TRANSNATIONAL CORPORATION RESPONSIBILITY CONCERNING TRANSBOUNDARY HAZE POLLUTION UNDER POLLUTER PAYS PRINCIPLE: A CASE STUDY OF SOUTHEAST ASIA

A BACHELOR DEGREE THESIS

By:

GANDAR MAHOJWALA PARIPURNO

Student Number: 12410038

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GANDAR MAHOJWALA PARIPURNO

Student Number: 12410038

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Nandang Sutrisno, S.H., M.H., LL.M., Ph.D.

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Defended before the Board of Examination

On 18th April 2018

And declared acceptable

Yogyakarta, 18th April 2018

Board of Examination	**Signature**
1. Chief Examiner: Nandang Sutrisno, SH., LLM., M.Hum., Ph.D	
2. Examiner 1 : Dra. Sri Wartini, SH., M.Hum., Ph.D	
3. Examiner II : Drs. Agus Triyanta M.A., M.H., Ph.D	

International Program

Faculty of Law

Universitas Islam Indonesia

Dean,

Dr. Aunur Rohim Faqih, SH., M.Hum

NIK: 844100101

SURAT PERNYATAAN
ORISINALITAS KARYA ILMIAH BERUPA TUGAS AKHIR MAHASISWA FAKULTAS HUKUM UNIVERSITAS ISLAM INDONESIA

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Nama : **GANDAR MAHOJWALA PARIPURNO**
No. Mahasiswa : **12410038**

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Dibuat di : Yogyakarta
Pada tanggal : 22 Desember 2017



Pembuat pernyataan

GANDAR MAHOJWALA PARIPURNO

CURRICULUM VITAE

Name: Gandar Mahojwala Paripurno

Place and Date of Birth: Yogyakarta, 11 September 1994

Phone Number: +6281 2297 80818

E-mail: gandarmahojwala@gmail.com

Address : Perumahan UPN No. A-42, Wedomartani, Ngemplak, Sleman, Daerah Istimewa Yogyakarta..

Education Background

1. International Program Law Department of Universitas Islam Indonesia, International Law Major, Concentrating in International Environmental Law.
2. SMA Budi Mulia Dua, Yogyakarta.
3. SMPN 4 Depok, Yogyakarta.
4. SD Adisucipto 1, Yogyakarta.

Organizational Experiences

1. Head of Senior Council in Unisi Scout Movement, 2016 – 2017.
2. Journalist and Staff of Human Resources in KEADILAN Student Press, 2013 – 2014.

Working Experiences

1. Lawyer Assistant, Legal Consultant, and Staff of Campaign and Research Division in Yogyakarta Legal Aid Institute (YLBHI), March 2016 – Present.
2. Board of Trustee in Kerabat Kaum Miskin Kota (ex-Save Street Children Yogyakarta), December 2017 – Present.
4. Founder of Yayasan Kerabat Kaum Kota, 2016.
3. Research Advisor in Budi Mulia Dua Senior High School, January – August 2017.
5. Head of Advocacy Division in Save Street Children Yogyakarta, 2014 – 2015.

Publication

1. *Catatan Hak Asasi Manusia Tahun 2017*, Yearly Human Rights Report of Yogyakarta Legal Aid Institute, as Writer and Editor. (2017)
2. *Kabut Kelam Sepanjang Tahun – Rapor Merah Pelanggaran Hak Asasi Manusia*, Yearly Human Rights Report of Yogyakarta Legal Aid Institute, as Writer and Editor. (2016)

Languages

Bahasa Indonesia (Native)
English (Fluent speaking, writing, reading and listening)

MOTTO

"Know that the life of this world is but amusement and diversion and adornment and boasting to one another and competition in increase of wealth and children – like the example of a rain whose [resulting] plant growth pleases the tillers; then it dries and you see it turned yellow; then it becomes [scattered] debris. And in Hereafter is severe punishment and forgiveness from Allah and approval. And what is the worldly life except the enjoyment of delusion."

The Holy Quran, Surah Al-Hadid [57:20]

This thesis is dedicated to Mom and Dad,

with love that undescribed.

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ABSTRACT

Forest fire – which happen in Indonesia especially Sumatera and Kalimantan – leading to transboundary air pollution have occurred since the 1980s and still occur until 2015. It affect Indonesia, Malaysia, and Singapore. This pollution cannot be blamed on Indonesia alone. Malaysia and Singapore is also taking advantage of the plantation in Indonesia, and their transnational corporations taking part as fire contributor. Writer emphasize the urgency of compensation from the corporation that making pollution that happen. Thus, there is two problem arised. How is ASEAN Agreement on Transboundary Haze Pollution to address responsibility of polluter? How about the implementation of Polluter Pays Principle by Indonesia, Singapore, and Malaysia related to the addressing responsibility of transnational corporation – as the corporation that contributing in the fire? This article is a juridical-normative writing with a descriptive form. The outcomes are find out that the ASEAN Agreement does not have any dispute settlement mechanism or even to seek responsibility from perpetrator. The agreement only emphasize the coordination to mitigate the haze for ASEAN members. Thus, the responsibility is back on the domestic regulation of the state to seeking compensation from polluters. Indonesia and Singapore is actively punish the corporation that done the pollution by their own regulation. Meanwhile, Malaysia is more focused in ASEAN Agreement, and avoiding any legalistic manners to punish the corporation. This thesis found out that every decision to-punish or not-to-punish the corporation is based on the interest of every states. It is being the further task for the three states – as the producer and the victim of the pollutin itself – to find out the way to stop pollution and seeking compensation of corporation by considering the interest of each states.

Keywords: International Environmental Law, Transnational Corporation, Polluter Pays Principle.

Table of Contents

CHAPTER I **4**

INTRODUCTION

A. Context of Study 4

B. Problems Formulation 11

C. Research Objectives 11

D. Definition of Terms 11

E. Theoretical Review 13

1. ASEAN and Environmental Issue 13

2. Corporation and Environmental Damage 13

3. Different Concept of Transnational Corporations and Non Transnational Corporation 15

4. Transnational Corporation Conducts 16

5. Legal Instruments of Transnational Corporation 18

6. Polluter Pays Principle as Legal Instruments to seek Corporations Responsibility 21

7. Transnational Corporations and Non-Transnational Corporations Difference related to Environmental Damage 22

F. Research Methods 22

G. Systematic of Writing 23

CHAPTER II **25**

GENERAL OVERVIEW ON POLLUTER PAYS PRINCIPLE AND TRANSNATIONAL CORPORATION

A. The Development of Polluter Pays Principle 25

1. The First Generation of Polluter Pays Principle 25

2. The Development of Polluter Pays Principle after OECD Guiding Principle 28

B. Polluter Pays Principle in International Law Perspective 30

1. International Law Perspective on General Principle of International Law 30

2. Polluter Pays Principle as General Principle of International Law 34

3. The Variety of Polluter Pays Principle Implementation 36

C. Urgency of Polluter Pays Principle Implementation 41

1. Mainstreaming the Polluter Pays Principle 41
2. PPP Role as Human Rights Protection Instrument 45
D. Transnational Corporation as Polluters Subject 49
E. Development of Transnational Corporation and Human Rights 52
F. Prohibition of Slash and Burn Practice in Al-Quran Teachings as Importance to Protect Human and Environment 57
CHAPTER III 63
IMPLEMENTATION OF POLLUTER PAYS PRINCIPLE IN ASEAN AND ITS FUNCTION TO REGULATE TRANSNATIONAL CONDUCT IN TRANSBOUNDARY HAZE
A. ASEAN Norms and 'ASEAN Way' as Root of Policy Making in ASEAN 63
1. ASEAN Norms 63
2. ASEAN Way 68
3. Role of ASEAN Norms and 'ASEAN Way' in Affecting Policy Making in ASEAN and Its Challenge 69
B. Environmental Institution and Policy Making in ASEAN 72
C. ASEAN Agreement as Current Action for Mitigating Transboundary Haze Pollution 76
D. Transnational Corporation as Polluter in Southeast Asia Transboundary Haze Pollution 81
E. Polluter Pays Principle Implementation in ASEAN Regional Organization and Its Member State 84
1. Familiarity of Polluter Pays Principle in the ASEAN 84
2. Polluter Pays Principle in ASEAN Member States 87
3. Adoption of Polluter Pays Principle in Transboundary Haze Pollution Cases 89
4. Victim-Pays and Government-Pays Practice in Transboundary Haze Pollution 91
F. Polluter Pays Principle Practice in Addressing TNC Responsibility in Southeast Asia Haze 93
1. Implementation in Indonesia by Environmental Protection and Management of Environment Act 94
2. Implementation in Singapore by Transboundary Haze Pollution Act 96
3. Portrait of Malaysia Position Regarding to Strict Enforcement on Transnational Corporation 102
CHAPTER IV 106
CONCLUSION AND RECOMMENDATION

A. Conclusion 106
B. Recommendation..... 108
REFERENCES..... 110

CHAPTER I

INTRODUCTION

A. Context of Study

Environmental damage related to economical activities has been a long-felt in humanity life.[1] Even, air pollution is known as one of the environmental damage being concerned nowadays.[2] While many developed states in 1950s encounter with smoke pollution called "smog" as a result of fuel combustion,[3] Association of Southeast Asian Nations (ASEAN), especially Indonesia, Singapore, and Malaysia feel the same way because of haze pollution as a result of forest fires. This issue cannot be separated from yearly event occurred in ASEAN, especially in last eighteen years.[4] Major episodes of fire and transboundary haze pollution occurred in the region during the 1980s and 1990s.[5] Mainly, fires occur in Indonesian's Island, such as Sumatera and Kalimantan.[6] This event in 2015 and on the other year could not be separated from the slash and burn practices done in plantation area.[7] Practically, slash and burn practice firstly

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[1]TriyanaYohanes, *HukumEkonomiInternasional* (Yogyakarta: CahayaAtmaPustaka, 2015) Page 187.
[2]M. HasyidAriman, *FungsiHukumPidanaTerhadapPerbuatanPencemaranLingkunganHidup* (Jakarta: Ghalia Indonesia, 1988) Page 17.
[3]TriyanaYohanes. ***Op.Cit.***
[4]Luca Tacconi, "KebakaranHutan di Indonesia: Penyebab, Biaya, danImplikasiKebijakan," *CIFOR Occasional Paper,* No. 38(i) (2003), Page 1.
[5] ASEAN Haze Action Online, "Information on Fire and Haze," Retrieved on 1 November 2017 fromhttp://haze.asean.org/about-us/information-on-fire-and-haze/
[6]***Ibid.***
[7]IndroTjahjono,*Hutan Kita Dibakar*(Indonesia: ISAI-SKEPHI, 1999) Page 13.

implemented in 1994 by local people[8] and eventually become a habit of plantation companies.[9] Thus, it was obvious that the forest fires significantly triggered by fire that deliberately rise, not naturally started.[10] This practice have big economical value and give big beneficial for the corporation.[11] Slash and burn is also known as cheaper way to clear the last plantation.[12] It is obvious that business making environment damage is a cliché issue[13], but never ends until this era.

In 2015, forest fires happened again, and it was different from previous years. Its region was extensively affected wider areas, andthe drought and El Nino phenomenon massively affected the forest and plantation in much longer periods.[14] Pollution itself is making impact outside of Indonesian sovereignty.[15] The haze resulted on decreasing quality of air in Indonesia and its neighbourhood nations.[16]The haze resulted some people died.[17] Furthermore, forest fires reached

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[8]YayatRuchiat, "PenyebabdanDampakKebakaranHutandanLahan: StudiKasusTumpangTiti, KabupatenKetapang, Kalimantan Barat," *MakalahLokakaryaPerencanaanProyek Community Development Through Rehabilitation of Imperata Grasslands Using Trees: A Model Approach Growing VitexPubescens for Charcoal Production in Kalimantan,* ACIAR *(*Pontianak: 2001) Page 1.

[9]BBC News, "South East Asia Haze: What is Slash-and-Burn?," Retrieved on 1 November 2017 from http://www.bbc.co.uk/news/business-23026219

[10]Daniel Mudiyarso, *SepuluhTahunPerjalananNegosiasiKonvensiPerubahanIklim* (Jakarta: Kompas, 2003) Page 11.

[11]KementerianKesehatan RI, *Pusat Data danInformasiKementerianKesehatan RI: MasalahKesehatandanKabutAsapKebakaranHutandanLahanTahun 2015* (Jakarta: Kemenkes RI, 2015) Page 1.

[12]The Guardian News, "Indonesia's Forest Fires: Everything You Need to Know," Retrieved on 1 November 2017 from http://www.theguardian.com/sustainable-business/2015/nov/11/indonesia-forest-fires-explained-haze-palm-oil-timber-burning

[13]TriyanaYohanes, ***Op.Cit.,***Page 187.

[14]KementerianKesehatan, ***Loc. Cit.,*** Page 2.

[15]ApichaiSunchindah, "Transboundary Haze Pollution Problem in Southeast Asia: Reframing ASEAN's Response," *ERIA Discussion Paper Series,* ERIA (December, 2015) Page 2.

[16]ASEAN Haze Action Online, "Information on Fire and Haze," ***Loc.Cit.***

[17]JaringanKerjaPenyelamatHutan Riau, *CatatanAkhirTahun 2015* (Riau: Jikalahari, 2015) Page 2.

impact on ecological damage, declining biodiversity, degradation economic value of forest,[18]land productivity,[19]and climate change in micro and global scope.[20] Riau Forest Rescue Network (Jikalahari) and Eyes on the Forest Network found out that the 2015 fire happen majorly in peatlands, which obviously trigger carbon release to the air that done by plantation corporation in Indonesia.[21] In this ecological perspective, at least two things to be most important thing to concern as effect of the forest fire: protection of peat lands and climate change issue. Both of these issues carry capacity to affect each other.[22] World Bank analyzed the costs of Indonesia's fires and haze impacts. In 2015, fires cost Indonesia an estimated USD 16.1 billion.[23] Agriculture and forestry have sustained estimated losses and damages of USD 8.8 billion in 2015.[24]

The main actor of this burning is corporation, and it could be seen from the fact that fifty percent of all agricultural land in the country being controlled by foreign interests, especially Malaysian and, to a lesser extent, Singaporean companies.[25] Malaysia is the biggest investor in the Indonesian oil palm

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[18]Luca Tacconi, ***Loc.Cit.,***Page 9.
[19]FachmiRasyid, "PermasalahandanDampakKebakaranHutan," *JurnalLingkarWidyaiswara*, Volume 1(4) (2014)Page 53.
[20] ***Ibid.***
[21]JaringanKerjaPenyelamatHutan Riau, ***Loc.Cit.,***Page 19.
[22]FAO and Wetlands International, *Mitigation of Climate Change in Agriculture Series 5: Peatlands, Guidance for Climate Change Mitigation Through Conservation, Rehabilitation, and Sustainable Use* (Italy: FAO & WI, 2012) Page 10.
[23]World Bank, *The Cost of Fire: An Economic Analysis of Indonesia's 2015 Fire Crisis* (Jakarta, World Bank, 2016) Page 1.
[24]***Ibid.,***Page 4.
[25] Helena Varkkey, "Transboundary Haze and Human Security in Southeast Asia: National and Regional Perspectives," *Georgetown Journal of Asian Affairs*, Volume 3(1), (2016) Page 44.

sector.[26]Additionally, at least seven firms with substantial oil palm or pulp and paper operations are listed in Singapore.[27]Singapore also serves as the headquarters to several major plantation companies.[28]The question arising: does that corporation could be defined as transnational corporation (TNC)? United Nations Sub Commission on the Promotion and Protection of Human Rights defined Transnational Corporation as an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - regardless their legal form, their home country or country of activity, and whether it is taken individually or collectively.[29] Thus, because the half of companies that exist in plantations area in Indonesia is operationg in two country at least (Indonesia and Singapore or Indonesia and Malaysia), it fulfill the definition of the United Nations about TNC.

TNC must be pursued for its responsibility, compared to local companies. It is based on two reasons. First, the transnational corporation is the half contributors of Southeast Asia Haze, and damage to the environment in general. Even assuming that the use of fires is equal among the different players, prosecuting the TNC makes half of the fires and haze problem resolved.[30]Second,

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[26] Daniel Helimann, "After Indonesia's Ratification: The ASEAN Agreement on Transboundary Haze Pollution and its Effectiveness As a Regional Environmental Governance Tool," *Journal of Current Southeast Asian Affairs*, Volume 34 (3) (2015) Page 109.

[27] ***Ibid.***

[28] Helena Varkkey, ***Loc.Cit.,*** Georgetown Journal of Asian Affairs, 3(1), 2016, Page 47.

[29]U.N Sub Commision on the Promotion and Protection of Human Rights, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights," (U.N. Doc. E/CN.E/Sub.2/2003/12/Rev.2, 2003) Article 20.

[30] Alan Khee-Jin TAN, "The Haze Crisis in Southeast Asia: Assessing Singapore's Transboundary Haze Pollution Act 2014," *National University of Singapore Working Paper 2015/002*, NUS, (2015), Page 40.

the power of transnational corporation cannot be doubted.[31] Most TNCs now conduct their operations through often complex structures of holding and subsidiary firms,[32] Alice de Jonge, senior lecturer in the business law of Monas University, analyse that the rationale for interposing subsidiaries is easily understood to minimize risk and insulates the parent.[33] For instance, the complexity structures of APRIL and APP is obviously created to protect the parents company from taking responsibility of subsidiary companies. APRIL and APP have a lot of subsidiary companies in Riau, which technically done the action of slash and burn.[34] The complexity of the structures successfully makes the domestic law enforcement of Indonesia hardly reaches the subsidiary companies, moreover parents company of transnational corporation. It could be seen from the existence of a letter of termination of investigation case for 15 corporations that are done slash-and-burn in Riau,[35]lack understanding of the law enforcer about environmental criminal law,[36] even weakness in procedural law in enforcing the

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[31]Sri Wartini, JamaludinGhafur, "KebijakanHukumTerhadapTanggungJawabTransnasional Corporations (TNCs) atasPelanggaranHakMenikmatiLingkungan yang Sehat di Indonesia," *JurnalHukumIusQuiaIustum,* Volume 21(4) (Oktober, 2014) Page 656.

[32]Alice de Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment* (UK: Edward Elgar Publishing Limited, 2011) Page 83.

[33]***Ibid.,*** Page 84.

[34]Jaringan Kerja Penyelamat Hutan Riau, ***Loc.Cit.,*** Page 22.

[35]Tempo, "WalhiKerahkan 13 PengacaraPraperadilankan SP3 Polda Riau," Retrieved on 1 November 2017 from https://m.tempo.co/read/news/2016/11/12/058819713/Walhi-Kerahkan-13-Pengacara-Praperadilankan-SP3-Polda-Riau

[36]CNN News, "PenegakHukumDinilaiLalaiBelumPahamHukumLingkungan," Retrieved on 1 November 2017 from http://www.cnnindonesia.com/nasional/20160830205100-12-154976/penegak-hukum-dinilai-belum-paham-hukum-lingkungan/

law[37]. WALHI, an environmental organization, also demands the government to enforce the sanctions to its masterminds, so the chain of sanctions is not interrupted.[38]

However, there is no evaluation or follow-up regarding to case of forest fire, only being more reactive year by year.[39] In fact, its anticipation is actually not too difficult, because the origin and cause of it is generally always the same.[40] Many rules were made but difficult to be implemented.[41] Thus, ApichaiSunchindah, Policy Adviser in ASEAN, giving comment that the effective implementation in this measure is likely to be problematic due to the extra-juridical, territorial, and national sovereignty issues involved coupled with the difficulty of making irrefutable attribution or correlation between cause and effect of the problem.[42] Facing its problem, ASEAN try to mitigate transboundary haze by making agreement called ASEAN Agreement on Transboundary Haze Pollution, known as centrepiece of ASEAN efforts to combat haze and at the core of the haze regime.[43]Thus, in effort to combat transboundary haze pollution and seek responsibilities of transnational corporations as the polluter, it able to be

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[37]Okezone News, "Menteri LHK: PenegakanHukumKebakaranHutanMasihLemah," Retrieved on 1 November 2017 from http://news.okezone.com/read/2016/08/12/337/1462254/menteri-lhk-penegakan-hukum-kebakaran-hutan-masih-lemah

[38]Antara News, "WalhiInginPenegakanHukumKarhutlaDipertegas," Retrieved on 1 November 2017 from http://www.antaranews.com/berita/597031/walhi-ingin-penegakan-hukum-karhutla-dipertegas

[39]PopiTuhulele, "KebakaranHutan di Indonesia dan Proses PenegakanHukumnyaSebagaiKomitmendalamMengatasiDampakPerubahanIklim," *SupremasiHukum,* Volume 3(2) (Desember, 2014) Page 120.

[40]***Ibid.***

[41]***Ibid.,***Page 119.

[42]***Ibid.***

[43] Daniel Helimann, ***Loc.Cit.,*** Page 96.

done by ASEAN as regional organization, or domestic state policy and regulation by Indonesia, Malaysia, and Singapore. Hence, this writing will also figure out the role of the ASEAN Agreement on Transboundary Haze Pollution.

