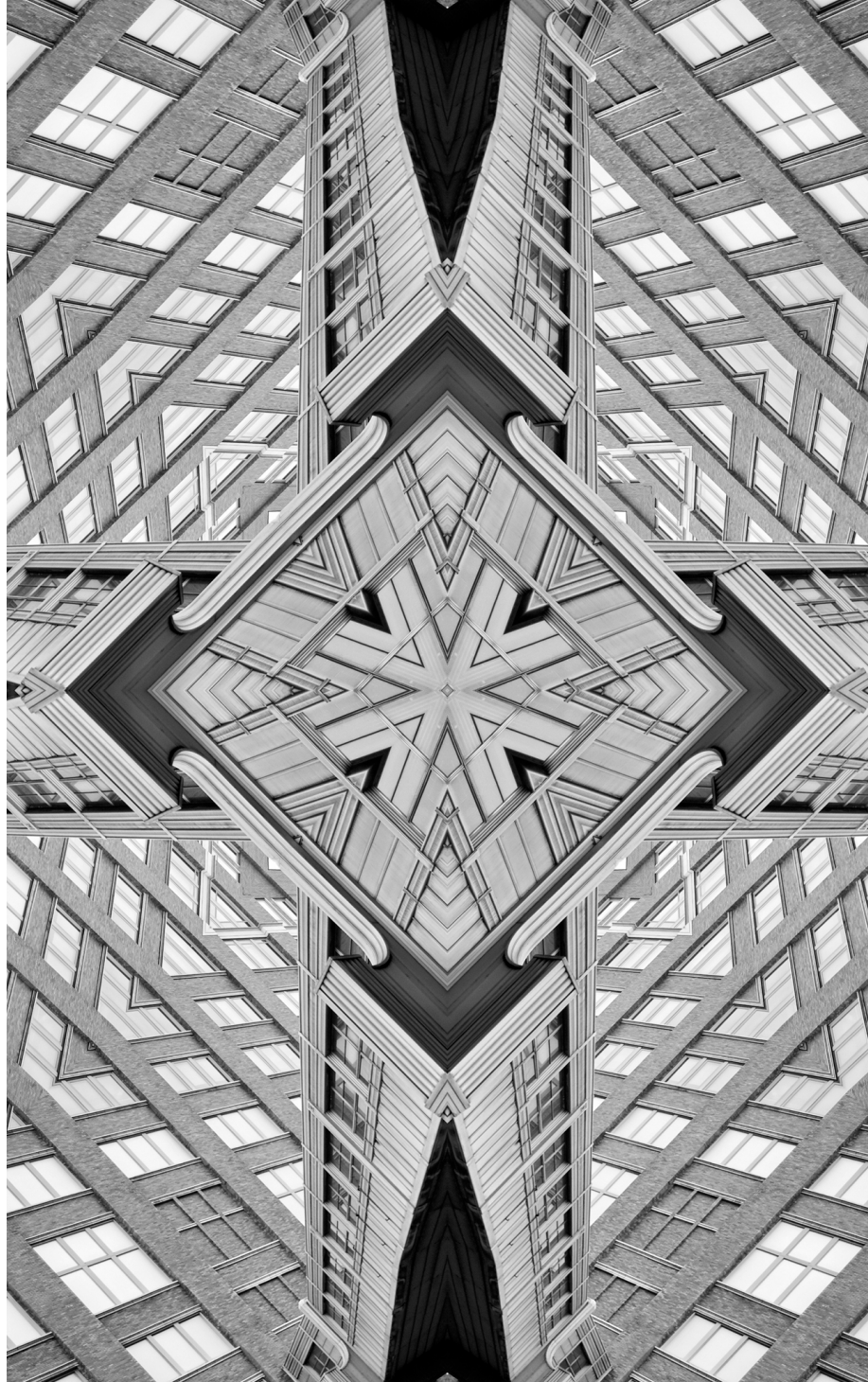


Issue

Brief

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Sovereignty Vs. Sovereign Rights: De-escalating Tensions in the South China Sea

