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NEWS

Could haze in Asia give rise to treaty claims?

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The midday view from Mark Mangan's office at Dechert in Singapore on 5 October

The smoke haze that has engulfed Singapore, Malaysia and other parts of Southeast Asia for two months could violate international law and be the subject of an investment treaty claim against Indonesia, according to a recent briefing prepared by Dechert partner **Mark Mangan** and colleagues in the firm's Singapore arbitration team.

The briefing has attracted the attention of the regional press, notably Singapore's *Business Times* and *Eco-Business*, which is published by an NGO focused on promoting sustainable development in the Asia-Pacific.

It has also spurred activity at the Singapore-based Haze Elimination Action Team (HEAT), which has been on the hunt for claimants willing to take on those responsible for the fires through some form of legal action.

Mangan argues that such an investment treaty claim, if it came about, could be an effective means of "shining an international spotlight on a regional problem" and help motivate Indonesia and its organs of government "to comply with international norms".

Turning a blind eye?

The briefing explains that the smoke haze has its origins in parts of Indonesia such as Sumatra and Kalimantan, where provincial governments have reportedly condoned, or turned a blind eye, to the practice of slashing and burning forested lands for the planting of crops.

"This has happened nearly every year since 1997 [and] begs the question whether international law can be used to put a stop to it," the briefing says.

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Mangan writes that if it were true that the practice of clearing land through burning is condoned by provincial governments, that would be "a clear breach of international law."

"Further, a failure by the government to exercise due diligence to prevent transboundary pollution may also amount to a breach of international law."

State to state actions over transboundary pollution

"States are under an obligation not to conduct or permit activities within their territory that result in harm to the environment of other states," Mangan says. He gives examples of cases in which states have sued their neighbours for breach of this obligation, including the US's successful claim against Canada in the *Trail Smelter* arbitration of the late 1930s, over damage to vegetation in the state of Washington caused by a Canadian smelter.

Similarly, Australia and New Zealand pursued claims against France before the International Court of Justice in 1973 for radioactive pollution detected in Australian and New Zealand territories caused by France's testing of nuclear weapons in the South Pacific.

Those claims were left unresolved but two decades later the ICJ confirmed in a 1996 advisory opinion on the legality of the threat or use of nuclear weapons that states have an obligation "to ensure that activities within their jurisdiction and control respect the environment of other states".

In 2010, in the so-called *Pulp Mills* case between Argentina and Uruguay, the court further held that a state is "obliged to use all means at its disposal in order to avoid activities which take place in its territory, or any area under its jurisdiction, causing significant damage to the environment of another state."

Mangan notes that in January this year all 10 members of the Association of Southeast Asian Nations (ASEAN), including Indonesia, signed up to the 2003 Transboundary Haze Pollution Agreement. The parties to the agreement expressly acknowledge in Article 3 that they are responsible under international law "to ensure that activities within their jurisdiction or control do not cause damage to the environment and harm to human health of other states".

Article 4 of the treaty obliges each state to cooperate in developing and implementing measures to prevent, monitor and mitigate transboundary haze pollution; to respond promptly to requests for relevant information sought by affected states; and to take legal, administrative or other measures to implement their obligations under the agreement.

The possibility of BIT claims

But while the obligation not to pollute neighbour states is well established, Mangan thinks affected states would be unlikely to pursue international law claims against Indonesia even if there were evidence to support such a claim.

The ASEAN treaty merely requires that any dispute as to the interpretation or application of the agreement shall be settled amicably by consultation or negotiation, he notes. The arbitrators and judges in the *Trailer Smelter arbitration* and ICJ cases discussed above had jurisdiction based on the consent of the disputing states – which he thinks Indonesia would be unlikely to give in relation to a claim over haze pollution.

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Individuals or entities covered by one of Indonesia's investment treaties with fellow ASEAN nations and other states could, however, potentially pursue a claim against the government of Indonesia for harm suffered by qualifying foreign investors and their investments within the country.

Arbitral tribunals have interpreted the "full protection and security" standard found in most of Indonesia's investment treaties as obliging a host state to exercise sufficient "due diligence" to protect an investor's physical assets and persons, Mangan explains. This could arguably include an obligation on the part of states to take "all necessary steps to prevent damage caused by egregious pollution".

Indeed, he notes that the Canadian owner of an eco-tourist facility in Barbados is currently suing the government of Barbados at the Permanent Court of Arbitration for allegedly breaching its treaty obligations by failing to enforce its domestic environmental laws. Claimant Peter Allard complains that this failure has led to the environment being spoilt and a loss of tourist revenues at his resort in breach of the treaty.

Quite apart from the potential of the "full protection and security" standard, Mangan says that investment treaties arguably incorporate the "whole panopoly of obligations imposed upon states by customary international law," including the environmental obligations already described.

