

Private Actor accountability

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Overview

- Aim : Exploring private actor accountability using the Indonesian Haze as an example
- Defining “accountability”
- Framework to Analyze Accountability
 - 1) WHO – Who is accountable and to whom?
 - 2) WHAT – What should they be accountable for?
 - 3) HOW – How can accountability be ensured?
 - 4) PUNISHMENT – When and how to punish non-compliance?

Looking at the Indonesian Haze through this framework

The HAZE IN INDONESIA

- Haze pollution is caused by widespread peat and forest fires in Indonesia. Farmers there practice the slash-and-burn method of clearing land for cultivation. Agricultural expansion, **driven by the growing demand of palm oil, pulp and paper** has exacerbated this problem
- Effects of the Haze Pollution
 - Threat to public health in Indonesia and other affected countries
 - Disrupt the Economy – Estimated cost of 2015 Haze was US\$700 million on Singapore
 - Local Communities
 - Biodiversity
 - Carbon Emissions – 1 Gigaton of GHG



What is accountability

- Actors are (potentially) being responsible for their actions

Grant and Keohane (2005):-

“[T]hat some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these [standards] have not been met”

- *“Internal Accountability”* – within the organization, between principal and agent which are institutionally linked to each other
- *“External Accountability”* – between the decision-makers within an organization/company and those impacted by their decisions
- Singapore’s Transboundary Haze Pollution Act – an extra-territorial instrument of accountability

Analyzing accountability

- 1) WHO – Who is liable or accountable and to whom?
- 2) WHAT – What should they be accountable for?
- 3) HOW – How can accountability be ensured? What are the tools we need in place for accountability to be assured. The “carrot” and “stick”
- 4) PUNISHMENT – When and how to punish non-compliance? What are the effects of finding that standards have been breached? Sanctions? Penalties? Whether meted by government in the form of criminal or civil sanctions, or boycott?

ACCOUNTABILITY – actors INVOLVED

THREE ACTORS

1. Government
2. Private Actors - The Firm or Company
3. Civil Society

2015

Worst Case of haze

The Haze

1) WHO is accountable and TO WHOM?

WHO?

- Indonesia (Precautionary Principle” under International Law)

Principle 2 of RIO Declaration : Indonesia has ”a responsibility to ensure that activities within [its] jurisdiction or control [do] not cause damage to the environment of other States or to areas beyond the limits of national jurisdiction”.

Under International Law, “no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequences and the injury is established by clear and convincing evidence” (Trail Smelter Arbitration (USA v Canada) (1941).

The Haze

1) WHO is accountable and TO WHOM?

States are further required to assess the environmental impact of their activities, and when *“an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically”*.

- Companies or Private Individuals

Singapore’s Foreign Minister Dr Vivian Balakrishnan when presenting the bill for the Transboundary Haze Pollution Act - *“[We] must not allow companies to ignore the environmental and health impacts of their actions”*.

Chief Justice Sundaresh Menon – The THPA *“is designed to shift the cost-benefit calculus to the corporate economic actors who perpetuate such practices”*.

The Haze

1) WHO is accountable and TO WHOM?

- Partners
- Shareholders and Investors
- People Affected – In Indonesia? In Singapore? Globally?
- Governments
- The Future Generations

The Haze

2) **WHAT** should they be accountable for?

- Physical damage ?
- Economic losses
- Loss of wildlife
- Effects of the carbon emissions on climate change
- Personal injury

What is the legal basis?

The Haze

3) **HOW** can accountability be assured?

Corporate Buy-In

- Voluntary commitments – pledge by companies only to purchase palm oil produced using higher standards of deforestation-free and peat-free palm oil.