Pratnashree Basu

Abstract

Competing maritime territorial claims in the South China Sea resulting in frequent provocations and standoffs are well-documented. China's increasingly assertive stance over its claims has led to increased militarisation of the region, making it a potential flashpoint. To better understand the complex SCS question vis-a-vis the extent of, and jurisdiction over this maritime space, this brief explores the distinction between the principles of "sovereignty" and "sovereign rights" in the context of the region. It identifies gaps in the existing maritime legal regime specifically with regard to making such a distinction, with the aim of developing a more coherent understanding and appreciation of the political geography of the SCS. This in turn can help identify bottlenecks in the existing maritime governance framework to enable the framing of functional, policy-oriented regional strategies.

Spanning 3.5 million sq. km, the South China Sea (SCS) is one of the world's most strategically important bodies of water. One-third of global maritime shipment passes through its sea lanes, and it is home to ample fishing, hydrocarbon, and mineral resources. It is a much contested region in contemporary geopolitics, with the tussles arising from the asymmetrical power relations between China and the region's other coastal states, and the extent and nature of their claims of ownership over it.¹

The conflict is over maritime limits as laid out by international law, on the one hand, and historical rights, on the other. This in turn has led to differing notions of the principles of 'sovereignty' and 'sovereign rights'. Challenges have arisen relating to the extent and exercise of legal rights and their relation to sovereignty. China has gradually sought to expand the ambit of what it considers its sovereign rights, which has led to the compromise of the sovereignty of other littoral countries.^a The distinction between the two is thus an essential component of issues around the SCS.

Two reasons are frequently cited for Beijing's belligerence in the SCS and the Indo-Pacific maritime space. First, China wants to diversify its sources of energy. The SCS holds an estimated 190 trillion cubic feet of natural gas and 11 billion barrels of oil in proved and probable reserves,² together with potentially undiscovered hydrocarbon. Second, exercising influence over the busy sea lanes of communication (SLOCs) that pass through these waters will ensure commercial and naval access for China into both the Indian and Pacific oceans. China claims historical rights over these waters as part of the Chinese Communist Party's aspirations both in domestic politics and global perception.

China's determined projection of control in the area—primarily by extending and establishing its physical presence in the many shoals, atolls, small islands, and other rock formations that dot the SCS—has steadily grown over the past decade. This strategy, which analysts refer to as "salami slicing", has led to constant competition in the region, adversely impacting regional stability. There have been disputes over a large segment of the sea outlined on maps by the 'nine-dash line' (all of which China claims, but which is contested by the other

a These are Brunei, Indonesia, the Philippines, Taiwan and Vietnam.

nations), China's building of artificial islands in the sea and militarising three of them, its new coast guard law that permits use of lethal force on foreign ships moving through the waters it claims as its own, and the increase in its maritime militia's patrols.

The response of the littorals, as well as that of external powers with interest in the region such as the United States (US), Japan, and Australia, has been largely episodic and reactive. And while Beijing is most often the principal instigator of tensions, other littoral countries, too, have engaged in similar activities, though on a smaller scale.

Delineating the disputed maritime areas is fundamental to any effort at de-escalating tensions. However, international maritime law is not enforceable. Compliance can be best ensured through deterrence mechanisms that would put the cost of non-compliance higher than engaging constructively within the limits agreed to.³ In the instance of the SCS, measures that would dissuade Beijing from acting unilaterally, or in consonance with its own interpretation of the extent of its territorial boundaries, need to be laid down. They can be both political and economic, but effective enough to discourage China's 'salami slicing.'

“China seeks to expand the ambit of what it considers its sovereign rights in the SCS, leading to the compromise of the sovereignty of other littoral countries.”