In this writing, polluter pays principle (PPP) implementation is also used to analyze the responsibility process in transboundary haze pollution, limited on Indonesia, Singapore and Malaysia because those state is the most related states in context of perpetrator and victim. PPP known as one of the is one of the international general principle of law[44] and considered to be the most efficient economic instrument in modern environmental policies.[45] In simple terms PPP means that the cost of pollution abatement should be paid by the polluters and not by their governments.[46]PPP could be used by regional organization – for instance EU that already adopt PPP continously – or used in domestic regulation. This principle is known as important role in national and international environmental policy.[47]

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[44]Malcolm N. Shaw, *International Law* (New York: Cambridge University Press, 2008), Page 870.
[45]Muhammad Munir, "History and Evolution of the Polluter Pays Principle: How an Economic Idea Became a Legal Principle?" *Social Science Research Network*, Retrieved on 1 November 2017 from https://ssrn.com/abstract=2322485/, Page 2.
[46]***Ibid.***
[47]Margaret Rosso Grossman, "Agriculture and the Polluter Pays Principle: An Introduction," *Oklahoma Law Review*, Volume 59 (2006) Page 3.

B. Problems Formulation

1. How is the role of the ASEAN Agreement on Transboundary Haze Pollution to address responsibility of polluter?

2. How is the Polluter Pays Principle implementation by Indonesia, Singapore, and Malaysia related to the Southeast Asia transboundary haze pollution in addressing responsibility of transnational corporations?

C. Research Objectives

The objectives of this research are to:

1. Figure out the role of ASEAN Agreement on Transboundary Haze Pollution to address responsibility of polluter.

2. Analyze the implementation of Polluter Pays Principle by Indonesia, Singapore, and Malaysia related to the Southeast Asia transboundary haze pollution in addressing responsibility of transnational corporations.

D. Definition of Terms

1. *Transnational Corporation*is defined as an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.[48]

2. Haze Pollution is defined as smoke resulted from land and/or forest fire which causes deleterious effects of such a nature as to endanger human

[48]U.N Sub Commision on the Promotion and Protection of Human Rights, Norms, ***Loc.Cit.,***

health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment.[49]

3. Transboundary Haze Pollution is defined as haze pollution whose physical origin is situated wholly or in part within area under the national jurisdiction of one Member State and which is transported into the area under the jurisdiction of another Member State.[50]

4. *Polluter-Pays* Principle is defined as that the polluter should bear the cost of pollution prevention and control measures, such as measures to reduce the pollutant emissions at source and measures to avoid pollution by collective treatment of effluent from a polluting installation and other sources of pollution.[51] The Polluter-Pays Principle also bear the cost of damage caused by pollution, and would be liable and would have to pay compensation to any victims.[52]

[49]ASEAN, ASEAN Agreement on Transboundary Haze Pollution, Article 1(6).
[50]***Ibid.,*** Article 1(13).
[51]Organisation for Economic Co-operation and Development, *The Polluter Pays Principle: OECD Analyses and Recommendations* (Paris: OECD, 1992) Page 5.
[52]***Ibid.,*** Page 6.

E. Theoretical Review

1. ASEAN and Environmental Issue

ASEAN was established with the main objective to enhance the region's economy, environmental protection is not include as one purpose of establishment of this regional organization.[53]Problems related to the protection and conservation of the environment in the beginning are that there were not discussedin the framework of cooperation. Therefore, ASEAN is considered as the most under-developed organization in terms of environmental protection.[54]

However, the appearance of the Stockholm Declaration of 1972 have inspired the leaders of ASEAN to develop, with the great help of the United Nations Environment Programme, ASEAN Environment Programme I (ASEP I) established in 1997.[55]ASEP I, which was then endorsed by the ASEAN Ministerial Meeting on the Environment first, marked the beginning of the ASEAN regional cooperation in the environmental field.[56] ASEAN Summit and Annual Ministerial Meeting have been very active in holding meetings to negotiate a response to environmental issues in ASEAN.[57]

2. Corporation and Environmental Damage

Environment as public property was seen as the reason why environmental

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[53]SukandaHusin, *HukumLingkunganInternasional*(Depok: RajagrafindoPersada, 2016) Page 100.
[54] ***Ibid.***
[55]***Ibid.,*** Page 101.
[56]***Ibid.***
[57]***Ibid.,*** Page 102.

damage may emerged.[58]As the result of it, people have less sense of belonging.[59] Business making environment damage is a cliché issue,[60] many environmental conflict arise by the background of corporation business. A case related to plan on establishing Electric Steam Power Plant (PLTU) in Batang possessed pollution risk in form of fly ash, bottom ash as a form of land degradation, coastal ecosystem and sea ecosystem damage as result of heat spread.[61] Beside that, Cement Plant Project of Gresik in Sukolilo, Pati, would threat 72 water spring as those mining process could damage or destroy surrounding karst area and its water spring, as well.[62] In terms of international case, acid rain poured in eastern Canada was occurred as the result of industries activities located in US.[63] Although these projects established the greatest possible happiness for the greatest number principle, it will still trigger disharmony and injustice.[64]

However in practice, the results of legal effort in environmental issues are not satisfying.[65]This can be seen in environmental cases, which have tendency to be treated as civil case.[66] In other words, environmental disputes could be settled when there are compensations of the material and immaterial suffers are

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[58]Sudharto P. Hadi, *BungaRampaiManajemenLingkungan* (Yogyakarta: Thafa Media, 2014) Page 274.
[59]***Ibid.***
[60]TriyanaYohanes, ***Op.Cit.,***Page 187.
[61]Sudharto P. Hadi, ***Op.Cit.,***Page 3.
[62]***Ibid.,***Page 42.
[63]***Ibid.,***Page 272.
[64]***Ibid.,***Page 44.
[65]EkoTeguhParipurno, "Environmental Dispute Resolution by Means of Disaster Management Perpsectives to Reduce Potential Conflicts," *Kapai – Journal of Disaster Management & Environment,* Volume46 (April-June, 2007) Page 5.
[66]***Ibid.***

paid.[67]Meanwhile, it is clear that according to the laws, every action results in environmental pollution will be prosecuted with criminal law.[68]

3. Different Concept of Transnational Corporations and Non Transnational Corporation

Transnational corporation is a corporation which done the main activities in various countries, but the number of states that must be achieved so that a corporation can qualify as a transnational company is a matter that debatable.[69]The main thing is that the corporation that run the business not only within the country but also across national borders.[70] Their organization also stretched across political boundaries.[71]Due to so many varieties of the forms of transnational corporation, thus exact definition of transnational corporations according to the law is not required to be used as guidelines.[72]

Compared to non transnational corporation, transnational corporations have different characteristic.[73] Transnational corporations have more power compared to other non transnational corporation, total consumers and perhaps total governmental authorities in terms of business domination and financial strength.[74] They also have accumulated more knowledge about products, markets,

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[67]***Ibid.***
[68]***Ibid.***
[69]Pieter Kuin, *Perusahaan Transnasional* (Jakarta: YOI & PT. Gramedia, 1987) Page 3.
[70]***Ibid.***
[71]***Ibid.***
[72]***Ibid.,*** Page 175.
[73]Sri Wartini, JamaludinGhafur, ***Loc.Cit.,***Page 661.
[74]Mahapatra, ChahalAarti, "Transnational Corporations and Marketing Ethics," *International Journal of Scientific and Management*, Volume 1 (India: 2013) Page 180.

consumer behavior and social consequences of their actions.[75] Transnational corporations also valued more than non transnational corporation, the domestic one or the local one.[76] Thus, transnational corporation have relatively greater access and more long-term oriented sources of finance from development financial institutions than non transnational corporations.[77]

In any capacity, transnational corporations are often connected with the state in terms of respect, protection, fulfillment, enforcement and practice of human rights.[78] Mostly, transnational corporation exist from a non-transnational.[79] Non transnational company extend to other countries with reason of urge to have products or special abilities to offer, and greater demands on overseas markets, and also the obstacles that held in the way of exports to markets.[80]

4. Transnational Corporation Conducts

Transnational corporations evoke particular concern in relation to recent global trends because they are active in some of the most dynamic sectors of national economies.[81] The sectors were consisted such as extractive industries, telecommunications, information technology, electronic consumer goods,

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[75]***Ibid.***

[76]Sumit K Majumdar, "Raising Corporate Debt in India: Has Foreign Ownership Been an Asset or a Liability?",*Transnational Corporations,* Volume 19 (2010) Page 42.

[77]***Ibid.,***Page 51.

[78]Wolfgang Benedek, "Understanding Human Rights," *European Training and Research Centre for Human Rights and Democracy*, ETC Graz (Belgium, Germany, Austria: 2006) Page 24.

[79]Pieter Kuin, ***Op.Cit.,*** Page 8.

[80]***Ibid.***

[81]KhaydaraliYunusov, "The Roles and Responsibilities of Transnational Corporations with Regard to Human Rights", *CuadernosConstitucionales de la CátedraFadriqueFurióCeriol,* Volume 64/65 (2008), Page 187.

footwear and apparel, transport, banking and finance, insurance, and securities trading.[82]

Transnational Corporations do not always behave appropriately. Some are trying to influence politics to secure or maintain an advantageous social environment of their operations. Others bought local businesses and close it, to eliminate rivals. There are various ways to highlight the power that transnational corporation are rich, smart, and feel needed.[83] This is relevant with most common critic for transnational corporation.[84] In relation to natural resources business, Transnational Corporation actively depleted natural resources that could not be renewed, and these corporations have less concerned about the environment.[85]

Environmental damaged and air pollution that done by companies could be determined as international level white collar crime.[86] Typical of the white collar crime is to obtain financial profit.[87] It relevance with the activity of slash and burn as the cheapest method to open the forest, which means more profit could be kept. Transnational corporations have power to negotiate with many states.[88]Those transnational corporations often interfere with the political and economical situationwithin recipient country, and could determine the political course of a country with its economic power – the aim is to gain influence in decision-making

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[82]***Ibid.***
[83]Pieter Kuin, ***Op.Cit.,*** Page 9
[84]Huala Adolf, *HukumEkonomiInternasional: SuatuPengantar, Cetakan ke-5* (Bandung: Keni Media, 2011) Page 71.
[85]***Ibid.,*** Page 72.
[86]MunirFuady, *BisnisKotor: AnatomiKejahatanKerahPutih* (Bandung: Penerbit Citra AdityaBakti, 2004) Page 2.
[87]***Ibid.,***Page 7.
[88]***Ibid.***

in the country.[89]Economic strength and influence of transnational corporations is often expressed that their role may endanger the sovereignty of a state.[90] Approximation of power can be seen how wealth of transnational corporations can exceed the state budget, especially within developing and disadvantaged states.[91]Therefore, Transnational Corporation must be separated from individuals and other legal entity, because it has higher level personality. The legal treatment needs to be distinguished.[92]Overall, the corporation actions are clearly not much affected by the regulations. Only a few corporations adopt regulation in the negotiations, either with the government or unions.[93]

5. Legal Instruments of Transnational Corporation

The international community has become increasingly concerned about the impact of transnational corporations on the exercise of human rights, especially in developing countries where the institutional framework often does not allow a sufficient guarantee of host countries protection of their natural and human resources.[94]There is no binding international law imposing even the most basic of enforceable human rights obligations on TNCs.[95] Moreover, so far as human rights are concerned; only states are subject to mandatory human rights

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[89]Huala Adolf, ***Loc.Cit.,*** Page 71.
[90]***Ibid.***
[91]***Ibid.***
[92]***Ibid.,*** Page 63.
[93]Pieter Kuin, ***Op.Cit.,*** Page 209
[94]KarelVasak, *The International Dimensions of Human Rights*, (USA: Greenwood Press - UNESCO, 1982) Page 660.
[95]Alice de Jonge, ***Op.Cit.,*** Page 147.

requirements established by international law.[96] TNCs, at the global level, are subject to nothing stronger than the 'motherhood-statements' contained in Aspirational Guidelines.[97] Moreover, TNCs are not subjects of international law, and they are subjected to jurisdictions of States where they operate.[98] It is finally become cause, that the regulations that rule the world of business, including transnational business, mostly in the form of national law.[99] Even, TNC regulation in many states is very diverse, and most are not consistent with one another.[100] This is because the harmonization of legislation with international regulations is never happened, due to differences in the interests between big countries with other countries.[101]

Any regulation so far was in voluntary nature, such as UN Global Compact, ILO Tripartite Declaration, and the OECD Guidelines for Multinational Corporation.[102] Even Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights still in soft-law instruments[103] and soft-law still considered as voluntary as well.[104] The United

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[96] ***Ibid.,*** Page 148.
[97] ***Ibid.***
[98] SauliusKatuoka, "Responsibility of Transnational Corporations for Human Rights Violations: Deficiencies of International Legal Background and Solutions Offered by National and Regional Legal Tools," *Jurisprudence,* Volume19(4) (2012), Page 1303.
[99] Pieter Kuin, ***Op.Cit.,*** Page 165
[100] ***Ibid.***
[101] ***Ibid.***
[102] David Weissbrodt, "Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights," *American Journal of International Law,* Volume 97 (2003) Page 913.
[103] ***Ibid.,*** Page 914.
[104] Gordon M. Hickey, "Monitoring and Information Reporting through Regulation: An Inter-Jurisdictional Comparison of Forestry-Related Hard Laws," *Silva Fennica Research Article,* Volume 40 (2) (2006), Page 366.

Nations unsuccessfully attempted to draft an international code of conduct for businesses in the 1970s and 1980s.[105] The Organization for Economic Co-operation and Development (OECD) undertook a similar effort in 1976 when it established its first Guidelines for Multinational Enterprises to promote responsible business conduct consistent with applicable laws.[106] In 1977 the International Labour Organization (ILO) adopted its Tripartite Declaration of Principles Concerning Multinational Enterprises, which calls upon businesses to follow the relevant ILO conventions and recommendations.[107] Further, in January 1999, United Nations Secretary-General Kofi Annan proposed a "Global Compact" of shared values and principles at the World Economic Forum.[108] The Global Compact asks businesses voluntarily to support and adopt nine core principles, which are divided into categories dealing with general human rights obligations, standards of labour, and standards of environmental protection.[109]Other regional organizations and non-governmental organizations have also elaborated general codes of conduct for transnationals.[110] These various initiatives, however, failed to bind all businesses to follow minimum human rights standards.[111]

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[105]David Weissbrodt, ***Loc.Cit.,*** Page 903.
[106]***Ibid.***
[107]***Ibid.***
[108]***Ibid.***
[109]***Ibid.***
[110]KarelVasak, ***Op.Cit.,*** Page 660.
[111]David Weissbrodt, ***Loc.Cit.,*** Page 903.

6. Polluter Pays Principle as Legal Instruments to seek Corporations Responsibility

In case of effective seeking responsibility of corporation in environmental damage, states commonly use the PPP. First reason is that PPP could be considered as an economic policy instruments – which focused on pollution control[112], or even environmental policy.[113] Its first development is related to responsibility of polluters to bear the costs of pollution which means do prevents and controlling any pollution he originates.[114] The further development of the PPP, making the polluters also bear the cost of damage caused by pollution, and would be liable and would have to pay compensation to any victims.[115] Second, this principle put transnational corporation – as commonly who act as polluter – responsible to paid the cost of pollution, not by their governments.[116] The polluter could be a person or an entity.[117] Thus, transnational corporation as an entity could be a subject who responsible in polluter pays principle. Third, this principle have been adopted by many countries[118] and recommended by the OECD to be uniformly applied.[119]

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[112]Muhammad Munir, ***Loc.Cit.,*** Page 12
[113]Barbara Luppi, "The Rise and Fall of the Polluter-Pays Principle in Developing Countries," *International Review of Law and Economics,* Volume 32 (2012) Page 135.
[114]Organisation for Economic Co-operation and Development, ***Loc.Cit.,*** Page 5.
[115]***Ibid.,***Page 6.
[116]Muhammad Munir, **Loc.Cit.,** Page 2.
[117]Organisation for Economic Co-operation and Development, ***Loc.Cit.,*** Page 30.
[118]Stefan Ambec, "Regulation via the Polluter-Pays Principle," *Research Support by project ANR-08-JCJC-0111-01 on "Fair Environmental Policies",* ANR (December 2010) Page 11.
[119]Organisation for Economic Co-operation and Development, ***Loc.Cit.,*** Page 16.

7. Transnational Corporations and Non-Transnational Corporations Difference related to Environmental Damage

The existing regulations in Indonesia only set of corporate responsibility in preserving the environment without distinction between non transnational corporations and transnational corporations.[120] Both of them have different characteristics in many ways such as capital support, technology used, all of which will affect and lead to the size of the environmental damage caused.[121] Transnational Corporations, which are companies supported by a large capital and super-sophisticated technology will surely cause great environmental damage compared to a non-transnational enterprise with limited technological capabilities.[122]

F. Research Methods

1. Source of Data

The source of data was divided into three; primary legal materials, secondary legal materials and tertiary legal materials. The primary legal materials that were used to complete this research consisted of legal instruments in nationals, regional, and internationals scope. The secondary legal materials comprised of books, journals, articles, documents and news that covered various aspects related to this topic.

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[120]Sri Wartini, ***Loc.Cit.*** Page 661.
[121]***Ibid.***
[122]***Ibid.***

2. Data Collection

The process of data collection was done through both desk study by information from the books, journal, articles, documents and news, as well as from national and international laws.

3. Data Approach

The approach in this research used the combination of normative approach, which will be centeredon statute approach, conceptual approach, analytical approach, historical approach, philosophical approach and case approach.

4. Data Analysis

This research appliedqualitative method with descriptive and comparative approach. This was implemented throughdescribing existed data, knowledge and information through assessed opinions of the experts by laws.

G. Systematic of Writing

The systematic of writing on this thesis was made and arranged in four chapters to elaborate a systematic discussion of each issue. The systematics of this thesis wasexplained as follows:

1. Chapter One – Introduction

This chapter consisted of context of study, problem formulations, objectives of study, definition of terms, and theoretical framework.

2. Chapter Two - General Review

This chapter consisted of general review related to international legal instruments of transnational corporations, the trends and development of responsibility through polluter pays principle, the relationship between the activity of pollution and transnational corporations, and the urgency to implement polluter pays principle.

