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TRANSBOUNDARY HAZE POLLUTERS AND ACCOUNTABILITY: THE LEGAL LANDSCAPE IN INDONESIA AND MALAYSIA

Abstract:

In the second last quarter of 1997, the haze experience affected many countries in South East Asia (SEA) particularly Indonesia and Malaysia. These countries became unwilling victims of slash and burn or burning activities for land clearing purposes carried out in their own forestlands, mostly by foreign vested agricultural companies and local farmers. The impacts of severe haze caused by manmade burning activities in these neighbouring countries at that particular time transcended both borders into other parts of SEA and resulted into economic losses and damages, loss of biodiversity and impacts on human health. It was alleged that agricultural companies that were mostly oil palm concessionaires had used fire as a tool to clear forests including peatland areas to transform the areas into readily planted areas despite the fact that Indonesia and Malaysia were well aware of the need for strict law enforcement. Implementation and changes in domestic laws of Indonesia and Malaysia since the 1997 haze occurrence had proved to be quite challenging in dealing with issues of local burning and prevention thereof. The enforcement to penalise foreign based companies in Indonesia and Malaysia is slow and plagued with issues related to alleged cronyism and corruption, lack of awareness and education, weaknesses in institutional framework and lack of political will. In addition, the penalties imposed are too low that it is insufficient to deter further acts of environmental pollution by these companies. Whilst these limitations hinders effective enforcement in both countries, incidences of forest fires leading to transboundary haze pollution becomes more imminent particularly between March to October each year. Hence, it is suffice to conclude that domestic laws have been insufficient to control and prevent transboundary haze from activities by foreign vested agricultural companies in Indonesia or Malaysia. As these companies have Indonesian or Malaysian interests that carry out agricultural activities in either countries, an external regulation should be explored to complement and support internal regulation in each country to ensure that the activities of these transnational companies are undertaken within the confines of environmental standards and ASEAN notion of cooperation. Thus, a legitimate legislative framework to impose and enforce internationally environmental standards recognised under human rights obligations upon the overseas activities of the plantation corporations incorporate within the host state's territory may be feasible to imposing accountability to haze polluters in Indonesia and Malaysia.

Keywords:

haze, polluters, Malaysia, Indonesia, accountability, companies.

JEL Classification: K32, Q53, K33

INTRODUCTION

The practice of investing abroad by corporate sector has been embraced for decades and is regarded as an important strategy to maximise a company's total growth in terms of revenue, profit and export market share. The opportunities in overseas investment beyond national borders are abundant and with this positive outlook, Malaysia and Indonesia have continuously becoming active in looking for new investments abroad in various types of economic activities in more than 100 countries. The interests in investing overseas by these nations have broadened into agricultural activities such as oil palm plantations, oil and gas explorations and extractions, telecommunications, banking and finance, infrastructure and property development, manufacturing, power generation and retail-related industries. While this development persists, environmental concerns including air pollution and its transboundary effects by Malaysian and Indonesian corporate activities abroad have become a critical issue that must be addressed to ensure sustainable development is uncompromised. The emergence of environmental threat such as in the form of transboundary air pollution resulting from land clearing for oil palm plantation by Malaysian and Indonesian companies abroad in the 1997 land and fire episode in Indonesia, has proved that these corporate entities are beyond local government's control in successfully ensuring that companies are responsible for acts that caused transboundary harm to the environment. Thus, the current environmental legal system in Malaysia nor Indonesia does not provide for the liability of foreign companies for non respect of environmental rules that causes transboundary haze pollution. Therefore, this paper explores the responsibility and accountability of a foreign company for polluting the environment and causing transboundary haze from its activities in Malaysia and Indonesia. Landmarks cases involving Malaysian companies implicated for environmental violations in Indonesia are highlighted in this paper.

