

The Paradox of the ASEAN Way in Environmental Law Enforcement: A Case Study of Transboundary Haze Pollution

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ABSTRACT

The ASEAN Way, as ASEAN's distinctive diplomatic approach grounded in the principles of non-intervention, consensus, and respect for state sovereignty, has long been regarded as effective in preserving regional stability and political cohesion. Nevertheless, this approach faces serious limitations when addressing transboundary environmental problems, particularly the recurring haze pollution caused by forest and land fires in Southeast Asia. This article argues that a normative tension exists between the ASEAN Way and the principles of international environmental law in the governance of transboundary haze pollution. This study employs normative juridical research through statutory and conceptual analysis and applies a comparative legal approach to examine the implementation of the ASEAN Way within the *ASEAN Agreement on Transboundary Haze Pollution* (AATHP). The findings demonstrate a significant mismatch between the ASEAN Way and core principles of international environmental law, particularly due to the absence of effective enforcement mechanisms, explicit state responsibility, and compensation arrangements. As a result, regional accountability remains weak and legal protection for affected states is limited. This article proposes a reformulation of the ASEAN Way through the adoption of responsible sovereignty, a graduated consensus mechanism, stronger regional compliance arrangements, burden-sharing, and broader participation of non-state actors in order to make ASEAN's environmental governance more adaptive and effective.

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INTRODUCTION

The Association of Southeast Asian Nations (ASEAN) is a regional international organization established to maintain peace, preserve regional stability, enhance resilience, and promote cooperation among its member states (ASEAN Charter, Art. 1). Over more than five decades of institutional development, ASEAN has cultivated a distinctive diplomatic approach that differentiates it from other regional organizations. This approach is commonly referred to as the *ASEAN Way*. In general, the ASEAN Way is characterized by non-intervention in the domestic affairs of member states, decision-making by consensus, and strong respect for national sovereignty (Severino, 2006, pp. 15–17; Acharya, 2007, pp. 319–346).

From a constructivist perspective, the ASEAN Way should not be understood merely as a technical decision-making procedure; rather, it constitutes a normative framework that has shaped ASEAN's collective regional identity (Acharya, 2007, pp. 319–346). It has informed the diplomatic habits of ASEAN member states by privileging informal consultation, quiet diplomacy, and consensus-building over adversarial legalism and coercive institutional enforcement. This approach has often been credited with reducing overt interstate conflict and sustaining regional cohesion despite the political, ideological, and developmental diversity of ASEAN member states (Morada, 2008, pp. 36–55).

However, the effectiveness of the ASEAN Way becomes increasingly questionable when ASEAN is confronted with transboundary environmental harm,

particularly recurrent transboundary haze pollution resulting from forest and land fires. ASEAN attempted to respond to this problem through the *ASEAN Agreement on Transboundary Haze Pollution* (AATHP), which entered into force on 25 November 2003 and remains the principal regional legal instrument addressing haze pollution in Southeast Asia (ASEAN Secretariat, n.d.). Although the AATHP is a legally binding treaty, numerous studies have shown that it suffers from serious structural weaknesses in terms of implementation and enforcement (Heilmann, 2015, pp. 95–121; Yo’el, 2016, pp. 328–348).

Empirical developments further reveal the limitations of this framework. The 2015 haze crisis, for example, became one of the most severe environmental disasters in Southeast Asia and caused serious public health consequences across Indonesia, Malaysia, and Singapore, with more than 500,000 people reportedly suffering acute respiratory illnesses requiring medical treatment (WHO, 2016). More importantly, the 2015 crisis was not an isolated event. Similar episodes have recurred over the past decades, demonstrating that transboundary haze in Southeast Asia is not merely an operational problem but a structural governance failure (ASEAN Haze Portal, n.d.; Ferry, 2025).

