

TALKING ASEA



Discussion Report **Talking ASEAN on**

Reviewing Two Years of PCA Tribunal Judgment on the South China Sea

Jakarta, 31 July 2018



Introduction

On Tuesday, 31 July 2018, The Habibie Center hosted Talking ASEAN dialogue entitled "Reviewing Two Years of PCA Tribunal Judgment on the South China Sea" at The Habibie Center Building in Jakarta.

This edition of Talking ASEAN was moderated by **Mr. Muhamad Arif** (Researcher, ASEAN Studies Program, The Habibie Center) and featured an expert panel made up of **Dr. iur. Damos Dumoli Agusman, S.H., M.A.** (Director General for International Law and Treaties, Ministry of Foreign Affairs, Republic of Indonesia), and **Mr. Rene Pattiradjawane** (Associate Fellow, The Habibie Center).

The objectives of this Talking ASEAN were to: (a) discuss the situation of the South China Sea dispute two years after the PCA ruling, (b) discuss the Code of Conduct in the South China Sea and its progress, (c) identify possible challenges in developing related states' relationships in regards to the South China Sea issue, and (d)

produce possible recommendations for the Philippines, China, and related states.

This discussion report summarizes the key points of each speaker, as well as the question and answer session that followed.

Recommendations:

Among the key recommendations that emerged from this particular Talking ASEAN public dialogue were: (1) to continue to solve the dispute peacefully through a direct settlement or third party settlement; (2) to utilize the COC as conflict prevention mechanism, since it provides the platform to exchange ideas and minimize misperception among the involved parties; and (3) to enhance maritime security and assistance to ASEAN claimants.



PRESENTATION FROM THE PANELIST

Dr. iur. Damos Dumoli Agusman, S.H., M.A.

(Director General for International Law and Treaties, Ministry of Foreign Affairs, Republic of Indonesia)

Dr. Damos Agusman explained that even after two years after the Arbitral Tribunal, there are still some confusion and different perception between the public expectation and the actual context. According to him, the Tribunal is not intended to solve the root of the conflict, nor decide the ownership of the sea features.

The Arbitral Tribunal is only intended to answer questions and interpret the UNCLOS provisions. There are a number

of clarifications that the Tribunal made, such as: (1) the nine-dash line is invalid, (2) no maritime features entitled to the 200 NM, (3) there is no contested waters, only undelimited waters, and (4) other clarifications related to the features.

Dr. Damos Agusman further highlighted some remaining issues here. He mentioned that the high tide features were not among the solved case, therefore it should be solved by the claimants themselves directly, or upon their agreement, through third party dispute settlement.

For the way forward, Dr. Damos Agusman suggested that first, we should use DOC and COC as conflict prevention mechanism. Second, we need to refer to UNCLOS 1982 for maritime delimitation. And third, the title of ownership should be solved through international law of territorial acquisition.



Mr. Rene Pattiradjawane

Associate Fellow,
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As the second to speak, Mr. Pattiradjawane highlighted that, there are only two paragraphs in the PCA ruling that are of interest to Indonesia. Based on this paragraphs, Indonesia can proclaim the area on the EEZ as the North Natuna Sea. Mr. Pattiradjawane continued that many maritime crisis happened in Indonesia's EEZ, such as



the confrontation between the Chinese Coast Guard and Indonesia's Bakamla, and the illegal fishing vessels entering this area.

He further explained some important timeline after the PCA ruling. There are a lot of military vessels sailing through the South China Sea. Mr. Pattiradjawane considered this as the new era of "Gunboat Diplomacy." It started with China and the United States, and now Japan also starts doing it, as well as the United Kingdom and France. Another important timeline is that after 2013, the Chinese seaport ownership is increasing with the lease period from 40-95 years.

We cannot also separate the allied interests in this powerplay, he noted. The competition between the United

States and China on building a new world order is about legal argument. Most ASEAN nations expect the external power to defend the rule-based order related to resources, maritime resources (oil and gas as well as fisheries).

To conclude his presentation, Mr. Pattiradjawane stated that there is no absolute control in the South China Sea as it is an international waterway. The PCA ruling has to serve as a minilateral engagement among ASEAN countries in order to encourage external powers to defend legitimate EEZ claims. Lastly, the new security architecture paradigm, e.g. Indo-Asia Pacific, should not be sidelining ASEAN centrality in maintaining and keeping stability and peace in the region.



QUESTION AND ANSWER SESSION

SESSION I

Question: Different countries respond to PCA ruling differently, and there is no single reality that is accepted similarly by these states. Which reality should be the basis for the ongoing negotiation?

RESPONSE

Dr. iur. Damos Dumoli Agusman, S.H., M.A. COC is not intended to solve the core issues. COC is the follow-up of DOC which was signed in 2002. It was also a painstaking process initiated by Amb. Hasjim Djalal through a series of workshop.

I believe that the COC is the remedy, although it is not a breakthrough. The dynamic between COC and what is happening on the ground is indeed interesting. This COC keeps China and ASEAN together. We understand that it is such a long process—should it be binding or non-binding, should it cover the UNCLOS wording or the PCA ruling, and etc. So, COC provides a platform where we cannot get suspicious towards each other. This is the avenue to share information and avoid misperception. It is a slow process, but we engage all claimant, we keep them busy, and it makes us all occupied that we forget to go to war.

