

REVIEW ESSAY

Disputed Waters,
Contested Norms:
Framing Discourses on the
South China Sea Disputes

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POWER POLITICS IN ASIA'S CONTESTED WATERS: Territorial Disputes in the South China Sea. *Global Power Shift. Edited by Enrico Fels, Truong-Minh Vu. Cham: Springer International Publishing, c2016. vii, 546 pp. (Illustrations.) CAD\$224.00, cloth. ISBN 978-3-319-26150-8.*

MAJOR LAW AND POLICY ISSUES IN THE SOUTH CHINA SEA: European and American Perspectives. *Contemporary Issues in the South China Sea. Edited by Yann-Huei Song, Keyuan Zou. Surrey, UK; Burlington, VT: Ashgate, 2014. xvi, 309 pp. (Figures, tables.) US\$149.95, cloth. ISBN 978-1-4094-5594-3.*

UN CONVENTION ON THE LAW OF THE SEA AND THE SOUTH CHINA SEA. *Contemporary Issues in the South China Sea. Edited by Shicun Wu, Mark Valencia, and Nong Hong. Surrey, UK; Burlington, VT: Ashgate, 2015. xvi, 351 pp. (Tables, figures, maps.) US\$145.95, cloth. ISBN 978-1-4724-5295-5.*

THE SOUTH CHINA SEA MARITIME DISPUTE: Political, Legal and Regional Perspectives. *Routledge Security in Asia Pacific Series, 28. Edited by Leszek Buszynski and Christopher B. Roberts. Abingdon, UK; New York: Routledge, 2015. 222 pp. (Figures, maps.) US\$168.00, cloth. ISBN 978-0-415-72288-9.*

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ABSTRACT

Territorial disputes in the South China Sea (SCS) have recently attracted serious attention from policy makers and scholars alike, raising important questions about the role of international law. The four volumes reviewed here bring a range of existing and new perspectives to bear upon the debates surrounding tensions in the SCS. First, *Power Politics in Asia's Contested Waters* mostly focuses on state actors and their interactions regarding the SCS disputes. Second, *Major Law and Policy Issues in the South China Sea* and, third, *UN Convention on the Law of the Sea and the South China Sea* go beyond the state level of analysis and bring international legal regimes and rules to our attention, and relate them to states' practices. Last, *The South China Sea Maritime Dispute* seeks to combine various levels of analysis in order to situate the SCS disputes within the political, legal, and regional dynamics. The various contributors further extend their research by suggesting practical solutions, including promoting regional common heritage, the Spitsbergen model, and the shared sovereignty model. The books under review are not only highly pertinent to the current debate on the SCS disputes, but also suggest multiple levels and frames of analysis, as well as proposing some innovative solutions to this thorny problem.

Keywords: South China Sea, maritime dispute, sovereignty, UNCLOS, China

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The South China Sea (SCS) is a semi-enclosed sea surrounded by China and the Southeast Asian states. It has become a potential flashpoint in the Asia Pacific region. Six claimants—China, Vietnam, the Philippines, Brunei, Malaysia, and Taiwan—vie for their national interests in the SCS. In 2013, when the Philippines brought a case for arbitration to the International Tribunal for the Law of the Sea (ITLOS) under the United Nations Convention on the Law of the Sea (UNCLOS), the proceedings caused ripple effects around the region. The final ruling released in July 2016 has completely denied China's historic rights and lawfulness of Chinese actions. Questions on the outcome of this legal case have still followed: will an award from the tribunal be a game changer in the SCS, or at least will the award affect the concerned actors' policies? To what extent? The first question can be answered by observing the pattern of cooperation and conflict in the SCS, while the second can be answered by assessing changes in the interactions among actors. This essay will assess the contribution of a number of new edited volumes bearing upon this timely subject in Asian affairs.

The involvement of international law in the SCS disputes has certainly expanded the range of discourse relating to the SCS disputes. But it is unclear whether the Philippines effort to internationalize the disputes successfully achieved its goal even though the ruling went unequivocally against China's claim based on the historic narrative. Different theoretical approaches give different views on the recent development in the SCS. The books reviewed

here introduce a comprehensive assessment of the SCS disputes and suggest frames through which to analyse the updated cases in recent years. The sixty-five chapters included in these four edited books manage to exhaustively cover the current status of academic discourse on the SCS. This review essay provides a summary of each book, and then appraises its contribution to the current literature on the SCS disputes.