Establishing Marine Jurisdiction

China has based its extended sovereignty claims over the SCS on historical rights going back to the second century BC, when Chinese sailors discovered the region's major territorial features. However, the international legal maritime regime has never recognised historical claims as a legitimate source for granting sovereignty and sovereign rights. Therefore, in recent years, China has sought to manipulate the existing legal framework—primarily the United Nations Convention on the Law of the Sea (UNCLOS) to which it is a signatory—to justify its claims.

The UNCLOS recognises a 12 nautical-mile (22.2 km) distance beyond the coast of any country as part of its 'territorial waters'.^b It also confers some special rights on archipelagic states. China's new approach is based on what it calls the 'Four-Sha' or four major island groups in the SCS—the Spratly Islands, the Paracel Islands, the Pratas Islands, and the Macclesfield Bank area—which it claims as its own. Despite not being an archipelago, China has claimed the same rights under UNCLOS as archipelagic states and considers the waters between these islands as its internal waters. It has also asserted its right to regulate military activities in waters that are part of its exclusive economic zone (EEZ) under UNCLOS regulations. However, this contravenes the UNCLOS principle which maintains that freedom of navigation is an integral and universally accepted norm of international law.⁴ All this has created new complexities and uncertainty.⁵

Senior Chinese officials have characterised the SCS as a 'core interest' of China, similar to Tibet, Xinjiang, and Taiwan. Its effort to impose sovereign rights in the maritime domain has blurred the distinction between the rights of states within their land boundaries and those they can enforce in their maritime zones.⁶ International laws maintain that while states have total rights over their land, their rights over bordering sea extend only to exploiting its resources. This has aggravated the concerns of other coastal states about their maritime spaces. The problem is accentuated by the huge power imbalance among the parties to the conflict, as in the SCS dispute.

^b UNCLOS divides marine areas into five zones – 'internal waters' (which are within the 'baseline' of every coastal country), 'territorial sea' (stretching 12 nautical miles), 'contiguous zone' (which is another 12 nautical miles beyond the territorial sea), 'exclusive economic zone' (which stretches 200 nautical miles from the baseline) and 'high seas' or 'international waters'.

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In July 2016, a tribunal set up by the Permanent Court of Arbitration under UNCLOS ruled that the waters around the Spratly Islands could not be regarded as an EEZ for China's exclusive use. This has seemingly hardened China's position; it has since taken several unilateral administrative and coercive steps to augment its claims.⁷ It has renamed 80 geographical features of the SCS⁸ and established two new districts in Hainan Province to administer SCS waters.⁹ It has increased its coast guard and military activity in the disputed waters and harassed other coastal states' private and law enforcement vessels. In 2021, it passed new legislation strengthening the authority of the Chinese coast guard. It is also planning offshore energy projects inside the internationally recognised EEZs of Malaysia and Vietnam.¹⁰

The actions of individual states to counter Beijing's strategy have been sporadic, lacking a concerted and targeted approach that requires mustering political will and capital. Nonetheless, littorals of the SCS have intermittently undertaken measures to counter China. After a series of hostile encounters with Chinese vessels, for instance, the Philippines, in 2011, officially started referring to the SCS as the West Philippine Sea—which then US Secretary of State Hillary Clinton also endorsed.¹¹ Vietnam passed a law in 2012 asserting its sovereignty over the Spratly and Paracel Islands, and mandated prior notification from foreign military vessels that pass through the area.¹²

In 2013, the Philippines filed the arbitration case (referred to earlier) against China's claims over the Spratly Islands and the Scarborough Shoal.¹³ China invoked the exemptions under UNCLOS provisions and rejected the tribunal's intervention even before it started proceedings. The tribunal ruled in favour of the Philippines in 2016, dismissing any legal basis under international law for the nine-dash line. It also declared many geographical features of parts of the SCS which China used to bolster its claims for its EEZ to be ineligible under UNCLOS. It criticised China for violating its obligation to protect marine biodiversity as a member of UNCLOS, and for elevating navigation risks by constructing artificial islands in the SCS region.¹⁴

