

FPCI Virtual Discussion**“Calming Troubled Waters in the South China Sea”**

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Keynote Speakers:**1. Prof. Dr. H. Hasjim Djalal**

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Moderator:**1. Dr. Dino Patti Djalal**

Founder of Foreign Policy Community of Indonesia (FPCI)

OPENING REMARKS**Dr. Dino Patti Djalal**

- We have seen a lot of unusual movements. The situation has become more fluid and moving in faster directions. There have been several drills and naval exercises by different powers in the South China Sea. We have seen countries including Indonesia and Malaysia submitting letters of our position to the UN.
- There have been quite a few flags showing naval activity by the claimants and also by non-claimants, mainly the great powers - the United States in particular.
- The US position is also hardening. There have been some strong words mentioned by the Secretary of State, Pompeo towards China and it was also followed by a statement by the Assistant Secretary of State for the East Asian Pacific. The United States seems to be somewhat moving its previous position towards a hardened position.

MODERATED DISCUSSION

Dr. Dino Patti Djalal

- Why is the tension rising recently and what is your take on that?

Dr. Arif Havas Oegroseno

- Sovereignty dispute is not a unique phenomenon. There are at least 16 cases of sovereignty disputes that have been settled through third-parties. Two of these cases involved Indonesia, the first one was in 1926 regarding the status of the island of Miangas or Las Palmas. It was a dispute between the US and the Netherlands. Regarding our country, we have the Sipadan and Ligitan case.
- If we talk about the unsettled cases, we have a list of unsettled or unresolved territorial disputes around the globe. Even among developed countries, Gibraltar for instance is one of the examples where two European countries have territorial disputes for the last 200 years or so.
- What makes the South China Sea dispute different is the fact that those countries who are locked in dispute, can manage the dispute when they realize that they could not solve the dispute, at least at this particular point of time.
- The key issue in the South China Sea is the management of the conflict.
- The question that needs to be understood is, if you could not resolve it then you should manage it. Resolve means you know who owns what and there is clarity on that. If you do not have that clarity and if you do not solve that, then you have to manage the conflict.
- In the context of geopolitics, there is the emerging strategic rivalry between the US and China. The fact that China is rising very quickly, and we also have the resident power, the United States in our particular region, that feel that it is being challenged.
- In the last 500 years, from 16 cases of competition between the ruling power and rising power, 12 led to war. This is the underlying issue in our particular region due to the strategic rivalry and the upcoming elections in the US. Moreover, at the same time, there is some discussion on leadership issues in Beijing.
- If you look at the three dynamics in the region, first the factual conditions, China's economic, military and technological power is stronger. If I look at the different analysis, they are starting psychologically to look at each other as enemies, not as friends or at least strategic partners in different cooperations. They are the hawks on both sides that have a strong impact in this rising tension between the two countries that impacted on the South China Sea.

- If the strategic rivalry is not managed, it might lead to something that we do not want. People say that there could be no war because both are so economically and socially intertwined, but from the lessons from Europe and the first World War, you can see that the trigger was something unrelated to the war itself. It was miscalculation and misperception that happened. Provocation, miscalculation and misperception are three deadly things that could lead to warfare.
- If the two powers really look at the public goods, the importance to maintain peace and security, they should be able to reduce tensions in this particular spot.

Dr. Dino Patti Djalal

- What do you think Beijing's game is in the South China Sea?

Dr. Arif Havas Oegroseno

- In different cases of sovereignty disputes, including ours, there are very strong domestic aspects at this particular time. Some countries are much more muted, Brunei for an instance, but they are not moving back. Some countries are much more aggressive, some are mixed. A lot of the time, because there is a strong domestic pressure, countries are acting as they are.
- Currently, we have this domestic situation coming up on both sides and the signals that are being sent to these flashpoints are increasing very strongly. There is an assumption that if you show your muscles or if you send your military, that will create a state practice. But in the sovereignty dispute from the first case that we have resolved, the rule is not state practice, the rule is the effective occupation which can only be shown by a legal document. In the eyes of international law, sending navies and flexing muscle is not going to help.

Dr. Dino Patti Djalal

- Are there any more features in the South China Sea that are left to be taken by any of the claimants?