MALAYSIAN COMPANIES AND ENVIRONMENTAL LAW

The bulk of overseas investments by Malaysian companies is focused in the services sector, mining, agricultural and manufacturing sectors. Investments in the agricultural sector concentrated on oil palm cultivation industry largely in Indonesian provinces is encouraged by the attractively low labour cost and the high demand for oil palm which further fuelled Malaysian companies to open up new plantation areas in Indonesia. These Malaysia companies have been largely blamed for transboundary haze pollution that affected countries in the ASEAN region in the past two decades. These Malaysian companies that are heavily invested in oil palm industry in Indonesia are either firstly, wholly owned by the parent company in Malaysia or secondly, the company managing the plantations in Indonesia are subsidiaries to the parent company. Thus, the former type of company being a foreign branch is directly controlled by the parent company in Malaysia while the latter is a distinct legal entity of Indonesia. However, these companies' abroad or transnational companies are entities that have been set up according to the procedures of the host state and therefore conform to the rules and legislation of the host state.

In relation to the violation of environmental legislation, the Malaysian oil palm companies in Indonesia have been alleged to use fire as a tool to clear land to make way for oil palm cultivation which led to atmospheric pollution and transboundary effects

causing severe environmental problems to the affected population in Indonesia as well as the neighbouring countries. Although the Malaysian government refuted these claims and left the legal autonomy to the host state where the breach of environmental law was committed, it still remains to be seen whether these transnational corporations are accountable to damages caused by air pollution and its transboundary effects resulted from their economic activities in another foreign country under its domestic environmental law.

Given the current Indonesian law where the Government Regulation No.41/1999 concerning Forestry 1999 stipulates under Section 50, every individual is forbidden to burn the forest area or throw away material that can cause such fires. An individual that violates this regulation will be liable for a maximum of 15 years in prison and a maximum fine of Rupiah 5 billion while an unintentional violation due to carelessness will be liable for a maximum of 5 years in prison and a maximum fine of Rupiah 1.5 billion. Article 49 further stipulates that 'the licensees shall be responsible for forest fires occurring in their working areas (concessions), and Article 50 prohibits the use of fire. The total ban on the use of fire in land clearing was later stated in the Decree of Director General of Forest Protection and Preservation of Nature No 152/1999. This is followed by the Government Regulation No.4 of 2001 on the Management of Environmental Damage and Pollution relating to Forest and Land Fires including peat land that was issued in February 2001. This set of regulation addressed the pollution and damage to the environment caused by forest and land fires by setting responsibilities of government at central, provincial and district levels for handling fires including preventing forest and land fire and environmental degradation and pollution. In addition, Article 11 under the Government Regulation No 4/2001 prohibits any person to deliberately set fires on land forests. Furthermore, strict legal penalties are provided in Article 78 where if a person has intentionally set fire to forests, committed an act of negligence or dumped materials which can cause forest fire will be imprisoned or fine up to a maximum fine of 5 billion Rupiah. The Government Regulation Number 29/1999 also provides that no one is allowed to burn forests without authorisation and stipulates that communities living around forests must participate in the prevention and control of forest fires that is regulated by provincial regulations. . However, there is a separate Law for Protection and Management of the Environment (Law No. 32 of 2009) that prescribes a minimum punishment of 3 years' imprisonment and a fine of 3 billion Rupiah (US\$260,000) and a maximum punishment of 10 years' imprisonment and a fine of 10 billion Rupiah (US\$900,000) for intentional starting of fires. 2 It is unclear which Law is the overriding provision – the prosecutors have been charging different perpetrators under both Laws, mostly the Forestry Law (Tan, Alan K.J 2015).