South-East Asian nations have also become more vocal about their displeasure over China's actions in the SCS.¹⁵ These countries have also stepped up their security and diplomatic engagements with the US, and other powers such as Japan, India, and Australia in the Indo-Pacific. In 2014, the Philippines, for instance, signed a 10-year military pact with the US, the Enhanced Defence

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Cooperation Agreement, which enables the US military to increase troop presence in the Philippines, gives it access to the country's ports and airfields, and engage it in joint training exercises.¹⁶

While the US and other countries in the Indo-Pacific and across the world have condemned China's defiance, much of the responsibility of projecting a coordinated and effective counter to China's aggressive posturing in SCS lies with the Association of Southeast Nations (ASEAN). In the past, ASEAN's responses have tended to be mostly diplomatic and rhetorical. In the last couple of years, however, there seems to have been a shift in ASEAN's position, especially with the release of its 'Outlook on the Indo-Pacific' report in 2019 which for the first time took a stronger position and also acknowledged the term 'Indo-Pacific'. This endorsement in itself marks the organisation's position on Beijing's expanding footprint in the region. Countries like Vietnam, the Philippines, Malaysia, and even Indonesia, have become increasingly vocal about China's maritime infringements. It is expected therefore that like-minded countries would find a more willing partner in ASEAN in mounting a response to China's inroads into the SCS.

The ASEAN nations and China are also deliberating on a Code of Conduct (CoC). First mentioned in 1996, followed by a written commitment to prepare one made in 2012, the CoC aims to build an understanding among countries locked in the dispute over the SCS and thereby lay the foundation for long-term stability. It is yet to be formulated, however, in what is turning out to be one of the world's longest exercises in diplomacy.¹⁷ The CoC is expected to be a guiding framework for the littorals of the SCS, but China and the ASEAN states continue to remain at odds over a number of issues¹⁸—among them, the geography and scope of permissible maritime activities, the role of extra-regional powers within the region, and whether the agreement should be legally binding. Given China's attitude, a final agreement on the CoC seems increasingly elusive.

Decoupling Sovereignty and Sovereign Rights

The disputes discussed in the previous sections are multidimensional. However, the critical distinction is between a state's absolute 'sovereignty' and its 'sovereign rights'. Sovereignty, as applied to states, comprises "rights and power over a territory, responsibility and accountability over a population, general and specific authorities, and recognition by other sovereign states"; sovereign rights, meanwhile, as utilised by UNCLOS, "pertains to the entitlements or privileges of a state to a defined area of a sea called the exclusive economic zone" and thus "represents the limited rights of a state over its exclusive economic zone."¹⁹ Every state's right to exclude external actors from its area of jurisdiction, as conceptualised in the principle of Westphalian^c sovereignty, assumes great significance in the context of the SCS.²⁰ This principle, if applied to the SCS dispute, raises questions on the validity of concepts such as 'innocent passage' and 'cooperative maritime boundary settlement' as envisioned in international law on marine administration. The conflict is mostly due to differences in the understanding of historical and modern sovereignty. It is not surprising, therefore, that administering a mutually acceptable framework of sovereign rights in the maritime zone is highly complex and challenging.

There is a rethinking of the idea of sovereignty, from an absolutist notion of complete non-interference in a state's domestic affairs to ensuring the state discharges its responsibility to protect the rights of its citizens, especially human rights. This has provided space for limited interventions by the international community on legitimate grounds. It has made sovereignty partly conditional on a state's performance in fulfilling its obligations.²¹ The question is whether this reassessment of sovereignty can be extended to a state's obligation in the maritime domain under international maritime law. The UN's Declaration on Principles of International Law creates a responsibility for states to duly acknowledge equal sovereignty of all and the sovereign rights inherent therein. Suppose it is established that China is leveraging its economic and political heft to violate the sovereignty of coastal states of the region. Can this be a legitimate ground for intervention by external players such as the US and its allies, international and regional bodies such as the UN and ASEAN, or even multi-

^c This refers to the Peace Treaty of Westphalia, reached in 1648, which ended the Thirty Years War in Europe, and which agreed that there should be no external interference in a state's domestic affairs. The principle was subsequently enshrined in the UN charter.