As the principal pillar of ASEAN’s regional environmental regime, the AATHP was negotiated and designed within the normative framework of the ASEAN Way. Consequently, the agreement does not establish coercive enforcement measures, does not provide an independent dispute settlement mechanism, and does not impose sanctions on member states that fail to fulfill their obligations (Heilmann, 2015, pp. 95–121). Its provisions are predominantly cooperative rather than punitive, emphasizing consultation, information-sharing, and technical assistance over legal accountability.

From the perspective of international environmental law, this institutional design is problematic. The customary principle of *sic utere tuo ut alienum non laedas*—often expressed as the no-harm rule—requires states to ensure that activities within their jurisdiction or control do not cause significant environmental harm to other states (Sands & Peel, 2018, pp. 195–203; Fitzmaurice, 2001, pp. 479–488). This obligation is reflected in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration (Stockholm Declaration, Principle 21; Rio Declaration, Principle 2). Yet, within ASEAN, these obligations have not been translated into operational regional mechanisms, largely because the ASEAN Way itself constrains the development of stronger accountability structures.

The novelty of this article lies in its specific focus on the incompatibility between the ASEAN Way and the principles of international environmental law in addressing transboundary haze pollution, as well as on the formulation of an ideal reconstruction of the ASEAN Way to better respond to this issue. Accordingly, this study seeks to: first, analyze the implementation of the ASEAN Way in the governance of transboundary haze pollution; second, explain its relationship with international environmental law principles; and third, propose an ideal reformulation of the ASEAN Way for more effective regional environmental governance.

METHOD

This study employs a normative juridical method. Normative legal research focuses on the analysis of legal norms, legal principles, and relevant regulatory instruments in order to identify legal issues and formulate appropriate solutions. In this context, the research examines the ASEAN Way as a normative framework governing ASEAN regional cooperation and evaluates its compatibility with the legal regime addressing transboundary haze pollution.

The primary legal materials used in this study include international legal instruments such as the *ASEAN Charter*, the *ASEAN Agreement on Transboundary Haze Pollution (AATHP)*, the Stockholm Declaration, and the Rio Declaration. These materials are examined to identify the legal principles relevant to ASEAN's response to transboundary haze pollution.

Secondary legal materials consist of scholarly books, journal articles, official reports, and other relevant analyses concerning ASEAN environmental governance, international environmental law, and transboundary haze pollution in Southeast Asia. These materials are used to contextualize the doctrinal analysis and to assess the practical implications of ASEAN's institutional framework.

In addition, this study applies a comparative legal approach in order to compare the normative orientation of the ASEAN Way with the principles and mechanisms of international environmental law. Through this comparison, the study identifies areas of normative tension and institutional insufficiency. The analysis is descriptive-qualitative in nature, focusing on the interpretation of legal norms and on the identification of structural weaknesses and possible legal reforms.

To strengthen the analysis, the study also uses a case-study approach by referring to concrete instances of transboundary haze pollution affecting Indonesia, Malaysia, and Singapore. This case study serves to illustrate how the ASEAN Way operates in practice and how its normative characteristics shape the regional response to cross-border environmental harm.

RESULTS AND DISCUSSION

1. The Compatibility of the ASEAN Way with the Governance of Transboundary Haze Pollution

The ASEAN Way may be understood as a set of diplomatic norms and practices that structure relations among ASEAN member states. It is characterized by a preference for informality, avoidance of open confrontation, and gradual confidence-building. Institutionally, these values are reflected in ASEAN's longstanding emphasis on sovereignty, equality, territorial integrity, and non-interference (Severino, 2006, pp. 15–17; Acharya, 2007, pp. 319–346; Caballero-Anthony, 2014, pp. 563–584).

The AATHP reflects these values in several fundamental respects. First, the agreement prioritizes cooperation and coordination rather than coercive enforcement. Article 3 of the AATHP provides that the parties shall cooperate in developing and implementing measures to prevent and monitor land and forest fires and to control transboundary haze pollution. Second, the AATHP does not contain a firm doctrine of state responsibility, nor does it provide a binding dispute settlement mechanism. Instead, it relies primarily on information exchange, technical cooperation, and regional coordination (ASEAN Secretariat, n.d.; Heilmann, 2015, pp. 95–121).

