

## China's Challenge to East Asia's Maritime Order

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This paper assesses the impact of China's rise on maritime order in East Asia. The paper argues that East Asia's maritime order has been defined by four pillars since the end of World War II, which have fostered the conditions of the region's economic growth and relative political stability. This order rests on a forward deployed American force presence, *de facto* acceptance of the norm of freedom of navigation, the law of the sea and recognition of national sovereignty. These pillars have created a functioning maritime system that governs the day to day use of the sea in East Asia. The paper surveys recent Chinese behaviour towards this order and assesses whether it could be interpreted as a challenge to this maritime order. By juxtaposing China's long term statements towards the laws and norms of maritime law, against its recent behaviour, the paper argues that China is challenging two pillars of East Asia's maritime order: the American presence and the freedom of navigation. The paper surveys jurisdictional differences between China and other regional maritime powers and argues that China's recent activities represent a shift from tacit acceptance to explicit rejection of these two pillars of East Asia's maritime order.

There is little doubt about the fact of China's economic, political and military 'rise'; current debates assess the pace of its growth, the nature of its emergence and its effect on the international system. This paper is concerned with the latter and explores China's rise in the microcosm of the maritime order in East Asia. While analysts approach the problem of rising powers from a variety of theoretical perspectives, they disagree centrally on the effect of rising powers on the international system. For power transition theorists, a rising power that becomes dissatisfied with the system supported by the hegemon will seek to change the rules of the game, often through war.<sup>1</sup> Similarly Robert Gilpin argues that hegemonic war results when rising powers perceive that the benefits of the system disproportionately favour the hegemon.<sup>2</sup> While neither views great power wars as inevitable, they remain pessimistic about the prospects for peaceful power transitions. Others argue that the current liberal democratic order is unique in world history because the system created by the United States is appealing to all rising states.<sup>3</sup> A rising power thus finds within the system the tools required to fulfill its objectives and by extension does not develop revisionist aspirations. Regardless of their ambitions therefore, rising powers change the world by virtue of their very existence but do so unevenly across different sectors of the international system.

Rising powers alter international order in a number of ways. By definition rising powers affect the strategic calculations of all other states in the system by virtue of their increased military expenditure and expanded foreign policy agenda. Rising powers can also present compelling economic challenges. First, if the rising state has revisionist aspirations it can advance opposing models of economic order to that of the hegemonic state as the USSR did during the Cold War period. Alternatively, if the rising power is an active participant in the dominant economic order, its economic growth will almost certainly present opportunities and challenges to other trading states. For example, according to one scholar, China is advancing an economic order in the energy sector that sub-optimizes the American system.<sup>4</sup> This alternative economic order is rooted in a set of political preferences that privilege the state over free market mechanisms and collective good over individual liberties.<sup>5</sup>

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<sup>1</sup> A.F.K. Organski and Jacek Kugler, *The War Ledger* (Chicago: University of Chicago Press, 1980), Jacek Kugler and Ronald L. Tammen, 'Regional challenge: China's Rise to Power', in Jim Rolfé (ed.), *The Asia-Pacific: A Region in Transition* (Honolulu: Asia-Pacific Center for Security Studies, 2004), pp. 33–53.

<sup>2</sup> Robert Gilpin, "The Theory of Hegemonic War," *Journal of Interdisciplinary History* 18, no. 4, (1988), pp. 591-613; Robert Gilpin, *War and Change in World Politics* (Cambridge: Cambridge University Press, 1981).

<sup>3</sup> Fareed Zakaria, "The Future of American Power: How America Can Survive the Rise of the Rest", *Foreign Affairs* 87 (May/June 2008), pp. 18-43, G. John Ikenberry, "The Rise of China and Future of the West," *Foreign Affairs* 87 (January/February 2008), pp. 23-37.

<sup>4</sup> Vlado Vivoda, "China Challenges Global Capitalism," *The Australian Journal of International Affairs* 63, no. 1, (2009), pp. 22-40.

<sup>5</sup> See Martin Jaques, *When China Rules the World: The End of the Western World and the Birth of a New Global Order* (New York: Penguin, 2009); Stephen Halper, *The Beijing Consensus: How China's Authoritarian Model Will*

