THE ASEAN AGREEMENT ON TRANSBOUNDARY HAZE POLLUTION: PROSPECTS FOR COMPLIANCE AND EFFECTIVENESS IN POST-SUHARTO INDONESIA*

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I. OVERVIEW

The problem of large-scale forest and land fires is a serious ecological and health issue in many parts of the world today.[1] In recent years, the problem has become especially acute in Southeast Asia. The deliberate use of fire to clear forests and land, particularly in Indonesia, has led to periodic fires and smoke pollution episodes in the region, most disastrously in 1997–98.[2] The severe consequences of the fires and "haze" (as the smoke pall is euphemistically referred to in the region) recently compelled the ten member states of the Association of Southeast Asian Nations (ASEAN) to conclude a landmark regional Agreement on Transboundary Haze Pollution ("the Agreement") to deal with the

* [*Editor's Note*: Due to the subject matter of this article, several of the citations herein were difficult or impossible to find in English. For this reason, the editorial staff of the New York University Environmental Law Journal was unable to complete a customary check on the references used to support some of the assertions made in this article. The Author has vouched for the accuracy of all of the citations and translations.]

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[1] *See generally* Nicholas A. Robinson, *Forest Fires as a Common International Concern: Precedents for the Progressive Development of International Environmental Law*, 18 PACE ENVTL. L. REV. 459 (2001).

[2] The fires have been regular occurrences in Indonesia for decades, with the 1997–98 fires being the worst by far. Since then, major fires have broken out again in 1999, 2002, 2004 and 2005. *See* Robert Go, *Indonesians Pay Heavy Price for Illegal Fires*, STRAITS TIMES (Sing.), June 24, 2004.

problem.[3]

Adopted in June 2002, the Agreement came into force on November 25, 2003,[4] with the current state parties being Singapore, Malaysia, Myanmar, Brunei, Vietnam, Thailand and the Lao People's Democratic Republic.[5] Quite noticeably, Indonesia is missing from the list of state parties. This presents a particularly acute problem for the region since Indonesia is by far the biggest source of the fires and haze. Steps are reportedly being taken in Indonesia to send the Agreement for consultation among the relevant government ministries and agencies before submission to the legislature for approval.[6] Even optimistically, it will be at least another few years before Indonesia becomes a party to the Agreement.[7]

Indonesia's ratification aside, the fact that the Agreement was even adopted is noteworthy in itself, given ASEAN's traditional penchant for non-legal, consensual decision-making and non-interference in member states' internal affairs. Thus, for a period, the fact that the fires were on Indonesian territory had invited the instinctive response among the ASEAN states that this was an internal problem best left to Indonesia to handle.[8] However, the severe smoke pollution that blanketed the region in 1997–98 and the unprecedented health and financial damages

[3] ASEAN Agreement on Transboundary Haze Pollution, June 10, 2002, *available at* http://www.aseansec.org/pdf/agr_haze.pdf [hereinafter ASEAN Haze Agreement].

[4] The Agreement required the acceptance of six states as a condition for entry into force. *See id.* art. 29.

[5] These states are listed in the order of submission of instruments of ratification to ASEAN (the Agreement's depositary and Secretariat). The states which have yet to ratify are Indonesia, the Philippines and Cambodia.

[6] E-mail from Liana Bratasida, Expert Staff for the Global Environment and former Deputy Minister for Environmental Conservation, Office of the State Minister for the Environment, Indonesia (Apr. 21, 2004). In July 2004, the Indonesian State Minister for the Environment was reported to have linked Indonesia's reluctance to ratify the Agreement with its desire for the Agreement to extend to tropical forest management in the region. *See Jakarta Drafts Law to Put Illegal Loggers to Death*, STRAITS TIMES (Sing.), July 3, 2004. This is incongruous since, as analyzed below, there has never been strong political will among the ASEAN states to adopt and enforce even a simple treaty, let alone one extending to proper forest management. *See infra* text accompanying notes 71–78.

[7] This is the author's personal projection, based on his assessment of the legislative process and communications with regional experts.

[8] *See infra* notes 41–43.

inflicted region-wide led to moves to conclude a regional agreement on the matter. [9]

From an optimist's perspective, the fact that the Agreement was adopted and brought into force relatively swiftly signals a new willingness among the ASEAN states to deal with issues of transboundary concern in a more formalistic manner, entailing, for the first time, legal rights and obligations for member states.[10] In view of the regional grouping's long-standing abhorrence of challenges to sovereignty and reticence toward treaty adoption and legal settlement of disputes, the Agreement may be seen to herald a new era of political engagement in the region, one characterized increasingly by the assertion of legal rights in place of mere persuasion and consultation, particularly when the interests of states are materially damaged.[11]

Yet, for all its promise, a closer examination of the Agreement's substantive provisions and the political dynamics surrounding its adoption reveal the familiar ASEAN allergy to state accountability and strong, legally enforceable norms. As will be assessed in this Article, the result has been the crafting of an Agreement that is largely deficient in material obligations and enforceability. Of course, with less than two years having passed since its entry into force, a harsh judgment of the Agreement may be premature. Nevertheless, based on its weak provisions and the major actors' lack of capacity for implementation, one can safely surmise that there is very little likelihood that the Agreement will lead to effective and meaningful resolution of the fires and haze problem. Hence, even if Indonesia were to ratify the Agreement in the near future, it would make little practical difference to the problem at hand.[12]

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[9] *See infra* note 57.

[10] *See, e.g.*, Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), 2002 I.C.J. 4 (Dec. 17); Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (pending before the I.C.J); Land Reclamation by Singapore in and around the Straits of Johor (Malay. v. Sing.), 2003 I.T.L.O.S. 10 (Oct. 8).

[11] In this regard, see the other relevant ASEAN treaty, the Agreement on the Conservation of Nature and Natural Resources, July 9, 1985, 15 ENVTL. L. & POL'Y 64. Despite having been adopted 20 years ago, the Agreement is still not in force due to lack of interest among ASEAN states. The absence of a direct transboundary impact may partly explain why it has received a lot less attention than the 2002 Agreement.

[12] *See infra* Part III.C.

This Article seeks to assess the prospects of compliance with and effectiveness of the Agreement, relating it to prevailing theories on treaty enforcement, compliance and effectiveness. In the process, it will be argued that the Agreement cannot be meaningfully understood without locating it within the specific geo-political context that characterizes relations among the ASEAN member states. In this regard, it will be argued that significant pathologies have been implanted into the Agreement's substantive provisions—deficiencies which severely compromise the Agreement's potential effectiveness. At the same time, it will be contended that whatever prospects the Agreement has for effectiveness are influenced by internal conditions within the one state that matters most for this purpose—Indonesia. Hence, the whole structure and political economy of forest resource exploitation as well as issues relating to environmental governance and regional autonomy in Indonesia will have to be appreciated in order to assess the Agreement's future effectiveness.

II. ON TREATY COMPLIANCE AND EFFECTIVENESS

The effectiveness of any given treaty in addressing an identified concern depends in large part on whether the treaty secures the requisite compliance of "target actors" within the state parties. An international regime can be said to be "effective" only when the rules which it prescribes are adequately implemented and enforced, eliciting a high degree of compliance by the target actors at whom they are directed and resulting in an overall resolution or amelioration of the problem at hand.[13] In this regard, the notion of "implementation" refers to the measures which state parties adopt at the national level to make treaty rules effective in domestic law. Looked upon broadly, "implementation" relates to a state's overall effort to accomplish the objectives of a body of rules. The related but narrower concept of "enforcement" entails the state directly

[13] For literature on treaty compliance, see, for example, ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ACCORDS (Edith Brown Weiss & Harold Jacobson eds., 1998) [hereinafter ENGAGING COUNTRIES]; THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE (David G. Victor et al. eds., 1998); ABRAM CHAYES & ANTONIA H. CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995); THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL REGIMES: CAUSAL CONNECTIONS AND BEHAVIORAL MECHANISMS (Oran R. Young ed., 1999); and ROGER FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW (1981).

bringing into force the relevant rules (often, on pain of penalties or sanctions) to compel conformity and "compliance" on the part of specific target actors.

Compliance thus goes beyond implementation and entails an inquiry into whether states are putting into effect the measures which they have instituted and whether target actors are in fact adhering or conforming to the relevant rules. The cumulative extent and impact of implementation, enforcement and compliance go toward determining the level of "effectiveness" of that treaty. In this respect, the concept of "effectiveness" is concerned with whether the stated objectives of a body of rules have been met and whether the problems leading to the adoption of the rules have been meaningfully resolved.[14] Hence, "effectiveness" is connected to, but not identical with, compliance. States and target actors may well be in compliance with treaty rules, but the rules themselves, as influenced and enshrined by the relevant political interests, may nevertheless contain inherent pathologies or weaknesses and become ineffective in attaining the relevant treaty objectives.

Four factors may be identified as influencing whether a treaty regime encounters deficiencies, particularly in relation to inadequate compliance and lack of effectiveness.[15] First, the nature of the accord in question is critical,[16] as is the precise character of the activity being regulated.[17] In addition, the international environment within which regulation takes place forms a contextual background that may throw up forces affecting compliance and effectiveness.[18] Finally, the characteristics peculiar to individual state parties and the extent of their control (or lack thereof) over target actors may affect the effectiveness of treaty regimes.[19]

As this Article seeks to show in relation to the Agreement, where the surrounding political context is defined less by a *demand* by state parties for legally enforceable commitments, but more an *expectation* for moral force and action, prospects for compliance and effectiveness, as defined above, are affected

[14] Harold Jacobson & Edith Brown Weiss, *A Framework for Analysis*, *in* ENGAGING COUNTRIES, *supra* note 13, at 1–4.

[15] *Id.* at 4–12.

[16] *Id.* at 6.

[17] *Id.*

[18] *Id.* at 7.

[19] *Id.*

considerably. The dynamics of political intercourse among state parties are further impacted when the treaty regime depends solely or mainly on only one or a handful of state parties for compliance and effectiveness, as happens when such parties account for a disproportionately large share of the problem as defined.

In such situations, the final two components of the quartet of forces that determine compliance and effectiveness—contextual politics and dominant actors—assume an even more potent relevance. Efforts will thus have to be directed toward ameliorating the impact of these specific factors if greater compliance and effectiveness are desired. Otherwise, if these overriding factors cannot be "manipulated"[20] to a sufficient degree, compliance and effectiveness will remain stultified.

In the case of the Agreement, it will be seen that the twin factors of contextual politics and dominant actors impinge greatly upon the Agreement's effectiveness. Thus, the ASEAN states' distaste for what they perceive to be "confrontational" methods of dispute resolution and their prevailing instinct to uphold the principle of non-interference in member states' internal affairs have led to an Agreement containing the best of intentions, but severely lacking in effective sanctions and enforceability. This absence is particularly worrying given that the Agreement is probably one of the few multilateral treaties in existence that relies, almost exclusively, on *one* state party for meaningful compliance and effectiveness. That this state—Indonesia—is so crippled with political, administrative, financial and technical incapacities tends to deprive the Agreement of its usefulness in dealing with the fires and haze pollution problem. In this sense, the treaty's effectiveness—defined as its capacity to fulfill the objective of ameliorating or resolving the fires and haze problem—is substantially undermined.

On the whole, pessimism over the Agreement's effectiveness can be traced to several factors linked to contextual politics and dominant actors—namely (1) the political forces dictating the drafting of the Agreement's obligations; (2) the resulting pathologies implanted within the Agreement that affect treaty compliance and effectiveness; and (3) relevant internal conditions in politically relevant states. As will be assessed in this Article, these factors all collude to create a treaty regime that is worryingly

[20] *Id.* at 10–11.

deficient from the perspectives of compliance and effectiveness. In particular, this Article will be concerned with contemporary Indonesia's deficiencies in environmental governance, land tenure, forestry management, and decentralization of power, together with the continuing lack of political will and institutional capacity to combat fires and haze pollution effectively.

III. ASSESSING COMPLIANCE AND EFFECTIVENESS

A. *Background to the Fires in Indonesia*

Using fire to clear land has long been an entrenched practice in Southeast Asia, particularly in Indonesia.[21] While some fires are ignited by natural lightning strikes on parched, peat-rich lands, there exists incontrovertible evidence that the problem in Indonesia was, and continues to be, largely man-made.[22] In many cases, the fires are deliberately started by timber and plantation interests to clear land.[23] Burning is the cheapest and easiest method to clear undergrowth and logging wastes following the removal of valuable tropical timber. The cleared land tracts are then typically

[21] Fires in Indonesian forests have been a regular occurrence for as long as humans have inhabited the archipelago. *See, e.g.*, Lesley Potter, *Forest Degradation, Deforestation and Reforestation in Kalimantan: Towards a Sustainable Land Use?*, *in* BORNEO IN TRANSITION: PEOPLE, FORESTS, CONSERVATION AND DEVELOPMENT 13, 24 (Christine Padoch & Nancy L. Peluso eds., 1996).

[22] Satellite pictures taken in Singapore over the past few years clearly show the systematic grid-like burning conducted in Sumatra and Kalimantan. *See Singapore Helps Indonesia Fight Haze with Satellite Shots*, STRAITS TIMES (Sing.), Aug. 30, 1997. Forestry experts also agree on the human causes. *See, e.g.*, E. Harwell, *Remote Sensibilities: Discourses of Technology and the Making of Indonesia's Natural Disaster 1997–98*, 31 DEV. & CHANGE 307 (2000); F. Stolle & T. Tomich, *The 1997–98 Fire Event in Indonesia*, 35 NATURE & RESOURCES 22 (1999); A. P. VAYDA, WORLDWIDE FUND FOR NATURE INDON., FINDINGS AND CAUSES OF THE 1997–98 INDONESIAN FOREST FIRES: PROBLEMS AND POSSIBILITIES (1999); G. APPLEGATE ET AL., CTR. FOR INT'L FORESTRY RES., THE UNDERLYING CAUSES AND IMPACTS OF FIRES IN SOUTHEAST ASIA (2001); CHARLES V. BARBER & JAMES SCHWEITHELM, TRIAL BY FIRE: FOREST FIRES AND FORESTRY POLICY IN INDONESIA'S ERA OF CRISIS AND REFORM (2000) [hereinafter TRIAL BY FIRE].

[23] At the height of the 1997 fires, Indonesia's Office of the State Minister for the Environment conceded that 85 percent of the fires were set by oil palm and timber plantation firms. *See* OFFICE OF THE STATE MINISTER FOR THE ENVIRONMENT & UNITED NATIONS DEVELOPMENT PROGRAMME, FOREST AND LAND FIRES IN INDONESIA, VOL. 1: IMPACTS, FACTORS AND EVALUATION, at xi (1998) [hereinafter IMPACTS].

converted into oil palm,[24] industrial timber and pulp production plantations,[25] as well as transmigrant settlements.[26] Often, the companies which log and then convert degraded land into cash crop plantations are one and the same, or subsidiaries of a parent company.[27]

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[24] *See* TRIAL BY FIRE, *supra* note 22, at 32–33 (explaining that expansion of oil palm plantations is a powerful commercial force behind deforestation and the risk of fires). Foreign investment in the oil palm sector in Indonesia is significant, and the area covered by oil palm plantations has grown from 0.8 million hectares in the mid-1980s to 5.3 million hectares in 2004. For more on the role of oil palm plantations in forest conversion, see, for example, LESLEY POTTER & JUSTIN LEE, WORLDWIDE FUND FOR NATURE INDONESIA, OIL PALM IN INDONESIA: ITS ROLE IN FOREST CONVERSION AND THE FIRES OF 1997/98 (1999); Anne Casson, *The Political Economy of Indonesia's Oil Palm Subsector*, *in* WHICH WAY FORWARD?: PEOPLE, FORESTS AND POLICYMAKING IN INDONESIA 221 (Carol J. Pierce Colfer & Ida Aju Pradnja Resosudarmo eds., 2002) [hereinafter WHICH WAY FORWARD]; Anne Casson, *The Hesitant Boom: Indonesia's Oil Palm Sub-sector in an Era of Economic Crisis and Political Change* (Ctr. for Int'l Forestry Research, Occasional Paper No. 29, 2000).

[25] *See* TRIAL BY FIRE, *supra* note 22, at 31. Industrial timber plantations which provide feedstock for the pulp and paper industry are powerful engines of deforestation. The same companies usually log a concession area for valuable timber and then convert the site into industrial timber plantations. The aggressive expansion of and resulting overcapacity in plywood and pulp production fuel demand for feedstock. Because the plantations are often unable to meet this demand, intense pressure is created on natural forests, with illegal harvesting becoming rampant even in protected areas. *See id.*; CHRISTOPHER BARR, BANKING ON SUSTAINABILITY: STRUCTURAL ADJUSTMENT AND FORESTRY REFORM IN POST-SUHARTO INDONESIA 60, 70–96 (2001).

[26] The government's transmigration program which aims to resettle citizens from crowded islands like Java to less inhabited regions has long had the effect of intensifying conversion of forests to rice fields and cash crop plantations. *See* TRIAL BY FIRE, *supra* note 22, at 33 (discussing the role of transmigration in land clearing by fire). There is also often a direct link between transmigration and oil palm and industrial timber plantations, since transmigrants commonly find employment in these plantations. One of the most disastrous transmigration programs was the Suharto regime's decision in the mid-1990s to embark on the Million-Hectare Peat Swamp Project in Kalimantan. (Ill-)conceived by Suharto, inappropriately funded by the Reforestation Fund and supported by Suharto cronies ranging from logging companies to provincial and regency heads, the Project sought to transform 1 million hectares of peat forests into a rice-growing region for over a million transmigrants. The project failed spectacularly—a combination of drought, heavy peat and indiscriminate burning ignited huge infernos which largely accounted for Kalimantan's share of the 1997–98 fires disaster. With at least US$500 million spent to date, the project is today abandoned, and represents a striking example of Suharto-era excesses. Apparently, the rice-growing justification for the project was nothing more than a sham—the real purpose was to establish the canal and road infrastructure needed to attract oil palm investors, *see* TRIAL BY FIRE, *supra* note 22, at 55.

[27] In 1997, a total of just four companies held sixty-eight percent of the one

Of course, fires are also caused by small-scale farmers practicing swidden (shifting) agriculture,[28] but these are often smaller in impact compared to the systematic burnings conducted by timber and agribusiness companies. That poor logging practices and land use policies have contributed to the preconditions for major forest fires in Indonesia is well-documented.[29] While droughts, peat swamps, lightning strikes and subsistence farming have always been contributory factors, the major causes of forest fires have inexorably been the massive disturbance to vegetative cover by logging activities and the indiscriminate use of fire to clear land.[30] In sum, the root causes of the fires and haze disaster are clearly man-made. As will be assessed in this Article, these causes go deep into the heart of Indonesian forest and land-use policies, the very structure of which encourages large-scale plundering of natural resources by politically-connected commercial interests with little consideration for sustainability.[31]

million hectares of estates in private hands. *See* TRIAL BY FIRE, *supra* note 22, at 32. Oil palm companies reportedly apply for planting concessions primarily as a guise to access valuable timber. Consequently, many oil palm estates appear on production forestland and even protected areas despite the availability of large areas of degraded land elsewhere. *See* Casson, *in* WHICH WAY FORWARD, *supra* note 24, at 221, 239.

[28] Dutch colonial and Javanese cultural biases have long characterized shifting cultivators as being backward and destructive. *See* Peter Dauvergne, *The Politics of Deforestation in Indonesia*, 66 PAC. AFF. 497, 499 (1993); TRIAL BY FIRE, *supra* note 22, at 7. This attitude carried on into Suharto's New Order policies, particularly when the state sought to impose centralized control over land use. Thus, it comes as no surprise that traditional cultivators are typically blamed for forest fires, as was the case in 1997 when the then-Forestry Minister, Sudjarwo and the Suharto-linked logging magnate, Bob Hasan, publicly blamed shifting cultivators for the fires. *See* TRIAL BY FIRE, *supra* note 22, at 12.

[29] IMPACTS, *supra* note 23, at 74. *See also* Peter Dauvergne, *The Political Economy of Indonesia's 1997 Forest Fires*, 52 AUSTL. J. INT'L AFF. 13 (1998); James Cotton, *The "Haze" over Southeast Asia: Challenging the ASEAN Mode of Regional Engagement*, 72 PAC. AFF. 331, 334 (1999); A. Bakar Bin Jaafar, *Smoke Signals in Southeast Asia*, 14 F. APPLIED RES. & PUB. POL'Y 62, 62–63 (1999); Potter, *supra* note 21, at 24.

[30] In general, disturbed forests are more prone to fires, whether natural or man-made. Such forests typically contain lower humidity and higher amounts of ground vegetation, leaf litter and logging wastes to act as fuel, particularly during droughts. Logging roads and tracks also provide easier access to shifting cultivators and transmigrant settlers who use fire to clear land. *See* TRIAL BY FIRE, *supra* note 22, at 7.

[31] Estimates show that total forest cover loss in Indonesia over the 32 years of Suharto rule came up to at least 40 million hectares. *See* TRIAL BY FIRE, *supra*

The 1997–98 transboundary haze problem that afflicted vast areas of Southeast Asia was exacerbated by the onset of a severe and prolonged drought arising from the El Niño climatic phenomenon.[32] Unfavorable winds then brought the smoke to large parts of Malaysia, Brunei and Singapore. In that episode alone, nearly ten million hectares of forests were destroyed, including parts of seventeen protected forest areas in Indonesia.[33] Some twenty million people in Southeast Asia were exposed to the hazardous smoke, with Indonesians living near the sites of the fires in Sumatra and Kalimantan bearing the brunt of the disaster.[34]

The total cost of the fires will probably never be known. Estimates for losses have ranged from US$4.5 billion[35] to around US$9.3 billion internationally.[36] The economic damage arose

note 22, at vi. Recent estimates suggest that between 1985 and 1997, the annual deforestation rate was about 1.64 million hectares. WORLD BANK, INDONESIA: ENVIRONMENT AND NATURAL RESOURCE MANAGEMENT IN A TIME OF TRANSITION 9 (2001). Recent estimates put the deforestation rate at 3.8 million hectares per year. *Sustainable Palm Oil: Mission Impossible?*, DOWN TO EARTH (Down to Earth, London), Nov. 2004, at 16, *available at* http://dte.gn.apc.org/63OP1.htm.

