the Indonesian Sustainable Palm Oil<sup>25</sup> scheme, which bans the use of fire in plantation development, and will be mandatory for all palm oil companies in Indonesia by end-2014.<sup>26</sup>

In the case of law enforcement there has been increasing legal efforts taken to reduce the number of the offense of forest fires. In the report of KLH<sup>27</sup> in 2012 there were two cases that have been handled, namely PT Kalista Alam and PT Surya Panen Subur. While in 2013, there were 7 criminal case files that had been submitted to the General Attorney of Republic

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<sup>22</sup> Teddy Prasetiawan, *op. cit.*, p.10

<sup>23</sup> *Ibid.*,

<sup>24</sup> Article 98, Law Number 32 of 2009 on Environmental Protection and Management

<sup>25</sup> The Indonesian Sustainable Palm Oil (ISPO) Foundation is a national non-profit organization aiming to improve the sustainability and competitiveness of the Indonesian palm oil industry and contribute to the Indonesian government's objectives to reduce greenhouse gases emissions and draw attention to environmental, <http://www.sustainablepalmoil.org/>.

<sup>26</sup> Indonesia's Ratification of the ASEAN Agreement on Transboundary Haze Pollution, retrieved from, <http://www.herbertsmithfreehills.com/insights/legal-briefings/indonesias-ratification-of-the-asean-agreement>, accessed on July 5, 2015 at 5.11pm

<sup>27</sup> Kementrian Lingkungan Hidup (KLH) or The Ministry of Environment is the Indonesian government ministry in charge of environmental affairs. The Ministry of Environment headed by a Minister of the Environment.



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of Indonesia and one civil case file that is still in the process of drafting a lawsuit.<sup>28</sup> Since 2013 until now, the police have conducted 41 prosecutions against the offenders, especially to the palm oil plantation companies. From the 41 prosecutions, the 25 offenders have been named as the suspects and even already punished started from 8 months to 8 years.<sup>29</sup>

In terms of technical implementation mandated by the ASEAN Agreement on Transboundary Haze Pollution (AATHP), Indonesian government has conducted several measures to prevent and control land and/or forest fires, among others:<sup>30</sup>

1. To conduct the socialization of AATHP and capacity building massively and sustainable to the ministries/agencies, business community, society, NGOs, and local governments in areas prone to land and forest fires.
2. To commit good coordination inter-ministerial/agency, local government or with the society based on Indonesia Comprehensive Plan of Action on Transboundary Haze Pollution such as:
  - a. Mapping prone areas of land and forest fires;
  - b. Strengthening the data and information relating to hot-spot, the distribution of smoke, burnt area mapping, Fire Danger Rating System (FDRS), SOP development in the prevention and control of land and forest fires, and peat land management. Even LAPAN<sup>31</sup> has provided training to Malaysia in the development FDRS through remote sensing system;
  - c. Strengthening and building the capacity of caring fires society which conducted through the socialization, early prevention activities and training
  - d. Disaster management of coordinated smoke in terms of emergency response, among others: through the fire fighting forces and weather modification operations.

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<sup>28</sup> KLH Selidiki 29 Kasus Kebakaran Hutan di Riau, <http://news.okezone.com/read/2014/08/07/337/1021369/klh-selidiki-29-kasus-kebakaran-hutan-di-riau>, accessed on July 10, 2015 at 8.00pm

<sup>29</sup> Membakar Akar Kebakaran Hutan di Riau, [http://www.kompasiana.com/yosa/membakar-akar-kebakaran-hutan-di-riau\\_54f81a0ea3331127658b4b1f](http://www.kompasiana.com/yosa/membakar-akar-kebakaran-hutan-di-riau_54f81a0ea3331127658b4b1f), accessed on July 11, 2015 at 4.15am

<sup>30</sup> Kementerian Lingkungan Hidup - Republik Indonesia, retrieved from, <http://www.menlh.go.id/indonesia-meratifikasi-undang-undang-tentang-pengesahan-asean-agreement-on-transboundary-haze-pollution-persetujuan-asean-tentang-pencemaran-asap-lintas-batas/>, accessed on January 10, 2015 at 11.44am