Prof. Dr. H. Hasjim Djalal

- The question is not about the ability to occupy, but rather who owns them. In the South China Sea area, the uncertainties are a result of the unclear maritime boundaries in certain areas, therefore there is always a quarrel between the neighbors and there is always the possibility of using force to implement your claims.
- One can take features everywhere, but that may not necessarily be legally right to do unless it is justified under certain rules and regulations.

- In the past, we have been trying to work out all of these kinds of things. We are now preparing the 28th year workshop process, but we are still not sure when, where, and what subject is to be discussed during the workshop. Friends of ours in the Foreign Ministry are talking about this and maybe we can come up with a better idea in the future.
- We have to learn of what we have done and what we can do more in the South China Sea issue as we are not yet settled with the issue.
- That indicates the implications and the complexities of the problems, because it involves political, economic, historical, and strategic reasons that the country may have a different kind of view. Therefore we should continue the discussion and encourage particularly among the parties concerned in the dispute.
- I was trying to encourage the government of Indonesia to take a much more active policy and act more formally in this issue as we have done so in the 27 years informally between the parties.
- It appears now that if the quarrel between China and the US is increasing in the South China Sea, that will endanger all of us if that develops to a point that we could not manage.
- How could we guide them in the original foreign policy of sailing and navigating between the two rocks? In the South China Sea, we have two rocks now, the rocks of China and the rocks of the US. In the middle, there is ASEAN, which is why we should encourage ASEAN to take a much more active role in seeking peace in the region as a whole.

Dr. Dino Patti Djalal

- You started the workshop on managing potential conflict in the South China Sea 30 years ago. I remember I think you wanted in the beginning to explore whether or not a joint development of hydrocarbons would be possible in the South China Sea, among the claimants. 30 years later, can we conclude that none of the claimants, China, Brunei, Malaysia, Philippines, Vietnam, and Thailand, are interested in having any scheme of joint development when it comes to oil? Is that a fair conclusion?

Prof. Dr. H. Hasjim Djalal

- It involves the issue of joint “development on what?” It can be on resources management, environmental management, scientific management, and if we agree with that one, the next question would be “where to do it?” and then to find out an area, it involves territorial disputes. That is why it is very difficult to hold on to joint oil development.
- What’s possible is, we can manage joint development in the sense that we promote environmental protection, scientific research and so on.
- Which countries shall be involved in this joint development? Are those countries that are part of the South China Sea process involved?

Dr. Dino Patti Djalal

- What do you think is the impact of the hardened position of the US on China? How would that affect the dynamics of play in the South China Sea? Do you think this will continue or is this only temporary?

Evan A. Laksmana

- The question with the US and China is probably the most salient dynamic. The South China Sea end of itself has multiple dynamics, it is not just about a legal dispute. The vortex, if you will, that is short of shaping how we understand the tension today, is largely because of the US - China on strategic elements.
- Washington's perception and rhetoric especially in the last few years under Trump has been particularly hardened. It is largely now a domestic political issue. In Washington, there is a strong consensus that the US confront China in various aspects, and it is not just a temporary thing. Let's say we have a new administration in November, in Washington, we will still have to confront some of the structural features of the competition between the US and China.
- Whether we are talking about the power transition in the Indo-Pacific region or whether we are talking about a much broader global governance challenge between the US and China.
- China has been particularly good at baiting the US to be a lot more assertive in the region, particularly in the South China Sea, present the US's behavior whether its freedom of navigation operation or its rhetoric. China has been quite adapted at presenting those developments as an extra regional intervention by the US into the Southeast Asia region.
- This is why we are seeing the feelings across the region that we are not particularly pleased that we are pulled into either pro-US or pro-China.
- The fault is not just the US alone, from China the rhetoric has been particularly strong as well. Both sides in terms of its rhetoric and behavior are what makes things a lot more difficult for the rest of the region. Every year we see this in various ASEAN meetings, every time there is a potential incident at sea and I think the trend is much more hardening than 5 or 6 years ago.
- Right now, it is very difficult to focus on the ASEAN-China tension management mechanisms, such as the code of conduct, without making sure that we have a separate tension management mechanism for the US and China.
- We should be the one trying to push forward some tension management mechanism between the US and China but I think unfortunately, while we have a welcoming ear in Beijing, we do not have one in Washington DC. Our presence in DC is a lot less strong and powerful than several years ago.
- It is up to us to figure out a separate tension mechanism between the US and China and we have not quite figured out how to do that.