[32] The El Niño Seasonal Oscillation arises from the interaction between the atmosphere and unusually warm surface water in the Pacific Ocean. Its effects lead to abnormal weather patterns and prolonged droughts, which occur roughly every three to seven years. Twenty-six of the twenty-eight droughts in Indonesia since 1877 have been associated with El Niño, along with all the major fire events. *See* ASIAN DEV. BANK, PLANNING FOR FIRE PREVENTION AND DROUGHT MANAGEMENT PROJECT (1999). The 1997–98 episode was particularly severe in Indonesia, where some areas received only ten percent of rainfall recorded in "normal" years. *See* TRIAL BY FIRE, *supra* note 22, at 5.

[33] BAPPENAS [Indonesian National Development Planning Agency], ASIAN DEVELOPMENT BANK TECHNICAL ASSISTANCE GRANT TA 2999-INO, PLANNING FOR FIRE PREVENTION AND DROUGHT MANAGEMENT PROJECT FINAL REPORT, ANNEX I: CAUSES, EXTENT, IMPACT AND COSTS OF THE 1997/98 FIRES AND DROUGHT 2 (1999) [hereinafter BAPPENAS].

[34] *See* TRIAL BY FIRE, *supra* note 22, at 8–10.

[35] ECON. & ENV'T PROGRAM FOR SOUTHEAST ASIA (EEPSEA) & WORLDWIDE FUND FOR NATURE (WWF), THE INDONESIAN FIRES AND HAZE OF 1997: THE ECONOMIC TOLL (1997), *available at* http://reseau.crdi.ca/uploads/user-S/10536124150ACF62.pdf [hereinafter EEPSEA & WWF]. Another study arrived at an estimate of US$2.4 billion. *See* IMPACTS, *supra* note 23. Both sets of estimates are for 1997 losses only and exclude losses incurred in 1998. *See also* FOREST FIRES AND REGIONAL HAZE IN SOUTHEAST ASIA (P. Eaton & M. Radojevic eds., 2001); D. GLOVER & T. JESSUP, INDONESIA'S FIRES AND HAZE: THE COST OF CATASTROPHE (1999); A. ROWELL & P. MOORE, GLOBAL REVIEW OF FOREST FIRES (2001).

[36] BAPPENAS, *supra* note 33. The BAPPENAS study includes losses from both 1997 and 1998. *Id.* These are estimated to range from US$8.9 billion to

from losses such as destruction of crops and timber, declines in tourism and foreign investment and additional health care costs.[37] The long-term human health risks are unquantifiable, as are losses to biological diversity and habitats (including the destruction of endangered species of fauna and flora), impairment in crop productivity due to pollution and reduced photosynthesis, and the release of greenhouse gases into the atmosphere.[38]

The recurrence of future large-scale transboundary haze pollution episodes is a very real possibility, given the continuing difficulties of lack of political will and financial, technical and institutional capacity in Indonesia to deal with the problem. It was with this concern in mind that the ASEAN states hurried to adopt a Regional Haze Action Plan (RHAP) in 1997, culminating eventually in the Agreement that is the subject of this Article.[39]

B. *The Contextual Politics of Engagement in ASEAN: Reticence in Crisis*

It should be noted that Indonesia has never been called upon by its ASEAN neighbors to bear state responsibility for breaching its obligation to control its forest and land fires and to incur international liability for the transboundary haze damage caused to other states. This is despite the fact that such state responsibility and liability can be clearly made out, particularly for the extreme fires and haze of 1997–98.[40] Even at the height of these fires, the

US$9.7 billion (based on two sets of assumptions), with the US$9.3 billion figure being a mean value of these estimates. For a reconciliation of the BAPPENAS and EEPSEA/WWF estimates, see Luca Tacconi, *Fires in Indonesia: Causes, Costs and Policy Implications* 7–9 (Ctr. for Int'l Forestry Research Occasional Paper No. 38, 2003), who reassesses the damage to be in the range of US$2.3 to US$3.2 billion. These reduced figures are apparently accounted for by the fact that many of the burnt areas were already degraded to begin with. *See id.*

[37] EEPSEA & WWF, *supra* note 35.

[38] It has been estimated that the total amount of carbon released into the atmosphere during the 1997–98 fires was 206.6 million tons, over seventy-five percent of which arose from peat combustion. *See* BAPPENAS, *supra* note 33. In this regard, the Indonesian fires contributed thirty percent of all man-made carbon emissions globally—more than the entire emissions from man-made sources in North America. *See* TRIAL BY FIRE, *supra* note 22, at 17. *See also* Susan E. Page et al., *The Amount of Carbon Released from Peat and Forest Fires in Indonesia During 1997*, 420 NATURE 61 (2002).

[39] *See infra* text accompanying note 57.

[40] For a discussion of Indonesia's state responsibility for failing to control the use of fires by plantation and timber interests in 1997–98, see Alan Khee-Jin

response from the "victim" states in the region—principally Malaysia, Singapore and Brunei—was couched in careful diplomatic terms. Although frustration with Indonesian inaction ran high, official admonitions went as far as to call on Indonesia to co-operate with its neighbors, to act decisively on the matter and to enforce its laws and prosecute the offenders.[41] In addition, some technical and managerial assistance was offered by several states in conjunction with international governments and donors.[42] Overall, the governments in the region never publicly raised the "state responsibility" argument that Indonesia was in breach of its obligations under international law in failing to control the activities of its timber and plantation interests who were deliberately setting the fires.[43]

Given the intensity of the health and economic damages being caused to the victim states,[44] one would have expected their response to have been more robust. That this was lacking can be traced to the soft approach that ASEAN member states have traditionally adopted in their relations with one another,

Tan, *Forest Fires of Indonesia: State Responsibility and International Liability*, 48 INT'L & COMP. L. Q. 833 (1999).

[41] For an example of the responses, see *Jakarta Must Take Firm Action*, STRAITS TIMES (Sing.), Oct. 1, 1997, at 36. The Singapore Environment Minister was quoted as saying, "I hope that the current scale of the problem would have brought the message home very, very clearly to the Indonesians[;] . . .[they need to] not let the intensity of the fires get to the stage where it is out of control." *Id.* The Minister was also reported elsewhere as saying, "[w]e do not believe that sanctions are the answer to the problem. We believe that cooperation and mutual assistance are the answer." *Regional Haze Action Plan Set in Motion*, STRAITS TIMES (Sing.), Dec. 24, 1997, at 1. In Malaysia, the government's defensive posture extended to a bizarre ban on academics talking to the media about the event for fear of causing alarm among foreigners. *See Researchers Barred from Talking on Findings that Can Distort Image*, NEW STRAITS TIMES (Malay.), Nov. 6, 1997, at N4. A Malaysian minister was quoted to have said that Malaysia would "'unofficially' inform Indonesia about the economic losses and health effects [that] Malaysians have suffered." *KL to Inform Jakarta of Losses We Suffered*, NEW STRAITS TIMES (Malay.), July 29, 1997, at N2. *See also KL 'No' to Unilateral Actions*, BUSINESS TIMES (Malay.), Oct. 9, 1997, at 20.

[42] TRIAL BY FIRE, *supra* note 22, at 13–14.

[43] The main voices to have raised this issue publicly were Singapore's Ambassador-at-Large (Tommy Koh) and an Indonesian NGO (WALHI). *See* Cotton, *supra* note 29, at 346, 350. It was also reported that Brunei had threatened to bring a suit against Indonesia for the fires. *See Experts Call for Indonesia to Face Court Over Smog*, JAKARTA POST, Aug. 7, 1999. This course of action was never pursued.

[44] *See* BAPPENAS, *supra* note 33; EEPSEA & WWF, *supra* note 35.

particularly with the regional giant that is Indonesia. Instead, the call for strong action was left to inter-governmental organizations and governments from outside the region as well as non-governmental organizations (NGOs), opposition political parties and public interest groups from within the victim states.[45]

The muted response from the region demonstrated how the traditional ASEAN adherence to the principles of "non-intervention" and consensus had remained supreme even at a time of great regional crisis and adversity.[46] The ASEAN member states were sensitive to the political and social context—the region was then in the throes of the currency crisis precipitated by the collapse of the Thai Baht in July 1997, and Indonesia became the worst-hit country in the economic meltdown that followed.[47] Political turbulence was brewing in Indonesia, with then-President Suharto's reign looking more uncertain than it ever did in the past three decades.[48] A self-interested wish for Indonesia (and thus, the

[45] *See, e.g.*, Ho Wah Foon, *What a Mockery of Suharto Apology, Says DAP Leader*, STRAITS TIMES (Sing.), Sept. 30, 1997, at 23.

[46] On the traditional ASEAN emphases on consensus, non-interference and *musyawarah* (an Indonesian expression meaning "discussion with the goal of achieving consensus"), see, for example, Robin Ramcharan, *ASEAN and Non-Interference: A Principle Maintained*, 22 CONTEMP. SOUTHEAST ASIA 60 (2000); Tobias Ingo Nischalke, *Insights from ASEAN's Foreign Policy Co-operation: The "ASEAN Way," a Real Spirit or a Phantom?*, 22 CONTEMP. S.E. ASIA 89 (2000); AMITAV ACHARYA, CONSTRUCTING A SECURITY COMMUNITY IN SOUTHEAST ASIA: ASEAN AND THE PROBLEM OF REGIONAL ORDER (2001).

[47] By July 1998, the Indonesian currency—the rupiah—had fallen by eighty percent, inflation had ballooned to fifty percent and massive unemployment had arisen. *See* TRIAL BY FIRE, *supra* note 22, at 3. For effects of the crisis on Indonesia in general, see, for example, Mohammad Sadli, *The Indonesian Crisis*, *in* SOUTHEAST ASIA'S ECONOMIC CRISIS: ORIGINS, LESSONS, AND THE WAY FORWARD (H. W. Arndt & Hal Hill eds., 1999); HAL HILL, THE INDONESIAN ECONOMY IN CRISIS: CAUSES, CONSEQUENCES AND LESSONS (1999); TIM HUXLEY, DISINTEGRATING INDONESIA?: IMPLICATIONS FOR REGIONAL SECURITY (2002); N. Scotland, *The Impact of the Southeast Asian Monetary Crisis on Indonesian Forest Concessions and Implications for the Future*, Indon.-U.K. Tropical Forest Management Program, (ODA-DFID Report No. SMAT/EC/98/02, Jakarta, Indonesia) (1999); PHILIPPE DELHAISE, ASIA IN CRISIS: THE IMPLOSION OF THE BANKING AND FINANCE SYSTEMS (1998); Manuel F. Montes, *Indonesia: Reaping the Market*, *in* TIGERS IN TROUBLE (K. S. Jomo ed., 1998).

[48] The economic collapse of 1997–98 triggered widespread political unrest which drove Suharto from office in May 1998. For an account of the Suharto regime's demise, see generally THE FALL OF SOEHARTO (Geoff Forrester & R. J. May eds., 1999). Suharto's resignation led to a period of instability, involving multiple leaders in a relatively short period of time. Overall, however, Indonesia

region) to regain its stability may have contributed to the ASEAN member states' reluctance to criticize Indonesia harshly and openly for the fires. In sum, there was an overall sense of resignation among the regional governments over the fires and haze. There was even an implicit recognition that the Indonesian government was perhaps doing its level best to deal with the situation amidst its other crises and given the difficulties of controlling its many provinces in the sprawling archipelago.

The whole reluctance to deal with Indonesia in harsher terms can be linked to the regional governments' belief that in view of ASEAN's history, culture and context, such methods were unlikely to work, or worse, could prove to be counter-productive.[49] The "ASEAN Way" of doing things,[50] rightly or wrongly, would prove determinative in crafting the response of the regional governments to the haze, and eventually in the drafting of the key provisions of the Agreement. As a result, provisions that would result in major deficiencies were implanted in the Agreement, ranging from weak obligations relating to requesting and receiving assistance, monitoring, reporting, exchanging information and conducting research[51] to the complete absence of enforcement and liability provisions. Strong on legal niceties relating to "co-operation," "coordination" and "consultation," the Agreement reiterates the traditional ASEAN platitudes of partnership and regional solidarity while omitting any mention of legal consequences for non-compliance.[52]

remains largely intact, and the relatively free parliamentary and presidential elections of 2004 have been hailed as a remarkable achievement for a six-year old democracy. *See Indonesia's Shining Example*, THE ECONOMIST, July 10, 2004, at 10.

[49] In recent years, ASEAN's reluctance to deal with its members in a strong fashion has been demonstrated by its lax attitude toward the military junta in Myanmar (Burma). *See, e.g.*, *Dialogue of the Deaf*, THE ECONOMIST, June 14, 2003, at 28.

[50] On the "ASEAN Way" in relation to the environment and development, see Koh Kheng Lian & Nicholas A. Robinson, *Strengthening Sustainable Development in Regional Inter-Governmental Governance: Lessons from the 'ASEAN Way'*, 6 SING. J. INT'L & COMP. L. 640 (2002).

[51] The present author is not in any way suggesting that these are unimportant features of a treaty regime, only that they are inadequate *in themselves* in fostering compliance and effectiveness.

[52] *See infra* Part III.C.

C. *Analysis of the Agreement*

It is opportune at this juncture to review the Agreement in some detail. In its preamble, the Agreement recalls earlier regional instruments adopted on transboundary pollution abatement and prevention—namely, the 1990 Kuala Lumpur Accord on the Environment and Development[53], the 1994 Strategic Plan of Action on the Environment,[54] the 1995 ASEAN Cooperation Plan on Transboundary Pollution,[55] the 1997 Regional Haze Action Plan (RHAP)[56] and the 1998 Hanoi Plan of Action.[57] These instruments called for co-operative measures in preventing, monitoring and fighting transboundary pollution, but none contained specific prescriptions on preventive measures, enforceable obligations and consequences for non-compliance. Indeed, none of these instruments are legally binding to begin with, and they constitute what amounts to "soft law" within the regional context.[58]

For its part, the Agreement is envisaged to be a full-fledged treaty regime with legally binding obligations. Its stated objective is the prevention and monitoring of transboundary haze pollution "as a result of land and/or forest fires which should be mitigated through concerted national efforts and intensified regional and

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[53] Kuala Lumpur Accord on Environment and Development, June 19, 1990, *available at* http://www.aseansec.org/9674.htm.

[54] Strategic Plan of Action on the Environment 1994–1998, Apr. 25, 1994, *available at* http://www.aseansec.org/9789.htm.

[55] ASEAN Cooperation Plan on Transboundary Pollution, June 17, 1995, *available at* http://www.aseansec.org/9803.htm.

[56] Regional Haze Action Plan, Dec. 23, 1997, *available at* http://www.aseansec.org/10469.htm.

[57] Hanoi Plan of Action, Dec. 16, 1998, *available at* http://www.aseansec.org/11644.htm. Of these, only the 1995 Cooperation Plan and the RHAP (inspired by the fires of 1994 and 1997 respectively) relate specifically to the haze. Even then, neither contains binding obligations on states to deal with the fires. The Hanoi Plan of Action calls on states to fully implement the 1995 Cooperation Plan by the year 2001, with particular emphasis on the RHAP. *Id.* art. 6.1. This date has passed, but there are few indications that the respective plans have been meaningfully implemented. For assessments of the ASEAN response, see, for example, Robinson, *supra* note 1, at 474–82; FIRE, SMOKE AND HAZE: THE ASEAN RESPONSE STRATEGY (S. Tahir Qadri ed., 2001); Simon SC Tay, *Southeast Asian Fires: The Challenges for International Environmental Law and Sustainable Development*, 11 GEO. INT'L ENVTL. L. REV. 241, 258–60 (1999); Sompong Sucharitkul, *ASEAN Activities with Respect to the Environment*, 3 ASIAN Y.B. INT'L L. 317 (1993).

[58] *See generally* Koh & Robinson, *supra* note 50 (characterizing the "ASEAN way" as a "soft law" approach).

international co-operation."[59] This objective is to be pursued in the overall context of sustainable development and in accordance with the provisions of the Agreement.[60]

The sovereign right of parties to exploit their resources pursuant to their own environmental and developmental policies is reaffirmed, together with the now-familiar ancillary responsibility to ensure that activities within the jurisdiction or control of states do not cause damage to the environment and harm to human health of other states or of areas beyond the limits of national jurisdiction.[61] The precautionary principle is duly reiterated,[62] as is the management and use of natural resources in an ecologically sound and sustainable manner.[63] The involvement of non-state stakeholders such as non-governmental organizations, local communities, farmers and private enterprises is provided for.[64] However, the provisions on the precautionary principle, ecologically sound and sustainable management and non-state stakeholders are all carefully couched in non-mandatory language (i.e. parties "should," as opposed to "shall" . . .).[65]

1. *Non-binding General Obligations*

The more notable features of the Agreement can be found in Articles 4 and 9, which outline general obligations in seemingly mandatory language. Thus, parties *shall* co-operate to prevent and monitor transboundary haze pollution and to control sources of fires.[66] When fires originate from within their territories, parties

[59] ASEAN Haze Agreement, *supra* note 3, art. 2. On the duty to co-operate under international law, see Robinson, *supra* note 1, at 469.

[60] ASEAN Haze Agreement, *supra* note 3, art. 2.

[61] *Id.* art. 3(1).

[62] *Id.* art. 3(3).

[63] *Id.* art. 3(4).

[64] *Id.* art. 3(5).

[65] Moreover, it is provided that non-state stakeholders should be involved "as appropriate." *Id.* art. 3(5). Hence, the state parties appear to have sole discretion in determining the appropriate stakeholders. Recent ASEAN instruments, including the 2002 ASEAN Agreement and the 1997 RHAP, have recognized the role of NGOs and the private sector. While this is interpreted to be significant by some observers, see, for example, Cotton, *supra* note 29 at 350, the rise of NGOs in states like Indonesia has had to do more with progressive democratization at home rather than ASEAN nudging. For an assessment of NGOs in Asia, see, for example, GOVERNMENT-NGO RELATIONS IN ASIA: PROSPECTS AND CHALLENGES FOR PEOPLE-CENTRED DEVELOPMENT (Noeleen Heyzer et al. eds., 1995).

[66] ASEAN Haze Agreement, *supra* note 3, art. 4(1) (emphasis added).

are obliged to respond promptly to requests for information and consultations by affected states.[67] Most significantly, state parties "*shall* take legislative, administrative and/or other measures" to implement their obligations under the Agreement.[68] It is further provided that states *shall* undertake measures to prevent and control activities related to land and/or forest fires that may lead to transboundary haze pollution, including developing and implementing legislative and other regulatory measures, as well as programs and strategies to promote zero burning policy to deal with fires and haze, and ensuring that legislative, administrative and/or other relevant measures are taken to control open burning and to prevent land clearing using fire.[69]

These provisions clearly impose obligations on states to develop the requisite legal or administrative machineries in order to prevent and combat transboundary haze pollution arising from forest and/or land fires. Even though the Agreement provides no elaboration on law enforcement and penalties, the general provisions seem wide enough to embrace the enactment of strong anti-burning laws, the prosecution of offenders and the imposition of adequate penalties to deter the use of fires effectively. Thus, while it is unfortunate that the Agreement does not spell out a positive obligation to impose penalties adequate in severity to deter open burning, all the necessary legal, administrative and other measures needed to curb transboundary haze pollution arising from forest and/or land fires can conceivably be taken pursuant to the Agreement's broad provisions. Such an interpretation is necessary to imbue the Agreement with some tangible legal force.

Although there is no lack of legal authority to provide for strong legislation as well as enforcement and adjudication, the overriding obstacle is the lack of political will in some state parties to implement the Agreement and to ensure compliance with the obligations outlined above. As far as the Agreement is concerned, the most worrying feature is the complete absence of sanctions in

[67] *Id*. art. 4(2).

[68] *Id.* art. 4(3) (emphasis added).

[69] *Id.* art. 9 (emphasis added). Art. 9 also prescribes measures to curb activities that may lead to fires, to identify and monitor fire-prone areas, to strengthen fire management and firefighting capabilities and to promote public education, community participation and the use of indigenous knowledge to prevent and manage fires. *Id.*

the event that states fail to comply with their obligations. Even if Indonesia were to ratify the Agreement in the future, the Agreement appears to be heading towards serious ineffectiveness in meeting its outlined objectives, given its weak provisions and Indonesia's poor record in dealing with past fires.[70]

2. *Weak Dispute Resolution Mechanisms*

A related deficiency is the absence of a strong dispute resolution mechanism. Consistent with the ASEAN preference for consensus and non-confrontation, disputes as to the interpretation or application of, or *compliance* with the Agreement or its protocols "shall be settled amicably by consultation or negotiation."[71] Unlike other relevant treaty regimes, no provision whatsoever is made for disputes to be settled by recourse to international courts or arbitration tribunals. This wholly preempts the enforcement of compliance through legal principles of state responsibility and international liability. Moreover, unless consultation or negotiation is able to procure an undertaking to compensate (in itself highly unlikely), no compensation is due to victim states or their citizens for losses incurred as a result of transboundary haze.

Given ASEAN's operating dynamics, it is not difficult to imagine what "consultation or negotiation" will entail—a great deal of persuasion and "behind-the-scenes" diplomatic cajoling and discussions, all of which were readily employed during the 1997–98 fires, but with precious little effect. In this regard, the Agreement effectively adds little to ASEAN's traditional modes of regional engagement. To such extent, it is highly questionable if the existence of the Agreement provides anything more than a formal encapsulation of "tried and tired" methods.

Moreover, the Agreement is silent as to the recourse of victim states should "consultation or negotiation" fail to produce satisfactory results. What happens then? The Agreement appears to have foreclosed all forms of compulsory dispute resolution. By the same token, it is arguable that by accepting the Agreement, the state parties could have waived their right to any forms of judicial or arbitral recourse. One may contend that it would be unrealistic to expect a more stringent treaty regime to work within ASEAN's

[70] *See infra* text accompanying notes 120–45.

[71] ASEAN Haze Agreement, *supra* note 3, art. 27 (emphasis added).

immense geo-political constraints. In fact, a more strongly worded agreement with compulsory dispute settlement provisions would in likelihood *not* have secured the minimum number of ratifications required for entry into force. Certainly, a state like Indonesia would have had greater difficulty in accepting such a treaty.