3. Chapter Three - Research Analysis

This chapter consisted of the answer of problem statements. This chapter discussedthe discovery of polluter pays principle to address responsibility for transnational corporations and the role of ASEAN Agreement on Transboundary Haze Pollution

4. Chapter Four - Conclusion and Recommendation.

This chapter will concludedthe discussed matter based on the analysis made by the writer and gives recommendation to the aforementioned issues

CHAPTER II

GENERAL OVERVIEW ON POLLUTER PAYS PRINCIPLE AND TRANSNATIONAL CORPORATION

A. The Development of Polluter Pays Principle

1. The First Generation of Polluter Pays Principle

The polluter pays principle (PPP) is essentially an economic policy for allocating the costs of pollution or environmental damage.[1]Organisation for Economic Co-operation and Development (OECD) paved the way for the formal adoption of the Polluter Pays Principle started by seminar held in summer 1971 about the "Problems of Environmental Economics".[2]Later, the Council of the OECD formally recommended the PPP to be the "Guiding Principle Concerning the International Economic Aspects of Environmental Policies",[3] which got wide acceptance very quickly.[4]

Basic concept of the guiding principle is internalization of external costs, which already being discussed by the economics since 1900's.[5] An external cost, also known as an externality, arises when the social or economic activities of one group of persons have an impact on another group, and requires the polluters to

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[1] Patricia Birnie, *International Law & Environment* (Oxford: Oxford University Press, 2009), Page 322.
[2] Muhammad Munir, ***Loc.Cit.,*** Page 8.
[3] ***Ibid.***
[4] ***Ibid.,*** Page 7.
[5] ***Ibid.,*** Page 4.

pay costs of pollution prevention and control.[6] But, the cost of pollution prevention and control measures adopted to fight pollution should be reflected in the cost of goods and services which cause pollution in production and/or consumption'[7]. Thus, every goods and services that causes pollution in production and/or consumption should bear the cost of externality. It is assumed that to keep production costs low, producer will attempt to cut back on pollution.[8] Moreover, the member states were asked not to subsidize the environmental cost, because such subsidies would create side-effects, particularly distortions in international trade rather than pollution reduction.[9] Even, some countries also still continue to subsidize measures to control pollution.[10]There are several ways of taking account of the cost to internalise external costs.[11] One possibility would be via eco-taxes, i.e. by taxing damaging fuels and technologies according to the external costs caused.[12]Even, OECD's concept of the PPP needs more elaboration.[13]Even, environment standard in OECD is not clear, because it only stated 'to ensure that the environment is in an 'acceptable state".[14]

Even PPP mechanism is making the external costs bear by the polluter, but the weakness of externality is, it may allow the polluter to continue to pollute, as

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[6] Margaret Rosso Grossman, ***Loc.Cit.,*** Page 10.
[7] Pierre-Marie Dupuy, *International Environmental Law* (UK: Cambridge University Press, 2015), Page 72.
[8] Patricia Birnie, ***Op.Cit.,*** Page 322.
[9]***Ibid.***
[10] Margaret Rosso Grossman, ***Loc.Cit.,*** Page 11.
[11] European Commission, *External Costs: Research Result on Socio-environmental Damages due to Electricity and Transport* (Luxemburg: European Commission, 2003) Page 7.
[12]***Ibid.***
[13] Muhammad Munir, ***Loc.Cit.,*** Page 9.
[14] Patricia Birnie, ***Op.Cit.,*** Page 322.

long as the polluter pays the proper price.[15] The preventive function should abate pollution by encouraging polluters to reduce their emissions instead of being pleasure to pay charges.[16]

Other problem is that the specific assumption of this internalisation are difficult to set the limit because several parameters need to be defined, starting with the social cost itself, the probability in the case of an accident or when the effects of an activity are not known with certainty, the determination of the share of each polluter where a negative externality results from the activities of several companies, the compensation, and many other factors.[17]Furhtermore, in the development of externality, the executive director of UN Environment, Erik Solheim, calls for polluters to pay the environmental damage, and no more transfer the cost to the consumers as extra costs.[18]

PPP in the beginning is no more than an efficiency principle for allocating costs and does not involve bringing pollution down to an most level of any type, although it does not exclude the possibility of doing so.[19] It also have no object to penalize the polluter.[20]In other words, it more based on trade and economic efficiency considerations rather than the environment protection

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[15] Margaret Rosso Grossman, ***Loc.Cit.,*** Page 32.
[16]***Ibid.***
[17] Pierre-Marie Dupuy, ***Op.Cit.,*** Page 72.
[18] Climate Action, "UN Environment Chief Calls for Polluters to Pay for Environmental Damage-Not Taxpayers," Retrieved on 1 November 2017 from http://www.climateactionprogramme.org/news/un-environment-chief-calls-for-polluters-to-pay-for-environmental-damage-no
[19] Muhammad Munir, ***Loc.Cit.,*** Page 10.
[20]***Ibid.,*** Page 9.

improvement.[21]Thus, in the beginning PPP was more considered as economic principle,[22]rather than environmental principle. Despite the shortcomings, the recommendation does recognize the justifiability of member states taking far-reaching actions to protect their environments, but unfortunately it was only a recommendation without having any binding effect.[23]

2. The Development of Polluter Pays Principle after OECD Guiding Principle

The PPP is essentially an economic policy, but not until UNCED Conference that PPP for the first time secured international support as an environmental policy.[24]By recognized by Principle 16 of the Rio Declaration on Environmental and Development, this move portrays the principle significance as a fundamental principle recognized at a global level.[25]

Principle 16 can also be said to have re-emphasised the meaning of the polluter-pays principle given by the OECD.[26]Even, based on the wording of Principle 16, it cannot be said that the polluter-pays principle is intended to be legally binding, and simply lacks the normative character of a rule of law.[27]it also

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[21]***Ibid.***
[22]***Ibid.,*** Page 7.
[23]***Ibid.,*** Page 9.
[24] Patricia Birnie, ***Op.Cit.,*** Page 322.
[25]AyobomiOlaniyan, "Imposing Liability for Oil Spill Clean-Ups in Nigeria: An Examination of the Role of the Polluter-Pays Principle," *Journal of Law, Policy, and Globalization*, Volume 40 (2015), Page 76.
[26]***Ibid.***
[27] Patricia Birnie, ***Op.Cit.***

based on the nature of Rio Declaration that as soft law instrument.[28]Moreover, in some treaties after the Rio, it require parties to 'apply the polluter pays principle',[29] and others use the softer language of guidance.[30]PPP only appears in a limited range of treaties dealing with pollution of international watercourses, marine pollution, transboundary industrial accidents, and energy.[31]Although there are examples where it has been used more broadly in national environmental policy and legislation, as in Article 174 of the European Community Treaty, but it is impossible to point to any general pattern of state practice.[32]But further in the development, PPP recognized as 'general principle of international environmental law' as referred in the International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 and in the Convention on the Transboundary Effects of Industrial Accidents, 1992.[33] General principle of law – or even in form of general principle of international law – is recognised as source of international law by the Article 38 (1)(c) of the Statute of the International Court of Justice.[34]

PPP after the OECD giving broader meaning about how the polluter pays, and how the polluter responsible. States no more only using method of

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[28] Pierre-Marie Dupuy, ***Op.Cit.,*** Page 72

[29] Recognized in 1992 Paris Convention for the Protection of the Marine Environment of the NE Atlantic, Article 2(2)(b); 1992 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area, Article 3 (4); 1994 Danube River Protection Convention, Article 2(4); 1995 Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, Article 4.

[30] Recognized in 1990 Convention on Oil Pollution Preparedness, Response and Cooperation, Preamble: 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and Lakes, Article 2(5); 1995 Protocol to the London Dumping Convention, Article 3; 1999 Convention on the Protection of the Rhine, Article 4.

[31] Patricia Birnie, ***Op.Cit.,*** Page 322.

[32]***Ibid.,***

[33] Malcolm N. Shaw, ***Op.Cit.,*** Page 870.

[34]Martin Dixon MA, *International Law* (London: Blackstone Press Limited, 2000), Page 41.

internalisation by reflecting in goods price, but also by regulate taxation, charges, or even liability laws to make polluter pays.[35]However, PPP still cannot answer the questions of who is responsible for past-contamination and soil-erosion, how to contain the dying of the forests or end the reduction in the number of species occurred because of the unsustainable development of the past and before environmental laws werecreated[36], without further definition in the domestic regulation.[37]

B. Polluter Pays Principle in International Law Perspective

1. International Law Perspective on General Principle of International Law

Article 38 (1)(c) ofthe Statute of the International Court of Justice recognised the general principle of law**.** This article wasknown as the most authoritative and complete statement as the source of international law.[38] This 'general principle' is not limited into domestic general principle, but includes 'general principles of international law'.[39] Role of general principles of law as a way of complementing custom and treaty law places that category fairly firmly in third place, after treaty and custom that known as primary source of international

[35] Patricia Birnie, ***Op.Cit.,*** Page 323.
[36] Muhammad Munir, ***Loc.Cit.,*** Page 8.
[37] Patricia Birnie, ***Op.Cit.,*** Page 326.
[38] Malcolm N. Shaw, ***Op.Cit.,*** Page 70.
[39] Martin Dixon MA, ***Op.Cit.,*** Page 41.

law.[40]General principle of international law intended to ensure that international law includes those rules and principles common to all legal systems.[41]However, Article 38 1 (c) is an intriguing provision and it has generated much academic comment.

First, it recognize as a truly ground-breaking, arguing that it represents an acknowledgement by states that there are sources of international law outside state control[42], because of it as an affirmation of Natural Law concepts, which are deemed to underlie the system of international law and constitute the method for testing the validity of the positive rules.[43] It is being source of those legal rules dealing with the moral issues and protection such as human rights.[44]Respect for the moral doctrines may be examples of 'general principles' and this may explain why they should be law, but states concerned such principles from part of the corpus of international law only if they are 'enacted' by treaty or custom, even if these may well have universal appeal.[45]

Second, contending that paragraph 1(c) merely describes general, non specific principles that have already been validated as law by real formal sources such as Custom and treaty.[46] Thus, it only reiterating the fundamental precepts of international law that have already been set out in treaty and custom law and incapable of adding anything new to international law unless it reflects the

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[40] Malcolm N. Shaw, ***Op.Cit.,*** Page 123.
[41] Martin Dixon MA, ***Op.Cit.,*** Page 39.
[42]***Ibid.,*** Page 38.
[43] Malcolm N. Shaw, ***Op.Cit.,*** Page 99.
[44] Martin Dixon MA, ***Op.Cit.,*** Page 39.
[45]***Ibid.***
[46]***Ibid.,*** Page 38.

consent of states[47], and the obligations incumbent on states in these areas derive from treaty or custom.[48]The two different interpretations above in the end do not contradict and agree on the same thing, that general principle of law still depends by treaty or custom that enacted it. Even, in the International Court of Justice, Judge commented that a 'general principle' argument need to be tempered with more focused content rules and it may well be that custom or treaty.[49] Thus, general principle in state practice itself still depends by the existence of the other rules of custom or treaty. It is also still related to its weakness. General principle bindingness is often questionable, because it is known as clearly not a legally enforceable instrument[50], and considered as imprecise, vague, not to say ambiguous[51], and the application is uncertain.[52]Moreover, the weakness of these 'general principles' does not seem to have inhibited the Court and other tribunals from making full use of them.[53]

Nevertheless, even if these general principle of law do not qualify as binding law, but it may have a fundamental impact on international law development, either as providing a reason why specific norms should be adopted or as the stimulus for state practice leading to the creation of customary and treaty law.[54]Initially, the general principle of law acknowledgement on the Statute of the International Court of Justice assists international trials itself, because it close the

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[47] Malcolm N. Shaw, ***Op.Cit.,*** Page 99.
[48] Martin Dixon MA, ***Op.Cit.,*** Page 39.
[49]***Ibid.,*** Page 41.
[50] Malcolm N. Shaw, ***Op.Cit.,*** Page 279
[51]***Ibid.,*** Page 49.
[52]***Ibid.,*** Page 871.
[53] Martin Dixon MA, ***Op.Cit.,*** Page 41.
[54]***Ibid.***

gap that might be uncovered in international law and solve this problem which is known legally as non liquet[55], and has eroded the strict positivist view of international law.[56]As in all systems of law, judges fear a non liquet – an absence of rules in novel situations – and art. 38 (1) (c) clearly helps reduce this risk although it has not eliminated it.[57]There are fewer decided cases in international law than in a municipal system and no method of legislating to provide rules to govern novel situations.[58] Perhaps this is the great justification for their use in International law which, after all, cannot rely on institutional methods of law creation and the certainty they bring.[59]

But in the development, general principle of law become third position of firm source of international law after treaty and custom, and become complementary of custom and treaty.[60] In some way, the imprecise nature of general principle of law is advantageous, because the progress and development of the general principle itself make it expand, filling the novel condition of international law. For example, no harm principle, firstly recognized as general principle to protect territory of other states, but being developed its implementation that the protection is for environment both in other States and in areas beyond the limits of national jurisdiction.[61] PPP also firstly recognized by

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[55] Malcolm N. Shaw, ***Op.Cit.,*** Page 98.
[56] Martin Dixon MA, ***Op.Cit.,*** Page 41.
[57]***Ibid.***
[58]***Ibid.***
[59]***Ibid.***
[60] Malcolm N. Shaw, ***Op.Cit.,*** Page 123.
[61] Pierre-Marie Dupuy, ***Op.Cit.,*** Page 53.

OECD as economic principle, but developed further being principle to seek responsibility from polluter as environmental principle.[62]

The no-harm rule has essence of obligation that states may not conduct or permit activities within their territories, or in common spaces, without regard to other states or for the protection of the global environment. The origins of the obligation lie in the old principle of international law that states are obliged not to inflict damage on, or violate the rights of other states, which is often expressed by reference to the *sic uteretuoutalienum non laedas* principle (use your own property in such a way that you do not injure other people's).[63]

*Sic utere*principle is frequently invoked common law maxim both in England and America, as the core legal structure defining the contours of private property rights.[64] This maxim was considered as a fundamental principle of the common law that accepted by common law court.[65] Neighbor was expected not to interfere with another's quiet enjoyment of his or her land because "it is incumbent on [a neighboring owner] to find some other place to do that act, where it will be less offensive."[66] Thus, in the development, *sic utere*principle considered to applicated on the principle of good neighborliness, because it have the same nature.[67] However, while it restrained landowners from altering nature in

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[62] Patricia Birnie, ***Op.Cit.,*** Page 322.

[63]MarteJervan, The Prohibition of Transboundary Environmental Harm, PluriCourts Research Paper 14-17, 2014. Page 1

[64]Joseph H. Guth, Law for Ecological Age, Vermont Journal of Environmental Law, Vol 9, 2008. Page 447.

[65]Elmer E. Smead, Sic UtereTuoUtAlienum Non Laedas: A Basis of the State Police Power, Cornell Law Review, Volume 21, Issue 2, February 1936. Page 279.

[66]Joseph H. Guth, ***Op.Cit.,***Page 448.

[67]Max Valverde Soto, General Principles of International Environmental Law, ILSA Journal of

ways that would damage neighbors, *sic utere* principle was concerned essentially with people's direct effects on each other and did not protect the environment for its own sake.[68] The maxim also could legitimately extend the application of the principle. so far as may be requisite for the protection of the public.[69]

The Trail Smelter dispute that arose between Canada and the United States in the 1930s is broadly regarded as the first step in giving the sic utere principle actuality as a fundamental rule of modern international environmental law.[70] The background for the dispute was that atmospheric emissions from a private owned smelter operating on Canadian territory had caused damage to agricultural interests in the United States. To solve the dispute that arose, the two governments concluded a special agreement submitting their dispute to arbitration.[71] Together, these decisions of Trail Smelter, followed by Corfu Channel and Lac Lanoux, gave the old *sic utere* principle new importance in relation to transboundary environmental harm, and as will be shown in the following chapters, they gave rise to the development of important rules of environmental law.[72]*Sic*

International & Comparative Law, Vol 3, 1996. Page 197.
[68]Joseph H. Guth, ***Op.Cit.,*** Page 449.
[69]Elmer E. Smead, ***Op.Cit.,***Page 287.
[70]MarteJervan, ***Op.Cit.,*** Page 21.
[71]***Ibid.***
[72]***Ibid.,***Page 24.

*utere*principle also contain in the Principle 21 of the Stockholm Declaration[73] and Principle 2 of the Rio Declarations[74].

There are some cases that general principle progressed and being recognized as customary law. 'No harm principle' as example, firstly recognized as general principle of law, and being confirmed by ICJ as customary in the Corfu Channel Case.[75]The other progress – but from soft law into customary law – is 'principle of prevention', which first featured in soft-law instruments, before being recognised as a customary principle.[76]Thus, general principle is ideally develop into customs, and it is always available to fill the void should the detailed legal regime of a treaty fail to gain universal acceptance.[77]

2. Polluter Pays Principle as General Principle of International Law

PPP enacted by International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 and in the Convention on the Transboundary Effects of Industrial Accidents, 1992 as 'a general principle of international

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[73]Principle 21 of Stockholm Declaration 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 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".

[74]Principle 2 of Rio Declaration 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".

[75] Pierre-Marie Dupuy, ***Op.Cit.,*** Page 55.

[76]***Ibid.,***Page 58.

[77] Martin Dixon MA, ***Op.Cit.,*** Page 28.

environmental law'.[78]PPP is uncertain – same nature as the other general principle[79] – but such duty of PPP is well-established in customary international law through both the no harm and the prevention principles.[80] From its first development in OECD, PPP does not make any environmental standard, legitimately stated by OECD Note on the Implementation of the PPP that public authorities in each state should identify the "acceptable state" of the environment.[81]Thus, implementation and development of the PPP has potential to be interpreted differently[82], and whatever its legal status, the PPP cannot supply guidance on the content of national or international liability without further definition.[83]PPP cannot be treated as a rigid rule of universal application, nor are the means used to implement it going to be the same in all cases.[84]

The other reason is that the capacity of the natural environment to withstand pollution varies from one country to another.[85] Other reasons are the different social objectives and priorities attached to environmental protection and different degrees of industrialization and population density.[86] Thus, environmental policies of one states to the other will be different, and public authorities such as intergovernmental regulatory institutions and court can and should take account of the PPP in the development of environmental law and

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[78] Malcolm N. Shaw, ***Op.Cit.,*** Page 870.
[79]***Ibid.,*** Page 871.
[80] Pierre-Marie Dupuy, ***Op.Cit.,*** Page 71.
[81] Margaret Rosso Grossman, ***Loc.Cit.,*** Page 7.
[82]AyobomiOlaniyan, ***Loc.Cit.,*** Page 75.
[83] Patricia Birnie, ***Op.Cit.,*** Page 326.
[84]***Ibid.***
[85] Muhammad Munir, ***Loc.Cit.,*** Page 12.
[86]***Ibid.,***

policy[87], but it must decide the means of implementing PPP into binding obligations, such as policy instruments, regulations, standards, or economic instruments[88], which the content may include process and product standards, individual regulations and prohibitions, or pollution charges.[89]

3. The Variety of Polluter Pays Principle Implementation

PPP are recognized as one of the fundamental principles of modern environmental policies[90], widely accepted in some countries and regions[91], been providing foundation for many environmental decisions[92], and OECD – as the PPP promoter – also urged it to adopt by all OECD member countries.[93]Although many countries have adopted the PPP, but few states have been fully consistent in their policy[94], and several countries continue to treat permitted pollution as largely free.[95]The different application of PPP making result on both of the choice of methods such as taxation, charges, liability laws and the degree of its implementation have been very variable.[96]

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[87] Patricia Birnie, ***Op.Cit.,*** Page 323.
[88] Jean-Philippe Barde, "Economic Instruments in Environmental Policy; Lessons From the OECD Experience and Their Relevance to Developing Economies" *OECD Development Centre Working Paper No. 92*, OECD, (1994) Page 6.
[89] Margaret Rosso Grossman, ***Loc.Cit.,*** Page 7.
[90] Muhammad Munir, ***Loc.Cit.,*** Page 1.
[91] Malcolm N. Shaw, **Op.Cit.,** Page 870.
[92] Dinah Shelton, et al., *Judicial Handbook on Environmental Law* (Kenya: United Nations Environment Programme, 2005) Page 6.
[93] Margaret Rosso Grossman, ***Loc.Cit.,*** Page 7.
[94] Patricia Birnie, ***Op.Cit.,*** Page 323.
[95] Barbara Luppi, ***Loc.Cit.,*** Page 136.
[96] Patricia Birnie, ***Op.Cit.,*** Page 323.

Taxation is a relatively rough way to recover the external costs of environmentally harmful activities.[97]Environmental taxes are not yet widespread for several reasons. First, many people are opposed in principle to raising taxes. Second, analysis showed that some environmental taxes would be regressive, falling most heavily on the poor. Third, there is concern that countries employing them would no longer be competitive in the global marketplace, as their industries would suffer in comparison to industries in countries without such taxes.[98] Charges to fulfill the cost of preventing, reducing, or restoring environmental damage could be more accurately targeted, but their impact in prevent environmentally harmful activities will vary.[99] Charges and taxes cannot easily be targeted at accidental damage, nor can they be applied to transboundary polluters.[100]

Another variation of PPP implementation is by making access of direct course against the enterprise causing the damage.[101] Direct course against the enterprise could be in form of civil litigation or public litigation. This kind of making real polluter pay have a deterrent effect for polluter, so doer will avoid such consequences from illegal act and contributing to the better enforcement of environmental regulations.[102] This civil litigation is important to be provided in

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[97]***Ibid.,*** Page 322.
[98]***Ibid.,*** Page 759.
[99]***Ibid.,*** Page 323.
[100]***Ibid.,*** Page 323.
[101]***Ibid.,*** Page 303.
[102] Chen-Ju Chen, "The Liability and Compensation Mechanism under International Marine Environmental Law: Adopting the Polluter Pays Principle to Control Marine Pollution under International Law from Aspect of International Cooperation," *LOSI Conference Papers*, Conference on Securing the Ocean for the Next Generation, (2012), Page 10.

the case of transboundary environmental disputes. First, It deescalates disputes 'to their ordinary neighborhood level', where they can be resolved using national law, and avoids turning them into interstate controversies based on problematic concepts of stateresponsibility in international law.[103]Second, it empowers individuals by enabling the private plaintiff to act without the intervention of a government, and extent facilitates further development of a rights-based approach to environmental issues.[104]In reality, mostly transboundary environmental problems – also transboundary pollution – are mainly caused by and affect private parties, rather than states,[105] and the pollution affect the people as civilian.