Dr. Dino Patti Djalal

- Would you agree that the US position is also problematic because it is telling everybody to play by the rules and norms but the US still has not ratified the clause? How do we short out this situation regarding these US policies?

Evan A. Laksmana

- It is somewhat odd, if not potentially double standards that the US keeps fighting for a rule-based order and yet it has not ratified the clause. For the US's credibility to be improved in the region, ratifying the clause would be a major step, a much more significant step for example, rather than just conducting freedom of navigation operations.
- The problem is, when it comes to domestic politics, the US is now a little bit more inward-looking than before.
- I find it a bit hard now to push that idea forward, but what kind of policies that we should get the US to commit to? The problem is that whatever ideas we have, the White House is probably unlikely to welcome it unless it helps boost the election prospects of the current administration.
- Being hard on China and all these kinds of string rhetoric coming out of the key policymakers in Washington, it will be hard to get them to turn back on those policies and rhetoric before the election. Maybe after the election, we can figure out new ways to work within. Either an ASEAN framework to a special US-ASEAN summit or maybe even to a special East Asian summit on these specific issues. But before we have a new administration, there will always be a stark contrast between the reality and the rhetoric coming out of Washington DC.

Dr. Dino Patti Djalal

- You were involved in the negotiations to formulate the code of conduct in the South China Sea. What has been your impression about the negotiating process of the code of conduct in the South China Sea which remains not final until now?
- Even if the agreement is reached on the code of conduct, do you think that will introduce a much more durable and stable order in the South China Sea? Will it calm down the situation a lot more or will it not?

Evan A. Laksmana

- In the early times, we had discussions on the structure of the COC and since we had the discussion quite a while back, the thinking was that we already had a code of conduct which was the UNCLOS 1982. It is our code of conduct in managing the ocean and managing the sea. It is a code of conduct in how you do fisheries, safety of navigation, protecting the environment, and other natural resources. It is a code of conduct of any activities of countries at sea.

- When we discussed the COC of the South China Sea, we are actually looking at the tailor-made specific aspect of managing the South China Sea conflict on UNCLOS as a basis to do that. Because of the bigger picture, the UNCLOS itself already gave us the legal basis as a COC.
- For example, Chapter 9 in the convention of the semi-enclosed seas for instance, just like the South China Sea, it requires a country in the bordering region of the South China Sea to cooperate. This is very clear on who to cooperate, who is the element of cooperation and how they do it.
- It is already in the convention's Chapter 19 that specifically mentions the legal obligations of all countries' parties of the convention to protect and preserve the marine environment.
- There are also legal obligations to prevent, reduce, and control pollutants in the marine environment. The UNCLOS is full of different rules, regulations, and COC on managing the sea at large. That is why at our initial informal discussions, it was to tailor-make the UNCLOS legal obligations into specific legal obligations applied to the South China Sea.
- It was rather difficult because it was more of a political exercise, having one actually will testify the willingness of the claimants to manage, much more seriously the conflict in the South China Sea. It is a mix of legal dimensions but also a large aspect, it is a mix of political and strategic dimensions.
- Having a COC will create a path in the creation of peace or maintenance of peace in the region in a much more legally binding situation.
- The rising tensions are related to the strategic rivalry between the US and China. We have different elements now in the dispute, there is the specific claimant issue, the civic ASEAN-China claimant issue, the COC issue and there is the bigger picture of the subject of rivalry between the US and China.
- This strategic rivalry also has ramifications in Europe, because the European Union and Germany have strong trading relations both with the US and China. EU and many European countries are part of NATO, which has very strong transatlantic relationships but we already have very strong relations with some European countries with China.
- It is not an issue specific to a part of the world but it is a global issue because this strategic rivalry with the US and China has different ramifications in different parts of the world.
- Indonesia could actually play a role in creating mechanisms that would help ease the tension between these two major powers in our region. The idea was to have a think tank dialogue between Indonesia, China, and the US.

Dr. Dino Patti Djalal

- On China's claims, there are 2 aspects. One is a reference to the UNCLOS as a basis for settlements or management of the issue and the other is China's historical rights. What is your take on the interplay between these two things?