Government Action

- Transboundary Haze Pollution Act, Singapore
- Policy change from the top

Packaged Food			
Company	Example Brands	Score 2015	Score 2014
 Nestlé <small>Good Food, Good Life</small>	Toll House, Gerber	90.5	85.5
 DANONE	Danimals	89.2	51.5
 Kellogg's	Pop-Tarts, Nutri-Grain	88.5	52.8
 ConAgra Foods <small>Food you love</small>	Act II Popcorn, Marie Callender's	84.1	35.5
 Unilever	Ben and Jerry's, Popsicle, Slimfast	83.4	83.5
 PEPSICO	Quaker, Frito-Lay	80.7	33.7
 GENERAL MILLS	Pillsbury, Nature Valley	77.8	42.6
 Heinz	Ore-Ida, Smart Ones	42.9	37.1
 Mondelēz International	Oreo, Ritz, Nutter Butter	36.8	68.6
 Kraft	Cool Whip, JELL-O	10	0
Personal Care			
Company	Example Brands	Score 2015	Score 2014
 COLGATE-PALMOLIVE COMPANY	Softsoap, Irish Spring	88	35
 Henkel	Dial, Right Guard	86.3	40
 P&G	Cover Girl, Old Spice	84.2	16.1
L'ORÉAL	The Body Shop, Kiehl's, Lancôme	80	80
 Reckitt Benckiser	Veet, Clearasil	72.3	68.3
 kao	Jergens, Curoil	54.8	34
Beiersdorf	Nivea, Aquaphor	51.3	37.3
ESTÉE LAUDER COMPANIES	Clinique, Bumble and bumble	28.3	0
AVON	-	20	15
THE CLOROX COMPANY	Burt's Bees	0	0

To download detailed information on each company's score, including the documents we examined to calculate it, visit www.ucsusa.org/palmoilscorecard.

■ Strong Commitment
 ■ Some Commitment
 ■ Little Commitment
 ■ No Commitment

How can accountability be assured?

Commitment from Private Actors

- See 2015 report by Union of Concerned Scientists
- Roundtable for Sustainable Palm Oil (RSPO) – an organization that was established to promote the growth and use of certified sustainable palm oil (CSPO).

“Many major consumer good firms now delegate responsibility for their sourcing to the RSPO, and by extension, to the auditors. If the auditors are engaging in box ticking, and even colluding to cover up unsustainable practices, then the products will get to the supermarket shelves that are tainted with human trafficking, rights abuses and the destruction of biodiversity”

- Problems – Who Watches the Watchmen?

DISCUSSION TIME !

How can accountability be assured?

Commitment from Private Actors

- Who watches the watchmen?
 - Failures in the RSPO system
 - Auditors failing to identify land, labour, human rights and environmental issues
 - Certification Bodies not understanding the Standards
 - Conflict of Interests between the Certification Bodies and the companies involved
- Oversight – provided by the NGOs and Local Communities

How can accountability be assured?

Government Intervention - Singapore

- Transboundary Haze Pollution Act – provides the National Environment Agency and authorities in Singapore with extra-territorial jurisdiction over overseas actors and activities
→ can pursue as long as haze pollution extends to Singapore.
- Cause of action can be commenced against companies by **any person or body corporate** who/that sustains personal injury, physical damage and economic loss.
- How has Singapore used the THPA to ensure accountability?
 - Preventive measures notices sent to 6 companies in 2015 – 2 companies have responded to say they were no longer associated with the affected lands before the 2015 fires occurred.
 - Notice issued to a director of one of the 4 remaining companies. When he failed to turn up for interview with NEA, arrest warrant issued.
- What Singapore really needs : - Cooperation of Indonesia to provide the concession maps that showed which land was owned by each company – to match owners of land with location of the fires identified through satellite.

How can accountability be assured?

Government Intervention – Indonesia

- President Joko Widodo announced a ban on new palm oil concessions and peat development (2016)
- Newly established Peatland Restoration Agency – non structural institution directly under and responsible to the President of Indonesia.
 - The responsibility of BRG is to coordinate and facilitate the restoration of peatlands in priority regions: the provinces of Riau, South Sumatra, Jambi, Central Kalimantan, South Kalimantan, West Kalimantan and Papua. BRG's target is to restore the approximately two millions of hectares of degraded peatland within five years period.
- Problems remain – still no political will to provide the maps
- Challenge to the THPA on the grounds that it violates Indonesia's sovereignty

The Haze

4) PUNISHMENT – When and How ?