Though all four volumes are focussed on the same issue, they represent very different assumptions and methodologies. *Power Politics in Asia's Contested Waters* primarily focuses on state actors and their interactions regarding the SCS disputes. Authors in this edited book take different theoretical approaches in every chapter: traditional international relations theories, securitization theory, constructivism, power transition theory, and a few new models as well. China and the Southeast Asian claimants in the SCS are the main case studies of *Power Politics in Asia's Contested Waters*. Meanwhile *Major Law and Policy Issues in the South China Sea* and *UN Convention on the Law of the Sea and the South China Sea* go beyond the state-level analysis and bring international legal regimes and rules into consideration when assessing states' practices. *The South China Sea Maritime Dispute* further seeks to combine various levels, and suggests practical conflict resolution based on a multi-level analysis of the SCS disputes.

The first of the titles, *Power Politics in Asia's Contested Waters*, approaches the SCS disputes from the strategic and security perspectives. Based on a shared assumption that China's rising power has shaped major power rivalry and regional competition in the SCS, the editors, Fels and Vu, argue that China's agenda in the SCS is "gaining privileged rights in its 'near abroad' ... [in] its own maritime Monroe Doctrine" (10). The editors argue that a rising China will further jeopardize US interests in the SCS and freedom of navigation, and as a result the US will be forced to change its current position of being neutral as a non-claimant.

The authors of the first book discuss the factors contributing to instability in the SCS. Lanteigne argues that China's increased regional power has led to more assertive sovereignty claims in the SCS. Li particularly focuses on China's increasing naval capacity, and argues that it is part of an "on-going process of identity construction" (117) as a sea power. Li considers China's identity as an independent variable to explain China's growing naval capacity and strategy. Turcsányi shares a similar analytic frame. Turcsányi sees the attempts to exert power as a direct consequence of pursuing particular "strategic intentions" (174). He persuasively links China's core interests—consisting of the political system, economic development, and territorial integrity and state sovereignty—to its specific needs in the SCS to explain its strategic intentions.

Kivimäki's chapter in *Power Politics in Asia's Contested Waters* criticizes a state-centric analysis and argues that "East Asia strategic culture desecuritized to a degree" the discourses on the maritime dispute (73). He reasons that

developmentalism and legalism involve more non-state actors, such as lawyers and third-party organizations, than state-centric actors, therefore avoiding “an autocratic temptation for regimes to securitize more issues” (57). Ohnesorge studies the Spitsbergen Treaty of 1920, which resolved the sovereignty issue in a contested area of the Arctic Archipelago, Spitsbergen. He deems the problem to rest in China’s declarations and statements to the UNCLOS, which restrict dispute settlement procedures. One of the “creative diplomatic solutions” (48) is to learn from the Spitsbergen archipelago dispute that was solved by assuring absolute sovereignty to Norway while dozens of other concerned states still retained the shared right to economic activities in the waters. Ohnesorge also points out that a treaty like Spitsbergen would support China’s diplomatic principles, introduced by Deng Xiaoping in the 1980s, that advocated shelving the question of sovereignty and conducting joint explorations and development in the disputed waters (50).

Overall, the authors of *Power Politics in Asia’s Contested Waters* test different theories. China’s use of force is analysed in a bargaining power-prospect theory in chapter 10. Jones, in his chapter, argues that China’s use of force became more likely when Chinese leaders were situated in a domain of losses. The 1974 Paracels battle and the 1988 Sino-Vietnamese encounter in the Spratlys are used as cases to prove the author’s argument. Indeed, these naval clashes in the SCS have not been studied broadly in existing literature. His study fills the gap in the literature by using prospect theory to explain the causes of China’s naval skirmishes. Silva and Amorim test democratic peace theory, balance of threat theory, and regional security complex theory (RSCT) to find which theory is the most suitable analytic tool for the SCS security environment and the related strategies of Australia, Japan, and India. They conclude that RSCT is most useful for explaining the “formation of a supercomplex in the [SCS] region” (465). McEwen-Fial and Brand analyse power transition dynamics when smaller countries are involved and they form triangular relations such as China-US-Vietnam.