- Does UNCLOS negate the historical rights or can UNCLOS provisions be used at the same time as historical rights and are there any cases around the world whereby both UNCLOS provisions and historical rights have been used conjunctively? What is the legal viewpoint on this?

Prof. Dr. H. Hasjim Djalal:

- In my opinion, UNCLOS should be used as far as possible especially between the countries in the region where they all ratified the UNCLOS. Consequently, legally speaking they are bound by it. But one issue that has not been discussed is the fact that the US does not ratify the UNCLOS up to now. The reason is that some people in the US do not like it. Somehow I feel that if the US does ratify the UNCLOS which they participated actively in negotiating it, some of the problems in the South China Sea issue could be solved much more promisingly than the situation we face now.
- If more countries follow UNCLOS, I think that the situation in the South China Sea will be much better managed than what it is now.

Dr. Dino Patti Djalal

- There is a lot of discussion on the ASEAN-China claimant dynamics in the South China Sea but there is also another layer, which is the dynamics among the ASEAN claimants. Does that make it more difficult or less difficult to resolve the issue?
- Am I correct in assuming that their legal basis is not as perfect as assumed, meaning there are still legal loopholes in the nature of their claims? In which, this might be the reason why they have not moved to the negotiating table because they realized that their position still has legal obstacles, except for Malaysia and Brunei which have moved forward quite well in negotiating their boundaries.

Evan A. Laksmana

- You are absolutely right. I think the intra-ASEAN dynamic itself is very tricky. This is why the idea of COC that is taking its time, is not necessarily a bad thing for the intra-ASEAN claimants as well. Once we separate the COC as a tension management mechanism rather than a dispute resolution mechanism, the longer the ASEAN COC process takes time to conclude, the longer for the claimants to figure out their basis.
- I think if I am not mistaken, over the last 10 to 20 years the ASEAN claimants have tried to bring their claims a lot closer to UNCLOS, not necessarily in all its entirety, but as far as I understand, it is a lot close to UNCLOS today than it was in the 1990s. Whether or not this means that we can have a speedy resolution to the maritime delimitation process, I think it is a different matter. I think Indonesia's efforts to have a maritime delimitation process concluded with Vietnam and Malaysia remains ongoing and has been slow in its process.

- However, it would help if all of the ASEAN claimants sort of clarify their claims and figure out which areas in which they can conclude some of the maritime delimitation processes. I think a concluded negotiation between Indonesia and Vietnam; Indonesia and Malaysia, would certainly help our position in the North Natuna Sea.
- But I am worried that as far as the domestic political angle is concerned, precisely because the process to align the ASEAN claims to UNCLOS takes time and is not necessarily the easiest process to do. Waiting around for the ASEAN COC process to delay the eventual maritime delimitation makes more political sense rather than rushing to the process especially if it can come at the cost of actually losing some of your claims.
- The problem with the intra-ASEAN claimants is that it is not just about those that overlap in the South China Sea but it is about the other aspect as well. One aspect that is hard for us to figure out with Malaysia is also our problem with Ambalat. I think the broadening of the border dispute and the maritime delimitation process beyond those areas in the SCS makes it harder, politically, for the ASEAN claimants themselves.
- One way to figure it out, if we can accelerate some of those maritime delimitation processes and border negotiations, perhaps not necessarily in the South China Sea, but in other areas, I think that would certainly push the need at least a bit further to finalizing the wider issue. But I think at this point, as far as I can see it seems that the ASEAN claimants are ready to still focus and rely on the COC process as a temporary stop-gap mechanism before they get into figuring out the final delimitation negotiations.

Dr. Arif Havas Oegroseno

- I think there are two issues involved. First is the claims of countries on features/islands and maritime delimitation. These are two separate issues even in the South China Sea.
- The legal basis of the claims of islands/features is already established in international law which is the Principle of Effective Occupation and Effectivity. Effective occupation is not just merely occupying it but actually, you do have a legal basis to occupy the place.
- As far as I understand, not a single claimant, even within the ASEAN countries, has publicly come up to say that 'this is my claim.' Normally they say 'we claim the whole Paracel and Spratly.' But if you want to make a claim you have to identify which one. None of them have come up with a clear official document claiming something officially with the names, locations, and what are the legal basis of the claim. Some rely on the argument that those features are on their continental shelves thus it becomes their own.

