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THE SOUTH CHINA SEA DISPUTE AND THE ROLE OF INDONESIA

By: Dr. Iur Damos Dumoli Agusman[1]

ABSTRACT

The dispute in the South China Sea, which mainly about, and rooted in, overlapping claim over maritime features by six countries bordering the South China Sea, is a complex and proliferated dispute. The dispute becomes more exacerbated when China starts embracing in its legal argument the ambiguous concept of '9-dashed-lines'. Amidst its controversy, China officially attached a map showing the 9-dash-lines in its note to the Commission on the Limits of Continental Shelf in 2009 and in 2012 issued its passports showing the illustrative map. Many states, including Indonesia, have protested this map. However, the reluctance of the claimant states to bring the issue to an international court or using intermediary, preventing any progress towards an achievable solution and recently, the tension in South China Sea has risen dramatically. The on-going land reclamations in the South China Sea increased tensions and may undermine peace, security and stability in the region. The dispute now no longer involved claimant states, but also evokes non-claimant states involvement. This Article attempts to explain the nature and recent developments of the dispute in the South China Sea, the position of Indonesia in the midst of its dynamic development, as well as seeks the role that Indonesia has played and continues to play in preventing the dispute from escalation and in clarifying the nature of the conflict.

Keywords: dispute, South China Sea, role of Indonesia.

1. Introduction

The South China Sea dispute is a complex and proliferated dispute. The dispute in the South China Sea is mainly about, and rooted in, overlapping claim over maritime features (islands, rocks, reefs) in the South China Sea by six countries bordering the South China Sea[2] i.e. China (including Taiwan), Vietnam, Malaysia, Brunei and the Philippines. The dispute starts since WW II but it has been since 1960 that the respective claim of the claimant states have been known to each other. China claims all the Spratly Islands based on historical discovery and control. Taiwan mirrors China's claim with some modifications. Vietnam also claims all the Spratly Islands based on historical discovery and colonial French inheritance. The Philippines claims some islands based on proximity and discovery/ occupation but has abandoned its claim on the basis of 'Paris Treaty Box'. Malaysia claims some islands based on proximity.

The dispute becomes complicated because in the same time the claimant states assert their respective maritime claim, the claim over the maritime zones (territorial sea, economic exclusive zone and continental shelf). Albeit distinguishable, the question of ownership over

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[1] The author graduated from Goethe University of Frankfurt and is currently the Secretary of Directorate General for Legal and Treaties Affairs, Ministry of Foreign Affairs, Indonesia. This Article is purely his academic view.

[2] Many books and articles have been written about the dispute. The most popular and recent one is written by Bill Hayton, *"South China Sea: the Struggle for Power in Asia"*, Yale University, 2014. Overview about this book has been written by Damos Dumoli Agusman, Kompas, 22 November 2015.

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the maritime features is closely related to the question of maritime claims. The former usually determines the latter. In this case however the claimant states (excluding China) asserts their maritime claim by using their interpretation that the maritime features in the disputed sea are mostly rocks or reefs, which entitled only 12 miles. Some are even low tide elevations, which are part of the sea and therefore are not subject to ownership in the same way as islands or rocks/reefs. Who owns the low tide elevations will depend on who own territorial sea or economic exclusive zone covering them[3].

The dispute becomes more exacerbated when China starts embracing in its legal argument the ambiguous concept of '9-dashed-lines', through which China is aggressively asserting "indisputable sovereignty" to all the islands and waters enclosed by the lines. China's so-called "9-dashed-lines" (originally "11 dashes") first promulgated by R.O.C. in 1947. No record has shown that the map has been officially known to public debated until 1990's. Nor did it become China's argument in supporting its claim during incident with Vietnam in 1974. In 1993 during the "Workshop on Managing Conflict in South China Sea" held in Surabaya, the Chinese delegation distributed a map showing the 9-dash-lines and since then the mysterious map becomes subject to controversial debate among scholars and commentators around the world. Amidst its controversy, China for the first time officially attached this map in its note to the Commission on the Limits of Continental Shelf in 2009, protesting the join submission of Malaysia and Vietnam about their extended continental shelf to the Commission. In 2012 China issue its passports showing the illustrative map.