<sup>31</sup> Lembaga Penerbangan dan Antariksa Nasional (LAPAN) or National Institute of Aeronautics and Space is a Non-Government Institutions of the Republic of Indonesia who carry out government duties in the field research and development of aerospace and its utilization, <http://www.lapan.go.id/>

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3. To commit the law enforcement (criminal and civil law) to the offenders (individual or corporations) of burning land and forest and transboundary haze pollution which is resulting environmental damages. Criminal law enforcement is conducted, integrated and coordinated by PPNS KLH<sup>32</sup> and Police investigators together and through the mechanism of multi-doors.<sup>33</sup> Civil law enforcement conducted through a lawsuit of compensation against the offenders of the burning of land and forest to restore the quality of the environment.
4. To strengthen the institutional and legislation which supports the policy of land clearing without burning (zero burning policy) and the prevention of the land or forest fires and transboundary haze pollution.

**6. The Responsibility Before Ratification of AATHP**

For a long time, transboundary haze pollution has been a concern of international law. The first and famous case of transboundary haze pollution is the Trail Smelter Arbitration. Until recently, transboundary haze pollution was high on the environmental agenda in many regions of the world including Europe, the United States and South East Asia. In addition, the threat of transboundary haze pollution is now on a global scale with such ozone depletion and climate change which requiring cooperation to tackle this problem.<sup>34</sup>

According to Draft Articles on Responsibility of States for Internationally Wrongful Acts, “*every internationally wrongful act of a State entails the international responsibility of that State*”.<sup>35</sup> An internationally wrongful act exists when conduct consisting of an action or omission is attributable to the State under international law; and that conduct constitutes a breach of an international obligation of the State.<sup>36</sup>

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<sup>32</sup>PPNS KLH is the Civil Investigators of Environmental Ministry of the Republic of Indonesia.

<sup>33</sup>Multi-doors mechanism is a case management guidelines launched by the Police, the Ministry of Environment and the General Attorney to deal with cases related to natural resources and forestry, especially the problem of forests and peat lands.

<sup>34</sup>Laely Nurhidayah, *op.cit*, p.5

<sup>35</sup>Article 1 of Draft articles on Responsibility of States for Internationally Wrongful Acts

<sup>36</sup>Alan Khee-Jin TAN, 2015, *The ‘Haze’ Crisis in Southeast Asia: Assessing Singapore’s Transboundary Haze Pollution Act 2014*, Singapore, NUS Law Working Paper 2015/002, p.6

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When a state causes an injury to another state, the responsible state is liable to make full reparation to the injured state. Under Article 31 Draft Article on Responsibility of State for Internationally Wrongful Act, reparation may take the form of restitution, compensation, and satisfaction.<sup>37</sup>

1. Restitution: restitution involves the restoration of a situation that existed before the wrongful act was committed, provided that this is possible does not impose a greater burden on the responsible state than compensation.<sup>38</sup> A state responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:<sup>39</sup>
  - a. is not materially impossible;
  - b. does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation
2. Compensation: the state responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.<sup>40</sup>
3. Satisfaction: the state responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.<sup>41</sup> Satisfaction may consist of in an acknowledgment of the breach, an expression of regret, a formal apology.<sup>42</sup> Satisfaction will be necessary where restitution or compensation is inadequate.<sup>43</sup>

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<sup>37</sup>Ademola Abass, 2012, *International Law: Text, Cases, and Materials*, New York, United States, Oxford University Press, p.295

<sup>38</sup>*Ibid*, p.295

<sup>39</sup>Article 35, Draft Article on Responsibility of State for Internationally Wrongful Act

<sup>40</sup>Article 36, Draft Article on Responsibility of State for Internationally Wrongful Act

<sup>41</sup>Article 37, Draft Article on Responsibility of State for Internationally Wrongful Act

<sup>42</sup>Muhammad Naqib Ihsan Jan, *op.cit*, p.234

<sup>43</sup>Ademola Abass, *op.cit*, p.296

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Based on the state responsibility theory of International Law Commission's Draft Article on Responsibility of State for Internationally Wrongful Act, the Indonesian government should be responsible for the transboundary haze pollution.