On the other hand, it is conceivable that, in theory, any dispute may *still* be referred to judicial or arbitral resolution, provided that all states involved agreed to do so. In this sense, the Agreement does not alter the prevailing rights of the respective states under general international law to seek resolution of a dispute.[72] What it does do, however, is to *practically* eliminate all expectations and possibilities for compulsory dispute settlement. This lack of enforcement, it is submitted, is the Agreement's primary systemic drawback. At the very least, the Agreement could have provided for some form of compulsory dispute resolution as a measure of last resort contingent upon the prior exhaustion of attempts to consult or negotiate. This type of provision would still have been faithful to the traditional ASEAN spirit of consensus. In fact, the prospect of compulsory dispute resolution may well provide states with the incentive or push for a successful process of consultation or negotiation. By not providing for what happens should consultation or negotiation fail, the Agreement actually fosters even more uncertainty for the region's legal and political order.

3. *Concessions to State Sovereignty*

Other substantive sections of the Agreement bear testimony to the realities of decision-making in ASEAN. Part II of the Agreement (Articles 5 to 15) lays down provisions relating to monitoring, assessment, prevention and response.[73] An ASEAN Coordinating Center for Transboundary Haze Pollution Control (hereinafter "the ASEAN Center") is to be established to facilitate cooperation and coordination among parties in managing the impact of transboundary haze.[74] However, concessions to state sovereignty abound—the Center shall work on the basis that the national authority[75] designated by state parties will act *first* to put

[72] U.N. CHARTER, art. 33–38.

[73] ASEAN Haze Agreement, *supra* note 3, arts. 5–15.

[74] *Id.* art. 5.

[75] States are to designate Competent Authorities and a Focal Point to act on their behalf in performing their administrative functions under the

out any fires. The national authority has the discretion to declare a state of emergency, and when it does so, *may* then make a request to the ASEAN Center to provide assistance.[76]

Hence, the ASEAN Center is powerless to prescribe or take any action should state parties decide to handle the problem unilaterally. This was the precise challenge faced in 1997–98 when the Indonesian government initially refused to acknowledge that the haze was a deliberate and large-scale man-made problem. It continued to blame the El Niño phenomenon and shifting agriculture for the fires, accepting assistance in the form of firefighters and technical experts from other countries only at a later stage of the crisis.[77] That the Agreement allows room for state parties to receive outside assistance at its sole discretion seems at odds with the whole spirit of the Agreement to *require* timely cooperation and consultation. Again, this is an example of the non-legally binding *expectation* of cooperation which ASEAN typically resorts to.

State parties shall also designate National Monitoring Centers to take appropriate measures to monitor fires and the resulting haze, and to initiate immediate action to control or put out fires.[78] However, as a further concession to national sovereignty, monitoring activities may be undertaken in accordance with the respective *national* procedures.[79] As such, there is no provision for a *minimum* level of monitoring competence and procedures. In assessing the impact of fires, state parties shall ensure that their National Monitoring Centers regularly communicate data on fires and haze to the ASEAN Center.[80] This reporting requirement is limited in its effect because the ASEAN Center is not bound to do anything more beyond analyzing the received data and providing to state parties an assessment of the risks to human health and the environment.[81] Ideally, there should have been a procedure for the ASEAN Center to prescribe remedial measures to be immediately

Agreement. *Id.* art. 6. Competent Authorities and Focal Points are typically the national Ministries or Departments in charge of environmental protection.

[76] *Id*. art. 5(2).

[77] *See* TRIAL BY FIRE, *supra* note 22, at 12–13.

[78] States are to designate National Monitoring Centers to undertake monitoring activities in accordance with the respective national procedures. ASEAN Haze Agreement, *supra* note 3, art. 7.

[79] *Id.*

[80] *Id.* art. 8(1).

[81] *Id.* arts. 8(2) and 8(3).

undertaken by state parties, accompanied by possible sanctions for non-compliance. In addition, since there is no elaboration on the amount and nature of information to be provided by each state party in the first instance, the ASEAN Center does not appear to have the authority to require further and additional information should the initial data be deemed inadequate.

As far as response measures are concerned, state parties are to develop strategies and response plans to deal with the risks posed by fires and haze.[82] In this regard, state parties are to ensure that the appropriate legislative, administrative and financial measures are taken to mobilize all forms of resources towards responding to fires and haze.[83] A state party needing assistance in the event of fires or haze pollution "may" request assistance from other state parties, international organizations or other states.[84] At all times, however, assistance can only be rendered with the consent of the requesting or receiving state.[85] In effect, the specific form and type of assistance contemplated can only be decided upon with the consent and participation of the requesting state.

Overall, the state in which the fires occur retains complete sovereignty over the admission of assistance into its territory, even when the harm being caused to other states is egregious. Thus, there is nothing victim states can do to compel the acceptance of assistance should the state causing harm refuse offers of assistance. In practical terms, this does not take the situation beyond the pre-Agreement scenario, as exemplified in 1997 when Indonesia took months before finally agreeing to assistance.[86] In this regard, the Agreement should have set up safeguards in the form of, for instance, a high-level Council comprising representatives of all state parties which has the power to call for mandatory acceptance of assistance upon making a determination that transboundary haze injury is sufficiently serious. However, such measures would have been viewed as intolerable incursions into ASEAN member states' sovereignty, and were predictably omitted.

4. *Control Fund*

One positive feature of the Agreement is its provision for the

[82] *Id.* art. 10.
[83] *Id.* art. 11(1).
[84] *Id.* art. 12(1).
[85] *Id.* art. 12(2).
[86] *See generally* TRIAL BY FIRE, *supra* note 22.

establishment of an ASEAN Transboundary Haze Pollution Control Fund ("the Fund").[87] To be administered by the ASEAN Secretariat under the guidance of the Conference of Parties, the Fund is to receive voluntary contributions made by state parties in accordance with decisions of the Conference of Parties.[88] The Fund shall also be open to contributions from external sources, including regional financial institutions, the international donor community and foreign governments and organizations.[89] The bulk of contributions is likely to come from the state parties themselves, presumably in accordance with the relative capacities of the various states.

However, without the assurance of immediate and effective measures to curb the fires, it is highly unlikely that the richer states such as Singapore, Malaysia and Brunei will be willing to throw vast amounts of money at the problem. This is despite the fact that these three states are often the most hard-hit victims of any fires and haze incident. Any amount of financing offered is thus likely to be symbolic in nature. Overall, Indonesia still lacks the necessary political will to overcome the problem, and this will invariably affect the amount of financing that external actors are likely to contribute.

5. *The Agreement's Shortcomings and the Regional Context*

Ultimately, it is hardly surprising that the Agreement has been drafted in a manner that leaves state sovereignty and discretion uncompromised. This would have been the only way to avoid states rejecting the Agreement outright. It also explains the absence of a compulsory dispute resolution mechanism, for such a mechanism would probably have foreclosed Indonesia's ratification of the Agreement. The fact that the Agreement is able to provide for no reservations to be made[90] is another indication of how its provisions have been deliberately designed not to be onerous.

In the years to come, even a full ratification by all ten ASEAN member states is unlikely to resolve the systemic problems affecting the treaty's effectiveness. In the first place, there is still

[87] ASEAN Haze Agreement, *supra* note 3, art. 20.
[88] *Id*.
[89] *Id*.
[90] *Id*. art. 30.

little prospect of Indonesia's compliance with the Agreement. The severe lack of capacity on Indonesia's part to comply will be explored in the next section of this Article. In any event, the haze problem will probably remain unabated in the long term even if states were to be in substantive compliance with the Agreement. Thus, even if Indonesia were to fully comply with the obligations to legislate anti-burning laws, to monitor fire-prone areas, to exchange information and to seek assistance, these are but immediate and "short-term" measures which do not address the long-term fundamental problem of unsound forest management in Indonesia.[91]

Apart from a vague exhortation to manage and use natural resources in an "ecologically sound and sustainable"[92] manner and to adopt "appropriate policies"[93] to curb activities that may lead to land and/or forest fires, the Agreement does not oblige states to adopt effective forest management practices or to clamp down on illegal logging[94]. Thus, the Agreement hardly addresses the root causes of the fires, much of which relate to systemic problems in Indonesia such as unsound natural resource management, land tenure conflicts, "crony capitalism" in the forestry sector, ill-considered mega-development projects, illegal logging in protected areas and rampant corruption at all levels of governance.[95]

Indeed, the Agreement's emphasis on depoliticized measures such as technical and managerial responses may be counter-productive in the long term, in that they detract from a meaningful restructuring of the underlying architecture of forest exploitation and management in Indonesia.[96] Moreover, the

[91] In this regard, the Agreement is a classic example of a treaty which may potentially enjoy substantive compliance, but which still lacks effectiveness. *See supra* text accompanying note 14.

[92] ASEAN Haze Agreement, *supra* note 3, art. 3(4).

[93] *Id.* art. 9(b).

[94] "Illegal logging" is defined as the felling of tree species protected by the Convention on International Trade in Endangered Species (CITES), logging outside stipulated zones and logging within protected forest and conservation zones. *See* Hariadi Kartodihardjo, *Structural Problems in Implementing New Forestry Policies*, *in* WHICH WAY FORWARD, *supra* note 24, at 147.

[95] Indeed, the problems afflicting reform of government institutions and the bureaucracy have been considered the largest reason for lack of forest protection; other matters affecting forest management are only symptoms of the malaise. *See id.* at 144, 149.

[96] *See* TRIAL BY FIRE, *supra* note 22, at 4.

Agreement's dependence on wholly *technical* responses seems out of touch with the contemporary social landscape in Indonesia, one in which a wary public is demanding greater *political* accountability of government and corporate interests.[97] Ultimately, though, a treaty regime (particularly one operating within the ASEAN context) cannot dictate the re-ordering of a national system of governance, particularly one with an entrenched ethos of mismanagement and corruption.[98] In this respect, the forces for fundamental change will have to arise first from within Indonesia itself, aided by external factors such as conditions imposed on aid, economic incentives and sanctions, or diplomatic pressure by other states.

From this perspective, the Agreement is a lost opportunity for laying down more ambitious goals and stronger sanctions-backed obligations.[99] These could have had the effect of helping to propel and accelerate the pace of reform to environmental (mis)governance in Indonesia, which lies at the root of the forest fires problem. For now, the Agreement's shortcomings must be placed squarely within the context of the regional community's own governing deficiencies. Optimism for

[97] This is consistent with the climate of *reformasi* (reformation) that has taken hold in Indonesia since the ouster of Suharto. This has given a boost to the institutions of civil society, particularly NGOs and community-based groups. *S*ee TRIAL BY FIRE, *supra* note 22, at 3, 46.

[98] In a 2004 survey, Indonesia was ranked the tenth most corrupt country in the world, out of 146 countries. TRANSPARENCY INT'L CORRUPTION PERCEPTIONS INDEX 2004, at 4–5 (2004), *available at* http://www.transparency.org/cpi/2004/dnld/media_pack_en.pdf. For analyses on corruption generally, see, for example, Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 J. ECON. LIT. 1320 (1997); Andrei Schleifer & Robert W. Vishny, *Corruption*, Q. J. ECON. 599 (1993); CORRUPTION AND THE GLOBAL ECONOMY (K. A. Elliott ed., 1997); SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY (1978); JACQUELINE COOLIDGE & SUSAN ROSE-ACKERMAN, HIGH-LEVEL RENT-SEEKING AND CORRUPTION IN AFRICAN REGIMES: THEORY AND CASES (The World Bank Private Sector Dev. Dep't and Foreign Inv. Advisory Serv., Policy Research Working Paper No. 1780, 1997).

[99] For a more optimistic assessment of the Agreement, see Ebinezer Florano, *The ASEAN Agreement on Transboundary Haze Pollution*, 4 INT'L REV. ENVTL. STRATEGIES 1 (2003). In comparing the ASEAN Agreement with the 1979 European Convention on Long Range Transboundary Air Pollution (LRTAP), 1302 U.N.T.S. 217 (1979), Florano concludes that the former is stronger, at least in theory, particularly in its creation of the Haze Pollution Control Fund. However, for the reasons explained here, it is unlikely that the ASEAN Agreement will reach the level of implementation and compliance exhibited by the LRTAP.

the Agreement's effectiveness is thus premature, if not misplaced. Instead of playing a pivotal part in driving change, it is likely that the Agreement will first have to await fundamental reforms to environmental and forestry governance within Indonesia before it itself can claim to be effective.

IV. SYSTEMIC PROBLEMS AFFECTING COMPLIANCE IN INDONESIA

At this point, it is critical to appreciate the domestic challenges posed to environmental and natural resource management in Indonesia, with specific reference to the fires and haze. Several inter-linked factors give rise to doubts over Indonesia's capacity to comply with the Agreement, if it were to become a party to it. Chief among these factors is the institutional structure for forestry, land use and environmental governance in the country, the complications of which create serious jurisdictional conflicts as between central governmental agencies on the one hand, and between central and regional authorities on the other.

Such problems were already endemic during the Suharto era and had a grave impact on the effective control of forest and land fires. This was amply evidenced by the gross failure on the Indonesian government's part to deal with the 1997–98 fires.[100] Even after the ouster of Suharto in 1998 and the introduction of regional autonomy in 2001, the systemic problems of natural resource mismanagement persist, arguably to an even larger extent than before. As the following sections will argue, such problems have severe repercussions on Indonesia's current capacity to deal with any potential fires or haze occurrences.

A. *Institutional Deficiencies in Environmental Governance*

During Suharto's New Order period, the exploitation of the nation's natural resources became synonymous with the regime's brand of corrupt patronage politics.[101] In a system run by a centralized bureaucracy and yet effectively controlled through power networks extending all the way into the provinces and regencies, natural resource exploitation in Indonesia became dominated by a clique of businessmen with political connections to

[100] *See* TRIAL BY FIRE, *supra* note 22, at 8–10; text accompanying notes 40–52.

[101] *See, e.g.*, Cotton, *supra* note 29, at 334–37.

the powerful Suharto family.[102] These vested interests were able to exert inordinate influence over—and indeed, override—governmental agencies and policies, and remained largely free from regulatory control and supervision.

At the same time, the institutions which existed for environmental and natural resource governance were fractured and weak. For instance, the environmental management effort at the time was complicated by the existence of two separate and seemingly competent agencies: the Office of the State Minister for the Environment and the Environmental Impact Management Agency (known by its Indonesian language acronym as BAPEDAL). The Office of the State Minister was (and remains till today) a body with limited powers. Not being a full-fledged "departmental" Ministry, the Office merely existed to oversee, coordinate and supervise general environmental policies.[103] In contrast with more powerful agencies like the Ministry of Forestry, the Office of the State Minister was essentially powerless in both sectoral and geographical competences. It had no authority over forestry and agriculture activities, and most importantly, had no direct competence over forest and land fires. At the same time, it possessed no representative branches in the regions to enforce the relevant laws. Enforcement competence resided instead with the respective provincial (*provinsi)* and regency (*kabupaten*)[104] authorities, including the local police and prosecutors.

Such anomalies in the structure of environmental institutions accounted for much of Indonesia's failure to deal with the fires of 1997–98. Inter-agency coordination at the national and provincial

[102] TRIAL BY FIRE, *supra* note 22, at 1, 28–37.

[103] Indonesian government ministries are classified as departmental and non-departmental; the latter (which includes the Office of the State Minister for the Environment) are characteristically weaker, enjoy only supervisory powers and were essentially marginal actors during the forest fires. *See* TRIAL BY FIRE, *supra* note 22, at 12–13.

[104] Indonesia is administratively divided into *provinsi* (provinces), *kota* (towns) and *kabupaten* (regencies) and various smaller units. The *kabupaten* are usually referred to in English as districts or regencies—this Article will use the term "regency". The *kota* and *kabupaten* are at the same level within a *provinsi*. The *gubernor* (governor) heads the *provinsi*, while the *bupati* (regent) and *walikota* (mayor) head the *kabupaten* and *kota* respectively. The *kabupaten* are further divided into smaller units such as the *kecamatan*, *keluharan* (sub-districts) and *desa* (villages). *See* Gary F. Bell, *The New Indonesian Laws Relating to Regional Autonomy: Good Intentions, Confusing Laws*, 2 ASIA PAC. L. & POL'Y J. 1, 13 (2001).

levels was minimal, and each agency seemed to be operating independently of the others. While it appeared to the world at large that the Office of the State Minister for the Environment was directly responsible for tackling the fires,[105] the agencies with real capacity in the matter were the Ministries of Forestry and Agriculture, together with the local authorities. For one thing, the Ministry of Forestry granted lucrative timber concessions, which were major sources of fires.[106] In addition, the Ministry had specific competence over forest fires, given that it ran a Sub-Directorate for Forest Fire Control[107] which had operations within the provincial and regency Forest Service. For its part, the Ministry of Agriculture had direct control over the oil palm plantations.[108] As such, these were the agencies which had the actual competence and capacity to take action against the perpetrators of the fires.

However, the sectoral ministries in Indonesia have traditionally been more concerned with exploiting resources and generating revenue, often in association with private interests. In particular, collusion between the Ministry of Forestry and the timber and plantation industries has long been documented, given

[105] *See* TRIAL BY FIRE, *supra* note 22, at 12.

[106] *See supra* text accompanying notes 23–27.

[107] This has now been elevated to a Directorate. The Ministry of Forestry had also established a National Forest Fire Control Center, together with a bewildering array of provincial- and regency-level fire control centers. *See* DICKY SIMORANGKIR & SUMANTRI, PROJECT FIREFIGHT SOUTHEAST ASIA, A REVIEW OF LEGAL, REGULATORY AND INSTITUTIONAL ASPECTS OF FOREST AND LAND FIRES IN INDONESIA 12–19 (2002). There was also an inter-agency National Coordinating Team for Forest and Land Fire Control set up in 1997 and headed by the State Minister for the Environment. Another agency which appeared to have competence over the matter was the National Board for Disaster Management and Control of Refugees. None of these arrangements proved effective during the 1997–98 fires. *Id.*

[108] Even then, there was uncertainty as to whether the Ministry of Agriculture had direct control over cash crops. For a period after the fall of Suharto (late 1999 to late 2000), estate crops came under the purview of the Ministry of Forestry, which was renamed the Ministry of Forestry and Estate Crops (MOFEC). While this was intended to maximize coordination over land use policies, the decision proved to be unpopular among NGOs that feared that pressures to develop plantations would lead the Ministry to approve more forest conversions. In 2000, estate crops reverted to the control of the Ministry of Agriculture. There was even a confusing intervening period when MOFEC was amalgamated with the Ministry of Agriculture. However, this "super ministry" arrangement proved to be short-lived. *See* LIZ CHIDLEY, DOWN TO EARTH, *Part II: Forest Reforms in the Post-Suharto* Era, *in* FORESTS, PEOPLE AND RIGHTS (2002), *available at*. http://dte.gn.apc.org/srfin.htm.

the Ministry's tendency towards exploitation rather than conservation functions.[109] True to form, despite overwhelming evidence to the contrary, the Ministry downplayed the roles of the timber interests in the 1997–98 fires.[110] Similarly, the Ministry of Agriculture did little to control the activities of the oil palm plantations.

BAPEDAL was a separately constituted agency with some provincial and regency enforcement competence reposed in its regional branches, the so-called *Bapedaldas*. BAPEDAL was originally established in 1990 to remedy the many weaknesses of the Office of the State Minister, principally the latter's lack of provincial competence. The Office of the State Minister itself was never elevated to the status of a full Ministry due to the resistance of sectoral agencies which feared interference from an empowered environmental agency. Thus, it was commonly believed that BAPEDAL was created to "divide" the environmental management effort in Indonesia.[111] Predictably, what transpired was an overlap in the functions of the Office of the State Minister and BAPEDAL, with paralysis in enforcement action frequently arising from rivalry between the two agencies as well as uncertainties over competence.[112] This problem was further compounded by the inherent sectoral conflicts with more powerful agencies such as the Ministries of Forestry and Agriculture.

During the 1997–98 fires, these institutional deficiencies gave rise to huge confusion as to the respective roles of the Office of the State Minister and BAPEDAL. Even though the latter had

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[109] *See* TRIAL BY FIRE, *supra* note 22, at 1.

[110] The Forestry Minister at the time, Jamaludin Suryohadikusomo, did on occasion take a strong stance against illegal burning. However, he was thwarted by timber barons such as Bob Hasan, who was the most influential and closely-linked associate of Suharto's. For accounts on timber magnates such as Bob Hasan and Prajogo Pangestu, see, for example, Cotton, *supra* note 29, at 336–40 and Christopher Barr, *Bob Hasan, The Rise of APKINDO and the Shifting Dynamics of Control in Indonesia's Timber Sector*, 65 INDONESIA 36 (1998).

[111] *See* Alan Khee-Jin Tan, *Recent Institutional Developments on the Environment in Southeast Asia: A Report Card on the Region*, 6 SING. J. INT'L & COMP. L. 891, 896 (2002).

[112] *Id*. Ironically, BAPEDAL was led by none other than the State Minister for the Environment himself, reporting directly to the President. BAPEDAL has since been subsumed within the Office of the State Minister. *See infra* text accompanying notes 180–82.

provincial competence, it had set up *Bapedalda* branches in but a few of the provinces, and was effectively powerless to deal with the wide-ranging fires.[113] At the same time, BAPEDAL had no clearly defined mandate to deal with forest and land fires. In the ensuing controversy, the Office of the State Minister appeared to be leading the firefighting effort. In large part, this was due to the prominent role played by the State Minister himself, Mr. Sarwono Kusumaatmadja, who earned domestic and international credibility for his bold public stand against the plantation interests.[114] However, the efforts of his Office were thwarted in many instances by the sectoral ministries as well as by its own lack of authority in the provinces. Overall, no one agency emerged with the requisite authority and capacity to coordinate firefighting efforts and to set down tough enforcement policies against illegal burning.

B. *Inadequacies in Laws and Enforcement*

Compounding the problem of institutional overlap was the confusing state of laws and regulations issued by the different agencies. The difficulty resided in the fact that the legislative and executive bodies at both central and regional levels typically issued legal instruments at their own discretion, creating webs of often contradictory laws and regulations.[115] Even laws issued by the same body caused problems when they asserted that previous inconsistent laws were henceforth invalidated without specifying what these laws were.[116] It had also become a habit for new laws and regulations to be enacted every time a new Minister was appointed or a new problem identified.[117] Often, little effort was made to reconcile the conflicting instruments, and varying interpretations were typically canvassed by the different interest

[113] Fires were reported in 23 out of Indonesia's 27 provinces in 1997–98. *See* TRIAL BY FIRE, *supra* note 22, at 8.