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nation associations such as the QUAD (the Quadrilateral Security Dialogue of Australia, India, Japan, and the US) and the AUKUS (a trilateral security pact between Australia, the United Kingdom and the US)?

Sovereignty is often inflated by attaching a sense of divinity to its character. However, in its application, sovereignty is not absolute.²² In international politics, there are continuous negotiations over the extent to which a 'sovereign' nation needs to restrain itself while exercising its sovereign rights in exchange for its association with international, regional, or supranational entities. Similarly, the signatories of UNCLOS are subject to specific restrictions in the exercise of sovereignty in their maritime jurisdictions. Articles 207 to 212 of the UNCLOS provide that states must adopt regulatory policies to prevent, reduce, and control marine pollution. Article 17 says states enjoy the right of 'innocent passage' through the territorial sea of other states. This provision is the most critical distinction between sovereignty over territorial land and territorial sea. This is also perhaps why it is vehemently opposed by countries such as China.

Article 56 of the Convention confers sovereign rights on states for the exploitation, exploration, conservation, and management of living and non-living resources in the waters of their EEZs and continental shelves. Article 73 also enables states to take necessary punitive measures to ensure compliance with the Convention's provisions. In the *M/V Virginia G* case, a dispute over Guinea-Bissau's arrest of a Panama coastal tanker in 2009, the International Tribunal for the Law of the Sea addressed the restrictions on the exercise of sovereign rights by coastal states. It declared that in the exercise of such rights, the state must respect the rights of other coastal states, considering the UNCLOS's relevant provisions.²³

The restrictions on sovereign rights are institutionalised in the rules and regulations of various international treaties. These rules are constantly evolving according to the socio-political context. Changes in restrictions on sovereign rights give such rights a dynamic character, while sovereignty is a far more concrete concept. Sovereign rights are the parts, and sovereignty is the whole of an interactive system of the jurisdictional power of the states. The whole, however, cannot be reduced to the sum of the mechanical properties of the parts. The transfer or delegation of certain sovereign rights to an external entity does not dilute the state's sovereign integrity.²⁴

Decoupling Sovereignty and Sovereign Rights

There is another distinction between sovereignty and sovereign rights that pertains specifically to maritime jurisprudence. Maritime boundaries only separate sovereign rights that are functional and limited in character. Possession of sovereign rights over a marine space does not imply sovereignty over it; albeit sovereign rights are contingent on sovereignty over the ‘baseline’.^d In land administration, delimitation of territory also implies demarcation of exclusive rights. However, in the maritime domain, two or more states may have equal and valid entitlements to a given territory, and reasonable sacrifices are required by both for a mutually acceptable resolution to the boundary question.²⁵

China’s refusal to acknowledge these crucial distinctions is one of the primary reasons for the tensions in the SCS. Any assertion of sovereign rights by other coastal states is perceived as a challenge to its sovereign integrity. The SCS’s resources—existing and potential—and its own significance in global maritime trade may also have prompted China to conveniently ignore these distinctions.

To be sure, however, the distinction between sovereignty and sovereign rights is only part of the problem. Another aspect is that of China claiming sovereignty over almost all the major island groups in the region. The other littoral states consider these claims untenable as per international norms.

The first reference to ‘sovereign rights’ in international maritime law was made in the 1970s, around the same time that the third UN Conference on the Law of the Sea was held (which eventually led to the signing of the UNCLOS in 1982). The term has come to govern the rights of coastal states over resources in their continental shelves and EEZs, as well as their energy resources, since the 1990s. However, sovereignty is not automatically conferred because a state possesses sovereign rights over resources in its EEZ. The sovereign rights (a limited set of rights and powers) of a coastal state do not correspond to the right to exercise sovereignty (i.e., supreme political authority) over the area.