It is worth noting that many states have protested the China's 9-dash-lines map. Indonesia in many occasions has persistently protested this map and recently state by President Joko Widodo saying that Chinese 9-dotted-lines have no legal basis.[4] In these circumstances, considering that the map has violated UNCLOS 1982, the issue should not be regarded as a dispute between claimant states or between bilateral contexts only, but it should be the problem of all parties to UNCLOS 1982.

The claimant states are reluctant to bring the issue into an international court or using intermediary, preventing any progress towards an achievable solution. The consequence is severe, since claimant states are compelled to maintain the status quo in order to maintain peace in the region. The progress is halted since each claimant states stubbornly defend their absolute claim, where the claimed maritime features are inseparable part of their territory. Of course, this sacrilegious claim leaves no room for any kind of diplomatic approach.

This Article attempts to explain the nature of the conflict and how it has been developing and scans the position of Indonesia in the midst of

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[3] According to various international decisions, low tide elevations are not subject to title over islands and shall be regarded as parts of the maritime zone. The ownership will depend on who own the maritime zones that covering the elevations.

[4] *See "Indonesia's President says China has no legal claim to South China Sea: Yomiuri",* The Straits Times, 23 March 2015, available at: http://www.straitstimes.com/asia/se-asia/indonesias-president-jokowi-says-china-has-no-legal-claim-to-south-china-sea-yomiuri.

its dynamic development as well as seeks the role that Indonesia has played and continue to play in preventing the dispute from escalation and in clarifying the nature of the conflict.

2. Legal Touch to the Dispute

Recently, the tension in South China Sea has risen dramatically. On-going reclamation process by China in the disputed islands triggered reaction from many countries. The dispute now no longer involved claimant states, but also evokes non-claimant states involvement, such as the United States, Australia and Japan. Even G-7 forum begins to express its concern regarding the dispute. Now, the aggressiveness and display of China's military prowess escalate the tension into a psychological warfare between claimant states. These provocation includes, but not limited to, the U.S. invitation to conduct joint patrol in the overlapping disputed areas, joint military exercise between the Philippines and Japan, the U.S. military aid to Vietnam, and the U.S. freedom of navigation operation (FON) in the area, all of which inviting a reaction from China. The confrontation between claimant states acts as a catalyst to the conflict escalation has resulted in what so called 'security dilemma'. The Concept refers to a situation in which actions by a state intended to heighten its security, such as increasing its military strength or making alliances, can lead other states to respond with similar measures, producing increased tensions that create conflict, even when no side really desires it.[5] In the end, both sides will be forced to maintain an alert stance which will further destabilize the regional stability.

The claimant states are more focused in conflict prevention efforts which started in a series of workshop titled "Managing Conflict in South China Sea". The workshop is proposed by Indonesia since 1989 and succeeded to convene the claimant states. It is then followed by "Declaration of Code of Conduct on the South China Sea" signed by ASEAN and China in 2012, which the Code of Conduct itself is still on-going process. The conflict prevention itself is never meant to resolve the dispute, but rather intended to prevent the escalation of the conflict into a military conflict. However, the tension in the region is disturbed by reclamation of some claimants especially China over some features in South China Sea. Much speculation circulated that the conflict prevention attempts will be shattered and the conflict will enter a new phase. Now, the conflict escalation compels the claimant states, not only to exercise self-restrain but also to discuss the merit of the claim. Most claimant states nowadays understand that in order to support their claims, it is important to presents legitimate historical, political and judicial basis.

Since the merit of the claim has been taken into account, then the dispute will no longer merely about the 'power' as been repeatedly claimed by China. Legal arguments now become matters. Not satisfied by using political pressure only, the claimants and those interested

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[5] Jervis, R. *"Cooperation under the Security Dilemma"*, *World Politics* vol. 30, no. 2 (January 1978), pp. 167–174; and Jervis, R. *Perception and Misperception in International Politics* (Princeton, N.J.: Princeton University Press, 1978), pp. 58–113.

parties (including third Party such as the United States) have started to include legal basis to every actions and political stances they have taken. International law as a soft power has used to justify each other claims.