The laws mentioned aimed to prevent fires in Indonesia fail to deter discouraging reports showing repeated haze episode choking Malaysia and Indonesia was caused by the deliberate use of fire systematically ignited by agro-industrial companies in Indonesia to clear forests for agricultural land use. Ten plantation companies have been identified as the culprits that had set fires to clear forests for oil palm plantations on Sumatra Island including eight Malaysian transnational companies in the years ensuing 1997 haze pollution incident. These companies have yet to be brought to court. This indicates that, even with such given knowledge, Indonesia has failed to prosecute or imprison those violators for burning land by enforcing its domestic environmental laws, including

Malaysian controlled agri-transnational companies based in Indonesia. It can be concluded that the application of current legal system and the enforcement thereof in Indonesia makes it difficult to implicate the transnational companies for acts that contribute to air pollution and its transboundary effects due to various weaknesses in its implementation. Such obstacles include alleged cronyism, institutional weakness, corruption and lack of political will in Indonesia.

The Malaysian environmental laws also prohibit open burning as provided in Section 29A Environmental Quality Act (EQA) 1974 but does not extend to companies that causes transboundary air pollution. It does not apply extraterritorially for violations under the relevant provisions to deter activities that may result to air pollution and its transboundary effects by Malaysian companies in Indonesia, for example, as it would violate the principle of foreign relation and non interference into domestic affairs of another State. However, the Environmental Quality Act 1974 through its Amendment in 2007 invokes Section 43 to extend liability or punishment for offences against the EQA to a company, firm, society or other body of persons, any person who at the time of commission of the offence was a director, chief executive officer, manager, or other similar officer or a partner of the company, firm or society or other body of persons. This provision imposes accountability on the officers of a company by making any person liable for the daily administration and decisions in ensuring that companies' obligations are met without violating laws on environmental protection. This provision has its limitation to confine its enforcement only on officers within a local registered company that carries out activities within Malaysian boundary and not beyond. Hence, the offences by a Malaysian companies abroad that commits any acts of violation of environmental laws by those companies in a foreign country, in relation to preventing air pollution and its transboundary effects in the future, may continue to recur in the future as these actors are not being punished under the laws of the host or home State.

It is timely that the law in Malaysia is reassessed and reviewed to ensure that any acts to comply with rules and regulations pertaining to environmental protection by Malaysian transnational companies abroad be punished under a set of new laws or provisions within the existing laws. Having said that, the directors of the parent company must become active participants and play a role in determining that any corporate activity abroad must take into consideration or integrate environmental concerns into the corporate accountability and practices by its subsidiary abroad. Hence, any mandatory strategies to be deployed are to ensure that corporations and its subsidiary in another State are environmentally and socially responsible for their actions in the event these responsibilities are breached. In conforming to good corporate governance principles and standards in Malaysia, the Malaysian Code on Corporate Governance (Revised 2012) is established as a mark of a codification of principles and best practices of good corporate governance. This move is aimed, amongst others, to ensure that the board of directors discharges their roles and responsibilities effectively, thus, strengthening their control over companies businesses and activities. The best practices in corporate governance laid in the Code explicitly stated that directors assume several responsibilities that include identifying principal risks and ensuring appropriate management to counter such risks and to ensure that the company complies with applicable laws and regulations. It further states that the responsibility of directors should receive information encompassing the financial status of the business by also looking at

other issues including environmental performance of the company. These duties would incorporate environmental considerations into corporate decisions making it relevant for directors to identify, evaluate and resolved. The real implications of this new duty will remain unanswered until it is drafted into law and its meaning is scrutinized by the Malaysian courts.

It is important to reiterate that although the duty of directors is proposed to expand in its scope under law reforms in corporate law as to include environmental concerns in the business decision making process, this trend is only limited to environmental issues and effects arising from corporate activities within the domestic State. The key conceptual shift that also needs to take place is the duty of directors to be extended to the acts carried out by the company's subsidiaries abroad that cause pollution and its transboundary effects. Thus, it is submitted that if Malaysia wishes to apply its own domestic environmental regulations that extends the responsibility of directors concerning environmental protection to its subsidiary foreign operations, it needs to give extraterritorial effect to its existing environmental law. In this context, it must first be examined whether such an approach is in keeping with the requirements of international law thus, sets the legal basis for extraterritorial application of domestic laws.