In a 2013 book edited by **Pierre-Marie Dupuy** and **Jorge Vinuales**,"The enforcement of environmental norms in investment treaty arbitration", barrister and academic **Zachary Douglas** has even argued that an investor may bring a claim for the host state's breach of customary international law without reference to the substantive protections of the relevant investment treaty.

What remedies would be available?

Mangan says that claimants who successfully bring this type of treaty claim could be awarded declaratory relief requiring the offending state to take steps to prevent the pollution, monetary damage for harm caused or even moral damages – available in "extreme cases of egregious behaviour, including where a state's actions cause a grave or substantial deterioration of a person's physical or mental health."

"There may be an argument that haze which requires almost all activity outside to cease and schools to close given the risk of serious illness, as is the situation presently in much of Indonesia, Singapore and Malaysia, satisfies this criteria," he says.

He notes that, under the Transboundary Haze Pollution Act of 2014, Singaporeans affected by the haze can already pursue civil claims for damages against individual companies in Indonesia proved to have contributed to it.

But this is not the same as holding "the government of a country to account for damage caused by fires it had the ability to prevent," he says.

Proving government liability for the haze may well also be easier than tracking down the individual companies that lit the fires and their backers.

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Speaking to GAR, **Mahdev Mohan**, director of the Asian Business & Rule of Law Initiative at Singapore Management University, suggests that, while well intended, the Transboundary Haze Pollution Act has yet to be proven effective.

Those pursued to date have taken issue with the charges and sought to lay the blame on other Indonesian entities over which they have no "effective control" and the Indonesian authorities for not mitigating the damage, he says.

The interaction between human rights, investor rights and environmental protections

The haze problem was briefly discussed at last week's joint conference of the LCIA and Association of International Petroleum Negotiators in London, which included a panel on human rights and environmental protections chaired by **Joanne Cross** of BP and featuring speakers **James Castello** of King & Spalding, **Robert McCorquodale** of the British Institute of International Comparative Law and **Audley Sheppard QC** of Clifford Chance.

Mangan observed that Indonesia's Law Number 32 on Environmental Protection and Management expressly provides that the state's prohibition on clearing land by burning is subject to "local wisdom" that allows a maximum of two hectares of land to be burnt per head of family. The frequency with which such burning is permitted is not prescribed.

Since the rural population of Indonesia is reportedly in excess of 110 million people, this potentially leads to vast amounts of land being cleared by burning each year in a manner sanctioned by Indonesian law, he said.

Satellite imagery reveals the country has lost more than 60,000 square kilometres of forest since 2000, with the consequences of the burning particularly devestating this year owing to a dry spell caused by the El Nino weather pattern and prevailing northerly winds.

Delegates went on to debate how to reconcile the alleged human right to clear land with international law standards protecting the environment and the rights of foreign investors whose business interests have been negatively affected by the pollution. Mangan reports that the 13-year old daughter of one of the delegates came up with her own answer later that evening: "Surely the right to breathe trumps all else?"

Commenting for *GAR* after the event, McCorquodale suggested that such a right could be part of the treaty claim.

He explained that a claim under an investment treaty by a qualified investor could raise any action or inaction of the Indonesian goverment, including its alleged failure to act with due diligence to prevent human rights violations affecting health and children. It does not matter whether the actual violations are caused by individuals or companies, he said.

McCorquodale added that reliance by Indonesia on a national or local law or practice that was contrary to international human rights law or enabled a violation of international obligations "could be difficult to maintain before an international arbitration body".

What will bring about change?

ASEAN governments are not ignoring the problem of the haze, which this year has lasted longer than in previous years. *Bloomberg* reported earlier this month that Malaysia and Sin-

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gapore have both offered Indonesia help in extinguishing the fires but were refused on the grounds that their helicopters would be unable to take off in thick smoke.

Bloomberg also noted a recent Singapore initiative for banks to impose ethical lending practices that would make environmental factors part of their credit-decision process – a more indirect way of tackling the problem.

In his briefing, Mangan suggests that an investment treaty claim by an ASEAN investor against Indonesia could be a positive force for change. He notes the 2011 investment treaty award in *White Industries v India*, which by penalising India for its courts' failure to enforce an ICC award against Coal India for nearly a decade, prompted the state to look again at its enforcement procedures and even (this week) to amend the law.

This shows that, in the right circumstances, investment treaty claims can help motivate a state and its organs to comply with international norms, Mangan says.

"For the haze problem blighting Southeast Asia [such a claim] could just help lift the mask on an acute and worsening problem."

Mangan wrote the briefing with Dechert associates **Henry Defriez** and **Claire Chong**.

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