Third, decision-making under the AATHP occurs through the Conference of the Parties and follows the consensus-oriented logic that is central to the ASEAN Way. This preserves the formal equality of states and avoids majoritarian decision-making

that might impose obligations on unwilling members. Fourth, the agreement affords a high degree of deference to domestic implementation. This flexibility is consistent with ASEAN's strong commitment to sovereignty but also leaves substantial room for inconsistent compliance across member states (Yo'el, 2016, pp. 328–348).

When assessed against international environmental law, however, this model reveals substantial deficiencies. One of the central principles of international environmental law is the no-harm rule, which requires states not to use or permit the use of their territory in ways that cause serious environmental damage to other states (Sands & Peel, 2018, pp. 195–203; Fitzmaurice, 2001, pp. 479–488). This principle is reflected in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration (Stockholm Declaration, Principle 21; Rio Declaration, Principle 2). By contrast, the AATHP does not explicitly incorporate a clear regional mechanism by which an affected state may invoke responsibility against a source state for transboundary haze damage. The emphasis remains on cooperation rather than accountability.

A similar problem can be seen in relation to the precautionary principle. Principle 15 of the Rio Declaration provides that a lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation (Rio Declaration, Principle 15). While the AATHP does include provisions on prevention, monitoring, and mitigation, the operationalization of these obligations is largely delegated to national authorities without binding minimum regional standards. As a result, precaution remains normatively recognized but institutionally under-enforced (Kristiani, 2019, pp. 82–94).

The same structural weakness is evident with respect to the polluter pays principle. Under contemporary international environmental law, the actor responsible for pollution should bear the costs of prevention, control, and remediation (Bodansky, 2010, pp. 178–185). Yet the AATHP does not expressly adopt this principle, nor does it establish a compensation regime for states or communities affected by transboundary haze. Consequently, affected populations and neighboring states have no clear legal avenue within the AATHP framework to seek compensation for economic, environmental, or public health losses. This absence has repeatedly been identified as a core weakness of ASEAN's haze regime (Heilmann, 2015, pp. 95–121; Chaves et al., 2025, pp. 194–207).

This weakness becomes even more apparent when compared with other international regimes. Other environmental frameworks have developed more robust compliance procedures, clearer substantive obligations, and more structured institutional monitoring. In broader international practice, dispute settlement mechanisms ranging from arbitration to judicial adjudication are increasingly available to states in relation to treaty compliance (Alford, 2000, pp. 160–165; Esty & Ivanova, 2002, pp. 101–120). By contrast, Article 27 of the AATHP merely provides that disputes shall be settled through consultation or negotiation. No provision exists for binding arbitration or adjudication if negotiations fail. While this reflects ASEAN's preference for non-confrontational dispute resolution, it also weakens the credibility of the agreement's legal commitments.

The incompatibility of the ASEAN Way with international environmental law is particularly visible in the reactions of Malaysia and Singapore to haze episodes originating from Indonesia. Diplomatic protests have repeatedly been submitted, yet these protests have not evolved into stronger regional legal action or institutional sanctions (Ningsih et al., 2026, pp. 1–13; Ferry, 2025). In practice, the ASEAN Way

functions as a political safety valve: it allows affected states to signal dissatisfaction to domestic constituencies while preserving regional civility and avoiding overt legal confrontation. However, this also means that the ASEAN Way effectively shields source states from coercive enforcement, even where recurring transboundary harm strongly suggests a failure of prevention and regulatory control (Varkkey, 2016, pp. 89–95).