This new legal development started with the Philippines instituted arbitral proceedings against China in International Tribunal of Law of The Sea (ITLOS), which currently are on trial in Den Haag. On 22 January 2013, the Philippines submitted a Notification and Statement of Claim in order to initiate compulsory arbitration proceedings under Article 287 and Annex VII UNCLOS with respect to the dispute with China over "maritime jurisdiction" in the South China Sea. The impact of the Tribunal Case is significant. China has moves out from its silence by increasingly reveals its official position, Chinese scholars come out with abundant legal argument, which clarify the claim.[6] On 19 February 2013, China has reiterated that it will neither accept nor participate in the proceedings, by arguing that the Arbitral Tribunal does not have jurisdiction over the case. On 7 December 2014, China issued the Position Paper for its legal defence.[7] In the Position Paper, China stated that in regard with the South China Sea, China and the Philippines have agreed, through bilateral instruments and the Declaration on the Conduct (DOC)[8] on Parties in the South China Sea, to settle their relevant disputes through negotiations. In China's view, by unilaterally initiating the arbitration, the Philippines has breached its obligation under international law.

The legal action instituted by the Philippines against China in an arbitral tribunal under the United Nations Convention on the Law of the Sea 1982 (UNCLOS), which currently hold its proceeding in the Hague, attracts attention in the region including within ASEAN. ASEAN effort towards conflict prevention in the South China Sea is now encountered with a new challenge. The Joint Communiqué of the 48th ASEAN Foreign Ministers Meeting (AMM) expressly pointed that the land reclamations in the South China Sea, which have eroded trust and confidence, increased tensions and may undermine peace, security and stability in the South China Sea.[9] As mentioned above the concerns are not only expressed by major States in

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[6] Dr. Iur. Damos Dumoli Agusman, *"Legal Aspects of South China Sea Dispute and the Role of Indonesia,"* presentation on the Mid-Career Diplomats Training (Sesdilu LV), 12 October 2015.

[7] Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, 7 December 2014, available at: http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml.

[8] Declaration on the Conduct of Parties in the South China Sea (DOC), adopted on 4 November 2002, by ASEAN member States and China at the 8th ASEAn Summit in Phnom Penh. The 2002 DOC contains provisions on the following: (1) peaceful resolution of the territorial and jurisdictional disputes; (2) self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability; (3) confidence-building measures; and (4) cooperative activities.

[9] Joint Communiqué 48th ASEAN Foreign Ministers Meeting Kuala Lumpur, Malaysia 4 August 2015, available at: http://www.asean.org/images/2015/August/48th_amm/_JOINT%20COMMUNIQUE%20OF%20_THE%2048TH%20AMM-FINAL.pdf, last accessed 2 September 2015; and *"Minister: ASEAN, China to negotiatie code of conduct for South China Sea disputes"*, available at: http://www.themalaymailonline.com/malaysia/article/minister-asean-china-to-negotiate-code-of-conduct-for-south-china-sea-dispu, last accessed 2 September 2015.

the region, but also echoed by the G-7 forum in its 2015 meeting.[10]

The Tribunal proceedings have started touching the merits of the case following its decision on 29 October 2015 that it has jurisdiction to deal with the dispute. The Tribunal held public hearing on the merits of the case from 23-30 November 2015 and dealt with three legal questions. First is about the legality of the China's 9-dash-lines. The Tribunal may have difficulty in determining its legality in the absence of China's clarification since China does not appear in the case. However, the Tribunal revealed a hint that it might indirectly touch this question by arguing that it is under Tribunal competence to deal with the question whether or not there exists other maritime claims beyond UNCLOS 1982. Second, the Tribunal will determine whether the maritime features questioned by the Philippines are islands, rocks, reefs or just low tide elevation. The determination of their maritime status will clarify the respective claim, especially whether or not they may generate 12 or 200 mile maritime zones. Third, the Tribunal will decide whether or not the activities of China in reclaiming the features has violated the UNCLOS in relations its environmental impact.