A sound approach would be for transnational companies' home countries to exert indirect control over the activities of foreign affiliate corporations by regulating the behavior of their parent company in the home state . Thus, the proposed solution is to extend responsibility to the parent corporation in Malaysia and be punished for environmental violations if director's duties to take into account environmental implications arising from activities abroad is not carried out accordingly. However, it may seemed that the Malaysian companies incorporated in Indonesia have no legal obligation to comply with Malaysia's environmental standards but, in practice, these companies would likely be 'forced' to do so to ensure compliance with their parent companies' decisions or policies .

In that light, the jurisdiction of the existing environmental regulation of Malaysia to their parent company in Malaysia can be strengthened by ensuring the parent company to be legally obliged to make sure that their operations elsewhere matches the standard of care that would be expected in their home State. A new sub provision under Section 43 of the 1974 EQA is proposed to reflect the above statement. The current provision states:

'Where an offence against the Act or any regulations made there under has been committed by a company, firm, society or other body of persons, any person who at the time of the commission of the offence was a director, manager, or other similar officer or a partner of the company, firm, society or other body of persons or was purporting to act in such capacity shall be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he had exercised all such diligence as to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all circumstances.'

The proposed provision is as follows:

'Any person who owns or control, directly or indirectly, a company, firm, society or other body of persons in a foreign country, or any person who at the time of the commission of the offence was a director, manager or other similar officer or a partner of the company, firm, society or other body of persons or was purporting to act in such capacity in a foreign country shall be deemed to be guilty of an offence against the Act or any regulations made there under.'

Such legal proposals to apply extraterritorial application of the home country's corporate and environmental law is ultimately to ensure that transnational corporations are rendered accountable for environmental harm arising from their activities and further places value on the conduct of directors or any other officers in environmental corporate governance.

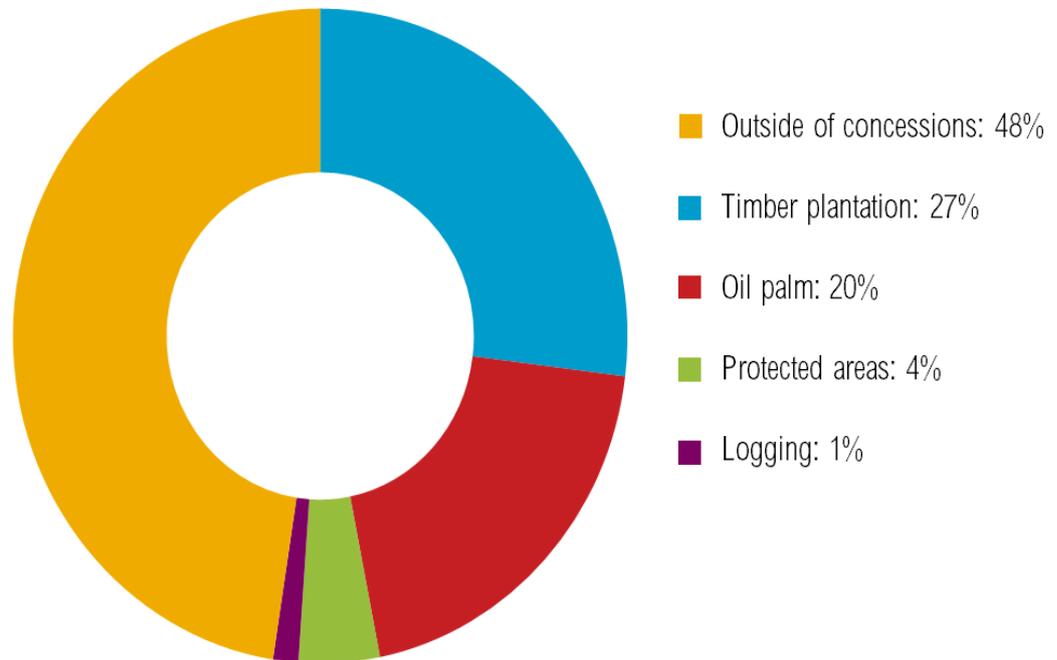
INDONESIAN FIRES AND OIL PALM PLANTATIONS