Civil litigation not only provides an effective mechanism for dealing with transboundary harm, but may also offer the possibility of securing redress from multinationals whose operations in developing countries are sometimes difficult to control through local law.[106]Even, the extent to which civil liability then makes the polluter pay for environmental damage will depend on a variety of factors.[107] In the context PPP implementation, civil litigation has been particularly applied[108]and full implementation of PPP may involve consideration of civil liability and compensation.[109]This kind of implementation is important to respect the victim by giving prompt and adequate compensation, as stated by International Law Commission's comment that 'PPP is an essential component to ensure that

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[103] Patricia Birnie, ***Op.Cit.,*** Page 303.
[104]***Ibid.***
[105]***Ibid.***
[106]***Ibid.***
[107]***Ibid.,*** Page 324.
[108] Malcolm N. Shaw, ***Op.Cit.,*** Page 870.
[109] Patricia Birnie, ***Op.Cit.,*** Page 324.

victims that suffer harm as a result of an incident involving a hazardous activity are able to obtain prompt and adequate compensation'.[110]

Direct course against the enterprise with public litigation are no less important. Application of PPP in domestic judicial and legal interpretation hold states and local governments jointly and severally liable for environmental damage caused by private parties, allowing these public bodies to act in subrogation against individual polluters.[111] In this process, local governments may revoke license of private parties, fine, penalize, etc.[112] With this implementation, state have role to fulfill the rights of victims for compensation, and do environmental recovery and conservation from environmental pollution fine from the polluter and helps environmental law to achieve the aim of a tolerable environment.[113]This function of the PPP completed the environmental prevention principle.[114]However, in the developing states this method will be ineffective, because they encounter with enterprise – especially TNC – that being the polluter, which have bigger bargaining power than the state.[115] These crimes frequently go unpunished[116] and this enterprise escape effective accountability for their activities, especially in those countries where regulation is weak, enforcement lax,

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[110]***Ibid.***
[111]Mizan R. Khan, "Polluter-Pays-Principle: The Cardinal Instrument for Addressing Climate Change," *Laws*, Volume 4, (2015), Page 645.
[112]***Ibid.***
[113] Margaret Rosso Grossman, ***Loc.Cit.,*** Page 9.
[114]***Ibid.,*** Page 32.
[115]Khudori, *NeoliberalismeMenumpasPetani: MenyingkapKejahatanIndustriPangan* (Yogyakarta: Resist Book, 2004), Page 150.
[116] Friends of the Earth International, "Historic Progress Towards Binding Treaty on Business and Human Rights," Retrieved on 1 November 2017 from http://www.foei.org/news/historic-progress-towards-binding-treaty-business-human-rights

the judicial system ineffective, the government corrupt, or simply inadequate.[117]Approximation of power can be seen how wealth of TNC can exceed the developing state wealth[118], and they dominate the economy of developing state**.**[119]

Although, PPP sometimes may be applied depend on the condition of the state itself. An even more extensive departure from the polluter-pays principle has emerged with regard to Dutch and other states in riparian zone on the Rhine River in order to persuade the French to reduce pollution from their potassium mines. Here, it is in effect the victim who pays[120] – which called as victim-pays.In the international context, it implies financial assistance from the country whose environment has been degraded (victim) to the country caused such environmental degradation (polluter).[121]Thus, Polluters could be subsided for pollution control measures.[122]In Taiwan, Chile, South Africa, and Kenya, this PPP is applied government liability, when polluters cannot be identified or are insolvent.[123] These countries adopted different variants of the PPP through judicial, legislative and constitutional reforms focused on mitigation of harms through government liability, to ensure victim's compensation.[124]This implementation reframing the original rationale of the PPP, its application has been transformed into a

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[117] Patricia Birnie, ***Op.Cit.,*** Page 326.
[118]Huala Adolf, ***Loc.Cit.,*** Page 71.
[119]Khudori, ***Op.Cit.,*** Page 151.
[120] Patricia Birnie, ***Op.Cit.,*** Page 325.
[121]Hyung-Jin Kim, "Subsidy, Polluter Pays Principle and Financial Assitance among Countries," *Journal of World Trade*, Volume 34(6) (2000) Page 129.
[122] Jean-Philippe Barde, ***Loc.Cit.*** Page 6.
[123]Mizan R. Khan, ***Loc.Cit.,*** 645.
[124]***Ibid.***

Government-pays regime.[125]This might be true in most of the developing countries where many production activities by the private sector are subsidized by the government for maintaining growth and jobs in the economy.[126]

In form of implementation, not every state use term of 'polluter pays principle' to its instrument, but do implement rules that require the polluter to pay for the damage caused by pollution.[127] Many environmental laws fit in this category, by using the concept of PPP but not use the term of 'polluter pays principle'.[128]Even when the PPP is stated explicitly in a legal text, its impact may vary.[129]

C. Urgency of Polluter Pays Principle Implementation

1. Mainstreaming the Polluter Pays Principle

As explained above, there are some cases that general principle or even soft law progressed and being recognized as customary law, such as 'no harm principle' and 'principle of prevention'.General principle have a fundamental impact on the development of international law, either as providing a reason why specific norms should be adopted or as the stimulus for state practice leading to

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[125]***Ibid.***
[126]***Ibid.***
[127] Margaret Rosso Grossman, ***Loc.Cit.,*** Page 32.
[128]***Ibid.***
[129]***Ibid.***

the creation of customary and treaty law.[130]General principle – or even soft law – is considered ideally to develop into customs.[131]

PPP as general principle of international law, which referred in the International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 and in the Convention on the Transboundary Effects of Industrial Accidents, 1992.[132], have the same potential for becoming customary law such as another principle 'no harm principle' and 'principle of prevention'. PPP is one of principles that aspire to the status of customary law, but have not as yet attained that designation.[133]Lakshman D. Guruswamy, professor of law in University of Tulsa, stated that PPP is soft, embryonic customary law that plays an important part in the development of IEL.[134] It may not amount to customary law per se, but they do constitute a presence and a backcloth that facilitates the creation and interpretation of IEL in general.[135]

Process of becoming customary law could be occured if the general principle could develop and fulfill the elements of customary law. The elements of customary law are practice – as objective element – and *opiniojuris* – as subjective element. Customary law, or custom, refers largely to unwritten law inferred from the conduct of states (practice) undertaken in the belief that such

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[130] Martin Dixon MA, ***Op.Cit.,*** Page 41.
[131]***Ibid.,*** Page 28.
[132] Malcolm N. Shaw, ***Op.Cit.,*** Page 870.
[133]Lakshman D. Guruswamy, Brent R. Hendricks, *International Environmental Law In A Nutshell*, (US: West Publishing, 1997), Page 29.
[134]***Ibid.***
[135]***Ibid.***

behaviour is 'law' (opiniojuris).[136] Practice (the objective element) in IEL takes a number of forms and the evidence necessary to establish it may be gathered, inter alia, from the following materials: 1) national legislation; 2) diplomatic Notes; 3) statements and votes by governments in international organizations and forums of varying kinds; 4) ratification of treaties containing the obligations in question; 5) opinions of legal advisers; 6) restatements of the law.[137] Evidence gathered from these sources will testify to what states actually do, and how they react when faced with a particular problem.[138] Suppose it is asserted that customary law establishes the right to take countermeasures in respect of an environmentally wrongful act, the evidence must prove that nations have resorted to such countermeasures following a pattern of conduct that is consistent, extensive, uniform, and general.[139]

Opiniojuris, or belief that a state activity is legally obligatory, is the factor which turns the usage into a custom and renders it part of the rules of international law.[140]If a practice is regarded as discretionary, or simply based on convenient of the state rather than obligatory, it is an example of usage that does not possess the critical element of opiniojuris.[141] But in practice, opiniojuris existence is difficult to be proved.[142]Due to the difficulty, increasing reference has been made to

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[136] Malcolm N. Shaw, ***Op.Cit.,*** Page 74.
[137]Lakshman D. Guruswamy, ***Op.Cit.,*** Page 26.
[138]***Ibid.***
[139]***Ibid.***
[140] Malcolm N. Shaw, ***Op.Cit.,*** Page 84.
[141]Lakshman D. Guruswamy, ***Op.Cit.,*** Page 27.
[142] Malcolm N. Shaw, ***Op.Cit.,*** Page 88.

conduct within international organisations.[143] In modern times, the opiniojuris of states has been gathered from their declarations or admissions in international forums like the international law commission and the general assembly of the UN.[144] Thus, the opiniojuris on PPP could be reflected on states declaration on international forum as Rio Declaration, International Convention on Oil Pollution Preparedness, Response and Co-operation 1990, Convention on the Transboundary Effects of Industrial Accidents 1992, or even in OECD forum related to PPP discussion.

Further, even general principle is already recognize as customary law, the unwritten, uncodified form of custom is one of its chief weaknesses, and important remedy to this weakness is to codify or restate customary law – thus making it known and accessible.[145] Restatements of customary law are undertaken by the International Law Commission, ICJ judicial decision, other scholars and jurists, courts, legal tribunals, conference declarations, and by treaties.[146] In a ICJ judicial decision it could give an analysis of the evidence supporting the law, an articulation or declaration of what the law is, and a demonstration of how law should be applied to the facts.[147] A restatement or codification by scholars and jurists serves the important purpose of reducing the law's uncertainty, but leaves open the extent to which it is accepted as accurate.[148] If the restatement or

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[143]***Ibid.***
[144]Lakshman D. Guruswamy, ***Op.Cit.,***Page 27.
[145]***Ibid.***
[146]***Ibid.***
[147]***Ibid.,***Page 34.
[148]***Ibid.,*** Page 27.

codification occurs during a law-making conference, It may take the form of a draft treaty which if accepted becomes binding as a treaty.[149]

The widespread practice and implementation of PPP must be maintained and developed, to keep collecting elements of customary international law. Because, many principles and rules have been promoted, but only few have been accepted into the corpus of customary law.[150] The biggest impediment to the formation of customary law lies in the element of generality which requires that the practice be widespread among at least majority of states, due to difficulty to establish in a world divided along cultural, economic, social, and religious lines.[151]

2. PPP Role as Human Rights Protection Instrument

In connection with certain rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR), nation should take steps to prevent transboundary harm that interferes with the enjoyment of human rights in other countries.[152]Although rights to enjoyment of a safe, clean, healthy, and sustainable environment is not explicitly recognized by ICESCR[153], but it is already recognized as a part of human rights both within regional convention and

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[149]***Ibid.,*** Page 28.
[150]***Ibid.,*** Page 29.
[151]***Ibid.***
[152] Office of the United Nations High Commisioner for Human Rights, "Mapping Human Rights Obligation Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Individual Report on the International Covenant on Economic," *Social and Cultural Rights Report No. 1*, OHCHR (2013) Page 4.
[153]***Ibid.,*** Page 6.

global convention.[154]Nonetheless, the Committee of Economic, Social and Cultural Rights has recognized that the enjoyment of economic, social and cultural rights depends on healthy environment.[155] Thus, the fulfillment to enjoyment of a safe, clean, healthy, and sustainable environment are crucial in respect to fulfillment of economic, social and cultural rights.

PPP could be considered as human rights protection instrument in the context of economy, social, and cultural rights if it implemented strictly to the entity that do the pollution. It gives deterrent effect for polluter, so doer will avoid such consequences from illegal act.[156] In other side, if the pollution already occurred, state by implementing PPP could receive compensation from polluter, and connect it to pay compensation of the victim and do environmental recovery and conservation to achieve the aim of a tolerable environment.[157]Thus, role of state to fulfill human rights is existed in the mechanism of PPP.

In the pollution context, violation of rights to enjoymentof a safe, clean, healthy, and sustainable environment is occurred. Obligation to prevent third party transboundary environmental harm has become the most relevant obligation to the case of transboundary haze pollution to protect human rights of the potentially victim abroad or even domestic. Variance of PPP is existed to ensure victim's compensation.[158]ILC also stated that 'PPP is an essential component to ensure that

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[154] Sri Wartini, ***Loc.Cit.,*** Page 656.
[155] Office of the United Nations High Commisioner for Human Rights, ***Loc.Cit.,*** Page 6.
[156] Chen-Ju Chen, ***Loc.Cit.,*** Page 10.
[157] Margaret Rosso Grossman, ***Loc.Cit.,*** Page 9.
[158]Mizan R. Khan, ***Loc.Cit.,*** 645.

victims that suffer harm as a result of an incident involving a hazardous activity are able to obtain prompt and adequate compensation'.[159]

In other context, forest fires that blanketed Southeast Asia in thick haze are released the greatest amount of climate-change carbon.[160]United Nations Independent Experton human rights and the environment made report that climate change issue related to the human rights threatened by climate change.[161] At least, rights that threatened by climate change could be two aspect; right to adequate food, and right to water.[162] In this report, there are five relevant obligations that must be done by the state related to climate change. The obligations that mentioned in this report are: 1) Obligation to conduct EIA; 2) Obligation to mitigate the climate change; 3) Obligation to adopt measures safeguarding the substantive rights of indigenous people, including mitigating the adverse consequences of climate change; 4) Obligation to prevent third party transboundary environmental harm; 5) Obligation to specific right to food.[163]

One of the important elements of PPP in protecting human rights is on its equal access elements. Equal access to national remedies has been considered as one method of implementing the PPP, as it aims to afford equivalent treatment in the country of origin to transboundary and domestic victims of pollution damage,

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[159] Patricia Birnie, ***Op.Cit.,*** Page 324.
[160] Reuters, "Southeast Asian Fires Emitted Most Carbon Since 1997: Scientists," Retrieved on 1 November 2017 from https://www.reuters.com/article/us-indonesia-haze/southeast-asian-fires-emitted-most-carbon-since-1997-scientists-idUSKCN0ZE210
[161] Office of the United Nations High Commissioner for Human Rights, ***Loc.Cit.,***Page 2.
[162]***Ibid.,***Page 3.
[163]***Ibid.,***Page 2.

or to those likely to be affected by such a principle.[164] The equal right of access may involve access to information, participation in administrative hearings and legal proceedings and the application of non-discriminatory standards for determining the illegality of domestic and transboundary pollution.[165] Thus, equal access is in accordance with the non-discriminatory principle, because it have similar component. Non-discrimination emphasize where domestic remedies are already available to deal with internal pollution or environmental problems, international or regional law can be used to ensure that the benefit of these remedies and procedures is extended to transboundary claimants.[166]Thus, both equal access and non-discriminatory are giving access to victims of transboundary pollution to have direct recourse to local remedies in the state where the source of the harm is located.[167]

The clear advantages of opening up local remedies to foreign parties as a process to settling transboundary disputes must be set against certain weakness or disadvantages inherent in relatively limited access to justice.[168]Non-discrimination also requires that polluters causing transboundary pollution should be subject to legal standards no less severe than would apply to pollution with domestic effects only.[169]Stockholm and Rio Declaration do not demonstrate clear support for the principle of non-discrimination[170] but ILC give consistent endorsement of the

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[164] Chen-Ju Chen, ***Loc.Cit.,*** Page 10.
[165]***Ibid.***
[166] Patricia Birnie, ***Op.Cit.,*** Page 304.
[167]***Ibid.,*** Page 306.
[168]***Ibid.***
[169]***Ibid.,*** Page 305.
[170]***Ibid.,*** Page 305.

non-discrimination principle in a transboundary environmental context.[171]These rights are to be accorded not only to individuals affected by the risk of transboundary injury but also to foreign NGOs and public authorities, insofar as comparable entities possess such rights in the country of origin of the pollution.[172]Even, by implementing PPP and non-discrimination, does not mean problem of transboundary victims could be easily solved. Another important process are resolving problems of private international law – particularly jurisdiction and choice of law in transboundary cases – and harmonization of national laws dealing with liability for environmental damage.[173]

D. Transnational Corporation as Polluters Subject

The core of the PPP is easy to understand: polluters are responsiblefor the pollution they have caused. PPP put polluter – which could be a person or an entity[174] – responsible to pay the cost of pollution, not by their governments.[175] Transnational Corporation – as commonly who act as polluter in transboundary haze in Southeast Asia – could be a subject who responsible in polluter pays principle. Thus, all polluters – in form of enterprise such as Domestic Corporation or transnational corporation, or even neighborhood state – as far as doing

[171]***Ibid.***
[172]***Ibid.,*** Page 304.
[173]***Ibid.***
[174]Organisation for Economic Co-operation and Development, ***Loc.Cit.,*** Page 30.
[175] Muhammad Munir, ***Loc.Cit.,*** Page 2.

pollution, must be responsible. PPP prevents a situation where nobody wants to claim responsibility.[176]

However, determine who is the polluter is being issues emerge. The person that bears the cost of the pollution must be known.[177] A more fundamental problem is PPP does not indicate who the polluter is. OECD and the ILC treat the operator of a hazardous installation as the 'polluter' in cases of accidental damage.[178] On this view, for example, the operator of an oil tanker is the polluter and should be responsible if the ship sinks.[179] But it can equally be said that the cargo causes the damage and that the cargo owner is in that sense the polluter.[180] In the responsibility scheme, both the ship's owner and the cargo owner as sharing responsibility, while excluding the liability of any other potential defendant in order to facilitate recovery by plaintiffs.[181]Thus, as far as someone – either human or legal entity – does pollution, either direct perpetrator or indirect perpetrator that have relation in pollution, could be determined as 'polluter'. In this case what matters is how the responsibility is shared, and how the compensation is funded.[182]

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[176]AyobomiOlaniyan, ***Loc.Cit.,*** Page 73.
[177]***Ibid.,*** Page 75.
[178] Patricia Birnie, ***Op.Cit.,*** Page 325.
[179]***Ibid.***
[180]***Ibid.***
[181]***Ibid.***
[182]***Ibid.***

In case of forest fire, the 'fire maker' is commonly done by poor local people that need money, which paid by the TNC to do the slash and burn.[183] Local people and TNC is being two actors of polluters, because both of them participate in pollution even not all is being direct perpetrator. As in the case of oil tanker, forest fire case should determine the pollution responsibility sharing and how the compensation funded. However, still need a clear regulation mechanism to determine the polluter so accusation not only on the local people. Because, many corporation take cover in the name of local people in order to keep burning the land and forest.[184] This is done to avoid punishment for corporation, because local people cannot be punished by the domestic law of Indonesia about environmental protection.[185] To avoid punishment, corporation also utilise the excuse that the burning land in their concession is a disputed land.[186] This avoiding process is making result of 15 corporations receive letter termination of investigation, meanwhile 25 individual perpetrator of forest burning have been processed in court.[187]Another issue emerging is multi-party causation. Although the polluter pays principle seems to provide an easy answer to the question 'who is responsible for the cost of environmental measures', i.e.the polluter, this easy

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[183] Viva News, "Kuntoro: Perusahaan Bayar Rakyat Kecil untukBakarHutan," Retrieved on 1 November 2017 from http://www.viva.co.id/berita/nasional/422767-kuntoro-perusahaan-bayar-rakyat-kecil-untuk-bakar-hutan

[184] CNN News, "Perusahaan MengatasnamakanMasyarakatuntukMembakarHutan," Retrieved on 1 November 2017 from https://www.cnnindonesia.com/nasional/20160830194431-20-154957/perusahaan-mengatasnamakan-masyarakat-untuk-membakar-hutan/

[185] ***Ibid.***

[186] ***Ibid.***

[187] Tirto, "KebakaranHutandanHukum yang Timpang," Retrieved on 1 November 2017 from https://tirto.id/kebakaran-hutan-dan-hukum-yang-timpang-bwoj

answer might not be enough in cases where pollution is caused by multi-polluters.[188]

Thus, determination of polluter must be further defined, to give clear definition, entity that responsible, and seek strong enforcement of law. When environmental protection regulation is strong, the primary obligation of a corporation will be fulfilled by its legal and regulatory responsibilities.[189] If corporation does not exist, there is a strong enforcement system in place to take fulfillment.[190] Where environment protection of state is weak or absent, a corporation is faced with the need to define its environmental responsibilities for itself.[191]

E. Development of Transnational Corporation and Human Rights

TNCs are often responsible for human rights violations, but these crimes frequently go unpunished due to glaring gaps in the international legal system[192] because there is no binding international law imposing even the most basic of enforceable human rights obligations on TNCs.[193] Moreover, so far as human rights are concerned; only states are subject to mandatory human rights

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[188] Petra E. Lindhout, Berthy van den Broek, "The Polluter Pays Principle: Guidelines for Cost Recovery and Burden Sharing in theCase Law of the European Court of Justice," *Utrecht Law Review,* Vol. 10(2) (May 2014) Page 47.

[189]Wesley Cragg, *Business and Human Rights* (UK: Edward Elgar Publishing Limited, 2012) Page ---

[190]***Ibid.***

[191]***Ibid.***

[192]Friends of the Earth International, Historic Progress Towards Binding Treaty on Business and Human Rights, ***Loc.Cit.***

[193] Alice de Jonge, ***Op.Cit.,*** Page 147.

requirements established by international law.[194] Several prominent international bodies had considered transnational corporation responsibilities issues in voluntary initiatives. United Nations unsuccessfully attempted to draft an international code of conduct for businesses in the 1970s and 1980s.[195] The Organisation for Economic Co-operation and Development (OECD) undertook a similar effort in 1976 when it established its first Guidelines for Multinational Enterprises to promote responsible business conduct consistent with applicable laws.[196] This is the earliest and most significant standards.[197] Even, in the interpretation of OECD Guidelines, most government representatives have chosen to use the most narrow and sometimes unjustified interpretation.[198] OECD has procedure to investigate the non-compliance complaints by 'National Contact Points'.[199] Human Rights Watch reported that 'The National Contact Point Procedure (of OECD) for dealing with these complaints in all relevant countries has been slow and ineffective.[200] Thus, that procedure generally perceived as ineffective by NGOs and by UNCTAD.[201]

In 1977 the International Labour Organization (ILO) adopted its Tripartite Declaration of Principles Concerning Multinational Enterprises, which calls upon businesses to follow the relevant ILO conventions and

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[194]***Ibid.,***Page 148.
[195]David Weissbrodt, ***Loc.Cit.,*** Page 903.
[196]***Ibid.***
[197] Patricia Birnie, ***Op.Cit.,*** Page 327.
[198]***Ibid.,*** Page 328.
[199]***Ibid.***
[200]***Ibid.***
[201]***Ibid.***

recommendations.[202]Further, in January 1999, United Nations Secretary-General Kofi Annan proposed a "Global Compact" of shared values and principles at the World Economic Forum.[203] The Global Compact asks businesses voluntarily to support and adopt nine core principles, which are divided into categories dealing with general human rights obligations, standards of labor, and standards of environmental protection.[204]Other regional organizations and non-governmental organizations have also elaborated general codes of conduct for transnationals.[205] These various initiatives, however, failed to bind all businesses to follow minimum human rights standards.[206]As discussed previously, any regulation so far is in voluntary nature.