3. ASEAN-China Process

Some people might be pessimistic with these recent developments, especially in the context of ASEAN effort toward conflict prevention and it raises question with regard to its progress and prospect. But there is indeed progress and prospect of the ASEAN effort toward conflict prevention. Even to some extent, recent developments have rendered impetus to the process of dialogue amongst ASEAN Community and stimulated the pace of discussion between ASEAN and China on the implementation of the DOC and particularly on the crafting of COC.[11]

In International Law, territorial dispute is considered as one of the most complicated case. The history has recorded that this kind of dispute is hardly solved through negotiations between the claimant states, because the absolutist positions and sovereign pride over their claimed territories would normally close the room for the abandonment of the claim. In the negotiation, the claimant states normally will encounter with the win-lose dilemma, which are irreconcilable.[12] It clearly explains why in practice the dispute over title to territories is increasingly, albeit with reluctantly, settled through a third party settlement mechanism or otherwise to keep the dispute unresolved.[13]

Southeast Asian countries have a better experience in settling disputes over title to territory, whether through negotiations or through a third party settlement. Thailand and Cambodia

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[10] *See Leader's Declaration*, G7 Summit, 7-8 June 2015, *"Maintaining a Rules-Based Maritime Order and Achieving Maritime Security"*, available at: https://www.g7germany.de/ Content/EN/Anlagen/G7/ 2015-06-08-g7-abschluss-eng_en.pdf?_blob=publicationFile&v=3, last accessed 2 September 2015.

[11] The Code of Conduct (CoC) is currently under negotiation, with the aim to further elaborate the principles in the DOC.

[12] Dr. Iur. Damos Dumoli Agusman, *"Conflict Prevention and the Rule of Law: Reassessing the South China Sea Conundrum in the 21st Century – Progress and Prospect,"* presented at the 4th MIMA South China Sea Conference 2015, Kuala Lumpur, 8-9 August 2015.

[13] *Id.*

settled their land title dispute over the Temple of *Preah Vihear* (ICJ/1962)[14], Indonesia and Malaysia over *Sipadan and Ligitan* Islands (ICJ/2002)[15], Malaysia and Singapore over *Pedra Branca* (ICJ/2008)[16], and also the case by their predecessors between the Netherlands and the USA over the Island of *Palmas/Miangas* (Arbitration/1928).[17] On the other hand, on the Northeast Asian scope, there is no record of dispute over territory is settled through third party and yet there is a number of title disputes left unresolved.[18]

4. **Claims are becoming clarified according to international rule-based**

In recent development, some derivative issues have come out and to some extent drag non-claimant states. First, the existence of 9-dash-lines drawn by China has created another problem with Indonesia in the waters in the vicinity of Indonesia's *Natuna Islands*.[19] Second, the characterization of the maritime features in the South China Sea is also being disputed, whether they are "islands", "rocks" or "low tide elevations" from the Law of the Sea definition, for which they are capable or not capable for generating maritime zones,[20] will concern the interest of other states, such as the U.S., in their enjoyment of the high seas freedom of navigation through the South China Sea. These derivatives issues have confused many with the core dispute, which is about ownership of maritime features, and detracted attentions from the non-claimant states, such as Indonesia[21] and the U.S.

In terms of ASEAN, it is already clear that ASEAN is not the forum for solving the dispute, which is the ownership of the maritime features. ASEAN has accurately upheld the position that it is the claimant states that should solve the question of sovereign title over the maritime features in the South China Sea. However, ASEAN is still the best mechanism in terms of providing forums for dialogue between ASEAN members and China, preventing

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14 Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Jugdment of 15 June 1962, available at: http://www.icj-cij.org/docket/index.php?sum=284&p1=3&p2=3&case=45&p3=5.

15 Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia), available at: http://www.icj-cij.org/docket/files/102/10570.pdf.

16 Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore), available at: http://www.icj-cij.org/docket/files/130/14492.pdf.

17 Reports of International Arbitral Awards, Island of Palmas case (Netherlands v. USA), 4 April 1928, Volume II pp. 829-871, available at: http://legal.un.org/riaa/cases/vol_II/829-871.pdf.

18 For instance: the *Liancourt/Dokdo* between Japan and South Korea; *Senkaku/Diaoyudau* Island between Japan and China, and the dispute concerning maritime features in South China Sea.