Q&A SESSION

Dr. Dino Patti Djalal:

- I am reading questions from the public. Are there any possibilities for Indonesia to unilaterally ask the Tribunal on the Law of the Sea whether the drawing of the Indonesian delimitation near the South China Sea is according to the law of the sea?

Dr. Arif Havas Oegroseno

- I do not think we can do that. An individual nation could not ask for an advisory opinion; it has to be done by an organization or group of countries.

Dr. Dino Patti Djalal:

- I do not think predicting US actions would get any help on calming the South China Sea issue itself, added the fact that the US has not ratified the UNCLOS. Is there any way to solve the South China Sea issue without US involvement?

Evan A. Laksmana:

- I think it comes back to how you define the South China Sea issue. If it is about disputes and maritime delimitation, the answer is obviously it does not depend on the US. It depends on the claimants.
- The issue in which the US is somewhat involved in shaping the dynamic is on the tension management part and I think on this part whether we like it or not, the US is part of the strategic equation either directly or indirectly. By directly, I mean, from its behaviors and rhetoric, whether it's freedom of navigation operations or public statements on the South China Sea disputes, or indirectly to its relationships with allies who happen to be claimants, like the Philippines.
- I think trying to separate the US entirely from the tension management part could have been possible maybe six or seven years ago, but now the US is firmly enmeshed in the problem. Therefore, any effort to reduce the tension management at least going back to the pre- 2012 level before Scarborough Shoal happened, I think would have to involve some sort of diplomacy to get the US and China to at least talk on how to de-escalate the situation between them.
- It is really hard to disentangle the security dilemma in the South China Sea without the US. Unless the US decides to withdraw its presence, right now the US is firmly part of the strategic equation over tension management, so for us to reduce the tension we have to involve the US.

Dr. Dino Patti Djalal:

- Each claimant, particularly China, interprets the UNCLOS differently and conveniently. How reliable is UNCLOS to manage or resolve the dispute?

Prof. Dr. H. Hasjim Djalal:

- Under UNCLOS, the South China Sea is regarded as a semi-enclosed sea. Semi-enclosed sea largely impacted cooperation between the countries bordering them to manage the use of environmental protection, scientific research, and so forth.
- UNCLOS does provide possibilities for solving some of these problems. UNCLOS provides so many possibilities for countries to discuss the agreement on how to achieve a solution to the conflict that countries face.
- However, not everything is being regulated by UNCLOS. For instance, there is no clear rule in regard to the overlapping boundaries of the EEZ. It should be settled between neighboring countries and it is up to the negotiation between them on how to determine the boundaries.

Dr. Dino Patti Djalal:

- Why do we have to rename it to the North Natuna Sea? Can you explain the policy background, the thinking behind why the government decided to rename that part of the Natuna Sea?

Dr. Arif Havas Oegroseno:

- Naming seas is an exercise that has been done by many countries. It is nothing magical.
- There is a document published in 1953 called the Limits of Oceans and Seas, Special Publication Number 23. This is a document coming from the International Hydrographic Organization (IHO) based in Monaco. On the first page of the document, it is stated that 'these limits have no political significance whatsoever'. Therefore, it is not a legal recognition of the name of the sea, it is not a political recognition.
- When this document was published, many countries were still under colonial powers at that time. Indonesia became a member of the IHO in 1952 but from our record, I did not see any Indonesian delegation from 1952 to 1956. We were occupied with nation-building processes and we did not have a lot of say in the making process of this document. According to this document, there is a map and it says that the South China Sea is defined as an area of sea from the Southern part of China all the way bordering the Java Sea. This is huge.
- We fought for our rights as an archipelagic state, from a concept to becoming international law and we then moved to discussions in IHO about renaming some parts of the South China Sea to reflect Indonesian culture, view, or names on the islands. In 2002, the IHO revised the document and it was launched on 4th June 2002. In this new document, the South China Sea is being carved out to include the Natuna sea.
- This document was going to be adopted, but there was a conflict between Korea and Japan on the names of the sea that they are disputing. Page 55, the very famous page of this document was not agreed and it has never been agreed upon. Therefore, today we are still holding on to the 1953 document.