- Consequences under the THPA
- Should private corporations lead the way?
 - Should companies follow the Brazilian example – companies like ADM, Bunge, Cargill, Louis Dreyfus and Wilmar created and adhere to the Brazilian soya moratorium, which bans deforestation by soya producers. Any soya farmer engaged in deforestation loses market access. Within 3 years, deforestation from soya fell from 25% to 0.25%
 - More than 24 major companies including Unilever, Bunge and Dunkin Donuts stop purchasing from Malaysian palm oil giant IOI
 - Wilmar has stopped buying from South Korean-Indonesian conglomerate Korindo which was caught on camera conducting illegal open burning and deforestation
- Laws in Indonesia – attempts at enforcement not successful

Concluding remarks

- Transboundary Haze Pollution Act represents the shifting from a monocentric regime to a polycentric regime of accountability
- Difficulties still present
 - Transparency, Monitoring and Reporting
 - Impact and Utility of Sanctions

REFERENCES

Extracts from the THPA

Extra-territorial application

4. This Act shall extend to and in relation to any conduct or thing outside Singapore which causes or contributes to any haze pollution in Singapore.

Offences for causing, etc., haze pollution in Singapore

5.—(1) An entity shall be guilty of an offence if —

(a) the entity —

(i) engages in conduct (whether in or outside Singapore) which causes or contributes to any haze pollution in Singapore; or

(ii) engages in conduct (whether in or outside Singapore) that condones any conduct (whether in or outside Singapore) by another entity or individual which causes or contributes to any haze pollution in Singapore; and

(b) there is haze pollution in Singapore at or about the time of that conduct by that entity.

(2) An entity which is guilty of an offence under subsection (1) shall be liable on conviction to —

(a) a fine not exceeding \$100,000 for every day or part thereof that there is haze pollution in Singapore occurring at or about the time of the entity's conduct referred to in subsection (1)(a)(i) or (ii) (as the case may be), but not exceeding in the aggregate the maximum prescribed in subsection (5); and

(b) if it is proved that, at or about the time of that haze pollution in Singapore, the entity had failed to comply with any preventive measures notice given in relation to that haze pollution in Singapore, then in addition to any fine imposed under paragraph (a), a fine not exceeding \$50,000 for every day or part thereof that the entity fails to comply with the preventive measures notice, but not exceeding in the aggregate the maximum prescribed in subsection (5).

Extracts from the THPA

Section 5 (3) An entity shall be guilty of an offence if —

(a) the entity participates in the management of another entity (referred to in this subsection as the second entity);

(b) the second entity is an owner or occupier of any land situated outside Singapore;

(c) the second entity —

(i) engages in conduct (whether in or outside Singapore) which causes or contributes to any haze pollution in Singapore; or

(ii) engages in conduct (whether in or outside Singapore) that condones any conduct (whether in or outside Singapore) by another entity or individual which causes or contributes to any haze pollution in Singapore; and

(d) there is haze pollution in Singapore at or about the time of that conduct by the second entity.

(4) An entity which is guilty of an offence under subsection (3) shall be liable on conviction to —

(a) a fine not exceeding \$100,000 for every day or part thereof that there is haze pollution in Singapore occurring at or about the time of the entity's conduct referred to in subsection (3)(c)(i) or (ii) (as the case may be), but not exceeding in the aggregate the maximum prescribed in subsection (5); and

(b) if it is proved that, at or about the time of that haze pollution in Singapore, the entity had failed to comply with any preventive measures notice given in relation to that haze pollution in Singapore, then in addition to any fine imposed under paragraph (a), a fine not exceeding \$50,000 for every day or part thereof that the entity fails to comply with the preventive measures notice, but not exceeding in the aggregate the maximum prescribed in subsection (5).