Thus there is divergence between international maritime law and China’s view of its authority.²⁶ Beijing regards the SCS as its *adjacent and relevant waters*.²⁷ But these terms are not spelt out in international law. China’s maritime understanding is consequently an extension of its ‘historical rights’ over the SCS. From China’s perspective, its activities in these waters—whether the construction of artificial islands or the passing of its new coast guard law—are entirely justified. They are, however, in contravention of international maritime law as laid out by the UNCLOS.

d Baseline is the officially recognised low-water line of a coastal state.

Gaps in the Contemporary Maritime Legal Regime

One of the main reasons for the demonstrable failure of the UNCLOS to rein in China has been the vagueness of crucial terms in the document. It outlines sovereignty and sovereign rights but fails to define them explicitly. Article 74 and 84²⁸ mandate an ‘equitable solution’ to the delimitation of maritime boundaries but do not spell out what concept of equality is to be followed. These ambiguities have enabled the member states to interpret the terms as per their respective interests, leading to differing and often conflicting versions.

The tribunals of the convention have no jurisdiction to decide on the question of sovereignty over disputed marine territory, which is at the core of the conflicts in the SCS. The International Court of Justice can adjudicate on the issue of sovereignty only when all the parties to the conflict consent to it. Given China’s insistence on bilateral resolution of its conflicts with other coastal states, and its opposition to any attempts at internationalising the issue, this seems unlikely to happen. Even if the tribunal awards a binding verdict, the UNCLOS lacks an effective enforcement mechanism.²⁹

Under Article 298, the UNCLOS also has adequate provisions to enable member states to exempt themselves from participating in dispute resolution proceedings such as marine boundary delimitation and military activities. This was used by China to declare the arbitration tribunal award of 2016 (following proceedings brought against it by the Philippines) as unacceptable and void.³⁰ Thus, conflict resolution is left entirely to the discretion of the states involved. Given the asymmetry of its power relations with the other coastal states, China can afford a protracted conflict, making the smaller states impatient and leveraging this to eventually gain huge concessions.


The limitations of the UNCLOS, however, do not justify violating it. As an internationally agreed framework guiding maritime activities and rights, the UNCLOS forms the fundamental reference point for both seafaring and non-sea faring states. (Besides, China had been an active participant in the negotiations leading up to the Convention.) The UNCLOS is the culmination of a long history of the formulation of maritime rights and boundaries dating back to the early 17th century.

Enabling Practicable Solutions

The issues of maritime territorial claims, activities therein, and the domestic and international laws and their interpretation in the context of the SCS, are therefore deeply political in nature. They call for a political solution.³¹ Clarity in legal understanding is a step towards taking political measures within the framework set by the UN.

Periodic tensions over competing and overlapping claims have contributed to making the SCS issue extremely complicated. This brief has underscored the ambiguities that exist in the maritime legal order with reference to perceived rights and entitlements. This should create the scope for further study, leading eventually to mitigation.

A thorough assessment is called for to clearly establish the distinction between sovereignty and sovereign rights with respect to the SCS maritime space vis-a-vis each littoral that borders the sea. This would allow the identification of gaps in the existing maritime legal regime specifically with regard to sovereignty and sovereign rights, which in turn would simplify the demarcation of specific rights, duties and obligations of states in this regard. Political incentives that would deter non-compliance are also required to guarantee that countries adhere to international maritime law.

Coherence with respect to the difference between sovereignty and sovereign rights would help simplify the extremely convoluted problem that is the SCS. This would undoubtedly lead to a better appreciation of the political geography of these waters. Finally, this could enable the framing of policies and regional strategies that would be better equipped to address ambiguities and differences in perception and understanding with regard to international maritime law. 

Pratnashree Basu is Associate Fellow at ORF, Kolkata.

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20, Rouse Avenue Institutional Area,
New Delhi - 110 002, INDIA
Ph. : +91-11-35332000. Fax : +91-11-35332005
E-mail: contactus@orfonline.org
Website: www.orfonline.org