[114] *Id.* at 12.

[115] *See, e.g.*, Krystof Obidzinski & Christopher Barr, *The Effects of Decentralization on Forests and Forest Industries in Berau District, East Kalimantan* 13–14 (Ctr. for Int'l Forestry Research, Case Study No. 9, 2003) (explaining that the forestry regulations issued by the regency of Berau in East Kalimantan province differed from national laws).

[116] *See, e.g.*, Government Regulation PP 8/2003 on Guidelines for Region-Level Organization, art. 29 (providing for the invalidation of "other regulations which conflict with this Regulation").

[117] *See, e.g.*, Bell, *supra* note 104 at 38 (commenting in the context of the new bankruptcy law on the "naïve belief amongst many that all that needs to be done is to change the laws").

groups to suit their own purposes.[118] The problem became particularly acute in relation to land tenure and natural resource management matters which fell within the overlapping purview of several different governmental agencies.[119]

During the 1997–98 fires, the ineffectiveness of the government's response was borne out by a series of failed executive and legislative attempts to control the fires. On September 9, 1997, for instance, President Suharto issued a decree at the height of the fires banning all forms of deliberate open burning.[120] At the same time, the President issued two unprecedented public apologies to Indonesia's neighbors for the haze.[121] A new Law on the Management of the Living Environment—UU 23/1997[122]—was also hastily brought into

[118] *See, e.g.*, *HPH Skala Kecil Dijual 20 Juta* [*Small-scale HPH's sold for 20 million rupiah*], KOMPAS, Feb. 26, 2001 (Indon.). *See also* TRIAL BY FIRE, *supra* note 22, at 8 (detailing the inaction of government authorities and the difficulties in bringing plantation firms before the courts). On the possibility of collusion between the police and the plantations, see *id.* at 23.

[119] These problems persist to the present day, and have in some instances become worse with the advent of regional autonomy. *See infra* Part IV.C.

[120] Derwin Pereira, *Suharto Bans Land Clearing by Burning*, STRAITS TIMES (Sing.), Sept. 10, 1997, at 1.

[121] The apologies of 16 September 1997 and 5 October 1997 were seen to be highly embarrassing for Indonesia. While they acknowledged that the fires were man-made, Indonesian governmental officials were still maintaining that the haze was a natural disaster. The statement of the Coordinating Minister for People's Welfare to this effect provoked an outcry in neighboring countries. *See* Ho Wah Foon, *supra* note 45. The Ministry of Information reportedly instructed newspaper editors to blame the fires on El Niño. *See* TRIAL BY FIRE, *supra* note 22, at 13. Only the Office of the State Minister for the Environment appeared to be taking a frank stance. *See Environment Agency Denies El Niño Responsible for Haze*, AGENCE FRANCE-PRESSE, Nov. 12, 1997.

[122] Law No. 23 of 1997 Concerning the Management of the Living Environment. Throughout this Article, Laws or Acts will be identified by the prefix "UU" (*Undang-undang* in the Indonesian language). UU 23/1997 remains the main environmental legislation in Indonesia today. For an overview of laws and regulations relevant to fires, see generally SIMORANGKIR & SUMANTRI, *supra* note 107 and AZRINA ABDULLAH, PROJECT FIREFIGHT, S.E. ASIA, A REVIEW AND ANALYSIS OF LEGAL AND REGULATORY ASPECTS OF FOREST FIRES IN SOUTH EAST ASIA (2002). In terms of the hierarchy of legal instruments in Indonesia, the Constitution occupies the highest position, followed by *Undang-Undang* (UU) (Laws) and *Perpu* (Government Regulations in lieu of Laws), *Peraturan Pemerintah* (PP) (Government Regulations), *Peraturan Presiden* (Presidential Regulations) and *Peraturan Daerah* (Regional Regulations). A new hierarchy laid down in 2004 by UU 10/2004 on Legal Regulations replaces the previous hierarchy set out by Decision TAP No. III/MPR/2000 of the *Majelis Permusyawaratan Rakyat* (People's Consultative Assembly). Presidential

force. However, UU 23/1997 proved to be largely ineffective. For one thing, it was exceedingly general in scope and contained no specific provisions on controlling forest and land fires.[123] Its enactment in 1997 had already been anticipated for some time to replace an older Law, and was in no way designed to deal specifically with the fires problem. Nevertheless, UU 23/1997 was viewed by the government to be useful, as it did contain several penalty provisions which had potential application to forest fire offenders. For instance, it prescribed general penalties of imprisonment and fines for "intentional environmental offences" that resulted in death or serious injury.[124]

Had UU 23/1997, together with the Presidential Decree of September 9, 1997[125], been immediately and effectively enforced, significant results could have been attained in curbing the fires. However, the new laws were never effectively used against the offending companies. The few cases of reported action being taken came well after the fires had raged out of control and transboundary injury caused. In mid-September 1997, for instance, the Minister of Forestry released the identities of 176

Regulations were formerly known as Presidential Decisions (*Keputusan Presiden* or KEPPRES). Throughout this Article, Presidential Decisions will be identified by the prefix "KP". Note that Ministerial decrees or decision letters (known as *Surat Keputusan* or SK) have been omitted from the official hierarchy since 2000, but many SKs continue to be issued. In theory, therefore, Regional Regulations can trump SKs, but this has not stopped central agencies such as the Ministry of Forestry from assuming that its Minister's decrees are still valid. In February 2001, the central government attempted to clarify that Ministerial Decrees are of a higher level than Regional Regulations. *See* Minister for Justice and Human Rights Letter No. M.Um. 01.06-27 (2001). This is highly doubtful and is anyhow ignored by regional governments. Regional Regulations include provincial and regency regulations (which have equal status), as well as village regulations (*Peraturan Desa*). *See* UU 32/2004, arts. 136–149.

[123] For an example of an extremely broad provision, see UU 23/1997, art. 34, providing that "every polluting or environmentally-destructive activity causing loss to other parties or the environment imposes upon the actor an obligation to pay compensation and/or to effect particular remedies."

[124] UU 23/1997, arts. 41–46. UU 23/1997 is reportedly undergoing revision, particularly to remedy the problem of lack of coordination among different institutions such as the ministries, police, prosecutors and courts. Public participation will also be enhanced, and the creation of an integrated team has been proposed to better investigate and prosecute environment-related offences. This is to avoid previous cases where defendants were charged with lenient indictments. *See* Urip Hudiono, *Government to Beef Up Environment Law*, JAKARTA POST, Dec. 16, 2003, at 4; *infra* text accompanying note 327.

[125] *Keputusan Presiden* (Presidential Decree) of 9 September 1997 Banning Open Burning.

plantation, timber and transmigration land-clearing companies suspected of illegal large-scale burning in contravention of the Decree of September 9, 1997.[126] Subsequently, it was reported that twenty-nine of these firms had had their operating licenses suspended or revoked.[127] However, these licenses were mostly reinstated by December 1997 without any apparent justification.[128] In many cases, the environmental agencies' efforts to prosecute companies were thwarted by the provincial police, indicating possible collusion between law enforcement and plantation interests.[129]

The courts have not performed any better. In Indonesia, there is a deep-seated belief that the judiciary is frequently paid off to prevent conviction of high-profile figures behind illegal logging and forest fires.[130] In the aftermath of the 1997 fires, a handful of prosecutions were undertaken, but few gave rise to satisfactory outcomes. Of the 176 companies identified publicly as violators in 1997, only five were ever brought to court, and only one was found guilty.[131] In October 1998, a test case brought by the Ministry of Forestry against a plantation company in Riau province ended with the company being exonerated on all charges. Apparently, the expert testimony provided by BAPEDAL against the company was not taken seriously by the court.[132] The Riau

[126] TRIAL BY FIRE, *supra* note 22, at 8.

[127] *Indonesia Gathering Evidence Against 29 Forestry Firms*, STRAITS TIMES (Sing.), Oct. 8, 1997, at 37.

[128] TRIAL BY FIRE, *supra* note 22, at 8; Gerry van Klinken, *Taking on the Timber Tycoons*, INSIDE INDONESIA Mar. 1998, at 25.

[129] *See* TRIAL BY FIRE, *supra* note 22, at 23 (discussing a 1998 case in East Kalimantan in which the police insisted on dropping investigations, ostensibly for lack of evidence). The authors of TRIAL BY FIRE raised the possibility of collusion, though this was not proven.

[130] In November 2003, the State Minister for the Environment, Nabiel Makarim, was quoted as saying that the prosecution of illegal logging was made difficult by a corrupt Indonesian judiciary. *See Indonesia Minister Calls Illegal Loggers "Terrorists" After Flood Disaster*, AGENCE FRANCE-PRESSE, Nov. 5, 2003, *available at* http://www.terradaily.com/2003/031105102221.e8q0w1bj.html; Shawn Donnan & Taufan Hidayat, *Jakarta Promises to Tackle Illegal Loggers, But Admits Corruption Will Impede Progress*, FINANCIAL TIMES (London), Nov. 8, 2004, at AP3.

[131] *Legal Action on Forest Fires*, DOWN TO EARTH (Down to Earth, London), Aug. 2002, *available at* http://dte.gn.apc.org/53act.htm.

[132] TRIAL BY FIRE, *supra* note 22, at 8 (identifying the company as PT Torus Ganda).

provincial governor proceeded to issue a decree freezing the company's operations pending rectification of its practices, but by July 1999, the company was reportedly ignoring the decree and "conducting business as usual."[133]

In another case in Riau, a company was found guilty of illegal burning, and three people—two casual laborers and one field staff—received sentences of three to ten days in jail.[134] Most notably, no action was taken against the company's management. Another test case brought in October 1998 by WALHI—a coalition of environmental NGOs—against eleven firms in southern Sumatra saw only two of these being found guilty,[135] with the other nine being acquitted. The court threw out detailed geographic information systems (GIS) evidence pointing to the perpetrators' guilt and instead chose to rely only on eyewitness testimony.[136] As a result, no fine was imposed—the two guilty firms were merely ordered to pay court costs, to reforest their areas and to create firefighting capabilities.[137] In all these cases, the government's severe lack of monitoring capabilities led to problems with obtaining adequate evidence.[138]

In a related development, a coalition of thirteen NGOs and local interest groups from the province of North Sumatra commenced legal action in mid-1998 against several national timber industry associations for their part in the 1997–98 fires.[139] The court handed down a fine of 50 billion rupiah fine

[133] *Id.* (citing *Pemda Riau Membiarkan Kasus Pembakaran Hutan [Riau Provincial Government Ignores Forest Arson Cases]*, REPUBLIKA (Indon.), July 29, 1999).

[134] *Legal Action on Forest Fires*, *supra* note 131 (discussing the conviction of PT Cipta Daya Sejati). On the whole, Riau provincial forestry officials had boldly announced that they were taking a total of forty-seven companies to court for starting fires; seventeen were to be prosecuted for fire offenses in 1997 and 1998 and thirty others for offenses in 1999. However, nothing became of these cases except for the PT Cipta Daya Sejati and PT Torus Ganda cases. *See id.*; TRIAL BY FIRE, *supra* note 22, at 8.

[135] *See Two Firms Blamed for Forest Fires*, JAKARTA POST, Oct. 20, 1998, at 1 (identifying the two Sumatra companies as PT Musi Hutan Persada and PT Inti Remaja Concern).

[136] TRIAL BY FIRE, *supra* note 22, at 8.

[137] *Id.*

[138] *Id.*

[139] *Legal Action on Forest Fires*, *supra* note 131. These associations included the politically-connected Indonesian Association of Timber Companies (APHI), the Indonesian Wood Panel Producers' Association (APKINDO) and the Indonesian Timber Society (MPI). *Id.*

(approximately US$5 million), but the verdict was later reversed on appeal.[140] In 2000, BAPEDAL filed suits against five companies for their alleged roles in fires in Kalimantan and Sumatra. However, it ultimately proceeded against only one of these companies due to a lack of evidence against the others.[141] Another twenty-four companies in Riau and five in West Kalimantan were named in mid-2001, but yet again, there were no further reports of action taken.[142]

The sole case in Riau to have been processed involved PT Adei Plantation and Industry, an Indonesian-Malaysian joint venture rubber and oil palm company.[143] The company was charged for starting fires in 2000, and the Bangkinang district court handed down a two-year imprisonment term for the company's Malaysian manager and a 250 million rupiah (US$25,000) fine.[144] On appeal by the company, the Riau High Court reduced the penalty to eight months' imprisonment and 100 million rupiah (US$10,000) in fine. This was upheld by the Supreme Court at the end of 2002. To date, this has been the only case to have attained a significant conviction, and the company has also reportedly agreed to pay more than US$1 million in compensation, following which the government agreed to drop a civil lawsuit against it.[145] The money was purportedly to be used for reforestation programs.[146]

In the aftermath of the fires of 1997–98, environmental groups in Indonesia lobbied hard for comprehensive laws on forest and land fires. The first specific instrument on the matter emerged

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[140] *Id.* Subsequently, it was reported in 2000 that the North Sumatra Forestry and Plantation Office planned to bring at least 18 companies to court for their contributions to the fires. *Id.*; *Indonesia to Take 18 Firms to Court over Slash and Burn*, AGENCE FRANCE PRESS, Aug. 3, 2000.

[141] *Legal Action on Forest Fires*, *supra* note 131.

[142] *Id.*

[143] *See* PROJECT FIREFIGHT S.E. ASIA, CONVICTING FOREST AND LAND FIRE OFFENCES: A CASE STUDY OF THE LEGAL PROCESS IN RIAU, INDONESIA 2 (2003), *available at* http://www.iucn.org/themes/fcp/publications/files/ff_legal_conviction_case_study.pdf. PT Adei was a joint venture between the well-known Malaysian company, Kuala Lumpur Kepong Plantation Sdn. Bhd. and Al Hakim Hanafiah of Indonesia. *See id.* at 3.

[144] *Id.* at 3, 7–10.

[145] *Malaysian Plantation Firm to Pay 1.1 Million Dollars over Indonesia Haze*, AGENCE FRANCE PRESSE, May 1, 2003. For a complete analysis of the PT Adei case, see PROJECT FIREFIGHT S.E. ASIA, *supra* note 143.

[146] *See* PROJECT FIREFIGHT S.E. ASIA, *supra* note 143, at 8.

in 2001 when Government Regulation PP No. 4/2001 was issued.[147] The Regulation recognizes the serious health and economic impact posed by forest and land fires both domestically and across national boundaries.[148] Under the Regulation, forest and land burning activities are prohibited,[149] and every individual, company or enterprise is obliged "to prevent the occurrence of forest and land fires" and to "overcome these fires within his/its sphere of activity."[150] In addition, parties responsible for the occurrence of fires are obliged to conduct remediation activities.[151] International cooperation, where the fires have a transboundary effect, is to be handled by the Minister in charge of forestry.[152] Functions are also envisaged for various other national agencies such as those responsible for environmental protection.[153] PP 4/2001 is thus noteworthy for identifying the Minister for Forestry as the focal point in dealing with transboundary effects of forest and land fires.

By the time PP 4/2001 was enacted, Indonesia's laws on regional autonomy had already entered into force.[154] Consistent with regional autonomy, PP 4/2001 accords considerable competence to local authorities. In particular, provincial governors have the authority to deal with fires involving more than one regency or city within a province,[155] while regents and mayors are to deal with fires occurring within their respective territories.[156] The minister is to be involved only where fires occur across provinces, or if their impact is felt in other countries. Detailed provisions on dealing with forest fires are expected to be adopted by local governments through Regional Regulations.[157]

PP 4/2001 also emphasizes reporting obligations, community

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[147] PP No. 4 of 2001 on the Control of Environmental Degradation and/or Pollution in Relation to Forest and/or Land Fires. Government Regulations are identified by the prefix "PP" (*Peraturan Pemerintah* in the Indonesian language).

[148] *Id.* Preamble.

[149] *Id.* art. 11.

[150] *Id.* arts. 12–18. As to how exactly one is to "overcome" the fires is left unelaborated in the Regulation.

[151] *Id.* art. 20.

[152] *Id.* arts. 23, 24(3).

[153] *Id.* arts. 25, 26, 34.

[154] Regional autonomy will be discussed in greater detail *infra* Part IV.V.

[155] PP 4/2001, arts. 27–29.

[156] *Id.* arts. 30–33.

[157] *Id.* arts. 18(3), 21(3).

awareness as well as transparency of information provided to affected communities.[158] In relation to monitoring and enforcement, the governor, regent or mayor in a particular locality may order a responsible party to stop harmful burning activities or to effect prevention or remediation measures.[159] The administrative sanctions to be imposed for failure to adhere to such orders are those prescribed in UU 23/1997 on Environmental Management.[160] The courts may also order a party responsible for damage caused by fires to compensate the affected parties, including for delays in rectifying the situation.[161]

On the whole, PP 4/2001 suffers from being too general in its proscription of burning activities. For one thing, the Regulation does not discriminate between the different contexts within which fires can be started, e.g., in peat-rich lands, during an El Niño occurrence or otherwise, for clearing plantations or for shifting agriculture. Without differentiated provisions to deal with the varied situations in which fire can be used, the Regulation's blanket ban on fires is wholly unrealistic and doomed to fail. In this regard, there have been calls for the revision of PP 4/2001 to ban egregious forms of burning (such as large-scale burnings by plantation interests during a drought), while regulating smaller-scale fires such as those used in shifting agriculture.[162] This argument recognizes the reality that the use of fires is unavoidable in an agrarian economy like Indonesia's, and has the advantage of concentrating limited resources on the most serious fires.

Another weakness of PP 4/2001 is its excessively broad exceptions to the obligation to pay compensation. Thus, where fires are caused by natural factors, acts outside the control of human beings or acts of third parties, the primary party may seek to escape liability.[163] It would then be up to the courts to interpret these provisions against the plantation interests responsible for

[158] *Id.* arts. 42, 46.
[159] *Id.* art. 38.
[160] *Id.* arts. 48, 52.
[161] *Id.* arts. 49–50. In addition, strict liability is envisaged for parties causing severe environmental damage or those using poisonous or hazardous substances. *See id.* art. 51.
[162] *See* Tacconi, *supra* note 36, at 16.
[163] PP 4/2001, *supra* note 147, art. 51.

massive burnings.[164] The problem here is that when fires occur during droughts or in peat-rich lands, it is wholly conceivable that the plantation interests will successfully plead this defense.

Most importantly, the reference to the penalties in UU 23/1997 is problematic. As has been amply demonstrated by past cases relying on UU 23/1997 and its vaguely worded provisions, the courts have generally been unwilling to impose heavy penalties that will effectively deter the plantation interests.[165] Most penalties imposed to date have been extremely lenient,[166] and it is unlikely that PP 4/2001 and its reference to UU 23/1997 will provide additional deterrence.[167] As noted by Indonesia's National Development Planning Agency (BAPPENAS) and the Asian Development Bank, the cases that have been decided to date may actually "seriously undermine other attempts at further prosecutions."[168] It is believed that the corruption of high-level officials had affected the outcome of many of these court cases, thus diminishing the value of potential sanctions against illegal logging and burning.[169]

Another source of confusion is the fact that PP 4/2001 makes no mention of the specific prohibitions and penalties against illegal burning contained in the new Forestry Law UU 41/1999.[170] UU 41/1999 sets out a list of prohibited acts in the forests, including forest burning and illegal logging.[171] It also imposes responsibility on holders of rights and licenses for forest fires occurring in their working areas.[172] The penalty provisions prescribe a maximum liability of imprisonment of up to 15 years and a fine of up to 10 billion rupiah (approximately US$1

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[164] *Id.*

[165] *See, e.g.*, the cases indicated in text accompanying notes 130–43.

[166] *See, e.g.*, the cases indicated in text accompanying notes 130–43.

[167] *See, e.g.*, the cases indicated in text accompanying notes 130–43.

[168] BAPPENAS *supra* note 33, at 91.

[169] Carol J. Pierce Colfer, *Ten Propositions to Explain Kalimantan's Fires*, *in* WHICH WAY FORWARD, *supra* note 24, at 309, 314–15.

[170] Law (UU) No. 41 of 1999 on Forestry.

[171] UU 41/1999, art. 50. Art. 64 also provides that the government and local communities shall monitor aspects of forest management that have national and international repercussions. These repercussions are stated to include forest fires, illegal logging and breaches of international conventions. *See id.* Elucidation (*Penjelasan*) to art. 64.

[172] *Id.* art. 49. The only exceptions to burning are limited burnings for specialized purposes such as fire control and disease eradication. *See id.* Elucidation (*Penjelasan*) to art. 50(3)(d).

million).[173] The specific punishment for intentionally using fire is imprisonment of up to 15 years and a fine of up to 5 billion rupiah.[174] For illegal logging, the prescribed penalties are imprisonment of up to 10 years and a fine of up to 5 billion rupiah (approximately US$500,000).[175] Given that these provisions are more specific than those found in UU 23/1997, PP 4/2001 should have explicitly referred to these.[176] Instead, the reference to the exceedingly general provisions of UU 23/1997 leaves courts with too much latitude in handing down light and ineffective penalties.

With the advent of regional autonomy, the empowering of local authorities such as provincial governors and regents is fraught with risks. The reality on the ground, as discussed below, is that ineffective implementation is often to be expected of regional authorities. These low expectations are particularly justified when these actors have limited enforcement capacity, or have vested interests to protect (for instance, when they have been paid off by plantation interests). In line with regional autonomy, BAPEDAL's competence was transferred to the Office of the State Minister in 2002 and the regional *Bapeldalda*'s subsumed wholly within the local government apparatus.[177] The task of enacting central government policies relating to the environment remains

[173] *Id.* art. 78.

[174] *Id.* art. 50(3)(d). The punishment for negligent burning is imprisonment of up to 5 years and a fine of up to 1.5 billion rupiah. *Id.*

[175] *Id.* arts. 50(3)(e), 50(3)(f). In addition, violations committed by business entities attract penalties for members of the board of management, who shall be liable, either individually or jointly, for punishment in accordance with the respective sanctions, and with a possible addition of one third of the decided sanctions. *See id.* art. 78(14).

