UNCLOS and Ocean Dispute Settlement: Law and Politics in the South China Sea


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The South China Sea (SCS) dispute has been a hot issue for decades. Lawyers, diplomats, political scientists, and other experts on this issue have been struggling for the establishment of a regime to govern the maritime area in the South East Asian region. This book is very timely in the sense that it proposes an idea to settle the dispute, after the author of the book under review, Nong Hong, thoroughly considers the backgrounds and structural aspects of the dispute from various points of view, including international legal and political factors. The book originates from her PhD dissertation, completed in 2010, and stresses the significance of the maritime regime, or the United Nations Convention on the Law of the Sea (UNCLOS), as a regime to govern dispute settlement and to maintain the peace and stability of the region. As the subtitle of this book (‘Law and Politics in the South China Sea’) shows, however, the author does not only focus on the legal significance of UNCLOS and its applicability to the SCS dispute, but also makes an attempt to provide a collaborative point of view, melding international law and international politics (relations), and even to propose a new paradigm to settle the dispute.

In Chapter 1, which explains the purpose and scope of the book under review, the author ‘aims at, on one hand, exploring the most practical mechanism to settle the SCS dispute under the new development tendency, and on the other hand, assessing the effectiveness and implementation of UNCLOS as an international regime to settle maritime disputes’ (p. 2). In order to evaluate the effectiveness and the role of UNCLOS, she takes the
approach of regime theory in this book. By doing so, the book looks ‘both at the internal regimes of UNCLOS and at the relationship of UNCLOS and other regimes and institutions in the SCS’ (p. 3). Chapter 2 provides a background to the SCS dispute and its development from several dimensions, including geopolitics, history, military, and security, as well as the claim of each disputant, the interests of the external players involved in the disputes, and the recent developments since 2009. This chapter is also well organized and visually informative to the reader with four different illustrative maps concerning the SCS and three well-classified tables (historic events in the SCS, military installations in the Spratly Islands, and military exercises in the SCS from 2007 to 2009). These maps provide the compact explanations of the famous U-shaped line (in its earlier shape), occupation claims, resources distribution, military significance, and historical developments of the dispute in the region. Although the map of 1947 cited in the book (Figure 2.1, at p. 11) shows the ‘U-shaped line’ here, one may note that there is another famous official map of the same year published by the Government of the Republic of China under the title of ‘Map of the Location of the Hainan Islands’. This map indicates that there were originally eleven segments of the U-shaped dotted line. In addition, one may be tempted to refer to the appearance of the nine-dotted line on a map attached to the note verbale dated 7 May 2009 from the People’s Republic of China to the United Nations Commission on the Limits of the Continental Shelf (CLCS) with regard to the joint submission by Malaysia and Vietnam to the CLCS on 6 May 2009. It is important to recall that this occasion of the so-called ‘paper war of protests’ at the CLCS can be said to be one of the elements to have heightened tensions in the recent situation of the SCS.

Chapter 3 discusses the dispute settlement regime of UNCLOS and its applicability in the SCS. The author of the book under review positions island regimes at the core of sources of the SCS dispute, surrounded by other factors such as historic concepts (historic waters/rights/titles), resources management (including fishing, oil and gas), freedom of navigation, and marine environment. She distinguishes three categories of disputes: the sovereignty of the islands (a matter covered by Article 121(3) in particular), maritime zones generated by islands, and maritime delimitation. The first issue is, for the author, ‘the core issue’ (pp. 42 & 92), although Article 298
of UNCLOS, which provides some exceptions to the compulsory procedure of dispute settlement under UNCLOS, functions to allow China to advance its own unique idea about the U-shaped line and its historical significance. With respect to a third-party forum, the author, who does not necessarily seem to support the use of the mechanism, restricts herself to the idea that ‘[t]he political culture in East Asia sets and impediments for the states to resort to a third-party forum to resolve disputes’ (p. 94). She admits the comparative effectiveness of UNCLOS in terms of its internal coherence in its application to the SCS.

Chapter 4 considers state practices under UNCLOS in the SCS through the following aspects: attitude toward international law, participation in UNCLOS negotiation process, maritime legislation by the SCS countries, and practice of dispute settlement of parties concerned in the SCS. The author of the book here under review carefully and thoroughly deals with state practice by making a full and wide survey of the domestic policy, legislation, some other relevant incidents, and so on. The author stresses that although Asia, generally, has its own political culture evident in their attitude to a third-party forum in dispute settlement, China, among others, should be encouraged to place more weight on the third dispute settlement mechanism under certain conditions. Since ‘the situation of the SCS is where multiple issues interrelate with each other’ (p. 143), a theoretically sound legal system, which may refer to modern international law largely fashioned by European states in the past 300 - 400 years, does not always play a positive role in fields such as maritime delimitation, overlapping maritime jurisdiction claims, fishing disputes, and trans-boundary marine environmental pollution. However, one may still want to know more about the author’s analysis and arguments concerning Chinese or Taiwanese perspectives on the modern and contemporary international law created mainly by major Western states, on the one hand, and the author’s opinion on the validity of the arguments that China and some other Asian countries may have their own perspective on historical elements (historic title, historic waters/seas, historic rights, etc.) that will not be explained or justified within the framework of international law, on the other hand.