The first responsibility that must be carried by the Indonesian government based on the concept of the state responsibility in international law is restitution. Indonesia should perform the restoration of situation to the affected countries of transboundary haze pollution until the original condition of a state before affected by haze pollution either material loss or immaterial losses as a form of state responsibility at the highest level. Indonesia also have to pay compensation to the affected countries by replacing the losses caused by haze pollution and convince the neighboring countries that the pollution caused by the haze will not be repeated again. Then, in conditions where the replacement of economically, either restitution or compensation do not allow, acknowledgment of the breach, an expression of regrets, and a formal apology become a form of responsibility that must be done by the state that led to the haze pollution.

Many environmentalists hold that the principle for transboundary pollution, as declared in Principle 21 of the Stockholm Declaration, is now a norm of customary international law.<sup>44</sup> To cause damage to other countries is considered as a breach of international law. States are supposed to avoid negative externalities and to compensate for the damage the cause to other states. States are supposed to terminate the activity that led to the occurrence of externalities.<sup>45</sup>

Principle 21 from the 1972 Stockholm Conference has become one of the most important principles used in international environmental law.<sup>46</sup> It states 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 policies, and the responsibility to ensure that activities*

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<sup>44</sup> Simon S.C. Tay, 1998, *South East Asian Forest Fires: Haze Over ASEAN and International Environmental Law*, Hoboken, United Kingdom, Blackwell Publishers Ltd, p.202

<sup>45</sup>Henriette Litta, 2012, *Regimes in Southeast Asia: an Analysis of Environmental Cooperation*, Germany, Springer Science Business Media. p.97

<sup>46</sup> Ademola Abass, *op.cit*, p.622

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*within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.*<sup>47</sup>

Besides, in international law, states are not allowed to conduct or permit activities within their territories, or in common spaces, without regard for the rights of other states or for the protection of the environment<sup>48</sup>. This point is referred to as the principle of “good neighborliness”<sup>49</sup> or “*sic utere tuo ut alienum non laedes*” in Article 74 of the UN Charter.

The Principle refers to social, economic and commercial matters, but has been extended to environmental matters by rules promoting international cooperation. It applies particularly to activities carried out in one state that might have adverse effects on the environment of another state or in areas beyond national jurisdiction.<sup>50</sup>

The commitment to environmental cooperation is reflected in many international agreements and supported by state practice. According to international lawyer Allen Tan, state responsibility and liability for Indonesia under international law for the 1997-98 fires can clearly be made out because Indonesia failed to “exercise its due diligence obligation to prevent and punish the activities of its private citizens who were deliberately setting fire.”<sup>51</sup>

## **7. The Responsibility After Ratification of AATHP**

To reduce the impacts of transboundary haze pollution, the ASEAN countries realize that they need to strengthen national policies and strategies to prevent and mitigate the land and forest fires that cause the transboundary haze pollution. The ASEAN Agreement on Transboundary Haze Pollution is an international agreement that made between the countries in the written form.

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<sup>47</sup> Principle 21 of Stockholm Declaration 1972, Declaration of the United Nations Conference on the Human Environment

<sup>48</sup> Mirjam van Harmelen, Matthijs S. van Leeuwen and Tanja de Vette, 2005, *International Law of Sustainable Development: Legal Aspects of Environmental Security on the Indonesian Island of Kalimantan*, The Hague, Netherlands, Institute for Environmental Security, p.35

<sup>49</sup> Article 74 of the United Nations (UN) Charter, <http://www.un.org/en/documents/charter/chapter11.shtml>

<sup>50</sup> Regina S. Axelrod and Stacy D. Van Deveer's, 2014, *The Global Environment: Institutions, Law, and Policy*, Fourth Edition, California, CQ Press an Imprint of SAGE Publications, p.66

<sup>51</sup> Henriette Litta, *op.cit.*, p.97

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According to Article 2 of the Vienna Convention the Law of Treaties (1969):

*“Treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”*<sup>52</sup>

The definition of international agreement also stated in the Article 1 of Law on Diplomatic Relationship (1999):

*“Treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”*<sup>53</sup>

Therefore, it can be concluded that the international agreement is all agreements made by the state as a subject of international law, which is governed by international law, binds the state (parties) and have legal consequences.<sup>54</sup>

In international law, international agreement that have been made, will create binding obligations for the state (the parties), and the forces binding of international agreements stated in the Article 26 Vienna Convention on the Law of Treaties 1960: *“Every treaty in force is binding upon the parties to it and must be performed by them in good faith”*<sup>55</sup> or it called as the principle of *pacta sunt servanda*.<sup>56</sup>

As the sovereign country, Indonesia has been actively involved in diplomatic relationships and established the international agreements with other countries both bilaterally and multilaterally. In implementing the International agreements, Indonesia follows the principle of primacy of national law which means that the national law has a higher status than international law.