[176] Another instrument ignored by PP 4/2001, but which contained relevant penalties for forest degradation, was Government Regulation (PP) No. 28 of 1985 on Forest Protection. This old Regulation, adopted pursuant to the Basic Forestry Law of 1967, was abrogated recently by Government Regulation No. 45 of 2004 on Forest Protection. This new Regulation contains various provisions on forest burnings and purports to supplement UU 41/1999 on Forestry. To add to the confusion, a new Law on Plantations was adopted in 2004 to govern plantation companies, Law (UU) No. 18 of 2004 on Plantations. Among other things, it provides for a maximum prison term of 10 years and up to 10 billion rupiah in fines for companies or personnel using fire to clear land. It remains unclear how this new Law is to be reconciled with UU 41/1999, UU 23/1997 and PP 4/2001.

[177] Pursuant to Presidential Decision KP 2/2002 on Revisions to the Status, Functions, Authority, Organization and Operations of State Ministers and Presidential Decision KP 4/2002 on the Organizational Units and Responsibilities of State Ministers.

with the Office of the State Minister, but enforcement is now fully within the domain of the local governments and their *Bapedaldas*.[178]

BAPEDAL's merger with the Office of the State Minister has proved to be unpopular with the environmental NGOs. Their fear is that the environmental protection effort will become further weakened. In particular, the NGOs are concerned that BAPEDAL's erstwhile enforcement competence (limited and imperfect as it was) will now be completely diminished within the framework of the Office of the State Minister, which itself has not seen any enhanced powers. In addition, the NGOs see the merger as forestalling any possible elevation of the Office of the State Minister to the (desired) status of a full Ministry. Thus, the merger is feared to have created a net reduction in the powers of environmental agencies, particularly at the regional level.[179]

In this regard, the State Minister himself has defended the merger, pointing to the fact that no competence has been lost in the process, and that BAPEDAL's enforcement competence has simply been transferred to his Office.[180] In addition, it was argued that the merger would eradicate the bitter rivalries over competence, which have long afflicted the two agencies.[181] Time can only tell if this will be true—for now, it remains highly doubtful whether the Office of the State Minister possesses any meaningful enforcement competence, particularly in the provinces and regencies.[182] It would appear that the Office (already weak before regional autonomy) has become even more diminished in status now that decentralization is in full motion. Overall, the future of institutional governance of the environment in Indonesia remains mired in uncertainty.

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[178] *Id.*

[179] *Koalisi Ornop Demo soal Bapedal* [*NGO Coalition Demonstrates over BAPEDAL Question*], KOMPAS (Indon.), Jan. 11, 2002.

[180] Tan, *supra* note 111, at 895–97. *See also* Tertiani ZB Simanjuntak, *BAPEDAL Gone, Fears of Environmental Abuse Up*, JAKARTA POST, Jan. 28, 2002, at 8.

[181] Simanjuntak, *supra* note 180.

[182] The NGOs were reported to be planning to challenge the merger before the courts, alleging that the Presidential Decrees which effected it were inconsistent with higher-level Laws and Regulations which were premised upon a separate and independent BAPEDAL. *Id*. As of the end of 2004, this challenge did not seem to have been pursued.

C. *Forestry and the Challenge of Regional Autonomy*

The contemporary challenge of tackling forest fires and managing Indonesia's vast natural resources cannot be properly appreciated without considering the movement towards greater autonomy for the country's regions. For decades, the exploitation of forest resources in Indonesia, like all major revenue-generating sectors in the economy, had come under the strong centralized control of the Suharto regime.[183] Thus, the (now-repealed) Basic Forestry Law UU 5/1967[184] reposed authority over forests in the central government.[185] Indeed, UU 5/1967, together with the Foreign Investment Law UU 1/1967[186] and various other regulations,[187] provided the legal bases for the thirty-year

[183] However, some laws and regulations containing limited forms of decentralization date from 1945, the year of Indonesia's independence. *See* Ahmad Dermawan & Ida Aju Pradnja Resosudarmo, *Forests and Regional Autonomy: The Challenge of Sharing the Profits and Pains*, *in* WHICH WAY FORWARD, *supra* note 24, at 325, 327–30. For a large and complex country like Indonesia, decentralization as a concept is thus not new—what has changed is the extent of power transferred. *See infra* text accompanying notes 199–204.

[184] Law (UU) No. 5 of 1967 on Basic Provisions on Forestry. This law differed little from its colonial predecessor, which put all forests under state control. *See* LIZ CHIDLEY, DOWN TO EARTH, *Part I: Forest, People and Rights*, *in* FORESTS, PEOPLE AND RIGHTS, *supra* note 108.

[185] This was consistent with the Suharto regime's interpretation of Article 33 of Indonesia's 1945 Constitution, which held all authority over natural resources resided in the state. *See id.*

[186] Law (UU) No. 1 of 1967 on Foreign Investment.

[187] Other exploitation-friendly instruments enacted pursuant to these basic laws included the now-repealed PP 22/1967 on Concession License Fees and Royalties and PP 21/1970 on Forest Exploitation Rights and Forest Product Harvesting Rights. PP 22/1967 provided for the central government to stipulate, at its discretion, the proportion of revenue to be distributed back to the local governments. On its part, the infamous PP 21/1970 (as revised by PP 18/1975) provided the legal basis for the massive concessions awarded by Suharto to his cronies—these were the *Hak Pengusahaan Hutan* (HPH) (Forest Exploitation Rights), the validity of which ran for 20 years. The granting of the smaller-scale *Hak Pemungutan Hasil Hutan* (HPHH) (Forest Product Harvesting Rights) was left to the provincial governments. After Suharto's fall, the right to grant HPHH was transferred to the regencies, with co-operatives being allowed to manage forests. In some areas, regency governments have been aggressively issuing their own concession rights independent of the conditions imposed by the central government—these include the *Izin Pemungutan dan Penmanfaatan Kayu* (IPPK) (Timber Extraction and Utilization Permits). *See* J. Smith et al., *Illegal Logging, Collusive Corruption and Fragmented Governments in Kalimantan, Indonesia*, 5 INT'L FORESTRY REV. 293, 298–99 (2003). Small-scale fellings are also widespread, often done without any form of permit. *See* OBIDZINSKI & BARR, *supra* note 115, at 8 (detailing how illegal logging at the regency level can be lucrative for small-time loggers).

systematic plunder of Indonesia's natural resources by Suharto, his family members and business and military associates.[188]

During the Suharto period, various pro-logging policies were introduced, often with disastrous consequences. These included the selective cutting and reforestation fund policies. Selective cutting assumed a thirty-five year regeneration cycle for felled trees—yet, the concessions handed out were usually for twenty years. This effectively removed any incentive for sustainable forestry.[189] In addition, royalties were imposed based on the amount of logs the companies removed rather than the volume of harvestable trees in a concession.[190] This encouraged the loggers to fell the most valuable trees while destroying others in the process. For its part, the reforestation fund levied a certain amount of money per cubic meter of extracted timber, refundable only upon replanting. However, the small levies imposed meant that replanting proved to far be more expensive, and this simply led to companies forfeiting the amount.[191] To make matters worse, monies from the fund, instead of being used for reforestation, were often channeled by corrupt means to other projects.[192]

In the past five years or so, the prevailing problems of deficient law enforcement by governmental agencies and the courts have been severely exacerbated by the uncertainties brought about by decentralization.[193] Since the downfall of Suharto,

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[188] The forestry industry was (and remains) a sector riveted by what the Indonesians call KKN: "Korupsi, Kolusi dan Nepotisme" [Corruption, Collusion and Nepotism]. The excesses of KKN sowed massive public discontent with the Suharto regime and ultimately drove it out of power in 1998. Since 1999, an anti-corruption law has been in effect. *See* UU 28/1999 on A Clean State Apparatus Free from Corruption, Collusion and Nepotism. Observers remain pessimistic over the effect of this law, given the continuing state of corruption within the administration and judiciary. *See, e.g.*, Bell, *supra* note 104, at 38. *See also* Presidential Instruction 5/2004 on Accelerating the Eradication of Corruption.

[189] *See* Dauvergne, *supra* note 28, at 514.

[190] *See id.*

[191] *See id.*

[192] *See* TRIAL BY FIRE *supra* note 22, at 33–37, 55. These included rice cultivation in the Million-Hectare Peat Swamp Project in Kalimantan and former President Habibie's grand ambition for an Indonesian aircraft manufacturing industry. *Id.*

[193] For decentralization in developing countries generally, see CENTRAL-LOCAL RELATIONS IN ASIA-PACIFIC: CONVERGENCE OR DIVERGENCE? (Mark Turner ed., 1999); DECENTRALIZATION AND DEVELOPMENT: POLICY IMPLEMENTATION IN DEVELOPING COUNTRIES (G. Shabbir Cheema & Dennis A.

considerable degrees of administrative, legislative and regulatory authority have been transferred from the central to the regional (i.e. provincial and regency) governments. In tandem with the *reformasi* movement that is dismantling and reforming the core structures of the previous order, the promise of regional autonomy represents a dramatic shift away from the highly centralized system of the Suharto years.[194]

1. *The Regional Autonomy Laws*

Decentralization and regional autonomy in Indonesia are essentially political responses to separatist forces in regions long disgruntled by the national government's monopoly of revenues.[195] Thus, regional autonomy was conceived as the means to stave off national disintegration and offer resource rich regions more financial control over their revenue streams. As part of reforms carried out in the post-Suharto era, Law (UU) 22/1999 on Regional Government[196] came into force on January 1, 2001, together with the accompanying UU 25/1999 on Fiscal Balance between the Central Government and the Regions. In October 2004, these two laws were respectively revised by UU 32/2004 on Regional Government and UU 33/2004 on Fiscal Balance between the Central Government and the Regions.[197] Taken together, these

Rondinelli eds., 1983). On decentralization in Indonesia in particular, see, for example, LOCAL POWER AND POLITICS IN INDONESIA: DECENTRALIZATION AND DEMOCRATIZATION (Edward Aspinall & Greg Fealy eds., 2003); AUTONOMY AND DISINTEGRATION IN INDONESIA (Damien Kingsbury & Harry Aveling eds., 2003); MARK TURNER ET AL., DECENTRALIZATION IN INDONESIA: REDESIGNING THE STATE (2003); and NICOLE NIESSEN, MUNICIPAL GOVERNMENT IN INDONESIA: POLICY, LAW AND PRACTICE OF DECENTRALIZATION AND URBAN SPATIAL PLANNING (1999).

[194] On *reformasi* and the forestry industry, see, for example, J. F. McCarthy, *The Changing Regime: Forest Property and Reformasi in Indonesia*, 31 DEV. & CHANGE 91 (2000); Madhur Gautam et al., *Forest Management in Indonesia: Moving from Autocratic Regime to Decentralized Democracy*, *in* MANAGING A GLOBAL RESOURCE: CHALLENGES OF FOREST CONSERVATION AND DEVELOPMENT 167 (Uma Lele ed., 2002).

[195] CHIDLEY, *supra* note 108.

[196] This Law replaced UU 5/1974 on the Principles of Regional Governance and UU 5/1979 on Village Governance, two instruments which were popularly reviled during the Suharto era for undermining local community rights. Even though these two instruments have been revoked, the majority of rural villages in Indonesia continue to be administered through this system. *See Suspend FSC Certification, Says Major New Study*, DOWN TO EARTH (Down to Earth, London), May 2003, *available at* http://dte.gn.apc.org/57FSC.htm.

[197] The original regional autonomy laws—UU 22/1999 and UU 25/1999—

laws (collectively referred to here as the "regional autonomy laws") brought with them far-reaching consequences, at least in theory. Substantial portions of governance and decision-making authority are meant to be transferred to the regions, including competence over forestry and other natural resources.[198]

One of the revolutionary features of regional autonomy in Indonesia is the transfer of substantive powers directly to the "second-level" regencies (*kabupaten*) and towns (*kota*), as opposed to the "first-level" provinces (*provinsi*).[199] Under the new UU 32/2004, the heads of the provinces, regencies and towns (the *Gubernur*, *Bupati* and *Walikota* respectively) are to be directly elected by the people.[200] This is a major change from UU 22/1999, which had provided for regional heads to be elected by and accountable to the respective provincial, regency or town legislative assemblies.[201] Elsewhere, however, UU 32/2004 appears to favor re-centralization of powers to Jakarta, limitations on the powers of regents and mayors, and a general backtracking from the more pro-autonomy UU 22/1999.[202] The situation is

were hastily enacted at the end of the 1990s partly to appease the clamor for reform coming from both within Indonesia and from external agencies such as the International Monetary Fund (IMF). IMF conditions for economic aid included forest-related reforms such as the requirement for concessions to be auctioned and not awarded, the elimination of monopolies over plywood exports (and thus, the dismantling of APKINDO, the plywood monopoly) and the demarcation of money in the reforestation fund strictly for reforestation purposes. For a critique of the Indonesian Bank Restructuring Agency's (IBRA) role in recapitalizing banks saddled with forestry-related debts and in failing to impose socially-responsible behavior among forestry conglomerates which own these banks, see Christopher Barr & Bambang Setiono, *Corporate Debt and Moral Hazard in Indonesia's Forestry Sector Industries*, *in* BARR, *supra* note 25, at 100, 108–17; and Christopher Barr et al., *Corporate Debt and the Indonesian Forestry Sector*, *in* WHICH WAY FORWARD, *supra* note 24, at 277. Elsewhere, IMF reforms in the oil palm sector—including a lifting of investment restrictions to bolster exports—have been alleged to intensify pressures for forest conversion. *See* TRIAL BY FIRE, *supra* note 22, at 39.

[198] *See* UU 22/1999, arts. 7–13 and UU 32/2004, arts. 10–18.

[199] UU 22/1999, art. 11(2), read with arts. 7 and 9; UU 32/2004, art. 14. Observers believe that this could have been a deliberate strategy to stifle the secessionist tendencies among some provinces; indeed, provinces are viewed to be large and well-endowed enough to secede, unlike regencies and towns. For an assessment of the powers of the different levels of government, see Bell, *supra* note 104, at 8–14.

[200] UU 32/2004 on Regional Government, arts. 4–5.

[201] *Compare* UU 22/1999, art. 18, *with* UU 32/2004, arts. 56–67.

[202] *See* Ridwan Max Sijabat, *Regional Autonomy Makes Little Headway*, JAKARTA POST, Dec. 27, 2004, at 1.

highly uncertain at the moment, given the vague provisions of UU 32/2004 and the impending passage of further implementing regulations.[203] At any rate, the position may well be altered (again!) by future legislation, particularly since there is now an unsettling habit of enacting new laws every few years or so. This is evident from the revisions introduced by UU 32/2004 itself, barely three years after UU 22/1999's coming into effect.[204]

Pursuant to the regional autonomy laws, the regencies and towns are now recognized as "autonomous regions" (*daerah otonom*), and possess significant competences independent of the provinces of which they are part.[205] As such, the regency/town has become the new locus of devolved authority in present-day Indonesia, which in itself represents a seismic change in the way regional governance is conducted. In relation to forest management, authority has now been transferred directly to the regency/town level, bypassing the provincial authorities whose only role is to act as facilitators in forestry management.[206]

UU 22/1999 and UU 25/1999 (the original regional autonomy laws) had been enacted to provide greater allocation of revenue to the regions. Accordingly, only 20 percent of forest utilization rights levies were to be retained by the central government, while 80 percent would accrue to the regions (16 percent to the provinces and a hefty 64 percent to the producing regency or town).[207] Where forest revenue is concerned, the new UU 33/2004 effects no change to the prevailing formula.[208] The only revisions introduced by UU 33/2004 relate to the division of oil and gas and property

[203] UU 32/2004, art. 238(2) anticipates implementing regulations within two years of UU 32/2004's enactment.

[204] *See* Ridwan Max Sijabat, *supra* note 202.

[205] UU 32/2004, art. 24.

[206] Kartodihardjo, *supra* note 95, at 153. In most cases, the provinces only have competence for cross-border issues impacting on more than one regency. *See generally* UU 22/1999, art. 9(1); UU 32/2004, art. 13.

[207] PP 104/2000 on Distribution of Revenues, enacted pursuant to the parent UU 22/1999 and UU 25/1999. In the past, the central government retained thirty percent, with the rest going to the government of the producing province (and none specifically for the regencies/towns). Illustrating these changes, the regency of Berau in East Kalimantan province received 6 billion rupiah in natural resource taxes in 1998/99, and 155 billion rupiah or US$18 million (a twenty-five-fold increase) in 2001. *See* OBIDZINSKI & BARR, *supra* note 115, at 16.

[208] UU 33/2004 on Fiscal Balance between the Central Government and the Regions, arts. 14–15.

tax revenue.[209]

Despite their spirit and intent, the regional autonomy laws contain inherent contradictions. For instance, even though the *daerah* or regions (the general term denoting the provinces, regencies and towns) are authorized to manage natural resources within their respective territories, policies on "natural resource utilization" were slated to remain with the central government pursuant to Article 7(2) of UU 22/1999.[210] In this regard, further confusion was sowed in May 2000, when the central government issued Governmental Regulation PP 25/2000 on Government Authority and the Authority of Provinces as Autonomous Regions, the provisions of which appear to negate the broad objectives of UU 22/1999.[211]

As the first of the implementing Regulations for UU 22/1999, PP 25/2000 attempts to clarify the demarcation of authority between the central and provincial governments, but ambiguously fails to elaborate on regency and town authority. This omission, in itself, is highly problematic given that UU 22/1999 clearly identifies the regency/town as the locus of decentralized authority.[212] In any event, UU 22/1999 had stipulated that the regencies and towns possess residual powers that it has not otherwise reserved for the central and provincial governments.[213] Yet, PP 25/2000 attempts to specify more powers for the central government than UU 22/1999 itself had specified, including powers over natural resource sectors like mining, forestry and oil and gas.[214]

Thus, Article 2(3) of PP 25/2000 specifically lists forestry and mining as sectors that fall within central government competence, even though this was never made explicit under UU 22/1999. Proponents of this position argue that PP 25/2000 is merely clarifying the intent of Article 7 of UU 22/1999, which provides for the central government to retain competence over a whole host of policies, including those affecting "natural resource utilization"[215] This interpretation runs directly counter to the

[209] *Id.*
[210] UU 22/1999, art. 7(2).
[211] *See infra* text accompanying notes 212–15.
[212] UU 22/1999, art. 11.
[213] *Id.*; UU 32/2004, arts. 2(3), 10.
[214] *See* Bell, *supra* note 104, at 21–22.
[215] UU 22/1999, art. 7(2).

whole objective and spirit of regional autonomy, and it is obvious that Article 7 could readily be used to subvert regional autonomy.

In addition, PP 25/2000 goes on to list forestry as a sector that may cut across regency borders, in which case it is to fall within provincial competence.[216] Moreover, it is provided that the provinces may exercise competences which have not, as of yet, been exercised by the regencies or towns.[217] In other words, it appears that the regencies will only have exclusive competence over forests that fall *entirely* within their borders, and even then, only if they have explicitly sought to exercise this competence. In sum, PP 25/2000 attempts to define the division of competence not by law, but by *de facto* exercise. This is bound to create uncertainty, particularly if different regencies within a province act to exercise this competence to different degrees.

PP 25/2000 also provides for a mechanism by which the central government may resume power over areas where regions are deemed to be incapable of performing the relevant tasks.[218] It is unclear who is to make this determination—presumably, the central government has unfettered discretion to do so. Underlying all these uncertainties is the fact that other parts of PP 25/2000 seek to repose authority over environmental protection and land matters in the regencies and towns, as opposed to the provinces or the central government.[219]

For its part, the new UU 32/2004 has explicitly abrogated UU 22/1999, but is silent on the status of PP 25/2000. There is

[216] PP 25/2000, Elucidation to art. 9(1). It is doubtful if the Elucidations (*penjelasan*, a common feature of Indonesian legislation whereby the main provisions are explained by further enumerations at the end of the instrument) can add provisions which have the force of law, particularly if they contradict the spirit of the parent provisions. *See* Bell, *supra* note 104, at 24.

[217] In addition, the regencies and towns may delegate powers to the provinces, which can further delegate these to the central government if they (the provinces) are incapable of exercising them. *See* PP 25/2000, art. 4. See Bell, *supra* note 104, at 26, for the view that this is inconsistent with the regional autonomy laws and indeed the Constitution, which provide that central government competence must clearly be set out by a Law, and not just any Regulation. Indeed, Bell detects a trend for the central government to use regulations like PP 25/2000 to take away what have been accorded to the regions by the regional autonomy laws, with the trend extending far beyond natural resource issues to all forms of governance, including the appointment of civil servants, authority over foreign investments and the transfer of infrastructure and assets to the regions. *Id.* at 34–36.

[218] *See* Dermawan & Resosudarmo, *supra* note 183, at 331–32.

[219] *E.g.*, PP 25/2000, art. 2(3)(25).

thus uncertainty as to whether PP 25/2000 survives, given that UU 32/2004 preserves all legislation that is not inconsistent with it.[220] In this regard, UU 32/2004 itself is extremely vague as to the division of powers over natural resources. For one thing, it appears to contemplate shared competence on the part of central and regional governments.[221] At the same time, UU 32/2004 abandons the problematic wording of Article 7(2) of UU 22/1999 which had sought to preserve central government authority over natural resource issues. Yet, in enumerating the specific competences of regional governments, UU 32/2004 omits to list natural resource matters as coming within the purview of regional authorities.[222]

Such uncertainty mounting upon uncertainty is further compounded by the central government's reluctance, particularly on the part of the Ministry of Forestry, to give up power over lucrative natural resource issues.[223] Indeed, the Ministry continues to assume that no forest policy can be set without its initiative or concurrence.[224] The underlying political context is important—successive governments in Indonesia continue to face pressure to backtrack on regional autonomy in order to preserve a unitary state

[220] *See* UU 32/2004, art. 238.

[221] *See id.* arts. 2(4), 17.

[222] *Id.* art. 14.

[223] Dermawan & Resosudarmo, *supra* note 183, at 332. For a history of the Ministry of Forestry's traditional reticence towards local empowerment, see Rita Lindayati, *Ideas and Institutions in Social Forestry Policy*, *in* WHICH WAY FORWARD, *supra* note 24, at 36, 47–51.