- We have what we call the analysis of the decision of the PCA (Philippines v. China). The PCA on the case between the Philippines and China, which China did not participate in. We believe that the decision of the PCA is part of the process under UNCLOS, thus it is legally binding to both parties and it creates new chapters in the question of the definition of islands.
- We have seen the analysis, we have done our own internal analysis and then we bumped into an old document about the hydrocarbon extraction in the northern part of Natuna. We found very interesting naming of the blocks; the Northeast Natuna, North Natuna, East Natuna, South Natuna, Southeast Natuna. There is a lot of different naming that refer to compass. We believe that to make it very clear that this is the area that is demarcated for Indonesia because we have a continental shelf treaty with Vietnam and Malaysia. So we decided that first because all those islands have only 12 nautical miles, they are not going to overlap with our 200 nautical miles. Secondly, we had a treaty signed with Malaysia and Vietnam submitted to the UN. We have already done hydrocarbon resources on the continental shelf. So to differentiate the area, we are taking the old previous exercise of naming the Natuna Sea and we name it as the North Natuna Sea.
- It is a purely legal technical analysis. We wanted to have a differentiation that this is the area where there are no more disputes. We have settled the waters. We believe that the name North Natuna Sea is proper.

Dr. Dino Patti Djalal:

- How do you think the Southeast Asian countries should balance their diplomatic and military approach to the South China Sea disputes?

Evan A. Laksmana:

- From a security standpoint, maritime security and governance remain an elusive problem whether it is illegal fishing, piracy, and others. Not to mention the potential flashpoints with China or with neighboring countries.
- To say that we can only deal with the maritime space diplomatically is probably not sufficient. We must engage in diplomatic communication, negotiation whether multilaterally or others, but I do think that when it comes to improving our capacity to control the maritime domain, we need to put efforts into improving our maritime security capabilities. The problem is that not every coastal state in the area has the same model of how to manage the maritime domain. Some are very messy like us, we have multiple agencies, some are a lot more streamlined and they can have a coast guard handling the issues, some are mixed between the two. Therefore, I think figuring out the maritime security governance and capacity requires a serious effort as well.

- Conflict in the South China Sea does nobody any good. And even if there were a possibility, the scale and the speed in which we would need to develop some kind of military capabilities to even match half of what China can muster in the area right now would be too costly for us. A purely military solution to the conflict is out of the question but I do think efforts to improve maritime capacity are within reach. Then the diplomatic part needs to be front and center.

Prof. Dr. H. Hasjim Djalal:

- I do not think that military approaches are recommended but we need to be prepared all the time for all kinds of danger and problems. We know that Natuna is Indonesia's and I think China also recognizes that. The problem is not Natuna, but the waters. Therefore, it is important for us to develop our capacities to make use of the resources around Natuna, for scientific purposes and defense, for instance.
- Sometimes I would like to imagine that Natuna is just like Hawaii. Hawaii for the US is like a post to look west, to see what they can use and take advantage of the situation in the Pacific Ocean. We also have to think about how we can make use of and develop Natuna. I think Natuna can be developed to be some kind of a center for Indonesia's activities in the South China Sea. How to do that is not necessarily through conflict, we can develop our scientific capabilities for instance. Our knowledge of the resource, our capacity to utilize the resources that belong to us, and to develop cooperative relationships with neighboring countries in the area.

CONCLUDING REMARKS

Dr. Dino Patti Djalal:

- This is still a long process, it will take years. We are going to see more strategic involvement in the future, and there are still quite a few strategic unknowns that we have not figured out but they will definitely come our way at some point.
- I think the best game in town is the negotiations on the Code of Conduct. We hope that ASEAN and China will be able to finalize it. I am hearing from my friend, H.E, Jose Tavares that there is good progress, although several meetings were postponed due to the pandemic. But we are quite hopeful that it will not be a rhetoric document but it will be a substantive document that has details and able to capture possible scenarios of clash and conflict and how to respond to them.
- We have high hopes for the COC to be finalized and once it is done, I think the political-diplomatic environment will change, the environment of the region will somewhat change, and we will have greater predictability. By that, maybe other negotiations on other things will begin such as the negotiations on the sovereignty issues or jurisdictional issues.