In Chapter 5, the author of the book under review deals with the relationship between UNCLOS and other regimes and institutions in general in the SCS, referring to regime theory. This relationship is considered across
four fields: maritime security, marine environment protection, oil and gas joint development, and political interaction (ASEAN + 1 Mechanism). The first section of this chapter, under the title of maritime security, addresses the 1988 Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention), the Amendments to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 (2005 SUA Protocols), the Proliferation Security Initiative (PSI) Interdiction Principles of 2003, and the maritime policy of coastal states and maritime states (or, for the author, ‘user states’), both of whose interests may cause clashes between sovereignty and freedom of navigation. The author stresses the importance of mutual understanding and confidence among states in the SCS for maritime security cooperation in this region. The second section deals with marine environmental protection regimes in the SCS with a view to enhancing marine environmental cooperation, and proposes a strategy to ‘depoliticize environmental cooperation in the region’ (p. 180) so that marine environmental cooperation may initiate and forge substantive inter-governmental cooperation without touching the sensitive political issue of sovereignty. The third section refers to the difficulties in implementing joint development regimes in the SCS, though the merits of shelving the sovereignty and maritime delimitations issues are admitted. The final section discusses the functions and limits of the ASEAN + 1 (China) regime for solving the SCS disputes, by focusing the position and policy of China vis-à-vis ASEAN. Considering the regimes relevant to the SCS disputes, the author concludes that ‘UNCLOS plays a critical but not comprehensive role in providing legal regulations and rules’ (p. 199).

Chapter 6 proposes a pragmatic settlement regime for the SCS dispute from the following five dimensions: cross-strait cooperation (China-Taiwan relations) as a breakthrough for the China-Taiwan element in the SCS issues; environmental security as a driving force for regional cooperation; fisheries cooperation as a start of SCS dispute resolution; UNCLOS as a framework for ocean governance in the SCS; and transformation of ways of thinking as a foundation to lead policy and research direction. All the proposals except for the last one may sound pragmatic and easy for many readers to support. The last proposal, in which the author refers to the metaphysical and ideological elements of nationalism, sovereignty, and national identity with respect to
China’s domestic situation, however, probably deeply and extensively underlies the SCS dispute. The author argues that the policy makers and scholars (or, diplomatic communities and academics) on the SCS need to change their ways of thinking while ‘an interdisciplinary collaborated research agenda’, utilising both political knowledge and legal tools, ‘to address SCS disputes and potential regional ocean governance in this troublesome semi-closed sea’ (p. 232) are also necessary. By bridging the gap between theories and pragmatic approaches, the author supports more integral interpretations of the SCS disputes by relying upon the historical record in a way that may overcome the limits of theories and by introducing new ideas for resolution.

Chapter 7, as the concluding chapter, attempts to answer the following three questions raised at the beginning of the book: the constitutionality of UNCLOS; the applicability of UNCLOS as a settlement regime of maritime disputes; and the ability of international relations and international law to collaborate. For the author, the legal goal of UNCLOS is to provide a system of governance or to provide a constitutional framework, while its political goal is to establish an international order for the oceans by which to ensure peaceful maritime relationships. The former and the latter are two different things according to the author. Regime effectiveness of UNCLOS depends on the states’ responsibility to follow up with the implementation and improvement of UNCLOS in national marine legislation, ocean governance system, and state practice in ocean dispute settlement. Moreover, the author positively evaluates the applicability of UNCLOS in maintaining the ocean order in the SCS, and advocates the use of a third-party forum. The author reiterates five sets of policy recommendations that she proposed in Chapter 6. Finally, she shows that there is room for both international relations and international law to have an interdisciplinary collaboration with each other to settle the SCS dispute.

The strengths of this book are a thorough, careful survey of state practices of the parties concerned in the SCS dispute, and a concrete and pragmatic proposal of policy recommendations with interdisciplinary approaches between international relations and international law. There are some good collections of academic books on the theme related with the SCS dispute and UNCLOS for the last few decades.¹ The book is, however, written by a single author and widely covers both the consideration of UNCLOS as an applicable and
effective regime to govern the SCS dispute and the discussion of multifaceted and interrelated issues involved in the disputes. In this sense, the book will be counted as one of the most challenging monographs written in English on this theme in recent years. Since the Declaration on the Conduct of Parties in the SCS (DOC) was agreed upon by the ASEAN states and China in 2002, the possibility and perspective of upgrading the DOC to a binding legal agreement in the name of a Code of Conducts (COC) have been debated inside and outside of the ASEAN and the SCS states group. As China increasingly rises as a maritime and economic power with significant military force, the balance of power in the region and the international concern about actual tense situations surrounding the SCS will affect an outcome of diplomatic talks and negotiations among the parties concerned. This region cannot actually neglect the commitment and presence of US power as there will apparently always be a tug of war between the US and China. The readers of this book, most of whom will hopefully include practitioners, academics, politicians, and students, will certainly look forward to further research undertaken by Nong Hong with respect to updating the debate on a COC in addition to interdisciplinary collaboration between international relations and international law.

1 See, for example, Mark J. Valencia, Jon M. Van Dyke, & Noel A. Ludwig, Sharing the Resources of the South China Sea, University of Hawaii’s Press, 1999; Timo Kivimäki, (Ed.), War of Peace in the South China Sea?, NIAS Press, 2002; Sam Bateman & Ralf Emmers, (Eds.), Security and International Politics in the South China Sea: Towards a Cooperative Management Regime, Routledge, 2009; and Shicun Wu & Keyuan Zou, (Eds.), Maritime Security in the South China Sea: Regional Implications and International Cooperation, Ashgate, 2009.