19 For example the statements attributed to Indonesian Navy Commodore Fahru Zaini, an assistant to the first deputy of the Coordinating Minister for Political, Legal, and Security Affairs (*Menkopolhukam*): *"China has claimed Natuna waters as their territorial waters. This arbitrary claim is related to the dispute over Spratly and Paracel Islands between China and the Philippines. This dispute will have a large impact on the security of Natuna waters"*, see Evan Laksmana, *"Why there is no 'new maritime dispute' between Indonesia and China"*, the Strategist, 4 April 2014, available at: http://www.aspistrategist.org.au/why-there-is-no-new-maritime-dispute-between-indonesia-and-china/.

20 The United Nations Convention on the Law of the Sea 1982 (UNCLOS), in Article 121.

21 Within Indonesian public, there is a growing concern triggered by the intrusion of the 9-dashed-lines into the waters of the *Natuna Islands* and has created a public confusion and quickly created a misleading assertion among commentators that Indonesia is now becoming a claimant state over the South China Sea. *See* Evan Laksmana, *supra* note 18.

conflict escalation, and creating a good atmosphere for consultation and exchange of views. Dialogues between claimant states, and even other interested states, under ASEAN framework in all tracks has contributed to the prevention of conflict escalation.

The initiative to discuss the dispute initially could only be taken in second track dialogue in a low-fashioned manner. The Indonesian initiative, since 1989, for the Workshop on Managing Conflict in the South China Sea has successfully brought together the claimant states to discuss matters which aimed to achieve cooperative programs, promoting dialogue and developing confidence-building process.[22] At the initial stage, they were discussing in their personal capacity and selecting the issues that are comfortable for them. Second track, including 1.5 track forums for discussing the South China Sea have increasingly proliferated in various format and have been held on a regular basis.[23]

Since the beginning of the Arbitral Tribunal[24] proceedings instituted by the Philippines, a number of legal constructions have been introduced by both Parties, namely China and the Philippines, to international audience either through scholars' views, published book or through official statements.[25] These legal arguments are not only clarifying the claims of both States over the maritime features, but also provides categorization of claims by, *inter alia,* distinguishing claims over title to territory from the question of maritime zones derived therefrom, or distinguishing those of territorial disputes from maritime ones. The public discussion among respective legal scholars, including Chinese scholars, has also started exploring the legal meaning of 9-dash-lines in the language of international law and introduced the so-called "historical rights"[26] beyond the law of the sea.[27]

Albeit not directly, the public discussion on the legal aspect has come out with some legal clarification. The Chinese Position Paper of 7 December 2014 has shed a light on the very issue in the language known to the legal scholars. In explaining the submission related to the nine-dash line, the Paper made reference to the known principle of the law of the sea by confirming that "maritime rights derive from the coastal State's sovereignty over the land," a principle which can be summarized as "the land dominates

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[22] Hasjim Djalal, *"Conflict Management Experiences in Southeast Asia: Lessons and Implications for the South China Sea Dispute", 3 Asian Politics and Policy 4*, October 2011, 629.

[23] *See* Dr. Iur. Damos Dumoli Agusman, *supra* note 11.

[24] The Arbitral Tribunal is on progress: 7-13 July 2015 – hearing on jurisdiction; end of 2015 – the decision on jurisdiction; and 2016 – the decision on the merits.

[25] *Id.*

[26] The term "historic rights" is usually related to the acuisition of territory in international law. According to Blum, "the term *'historic rights'* denotes the possession by a State, over certain land or maritime areas, of rights that would not normally accrue to it under the general rules of international law, such rights having been acquired by that State through a process of historical consolidation. Blum further explains that *"historic rights* are a product of lengthy process comprising a long series of acts, omissions and patterns of behavior which, in their entirety, and through their cumulative effect, bring such rights into being and consolidate them into rights valid in international law". *See* Zou Keyuan, *"Historic Rights in International Law and in China's Practice,"* Ocean Development & International Law, 32:149-168, 2001.

[27] *Id.*

the sea".[28] Notwithstanding its controversy, the discussion is very encouraging in term of legal clarity and should be welcome.

The public discussions on the legal aspect using ruled-based approach are mostly welcome and may contribute to the transparency and clarity of claims among the claimant states. These dialogues using the language of International Law will clarify the respective claims and present the dispute in more concise terms which eventually bring the claimant states closer in addressing the case.