[224] In May 2000, just months before regional autonomy was to be implemented, the Ministry passed a decree determining, *inter alia*, the maximum areas which provinces and regencies can set for forest exploitation and the retention of Ministry authority over existing concessions. *See* Decree (SK) 05.1/Kpts-II/2000 on the Criteria and Standards of Licensing for the Utilization of Forest Products and the Licensing of Harvesting Forest Products in Natural Production Forests. This decree followed a host of other decrees issued hurriedly in 1999 by the Ministry (e.g. SK 307, 308, 310, 312, 313, 314, 315, 317 and 318), all purporting to give effect to the new trend favoring regional autonomy and local community empowerment, but in reality retaining competence with the central government. At one juncture, the Ministry of Forestry sought to overturn SK 05.1/Kpts-II/2000 and to ban provincial and regency governments from issuing forest concessions altogether. SK 05.1 has since been repealed by SK 541/Kpts-II/2002 on Plantation Forests, which has itself been accused of recentralizing power for Jakarta. For a description of these instruments, see Kartodihardjo, *supra* note 95, at 157–60. Of course, the status of Ministerial Decrees remains uncertain today, although this does not seem to have troubled the Ministry of Forestry, *see supra* note 122.

and avert a federal-style system. This explains why, in recent times, the state-owned forestry enterprises continue to be designated as being responsible for forestry management, usually in conjunction with, but at times in place of, the local governments.[225]

Indeed, other signs of backtracking have appeared. At the central level, the lukewarm commitment to regional autonomy was evident from the very beginning. The agency created to oversee the matter—the Office of the State Minister for Regional Autonomy—began its existence as a weak non-departmental agency.[226] Not unlike the Office of the State Minister for the Environment, the agency was considered a "junior" ministry within Indonesia's state apparatus, subservient to more powerful agencies such as the Ministry of Forestry.[227] In any event, the agency no longer exists today, its functions having been subsumed within the Ministry of Home Affairs.[228] Resistance to regional autonomy has also come from the provinces themselves, which are naturally uneasy over the enhanced powers of their constituent regencies and towns.[229] This makes for increasing tension between them. Meanwhile, a bewildering patchwork of laws and regulations on regional autonomy continues to be promulgated, the latest being UU 32/2004 and UU 33/2004.[230] Yet, these instruments are mutually contradictory, often displaying little real commitment to transferring power to the regions.

2. *Forestry Law UU 41/1999*

At the sectoral level, the central government ministries have begun to issue regulations and decrees which reflect a desire on

[225] *See* Kartodihardjo, *supra* note 95, at 153. These state enterprises often have conflicted interests as they take on both a regulatory role as well as a monopolistic profit motive and an obligation to pursue local community development and welfare activities. *See* Jeffrey Y. Campbell, *Differing Perspectives on Community Forestry in Indonesia*, *in* WHICH WAY FORWARD, *supra* note 24, at 110, 119.

[226] This is essentially similar to the position of the State Minister for the Environment. *See* TRIAL BY FIRE, *supra* note 22, at 12–13.

[227] *See generally id.*

[228] *See* Sijabat, *supra* note 202.

[229] The new UU 32/2004 reinstates some power to the provincial governors to oversee and check the regents and mayors. *See id.*

[230] *See* Government Regulation PP 8/2003 on Guidelines for Region-Level Organization, replacing Government Regulation PP 84/2000 on Guidelines for Region-Level Organization.

their part to reclaim substantive competence for themselves. Apart from the uncertainties posed by the regional autonomy laws, the most troubling development relates to the new Forestry Law UU 41/1999. Designed to replace the Basic Forestry Law of 1967, UU 41/1999 was adopted in September 1999, only four months after the enactment of UU 22/1999 on Regional Autonomy. The major problem is that UU 41/1999 has not been properly reconciled with the laws on regional autonomy. The process by which UU 41/1999 was adopted has also been heavily criticized; it was essentially pushed through the legislative process without comprehensive consultation with environmental groups and local communities.[231]

On its face, UU 41/1999 purports to augment the regional autonomy laws by decentralizing forestry management to the regions. In theory, this is supposed to hold out the promise of stronger participation for local communities, greater accountability of policymakers to peoples whose livelihoods depend on forests and a more equitable distribution of forest revenue between center and periphery.[232] UU 41/1999 goes some way toward acknowledging these goals, at least in principle. Thus, the concept of customary or *adat* forests[233] is recognized for the first time in Indonesia, alongside objectives such as community based forestry management and local communities' access to forest resources.[234]

However, as with the regional autonomy laws, a closer examination of UU 41/1999 reveals systemic flaws. In reality, customary forests exist only as a category of "state forests"—thus,

[231] *See* William D. Sunderlin, *Effects of Crisis and Political Change, 1997–1999*, *in* WHICH WAY FORWARD, *supra* note 24, at 246, 268–69. *See also* TRIAL BY FIRE, *supra* note 22, at 41 (detailing criticisms against UU 41/1999 by respected personalities such as the former forestry minister, Djamaluddin Suryohadikusumo and the former State Minister for the Environment, Emil Salim). Despite initial well-intentioned consultations with NGOs, a separate draft apparently emerged from within the Ministry of Forestry and Estate Crops, and this draft eventually became the new law in September 1999 with little external consultation. *See* Chip Fay & Martua Sirait, *Reforming the Reformists in Post-Soeharto Indonesia*, *in* WHICH WAY FORWARD, *supra* note 24, at 126, 130. It is a fairly common phenomenon in Indonesia that while a draft bill is being debated, an alternative bill materializes from elsewhere and eventually becomes the approved version.

[232] *See, e.g.*, W. ASCHER, COMMUNITIES AND SUSTAINABLE FORESTRY IN DEVELOPING COUNTRIES (1995).

[233] UU 41/1999, art. 5(2).

[234] UU 41/1999, arts. 67–70.

they are not to be owned and controlled outright by local communities.[235] Consequently, the rights of such communities within customary forests are recognized only to the extent that they do not conflict with "national priorities," the latter being defined solely by the central government.[236] In addition, the state retains the power to accord, recognize and revoke the status of a "customary community"[237] according to criteria defined by the central government.[238] At the same time, the burden of proof rests on such communities to justify their customary status.[239] These provisions are all hugely unsatisfactory as they effectively subject local communities to the absolute discretion of government officials.[240]

Outside of state forests, the concept of collective land rights (*hak ulayat*) is recognized under Indonesian law.[241] However, no effective procedures are set down by UU 41/1999 to secure these rights. Customary rights are thus treated as weak forms of usufruct rights which are wholly subordinate to the interests of the government.[242] Finally, class action rights and the right to obtain compensation for customary communities are mentioned, but not elaborated upon in UU 41/1999.[243] Hence, from the perspective of customary communities, the new Forestry Law accords little recognition to the rights of forest-dwelling peoples, a problem that has long been unresolved in Indonesia.[244] For all purposes,

[235] Thus, all forests are either "state forests" or "private forests," with state forests being divided into customary and non-customary forests. *See id.* arts. 1(6), 4(1), 5(2), 37. The original drafts of UU 41/1999 had customary forests as a separate category altogether, distinct from state and private forests, but this was omitted in the Ministry of Forestry's internal draft. *See* Fay & Sirait, *supra* note 231, at 130.

[236] UU 41/1999, arts. 4(3), 5(3), 37. Art. 4(3) is telling in its ruthless simplicity: the rights of customary communities will be upheld "if they actually exist and are recognized as such, and do not conflict with national priorities."

[237] *Id.*, Elucidation to Para. VII of the pmbl., art. 67.

[238] Pursuant to UU 41/1999, art. 67, Government Regulations are to be enacted to deal with the existence and recognition of customary communities. Note also UU 41/1999, arts. 71 and 72, which accord customary communities the right of legal action in respect of damage to forests that causes losses to their livelihoods.

[239] *See Suspend FSC Certification, Says Major New Study*, *supra* note 196.

[240] *See id.*

[241] *Id.*

[242] *Id.*

[243] *See* UU 41/1999, arts. 68–73.

[244] *Suspend FSC Certification, Says Major New Study*, *supra* note 196.

UU 41/1999 is a pro-exploitation instrument which does little to promote sustainable conservation and protection of forest resources.

With regional autonomy, regency governments now have the right to issue their own implementing regulations on customary uses of forests.[245] In addition, the new regional autonomy and forestry laws stipulate that local communities may form co-operatives to bid for exploitation licenses and concessions.[246] The reality, however, is that such co-operatives often do not possess adequate capital or technical capacity to carry out logging operations. As a result, many large-scale concessionaires have emerged to back these co-operatives, setting up "foundations" to effectively "buy" them out (often with the connivance of corrupt local leaders) so as to gain access to forest resources.[247]

Hence, even though the concept of co-operatives is meant to benefit local communities who wish to exploit forest resources, the system remains open to manipulation by outside interests. Even more insidiously, the co-operatives breed disunity among different factions within local communities, with more powerful or educated groups often compromising the interests of the whole community.[248] The fact that the co-operative is mandated as the only vehicle for community natural resource management is also undemocratic in itself, and shows the government's continuing mistrust of local communities. In essence, the very nature of a co-operative is geared more toward enterprise and exploitation, as opposed to conservation. The insistence on the co-operative can only entrench continuing patterns of state control and orthodoxy, given that co-operatives typically lack accountability.[249] In this regard, reform is very much needed, and there is no reason why community organizations should not enjoy the freedom to define their own organizations (apart from co-operatives) to manage

[245] *See, e.g.*, UU 41/1999, arts. 67–70; UU 32/2004, arts. 14, 160.

[246] *See* UU 41/1999, SK 677/1998 on Community Forestry; PP 6/1999 on Forest Utilization and Forest Product Harvesting in Production Forests (which has since been replaced by PP 34/2002 on the Management, Exploitation and Use of Forest Areas. *See infra* text accompanying note 255).

[247] Dermawan & Resosudarmo, *supra* note 183, at 338–40 (citing *HPH Skala Kecil Dijual 20 Juta* [*Small-scale HPH's sold for 20 million rupiah*], KOMPAS (Indon.), Feb. 26, 2001).

[248] Dermawan & Resosudarmo, *supra* note 183, at 339.

[249] *See generally id.* (discussing the relationship between HPHH permits and illegal logging).

forest resources, or if they so wish, to prefer subsistence over full-scale exploitation.

As for the demarcation of institutional authority over forests, UU 41/1999 blatantly contradicts the spirit of the regional autonomy laws. For instance, UU 41/1999 provides that the central government continues to retain authority over forest administration and management.[250] Pursuant to this provision, the Ministry of Forestry has issued various decrees purporting to maintain authority over forest exploitation.[251] In the meantime, depending on the individuals in power in the Ministry and the extent of their sympathy for regional autonomy, various contradictory policies have been enacted (and replaced) in quick succession.[252] For instance, a Government Regulation was issued in 1999, purporting to allow regency heads to grant small-scale forestry exploitation licenses.[253] This Regulation quickly came under pressure, and by 2002, Government Regulation PP 34/2002 had been issued to override PP 6/1999.[254]

As the first significant implementing regulation for UU 41/1999, PP 34/2002 had been expected to clarify the ambiguities posed by UU 41/1999 and the laws on regional autonomy. However, PP 34/2002 further compromised the regional autonomy movement by reposing significant authority in the Minister for Forests to lay down rules and criteria for the exploitation of forests and forest products.[255] This is pointedly the

[250] UU 41/1999, art. 4(2).

[251] *See, e.g.*, the Decrees listed in note 224.

[252] It has been estimated that there are some 137 separate regulations applying to logging concessions alone, with the estimated annual costs of the regulatory regime being put at US$98 million. *See* ASIAN DEV. BANK, STRATEGY FOR THE USE OF MARKET-BASED INSTRUMENTS IN INDONESIA'S ENVIRONMENTAL MANAGEMENT (1997). In relation to compliance with forestry regulations, it was estimated that in the early 1990s, only four percent of concessions adhered to the relevant regulations. In 1991, the Minister of Forestry himself estimated that only 10 percent of companies obeyed the law. *See* TRIAL BY FIRE, *supra* note 22, at 47. A treatment of the perplexing array of forestry laws and regulations enacted in the past few decades is outside the scope of this work. For a brief analysis, see Rachel Wrangham, *Changing Policy Discourses and Traditional Communities, 1960–1999*, *in* WHICH WAY FORWARD, *supra* note 24, at 20; SIMORANGKIR & SUMANTRI, *supra* note 107, at 3–11.

[253] PP 6/1999 on Forest Utilization and Forest Product Harvesting in Production Forests.

[254] PP 34/2002 on the Management, Exploitation and Use of Forest Areas.

[255] *See* PP 34/2002, art. 37 (outlining the respective competences of the regent, governor and minister for the award of forest concession rights depending

case for large-scale concessions exceeding a certain production capacity.[256] PP 34/2002 also envisages administrative sanctions for concessionaires who breach the terms of their concessions, the details of which are to be issued through Ministerial Decisions.[257] What is noteworthy here is that in the era of regional autonomy, Ministerial Decisions no longer occupy a position within the hierarchy of laws in Indonesia.[258] Thus, even though the Ministry continues to believe that its decrees are relevant, the reality on the ground is that the regional governments no longer treat such decrees to be binding upon them. This is setting the stage for a tumultuous relationship between the regional governments and the Ministry of Forestry.[259]

PP 34/2002 is reportedly being challenged by environmental NGOs and civil society groups, which see it as an unwarranted attempt by the central government to thwart regional autonomy and to reassert control over natural resources.[260] There are plans to send PP 34/2002 to the courts for judicial review, a move resisted by the Ministry of Forestry.[261] Yet, at the same time, many international donors actually support the Ministry's recentralization effort, viewing this as positive for environmental conservation and necessary to thwart the indiscriminate issuing of permits by regional leaders.[262]

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on whether the concession straddles the borders of other regencies or provinces). *See also* arts. 43–44 (according the Minister the competence to lay down rules and criteria for the auction of concession rights).

[256] *See, e.g.*, PP 34/2002, arts. 58 and 64, prescribing the Minister as the competent authority for annual wood-based production exceeding 6000 cubic meters.

[257] PP 34/2002, arts. 87–97.

[258] For the hierarchy of laws and the status of ministerial decrees, see *supra* note 122.

[259] For an intriguing glimpse into the politics of forest exploitation at the regency level, see OBIDZINSKI & BARR, *supra* note 115; CHRISTOPHER BARR ET AL., CTR. FOR INT'L FORESTRY RESEARCH, THE IMPACTS OF DECENTRALISATION ON FORESTS AND FOREST-DEPENDENT COMMUNITIES IN MALINAU DISTRICT, EAST KALIMANTAN (2001); Ida A. P. Resosudarmo, *Closer to People and Trees: Will Decentralization Work for the People and the Forests of Indonesia?*, 16 EUR. J. DEV. RES. 110 (2004); and Ida Aju Pradnja Resosudarmo, *Shifting Power to the Periphery: The Impact of Decentralization on Forests and Forest People*, *in* Aspinall & Fealy eds., *supra* note 193, at 230.

[260] *International Concerns over Illegal Logging Dominate Indonesian Forest Policy*, DOWN TO EARTH (Down to Earth, London), Aug. 2003, *available at* http://dte.gn.apc.org/58for.htm.

[261] *Id.*

[262] *Id.* Another sign of backtracking relates to mining in protected forests. In

While it is tempting to characterize the regional governments' desire for more power as self-interested and environmentally destructive, and the central government's efforts at re-asserting authority as being enlightened, it is highly doubtful that the latter is being dictated by altruistic ecological motives. In reality, the tussle between center and periphery has always been one for control over natural resources and ultimately, revenue. Such are the complexities in Indonesia today, where the central government is seen to be trying to undo the damage of what it perceives to be a rushed attempt at decentralizing power to ill-equipped regional authorities.[263]

It is undeniable that the clamor for regional autonomy has led to powers being decentralized well before the provinces and regencies have had the time to develop strong institutions necessary for good governance. In particular, the shifting of power and competence to the regions has not been accompanied by increased manpower and technical capacity to enforce sustainable forestry practices.[264] In many regions, the forestry bureaucracy remains understaffed, poorly trained, low paid, ill-equipped and corrupt.[265] From the perspective of the forestry authorities, the need to enforce the boundaries of forestry concessions and to monitor the harvesting practices of the thousands of concession holders spread over millions of hectares of land is an enormous challenge. Hence, even with decentralization, the policymaking, budgetary and planning powers are likely to remain with the central ministry in Jakarta for some time. In this regard, the over-concentration of resources and manpower at the central government level is likely to persist for a few years yet, and the continued lack of coordination between center and periphery can

March 2004, the government issued a Government Regulation In Lieu of Law (Perpu) No. 1/2004 on the Revision of UU No. 41 of 1999 on Forestry to exempt mining activities in forest areas which were approved prior to the coming into force of UU 41/1999. This exemption was introduced in light of the concern that the government would otherwise have to compensate the (mostly foreign) holders of these existing concessions. On March 12, 2004, Presidential Decision KP 41/2004 was issued, approving 13 specific concessions for exemption. In August 2004, Perpu 1/2004 was formally confirmed by UU 19/2004 and is now a fully-fledged law. However, it is reportedly being challenged by a coalition of NGOs. *See Law on Mining Challenged*, JAKARTA POST, Feb. 17, 2005, at 4.

[263] *See generally* Sijabat, *supra* note 202.

[264] *See generally* Bell, *supra* note 104, at 33–35.

[265] *See generally* Smith et al., *supra* note 187, at 295–301; OBIDZINSKI & BARR, *supra* note 115, at 21–24.

only exacerbate problems to considerable degrees.[266]

3. *The Claims of Regional and Local Governments*

The confusion over the demarcation of authority has also been aggravated by the central and regional authorities rushing to issue laws and policies to neutralize each other's actions. Thus, the regional governments—particularly the regencies, who see themselves as the newly-empowered actors—are becoming increasingly strident in claiming exclusive competence over resources and revenue.[267] In many situations, they have invoked the spirit of regional autonomy to institute reforms that go well beyond the authority granted to them under the central government's decentralization laws. Generally, suspicion and resentment over the central government's half-hearted attempts at regional autonomy have been rising.[268]

The regencies have thus moved to enact all forms of *Peraturan Daerah* or Regional Regulations (whose status is newly elevated under the regional autonomy laws),[269] giving the local governments more authority and direct control over natural resources and revenue streams.[270] This is also consistent with UU 25/1999 and UU 33/2004, which give regencies the explicit authority to collect and retain a larger proportion of their

[266] *See* TRIAL BY FIRE, *supra* note 22, at 47.

[267] *See* OBIDZINSKI & BARR, *supra* note 115, at 16 (giving the examples of *bupati* (regents) in four timber-rich regencies in East Kalimantan Province threatening to break away if they did not receive a greater proportion of the revenue generated by their respective regencies). In January 2004, it was reported that several provincial governors in Kalimantan had protested against the Ministry of Forestry's imposition of a reforestation fee to be payable to the central government. The fee was said to have discouraged investment in the forestry industry. *Governors, Businessmen Reject Policy on Reforestation Fees*, JAKARTA POST, Jan. 7, 2004, at 1. The Ministry has since rescheduled the payment of the reforestation fee. *See* Ministerial Decree 43/Menhut-II/2004, *supra* note 224.

[268] *See* Dermawan & Resosudarmo, *supra* note 183, at 335. The Ministry of Forestry's decision to revoke or not extend many concessions, often with no explanation or justification may also be a source of resentment. *See* Christopher Barr, *Timber Concession Reform: Questioning the "Sustainable Logging" Paradigm*, *in* WHICH WAY FORWARD, *supra* note 24, at 191, 197.

[269] UU 32/2004, arts. 136–149.

[270] See Government Regulation PP 8/2003, *supra* note 230, for the legal authorization of *Peraturan Daerah* and of provincial and regency competence in general. For examples of *Peraturan Daerah* in Berau, see OBIDZINSKI & BARR, *supra* note 115, at 13–14.

locally generated revenue.[271] Thus, many regencies have been aggressively imposing various new taxes on natural resource products ranging from timber and minerals to turtle eggs and birds' nests.[272]

In relation to the lucrative timber industry, the regencies have sought to assert greater control by issuing their own district logging licenses,[273] establishing greater control over existing large-scale concessions (forest exploitation rights (HPH)) and restructuring the provincial forestry service so that it reports directly to the regency head, as opposed to the provincial governor or central ministry.[274] Varying interpretations have also arisen on the right of governors and regents to issue concessions of varying sizes without the approval of the central government. Efforts by the Ministry of Forestry to halt the issuance of regency concessions have typically fallen on deaf ears, and some regional governments have even threatened not to honor pre-existing concessions issued by the central government.[275] Conflicts between the regencies and the provinces of which they are part are

[271] UU 33/2004, arts. 14–15.

[272] OBIDZINSKI & BARR, *supra* note 115, at 14.

[273] These are the HPHH and IPPK. *Id.* at 17. The IPPK (and myriad other variants, depending on the province and regency) are favored by the *bupati* or regency heads as a means of appeasing local communities as well as increasing the regency's revenue base. They are also commonly used as leverage against large-scale concession (HPH) holders; granting an IPPK in areas overlapping with HPH concessions can be a signal to HPH holders that the regency leaders are to be cultivated. *See id.* at 18. Significantly, the granting of IPPK has also been used to legalize illegal logging activities. Confusingly, the latest instruments on forest exploitation—UU 41/99 and PP 34/2002—have introduced other terminologies to describe concessions—specifically the IUPHHK and the IUPHHBK—for timber and non-timber products respectively in production forests. These are good for fifty-five and ten year periods respectively. *See* PP 34/2002, art. 35. There are also concession rights for different categories of forests (e.g., IUPHHK and IUPHHBK for *plantation*, as opposed to *natural* forests). *See* PP 34/2002, art. 33. The IUPHHK for timber products (in both production and plantation forests) are to be awarded by the Minister through an auction on the recommendation of the regent/mayor and provincial governor. *See* PP 34/2002, arts. 42–43. In contrast, the less lucrative IUPHHBK for non-timber products can be awarded by the regent or governor if these fall exclusively within their areas of jurisdiction. *See* PP 34/2002, arts. 40–41. In practice, the large scale IUPHHK are often accorded to companies and state-owned enterprises, even though technically, co-operatives may also bid for them in conjunction with the companies.