The more fundamental problem of TNC is, they are not subjects of international law[207], although TNC has an influence in the international community.[208] Thus, TNC are only subjected to jurisdictions of States where they operate[209], and regulations that rule the world of business, including transnational business, mostly in the form of national law.[210] It arise that the best method for controlling these companies remains the well-established one usually deployed by developed states: effective regulation via national law and enforcement agencies.[211]

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[202]David Weissbrodt, ***Loc.Cit.,*** Page 903.
[203]***Ibid.***
[204]***Ibid.***
[205]KarelVasak, ***Op.Cit.,*** Page 660.
[206]David Weissbrodt, ***Loc.Cit.,*** Page 903.
[207]SauliusKatuoka, ***Loc.Cit.,*** Page 1303.
[208]An AnChandrawulan, *Hukum Perusahaan Multinasional* (Bandung: Keni Media, 2014) Page 33.
[209]SauliusKatuoka, ***Loc.Cit.***
[210] Pieter Kuin, ***Op.Cit.,*** Page 165.
[211] Patricia Birnie, ***Op.Cit.,*** Page 329.

However, in developing states, this method is ineffective. Developing countries does not have sufficient guarantee of host countries protection of their natural and human resources[212], and TNC frequently escape effective accountability for their activites and unpunished due to weak of regulation due to gaps in the international legal system, the absence or weakness of enforceable national policies, ineffective judicial system, and corrupt government in TNC host and/or home countries.[213]Approximation of power can be seen how wealth of transnational corporations can exceed the state wealth, especially within developing and disadvantaged states.[214]Corporate support by financing campaign of political candidates also creates a layer of impunity for TNCs.[215]Thus, based on condition of developing country, is potentially hard to making control of the TNC.

Meanwhile, it is possible for states to harmonize their domestic regulations about the TNC, for example by way of implementing general agreements, or authorizing supranational bodies to declare a set of binding rules around the world.[216] The harmonization process for regulations on TNC is being processed by United Nation Human Rights Council. Started in 14 July 2014, Human Rights Council adopted a resolution by which it decided "to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (IGWG on TNCs and Human Rights), whose mandate shall be to elaborate an international legally binding instrument to

[212]KarelVasak, ***Op.Cit.,*** Page 660.
[213] Patricia Birnie, ***Op.Cit.,*** Page 322.
[214]Huala Adolf, ***Op.Cit.,*** Page 71.
[215]Friends of the Earth International, "Historic Progress Towards Binding Treaty on Business and Human Rights," ***Loc.Cit.***
[216] Pieter Kuin, ***Op.Cit.,*** Page 165.

regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[217] This resolution recorded vote of 20 to 14, with 13 abstentions. Indonesia and Philippines is in favour, and many developed states are against, such as EU and USA.[218]This process of international instrument making is step forward to achieving enforcement of TNC to respect human rights.

So far, IGWG on TNCs and Human Rights have perform two sessions, that dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument.[219] Cuba is the first and so far still the only one state that give written contribution to support the legally binding treaty to on TNC.[220] The EU and several other, mostly rich, countries were largely absent from the oral contribution, allegedly claiming that negotiation of a legally binding treaty would distract from the implementation of the existing UN Guiding Principles, as a set of voluntary guidelines for businesses.[221]

Anne van Schaik, part of Friends of the Earth International, one of the non-governmental organization with the ECOSOC consultative status, emphasize

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[217]Human Rights Council, "Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights," *Resolution 26/9*.

[218]***Ibid.***

[219] United Nations Human Rights Council, "Open Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights," Retrieved on 1 November 2017 from http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx

[220] United Nations Human Rights Council, "Second Session of the Open Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights," Retrieved on 1 November 2017 from http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/Session2.aspx

[221]Friends of the Earth International, "Historic Progress Towards Binding Treaty on Business and Human Rights," ***Loc.Cit.***

that the growing abundance of human rights abuses perpetrated by TNCs or on their behalf proves voluntary guidelines are absolutely insufficient and TNCs should not be trusted to police themselves.[222] Many EU countries are home to TNCs with deplorable records of systemic rights violations in the global south.[223] Friends of the Earth International also emphasize that Indonesia's 2015 forest fires is one of the case that done by TNC, and become urgent consideration why international legally binding treaty must be formed.[224]

F. Prohibition of Slash and Burn Practice in Al-Quran Teachings as Importance to Protect Human and Environment

Burning the forest without concern of the environment is one of the ecological crises.[225] In principle, Islam is a teaching that is always actual both past, present, and future.[226] Islam with practice *rakhmatanlilalamin* certainly must be able to answer the challenge, because environmental issues are an important discourse because it is directly related to the human behavior and quality of life, including habit and civilization.[227]

Occurence of universal values of earth management contained in the Qur'an and morals character of Rasulullah in managing the earth with examples

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[222] ***Ibid.***
[223] ***Ibid.***
[224] Friends of Earth international, "Binding Treaty to Stop Corporate Abuse," Retrieved on 1 November 2017 from http://www.foei.org/news/binding-treaty-stop-corporate-abuse
[225] B.A. Rukiyanto, *SemakinMenjadiManusiawi: Teologi Moral MasaKini*, (Yogyakarta: PenerbitUniversitasSanata Dharma, 2014) Page 117.
[226] Fachruddin M. Mangunjaya, *KonservasiAlamDalam Islam*,(Jakarta: YayasanObor Indonesia, 2005) Page 6.
[227] ***Ibid.,*** Page 1.

and peaceful activity he ever did.[228]In Islam, it is sharia that should underlie environmental theory and law.[229] It is understandable that the main source of Islamic teachings is the Qur'an as the first source of its absolute necessity[230] and guarded by Allah[231], and made clear with the hadith and sunnah of Prophet Muhammad SAW.[232] This part seeks for discussinggenerally the law of environmental protection in Islam – mainly on sources by Al-Quran – and how it rules on the forest fires.

Sharia puts salvation on all beings on earth.[233] Thus, the Sharia is the limit for humans in utilizing resources on earth, and is also used to show the management of natural resources that are civilized.[234] Qur'an has clearly set about what man should do, and covers all aspects of human life.[235] Yet unknowingly, the human progress that forgets the divine mandate to manage nature in an orderly and wise manner has led to the degradation of natural conditions due to fatal ecological damage.[236]

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[228]***Ibid.,*** Page 18.
[229]***Ibid.***
[230]Marzuki, *PembinaanKarakterMahasiswaMelaluiPendidikan Agama Islam di PerguruanTinggiUmum* (PenerbitOmbak, Yogyakarta, 2012) Page 44.
[231] Al-Quran, Surah Al-Hijr: 9.
[232]Marzuki, "Pendidikan Al-Quran danDasar-DasarPendidikanKarakterdalamislam," Seminar "PenanamandanPengembanganKarakterMuliapadaAnak-anakMelaluiPendidikan Al-Quran" (Maret, 2012) Page 1.
[233]Fachruddin M. Mangunjaya, ***Op.Cit.,*** Page 19.
[234]***Ibid.***
[235]Marzuki, Pendidikan Al-Quran.., ***Loc.Cit.,*** Page 1.
[236] B.A. Rukiyanto, ***Op.Cit.,*** Page 119.

A major characteristic of *zalim* science and technology is that they destroy human, environmental and spiritual resources and generate waste.[237] In the cases of forest burning, the Indonesian Ulama Council has also issued a haram fatwa for the act of burning forests and land which may cause damage, environmental pollution, loss of others, health problems, and other corrupt effects.[238]Facilitating, letting and taking advantage of forest fires is also haram.[239]Qur'an has warned through the surah Al-Mu'minun, as Allah warned:

> *"But if the Truth had followed their inclinations, the heavens and the earth and whoever is in them would have been ruined. Rather, we have brought them their message, but they, from their message, are turning away." (Q.s. Al-Mu'minun (23):71)*

Through that surah, Allah has reminded every man not to follow his own desires, because the earth, the heavens, and what is between them will never satisfy human desires. The tendency of humans with their own ego also leads to destruction.[240] In the context of this case, slash-and-burn practice is one of the desire to gain more profit which done by the corporation, and the truth of message to avoid it have been true, such as pollution and death of people, but human and corporation still doing the slash and burn. Allah says in the Qur'an:

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[237]ZiauddinSardar, *The Touch of Midas: Science, Values, and Environmental in Islam and the West,* (Manchester: Manchester University Press, 1984) Page 8.

[238] Tempo, "Apa Fatwa MUI TentangPembakaranHutan?", Retrieved on 1 November 2017 from https://nasional.tempo.co/read/news/2016/09/13/206803751/apa-fatwa-mui-tentang-pembakaran-hutan

[239] BBC News, "Efektifkah Fatwa Haram MUI TentangPembakaranHutan?", Retrieved on 1 November 2017 from http://www.bbc.com/indonesia/berita_indonesia/2016/09/160913_indonesia_fatwa_hutan

[240]Fachruddin M. Mangunjaya, ***Op.Cit.,*** Page 18.

"Have you not considered those who exchanged the favor of Allah for disbelief and settled their people [in] the home of ruin?""[It is] Hell, which they will [enter to] burn, and wretched is the settlement." (Q.s. Ibrahim (14):28-29)

For the sake of public, strategic resources that affect the livelihood of the public may not be privately owned or commercialized by the corporation.[241]Rasulullah said, "Man is allied in three things; water, fire (energy) and forests. "(HR Ahmad and Abu Dawud).[242]Based on this hadith, these three vital and strategic natural resources are the public property that must be used for all fairly. Indirectly this hadith emphasizes the need for the state to manage it, so that everyone can be guaranteed fair access to the three natural resources**.**[243]

Habitation in the earth is given by God to human beings as a gift to be grateful, so man must keep it as a mandate[244], and the blessings that given by Allah shall not be disclaim.[245]Thus, forest and land owned by the corporation is a favor that must be maintained and is a mandate from Allah. Although the corporation already has the right to management the forest, they are not justified to destroy the forest ecosystem by burning, and making air pollution.[246] Because all of these deeds include of 'making damage on earth' or known as '*ifsad fi al-*

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[241]Rahima, "PelestarianLingkunganHidupdalamKhazanahHadisdanPeranPerempuan : DirasahHadisEdisi 44," Retrieved on 1 November 2017 from http://www.rahima.or.id/index.php/31-swara-rahima/dirasah-hadits/155-pelestarian-lingkungan-hidup-dalam-khazanah-hadis-dan-peran-perempuan-dirasah-hadis-edisi-44

[242]***Ibid.***

[243]***Ibid.***

[244]ZiauddinSardar, ***Op.Cit.,*** Page 8.

[245]***Ibid.,*** Page 5.

[246]AhsinSakho Muhammad, *FiqhLingkungan: Fiqh Al-Bi'ah*(Jakarta: Conservation International Indonesia, 2006), Page 84.

ardl', which forbidden by the Qur'an.[247]Surah Ibrahim clearly giving reminder that disclaim of the blessings will cause a great impact on society, making destruction.Air pollution which produced by slash-and-burn practice is a real example of a "destruction," because it cause death to people exposed to smoke with the threat of illness.Air pollution is also a violation of the shariah, and the shariah also allows the government to crack down on polluters when causing negative impacts at certain levels.[248]

'Making damage on earth' *(Ifsad fi al-ardl)* is one of the two negative characters that humans have, besides of 'making conflicts among human beings' *(safkl al-dima').*[249]The form of making damage on earth in the context of the environment is excessive environmental exploitation, one of which is slash-and-burn.[250]Meanwhile, the form of making conflicts among human beings in the context of the environment is an exploitation of the environment that has the potential to cause conflict among humans, internally as well externally. In the internal scale of Indonesia, in 2015, three thousands students demonstrated and urged the government to seriously enforce the law of suspects in forest and land fires in Sumatra and Kalimantan.[251]On an external scale, Singapore, along with Malaysia and Thailand, urged Indonesia to take immediate action against those

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[247]***Ibid.***
[248]***Ibid.,*** Page 43.
[249]Sumarwoto, "TinjauanHukum Islam Terhadap (Aksi) Terorisme," *RatuAdil*, Volume 3(2) (2014) Page 10.
[250]AhsinSakho Muhammad, ***Op.Cit.,*** Page 84.
[251] BBC News, "RibuanMahasiswa di PekanbaruProtesKabutAsap," Retrieved on 1 November 2017 from http://www.bbc.com/indonesia/berita_indonesia/2015/10/151028_indonesia_demoasap

responsible for forest fires.[252] ASEAN in the meeting of ASEAN Agreement on Transboundary Haze Pollution is urged Indonesia to immediately resolve this smoke issue.[253] Thus, cases of forest fires not only create damage on earth (*ifsad fi al-ardl*) but also making conflicts among human beings (*safkl al-dima').*

Allah says that the way to fight against these two negative human characters is to bring the teachings of religion.[254]Thus, the presence of religion is nothing but to erode the attitude of arrogance.[255]That way, people must be aware that multidimensional crises and disasters that come such as forest fires are because of the human activity itself[256]and maintaining the environment is part of the totality of human worship.[257]Therefore Islam becomes grace for the whole of universe (*rahmatanlil 'alamin)* which encourages people not to make damage or accelerate the destruction that done in earth and universe.[258]

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[252] BBC News, "KabutAsapMembuatPemerintah Indonesia Terpojok," Retrieved on 1 November 2017 from http://www.bbc.com/indonesia/berita_indonesia/2015/10/151008_indonesia_pemerintah_terpojok

[253]Republika News, "ASEAN Desak Indonesia SeriusTanganiPersoalanAsap," Retrieved on 1 November 2017 from http://www.republika.co.id/berita/nasional/umum/16/08/12/obrg3t354-asean-desak-indonesia-serius-tangani-persoalan-asap

[254]Sumarwoto, ***Loc.Cit.,*** Page 10.

[255]***Ibid.***

[256]AhsinSakho Muhammad, ***Op.Cit.,*** Page 78.

[257]Fachruddin M. Mangunjaya, ***Op.Cit.,*** Page 103.

[258]***Ibid.***

CHAPTER III

IMPLEMENTATION OF POLLUTER PAYS PRINCIPLE IN ASEAN AND ITS FUNCTION TO REGULATE TRANSNATIONAL CONDUCT IN TRANSBOUNDARY HAZE

A. ASEAN Norms and 'ASEAN Way' as Root of Policy Making in ASEAN

1. ASEAN Norms

Norms contribute to international order by forbidding actions which are subversive of collective goals, by providing a framework for dispute settlement, and by creating the basis for cooperative schemes and action for mutual benefit.[1]Norms help to coordinate values among states and societies, by making similar behavioral claims on different states, norms create parallel patterns of behavior among states over wide areas.[2] The key of ASEAN norms at the time of its founding were derived from the UN Charter and were compatible with the norms of other international institutions.[3]In first ASEAN summit – the meetings of ASEAN states member leader, it is agreed on four norms being foundation of organization life:[4] 1) Non-use of force and pacific settlement of disputes; 2) Regional autonomy and regional solutions to regional problems; 3) Doctrine of

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[1]AmitavAcharya, *Constructing a Security Community in Southeast Asia*, (USA: Routledge, 2003) Page 24.
[2]***Ibid.***
[3]***Ibid.,*** Page 206.
[4]BambangCipto, *HubunganInternasional di Asia Tenggara* (Yogyakarta: PustakaPelajar, 2010) Page 23.

non-interference; 4) No military pacts and preference for bilateral defence cooperation.

a. Non-use of Force and Pacific Settlement of Disputes

Non-use of force is reflected on Kuala Lumpur Declaration which accepted by all five members of ASEAN. In this declaration, it was agreed, that ASEAN was opposed to the use of violence and put forward the way of peace in preventing and resolving conflicts arising among member states.[5] The need for the pacific settlement of disputes also based on the non-use of forces, which was held in such importance by ASEAN's founders that they were willing to create formal mechanisms to support this principle within the ASEAN institutional framework.[6] Thus, the Treaty of Amity and Cooperation signed in 1976 provided for an official dispute-settlement mechanism, and supposed 'to take cognizance of the existence of disputes and situations likely to disturb regional peace and harmony' and 'in the event no solution is reached through direct negotiations', to 'recommend to the parties in dispute appropriate means of settlement such as good offices, mediation, inquiry or conciliation'.[7] The fact that this mechanism never been invoked, being indication an enduring commitment to the non-use of force in intra-regional relations as well as a sign of the grouping's success in intra-mural conflict avoidance and management.[8]Thus, the cited of the condition of good offices,

[5]***Ibid.,*** Page 39.
[6]AmitavAcharya (2003), ***Op.Cit.,*** Page 50.
[7]***Ibid.,***Page 51.
[8]***Ibid.***

mediation, inquiry, or conciliation – as an order to create pacific settlement of dispute – and in order to follow the norms of non-use of force.

b. Regional Autonomy and 'Regional Solutions to Regional Problems'

This desire for regional autonomy was a characteristic feature of several regional organizations in Asia and Africa, mirrored in their adopted slogans such as "Asian solutions to Asian problems".[9] The need for greater self-reliance in managing the region's security problems emerged as a key ASEAN norm.[10] Regional autonomy and 'regional solutions to regional problems' definition could be seen from statement of Adam Malik, explained this norm most forcefully in 1974:[11]

> "Regional problems that are those having a direct bearing upon the region concerned should be accepted as being of primary concern to that region itself. Mutual consultations and cooperation among countries of the region in facing these problems may lead to the point where the views of the region are accorded the primacy they deserve in the search for solution."

Thus, every problem that came in regional should be mediatedby the regional itself. It based on reason that ASEAN was established by South-east Asian states alone without the interference by outside powers.[12]This preference for regional solutions to regional problems were predicated on the fact that regional actors felt

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[9]Mely C. Anthony, "Regionalisation of Peace in Asia: Experiences and Prospects of ASEAN," *ARF and UN Partnership Working Paper No. 42*, Institute of Defence and Strategic Studies Singapore, (2003), Page 4.
[10]AmitavAcharya (2003), ***Op.Cit.,***Page 51.
[11]***Ibid.***
[12]***Ibid.,***Page 80.

they were best suited to mediate in local conflicts, as they understood the dynamics of strife and cultures more intimately than outsiders.[13]

c. Doctrine of Non-interference

Doctrine of non-interference was solidified in the ASEAN Treaty of Amity and Cooperation (TAC) 1971, in Article 2, which acts as a general guideline for intra regional relationships between states.[14] One of the most important ingredients in the TAC was the notion of states not getting involved in other member states' internal affairs.[15] Doctrine of non-interference is one of the strongest foundations supporting the continuity of ASEAN regionalism.[16] Based on this doctrine, ASEAN can maintain internal relations, thus closing the door for military conduct between ASEAN countries.[17] Practice and policy of non-interference is so important. The reason is related to domestic security concerns that diversity among the Southeast Asian nations such as race, religion, culture, combined with the weak State structures and lack of stable regime legitimacy are sources of threat to the national security of the States in the region.[18] Therefore, the policy of non-interference aims at preventing the aggravation of domestic

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[13]Mely C. Anthony, ***Loc.Cit.,*** Page 4.
[14]Muhammad Fuad Othman, "The Principle of Non-Interference in ASEAN: Can Malaysia Spearhead the Effort towards a More Interventionist ASEAN", *Proceedings of the Seminar on National Resilience "Political Managements and Policies in Malaysia", ed.* MohdAzizuddinMohdSani,(Malaysia:Universiti Utara Malaysia, 2010) Page 39.
[15]***Ibid.,*** Page 40.
[16]BambangCipto, ***Op.Cit.,*** Page 31.
[17]***Ibid.***
[18]Eric Corthay, "The ASEAN Doctrine of Non-Interference in Light of the Fundamental Principle of Non-Intervention," *Asian-Pacific Law & Policy Journal*, Vol. 17(2) (2016) Page 6.

conflicts by foreign factors.[19]The non-interference principle enables governments to exclude any issue deemed to be politically sensitive from being discussed at the regional level. Moreover, it ultimately discourages ASEAN member states from criticizing other member states.[20]

d. No Military Pacts and Preference for Bilateral Defense Cooperation

Since its establishment ASEAN members have tended to refuse military cooperation.[21] ASEAN tends to support bilateral cooperation, since security matters are unlikely to be avoided because of the geographic closeness of each member, making it particularly vulnerable to security issue.[22] In general, ASEAN leaders have demonstrated an inward orientation on security matters. Their key objective has been the accomplishment of national or regional resilience, and many continue to believe that a multilateral military pact or defense alliance is irrelevant and ineffective in meeting the ASEAN states most serious security requirements.[23] There is also a widespread belief among ASEAN leaders that any effort to turn the organization into a formal military pact would fracture the cohesion of ASEAN, which has been weakened by ASEAN's expansion and the inclusion of new members with divergent security orientations and threat perceptions.[24]