5. Progress in First Track Diplomacy

In the same time, the first track diplomacy has also moved forward. Under ASEAN framework, all claimant states and the rest of ASEAN members on their official capacity already have a permanent mechanism to discuss and to conduct negotiations on the issue. *The ASEAN-China Declaration on the Conduct of Parties in the South China Sea* (DOC) adopted by the Foreign Ministers of ASEAN and the People's Republic of China at the 8th ASEAN Summit in Phnom Penh on 4 November 2002 should be viewed as a successful achievement of this track. Since then, ASEAN is occupied with consultation on the implement-tation of the DOC including the drafting of *the ASEAN-China Conduct of Parties in the South China Sea* (COC). In the midst of turbulence on the ground, ASEAN persistently and increasingly believes that the completion of the COC is the only avenue to prevent escalating conflict in the waters. Foreign Minister of Indonesia Retno Marsudi even put further emphasis on the role of ASEAN urging that ASEAN should take leadership in solving pressing issues in the region, including the South China Sea disputes.[29]

The work on the COC is now underway and it is commonly held that that the process is irreversible. This is a long process that requires indulgence from ASEAN and China. The "ASEAN Way" of emphasizing consensus in every decision making have to some extent delayed and prolonged the process. In spite of this difficulty, ASEAN cohesiveness remains survived in the process and on its part has successfully agreed on "the Proposed Elements of the COC" in 2012.

The 9th ASEAN-China Senior Officials Meeting on the Implemen-tation of the Declaration of the Conduct of Parties in the South China Sea 29-29 July 2015 in Tianjin has shown a sign of significant progress. The Meeting is no longer being "trapped" with procedural matters that so far occupied and prolonged the process. In that Meeting, ASEAN and China have agreed to move forward with a more substantive discussion by declaring their readiness to draft the COC. The process has arrived in the stage of preparing the structure and elements of the COC and to be discussed in the next meeting in the near future. The way forward has been projected with the adoption of the Work Plan on the Implementation of the DOC for 2015-2016.[30]

A number of documents for the common basis of further works has also been agreed in that Meeting. They include the Second List of

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[28] *Supra* note 6.

[29] Statement of Indonesian Foreign Minister to the 48th AMM, Kuala Lumpur, 4 August 2015.

[30] *See "China, ASEAN vow to maintain peace on South China Sea"*, Xinhuanet, 29 July 2015, available at: http://news.xinhuanet.com/english/2015-07/29/c_134460610.htm.

Commonalities on the COC Consultation. The Commonalities will serve as starting agreed principle to be elaborated in the COC. Another point that has been decided is the Terms of References of the Eminent Persons and Expert Group (EPGP) on the COC.[31] The Group will assist the craft of the COC by providing professional and/or technical advice on the COC under direction form the Senior Official Meeting on DOC.

As mentioned earlier, it is in the very nature of Asian countries, particularly East Asia, to have a non-confrontational attitude in settling their differences. This leads to a culture to leaves the dispute open rather than to have a permanent and stable solution. Arguably, this phenomenon happened because there is no community building, particularly in the context of political and security, in the East Asian countries.[32] However, it should be noted that compare to Northeast Asian countries who have never settled any dispute over title to a third party dispute settlement, Southeast Asian countries has done it in a very selective manner.

6. Progress in Second Track Diplomacy

Whilst claimant states remain reluctant to openly discuss the core of the dispute, regional thinker and scholars have made significant progress in addressing the issue. Recent developments have brought impetus to the way people look at the conflict. Public discussion embracing legal perspective has clarified the claims and categorized the complexity of the issue into clear pictures. The issue is now clearly distinguished into different but interrelated levels. In this manner, they have already touched and analyzed the core issue, in particular, the basis of the respective claim and made projection on their potential strength and weakness in term of international law. It is with a great enthusiasm to observe that reference to International Law and UNCLOS has already been made and firmly upheld in the DOC and its implementing documents including in the List of Commonalities.