The oil palm plantation and palm oil processing sectors have become a key part of Indonesia's economy. Domestic and international demand has contributed to this growth. Indonesia becomes the global leader in terms of the cumulative area of oil palm plantations and Crude Palm Oil (CPO) production. In 2010, these plantations produced 22 million tons of CPO, while in 2011 the yield was 23.5 million tones (Obidzinski 2015).

Most of plantation estates and CPO production are located in Sumatra and Kalimantan Island. About 45 % of oil palm plantation owned by local farmers and 30% by foreign private company. While national private company own about 15 % and state owned company about 10 % (Suhendra 2015). Foreign investor in Indonesia oil palm are: Malaysia, Singapore, United States, Belgia and United Kingdom (Sa'diyah and Hafil 2015). Malaysian Investor retain about 25 % of oil palm plantation area in Indonesia (Indonesia Oil Palm Society 2015).

Besides contributing to the Indonesian economy, oil palm plantations have also been suspected to cause haze pollution problems. Land and forest fires in Indonesia has causing haze in Indonesia, Singapore and parts of Malaysia. According to the research of World Resources Institute (WRI) in 2013, about 52 percent of the fires in 12-20 June 2013 are burning on timber and oil palm plantations (Sizer et al. 2013). The research also found that companies that are part of a big company groups own the concessions licenses where more than 50 percent of the fire alerts are found (Sizer et al. 2013).

FIRE ALERTS BY LAND USE AREA, INDONESIA.
June 12-20, 2013



Source: (Sizer et al. 2013)

CASE STUDY OF LAW ENFORCEMENT TO FOREIGN OIL PALM COMPANIES IN INDONESIA

The Indonesian government has tried to do law enforcement effort against perpetrators of land and forest fires. In the regional context, the effort can be seen as the implementation of the Indonesian obligations under Article 4 of the ASEAN Haze Agreement to take administrative and/or other measures to prevent transboundary haze pollution. The following two cases illustrate the law enforcement efforts against oil palm company which is a foreign investment company.

(a) Adei Plantation I Case (2001)

Adei Plantation and Industry is a subsidiary of Kuala Lumpur Kepong (KLK), a Malaysian Company. In 2001, Mr. C. Gobi, a General Manager of the Company being indicted in Bangkinang District Court for the company responsibility in causing forest fire during 1999-2000 in the company area. In their decision, the district court decided that the defendant was proven legally and convincingly guilty of the crime "unlawfully intentionally perform acts that resulted in environmental pollution and destruction". The court then punish the defendant to imprisonment for two (2) years and about 25000 US \$ fine. However, the high court reduced the imprisonment to 8 month and about 10000 US\$ fine.

The high court found the crime is only a negligence. The Indonesian Supreme Court then reinforce the high court decision. The problems in this case are (Husin 2009); (a) the defendant can't be executed because he run from Indonesia, (b) A low penalties imposed showed lack of commitment and understanding of the Judges about losses and consequences of forest fires, (c) The weaknesses of applicable legal framework at that time. Environmental management act number 23 Year 1997 contain criminal clause for forest fire crime which is very difficult to proof.

(b)Adei Plantation II Case (2013)

In 2013, Pelalawan district court in Riau again sentenced Adei Plantation and Industry manager to 1 year in jail and fined him around 200.000 US\$ for neglecting to prevent forest fires on his company's estate (Danesuvaran K.R Singam Case 2015). The court also fined the company around 150.000 US\$ and to pay around 1.500.000 US\$ to repair the environmental damage (PT Adei Plantation & Industry Case 2015). The defendant was negligent in his supervisory role to prevent irresponsible parties from slipping into the estate and setting the fires.

