S. China Sea claims: Problems with technocratic way to peace

It is unlikely that smaller Asean states would risk forgoing the protection provided by Unclos and international law in negotiations

Robert Beckman

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I wish to respond to the commentary by Parag Khanna on Oct 29 in The Straits Times entitled "South China Sea claims: Technocratic way to peace?"

The author's thesis seems to be that sovereignty and maritime disputes in Asia generally, and in the South China Sea in particular, could be resolved if Asian states adopted a "technocratic peace theory" to resolve outstanding sovereignty and maritime boundary disputes.

This would involve negotiations between technocrats who are credible senior representatives from the disputant states. The negotiations would be confidential, and the technocrats would remain anonymous, but they would be authorised to make binding decisions on behalf of their states. As the negotiations come close to a settlement, the politicians and political leaders would be briefed on the terms of the settlement so that they could "sell the deal" and claim victory in the negotiations.

The author states that an important virtue of this technocratic approach is that it is not biased towards legal conventions or frameworks that not all parties view as "legitimate". He believes that this is necessary because the sovereignty and maritime disputes in the South China Sea are "pre-legal" because they arose before the development of modern international law in the late 19th and early 20th centuries. He supports this by pointing out that sailors from China and South-east Asia have fished and traded in the region for over 3,000 years.

The author also states that in 2019, China offered the Philippines the possibility of joint oil and gas exploration in disputed waters off the Philippines with 60 per cent of

the profits going to the Philippines in exchange for the latter giving up its claims to the islands occupied by China, but that ultimately the deal was not politically viable because it had been unilaterally proposed by China. He hints that if his proposed "technocratic peace theory" had been followed in that case, the proposal may have been accepted as a win-win solution in the economic interests of both China and the Philippines.

In this response, I will discuss the rationale for this proposal and how it could impact the maritime and sovereignty disputes in the South China Sea.

Disputes do not pre-date modern international law

The author justifies his proposal by stating that the sovereignty and maritime disputes in the South China Sea pre-date the development of modern international law. This is simply not correct.

Most of the states in South-east Asia achieved independence as a result of the development of international law after the founding of the United Nations in 1945. The sovereignty disputes over the islands in the South China Sea arose at the end of World War II because the peace treaties were silent on which state had sovereignty over islands that had been occupied by Japan.

The sovereignty disputes over the Spratly Islands became more complex in the 1970s for two reasons. First, states became aware that the seabed in the South China Sea contained hydrocarbon resources. Second, the negotiations at the Third United Nations Conference on the Law of the Sea began in 1973. The objective of the conference was to establish a legal order to govern all uses of the oceans, including new regimes setting out rights and jurisdiction of coastal states to explore and exploit fisheries and hydrocarbon resources.

In order to protect any rights to resources that the new convention might give states from their offshore islands, the states bordering the South China Sea, including Malaysia, the Philippines, Vietnam and China, began to occupy previously unoccupied islands and other smaller features in the Spratly Islands.

More than 150 delegations, including China and all of the Asean states bordering the South China Sea, participated in the negotiations at the United Nations Conference to draft a new law of the sea.

The push to establish a 200 nautical mile exclusive economic zone in which the coastal states have sovereign rights and jurisdiction over all of the fisheries and hydrocarbon resources, with no recognition of the historic rights of other states, was led by Latin American states and supported by the Group of 77, including China.

After nine years of negotiations, the United Nations Convention on the Law of the Sea (Unclos) was adopted on Dec 10, 1982. Unclos entered into force on Nov 16, 1994. There are currently 168 parties, including China and all of the Asean states surrounding the South China Sea.

Consequently, it is clear that the sovereignty and maritime disputes in the South China Sea did not predate the modern law of the sea. Rather, they arose as a consequence of the modern law of the sea.

Dangerous to ignore legal conventions or frameworks

The second reason the author's proposed technocratic approach cannot be accepted is that he has proposed that the sovereignty and maritime dispute be resolved by technocrats from the two states without taking into account legal conventions or frameworks if one of the parties does not view such conventions and frameworks as legitimate.