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[19]***Ibid.***
[20] Daniel Helimann, ***Loc.Cit.,*** Page 114.
[21]BambangCipto, ***Op.Cit.,*** Page 31.
[22]***Ibid.***
[23]Richard Sokolsky, *The Role of Southeast Asia in U.S. Strategy Toward China*, (USA: Rand Corporation, 2001) Page 46.
[24]***Ibid.***

Thus, norms clearly had a major impact on the making of ASEAN regionalism, being ground rules for the purpose of peace and amity.[25] Norms also played a central role in the development of a regional identity sought by ASEAN.[26] Among these norms were both legal-rational – such as non-interference in the interference in the internal affairs of members and non-use of force – and socio-cultural varieties – such consultation and consensus – including those associated with the ASEAN Way.[27]

2. ASEAN Way

In the area of conflict management, ASEAN is known for its inclination to settle disputes through consensus and consultation, avoiding binding dispute settlement mechanisms, or other strong, direct and formal measures.[28] This sociological approach to conflict management reflects the ASEAN Way. It is product of cultural similarities among ASEAN societies and sociological approach to conflict management and decision making.[29] Even the term origin is obscure, with a loosely used concept whose have vague and contested meaning, but subsequently the ASEAN Way was useful in attracting new members and persuading ASEAN's external dialogue partners to see things from an ASEAN perspective, as well as in muting substantive areas of disagreement.[30]ASEAN Way favoured by ASEAN's leaders themselves to describe the process of intra-

[25]AmitavAcharya (2003), ***Op.Cit.,*** Page 71.
[26]***Ibid.***
[27]***Ibid.,***Page 72.
[28] Eric Corthay, ***Loc.Cit.,*** Page 40.
[29]AmitavAcharya (2003), ***Op.Cit.,*** Page 195.
[30]***Ibid.,***

mural interaction and to distinguish it from other, especially Western, multilateral settings and procedures.[31]Thus, central to this process was a set of ASEAN norms and the practice of the 'ASEAN Way' – as the most outstanding one.[32]

3. Role of ASEAN Norms and 'ASEAN Way' in Affecting Policy Making in ASEAN and Its Challenge

With influence of norms and ASEAN Way, method of ASEAN resolving conflict and disagreements include as unique because the method used is more on diplomation, consultation, pressure, prevention[33] and avoiding formal and legalistic approaches[34], which is seen as a way to minimize tensions and avoid unnecessary conflicts.[35] By avoiding formal and legalistic approaches in dispute settlement, the dispute have not led to outright war, although some – such as fishing disputes between Malaysia and the Philippines, or between Thailand and Cambodia, for example – have produced minor skirmishes.[36] ASEAN's approach has differed with Pacific region, due to the influence of the British Commonwealth; most disagreements are settled with formal judicial methods.[37]

Although avoiding formal and legalistic approaches remains entrenched, now members are less convinced of its utility and relevance, especially in the

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[31]***Ibid.,*** Page 63.
[32]***Ibid.,*** Page 195.
[33]BambangCipto, ***Op.Cit.,*** Page 26.
[34]AmitavAcharya (2003), ***Op.Cit.,*** Page 198.
[35]KohKhengLian, Nicholas A. Robinson, "Regional Environmental Governance: Examining the Association of Southeast Asian Nations (ASEAN) Model," *Global Environmental Governance: Options & Opportunities, ed.* Daniel C. Esty (Yale Center for Environmental Law & Policy: 2002) Page 4.
[36]AmitavAcharya (2003), ***Op.Cit.*** Page 199.
[37]KohKhengLian, ***Loc.Cit.,*** Page 4.

wake of the Asian economic crisis[38], which highlighted many of the challenges facing the norms of ASEAN and raised questions as to whether they can survive into the future.[39] The problems faced such as membership expansion and emergence of new sources of intra-regional and transnational conflict, now challenge the sanctity of ASEAN's norms and the credibility of the ASEAN Way, including the doctrines of non-use of force and non-intervention.[40]

Norms changes over time, especially after ASEAN enlarge by its member.[41] Non-intervention have become functionally deficient in deal with transnational dangers such as financial unpredictability, environmental degradation or terrorism.[42] For instance in the case of Cambodian conflict, the principle of non-interference came get challenge, where ASEAN can no longer choose grey area and have to take a position in an essentially domestic conflict.[43] While ASEAN remains wedded to these norms, there is no guarantee that this will not change, especially through the internal initiative of some of the ASEAN members themselves.[44]Even ASEAN's norm of non-interference evolved, but remained influential in shaping ASEAN's response to transnational threats, which came at little notice and respected no national boundaries.[45] For example, in transboundary haze case when the inactive response of the affected states indicate

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[38]AmitavAcharya (2003), ***Op.Cit.,*** Page 198.
[39]***Ibid.,*** Page 206.
[40]***Ibid.,***Page 204.
[41]William J. Jones, "Human Security & ASEAN Transboundary Haze: An Idea That Never Came," *Journal of Alternative Perspectives in the Social Science,* Volume 5(4) (2014) Page 609.
[42]AmitavAcharya, *Constructing a Security Community in Southeast Asia,* (USA: Routledge, 2009) Page 297.
[43]***Ibid.,*** Page 288.
[44]***Ibid.,*** Page 297.
[45]***Ibid.,*** Page 276.

obedience to the principles of non-interference and sovereignty.[46]Further, ASEAN Way with its cultural underpinning in managing disputes and advancing security cooperation has been criticised as overstated, rhetoric, and hyperbolic.[47]

In its development, as a result of membership expansion, the debate over the non-interference doctrine, and the divisions over human rights/democracy, ASEAN has faced several different sorts of intra-mural polarisation and factionalism.[48] These problems within ASEAN are problematic in perspective of its traditional commitment to consensus-based agenda setting and decision making.[49]The impact of its development, ASEAN is abandoning some of its informality in favour of legalistic and formal measures and its identity become problematic. ASEAN losing uniqueness and becoming a 'regular' or 'normal' institution, ASEAN Way elements are hardly different from ordinary qualities of pragmatism and flexibility that are found in national decision-making styles in other cultural settings and its agenda has become too complex to be handled through informal channels.[50]

Thus, ASEAN meet many paradoxes in its development, and has been aggravated further by the enlargement of ASEAN and interpretation of norms and view towards organizational shifts concerning its old and new member states.[51] One of the essential normative paradoxes of contemporary Southeast Asian and Asian regionalism is: the very norms and practices that have kept ASEAN and its

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[46] Daniel Helimann, ***Loc.Cit.,*** Page 110.
[47]AmitavAcharya, (2003) ***Op.Cit.,***Page 63**.**
[48]***Ibid.,*** Page 296.
[49]***Ibid.***
[50]***Ibid.,*** Page 295.
[51] William J. Jones, ***Loc.Cit.,*** Page 609.

offshoots internally viable have also limited their effectiveness in dealing with external and global challenges.[52]

B. Environmental Institution and Policy Making in ASEAN

That Asia, which has always been confronted with classical human rights problems of poverty, hunger, unemployment, deprivation of certain civil and political liberties, and minority problems and which today faces new and "emerging" problems of human rights, generated in part by the activities of transnational corporations and by growing environmental pollution problems.[53]It include in ASEAN, which criticised for not dealing effectively with human rights issues, or transnational problems such as the forest fires in Indonesia that had caused severe air pollution in neighbouring states.[54]

ASEAN was established with the main objective of improving the region's economy, and environmental protection is not one of the objectives of this regional organization establishment.[55] Problems related to environmental protection and conservation were not initially discussed in the framework of cooperation. Thus, ASEAN is regarded as one of the most underdeveloped organizations in terms of environmental protection.[56]

Environmental awareness and environmental regionalism in ASEAN have evolved slowly and in three major phases. First phase is in 1970s – 1980s,

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[52]AmitavAcharya (2009), ***Op.Cit.,*** Page 297.
[53]KarelVasak, ***Op.Cit.,*** Page 652.
[54]AmitavAcharya (2009), ***Op.Cit.,*** Page 6.
[55]SukandaHusin, ***Op.Cit.,*** Page 100.
[56]***Ibid.***

ASEAN introduced the first sub regional environment program, ASEAN Sub regional Environmental Program, which mainly emphasised securing the availability of natural resources for economic development.[57] Second phases is in late 1980s – late 1990s, the focus shifted to transnational threats.[58] The third phases is characterised by the formation of formal relations with the community, and ASEAN established a system of environmental goals and objectives.[59]

The highest authority in the ASEAN structure lies in the hands of the head of state of each member country – in meeting of ASEAN Summit – as the highest decision-making body.[60] Although there are forum in ASEAN besides ASEAN Summit – for instance ASEAN Ministrial Meeting on the Environment (AMME) – but AMME itself considered as ineffective, because AMME with the purpose as soft-law maker in environmental aspect was failed to produce soft-law whichrevelant to environmental protection.[61] However ASEAN Summit held irregularly, and this give effect on the quantity of policy and law that could be developed especially in environmental protection.[62]

When environmental degradation – that initially domestic – reach other state territory, it will also affect international relations and become a source of conflict among ASEAN member.[63] Like other issue areas, environmental

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[57]Armin Ibitz, "Environmental Policy Coordination in ASEAN: The Case of Waste From Electrical and Electronic Equipment," *Austrian Journal of South-East Asian Studies*, Volume 5(1) (2012), Page 34.
[58]***Ibid.***
[59]***Ibid.***
[60]SukandaHusin, ***Op.Cit.,***Page 130.
[61]***Ibid.,*** Page 132.
[62]***Ibid.,***Page 130.
[63]BambangCipto, ***Op.Cit.,*** Page 234.

governance and its dispute settlement in ASEAN follows the norms of the ASEAN community.[64]Non-interference as one of the ASEAN norms may have been useful to avoid internal conflict, but they also being obstacle for integration and collective action.[65] Whereas, in addressing complex international environmental issues such as water pollutionor air pollution, requires a joint effort by all categories of polluters and all levels of government.[66]Thus non-interference is blamed for making ASEAN unable to confront important transnational problems[67]and its continuity is at the cost of the environment.[68]

The environmental challenge to ASEAN was highlighted during the Indonesian forest fires of 1990s, and the transnational side effects of environmental degradation was most clear evident in the form of a haze that covered much of Indonesia and neighboring Singapore and Malaysia.Transnational conflict, such as transboundary haze, is one of the internal security burden which threat and challenging the norms of ASEAN.[69]Non interference, as one of the ASEAN norms, no longer give guidance of intra-regional disputes management, and it could be seen in the ASEAN transboundary haze in the late 1990s[70], when the transboundary haze victims start to criticizing Indonesia.

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[64] Armin Ibitz, ***Loc.Cit.,*** Page 35.
[65]***Ibid.***
[66]Petra E. Lindhout, ***Loc.Cit.,***
[67] Lee Jones, "ASEAN and the Norm of Non-Interference in Southeast Asia: A Quest for Social Order," *Nuffield College Politics Group Working Paper*, Nuffield College (2009), Page 4.
[68] Armin Ibitz, ***Loc.Cit.,*** 36.
[69]AmitavAcharya (2009), ***Op.Cit.,*** Page 295.
[70]***Ibid.,*** Page 182.

Compromising on the non-interference is needed, becauseASEAN members demanded better environmental management from fellow member states and face the need to devise common response, and facing the truth that efforts to address forest fires through the ASEAN framework have not been encouraging.[71] Over time, ASEAN agreements, workshop, and meeting followed with references to transboundary pollution, such as the 1990 Kuala Lumpur Accord on Environment and Development and the 1992 Singapore Resolution on Environment and Development.[72] However, ASEAN environmental programs and agreements are highly ambitious in their promise; they often lack effective implementation and enforcement mechanisms.[73]ASEAN Agreement on the Conservation of Nature and Natural Resources of 1985 could be taken as example. This agreement comprehensive and well-designed, but this agreement is not yet valid and binding because only three state that ratify this agreement.[74]. The agreement was made 16 years ago.[75]

C. ASEAN Agreement as Current Action for Mitigating Transboundary Haze Pollution

After 1990s, it entered third phases of development, which characterised by the formation of formal relations with the community, and ASEAN established

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[71]***Ibid.,*** Page 180.
[72] Daniel Helimann, ***Loc.Cit.,*** Page 101.
[73] Armin Ibitz, ***Loc.Cit.,*** Page 36.
[74]SukandaHusin, ***Op.Cit.,***Page 123.
[75]***Ibid.***

a system of environmental goals and objectives.[76] The ASEAN Agreement on Transboundary Haze Pollution (ATHP) could be considered as one of the third phases outcome, because it make system of environmental protection, goals, and objectives. Unlike its predecessor agreements, the ATHP was envisioned to be a full-fledged treaty regime with binding obligations.[77]

ATHP is both the centrepiece of ASEAN efforts to combat haze and at the core of the haze regime.[78]It had come into force after being ratified in 2003[79], and oversee and prevent through various forms of cooperation.[80]It is the first regional agreement in the world that legally requires neighbouring states to tackle transboundary haze resulting from forest and peat fires.[81] and has been considered as a global role model.[82] Unlike previous policy statements and actions, AATHP is a formal international treaty.[83]

AATHP consist of 32 Articles which are divided into six parts. The main and important part in this ATHP is Part II which provides for monitoring, assessment, prevention and response. The objective of the Agreement 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

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[76] Armin Ibitz, ***Loc.Cit.,*** Page 34.
[77] Daniel Helimann, ***Loc.Cit.,*** Page 103.
[78]***Ibid.,*** Page 96.
[79]AmitavAcharya (2009), ***Op.Cit.,*** Page 253.
[80]BambangCipto, ***Op.Cit.,*** Page 235.
[81] Daniel Helimann, ***Loc.Cit.,*** Page 96.
[82]ApichaiSunchindah, ***Op.Cit.,*** Page 11.
[83]RodaMushkat, "Creating Regional Environmental Governance Regimes: Implication of Southeast Asian Response to Transboundary Haze Pollution," *Washington and Lee Journal of Energy, Climate, and the Environment*, Volume 4, (2013), Page 144.

regional and international cooperation.[84] The Agreement essentially calls for parties to undertake, among others, (i) legislative and administrative measures to prevent and control activities related to land and forest fires that may result in transboundary haze pollution; and (ii) national as well as joint actions to intensify regional and international cooperation to prevent, assess and monitor transboundary haze pollution arising from land and forest.[85]

However, ATHP is strongly affected by ASEAN way and ASEAN norms that could be seen from the means of dispute settlement by diplomacy and absence on sanction clause for failure to meet the stipulated obligations, and its consistent with established ASEAN practice.[86] ATHP strongly emphasizes cooperation, coordination and consultation between the member states.[87]Meanwhile, the weakness of ATHP is related to its absence on addressing important technical issues[88], such as: 1) noclear dispute settlement mechanism[89]; 2) no stipulated obligations and sanctions[90]and; 3) no direct legal redress.[91]Thus, this agreement carries no punitive measures[92]and it frustrates affected state-parties.[93]

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[84]Fadhilah Abdul Ghani, "Review on ASEAN Transboundary Haze Pollution Agreement 2002: Problems and Solutions," *Journal of Humanities, Language, Culture, and Business,* Volume 1(1), (2017) Page 156.
[85]***Ibid.***
[86]ApichaiSunchindah, ***Loc.Cit.,*** Page 6.
[87] Daniel Helimann, ***Loc.Cit.,*** Page 111.
[88]***Ibid.,*** Page 116.
[89]***Ibid.,***, Page 111.
[90]ApichaiSunchindah, ***Loc.Cit.***
[91] Daniel Helimann, ***Loc.Cit.,*** Page 108.
[92]AmitavAcharya (2009), ***Op.Cit.,*** Page 253.
[93] Daniel Helimann, ***Loc.Cit.,*** Page 115.

Indonesia – as the common producer of haze – at first are in most glaring absentee[94] and not ratify ATHP. Many effort have been done by ASEAN to make Indonesia ratify. For instances Singapore and Malaysia criticised Indonesia for not doing enough to prevent the haze and not ratified the ATHP,and AMME 2006 urged Indonesia to ratify the ASEAN Agreement.[95] Susilo Bambang Yudhoyono, President of Indonesia, has promising to ratify the ATHP.[96] But in turn, brought a backlash from Indonesian lawmakers by blaming Singapore and Malaysia for not being 'good neighbours', presumably for not controlling illegal logging in Indonesia by companies based there, which was a major reason for the haze[97] and refused to ratify the ATHP by claiming that already have national action and efforts.[98]

It should be noted that all the blame for haze cannot and should not be placed on Indonesia alone. Malaysia is the biggest investor in the Indonesian oil palm sector, and at least seven firms with substantial oil palm or pulp and paper operations are listed in Singapore.[99]Malaysia and Singapore have signed the haze treaty which is binding, however a closer look into investment in the oil palm sector reveals deep connections with Malaysian investors which often have links via government linked corporations and Singaporean firms that engage in both plantations as well as regional logistics to ship timber around the world.[100]

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[94]RodaMushkat, ***Loc.Cit.,*** Page 145.
[95]AmitavAcharya (2009), ***Op.Cit.,*** Page 253.
[96]***Ibid.,*** Page 253.
[97]***Ibid.***
[98]***Ibid.,*** Page 254.
[99] Daniel Helimann, ***Loc.Cit.,*** Page 109.
[100]***Ibid.***

Malaysian oil palm industry is also populated by companies closely associated with the Malaysian ruling elite.[101] These firms have been involved in clearing land, which may have resulted in transboundary haze.[102]So while these countries pay policy lip service to Indonesia's behavior their own practices of not taking care of home companies and in the Malaysian case facilitating investment by home companies exacerbates the problem to which they complain about.[103]

Indonesian lawmakers ratified the THPA on 16 September 2014, and the instrument of ratification was deposited with the ASEAN Secretariat on 20 January 2015, thus making Indonesia the last ASEAN country to join the agreement.[104]Even, more than a decade has passed since the ATHP came into force and the region still faces the transboundary haze problem periodically and in a seasonal fashion with severe episodes on some occasions like the ones in mid-2013 and 2015 in the southern zone and also in early 2015 in the northern section.[105]The long efforts at prevention of haze pollution is due to the limitations of regional governance caused by the characteristics of the ASEAN way such as non interference and sovereignty[106]which also reflected in ATHP disputes settlement means with diplomatically, through consultation and negotiation.[107] In other hands, ATHP is problematic because of its one major shortcoming that there

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[101]***Ibid.,*** Page 110.
[102]***Ibid.,*** Page 97.
[103] William J. Jones, ***Loc.Cit.,*** Page 618.
[104] Daniel Helimann, ***Loc.Cit.,*** Page 96.
[105]ApichaiSunchindah, ***Loc.Cit.,*** Page 9.
[106] Daniel Helimann, ***Loc.Cit.,*** Page 114.
[107]ApichaiSunchindah, ***Loc.Cit.,*** Page 6.

is no sanction clause for failure to meet the stipulated obligations[108] because a litigous attitude towards the forest fires was arguably seen as contradict to ASEAN values.[109]

Principally, a treaty regime can be effective only when the rules which it prescribes are sufficiently implemented and enforced, acquire a high degree of compliance by the parties and resulting in the resolution of the problem that faced.[110]Thus, ATHP to be meaningful and enforceable needs to be having strict compliance and enforcement coupled with appropriate sanctions and/or penalty provisions.[111] As long as ATHP stay at matter of diplomacy and no direct legal redress, domestic legal framework in member states remains crucial in cases of transboundary haze pollution.[112] In perspective of international environmental law, ATHP refers to the fundamental principles such as the no-harm rule, the precautionary principle and the sovereign right to exploit natural resources, and enshrines them in the regional governance framework.[113]Yet, ATHP does not refers to PPP, because it does not have any direct legal redress meanwhile the core of the PPP is to seek direct redress from polluters for victims of pollution.[114]

However by understanding condition and weakness of ATHP, Helimann argues that Indonesia could now be more inclined to assist other ASEAN member states in taking action against corporations responsible for contributing to the haze

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[108]***Ibid.***
[109] Daniel Helimann, ***Loc.Cit.,*** Page 110.
[110]***Ibid.,*** Page 112.
[111]ApichaiSunchindah, ***Loc.Cit.,*** Page 7.
[112] Daniel Helimann, ***Loc.Cit.,*** Page 108.
[113]***Ibid.,*** Page 105.
[114] Patricia Birnie, ***Op.Cit.,*** Page 324.

pollution, for instance, potential bilateral cooperation between Indonesia and Singapore. This cooperation is by using information plantation concession maps which include precise geographical coordinates of oil palm plantations that owned by Indonesia, and 2014 Singaporean Transboundary Haze Pollution – law that seeks accountability of Singaporean companies for violation of their subsidiaries in Indonesia.[115] It needs causal nexus between a company's economic activities in Indonesia and the haze pollution in Singapore.[116]Thus in enforcing its law, Singapore needs information on the ground as evidence which could be facilitated by Indonesia. Although, so far Indonesia has been reluctant to share with other states its plantation concession maps.[117]

D. Transnational Corporation as Polluter in Southeast Asia Transboundary Haze Pollution

Satellite images from the Centre for Remote Imaging, Sensing and Processing in Singapore have provided strong evidence linking the fires to the deliberate actions of oil palm plantation companies, estimating that 80% of these forest fires were set by plantation companies or their sub-contractors, while the remaining 20% of these forest fires were set by slash-and-burn farmers.[118] The transboundary nature of the haze problem becomes increasingly complex after by fact that the 'transboundary' is not only the haze, but also the companies that set

[115] Daniel Helimann, ***Loc.Cit.,*** Page 116.
[116]***Ibid.***
[117]***Ibid.***
[118] Euston Quah, "The Political Economy of Transboundary Pollution: Mitigation Forest Fires and Haze in Southeast Asia," in *The Asian Community – Its Concepts and Prospects*, (Tokyo: SosoSha, 2013), Page 4.

the fires. Indonesia is a breeding ground for regional agribusiness investment, with about fifty percent of all agricultural land in the country being controlled by foreign interests, especially Malaysian and, to a lesser extent, Singaporean companies.[119] Malaysia is the biggest investor in the Indonesian oil palm sector.[120]Additionally, at least seven firms with substantial oil palm or pulp and paper operations are listed in Singapore.[121]Singapore also serves as the headquarters to several major plantation companies.[122]

In Riau – as one province that providing haze majorly – currently 1.4 million hectares have been converted to palm oil plantation land, whereby a substantial amount of which is controlled by Malaysian companies.[123] For example, the major Malaysian government-linked company, Tabung Haji Plantations owns the development rights to 150,000 hectares of land and Kuala Lumpur Kepong owns 27,760 hectares of plantation land in Riau.[124]PT Minamas, a subsidiary of the Sime Darby, another major Malaysian GLC, also has land holdings there as well.[125]Singapore business is more located in Jambi area, as one of the haze producer. By 92,000 hectares of oil palm plantation in Jambi, Singapore's Golden Agri Resources is the majority of the landowner in the province.[126]

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[119] Helena Varkkey, ***Loc.Cit.,*** Page 44.
[120] Daniel Helimann, ***Loc.Cit.,*** 109.
[121]***Ibid.***
[122] Helena Varkkey, ***Loc.Cit.,*** Page 47.
[123] Euston Quah, ***Op.Cit.,*** Page 21.
[124]***Ibid.***
[125]***Ibid.,*** Page 22.
[126]***Ibid.,*** Page 26.