[274] OBIDZINSKI & BARR, *supra* note 115, at 17, 20.

[275] Dermawan & Resosudarmo, *supra* note 183, at 348.

also increasing.[276]

Additionally, there is strong evidence to show that private parties with vested interests are increasingly exploiting the uncertainties surrounding the decentralization process and the accompanying weaknesses in law enforcement. In many cases, the greater autonomy devolved to local governments has created conditions even more ripe for corruption and ineffective control.[277] Local elites have become further emboldened, and there are reports of timber concessionaires actively cultivating the "*putera daerah*" or "*raja kecil*" (regional princelings or minor kings) whose positions have been strengthened by regional autonomy.[278]

In many cases, even the leaders of customary or *adat*-based communities can be as corrupted as government officials, aided by opportunistic individuals who fashion themselves as community spokespersons.[279] As mentioned above, these individuals often position themselves as intermediaries between their communities and concession firms, negotiating settlements (such as release of limited tracts of land) from the companies. These settlements are frequently short-term fixes or "buy-outs" which provide minimal long-term livelihood benefits to local communities.[280]

Democratization in Indonesia has thus meant greater decentralization of political power and increased access by local elites to the profits of natural resource exploitation. As decentralization gathers momentum, the reduction in supervision and budgetary allocations from the center is encouraging regional actors to pursue extra-legal sources of income.[281] In the absence of

[276] *See* Sijabat, *supra* note 202; *Last Hurdle Cleared in Tangguh Talks*, JAKARTA POST, Feb. 15, 2005, at 13.

[277] Colfer, *supra* note 169, at 314.

[278] The princelings are usually regents (*bupati*) or other officials with strong local credentials. *See* OBIDZINSKI & BARR, *supra* note 115, at 12–14.

[279] *See, e.g.*, John F. McCarthy, *Power and Interest on Sumatra's Rainforest Frontier: Clientelist Coalitions, Illegal Logging and Conservation in the Alas Valley*, 33 J. S.E. ASIAN STUD. 77, 90–96 (2002) (describing the actions of local leaders in the regency of Southeast Aceh in Aceh province); Smith et al., *supra* note 187, at 299 (detailing a similar situation in East Kalimantan province).

[280] For examples of local leaders engaging in such behavior, see OBIDZINSKI & BARR, *supra* note 115, at 25–26.

[281] *See* Barr, *supra* note 268, at 212 (discussing the possibility of military, police and other state officers resorting to illegal means of procuring income). The experience in the East Malaysian states of Sabah and Sarawak has also shown that decentralization is no guarantee for effective management; on the contrary, local state elites there have been as susceptible to corruption and the

functioning state institutions and law enforcement, direct personal ties based on reciprocity, inducements and favors have emerged to govern relations between patrons and clients.[282] In this regard, the politics of "clientelism"—or the use of informal networks based on personal influence to secure one's interests—becomes especially strong where the rules imposed by central agencies are inappropriate, lack local legitimacy or contradict long-standing local traditions.[283]

In almost all cases, the replacement of Suharto-era "outsider" cronies[284] by native elites in natural resource exploitation has not led to greater distributive justice for local communities.[285] On the

influence of commercial interests as their Indonesian counterparts. *See* Dauvergne, *supra* note 28, at 515; Cotton, *supra* note 29, at 338.

[282] McCarthy, *supra* note 279, at 80–81.

[283] *Id*. There is every reason to believe that similar patron-client dynamics are being played out all over Indonesia. The Million Hectare Peat Swamp Project is one such instance. *See* discussion *supra* note 26. McCarthy also reports that officials representing the central government have lost legitimacy in the period after the fall of Suharto due to economic and environmental crises and have begun to make concessions to local demands. McCarthy, *supra* note 279, at 103.

[284] The Suharto-linked timber concessionaires were typically from outside the logged areas; they were usually Javanese elites, military allies and ethnic Chinese Indonesians. *See* Charles V. Barber & Kirk Talbott, *The Chainsaw and the Gun: The Role of the Military in Deforesting Indonesia*, *in* WAR AND TROPICAL FORESTS: CONSERVATION IN AREAS OF ARMED CONFLICT 137 (S.V. Price ed., 2003); WILLIAM ASCHER, WHY GOVERNMENTS WASTE NATURAL RESOURCES, 71–84 (1999). The Chinese businessmen, in particular, became highly effective proxies "hosting" business activity for members of the Suharto family. As an ethnic minority with no attachment to the general population and no constituency of their own, the Chinese were not considered to be a political threat and thus became the quintessential clients in the Indonesian patronage system. *See* Cotton, *supra* note 29, at 341. For a comprehensive case study of patronage politics in Indonesia, see McCarthy, *supra* note 279. For Suharto's use of off-budget sources (such as the Reforestation Fund) to finance and subsidize favored investors, see William Ascher, *From Oil to Timber: The Political Economy of Off-Budget Financing in Indonesia*, 65 INDONESIA 37 (1998).

[285] For a general assessment of the political economy of forest exploitation in Indonesia and the resulting social inequities, see, for example, CHARLES V. BARBER, ENVIRONMENTAL SCARCITIES, STATE CAPACITY, CIVIL VIOLENCE: THE CASE OF INDONESIA (1997), *available at* http://www.library.utoronto.ca/pcs/state.htm; D. W. BROWN, ADDICTED TO RENT: CORPORATE AND SPATIAL DISTRIBUTION OF FOREST RESOURCES IN INDONESIA: IMPLICATIONS FOR FOREST SUSTAINABILITY AND GOVERNMENT POLICY (1999), *available at* http://www.geocities.com/davidbrown_id/Atr_main.html; Malcolm Gillis, *Indonesia: Public Policies, Resource Management and the Tropical Forest*, *in* PUBLIC POLICIES AND THE MISUSE OF FOREST RESOURCES 43 (Robert Repetto & Malcolm Gillis eds., 1988); Colin MacAndrews, *Politics of the*

ground, the benefits of logging operations have largely evaded such communities, in many cases, local people whose lands have been encroached upon are employed in illegal felling activities, often for low pay.[286] In other situations, entire communities have been bought off by small compensatory payments or limited concessions given by commercial interests.[287] Meanwhile, wary of the legacy of harsh Suharto-era controls, the central government has been politically unwilling or unable to resolve conflicts in a robust manner.[288] All these factors are sowing the seeds of even more explosive land use and natural resource conflicts in the future.

Already, many logging concessions have been forced to suspend operations not by court orders, but by conflicts with local communities, some of which have turned violent.[289] During the Suharto era, forestry conglomerates were rarely deterred by local communities' opposition to their projects because the government could be counted upon to use harsh measures to guarantee social control. Today, however, the central government is substantially weaker and less willing to use force to resolve resource conflicts in

Environment in Indonesia, 34 ASIAN SURV. 369 (1994). For deforestation in Asia in general, see, for example, CONFRONTING ENVIRONMENTAL CHANGE IN EAST AND SOUTHEAST ASIA: ECO-POLITICS, FOREIGN POLICY AND SUSTAINABLE DEVELOPMENT (Paul Harris ed., 2004); PETER DAUVERGNE, SHADOWS IN THE FOREST: JAPAN AND THE POLITICS OF TIMBER IN SOUTHEAST ASIA (1997); PHILIP HURST, RAINFOREST POLITICS: ECOLOGICAL DESTRUCTION IN SOUTH-EAST ASIA (1990).

[286] Dermawan & Resosudarmo, *supra* note 183, at 343. For assessments of the impact on local communities, see, for example, NANCY L. PELUSO, RICH FORESTS, POOR PEOPLE: RESOURCE CONTROL AND RESISTANCE IN JAVA (1992); John F. McCarthy, *"Wild Logging": The Rise and Fall of Logging Networks and Biodiversity Conservation Projects on Sumatra's Rainforest Frontier* (Ctr. for Int'l Forestry Research Occasional Paper No. 31, 2000), *available at* http://www.cifor.cgiar.org/publications/pdf_files/OccPapers/OP-31.pdf.

[287] *See* Dermawan & Resosudarmo, *supra* note 183, at 343–44.

[288] This is due in no small part to the low esteem which Suharto brought to the rule of law. *See* TRIAL BY FIRE, *supra* note 22, at 39.

[289] *Id*. The controversy over the Indorayon pulp and rayon mill in North Sumatra and the mill's dispute with local Batak residents is only one case in point. *See* Barr & Setiono, *supra* note 197, at 114. At least fifty companies with concessions amounting to 10 million hectares have reportedly encountered disputes with local communities in Kalimantan, Papua (formerly Irian Jaya) and Sulawesi. *See Plywood Investors Back Off*, JAKARTA POST, Mar. 18, 2000, at 1. Protests against environmentally-destructive mining activities by foreign-owned conglomerates are also common, such as at the Newmont mine in Sulawesi. *See All-Out Campaign to Stop Mining in Protected Forests*, DOWN TO EARTH (Down to Earth, London), Aug. 2003, *available at* http://dte.gn.apc.org/news.htm.

favor of the business interests.[290] At the same time, many large commercial operations—particularly those funded by huge investments from overseas companies—have extremely poor relationships with local communities due to the practice of forced eviction of landowners, a failure to pay compensation for pollution incidents and a lack of effective dispute resolution mechanisms.[291] Instead of trying to reach negotiated solutions, these companies typically pay police or military security guards to suppress local opposition.[292] This often results in intimidation and human rights violations against the surrounding communities.[293]

There is an increasing expectation that the courts will resolve land use and environmental conflicts between local communities and business interests. In many of the regions, the local courts are assuming greater authority than they ever enjoyed in the past as a result of continuing devolution of power. Yet, the light penalties imposed by the courts against offending timber and plantation interests suggest that few substantive improvements have materialized in the judicial system, and that the influence of vested interests remains firmly entrenched. In response to these developments, there has been a significant growth in the number and stridency of environmental activists dedicated to social justice for local communities.[294]

Freedom from centralized control has thus meant not only greater leeway for the commercial interests, but also substantial empowerment for local communities, the media and NGOs. Consequently, the advent of democracy has brought about a

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[290] Barr, *supra* note 25, at 71.

[291] *Military Protection Funds Exposed*, DOWN TO EARTH (Down to Earth, London), May 2003, *available at* http://dte.gn.apc.org/news.htm.

[292] *See id.*; *More Protests Against Indorayon/TPL Pulp Mill*, DOWN TO EARTH (Down to Earth, London) Aug. 2003, *available at* http://dte.gn.apc.org/news.htm (detailing the involvement of much-feared elite troops such as Brimob).

[293] *See Military Protection Funds Exposed*, *supra* note 291 (discussing companies such as Freeport, Rio Tinto and ExxonMobil paying millions of dollars to the military for protection). The Indonesian military's fall from grace in the post-Suharto years has not diminished its influence on the ground, particularly in the restive and resource-rich regions like Aceh and Papua, where the heavy military presence leads to high incidences of intimidation. In many situations, the military's business relationship with the corporate sector invites rent-seeking behavior; security guards often provoke conflict in order to justify their presence at the site or to demand more money. *See id.*

[294] *International Concerns over Illegal Logging Dominate Indonesian Forest Policy*, *supra* note 260.

new equilibrium of interests in Indonesia. However, the balance reached is not one expected in a civil society where the state exercises an arbiter's role in balancing interests impartially, but has been increasingly one of different interest groups seeking to counteract each other's influence, even if this entails resorting to extra-legal measure to resolve conflicts. Such systemic weaknesses accompanying the process of decentralization translate into specific problems on the ground. In particular, illegal logging and timber smuggling have become especially rampant, and appear poised to accelerate with a continuing decrease in the control being exerted from the center.[295]

D. *Illegal Logging and Land Use Conflicts*

A study conducted in 1999 estimated that 52 percent of the total log consumption of Indonesia's wood-based industries originated from illegal felling.[296] It is also estimated that Indonesia has lost some 40 percent of its 160 million hectares of forests within the last twenty years due to illegal logging. The associated loss is estimated to range from US$3.5 to US$4.6 billion annually.[297] In many places, illegal logging activities are reportedly conducted with the collusion of timber barons, local governments, the military, the police and even conservation authorities.[298] It is widely acknowledged that at least some

[295] For comprehensive analyses of illegal logging in Indonesia, see, for example, CHARLES E. PALMER, CTR. FOR SOC. & ECON. RESEARCH ON THE GLOBAL ENV'T, THE EXTENTS AND CAUSES OF ILLEGAL LOGGING: AN ANALYSIS OF A MAJOR CAUSE OF TROPICAL DEFORESTATION IN INDONESIA (2001), *available at* http://www.cserge.ucl.ac.uk/Illegal_Logging.pdf; Richard G. Dudley, *Dynamics of Illegal Logging in Indonesia*, *in* WHICH WAY FORWARD, *supra* note 24, at 358; Anne Casson & Krystof Obidzinski, *From New Order to Regional Autonomy: Shifting Dynamics of "Illegal" Logging in Kalimantan, Indonesia*, 30 WORLD DEV. 2133 (2002); TELAPAK & ENVTL. INVESTIGATION AGENCY, THE FINAL CUT: ILLEGAL LOGGING IN INDONESIA'S ORANGUTAN PARKS (1999) [hereinafter FINAL CUT]; JULIAN NEWMAN ET AL., TELAPAK & ENVTL. INVESTIGATION AGENCY, ILLEGAL LOGGING IN TANJUNG PUTING NATIONAL PARK: AN UPDATE TO THE FINAL CUT REPORT (2000); DAVE CURREY ET AL., TELAPAK & ENVTL. INVESTIGATION AGENCY, ABOVE THE LAW: CORRUPTION, COLLUSION AND NEPOTISM AND THE FATE OF INDONESIA'S FORESTS (2002); Smith et al., *supra* note 187.

[296] Sunderlin, *supra* note 231, at 257. A World Bank study suggests that illegal log and pulpwood production in Indonesia is nearly three times the official harvest. *See* WORLD BANK, *supra* note 31, at ii.

[297] Dwight Y. King, *The Political Economy of Forest Sector Reform in Indonesia*, 5 J. ENV'T & DEV. 216 (1996).

[298] FINAL CUT, *supra* note 295, at 14.

members of Indonesia's forest and estate crops sector regularly pay bribes to government officials.[299] Widespread illegal logging, carried out in collusion with local authorities, has even been documented in showpiece national parks, such as Gunung Leuser in Sumatra and Tanjung Puting in Kalimantan.[300] In 2003, it was estimated that less than 50, out of hundreds of reports of illegal logging, were actually investigated.[301] Timber smuggling is reported to occur frequently from Indonesia to neighboring countries such as Malaysia, particularly from Kalimantan to the Malaysian state of Sabah.[302]

In response to such concerns, the administration of former President Abdurrahman Wahid issued a Presidential Instruction in 2001 aimed at overcoming illegal logging in the national parks.[303] The Instruction directed various ministers, the Attorney General, the police and army chiefs to take strong action against illegal

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[299] *See id.*

[300] TRIAL BY FIRE, *supra* note 22, at 30 (citing FINAL CUT, *supra* note 285). In some cases, forest rangers who tried to enforce the law were reportedly intimidated by armed personnel hired by illegal logging syndicates. *See* Moch. N. Kurniawan, *Money, Guns Destroy Protected Forest in Central Kalimantan*, JAKARTA POST, Feb. 10, 2003, at 2. Also, Forestry Ministry officials seeking to clamp down on illegal concessions granted by regencies had reportedly been "forced to flee by hoodlums hired by the regents." Rendi A. Witular, *Deforestation Accelerated as Regions Issue Concessions*, JAKARTA POST, Jan. 27, 2003, at 1.

[301] A. Junaidi, *Law Enforcement Weak, Forest Destruction Worsens: WWF*, JAKARTA POST, Dec. 23, 2003, at 1. Indonesia has struggled to define what is meant by "illegal logging;" furthermore, the country has only nominal capacity to monitor such activities. *See International Concerns over Illegal Logging Dominate Indonesian Forest Policy*, *supra* note 260.

[302] Smith et al., *supra* note 187, at 297. In recent months, Telapak (an Indonesian NGO) and the U.K.-based Environmental Investigation Agency have accused Malaysia of laundering smuggled *ramin* (a tropical hardwood) from Indonesia, particularly from Sumatra to the Malaysian state of Johor. *See* Moch. N. Kurniawan, *Syndicate Smuggles Millions of Dollars of RI Wood*, JAKARTA POST, Feb. 5, 2004, at 1. Malaysia has denied the claims. *See Malaysia Questions Ramin Report*, JAKARTA POST, Feb. 7, 2004, at 1. There is at present a Malaysian law banning imports of Indonesian logs. A few bilateral agreements and Memoranda of Understanding between Indonesia and importing countries (such as Japan and the U.K.) are also in force to curb the purchase of illegally-felled woods, but these have had little effect in overcoming the problem. *See International Concerns over Illegal Logging Dominate Indonesian Forest Policy*, *supra* note 260.

[303] Presidential Instruction 5/2001 on the Eradication of Illegal Logging and the Illegal Distribution of Forest Products in the Leuser Ecosystem and Tanjung Puting National Park.

loggers, including revoking forest concession permits.[304] However, there is little indication to show that the Instruction has been enforced and taken seriously. In November 2003, about 200 people died in a devastating mudslide and flood in Northern Sumatra, near the Gunung Leuser National Park. The disaster prompted the State Minister for the Environment to brand illegal loggers as "terrorists" and to ascribe flooding problems to illegal logging, judicial corruption and collusion by the armed forces.[305] The disaster has since prompted the government to propose an emergency law on illegal logging which promises severe sentences (reportedly including the death penalty) for illegal loggers.[306]

Like forest fires, the flooding and illegal logging issues have to be located within the context of the larger deforestation and natural resource mismanagement problems. With decentralization and the granting of authority to regencies to award logging concessions, the problem of illegal logging and over-harvesting has grown enormously.[307] Some field researchers believe that illegal exports of logs was actually lower during the Suharto years, and that the problems of corruption and land use conflicts have become much more acute with the advent of regional autonomy.[308] The encroachment of national parks and other protected forest areas, already common before 1998, is now occurring with alarming regularity.[309]

On the whole, illegal logging continues to be fueled by factors such as declining log supplies from legal sources, the collapse of

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[304] *Id.* ¶ 2.

[305] *Indonesia Minister Calls Illegal Loggers "Terrorists" After Flood Disaster*, *supra* note 130.

[306] *Jakarta Drafts Law to Put Illegal Loggers to Death*, *supra* note 6. It is unclear when this law will be enacted, or whether the Minister was simply responding to the Leuser floods. In July 2002, the same Minister had announced plans to form a new team of incorruptible law enforcers to tackle environmental crimes, particularly illegal logging. *See* Tertiani ZB Simanjuntak, *Government to Set Up Green Crimes Team*, JAKARTA POST, July 6, 2002, at 4. To date, there have been no concrete details on the formation of this team. In any case, there is clearly a risk that an over-emphasis on illegal logging may distract from more fundamental issues, such as land tenure and forest management reform.

[307] Dudley, *supra* note 295, at 359.

[308] *See, e.g.*, Smith et al., *supra* note 187, at 298–99.

[309] *Id*. at 298. In theory, national parks have remained under central government authority even after decentralization. With local governments offering little assistance in enforcement, these parks have become particularly vulnerable to illegal logging. *See id*.

government control and the post-economic crisis search for alternative incomes.[310] The problem is also aggravated by high government taxes on legal felling. Logging companies seeking to lower their costs of production will thus seek to fell more trees than their concessions allow while cutting spending on replanting and community projects. Structurally, the huge overcapacity in the plywood, pulp and paper industries continues to create high demand for raw timber. Where legal supplies are inadequate to fuel such demand, illegal logging steps in to fill the void.

A related problem that remains unresolved is the security of land tenure. Traditionally, there has always been a conflict between agrarian laws, which go some way toward recognizing community land claims, and forestry laws, which assert state control over all forests.[311] The concept of state primacy over forests, first introduced during Suharto's New Order regime,[312] has long been criticized for ignoring local communities' historical claims to their lands.[313] In this regard, the new Forestry Law UU 41/1999, by designating "customary forests" as a subset of state forests, [314] perpetuates the state's hold on forests at the expense of local communities.

Most of the land use conflicts that arise in Indonesia today stem from the absence of a proper demarcation of land tracts for different uses by different stakeholders. In the first place, notions of land ownership remain wholly uncertain, with the state often claiming ultimate rights over land in priority to customary or *adat* rights.[315] As a result of these claims, the land-use patterns of local communities are often disturbed and their rights sacrificed in the interest of commercial exploitation of the land. In this regard, the process of spatial planning,[316] as well as its reconciliation with land use by local communities, has changed little since the Suharto days.

Problems such as overlaps between concession and

[310] Sunderlin, *supra* note 231, at 258.

[311] CHIDLEY, *supra* note 184. *See also* Campbell, *supra* note 225, at 115.

[312] CHIDLEY, *supra* note 184.

[313] *Id.*

[314] *See supra* text accompanying notes 235–40.

[315] CHIDLEY, *supra* note 184. This is despite the 1945 Constitution and the 1960 Basic Agrarian Law (UU 5/1960) purporting to recognize customary rights over land.

[316] *See generally* UU 24/1992 on Spatial Planning.

small-scale land rights continue to arise, as do disputes between different ethnic groups, and between resentful local communities and oil palm plantations and logging companies.[317] In many of these conflicts, repressed and alienated groups seeking vengeance often resort to arson as a weapon against external actors.[318] Indeed, there is evidence of a higher risk of fires in areas of unclear boundaries between community territories.[319] This aspect of forest and land fires has not been extensively investigated, but is believed to be the root cause of many of the fires throughout the archipelago.

At the same time, the demographic changes brought about by the government's discredited transmigration program have also led to frequent land use conflicts between diverse ethnic groups.[320] Designed to ease population pressures in the crowded islands like Java and Madura, the program resettled thousands of new migrants over the past few decades to outlying islands without due regard to the rights of established stakeholders already living on the land. This typically foments conflict between recently arrived transmigrants and local settlers, with the use of fire as a weapon becoming common.[321]

Given these huge challenges, there is an urgent need for proper spatial planning and land use zoning to be conducted, taking into account features such as transmigrant settlement patterns. In this regard, the roles and functions of the agencies responsible for land tenure and spatial planning—the State Ministry for Agrarian Affairs and its National Land Agency—must

[317] *See* Colfer, *supra* note 169, at 315–17; CHIDLEY, *supra* note 184.