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<sup>52</sup>Article 2, 1969 Vienna Convention on the Law of Treaties

<sup>53</sup> Article 1, Law on Diplomatic Relationship 1999

<sup>54</sup>Boer Mauna, 2013, *Hukum Internasional: Pengertian, Peranan dan Fungsi dalam Era Dinamika Global*, Bandung, P.T. Alumni, p.85

<sup>55</sup> Article 26, 1969 Vienna Convention on the Law of Treaties

<sup>56</sup>*Pacta Sunt Servanda* is a Latin term which means agreements must be kept. It is the principle in international law which says that international treaties should be upheld by all the signatories. The rule of *pacta sunt servanda* is based upon the principle of good faith. The basis of good faith indicates that a party to the treaty cannot invoke provisions of its domestic law as a justification for a failure to perform. The only limit to *pacta sunt servanda* is the peremptory norms of general international law known as “*jus cogens*” which means compelling law.

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Based on the agreement of the countries that have ratified AATHP, there is a main objective contained in Article 4 (point 1) of AATHP, namely:

*“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 systems, exchange of information and technology, and the provision of mutual assistance.”<sup>57</sup>*

Article 27 of ASEAN Agreement of Transboundary Haze Pollution also states:

*“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.”*

It means that, even if there is a willful breach of the clauses in the agreement it will not lead to any national or international liability and that it can be resolved only through friendly cooperation.<sup>58</sup> After ratification the ASEAN Agreement on Transboundary Haze Pollution, Indonesia as the pollutant country cannot be required to pay compensation fully because it was a shared responsibility of the ASEAN countries. Shared responsibility means Indonesia should be responsible along with another ASEAN Countries in addressing transboundary haze pollution.

By ratifying the AATHP Indonesia can avoid the lawsuits of international law of transboundary haze pollution problem. Although based on the international law of state responsibility Indonesia can be required by other countries to compensate the affected countries by haze pollution from burnt land in Indonesia. Because of that, after ratification of the ASEAN Agreement on Transboundary Haze Pollution, Indonesia cannot be blamed because it was the responsibility of the ASEAN countries, despite the emergence of the haze pollution originating from Indonesia. Beside, in AATHP, the addressing haze pollution will not make the Indonesia legal system change as a result of the ratification of the agreement.

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<sup>57</sup> Article 4, ASEAN Agreement on Transboundary Haze Pollution

<sup>58</sup> Ayyappan Palanissamy, Haze Free Air in Singapore and Malaysia-The Spirit of the Law in Southeast Asia, *International Journal of Education and Research*, Montreal, Contemporary Research Center, Vol.1 No. 8 August 2013. p.4



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## **8. Conclusion**

Based on the description in the previous chapter, the research can be concluded as follows: Before ratification the ASEAN Agreement on Transboundary Haze Pollution, the first responsibility of Indonesian government to the haze pollution based on the International law of state responsibility is restitution that Indonesia should perform the restoration of the situation to the affected countries to the original condition before they were affected. Then, Indonesia has to pay compensation to the affected countries by replacing the loss caused by haze. The last is Indonesia should undertake the satisfaction such as expression of regret and offer an apology and it will be necessary where the restitution and compensation is inadequate.

After ratification the ASEAN Agreement on Transboundary Haze Pollution, Indonesia as the pollutant country of haze pollution in Southeast Asia cannot be required to pay compensation fully because it was a shared responsibility of the ASEAN countries. Indonesia also can avoid lawsuits of international law because of transboundary haze pollution.

## **9. Suggestion**

The Indonesian Government have to undertake preventive action, which prevents forest fires that often occur as a result of land clearing, so that the haze pollution which caused by land and forest fire will not happen again. The government also has to educate the farmers on how to open land effectively without burning it and if forest fires cannot be overcome and avoided, Indonesia has to ask for help to another countries such as Singapore and Malaysia as stated in AATHP.

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