However, this condition creates some impact. First, Southeast Asian haze can be considered transboundary in more ways than one, both in terms of the countries contributing to and being affected by the problem.[127]Second, one reason for not raising the issue of state responsibility in an international forum could well be the economic interests of Malaysian and Singaporean investors in Indonesian oil palm plantations.[128]However, Malaysia has not only played a significant role in the Indonesian oil palm industry over the last several decades, but that the Malaysian oil palm industry is also populated by companies closely associated with the Malaysian ruling elite.[129] Due to the vested interests among these companies and elites in the Malaysian government, the government arguably tries to protect the well-being of these palm oil operations in Indonesia.[130] It also became apparent that TNC have role in recent forest fires, and not merely the result of bad weather or poor methods of shifting cultivation.[131]

TNC get more attention to the fires because of these activities undertaken by them making great impact on the people[132] – local and transboundary – compared to the local company or local people practice of burning. Weak law enforcement on environmental regulation that is also weak in developing countries is often exploited and used by these TNC.[133] However, the company issues that should get more attention is not discussed in ASEAN negotiation of

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[127] Helena Varkkey, ***Loc.Cit.,*** Page 44.
[128] Daniel Helimann, ***Loc.Cit.,*** Page 109.
[129]***Ibid.,*** Page 110.
[130]***Ibid.***
[131] Euston Quah, ***Op.Cit.,*** Page 4.
[132]AyuNurulAlfia, "TanggungJawab Perusahaan TransnasionaldalamKebakaranHutan di Riau dalamPerspektifHukumInternasional," *Diponegoro Law Journal*, Volume 5(3) (2016), Page 5.
[133]***Ibid.,*** Page 7.

ATHP because deemed too 'sensitive'.[134] Eventhough ASEAN itself understanding that commercial plantation burning was the major source of haze, but the issue of illegal burning by local and foreign plantation companies was never raised during discussions leading up to the ATHP.[135]

E. Polluter Pays Principle Implementation in ASEAN Regional Organization and Its Member State

1. Familiarity of Polluter Pays Principle in the ASEAN

PPP is very different from custom in an ASEAN condition.[136] PPP has fundamental to seek direct redress from polluters for victims of pollution by many means and variation include litigious methods[137]meanwhile, any litigious attitude was arguably seen as contradict to ASEAN values.[138]PPP also considered as highly suggestive of faultfinding and blame which in turn, emphasizes confrontational measures to resolve the problem.[139]By avoiding any litigious attitude, ASEAN emphasize its dispute settlement through diplomation, consensus and consultation.[140]Although ASEAN adopted the PPP in the ASEAN Agreement on Conservation on Nature and Natural Resources adopted in 1985, this agreement is the only agreement outside Europe to refer to the PPP.[141]But because

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[134] Euston Quah, ***Op.Cit.,*** Page 18.
[135]***Ibid.***
[136]***Ibid.,*** Page 20.
[137] Patricia Birnie, ***Op.Cit.,*** Page 324.
[138] Daniel Helimann, ***Loc.Cit.,*** Page 110.
[139] Euston Quah, ***Op.Cit.,*** Page 20.
[140] Eric Corthay, ***Loc.Cit.,*** Page 40.
[141]Sumudu A. Atapattu, *Emerging Principle of International Environmental Law* (NY: Transnational Publisher, 2006), Page 468.

of any environmental governance, dispute settlement, and policy follows ASEAN way and norms[142], PPP – as principle that contradict with ASEAN way and norms – is not well developed.

This contradiction could be seen in ATHP, as centrepiece of ASEAN efforts to combat haze and at the core of the haze regime[143] and envisioned to be a full-fledged treaty regime with binding obligations.[144] However, its excellence initiative of ASEAN negotiation does not covering the weakness of ATHP related to its absence on addressing important technical issues[145] such as: 1) noclear dispute settlement mechanism[146]; 2) no stipulated obligations and sanctions[147]and; 3) no direct legal redress.[148]Thus, this agreement carries no punitive measures[149]and it frustrates affected state-parties.[150]However, redress is one of the important aspects of the PPP.[151] Absence of redress make ATHP could not considered as reflecting to PPP. By not implement PPP, victim's rights not fulfilled, especially related to these rights for compensation from the pollution. ASEAN also could not give equivalent treatment in the country of origin to transboundary and domestic victims of pollution damage.[152]Further, if ATHP is envisioned as treaty regime, it can be effective only when the rules which it

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[142] Armin Ibitz, ***Loc.Cit.,*** Page 35.
[143] Daniel Helimann, ***Loc.Cit.,*** Page 96.
[144]***Ibid.,*** Page 103.
[145]***Ibid.,*** Page 116.
[146]***Ibid.,*** Page 111.
[147]ApichaiSunchindah, ***Loc.Cit.,*** Page 6.
[148] Daniel Helimann, ***Loc.Cit.,*** Page 108.
[149]AmitavAcharya (2009), ***Op.Cit.,*** Page 253.
[150] Daniel Helimann, ***Loc.Cit.,*** Page 115.
[151] Patricia Birnie, ***Op.Cit.,*** Page 324.
[152] Chen-Ju Chen, ***Loc.Cit.,*** Page 10.

prescribes are sufficiently implemented and enforced, acquire a high degree of compliance by the parties and resulting in the resolution of the problem that faced.[153]Thus, ATHP must fulfill the condition above if it envisioned as treaty regime.

Although PPP is not recognized commonly in ASEAN organization, but many ASEAN members is implementing this principle as one of the fundamental to punish or seek compensation related to the pollution in domestic level.[154] This kind of practice is slowly affecting ASEAN organization in general. In ASEAN members, PPP is receiving great attention and is even being applied in certain situations.[155] ASEAN support for the PPP also increasing as a result of growing grassroots environmental movements in the countries coupled with crisis conditions such as water pollution in Java's rivers and Manila Bay waters, hazardous waste in Northern Malaysia, municipal wastes in Thailand, etc.[156]

2. Polluter Pays Principle in ASEAN Member States

PPP was renowned and implemented by many states internationally, although implementation of the PPP by different states enjoyed different status in national legal systems.[157] It also occurred in ASEAN member states. Indonesia, Philippines, and Thailand laws about environment contain principles established in Agenda 21 and the Rio Declaration, such as PPP, right of public participation,

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[153] Daniel Helimann, ***Loc.Cit.,*** Page 112.
[154] Tracie E. Monk, *ASEAN Environmental Markets: Opportunities for U.S Equipment and Service Companies* (US: U.S.-ASEAN Council for Business and Technology, 1991), Page 9.
[155]***Ibid.***
[156]***Ibid.,*** Page 7.
[157]Mizan R. Khan, ***Loc.Cit.,*** Page 643.

and EIA.[158] Notwithstanding that these principles are not incorporated by more ASEAN member states through legislation, member states do implement these principles as part of their environmental management plans.[159]Indonesia has implemented the PPP by established acts governing environmental namely Act No. 4 of 1982 which was later changed by the Act No. 23 of 1997 and amended again with Act 32 of 2009.[160]

Singapore and Malaysia have been leaders in the establishment of industrial waste treatment standards. Both have implemented pollution control regulations specifying discharge limits and a licensing system based on the PPP.[161] As a result, a large number of medium and large industries have installed pollution control and waste water treatment facilities.[162]Singapore has a well-developed legal infrastructure and well-trained technical and administrative personnel for waste management.[163] It has an excellent wastewater collection/treatment system and the most stringent environmental standards and procedures in the region.[164] Waste management measures, which include the PPP, are strictly enforced.[165]In accordance to PPP and environmental taxation principle,

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[158]KohKheng-Lian, ***Op.Cit.,*** Page 88.
[159]***Ibid.***
[160]EdyLisdiyono, "Problems of Compensation for Environmental Pollution in the Legal System in Indonesia," *International Journal of Business, Economics and Law*, Volume 5, (December, 2014) Page 73.
[161] Chua Thia-Eng, *Waste Management in the Coastal Areas of the ASEAN Region: Roles of Governments, Banking Institutions, Donor Agencies, Private Sector and Communities* (Philliphine: Ministry of the Environment, Canada-ASEAN Centre, Singapore; Asian Development Bank, and International Center for Living Aquatic Resource Management, 1992), Page 112.
[162]***Ibid.***
[163]***Ibid.,*** Page 107.
[164]***Ibid.***
[165]***Ibid.***

Singapore has implemented an electronic road payment system since 1998 to regulate road usage and traffic conditions, and imposes hefty taxes on cars.[166]In Thailand, PPP reflected in the 7th and 8th National Plans and the 1992 Enhancement and Conservation of National Environment Quality Act, ideally provides incentives that will encourage enterprises to adopt production processes and consumers to buy goods that cause less environmental damage.[167] Although the PPP has been accepted into the government's environmental policy at present, no comprehensive system of pollution charges or incentives for firms to reduce their pollution has been established.[168]

3. Adoption of Polluter Pays Principle in Transboundary Haze Pollution Cases

Before 1994, International development of PPP majorly due to Environmental Action Programme of European Commission, especially in interpret the principle more strictly, and it increases in importance.[169] It also emphasises the need for more study of the application of the principle, especially as it governs systems of charges and transboundary pollution.[170]However In 1994, PPP still considered as difficult to be implemented in transboundary and global

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[166]KohKheng-Lian, *ASEAN Environmental Legal Integration: Sustainable Goals?*(UK: Cambridge University Press, 2016), Page 88.
[167]YoheiHarashima, "Environmental Governance in Selected Asian Developing Countries," *International Review for Environmental Strategies*, Volume 1(1) (2000), Page 201.
[168]***Ibid.***
[169] Margaret Rosso Grossman, ***Loc.Cit.,*** Page 16
[170]***Ibid.***

environmental problems.[171] This difficulty occurs because the implementation of PPP is limited to the internalization and allocation costs. But there already exist of perspective that consider the transboundary pollution is need to internalized no less than when it is kept within the borders of a nation state.[172]

Along with its development and recognition in some declaration and convention, PPP implementation is not limited to the domestic scale. For instances, The Energy Charter Treaty give most clear statement of relation among PPP and transboundary pollution. Parties are to 'strive to take precautionary measures to prevent or minimise environmental degradation' and agree that the polluter should 'in principle, bear the cost of pollution, including transboundary pollution, with due regard to the public interest and without distorting investment in the energy cycle or international trade'.[173]Transboundary character of PPP also be seen from the equal access as one of the PPP elements.[174] Equal access to national remedies has been considered as one method of implementing the polluter pay principle, as it aims to afford equivalent treatment in the country of origin to transboundary and domestic victims of pollution damage, or to those likely to be affected by such a principle.[175] The equal right of access may involve access to information, participation in administrative hearings and legal

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[171] Candice Steven, "Interpreting the Polluter Pays Principle in the Trade and Environment Context," *Cornell International Law Journal*, Volume 27 (3) (1994), Page 578.
[172] Hans Christian Bugge, *The Polluter Pays Principle: Dilemmas of Justice in National and International Contexts, Environmental Law and Justice in Context*, (UK: Cambridge University Press, 2009), Page 425.
[173] Malcolm N. Shaw, ***Op.Cit.,*** Page 850.
[174] Chen-Ju Chen, ***Loc.Cit.,*** Page 10.
[175]***Ibid.***

proceedings and the application of non-discriminatory standards for determining the illegality of domestic and transboundary pollution.[176]

However, to reach efficiency in a transboundary pollution context raises special methodological and institutional problems. Principle of common but differentiated responsibilities is one way of at least partly implementing the PPP in the wide sense.[177] This viewpoint seems particularly valid for those international environmental problems which are mainly caused by the developed countries.[178]In this sense, Southeast Asia transboundary haze pollution is include of those environmental problems. EU implementation on PPP in national or transboundary pollution was done by assign cooperation between all levels of government or even between Member States to achieve the environmental objectives.[179] Thus, PPP practice in EU provides guidelines to achieve cooperation, burden sharing, and responsibility for the abatement of transboundary pollution should be shared.[180]

4. Victim-Pays and Government-Pays Practice in Transboundary Haze Pollution

The OECD was aware that, in some cases, the PPP must be abandoned in favour of the victim-pays.[181] Victim-pays in the international context implies financial assistance from the country whose environment has been degraded

[176]***Ibid.***
[177] Hans Christian Bugge, ***Op.Cit.,*** Page 426.
[178]***Ibid.***
[179] Petra E. Lindhout, Loc.Cit., Page 54.
[180]***Ibid.***
[181]Hyung-Jin Kim, ***Loc.Cit.,*** Page 129.

(victim) to the country that caused such environmental degradation (polluter).[182] The application of a victim-pay in international environmental agreements on international environmental problems is not necessarily contradictive[183] and seen as permissible more extensively[184] to the application of a PPP.

Compared to the PPP, ASEAN is more close to the concept of victim-pays.[185]In accordance with it, learning from success of pollution reduction in China's Beijing-Tianjin-Hebei region, victim-pays could be done to lowering haze pollution in ASEAN.[186] It based on regional cooperation, and can be achieved by incorporating mutual benefits, compliance and law enforcement mechanisms, stakeholder participation in the decision making processes, and the collaboration of experts.[187] But the weakness is, the victim countries might not get direct benefits from compensating the polluters, but they still benefit in the form of reduced air pollution and infrequent haze events.[188]The application of victim-pays in international environmental agreements does not necessarily exclude the application of PPP in domestic environmental policy[189] and the enforcement instrument to the polluters is vital.[190]Thus, victim or even the state that being place where the haze occur still can seeking compensation for the affected and

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[182]***Ibid.***
[183]***Ibid.,*** Page 133
[184]***Ibid.,*** Page 129.
[185] Euston Quah, ***Loc.Cit.,*** Page 20.
[186]EmbaEmba, "Indonesia's Haze: Should the Victims Pay the Polluters?," Retrieved on 1 November 2017 from https://thediplomat.com/2016/07/indonesias-haze-should-the-victims-pay-the-polluters/
[187]***Ibid.***
[188]***Ibid.***
[189]Hyung-Jin Kim, ***Loc.Cit.,*** Page 129
[190]EmbaEmba, "Indonesia's Haze: Should the Victims Pay the Polluters?," ***Loc.Cit.***

penalties for offenders. Even so victim-pays may be undesirable, because this strategy is likely to earn victims a reputation of weak negotiators.[191] It also can negatively affect the victimized player in future negotiations.[192]However in respond victim of transboundary haze pollution, ensure an effective and timely compensation of victims is needed. Thus, many state implement government-pays. This method occur commonly when polluters cannot be identified or are insolvent[193] or in certain case, the compensation is took long time, and government pay first to accelerate fulfillment of the victim's rights to compensation.[194]These reinterpretations of the PPP hold state and local governments jointly-and-severally liable for environmental damage caused by private parties, allowing these public bodies to act in subrogation against the individual polluters when possible.[195]

F. Polluter Pays Principle Practice in Addressing TNC Responsibility in Southeast Asia Haze

Because ATHP is absent in direct legal redress and stay at diplomatic manner, domestic law in member states remains crucial in cases of transboundary haze pollution.[196]The resort to domestic law is also driven by the realization that

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[191] Carlo Carraro, Carmen Marchiori, Alessandra Sgobbi, "Application of Negotiation Theory to Water Issues," *FondazioneEni Enrico Mattei: Nota Di Lavoro,* Volume 65 (May, 2005) Page 15.
[192] Richard E. Just, Sinaia Netanyahu, "Implications of "Victim Pays" Infeasibilities for Interconnected Games with an Illustration for Aquifer Sharing Under Unequal Access Costs," *Water Resources Research,* Volume 40 (May, 2004) Page 2.
[193]Mizan R. Khan, ***Loc.Cit.,*** Page 645.
[194]***Ibid.***
[195] Barbara Luppi, ***Loc.Cit.,*** Page 142.
[196] Daniel Helimann, ***Loc.Cit.,*** Page 108

an action before international tribunals is unrealistic.[197]The absent of the any legal means in ATHP further criticized as vague agreement[198], especially it claims as treaty regime. Thus, clear and strict law enforcement on the ground will inhibit government officials, large companies, and individuals from capitalising on legal ambiguities to perpetuate their interests at the expense of local communities and national interests.[199]It is also important to appreciate the identity of the players on the ground. For example, in Riau province alone, an estimated fifty percent of total cultivated oil palm land is run by the TNC.[200] Thus, by regulating and seek responsibility from TNC, deterrent effect will impact on TNC. Assuming that the use ofprosecute TNC will solve half of the problem.[201]

1. Implementation in Indonesia by Environmental Protection and Management of Environment Act

First recognition of the PPP appears in the elucidation of Article 34 of Act no. 23 of 1997. The elucidation of this article states that the article 'constitutes the realisation of the environmental law principle that the polluter pays'.[202] Article 34 is actually a provision concerning compensation according to liability based on

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[197] Alan Khee-Jin TAN, ***Loc.Cit.,*** Page 5.
[198] Euston Quah, ***Op.Cit.,*** Page 18
[199] Singapore Institute of International Affairs, "Southeast Asia's Burning Issue: From 2015 Haze Crisis to a More Robust System," *Policy Brief of Singapore Institute of International Affairs*, SIIA, (2016), Page 12.
[200] Alan Khee-Jin TAN, ***Loc.Cit.,*** Page 40.
[201]***Ibid.***
[202] Michael Faure, *Environmental Law in Development: Lessons from the Indonesian Experience*, (UK: Edward Elgar, 2006), Page 37.

fault rule. In this case, fault is interpreted as an unlawful act.[203] Further implementation of PPP could be seen in Act no. 32 of 2009.[204] From this act, there are no articles that make a difference of criminal act from TNC or Local Corporation. Act No. 25 of 2007 also emphasizes that TNC in operating business by subsidiary have same position before Indonesian national law.[205] Thus, both of them bind into same regulation without differentiation. Accordingly, liability will only come into play if the action infringes the law and at the same time gives rise to adverse impacts on other people or the environment.[206] In other situation, Indonesian law has no regulation specified on transnational corporation.[207]

Indonesian Plantation Act, Act No. 39 of 2014, is also regulating about the burning practice in plantation area. It show in Article 56 and 108. By this article, corporation is being subject that prohibited to do the burning practice to open or manage the plantation land. Corporation is also have obligation to own system and tools to manage the fire that happen in plantation area.[208] Similar regulation also could be find in Forestry Act, Act No. 41 of 1999. Every person is prohibited to fire the forest – not limited to the conservation forest, but also production forest that manage by corporation.[209] Production forest is forest area that have main function to producing forest product.[210] Forestry act also regulate any person to

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[203] ***Ibid.,*** Page 36.
[204] EdyLisdiyono, ***Loc.Cit.,*** Page 73.
[205] AyuNurulAlfia, ***Loc.Cit.,*** Page 8.
[206] Michael Faure, ***Op.Cit.,*** Page 37.
[207] Huala Adolf, ***Op.Cit.,***Page 65.
[208] Article 56, Act No. 39 of 2014.
[209] Article 50 (3), Act No. 41 of 1999.
[210] Article 1 (g), Act No. 41 of 1999.