In such a scenario, even if both states are parties to Unclos, but one of the parties indicates that it does not view as legitimate certain provisions in Unclos, the technocrats should still proceed to resolve the dispute without taking the Unclos provisions into account, even though the provisions are legally binding on both states under international law.

If the technocrats are to resolve the disputes without considering international conventions that are legally binding on both states under modern international law, how would they resolve the dispute? This is not clear except that the author seems to suggest that they would resolve the dispute by considering the pragmatic economic

interests of the two states. In addition, he might be suggesting that the technocrats consider the laws and practices followed in Asia before the development of modern international law, such as during the Ming Dynasty.

Importance of Unclos to Asean member states

For more than 30 years, the Asean states have stressed the importance of Unclos and international law in addressing the disputes in the South China Sea. The continued importance of Unclos to the Asean states is clear from the numerous statements of Asean on the South China Sea.

Just last week, at the 38th and 39th Asean Summits, the chairman's statement reaffirmed that Unclos sets out the legal framework within which all activities in the oceans must be carried out, and that its integrity must be maintained.

Given the importance of Unclos to Asean states, it is highly unlikely that any Asean state would agree to authorise its technocrats to negotiate practical solutions to maritime disputes which are not consistent with its rights and obligations under Unclos.

2016 award of the arbitral tribunal

None of the states surrounding the South China Sea has challenged the legitimacy of Unclos.

However, China has pointed out that as the preamble to the convention states, matters not regulated by the convention continue to be regulated by the rules and principles of general international law. China has also maintained that it is entitled to claim an exclusive economic zone and a continental shelf from the islands over which it claims sovereignty, notwithstanding the decision to the contrary by the arbitral tribunal in the 2016 South China Sea case.

Under Unclos, the 2016 award of the arbitral tribunal in the South China Sea case is legally binding on the two parties to the case, the Philippines and China. However, China decided not to participate in the case, and it has officially stated that it regards the award of the tribunal as "null and void", or illegitimate.

The Asean states bordering the South China Sea, as well as an increasing number of states from outside the region, are challenging China's maritime claims, especially its claims to resources in the exclusive economic zones of other states, as contrary to Unclos.

China continues to insist that arbitral award is null and void, and that it has "historic rights" to the fisheries and hydrocarbon resources in the South China Sea within the exclusive economic zones of other states.

The Asean states bordering the South China Sea are likely to assert that as ruled by the arbitral tribunal in the South China Sea case, when it became a party to Unclos, China gave up any "historic rights" to natural resources that are now within the exclusive economic zone of other states.

The proposal of the author would resolve these issues by referring any dispute between China and an Asean state to technocrats from the disputant states. They would resolve the dispute without reference to the 2016 arbitral award because China does not regard the award as legitimate. They would attempt to find a win-win compromise that would be economically beneficial to both states.

Such a solution would most likely be welcomed by China. The question is whether any of the Asean states bordering the South China Sea would agree to such a procedure. This is especially true when a smaller state has a dispute with a much larger and more powerful state. In such circumstances, the smaller state is unlikely to set aside its rights under an international treaty or under an arbitral or judicial decision which supports its position.

The proposal by China for joint oil and gas exploration in waters off the Philippines was referred to by the author. If the proposal had been referred to technocrats from both states, and they decided to ignore the 2016 arbitral award because China considers it illegitimate, would the proposal have been accepted? Perhaps.

But my understanding is that there were also serious questions about whether the proposal was consistent with provisions in the Constitution of the Philippines. It is doubtful that any government would have the authority to authorise technocrats to

resolve a dispute by ignoring their own Constitution, as well as legally binding decisions of an arbitral tribunal.

Consequently, in my opinion it is highly unlikely that any Asean state will indicate much interest in the "technocratic peace theory" proposed in the article to resolve the intractable disputes in the South China Sea.

- *Robert Beckman is head of the Ocean Law and Policy Programme at the Centre for International Law, National University of Singapore, and an emeritus professor in the NUS Faculty of Law.*