(5) In sentencing any entity upon its conviction of an offence under subsection (1) or (3), the court must not impose an aggregate fine exceeding \$2 million.

Extracts from the THPA

6.—(1) It shall be a duty of an entity —

(a) not to engage in conduct (whether in or outside Singapore) which causes or contributes to any haze pollution in Singapore; and

(b) not to engage in conduct (whether in or outside Singapore) that condones any conduct (whether in or outside Singapore) by another entity or individual which causes or contributes to any haze pollution in Singapore.

(2) It shall be a duty of an entity which participates in the management of another entity (referred to in this subsection as the second entity) that is the owner or occupier of any land situated outside Singapore to ensure that —

(a) the second entity does not engage in conduct (whether in or outside Singapore) which causes or contributes to any haze pollution in Singapore; and

(b) the second entity does not engage in conduct (whether in or outside Singapore) that condones any conduct (whether in or outside Singapore) by another entity or individual which causes or contributes to any haze pollution in Singapore.

(3) Where an entity engages in conduct that is in breach of any duty under subsection (1) or (2), then, subject to section 7 and the defences and other incidents applicable to actions for breach of statutory duty, that is actionable conduct at the suit of any person in Singapore who, in consequence of that breach —

(a) sustains any personal injury, contracts any disease or sustains any mental or physical incapacity in Singapore, or dies in Singapore from that personal injury, disease or incapacity;

(b) sustains any physical damage to property in Singapore; or

(c) sustains any economic loss, including a loss of profits, in Singapore.

(4) A cause of action for any actionable conduct referred to in subsection (3) shall be actionable in Singapore, whether or not that conduct is also actionable in the foreign jurisdiction where that conduct occurred.

Transboundary haze pollution act

Preventive measures notice to prevent, reduce or control haze pollution (Extending the precautionary principle to companies)

Section 9.—(1) Where —

- (a) there is air pollution of the environment in Singapore, or there is air pollution of the environment in any part of a country or territory outside Singapore, because of any land or forest fire on any land situated outside Singapore; and
- (b) based on satellite information, wind velocity and direction and meteorological information, the smoke from that fire is likely to move in the direction of Singapore,

the Director-General may, if he thinks it necessary or expedient to prevent, reduce or control any haze pollution in Singapore, give a preventive measures notice to any entity that, in his opinion, is directly or indirectly involved in any conduct which is causing or contributing to, or is likely to cause or contribute to, any haze pollution in Singapore.

(2) A preventive measures notice under subsection (1) is a request in writing to an entity (referred to in this subsection as the recipient entity) requiring it to do or refrain from doing anything specified by the Director-General in the notice for the purpose of preventing, reducing or controlling any haze pollution in Singapore, such as but not limited to any of the following:

(a) to deploy fire-fighting personnel and to use any other reasonable methods to extinguish or prevent the spread of any land or forest fire on any land situated outside Singapore which is owned or occupied by the recipient entity, or by another entity, the management of which the recipient entity participates in;

(b) to discontinue, or not commence, any burning activities on such land as is referred to in paragraph (a);

(c) to submit to the Director-General any plan of action to extinguish or prevent the spread of any fire on any land referred to in paragraph (a) and to prevent its recurrence.

(3) In this section, “fire” includes a fire the Director-General has reasonable grounds for believing may exist.

Extracts from the THPA

Offences by bodies corporate, etc.

16.—(1) Where an offence under this Act has been committed by a body corporate, an unincorporated association or a partnership, **any person who at the time of the commission of the offence was an officer of the body corporate or unincorporated association, or a partner or a partnership, purporting to act in such capacity shall be guilty of that offence** and shall be liable to be proceeded against and punished accordingly unless he proves, on a balance of probabilities —

(a) that the offence was committed without his consent, connivance or privity; and

(b) that he exercised all such diligence 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 the circumstances.

(2) In this section, “body corporate”, “officer” and “partner” have the same meanings as in section 10(11).

References

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