Other contributors to the first book reviewed the approaches of other SCS claimants with regard to their foreign policy and domestic politics determinants. According to Heydarian, the impact of Philippine domestic regime changes from pro-China to anti-China led a “qualitative change” and “dramatic recalibration” (354) in the three-way relationship between the Philippines, China, and the US. Hiep, on the other hand, argues that China’s increasing assertiveness in the SCS has forced Vietnam to pursue alliance-like politics with regional actors, though the strengthened relations do not include formal and treaty-bound commitments (285). A set of brief chapters on the non-claimant actors in the SCS follows, discussing the US, the EU, Japan, India, Australia, and New Zealand.

One of the strengths of *Power Politics in Asia’s Contested Waters* is its methodologically varied chapters. Abb focuses on patterns in China’s public opinion towards the other two competing claimants in the SCS dispute,

Vietnam and the Philippines, by analyzing over 1,500 pieces of commentary written by Chinese experts since 2010 (140). He concludes that Chinese experts view the SCS dispute as friction between China and the US, and these experts see local actors such as Vietnam and the Philippines primarily in relation to the closeness of their ties to the US. Lim similarly studies opinion pieces on Chinese Internet forums regarding the SCS and the East China Sea (ECS). Lim shows that the role of nationalism in the SCS dispute seems to be less pronounced than in regard to the ECS. According to Lim's data, the ECS dispute between China and Japan generates stronger emotions among Chinese people.

The second book under review, *Major Law and Policy Issues in the South China Sea*, focuses on how China's behaviour, the SCS disputes, and maritime disputes in general have been observed by others from the legal and policy points of view. The editors Song and Zou provide the book's rationale in chapter 1: the non-claimants to the SCS disputes, particularly European countries and America, have increased their involvement in the disputes. However, the chapters in this book do not directly analyze the European states or US interests and their involvement in the SCS disputes per se, except in the introduction and chapter 10.

Major Law and Policy Issues in the South China Sea mainly criticizes China from a legal, media, and military policy perspective (chapters 4, 10, and 12), and discusses China in comparison with Russia (chapter 8). In their chapters, Dutton and Schaeffer locate China's assertiveness in the SCS in, respectively, the authoritative nature of China's historic claims in the region, and a goal of incorporating the SCS as part a global strategy of naval encirclement of Taiwan. Franckx compares Chinese and Russian policy in the SCS and the North Pole respectively and finds common ground in their strategies, as they both drew an imaginary line in these contested waters.

The last two chapters by Lin and Townsend-Gault on Taiwan's position in the SCS disputes further develop this book's theme. Taiwan basically holds the same claims in the SCS as mainland China; however, there is certainly a difference in diplomatic choices between these two claimants due to the "One China" consensus. Lin and Townsend-Gault suggest that despite diplomatic restraints Taiwan has managed to engage in SCS ocean governance. Taiwan's participation in the South China Sea Workshop and the track two informal diplomatic initiative are pointed out. According to Lin, Taiwan and China share identical historical claims, and therefore are "natural partners" in the SCS. The respective chapters of Lin and Townsend-Gault contribute to the existing literature by analysing the expectations of other actors in regard to Taiwan, and their influence on Taiwan's policy.

The third book, *UN Convention on the Law of the Sea and the South China Sea*, edited by Wu, Valencia, and Hong, concentrates on "the differences between the UNCLOS and state practice" and "the evolution of the meaning of terms" of the UNCLOS (xvii). The authors assess the UNCLOS as an

evolutive body of provisions with obvious flaws, rather than a body that enforces fixed interpretations and directs governments to make particular applications. One of the achievements of the *UN Convention on the Law of the Sea* is that it presents the current discussion on the role of international law in the SCS disputes from both the Western and Chinese points of view. Throughout the chapters, uncertainties surrounding the UNCLOS provisions are raised, for example defining baselines, rights and obligations in different types of maritime jurisdiction zones, and conflict between sovereignty and freedom of navigation. Valencia's chapter deals with the asymmetric capabilities of China and the US from the realist's point of view; however, he also points out the asymmetric legal interpretations of China and the US regarding military activities in foreign exclusive economic zones.