The different political dynamic in these countries is definitely resulting in different degree of support. As international lawyer, I see that the tribunal award will always be there, even without political support. It will be there until the decision is over-ruled by another decision.

Mr. Rene Pattiradjawane PCA ruling does not only give judicial argument but also a strategic reality in the sense that China's efforts need to be supported by willingness that will eventually create a new norm. In China's geopolitical equation, the leader will always be there. Strategic calculation will be there. The problem is about the leader because they come and go.

SESSION II

Question: The recent case gives a clear picture on how claimant countries can resolve the issue peacefully. Can we expect countries like the Philippines, Vietnam, Brunei Darussalam, and Malaysia to negotiate bilaterally? When one or two countries start doing it, others may follow.

Question: When authority in China can continue their ruling for 10-15 years, they could contribute to the stability in the region. China have to calculate their relationship with ASEAN countries.

Question: Dr. Damos mentioned that the ruling needs no political support. However, no political support means no compliance. How do you navigate this?

RESPONSE

Dr. iur. Damos Dumoli Agusman, S.H., M.A. The Award made it clear to allow claimant states to make delimitation. Vietnam and China has made delimitation. Some said it's not a different exercise—it relies on political will.

In 1969, we concluded an agreement with Malaysia and there was no protest from China. However, in 2003, China made protest. We can see that China started protesting only in 2000-ish. Therefore, it is very questionable on when China start making claims on the nine-dash line.

Regarding the compliance in international law, international law itself has a weakness. There is no central unit that can impose the international law. State may not comply, but they can't sustain the incompliance. There must be the end of story of the incompliance.

Mr. Rene Pattiradjawane Historically, I believe China is land-based and never a maritime-based country. According to them, South China Sea belongs to China and they always say it's undisputable. If we traced it back, we need to see the original document made by Kuomintang in 1939.

What I am more worried about right now is the maritime resources. China and Indonesia are the first and second biggest fish catcher in the world respectively. However, Ibu Susi (Minister for Fisheries and Maritime Affairs of the Republic of Indonesia) never met China's authority on fisheries. Can you imagine the two biggest fish catcher in the world don't talk to each other? During Yudhoyono's time, there was MoU, agreement, and etc. So, politically, there is something missing.

to address the issue, we need to be a genuine partner for them. At the end of the day, we need the cooperation of the Myanmar government to resolve this issue. Non-interference is indeed an issue, but ASEAN should not be afraid to provide moral leadership.

SESSION III

Question: In 2025, China is expected to have naval power as strong as the United States. What will the situation be then? Southeast Asia and China are like lips and teeth. Between 2002 and 2017, we only manage to complete a framework of COC. China doesn't want the COC so they play around with the concept. Who is the lips and teeth, now?

Question: Documentation regarding Kuomintang's involvement is located at the Navy Headquarter in Taipei. We don't want people to see that we cooperate with China on South China Sea.

As far as I know, China is not a mainland only. During the Ming Dynasty, there were Zheng He's fleets all over the world. There are reasons that China's sea power is getting smaller because Taiwan and Japan won't let China to have it all.

Question: The PCA ruling establishes binding power for the involved parties. What about for the non-party? Would there be another tribunal needed?

RESPONSE

Mr. Rene Pattiradjawane From the earlier history, China is always a lonely power. Being the oldest civilization, China is being humiliated by other countries, but now, they are trying to show their power. However, their navy has never been tested in a big combat.

Dr. iur. Damos Dumoli Agusman, S.H., M.A. Before the UN Charter, it was easy to determine which one is the teeth and lips, because the prohibition of the use of the force hasn't been enforced. Nowadays, no matter how strong you are, you could never occupy an island illegally. If you're not legitimate under international law, you have no authority to be there. Legal order and international norm has put restriction for states to abuse power.

It is true that the Award is binding to the involved parties. But what about the third party? The tribunal interprets a number of articles in UNCLOS, such as the nine-dash line is all invalid. So if the logic operates here, Indonesia, even if we're not part of the party, we are still bound legally by the tribunal.



ABOUT ASEAN STUDIES PROGRAM

The ASEAN Studies Program was established on February 24, 2010, to become a center of excellence on ASEAN related issues, which can assist in the development of the ASEAN Community by 2015. The Habibie Center through its ASEAN Studies Program, alongside other institutions working towards the same goal, hopes to contribute to the realization of a more people-oriented ASEAN that puts a high value on democracy and human rights.

The objective of the ASEAN Studies Program is not merely only to conduct research and discussion within academic and government circles, but also to strengthen public awareness by forming a strong network of civil society in the region that will be able to help spread the ASEAN message. With the establishment of ASEAN Studies Program, The Habibie Center aims to play its part within our capabilities to the ASEAN regional development.

ABOUT TALKING ASEAN

Talking ASEAN is a monthly public dialogue held at The Habibie Center in Jakarta. Covering a wide array of issues related to ASEAN, Talking ASEAN addresses topics of: Economic Integration, Socio-cultural, & Democracy, human rights and regional peace, among others. Featuring local and visiting experts, Talking ASEAN is one of a series of twelve dialogues regularly held each month and open to a target audience consisting of ASEAN officials, foreign ambassadors & diplomats, academics, university students, businesses, and the media.

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