Legal scholars might provide further assistance by exploring some legal issues arising from the recent developments with a view of clarifying the complexity of the dispute. The legal scholars might provide legal answer aimed at removing the 'conundrum' issues that already occupied of in the crafting of the COC.

The first legal question needs to be discussed is concerning the so-called "critical date" of the issue. The element of critical date is significant to the territorial disputes. The ICJ on the Indonesia/Malaysia case over Pulau Sipadan and Ligitan stated that *"it cannot take into consideration acts having taken place after the date on which the dispute between the Parties crystallized unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on*

[31] *See "China, ASEAN to work together to safeguard peace, stability of South China Sea: Chinese FM"*, Xinhuanet, 3 August 2015, available at: http://news.xinhuanet.com/english/2015-08/04/c_134477024.htm.

[32] *See* N. Hassan Wirajuda, *"Dispute Settlement based on UNCLOS 1982 and the East Asia Dispute Settlement Culture,"* paper presented in *International Seminar on Maritime Delimitation and Fisheries Cooperation,* Bali, Indonesia, 26 August 2015.

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them".[33] This concept is relevant and needs to be developed in the discussion on the South China Sea by exposing that any actions taken after that "critical date" are excluded from consideration in legal assessments and therefore do not affect the legal status of maritime features in the South China Sea.[34] The critical date is normally set at the point that the dispute first emerges and is known to each party.[35] The principle will characterize the activities of all claimant states over the features under occupation as having no legal effect and will not constitute consolidation of title. The public awareness on this principle will expectedly ease the tension and mistrust among claimant states. The most important is that the 'critical date' might constitute element to the concept of 'self restraint'. The homework for legal scholars is to explore and determine the possible "critical date" of the South China Sea dispute that might be agreed among them by using a legal parameter.

The second question is concerning the dispute itself. What constitutes dispute and where the geographical scope of the dispute precisely is. The ramification of the dispute has brought about differences in defining the nature and scope of the dispute. Although all claimant states mostly started from the claim of maritime features, the ramification of the dispute has affected its maritime zones. Some claimants might not agree that its continental shelf and EEZ are included in the area to be disputed and therefore insist in putting them outside the disputed area. It is related to the inquiry on the determination which areas are disputed and which are not.

The third question is the exploration of what so-called 'historic claims' introduced by China, in particular what it means from the terms of international law. The discussion might be developed to the inquiry on the relationship between UNCLOS and 'historic claims' and how they are reconciled one to another.

The public understanding concerning the dispute among people in the region will contribute to the strengthening of community building. The prospect of the final settlement actually lies within ASEAN mechanism itself. Although it is not yet advance, ASEAN has started the blue print for its community building, which lays on three pillars namely economic, socio-cultural, and political-security. The influence of this community building should also targeted in relation with ASEAN dialogue partner, which includes China. When the community building reached to certain degree of trust between its participants, in the context of the South China Sea, the dialogue for conflict prevention will be successful. Furthermore, when the community building has reached its advanced stage, where dispute resolution becomes the essential part of it, it is not impossible that claimant states will agree to settle their dispute through a third party mechanism although it is not necessary done within the ASEAN system.

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[33] Sovereignty over Pulau Ligitan and Pulau Sipadan [Indonesia/Malaysia, Judgment, ICJ Reports 2002, p. 682, para. 135.

[34] *See* Miyoshi Masahiro, *"The "Critical Date" of the Takeshima Dispute,"* 30 January 2015, available at: http://islandstudies.oprf-info.org/research/a00016/.

[35] *Id.*

7. Indonesia and South China Sea Dispute

It has been a long standing position of Indonesia that the Country is not part of the dispute.[36] Indonesia is not claiming any feature in the South China Sea. *Vice versa*, China has not claimed Natuna Islands located in the South China Sea that belongs to Indonesia. Some doubts had been raised in 1990's whether or not China claimed the Natuna Islands following the disclosure of China's 9-dash-lines in 1993. The doubt has been removed when Foreign Minister Qian Qichen in 1995, in respond to Foreign Minister Ali Alatas question, clarified that China has no claim over Natuna Islands. In that neutral position Indonesia would be happy to be an honest broker to the dispute. Unfortunately, the statement issued by Coordinating Minister Luhut Panjaitan in November 2015, saying that Indonesia will bring the case against China to International Court, inadvertently has induced some medias and public commentators to jump to the conclusion that Indonesia and China have dispute on island and they easily referred to Natuna Islands. In managing the controversy, which apparently became misleading, Foreign Minister Retno Marsudi corrected the distorted report and stated that China has no claim over Natuna Islands.

