

Sea claims not well grounded

By Bunn Nagara



Long wait: resolution of the South China Sea disputes will most likely take a long time, due to their multiple layers of challenges

WHEN a problem clearly becomes hopeless, it may generate one of two opposite reactions – intellectual equivalents of fight or flight.

One is to see tremendous hope in the depths of disappointment; the other is to surrender utterly to crushing despondency. Both extreme reactions are equally unrealistic.

The intractable South China Sea disputes with their multiple layers of challenges form one such example.

Bill Hayton of London's Chatham House (Royal Institute of International Affairs) think tank became an authority on the subject with his 2014 book *The South China Sea: The Struggle for Power in Asia*.

China was more concerned about the Paracel Islands closer to home, not objecting to France's claim to the Spratlys in 1933. For much of the time China even seemed unaware of the Spratly Islands.

Beijing began to claim the Spratlys only in 1946. This island group is now hotly contested by Brunei, China, Malaysia, the Philippines, Taiwan and Vietnam.

In 2009 China sent a letter to the UN Secretary-General asserting its sovereign rights and jurisdiction over the relevant waters and islands of the South China Sea. Beijing argues that its rights date back centuries if not millennia.

But disputed claims based on little more than assumptions in a hazy and distant past pose problems abroad. Nothing substantive or meaningful can be anchored in international law recognised by all claimants.

For any country to display old maps of questionable origin to support the claims as ancient and therefore legitimate is not enough. That only enlarges the disputes, which is what has happened.

But what have Chinese geographers and legal experts made of Hayton's revelations? Apparently they have yet to respond, since a Chinese translation of his work is on the way.

Such findings can better inform the disputes, raise the level of debates and encourage more reasonable claims. But that is as far as they go.

New information does not enable anyone – not even Hayton, as he claims – to resolve the South China Sea disputes in a week. That is sheer delusion in full flight mode.

Greater familiarity with such disputes would make the many challenges clear enough. But some false hopes still need to be exposed.

The issue of joint development is among them. China has offered to conduct joint exploration and development with other claimant countries, but that has been rejected.

Apart from the problems of who should pay how much of the costs and receive how much of the profits, any partnership in the spoils of a dispute is no answer. In law, it would already be an admission of another country's rights over one's national territory.

Another problem area is the nature of talks itself. Given the multiple claims, should negotiations be multilateral involving all the claimant countries or just bilateral?

China insists on bilateral negotiations only, probably in series as it deals with one country at a time. The general perception however is that only inclusive multilateral talks can be worthwhile.

However, bilateral talks have also been seen as more realistic since the overlapping nature of the claims would get nowhere multilaterally. Too many conflicting disputes with far too many starting points may not see any progress.

But bilateral talks themselves may still go nowhere – each set of talks between two countries cannot proceed without recognising the prior arrangement made in the preceding set of talks involving other countries.

The fundamentally flawed nature of both bilateral and multilateral talks testifies to the surreal nature of ever resolving such disputes. The only realistic assessment of the prospect of successful talks may just be that success is unrealistic.

If all six parties claimed all of the Spratlys, then perhaps a settlement may be reached based on an equitable partitioning of the territory.

Alternatively, if each of the claimant states staked a claim on only a part of the area, a settlement may also be reached through an agreed distribution of those parts.

But none of those situations applies. Brunei, Malaysia and the Philippines each claims only part of the Spratlys, while China, Taiwan and Vietnam each claims all of the island group.

Complicating things further, there are overlapping claims by two or more countries. Worse, there are several areas of overlap by different sets of countries.

Besides the claims, claimant countries have also occupied various islands, outcrops and underwater features. Vietnam has some 30 military outposts on them, far outnumbering all the others which have 10 or fewer outposts each.

Backed by enormous resources, China has lately been the most ambitious in its scale of construction and land reclamation on the features it occupies. It has also rejected international legal hearings.

International law does not accept historical claims based on assertions, however vocal. Critics say that China avoids international hearings because it may lose by basing its claims on history alone.

However, China says that such disputes centre on national sovereignty, and tribunals such as the Permanent Court of Arbitration that rejected its claims last year have no authority to decide on issues of national sovereignty.

To add still more colour and complexity, Taiwan's claims have been subsumed by China. Since China already claims Taiwan as a province, Taiwan's claims are also China's.

This leaves Taiwan in an uneasy position. Even as it wants to assert its own individuality, it is comforted by China's embrace in its claims to outlying territory.

The other player that is not actually in the game is the US. When the Philippines once relied on it for backing if not outright protection in staking its claims, there are now serious second thoughts.

Unlike claimant countries including China, the US has no claim to any territory in this region. In one sense that makes it neutral in overseeing order on the high seas.

However, in another sense it means an asymmetrical relationship where the US may not go very far in protecting a country's disputed claims over another's. At the same time, the US has a very large economic stake of its own in maintaining healthy relations with China.

That explains US actions being limited to "freedom of navigation operations" (Fonops), which see its vessels plying through waters that China has declared as its own.

These are only symbolic and temporary gestures challenging China's own rhetorical assertions and presumptions. And that is just how they have been treated.

Hayton argues that countries in South-East Asia should be more assertive in making their own historical claims as China does, since they have been using the South China Sea for millennia.

However, use of waterways by a country's nationals in their passage (unlike occupation) may not equate to that country's sovereignty over the waterways in international law.

Besides, sovereignty may be claimed only by nation states, and those of today's South-East Asia did not exist centuries or even decades ago. Meanwhile state entities like Champa, Majapahit and Sri Vijaya are no longer with us.

Such challenges make any resolution of the South China Sea disputes most unlikely even in a month of blue moons.

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