The following chapters provide detailed examples of contested UNCLOS concepts and states' practices in accordance to these concepts. Djalal and Popovski see the UNCLOS as a balancer and norm provider for both coastal and noncoastal states. They point out the continued tension between the sovereignty of coastal states and the freedom of navigation of noncoastal states. Rothwell similarly raises an incompatibility issue between coastal states' security concerns and maritime states' innocent passage and freedom of navigation. Kaye and Tahindro explain the provisions of the UNCLOS on marine scientific research and military survey, and the feasibility of realizing the regional common heritage—also mentioned in the UNCLOS—in the context of the SCS. Schofield works on various types of baselines as defined by the UNCLOS, while Symmons and Beckman respectively explore the lack of rules of historic rights and the third-party dispute settlement system. Zou's assessment in chapter 11 shows that the UNCLOS “deliberately avoids the issue of ‘historic rights’” (242). Hong raises a point that China utilizes international law to “cloak” their national interests (268), and at the moment of ratification in 1996, Beijing was aware that the UNCLOS did not require China to accept any compulsory procedures. Gau's chapter further supports China's position that the tribunal had no jurisdiction over the dispute between the Philippines and China.

The fourth book reviewed is *The South China Sea Maritime Dispute*, which provides analyses from both political and legal perspectives. This book starts with Buszynski's assessment on the origins of the SCS disputes in relation to China's state formation. He explains the SCS had not been formally incorporated in the Chinese dynasties before the intrusion of France and Japan in the 1930s, and the maritime borders existed in the form of vague frontiers in the tributary system. However, after being alerted to the intruders and the inability of the San Francisco Conference in 1951 to restore the expected regional order, China realized it needed to regain its influence over the SCS. Ironically the Western and “modern concept of sovereignty” was used by China to strengthen its historical claim as it declared full title over the SCS (5). Buszynski concludes that China's historical claim in the SCS

dispute has no hope of being justified because the contemporary international law of the sea only gives full recognition to continuous administration rather than historical claims. The chapters written by Schofield and Rothwell share Buszynski's conclusions, but their tools of analysis are different: geographical circumstances, and the legal status of maritime features in the SCS, respectively. The direct claimants of the SCS and major external actors, including China, Vietnam, the Philippines, the US, and Australia, are analysed with regard to domestic and international laws.

Taylor maintains that the SCS is the "least dangerous" flashpoint in Asia (173). He employs the definition of "political-military 'crisis'" by Swaine and identifies the suitability of the SCS as a case for crisis through three criteria: core interests, urgency, and the advantage of military conflict (174). Does China have core interests in the SCS? His analysis indicates the answer could be yes and no both. The SCS is certainly believed to contain oil and natural gas, but Beijing has the capacity to divert its energy imports. From the Chinese point of view, is the SCS dispute an issue that needs to be urgently resolved? Not necessarily. The advantage of military conflict is also low because Beijing and Washington have "demonstrated their capacity to manage crises" in the SCS, as proved by the 2001 and 2009 clashes (177). Taylor's study raises a further question on the manageability of the SCS disputes. The last chapter, by Buszynski and Roberts, suggests the different goals set by stabilization efforts and plans for actual resolution. They argue that separate approaches to two different goals could establish realistic targets for conflict resolution.

Overall these four edited volumes deliver a comprehensive analysis of the recent developments in the SCS disputes from three levels: state actors, regional politics, and international legal regimes. From the state level, most chapters dealing with China's policies share an argument that China's increasing assertiveness has changed the status quo. Sitaraman and Sakaki in *Power Politics in Asia's Contested Waters* express their much stronger concern, stating that China's move in the SCS is territorial expansionism. From the Indian perspective, Sitaraman points out the "Chinese army's repeated intrusions" into Himalayan boundaries (418). Sakaki, from the Japanese point of view, similarly argues that China is engaging in "creeping expansionism in the maritime domain" in the South and East China Seas (426). This observation enables readers to assume that the perception of a China threat could have different contexts and contents depending on geographical proximity to China and historical experiences shared with China.