This case shows that the punishment in 2001 case has fail to deter further acts of forest/land fires crime by the same company. The punishment of the court that are lighter than the prosecutor indictment also implies that this case is still not able to give deterrent effect to other land fires actors.

SINGAPORE'S EXPERIENCE

Singapore has taken a bold step in creating an extra territorial liability for entities engaging in setting fire in a foreign country that causes transboundary haze pollution in Singapore. This piece of legislation was introduced as Transboundary Haze Pollution Act that came into effect on 25 September 2014. The reasons for the enactment and enforcement of this particular Act amongst others is cause by the inability and the slow reaction by the Indonesian government to take action against violators and environmental offenders found to have committed fires that occurred mostly within large oil palm plantations that are either owned or controlled by some companies listed in the Singapore Stock Exchange. The Singapore government was prepared to take an action involving the adoption of an extra territorial legislation ensuing serious haze pollution situation and discussions with Indonesian and Malaysian governments that appears to be on a consensual basis and adhered to the ASEAN way of non-intervention into the domestic issues in member countries. Hence, the Singapore government began its preparation to adopt a law that target agri- business companies involved in using fire beyond Singapore borders, not limiting liability (criminal and civil) to Singapore linked companies only.

Under Section 5 of the Transboundary Haze Pollution Act 2014, a convicted entity that engages in conduct, or engages in conduct that condones any conduct by another entity or individual which causes or contributes to any haze pollution in Singapore (or the entity that participates in the management of a second entity that owns or occupies land and engages in the relevant conduct) can face a fine not exceeding S\$100,000 (about US\$80,000) for every day or part thereof that there is haze pollution in Singapore. Furthermore, if the entity has failed to comply with any preventive measures notice, there

can be an additional fine not exceeding S\$50,000 (US\$40,000) for every day or part thereof. Section 6 prescribes for a civil liability regime where affected parties may bring civil suits against entities causing or contributing to haze pollution in Singapore. The civil damages recoverable are unlimited and will be determined by the court based on evidence of personal injury, physical damage to property or economic loss (including a loss of profits). The Act extends liability to any entity that participates in the management or operational affairs of another (second) entity, exercises decision-making control over the latter's business decision pertaining to land that it (the second entity) owns or occupies outside Singapore, or exercises control over the second entity at a level comparable to that exercised by a manager of that entity (Sections 3 and 8).

Hence, the 2014 Act basically targets:

1. Those companies registered or incorporated in Singapore that assumes operations in Indonesia or any other country ; and/or
2. Non Singaporean entities/companies operating outside Singapore where haze pollution is caused by their operations, where the effect of haze pollution can be felt by citizens of Singapore.

The convicted entity may still plead defences under two provisions covering both civil and criminal offences:

Section 7.(1) It shall be a defence to a prosecution for an offence under section 5(1) or (3), and to a civil claim for a breach of duty under section 6(1) or (2), if the accused or defendant (as the case may be) proves, on a balance of probabilities, that the haze pollution in Singapore was caused solely by — (a) a grave natural disaster or phenomenon; or (b) an act of war.

(2) It shall also be a defence to a prosecution for an offence under section 5(1) for engaging in conduct which causes or contributes to any haze pollution in Singapore, and to a civil claim for a breach of duty under section 6(1) not to engage in conduct which causes or contributes to any haze pollution in Singapore, if the accused or defendant (as the case may be) proves, on a balance of probabilities, that the conduct which caused or contributed to the haze pollution in Singapore was by another person acting without the accused's or defendant's knowledge or consent, or contrary to the accused's or defendant's wishes or instructions; but that other person cannot be (a) any employee or agent of the accused or defendant (as the case may be); (b) any person engaged, directly or indirectly, by the accused or defendant (as the case may be) to carry out any work on the land owned or occupied by the accused or defendant, and any of that person's employees; or (c) any person who has a customary right under the law of a foreign State or territory outside Singapore as regards the land in that foreign State or territory and with whom the accused or defendant (as the case may be) has an agreement or arrangement, which agreement or arrangement relates to any farming operations or forestry operations to be carried out by any person in respect of that land.