This reveals a deeper paradox. International environmental law seeks clear accountability, effective prevention, and access to remedies. Yet the ASEAN Way, when embedded in the AATHP, transforms these demands into soft diplomatic expectations rather than enforceable obligations. The result is a regional regime that is cooperative in form but fragile in enforcement. Accordingly, there is a significant normative mismatch between the ASEAN Way and the core principles of international environmental law. This mismatch is manifested in the absence of enforceable responsibility, the lack of compensation mechanisms, and the consensus-based decision-making process that may delay urgent action during environmental emergencies.

2. Towards an Ideal Reformulation of the ASEAN Way in Addressing Transboundary Haze Pollution

A reconstructive approach to international law suggests that legal norms and institutions should not be viewed as static; rather, they must be continuously reassessed and adapted to changing transnational realities (Koskenniemi, 1990, pp. 4–32; Dunoff & Pollack, 2013, pp. 987–991). From this perspective, the ASEAN Way is not immutable. It is a historically contingent normative arrangement shaped by Southeast Asia's post-colonial concerns with sovereignty, independence, and regional order. Its legitimacy derives from history and practice, but its continued relevance depends on its capacity to respond effectively to present-day challenges.

In this sense, the repeated failure to address transboundary haze pollution provides a compelling justification for reform. The objective is not to discard ASEAN's foundational values altogether, but to reconstruct them in a way that preserves regional legitimacy while enhancing legal effectiveness. ASEAN may learn from comparative regional experiences without simply transplanting foreign institutional models. What is needed is a context-sensitive reform that remains compatible with Southeast Asian political realities while strengthening regional environmental governance (Tow & Taylor, 2013, pp. 187–206; Elliott, 2011, pp. 61–64).

The first and most fundamental reform concerns the principle of non-intervention. This principle should be redefined from an absolute notion of sovereignty into a concept of responsible sovereignty. Under this approach, sovereignty remains protected, but it is understood as accompanied by obligations toward both domestic populations and neighboring states. A state retains the right to manage its own natural resources, yet this right is limited by the duty to prevent serious transboundary harm. Where a state fails to fulfill that duty and large-scale haze pollution occurs, collective regional action should no longer be viewed as an impermissible intrusion but as a legitimate response to a regional public harm (Benvenuti, 2013, pp. 295–333).

Second, ASEAN should reconsider its consensus model by adopting a system of graduated consensus. Full consensus may still be appropriate for ordinary and non-urgent matters, but environmental emergencies require faster and more flexible decision-making. In haze emergencies, ASEAN should allow qualified regional action when a substantial majority of member states support intervention, even if unanimity cannot be achieved. A modified "ASEAN minus X" formula could allow operational

initiatives—such as a regional fire-response task force, joint monitoring, or coordinated emergency assistance—to proceed without being blocked by a single reluctant member.

Third, ASEAN should establish a stronger regional environmental compliance mechanism under the AATHP. Such a mechanism would not necessarily need to replicate judicial enforcement, but it should at least provide structured monitoring, compliance review, reporting obligations, and corrective recommendations. It should also allow for transparent publication of compliance assessments and, where necessary, graduated diplomatic consequences for persistent non-compliance. This would strengthen accountability without wholly abandoning ASEAN's preference for cooperative solutions (Chaves et al., 2025, pp. 194–207; Heilmann, 2015, pp. 95–121).

Fourth, ASEAN should institutionalize burden-sharing as an expression of regional solidarity. Haze pollution is a shared regional problem, even if sources of pollution are geographically concentrated. Accordingly, ASEAN should create a clearer framework for financial, technical, and operational cooperation in fire prevention, peatland management, satellite monitoring, and emergency response. This approach would align with broader principles of common but differentiated responsibility in environmental governance by recognizing differences in capacity while maintaining a shared regional commitment to prevention and mitigation (Esty & Ivanova, 2002, pp. 101–120).