[318] *See* Colfer, *supra* note 169, at 315–17. Fires are also started by commercial interests such as oil palm plantations to intimidate local communities into submission or to decrease the value of their lands. In turn, peasants use fire as a defensive weapon against the takeover of their lands. *See* TRIAL BY FIRE, *supra* note 22, at 28; DAVID GANZ, PROJECT FIREFIGHT SOUTHEAST ASIA, FRAMING FIRES: A COUNTRY-BY COUNTRY ANALYSIS OF FOREST AND LAND FIRES IN THE ASEAN NATIONS 22 (2002).

[319] *See* Grahame Applegate et al., *Forest Fires in Indonesia: Impacts and Solutions*, *in* WHICH WAY FORWARD, *supra* note 24, at 293, 307 n.2.

[320] *See* Colfer, *supra* note 169, at 311; Dauvergne, *supra* note 28, at 511. The transmigration policy is today much less intensely pursued and its budget has been slashed significantly. Labor is now recruited largely through the private sector. *See* Sunderlin, *supra* note 231, at 264–65. For laws on transmigration, see PP 2/1999 on the Organization of Transmigration (repealing PP 42/1973) and UU15/1997 on Transmigration (repealing UU 3/1972).

[321] *See* TRIAL BY FIRE, *supra* note 22, at 28.

be clarified, given their lack of defined authority over the land use policies of other sectoral and regional agencies.[322] Any reform of land tenure would thus have to be conducted in a coordinated fashion not only by the central bodies such as the State Ministry for Agrarian Affairs, the Ministry of Forestry and the National Development Planning Agency (BAPPENAS), but also the numerous provincial and regency governments.

In line with their new-found autonomy, regional governments are now expected to conduct spatial planning exercises, particularly to reconcile the claims of commercial interests with those of local stakeholders. In practice, these efforts are often compromised by inadequate capacity, as well as by local officials placing revenue generation and corrupt interests over sustainable use. As a result, the provincial spatial plans which are required by law have yet to be agreed upon and completed.[323] At the same time, the procedures for environmental impact assessments (EIAs) of proposed land uses are not sufficiently defined. This is largely because EIA preparations and appraisals come under the purview of the Office of the State Minister for the Environment, whose authority is either not established or unrecognized by the relevant stakeholders.[324] As such, the potential of EIAs as a tool for spatial planning is wholly unrealized, both at the central and regional levels.

V. PROPOSALS FOR REFORM

Under current circumstances, it may well be that some measure of centralized supervision and policy coordination over forest exploitation is needed in Indonesia, lest misgovernance by local officials spiral out of control. At the same time, though, it is both unrealistic and undesirable to return to the Suharto-era

[322] In 1999, the State Ministry for Agrarian Affairs and the National Land Agency (BPN) issued Ministerial Decree SK 5/1999 for the Resolution of Traditional Rights Conflicts. This policy document, which addresses customary or *adat* rights over land, is not wholly reconcilable with the Ministry of Forestry's own policies on community rights. This leads to further confusion in relation to the actual state of community rights. *See* Fay & Sirait, *supra* note 231, at 140–41.

[323] Applegate et al., *supra* note 319, at 303–04.

[324] EIAs (better known by the Indonesian acronym AMDAL) are governed by the 1997 Law on Environmental Management (UU 23/1997, art. 15) and its implementing regulations, principally PP 27/1999 on Environmental Impact Analysis.

method of centralized control which inequitably deprived the regions of revenue from their own natural resources. The balance between greater autonomy for the regions and sustainable management of natural resources will prove to be one of the biggest challenges for present-day Indonesia. In seeking to create this balance, the first, immediate measure that must be carried out is a clarification of the regional autonomy and forestry laws to make clear the demarcation of authority among central, provincial and regency governments. There must also be greater stability in laws and government regulations, without changes being made every time a new problem arises or a new Minister enters the scene.

Secondly, the regency governments must be guaranteed meaningful and long-term control over their natural resources pursuant to the spirit of regional autonomy. At the same time, a mechanism should be worked out to enable the provincial-level authorities to oversee decision-making in the regencies, particularly in relation to major determinations such as the granting of large forestry concessions. This will provide a much-needed form of checks-and-balances on the regency governments. Efforts must also be accelerated to enhance the regencies' capacity to take on the great responsibilities of autonomy. For one thing, the central agency in charge of regional autonomy should be elevated to a full-fledged ministry to undertake a more concerted and meaningful effort at decentralization. In general, the strengthening of institutional capacity in the organization of regional autonomy is greatly needed, both at the central and regional levels.[325]

Thirdly, the enforcement of anti-burning and anti-illegal logging laws should be coordinated by a centrally organized body drawing resources from both the central and regional governments. Such an arrangement could prove to be useful in fostering greater center-periphery and inter-ministry cooperation without compromising the regions' right to manage their own resources and revenue. The problem with Indonesia today is that institutionally, it remains no more prepared than in previous years to deal with the problems of natural resource mismanagement, illegal logging, and forest and land fires. For one thing, no steps have been taken as yet to designate one central agency with

[325] *See* Kartodihardjo, *supra* note 95, at 152.

effective competence to oversee all illegal logging and burning activities.[326] This ignores the one great lesson learned from the 1997–98 forest and land fires—that Indonesia badly needs a body with the authority to coordinate not only the sectoral Ministries, but also the provincial and regency authorities.

A rationalization of the different bodies into a single agency comprising representatives from the various agencies could go some way toward dealing with future fires and to ensure compliance with the Agreement. To date, several proposals to overcome the fragmented state of natural resource management have already been made. The Office of the State Minister for the Environment recently proposed the establishment of a special agency free of influence from vested interests, to counter the grave problem of illegal logging.[327] In this regard, there is every reason for regional authorities to support the creation of a centrally-directed law enforcement agency. This arrangement can leave competence over natural resources and revenues intact with the regional governments, while offering central government capacity to gather evidence, impose administrative fines and prosecute offenders.

At the same time, the necessary incentives must be found to persuade regional authorities to stamp out illegal logging and forest burning. A viable short-term measure to counter the effects of illegal logging siphoning away public money and depriving local governments of much-needed revenue, is to increase law enforcement and penalties against illegal loggers and to allow the regions to collect monetary fines. In many respects, the necessary

[326] The forms of inter-agency coordination present during the 1997–98 fires, *see supra* note 107, proved ineffective as they had no real control over the plantations. The other existing form of coordination is provided by an Inter-Departmental Committee on Forestry (IDCF), established by Presidential Decision KP 80/2000. On paper, the IDCF promises coordination over forestry matters and illegal logging on the part of the different ministries. *See* KP 80/2000 ¶¶ 2, 3, 5. So far, the IDCF has failed, it has been argued, mostly because "it has not focused its efforts on decreasing the capacity of wood-based enterprises to a level that matches the sustainable capacity of natural forests." *Restructure Forest-Based Industries*, JAKARTA POST, Jan. 28, 2003, at 6. Moreover, the IDCF continues to be dominated by interests associated with the Ministry of Forestry. *See* CHIDLEY, *supra* note 108. Another relevant instrument here is UU 5/1990 on the Conservation of Natural Resources and their Ecosystem, which also advocates a holistic approach to natural resource management.

[327] *See Simanjuntak*, *supra* note 306; TRIAL BY FIRE, *supra* note 22, at 21.

laws already exist, but the will to enforce them is seriously wanting. To overcome evidentiary problems in courts, the burden of proof should be imposed on plantation owners to disprove satellite evidence that points to their having conducted illegal burnings.[328] Independent citizen groups can also be set up to monitor and report on illegal logging and burning activities. Companies can be required to provide performance bonds which should be forfeited in the event of their starting fires.[329]

Other immediate measures which can be taken include reforming the pulp and paper industries in order to ease the chronic overcapacity which currently exists. A moratorium should also be imposed on new concessions for oil palm plantations and timber estates, at least until a national inventory of the country's forests is conducted.[330] New plantations should only be established on already degraded forestlands to minimize the impact on existing forests. The environmental protection arms of the local regency governments should also be strengthened such that they are in a position to impose environmental impact assessment (EIA) requirements on their forestry counterparts.[331] In many ways, this is preferable to having the central government or the provinces exercise supervisory competence over the regencies, since regional autonomy must respect the spirit of self-determination for local government units. Transparent and accountable governance that takes into account the rights of various stakeholders, particularly the local communities, must be put into practice at the provincial and regency levels. This process, albeit a slow and difficult one, will have to be monitored by local-level NGOs and the media, themselves the subjects of empowerment in the era of democratization and regional autonomy.

On a more long-term basis, the central government must come up with policies and funding to improve land use and natural resource management practices, consistent with the need to protect the rights of local communities. In particular, efforts should be taken to involve local communities in forest fire prevention.[332]

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[328] TRIAL BY FIRE, *supra* note 22, at 52.

[329] *Id.*

[330] *Id.* at 51.

[331] Care must be taken to ensure that rent-seeking behavior does not arise and that EIA requirements are not abused to extract bribes.

[332] *See generally* SAMEER KARKI, FIREFIGHT SOUTHEAST ASIA, COMMUNITY INVOLVEMENT IN AND MANAGEMENT OF FOREST FIRES IN SOUTHEAST

The role of the courts should also be enhanced; aggrieved communities must possess the right to challenge the decisions of their *Bupati* and regency legislative bodies which affect their livelihoods. A solution to the systemic problem of corrupt judges must be found. This will not be an easy task, given the endemic level of corruption within the courts. At the same time, there has to be political will on the part of regional governments to use their new-found competence over natural resources in an environmentally and socially just manner. The central government ministries can seek to inculcate such commitment not by threatening to reassert control, but by working closely with provincial and regency authorities to foster greater mutual trust, particularly in the area of enforcement against offenders.

In the meantime, there are fledgling signs that a more enlightened approach is being pursued by the government. In 2001, the People's Consultative Assembly (the nation's highest legislative body) adopted a landmark decree calling for land and natural resources issues to be tackled together.[333] A subsequent decree of the Assembly called for specific legislation on natural resource management to be adopted in order to resolve agrarian and natural resource conflicts.[334] This is the first time that a holistic approach to agrarian reform and natural resource management has been endorsed at such a high level. Given that local communities' disputes with commercial interests often involve land use uncertainties, the decrees of the People's Consultative Assembly represent a positive new approach toward clarifying land tenure and natural resource issues.

Pursuant to this approach, a new Law on Natural Resources Management is in the early stages of preparation. This law seeks to reconcile exploitation with conservation functions.[335] However, as with most other reform efforts in Indonesia, difficult political challenges abound. From preliminary indications, it appears that some quarters in the central government are still attempting to

ASIA (2002), *available at* http://www.iucn.org/themes/fcp/publications/files/ff_community_sea.pdf.

[333] Decree TAP MPR IX/2001 of the People's Consultative Assembly (MPR) on Agrarian Renewal and Natural Resources Management.

[334] Decree TAP MPR VI/2002 of the People's Consultative Assembly (MPR) on Recommendations for the Report on Implementation of the MPR Decisions for Year 2002.

[335] *MPR's Natural Resources Decree under Threat*, DOWN TO EARTH (Down to Earth, London), May 2003, *available at* http://dte.gn.apc.org/57MPR.htm.

separate the twin issues of land and natural resource management in a sectoral manner.[336] This wholly contradicts the mandate to unify issued by the People's Consultative Assembly. At the same time, there are signs that the public consultation process has been short-circuited, with decisions on the new Law being taken at the ministerial level in an opaque and unilateral fashion.[337] There are thus serious uncertainties over the compromise that will eventually emerge, and there is every indication that the political tension between the forces favoring greater autonomy for the regions and those asserting recentralization of powers will result in yet another characteristically ambiguous legal instrument.

Finally, it must be noted that the above proposals for reform are made with full cognizance of the severe limitations facing the Indonesian governance system, including the lack of respect for the rule of law, the existence of deep-seated corruption at all levels of government and the deficiency in political will to tackle problems at their core. Trite as it may sound, it is only with the commitment to begin such difficult reforms that Indonesia can begin to shake off the terrible malaise that has long afflicted the governance of its rich natural resources.

VI. CONCLUSION

The mismanagement of forest resources remains so entrenched in Indonesia today that prospects for short-term amelioration of the deforestation and forest fires problems appear unrealistic. In the meantime, illegal logging and burning continue to be rampant, as evidenced by the numerous reports of deforestation, fires and human conflicts arising out of the regions.[338] It is within the contexts of bureaucratic corruption, patronage politics, social injustice and the uncertainties introduced by regional autonomy that the fires and haze must be specifically located so that their causes and effects can be properly understood.

It is appropriate at this juncture to return to one of the central tenets in this Article—that the domestic characteristics of natural resource governance in Indonesia have a severe impact on the

[336] *Id.* A sectoral approach entails the different agencies in charge of land, mining and forestry each regulating its own sector without attempting to coordinate policies or to foster an integrated approach for addressing inter-linked issues.

[337] *Id.*

[338] *See* CHIDLEY, *supra* note 108; CHIDLEY, *supra* note 184, pt. 1, 2.

enforceability of laws relating to fires and haze as well as on the effectiveness of the ASEAN Agreement. Even after the downfall of Suharto and the introduction of regional autonomy, forestry policies have remained tightly anchored to exploitation ideologies, rather than protection and conservation goals. Decentralization has been put into motion without the local governments first obtaining the institutional capacity, political incentives and financial resources to administer forests effectively. Corruption at all levels of government and the courts is rampant, and in cases where local elites have traditionally been strong and where marginalized groups are unable to organize themselves, decentralization has tended to strengthen or exacerbate existing power relations, rather than promote democratic decision-making.[339]

The end result has been the continued disenfranchisement of local communities and the mismanagement of the nation's natural resources. While it is apparent that there have been various efforts over the past few decades to introduce greater community involvement in resource management,[340] the influence of vested interests has been extremely difficult to shake off, even in the aftermath of the Suharto autocracy's collapse and the advent of regional autonomy. The complexities of governance in Indonesia are such that while vast changes have occurred on the political landscape, the reality on the ground has experienced few changes.

On the whole, there is a great risk that regional autonomy will simply lead to the substitution of one form of patronage politics for another, and the decentralization of corruption into the provinces and regencies. In this sense, one can conclude that little improvement has occurred since the Suharto period, and that regional autonomy may even have exacerbated corruption and mismanagement. Hence, present-day Indonesia shows worrying signs of emboldened local leaders compromising its natural resources to even greater degrees, checked only by fledgling but increasingly strident environmental groups and local

[339] OBIDZINSKI & BARR, *supra* note 115, at 12–14 (detailing the situation on the ground in a particular regency of East Kalimantan Province) (citing P. UTTING, TREES, PEOPLE AND POWER: SOCIAL DIMENSIONS OF DEFORESTATION AND FOREST PROTECTION IN LATIN AMERICA (1993)).

[340] For a history of the limited reforms attempted in the 1980s and 1990s, see Lindayati, *supra* note 223, at 46–51.

communities.[341] In this regard, the reform movement has neither curbed the excesses of the old elite nor promoted the emergence of a strong civil society based on the rule of law.

On a more positive note, the ongoing process of reform has also meant greater empowerment for the NGOs and local communities. Indeed, the post-Suharto era has witnessed a dramatic invigoration in the activities of the media, environmental activists, village communities and even the courts.[342] As a consequence, the plight of the local communities has been gaining increasing attention. While the culture that excludes customary communities from natural resource benefits is still firmly entrenched,[343] there are signs that this may be slowly eroding. Here, though, the likelihood of violent uprisings against perceived injustices cannot be ruled out, which is why the needs of local communities must be swiftly and meaningfully addressed.

From an institutional perspective, the central government's environmental agencies remain as powerless today as they were pre-1998. At the same time, the capacity of the local actors in dealing with illegal logging and forest fires has not been enhanced —they remain stretched in financial, managerial and technical capacity, and susceptible to manipulation by logging and plantation interests. In addition, fundamental measures to reform the forestry industry and to provide for strong law enforcement appear to have been forestalled.[344] Meanwhile, the various agencies continue to enact a bewildering variety of new and amending legislation in a bid to carve out competences over various matters. That these instruments are often contradictory and irreconcilable is an enormous problem.

Needless to say, law enforcement will have to be strengthened and the judicial system made more accessible and dependable before these problems can be resolved. The momentum for regional autonomy is now irreversible, and a return to the days of centralized control is both unwise and unrealistic. For all the difficulties, the only solution is for the central and regional governments to work closer together to stem out illegal logging and burning in the short term, and to craft more balanced land use

[341] CHIDLEY, *supra* note 108.
[342] *Id.*
[343] *Id.*
[344] CHIDLEY, *supra* note 108.

and natural resource management policies in the long term. One such mode of cooperation could be the establishment of a centrally-coordinated, but regionally-driven enforcement mechanism against illegal loggers and forest fire perpetrators.

Despite their obvious weaknesses, the new regional autonomy and forestry laws have led to greater overall expectations for change and reform. For all their faults, they are slowly changing mindsets on the ground, and how they are ultimately implemented is likely to become more important than their actual content.[345] At the same time, new environmental laws have been passed with more severe penalties.[346] Although the small number of convictions secured and the light penalties meted out pale in comparison to the large number of companies still conducting illegal burning, there is now a steady awareness of the utility of such laws in the prosecution of offenders.

Returning to the Agreement, it can thus be appreciated that without fundamental reforms within the Indonesian forestry sector, prospects for Indonesian compliance with the Agreement remain bleak. This, in turn, has a profound impact on the effectiveness of the Agreement, given the instrument's total reliance on Indonesian compliance. At the same time, it can be appreciated how the provisions of the Agreement have been crafted in sub-optimal ways that reflect the underlying geo-political realities facing ASEAN. In the overall scheme, the Agreement does not take the region any appreciable distance beyond the situation in 1997–98. State sovereignty and non-interference in internal affairs are still paramount, the consent of the state where the fires occur is still needed for international action, and the tools prescribed do not appear to be any more sophisticated or effective than those employed during the crisis of 1997–98. These deficiencies testify to the powerful constraints—both regionally within ASEAN and internally within Indonesia—which severely impede the Agreement's effectiveness.

For all its weaknesses and inability to guarantee state compliance, there is at least one modest benefit that the Agreement has engendered. This is the expression of the collective

[345] Such is the optimism of some observers. *See, e.g.*, Wrangham, *supra* note 252, at 32.

[346] *See, e.g.*, *Forest Fires*, DOWN TO EARTH (Down to Earth, London), Aug. 2004, *available at* http://dte.gn.apc.org/62FOB.HTM.

expectation (albeit, a non-enforceable one) among the ASEAN states for effective action to be taken to combat future forest and land fires. Thus, while the Agreement's provisions do not provide much in terms of ensuring compliance by states, they do, at the very least, encapsulate the expectations of the regional community and even the outrage and frustration felt at the inaction of the Indonesian authorities during the fires of 1997–98.

In other words, in an imperfect regional political system where legally binding commitments and recourse to formal dispute settlement mechanisms are rarely invoked (and even more rarely demonstrated to work), it is hoped that even a largely deficient treaty like the Agreement carries some moral force in enshrining an expectation for effective action. Thus, the worth of the Agreement, if any, lies not so much in its laying down of legally binding obligations (weak and unenforceable as these are), but in reinforcing a sense of duty, perhaps even shame, on an offending state should it fail to live up to the expectations of its neighbors.

While this amounts to precious little in the face of an intransigent state's inaction, what it means is that the next time the fires and haze come around, Indonesia would find it that much harder to face its neighbors. This, it is believed, is an improvement over the situation in 1997–98, and is probably more effective within the ASEAN environment in securing action than any treaty obligations can hope to be. The appeal to a state's sense of pride, honor, shame and moral duty may be quintessentially a feature of politics in Southeast Asia;[347] it may appear odd, even outrageous from the traditional perspective of state responsibility, but it nonetheless remains unshaken by conceptions of treaty formalism and legal obligations. In short, what we have here is a treaty which is little more than an attempt to formalize and legalize "moral persuasion." As much of a paradox as this may sound, it can be argued that treaty regimes, within the peculiar ASEAN context, can only work within the framework of such persuasion. Is this the best that ASEAN can come up with in dealing with the fires and haze? The realistic answer: probably, for now.

EPILOGUE

In August 2005, as this article was being sent for publication,

[347] *See, e.g.*, the literature on the "ASEAN way" of engagement, *supra* note 46.

fires caused by plantation burnings in Indonesia flared again, resulting in severe haze pollution in neighboring Malaysia. A state of emergency was declared in the Klang Valley region around the Malaysian capital, Kuala Lumpur.[348] As Indonesia was still not a party to the ASEAN Agreement, there could be no resort to its provisions.[349] This time, the haze prompted stronger language in Malaysia calling for Indonesia to ratify the Agreement and to take urgent action against the plantation companies.[350] The issue became clouded by Indonesian allegations that several Malaysian-owned oil palm plantations had a role in the fires, a charge refuted by the Malaysian companies.[351] The incident reveals yet again the region's acute vulnerability to the recurring fires, the political sensitivities confronting the states and the immense difficulties faced in securing enforcement action within Indonesia.

[348] *See Malaysia in State of Emergency from Pollution Haze*, AGENCE FR. PRESSE, Aug. 11, 2005.

[349] Indonesia did agree, however, to accept a team of firefighters from Malaysia. *See 100 Firefighters Going to Riau*, NEW STRAITS TIMES (Malay.), Aug. 14, 2005, at 10. *See also* Azhar Ghani, *Testing Times for ASEAN Haze Pact*, STRAITS TIMES (Sing.), Aug. 13, 2005.

[350] *See, e.g.*, Vijay Joshi, *Malaysian Haze Dissipates, Anger Grows*, ASSOC. PRESS, Aug. 13, 2005; Manny Mogato, *Malaysia Urges Neighbours to Do More on Haze*, REUTERS, Sept. 27, 2005.

[351] *See, e.g.*, Rendi A. Witular, *Government Vows to Prosecute 10 Firms Over Forest Fires*, JAKARTA POST, Aug. 16, 2005, at 5 (detailing Indonesian government's promise to prosecute firms accused of burning forests, including eight Malaysian firms); *Malaysian Firms in Riau Refute Open Burning Charge*, MALAY MAIL (Malay.), Aug. 17, 2005.