(3) It shall also be a defence to a prosecution for an offence under section 5(1) for engaging in conduct which condones any conduct by another entity or individual which

causes or contributes to any haze pollution in Singapore, and to a civil claim for a breach of duty under section 6(1) not to engage in conduct condoning any conduct by another entity or individual which causes or contributes to any haze pollution in Singapore, if the accused or defendant (as the case may be) proves, on a balance of probabilities, that (a) the accused or defendant took all such measures as is (or was at the material time) reasonable to prevent such conduct by the other entity or individual; and (b) if the conduct by the other entity or individual already occurred, the accused or defendant took all such measures as is (or was at the material time) reasonable to stop that conduct from continuing or to substantially reduce the detriment or potential detriment to the environment in Singapore or its use or other environmental value, or the degradation or potential degradation to the environment in Singapore, due to the other entity's or individual's conduct.

(4) It shall also be a defence to a prosecution for an offence under section 5(3), or a civil claim for a breach of duty under section 6(2), if the accused or defendant (as the case may be) proves, on a balance of probabilities, that the conduct which caused or contributed to the haze pollution in Singapore was by another person acting without the knowledge or consent of the accused or defendant and the second entity referred to in section 5(3) or 6(2), or contrary to the wishes or instructions of the accused or defendant and that second entity; but that other person cannot be — (a) any employee or agent of the accused or defendant (as the case may be) or of the second entity referred to in section 5(3) or 6(2); (b) any person engaged, directly or indirectly, by the accused or defendant (as the case may be) or by the second entity referred to in section 5(3) or 6(2), to carry out any work on the land owned or occupied by the second entity, and any of that person's employees; or (c) any person who has a customary right under the law of a foreign State or territory outside Singapore as regards the land in that foreign State or territory, and with whom the accused or defendant (as the case may be) or the second entity has an agreement or arrangement, which agreement or arrangement relates to any farming operations or forestry operations to be carried out by any person in respect of that land.

The general defences for criminal law offences in Singapore is provided under Part IV of the Penal Code where it applies to all criminal provisions in any statute. For strict liability offences such as those prescribed in the 2014 Act, the defence of mistake of fact under section 79 of the Penal Code will generally be applicable where it reads: Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law, in doing it.

Some issues in implementing and enforcing this 2014 Act can be summarised as follows:

- a. Determining the actual offenders of fires (using fire as the main tool in clearing of land that leads to transboundary haze pollution in the region), based on evidence such as maps and satellite images or any other sources including witnesses and reports from local communities.
- b. Proving direct or indirect control or knowledge of officers in a company over the use of fire.

- c. Enforcement of a judgment on a company registered or incorporated in countries other than in Singapore.
- d. Non interference principle in the ASEAN way of resolving a problem or issue implicating member states in South East Asia.

CONCLUSION

The legal developments towards greater corporate accountability and liability by extending directors duties of the parent company or imposing duties on parent companies in home State to prevent incidents of transboundary haze pollution is an important development to avoid the practice of double standards in matters of environmental protection. As a parent company which exercises *de facto* control over its foreign subsidiary, the directors on the board owes the duty to take into account environmental conditions and risk of harm that is contributed by the activities carried out by businesses abroad and within the domestic country. The above suggestions are merely contributing to good governance practices in the modern corporate management by exploring new measures highlighting Singapore's introduction on the 2014 Transboundary Haze Pollution Act to enhance the notion of corporate accountability and liability in extra territorial activities that cause transboundary haze pollution. Hence, Malaysian and Indonesian companies investing in foreign countries should move away from its 'voluntary identity' and to make environmental issues as a mandatory consideration in their company (incorporated in home state or other countries) in order to prevent environmental pollution and transboundary effects from its business activities abroad.