Fifth, the reformulation of the ASEAN Way must open wider space for non-state actors. Traditionally, ASEAN governance has been strongly state-centric. Yet in the haze context, non-state actors are indispensable. Plantation corporations, especially in the palm oil and pulp-and-paper sectors, are often directly implicated in land-clearing practices associated with fire risk. At the same time, civil society organizations, scientists, indigenous communities, and local residents possess critical information, monitoring capacity, and implementation experience. Their participation should therefore be institutionalized in regional environmental governance through reporting channels, consultative forums, and transparency mechanisms (Charnovitz, 2006, pp. 348–372; Varkkey, 2016, pp. 89–95).

In addition, ASEAN's reform agenda should be informed by the broader evolution of regional governance. ASEAN's credibility as a regional organization increasingly depends not only on its ability to preserve harmony, but also on its capacity to solve complex cross-border problems effectively. A purely procedural commitment to consensus and non-interference is no longer sufficient where recurring environmental harm affects public health, economic activity, and the right to a healthy environment across several states (Caballero-Anthony, 2014, pp. 563–584; Katsumata, 2009, pp. 619–637).

Therefore, the ideal reformulation of the ASEAN Way in addressing transboundary haze pollution should include at least five elements: the redefinition of non-intervention through responsible sovereignty; the adoption of graduated consensus; the establishment of a regional environmental compliance mechanism; the strengthening of burden-sharing; and the expansion of non-state actor participation. These reforms would not abolish the ASEAN Way, but would transform it from a doctrine of diplomatic restraint into a framework of responsible regional governance.

Ultimately, such reform would do more than improve haze governance. It would also enhance ASEAN's legitimacy and relevance in the twenty-first century by

demonstrating that the organization is capable of adapting its normative foundations to contemporary transnational challenges without abandoning its regional identity.

CONCLUSION

This study finds that the ASEAN Way is not fully compatible with the core principles of international environmental law in the context of transboundary haze pollution. This incompatibility is reflected in the design and operation of the *ASEAN Agreement on Transboundary Haze Pollution* (AATHP), which remains heavily shaped by ASEAN's traditional commitment to non-intervention, consensus, and state sovereignty. As a consequence, the AATHP lacks binding enforcement mechanisms, does not clearly operationalize state responsibility, and does not provide compensation mechanisms for affected states or populations.

The study further demonstrates that the ASEAN Way, as currently institutionalized, has not adequately incorporated fundamental principles of international environmental law, including the no-harm rule, the precautionary principle, and the polluter pays principle. This normative gap weakens regional accountability and contributes to the persistence of transboundary haze as a recurring environmental and public health problem in Southeast Asia.

Accordingly, the ideal response is not the abandonment of the ASEAN Way, but its reconstruction. In line with a reconstructive approach to international law, the ASEAN Way should be reformulated through the concept of responsible sovereignty, a graduated consensus mechanism, stronger regional compliance arrangements, burden-sharing, and wider participation of non-state actors. Through such reform, ASEAN can preserve its foundational values while making its regional environmental governance more effective, credible, and just.

Recommendations

In light of the foregoing analysis, ASEAN member states and ASEAN as a regional organization should undertake a comprehensive reassessment of the normative assumptions underlying the ASEAN Way in environmental governance. The principle of non-intervention should be reinterpreted in a manner consistent with the responsibility of states to prevent significant transboundary environmental harm.

At the domestic level, ASEAN states should strengthen national regulatory and enforcement frameworks against actors responsible for forest and land fires, including corporate actors whose activities contribute to haze pollution. At the regional level, ASEAN should adopt stronger compliance, monitoring, and emergency-response mechanisms under the AATHP.

The concepts of responsible sovereignty and core principles of international environmental law should be integrated into ASEAN's normative framework without eliminating the foundational values of regional cooperation and mutual respect. Such an approach would likely improve the effectiveness of transboundary haze prevention and response across Southeast Asia.

Finally, public participation should be enhanced. ASEAN societies, civil society organizations, and local communities should be given greater space to encourage stronger governmental commitment and to participate meaningfully in the prevention of transboundary haze pollution, thereby helping to protect the public's right to a good and healthy environment.

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