not causing damage to forest area.[211] Forest area is a specific area that appointed by the government to be maintained in its existence as permanent forest.[212]

Indonesia also limit the function of PPP only as a part of the liability system, instead of placing the principle as an overarching principle that underlies the need to internalize the externalized environmental costs.[213] Any regulation so far interprets PPP as a basis for the negligence rule, which requires unlawfulness in order to apply the polluter-pays principle.[214] This interpretation is inconsistent with the aim of the PPP, since there are several methods that can be employed to internalize the environmental externality; and these methods are not limited only to the negligence rule.[215]

Although, Indonesian government's strong actions and sanctions against companies liable for causing peat or forest fires sends the right signal that it is taking the issue seriously.[216] Building on this, laws must be effectively enforced going forward. Severe penalties and sanctions should be imposed on companies or individuals found guilty of instigating or causing forest fires.[217] In December 2015, Indonesia report that they already punish fifty corporation related to the forest fire.[218] However, problem in struggling to seek compensation is still

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[211] Article 50 (2), Act No. 41 of 1999.
[212] Article 1 (c), Act No. 41 of 1999.
[213] ***Ibid.***
[214] ***Ibid.***
[215] ***Ibid.***
[216] Singapore Institute of International Affairs, ***Loc.Cit.,*** Page 12.
[217] ***Ibid.***
[218] BBC News, "DapatkahKebakaranHutan di Indonesia Diakhiri?" Retrieved on 1 November 2017 from

problematic. It could be seen by example of Ministry of Environment and Forestry v. PT BumiMekarHijau. Palembang Court rejected civil suit of Indonesia Government[219] in the case of forest fires in PT BumiMekarHijau – part of Sinar Mas group – a TNC which having many other subsidiary in other business.[220] The judges said they did not see any impacts of forest fires on ecosystem destruction, experts who say there is no damage because the land still can be planted by acacia.[221] Although on appeal Indonesia government is win one-percent of its amount of compensation[222], can be seen that the law enforcement in Indonesia in terms of environment is still odd. Further, Indonesian Corruption Eradication Commissions urged all local government agencies to help prevent and report illegal actions to the authorities.[223] Thus, government officials embroiled in corrupt practices should be duly punished to deter future crimes.[224] Further, to support the law enforcement of Indonesia authorities and courts can be complemented by the transboundary laws passed by Singapore Transboundary Haze Pollution Act.[225]

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http://www.bbc.com/indonesia/berita_indonesia/2016/03/160314_indonesia_kebakaran_hutan_2016

[219] ***Ibid.***

[220] The Jakarta Post, "Pulp Firm BumiMekarHijau Found Guilty of Starting Illegal Fires," Retrieved on 1 November 2017 from http://www.thejakartapost.com/news/2016/08/31/pulp-firm-bumi-mekar-hijau-found-guilty-of-starting-illegal-fires-.html

[221] BBC News, "DapatkahKebakaranHutan di Indonesia Diakhiri?",***Loc.Cit.***

[222] Tempo, "KebakaranHutan, PT BumiMekarHijauCumaBayararRp. 78 Miliar," Retrieved on 1 November 2017 from https://bisnis.tempo.co/read/800226/kebakaran-hutan-pt-bumi-mekar-hijau-cuma-bayar-rp-78-miliar

[223] BBC News, "DapatkahKebakaranHutan di Indonesia Diakhiri?," ***Loc.Cit.***

[224] Singapore Institute of International Affairs, ***Loc.Cit.,*** Page 13.

[225] ***Ibid.***

2. Implementation in Singapore by Transboundary Haze Pollution Act

Singapore has stepped up efforts to combat haze from its own jurisdiction. The Transboundary Haze Pollution Act, which came into effect on 25 September 2014, attributes liability to entities that conduct or condone an act – occurring within or beyond Singapore – which causes or contributes to haze pollution in Singapore.[226] There are three reasons why Singapore enacted Transboundary Haze Pollution Law. First, Singapore felt that AATHP was not sufficiently effective[227] because resolving regional issues through diplomatic rather than legal means[228] and Singapore seen this is as one of major shortcoming of the AATHP is that there is no sanction and compensation clause for failure to meet the stipulated obligations.[229]Second, Singapore increasingly impatient with ineffective ASEAN-level efforts to mitigate haze over the years and following increasingly frequent transboundary haze episodes.[230]Third, it is continuation of Singapore frustration from Indonesia unwillingness to share its land maps with ASEAN member countries through the ASEAN Haze Monitoring System (HMS) mechanism.[231]

This act—which is one of the few acts of extraterrestrial environmental legislation in the world[232]—It seeks to take civil and criminal liability actions against entities responsible for conduct that causes or contributes to

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[226] Alan Khee-Jin TAN, ***Loc.Cit.,*** Page 2.
[227] Daniel Helimann, ***Loc.Cit.,*** Page 102.
[228] Helena Varkkey, "Trends in Environmental Studies in Southeast Asia: Transboundary Haze," *SEASREP Panel*, ICAS (2017), Page 6.
[229] Daniel Helimann, ***Loc.Cit.,*** Page 102.
[230] Helena Varkkey, Transboundary Haze and Human Security... ***Loc.Cit.,*** Page 45.
[231]***Ibid.***
[232]***Ibid.***

transboundaryhaze pollution in Singapore[233], which empowers Singaporeans to sue companies using fires in Indonesia that result in haze in Singapore.[234]This is designed to target whether these be Singapore-linked companies or otherwise[235], and parent or holding companies that have subsidiaries or related entities that are the owners or occupiers of land and that engage in offending conduct on the ground.[236]This extraterritorial reach is "double-edged" as it is often perceived as infringing another state's national sovereignty and is only triggered after the haze pollution has occurred.[237]So far, Indonesia is contradicted with Singapore position to make its own law to criminalize company linked to haze-causing fires in Indonesia. It could be seen from gesture of Indonesian's Environment and Forestry Minister, SitiNurbayaBakar described Singapore's actions as 'controversial' and did not show 'mutual respect' in accordance with the ASEAN Way.[238]

The Singapore position has to be understood in the context of allegations – arising frequently from Indonesia to deflect criticisms of inaction – that Singapore quite prepared to take risk of some Singaporean agribusiness companies being implicated in the legal approach of this act.[239] As already discussed before, many TNC that being perpetrator of fire were actually foreign-owned or -controlled,

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[233]ApichaiSunchindah, ***Loc.Cit.,*** Page 6.
[234] Helena Varkkey, ***Loc.Cit.,*** Page 45.
[235] Alan Khee-Jin TAN, ***Loc.Cit.,*** Page 18.
[236]***Ibid.,*** Page 20.
[237] Singapore Institute of International Affairs, ***Loc.Cit.,*** Page 8.
[238] Helena Varkkey, Trends in Environmental... ***Loc.Cit.,*** Page 6.
[239] Helena Varkkey, Transboundary Haze and Human Security... ***Loc.Cit.,*** Page 47.

with several being based in Singapore including major players such as Wilmar International, Asia Pulp and Paper, Golden Agri Resources and APRIL.[240]

Under this Singapore regulation, a convicted entity that engages in conduct, or engages in conduct that condones any conduct by another entity or individual which causes or contributes to any haze pollution in Singapore (or the entity that participates in the management of a second entity that owns or occupies land and engages in the relevant conduct) can face a fine not exceeding S$100,000 (about US$80,000) for every day or part thereof that there is haze pollution in Singapore.[241] If the entity has failed to comply with any preventive measures notice, there can be an additional fine not exceeding S$50,000 (US$40,000) for every day or part thereof that the entity fails to comply with the notice.[242] Overall, the court must not impose an aggregate fine exceeding S$2 million (US$1.6 million).[243] In addition, a civil liability regime is prescribed. Affected parties may thus bring civil suits against entities causing or contributing to haze pollution in Singapore. The civil damages recoverable are theoretically unlimited and will be determined by the court based on evidence of personal injury, physical damage to property or economic loss (including a loss of profits).[244]

However, effective implementation of this measure is likely to be problematic due to the extra-juridical, territorial, and national sovereignty issues involved coupled with the difficulty of making irrefutable attribution or

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[240] Alan Khee-Jin TAN, ***Loc.Cit.,*** Page 3.
[241]***Ibid.,*** Page 18.
[242]***Ibid.***
[243]***Ibid.***
[244]***Ibid.***

correlation between cause and effect of the problem.[245] Such action would have to entail the adoption of extra-territorial legislation.[246] In general, extra-territorial legislation both criminal and civil against individuals or companies engaged in transboundary pollution is rare.[247]What is unusual is that the Act also claims jurisdiction over non-Singapore entities operating outside Singapore, i.e. companies or individuals with little or no link to Singapore.[248] To the extent that the Act targets companies incorporated in Singapore with operations in Indonesia, there would be little controversy since these are Singapore entities or citizens in the first place.[249] In principle, Singaporean-entity easier to be traced and there can be enforcement against those assets.[250] If the criminal prosecution or civil action is taken out against a Singapore-based company, any penalties (e.g. fines or damages) imposed can be easily enforced against that company as it has a presence in Singapore. However, if the prosecution or civil action is taken against an entity that has no presence in Singapore, there will be problems in enforcing any judgment against it.[251] More problematic would be to trace the assets of the top management or officers of these companies, or to attempt enforcing judgments against these officers if they happen to come within Singapore's jurisdiction.[252] Thus by acknowledging the problem and complexity, for a start and so far the entity to be charged is likely to be a Singapore-based operation that is either listed

[245]ApichaiSunchindah, ***Loc.Cit.,*** Page 6.
[246] Alan Khee-Jin TAN, ***Loc.Cit.,*** Page 3.
[247]***Ibid.,*** Page 33.
[248]***Ibid.,*** Page 34.
[249]***Ibid.,*** Page 33.
[250]***Ibid.,*** Page 42.
[251]***Ibid.,***Page 41.
[252]***Ibid.,*** Page 42.

on the local stock exchange or, even if not publicly-listed, is operated and run out of Singapore – as long as have a clear connection with Singapore.[253] However, this enforcement serve as a 'warning shot' to highlight the urgency of tackling the issue in a more serious and timely manner.[254]

In order to establish liability, straight line between a company's economic activities in Indonesia and the haze pollution in Singapore need to be made. But it getting complicated by the inability to obtain necessary evidence on the ground.[255]Singapore thus took the position that it needed the maps to verify who the concession holders were[256] and to pinpoint the locations of the fires accurately.[257]Indonesia could have a role as facilitator related to the map of concession holders. Without map, it was hard to seek evidence from the field. Hence, Singapore authorities publicly raised the question of whether Indonesia could provide and share its plantation concession maps with the precise geographical coordinates.[258]This effort of Singapore is also by HMS to supports the tracking down of culprits behind the annual transboundary haze pollution. Developed by Singapore, the monitoring system relies on high-resolution satellite images coupled with land use and concession maps to identify those who burn land illegally.[259]The HMS was intended to allow the overlaying of thermal

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[253]***Ibid.,*** Page 43.
[254]ApichaiSunchindah, ***Loc.Cit.,*** Page 6.
[255] Daniel Helimann, ***Loc.Cit.,*** Page 116.
[256] Alan Khee-Jin TAN, ***Loc.Cit.,*** Page 3.
[257]***Ibid.,*** Page 2.
[258]***Ibid.***
[259] Singapore Institute of International Affairs, ***Loc.Cit.,*** Page 10.

hotspots and satellite images on concession maps from each country to help identify suspects thought to be using slash-and-burn practices.[260]

However, Indonesia as the map owner, firstly opposed to share its plantation concession maps – in publicly or even government-to government[261] – which include precise geographical coordinates of oil palm plantations[262]by citing privacy and legal concerns.[263]Malaysia support Indonesia's position.[264]However in the end, Indonesian central government has decided that it needs to reconcile all existing maps pursuant to its "One Map" initiative that rationalizes information on forest licenses, agricultural concessions and other land use claims.[265] If successful, the single reference map is expected to resolve overlapping and contradictory claims and provide much-needed certainty on land use rights.[266]This initiative will take several years to complete, if at all.[267] The problem, however, is the project's slow rate of implementation.[268]

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[260]***Ibid.***
[261]***Ibid.***
[262] Daniel Helimann, ***Loc.Cit.,***Page 116.
[263] Helena Varkkey, Trends in Environmental Studies... ***Loc.Cit.,*** Page 6.
[264] Alan Khee-Jin TAN, ***Loc.Cit.,*** Page 4.
[265]***Ibid.***
[266]***Ibid.***
[267]***Ibid.,*** Page 20.
[268]***Ibid.,*** Page 4.

3. Portrait of Malaysia Position Regarding to Strict Enforcement on Transnational Corporation

Malaysia should be encouraged to take similar strict enforcement on plantation companies both operating in Malaysia and in Indonesia.[269]The Malaysian government is also considering enacting a law similar to that of Singapore's Transboundary Haze Pollution Act. This is a positive step forward in tandem with prosecution in Indonesia.[270] However, the situation concerning Malaysia is different. The Malaysia government is contrast to the Singaporean government.[271] There are a few marked differences between Malaysia and Singapore that can explain their different styles of engagement. First, Malaysia is currently the world's second-largest producer of palm oil, trailing closely behind Indonesia.[272]Furthermore, the fact that Malaysia has its own domestic fire problems would make it both hypocritical and risky to elect for any harsher form of engagement with Indonesia, as Malaysia's own internal practices could potentially be targeted.[273]

Second, Malaysia must also consider the political and economic implications of taking a harder stance on haze. Malaysia has not only played a significant role in the Indonesian oil palm industry over the last several decades[274], but that the Malaysian oil palm industry is also populated by companies closely associated with the Malaysia government and political elites

[269] Singapore Institute of International Affairs, ***Loc.Cit.,*** Page 13.
[270]***Ibid.,*** Page 9.
[271] Daniel Helimann, ***Loc.Cit.,*** Page 110.
[272] Helena Varkkey, Transboundary Haze and Human Security... ***Loc.Cit.,***Page 46.
[273]***Ibid.***
[274] Daniel Helimann, ***Loc.Cit.***

through patronage politics and direct government ownership, there are serious political considerations to consider as well.[275] Due to the vested interests among these companies and elites in the Malaysian government, the government arguably tries to protect the well-being of these palm oil operations in Indonesia. As a result, the government may be influenced by economic interests in its decision-making process.[276]

Hence, eventhough there has been a significant level of public outcry over haze (mainly through mainstream and social media, and in formal complaints to the government), the Malaysian government must balance public concerns against the interests of well-connected elites and the country's developmental trajectory as a major player in the international commodities market.[277]Thus, Malaysia has not possess any suitable legal framework on the matter[278]and the grey area of intertwined interests might be one reason the Malaysian government has not resorted to litigation.[279]

Because of these circumstances, it is not surprising that Malaysia would prefer a more diplomatic/regionalist approach—as compared to harsher forms of bilateral engagement—over transboundary haze issues.[280]The ASEAN approach to environmental cooperation and management, which upholds states' sovereign right to exploit their own resources as they see fit, is important in terms of the

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[275] Helena Varkkey, Transboundary Haze and Human Security... ***Loc.Cit.,*** Page 48.
[276] Daniel Helimann, ***Loc.Cit.,*** Page 110.
[277] Helena Varkkey, Transboundary Haze and Human Security... ***Loc.Cit.,*** Page 46.
[278]Maizatun Mustafa, "The Position of Environmental Law in Malaysia in Dealing with Domestic and Regional Air Pollution Problems," *Jurnal Sultan AlauddinSulaiman Shah,* Volume 3(2) (2016), Page 162.
[279] Daniel Helimann, ***Loc.Cit.***
[280] Helena Varkkey, Transboundary Haze and Human Security... ***Loc.Cit.,*** Page 46.

continued development of Malaysia's own profitable agribusiness sector.[281]Hence, Malaysia's focus on ASEAN-level haze mitigation could be regarded as an attempt to show the Malaysian public that Malaysia is "doing something" while it actually continues to focus on elite and developmental interests.[282]Malaysia can often be seen to take the side of Indonesia on divisive issues at the ASEAN level when it comes to haze issues. For example, when Singapore was pushing for sharing land maps under the HMS, Malaysia supported Indonesia's decision to refuse to share its maps; in fact, Malaysia also refused to share its own maps, arguing that it was against Malaysian law to do so.[283] If Malaysia were to adopt a hard-line legal approach like that of Singapore, Malaysia would risk the embarrassment of its own companies, government entities, or elites being hauled up to court—and there is a risk that the activities of those companies would not only be affected in Indonesia, but in Malaysia as well.[284]

[281]***Ibid.***
[282]***Ibid.***
[283]***Ibid.***
[284]***Ibid.,*** Page 48.

CHAPTER IV

CONCLUSION AND RECOMMENDATION

A. Conclusion

Regarding the role of ASEAN Agreement on Transboundary Haze Pollution (AATHP) to address responsibility of polluter, AATHP has role as centrepiece of ASEAN efforts to overcome haze and at the core of its regime, by oversee and prevent haze through various forms of cooperation. AATHP calls parties to undertake by legislative and administrative measures, and intensify regional and international cooperation to prevent, assess and monitor transboundary haze pollution arising from land and forest. In settling disputes, AATHP use diplomatic means of settlement, through consultation and negotiation.

This means bring advantage and disadvantage to its parties. However, in perspective of victim's right to compensation, diplomatic means making the agreement absence of any strict legal means neither to punish nor seek compensation from polluter. Without strict legal means, this agreement is neither giving any deterrent effect to the polluter, nor show similarity of views of agreementmember to see that the commonenemy is the polluter in form of corporation.Victim is being uncompensated from the polluter. Hence, certain reason above is is to explain howthe AATHP as core-solution in framework of 'regional solution for regional problem is unable to reach responsibility for polluters.

In perspective of parties, Singapore get disadvantage from the agreement diplomatic means. Singapore's dissatisfaction to the AATHP's means leading to Singapore domestic law making process in seeking responsibility of polluters. Thus, Singapore is having its own strict legal means to access compensation and responsibility from polluters, the corporation that done fire-burning practice in Indonesia – which making impact and loss to Singapore. Malaysia, in the other hands, is getting advantage from AATHP's means and its support. This position is taken by Malaysia because of the grey area of their intertwined political and economic interests.

First, Malaysia is the biggest investors in palm oil sector in Indonesia. Second, government and political elites of Malaysia is closely associated with the palm oil business. Due to the vested interests among these companies and elites in the Malaysian government, the government arguably tries to protect the well-being of these palm oil operations in Indonesia. As a result, the government may take part in its decision-making process to avoid strict legal approach like Singapore.

By supporting responsibility from ASEAN or its own domestic law, Malaysia is threatening its own political and economic interests. Hence, their governmentchooses to be neutral and support on diplomatic way of AATHP. Last, Indonesia's effort to punish the corporation that done fire-burning is seen as strict action and position of Indonesia for seeking responsibility from polluters and

showing its position in the dilemma of AATHP's means. Indonesia itself already has some act to regulate corporation conduct and to seek compensation.

Regarding the polluter pays principleimplementation by Indonesia, Singapore, and Malaysia in addressing responsibility for TNC, Indonesia and Singapore are already have own laws to make the access for compensation and punishment for polluter, although the implementation were still problematic. Indonesia is still busy to build its law-enforcement apparatus for having a good environmental perspective, eradicating corruption in its apparatus and government official that inhibit punishment, and seeking compensationfrom TNC. Therefore, it also makes good law enforcement to deter effect from the TNC that burn land and fire.

vbSingapore is successful in seeking compensation and punishing Singapore-based TNC in accordance to its conduct in Indonesia for making transboundary haze that making loss of Singapore. However, its implementation still problematic because of difficulties in gathering evidence because the absence of concession map of the TNC itself, and Indonesia has yet support to provide the map. In the other hand, Malaysia does not take part in its domestic law to punish TNC as polluter of the haze. Malaysia tries to protect the interests of agribusiness and political elites in the government. Thus, Malaysia takes no risk and takes no domestic legal effort for making their corporation responsible for the pollution.

B. Recommendation

In response to the two laid out problems, there is one recommendation to be offered. Indonesia, Singapore, and Malaysia have interests lying behind Indonesia's fires and will not be resolved just by common approach of agreement that stated cliché issue about cooperation and regionalism. Indonesia, Singapore, and Malaysia should be admitted the condition of each other states in next transboundary haze-related meeting, such as its interests behind the policy making in each states, analyzing failure of AATHP implementation, and making perspective that Indonesia, Singapore, and Malaysia take part of the occurrence of transboundary haze and liable to mitigate haze. Hence, policy making to fulfill each other interests is needed, without disadvantaging and blaming other parties. A full solution will demand time, resources, and at the very least – political will – from governments, companies, and financial institutions.

However, access to compensation is still needed, either through ASEAN Agreement or domestic legal effort of each state. The Singapore Act exists because of the absence of access to compensation for Singapore and its resident from AATHP. Thus, the further agreement among Indonesia, Singapore, and Malaysia are needed to specify necessary means in seeking compensation to fulfill the rights of victim. Those countries must determine the means to access the compensation from polluters, whether by domestic regulation or by specific treaty on ASEAN.

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