

# Air pollution knows no boundaries

**ENVIRONMENTAL EQUITY:** Laws and treaties not enough to solve haze problem



**T**HE periodical occurrences of forest and peat fires from the plantation companies and farmers' land-clearing agricultural practices in Indonesia have caused massive haze problems. Winds blow the choking smoke from the forest and peat fires in Sumatra and Kalimantan across national borders into Malaysia, Singapore and other Southeast Asian countries. It is a known fact that the choking haze may cause adverse effects to human health, economy and social costs, such as lost productivity and missed educational and other human development opportunities.

Indeed, the haze problem is a classic example of a transboundary air pollution case. Article 1 of the 1979 Convention of Long-Range Transboundary Air Pollution defines transboundary air pollution as "where the physical origin of the air pollution is situated wholly or in part within the area under the national jurisdiction of one State and which has adverse effects in the area under the jurisdiction of another State at such a distance that it is not generally possible to distinguish the contribution of individual emission sources or groups of sources".

It is important to note that transboundary air pollution is governed by both customary international law and treaty regime. True, states have, in accordance with the Principle 21 of the Stockholm Declaration 1972, the "sovereign right to exploit their own resources pursuant to their own environmental policies".



Many parts of Penang were covered in smog due to transboundary haze in October. Haze can adversely affect health and the economy.

responsible for the damage caused by the smelter and granted compensation to the US. The *Trial Smelter* tribunal declared that: "No state has a right to use its territory in such a manner as to cause injury ... to the territory of another or the persons or property therein ..."

Arguably, if continuous, significantly harmful transboundary pollution must therefore be deemed inexcusable, it would be fair to assume that Indonesia is obliged to terminate its transnationally injurious conduct to stop infringing its neighbouring states' rights.

However, a source state with a legal system which provides only a limited range of participation rights, poor law enforcement and legal remedies that are often biased, would not be effective in controlling environmental harm. Anyone who has followed the haze problem can

international proceedings will rarely be the best way of settling claims of transboundary air pollution or environmental injury.

The inherent weaknesses of the law lead to the suggestion of other possible answers to curb the transboundary air pollution problem. Arguably, what we as developing countries are lacking is on the issue of environmental justice. It has been argued that environmental justice entails social empowerment as well as the expansion of freedom from the inequities that often result from traditional systems of resource exploitation.

Studies conducted by some non-governmental organisations based in the United Kingdom found that there are a number of environmental injustices which unfortunately are common among developing countries:

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However, Principle 21 also specifically provides that, "states should have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or to areas beyond the limits of national jurisdiction". The issue of transboundary air pollution is also addressed by Principle 2 of 1992 Rio Declaration.

Given that the transboundary nature of the environmental impact of the haze problem goes beyond the territory of the source state, affected states can bring the source state to the International Court of Justice (ICJ).

Indeed, one of the earliest legal cases involving transboundary air pollution is the *Trial Smelter* case which was brought to arbitration in 1935 and finally settled in 1941. In this case, fumes from a privately owned smelter at Trail, British Columbia, Canada, caused damage to orchards and crops across the border in the state of Washington, United States, during the 1920s and 1930s. To solve the problem, Canada and the US submitted their dispute to the ICJ through arbitration. The tribunal concluded that Canada was

in no doubt that Indonesia's current environmental laws are not capable and have limited success in addressing the forest and peat fires systematically.

Many of us would like Malaysia to seek resolution before the ICJ to address responsibility and liability for damage caused by the transboundary air pollution. However, some legal scholars concluded that international law represents an inadequate tool for the resolution of today's long-range transboundary air pollution.

This is because, firstly, a state must have standing, and be able to demonstrate that it is an "injured state" i.e. suffered substantial harm. Secondly, it should be noted that only states may apply to and appear before the ICJ. Thirdly, both the state of origin and the affected state must consent to the jurisdiction of the ICJ before the case may be heard. Lastly, it has been argued that some countries are substantially more powerful than others. Suing another country may expose the plaintiff country to retaliatory actions.

Against this backdrop, resorting to

countries.  
**A FAILURE** of governments and law to protect people across society from harm;

**A TENDENCY** of certain parts of the private sector to seek to maximise profits by externalising costs, with implications for people and the environment;

**A LACK** of explicit discussion of the distributional impacts of policies and actions;

**INADEQUACIES** in the tools and procedures for implementing environmental justice; and

**INEQUALITIES** in access to these tools and procedures.

The sad truth is that laws and treaties will not be enough to solve the haze problem. Environmental justice is a powerful way of achieving environmental equity. The future we want is not just a greener landscape with neat rows of palm oil and rubber trees and economic development, but it is also about a more equitable, fair, just and healthy environment for all living beings, regardless of their status.

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