Three of the four books focus on the influence of the UNCLOS on the SCS disputes. The scholars of *UN Convention on the Law of the Sea* contribute to the literature by describing the UNCLOS as a compilation of legal and open provisions. For instance, the UNCLOS enables one party to unilaterally seek arbitration over a dispute; however, the UNCLOS also allows states to *not* participate in the compulsory procedure of arbitration (Jesus, 8–9; Gau,

305). The Philippines initiated the legal “showdown” with China under Article 287 of the UNCLOS, on the other hand China “opted out of compulsory arbitration” under Article 298 of the UNCLOS (Heydarian, 349–350).

The question of the limited influence of the UNCLOS on the SCS disputes is further linked to a question on the authoritativeness of the UNCLOS in relation to sovereign states. One of the concerns recently raised in the middle of the ITLOS arbitration is that the Philippines’ legal victory would not be able to effectively deter China’s activities in the SCS, including land reclamation and reconnaissance capability build-up. Is the UNCLOS a protector of the sovereign right of weak states or rather a guarantor of the sovereignty of stronger states? The books *UN Convention on the Law of the Sea* and *The South China Sea Maritime Dispute* provide good input on this unfolding discussion. In *UN Convention on the Law of the Sea*, Popovski (79) and Djalal (68) prove that the UNCLOS is a protector of weaker states because of Article 301, which declares that states “shall refrain from any threat or use of force against the territorial integrity or political independence of any State.” Djalal further advocates his idealist point of view in declaring that neither sovereignty of coastal states nor national interests of non-coastal states has *absoluteness*, and both should be respected by each other in accordance with the UNCLOS provision of *due regards* (emphasis in original) (67). Meanwhile, Buszynski and Roberts argue that “power can shape law” and nothing can prevent the littoral states from insisting on their claims (210–211).

Buszynski and Roberts, the editors of *The South China Sea Maritime Dispute*, attempt to find a balanced solution by concluding that “a legal resolution” and “a negotiated political agreement on maritime claims” can supplement each other (215). They suggest this approach after discussing factors such as the sovereignty of coastal states, coastal and maritime states’ conflicting underlying interests, and developments in the field of international maritime law. Their conclusion is based on a combination of political, legal, and regional perspectives.

The authors of the reviewed books further extend their research by suggesting practical solutions for the SCS dispute. Tahindro in *UN Convention on the Law of the Sea* suggests the concept of regional common heritage (114), Ohnesorge in *Power Politics in Asia’s Contested Waters* raises the Spitsbergen model (48), and Buszynski and Roberts in *The South China Sea Maritime Dispute* propose “joint condominium” or “shared sovereignty” (203). The suggested solutions deserve attention, and require follow-up discussion.

The Spitsbergen model suggested by Ohnesorge provides an historical example of a maritime dispute that ended in a successful resolution of competing claims of sovereignty and access for economic activity. Ohnesorge focuses on how that model was created in 1920; scholars in the field should focus on how the model could be applied today. What Norway wanted to achieve in the sovereignty dispute in 1920 and what China aims to obtain in

the SCS dispute could be different in both quantitative and qualitative ways. In this case, the equation that led to the Spitsbergen Treaty would not work for the SCS dispute. Meanwhile, the shared sovereignty model suggested by Buszynski and Roberts is more focused on potential benefits to China. The “shared sovereignty” model needs to be supplemented by follow-up studies on how other claimants could also benefit from this solution.

The reviewed books are not only well situated in the current discourse on the SCS disputes, but also suggest inter-level analyses and innovative solutions. *Power Politics in Asia's Contested Waters* focuses on state actors and regional instability, and includes scholars who offer hypotheses based on different causal relations that explain what has made the SCS more complicated in recent years. *UN Convention on the Law of the Sea* closely looks into the SCS disputes using terminology found in the UNCLOS. *The South China Sea Maritime Dispute* discusses the international legal regime's limited but influential role in state interactions in the SCS dispute. The contributors to *The South China Sea Maritime Dispute* prove that the legal paradigm cannot solely address the causes and consequences in the SCS disputes, but political explanation can supplement the practicality of research.

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