The complexity of the dispute to some extent confuses Indonesian public about the position of the country in whole problem. As mentioned above, the dispute has proliferated and into multi-dimension cases. It is not only about ownership of the maritime features but also about maritime claims. Then it comes to the question of maritime status of the features whether they are islands, rocks or reefs. Together with the mystery of 9 dash lines, the dispute becomes most complicated and not easy for the public to understand. The complexity is the main reason why the dispute is understood differently and diversely amongst Indonesian public.

The remaining issue which concerned Indonesia is the fact that one of the dash lines has been said as encroaching Indonesian claimed ZEE in Natuna waters. Actually there is no geographical datum attaching to the 9-dash-lines so no one could be sure where exactly the lines are. Apparently, some have argued that it is in the Natuna waters. This is the root problem that showing, as if, Indonesia had dispute with China over maritime claim, and therefore lent to a convincing reason that Indonesia is a claimant state.

Claiming that Indonesia is a claimant state simply by the reason that it has overlapping maritime claim with China, if any, in the South China Sea is not very convincing on the following reasons. First, the notion 'claimant states' mostly refers to overlapping claim over title to islands, not to overlapping claim to maritime zones. Indonesia has overlapping maritime zones in entire bordering areas with all its neighbours and hardly been said as 'claimant state'. Second, whether or not Indonesia has overlapped its maritime claim with China could not be determined simply by the fact the there exists one of the dash lines. Indonesia has long been protesting the lines as lacking international legal basis. In order to constitute that there is an overlapping

[36] The position has been recently reiterated by President Jokowi during the ASEAN Summit in Kuala Lumpur, 22 November 2015.

claim, China should first clarify where the line is and then it is followed by a clear statement that the line is intended to determine its claim over the maritime zone. The problem is that China is always silent on the mysterious lines. In this circumstance, claiming that there is a dispute between Indonesia and China is legally incorrect and too premature.

From the law of the sea perspective, there would be a potential maritime claim involving Indonesia in the South China Sea only if the condition has already been met. The condition is that Spratly archipelagos are island entitled to 200 maritime zones. The distance between Natuna Islands and Spratly Islands is less than 400 miles under which, if they are islands in term of UNCLOS, Indonesian-claimed ZEE will encroach areas belong to Spratly. The potential maritime claim is still far from clear. The determination whether or not Spratly features are islands or only rocks, or even only low tide elevation as being claimed by the Philippines, will be dealt with the Arbitral Tribunal on the above mentioned case.

8. Conclusion

Having visited various aspects surrounding the dispute, it apparently clear that the dispute has been developing significantly. The dispute, which was previously shelved under carpet, has come into fore and reached its mature stage. It is developing from merely formal claim into substantive claim, from procedural into the merits of the dispute, from merely preventing escalation into touching the core dispute, and from political talks into judicial determination.

Various status and roles have been attached to Indonesia by many observers. Albeit Indonesia claims that it is not party to the dispute, some observers insist in putting Indonesia as being involved in the case and even regard it as a claimant state. This kind of assessment merely relies on the 9-dash-lines, which is not only unclear but also legally baseless.

Indonesia is not a claimant state but an interested state in the conflict. As a coastal state to the South China Sea, the escalation in the regions will affect the security interest of Indonesia. Therefore it is the interest of Indonesia to be involved in the conflict management and, having considered its neutral position, could act as an honest broker.

The dispute has been increasingly clarified in term of legal perspective. The legal approach to the dispute may help all claimant states to speak and argue in the same legal logic. The question of 9-dash-lines is also being scrutinized from international norm-based consideration. Its legality shall be tested in accordance with prevailing law with a view of removing its ambiguity. The Arbitral Tribunal dealing with the case brought up by the Philippines against China is expected to clarify the dispute to be more legally sound.

BHAKTI - DHARMA - WASPADA