According to Muthiah Alagappa, ‘order’ is “a formal or informal arrangement that sustains rule-governed interaction among sovereign states in their pursuit of individual and collective goals.”<sup>6</sup> In the post Cold War era, a liberal democratic international order has been established by the United States, which is composed of rules, norms and institutions that define the parameters of acceptable behaviour within the system.<sup>7</sup> A rising power may present challenges and opportunities to these by virtue of its rise; for some the accommodation of this power’s preferences is a prerequisite to avoid the dissatisfaction that precedes great power war.<sup>8</sup> For others, a state can be described as being status quo oriented not only when it follows the rules of the game, but when it accepts the logic of these rules and follows them for this reason.<sup>9</sup> By this measure the jury is still out on whether China can be described as a status quo rising power. There is ample evidence that it accepts the basic organizing principles of the US led liberal economic order.<sup>10</sup> Yet, as Chin and Thakur argue China does seek to modify certain aspects of international order, evidenced by its calls to end the reign of the dollar as the reserve currency and by its efforts to reform IMF governance structures.<sup>11</sup> If indeed China’s rise will vary across the international system, an analysis of its impact on maritime East Asia merits investigation for three reasons. First, it remains the only region in the world where a rising Chinese military interacts directly with the military power of the hegemonic United States.<sup>12</sup> Second, long before China emerges as a global hegemon (if at all) it will emerge as a regional power in East Asia and consequently seek to alter aspects of this order.<sup>13</sup> Third, a variety of other states in the region have a stake in East Asian regional maritime order, many of whom are allied to the hegemonic power.

This paper first outlines four pillars of East Asia’s maritime order and argues that the People’s Republic has tacitly accepted this order since its formation. The second and third sections explore China’s interpretations of maritime laws and norms, manifested since the early 1970s through its statements at Law of the Sea negotiations and since 2001 in its actions on East Asian seas. Differing interpretations of acceptable behaviour are responsible for a growing number of

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*Dominate the Twenty-First Century* (New York: Basic Books, 2010); Ian Bremmer, *The End of the Free Market: Who Wins the War between States and Corporations* (London: Portfolio, 2010).

<sup>6</sup> For a discussion of the term ‘order’ see Muthiah Alagappa, "The Study of International Order: An Analytical Framework," in *Asian Security Order: Instrumental and Normative Features*, ed. Muthiah Alagappa, (Stanford: Stanford University Press, 2003), pp. 33-69, quote at p. 39.

<sup>7</sup> G. John Ikenberry, "Power and Liberal Order: America's Postwar World Order in Transition," *International Relations of the Asia-Pacific* 5, no. 2 (2005), pp. 133-152.

<sup>8</sup> Jacek Kugler, "The Asian Ascent: Opportunity for Peace or Precondition for War?," *International Studies Perspectives* 7(2006), pp. 36-42.

<sup>9</sup> Barry Buzan, "China in International Society: Is Peaceful Rise Possible?," *The Chinese Journal of International Politics* 3(2010), pp. 5-36.

<sup>10</sup> Alastair Iain Johnston, *Social states: China in International Institutions, 1980-2000* (Princeton: Princeton University Press, 2009); Ann Kent, *Beyond Compliance: China, International Organizations and Global Security* (Stanford: Stanford University Press, 2007).

<sup>11</sup> Gregory Chin and Ramesh Thakur, "Will China Change the Rules of Global Order," *The Washington Quarterly* 33, no. 4 (2010), pp. 119-138.

<sup>12</sup> Robert J. Art, "The United States and the Rise of China: Implications for the Long Haul," *Political Science Quarterly* 125, no. 3 (2010), p. 379.

<sup>13</sup> John J. Mearsheimer, *The Tragedy of Great Power Politics* (New York: W.W. Norton & Co., 2001); Jacek Kugler, "The Asian Ascent: Opportunity for Peace or Precondition for War?" *International Studies Perspectives* 7 (2006), pp. 36-42.

crises between China and other regional maritime powers. The source of day to day tension lies in fundamental differences over the interpretation of international legal and behavioural norms, particularly over freedom of navigation, marine research and the basis for making claims to ocean space. The fourth section illustrates how China's practice towards these issues has changed and reflects an explicit rejection of two pillars of maritime order in East Asia.

### China and East Asia's Maritime Order

If this paper seeks to understand the ways in which a rising China is challenging the East Asia's regional maritime order, the first task is to establish the parameters of the existing maritime order in the region. Based on Alagappa's definition above, this paper views order in a similar fashion to Hedley Bull; it is the state of international affairs, sustained by implicit or explicit adherence to a series of informal or formal rules and norms of behaviour.<sup>14</sup> This distinction is different from the common use of the term order as a goal. Gaye Christoffersen for example views the establishment of a regional order as a solution piracy in East Asia.<sup>15</sup> If order is conceptualized as a goal, by definition the existing state of affairs at a given time is not an order, and may even be characterized by disorder. As will be illustrated below, disorder is not an accurate description of the state of affairs in maritime East Asia, despite the assertions of some analysts.<sup>16</sup> Building on Alagappa, the paper accepts that order is not the same as society; 'international society' sits at the cooperative end of a spectrum of order in which states have forgone conflict.<sup>17</sup>

The formal rules and norms of behaviour of East Asia's maritime order are spelled out in the UN Convention on the Law of the Sea (UNCLOS), which has been ratified by all major maritime powers in East Asia. While the United States has not ratified the treaty, it accepts the bulk of UNCLOS as customary international law.<sup>18</sup> UNCLOS, the document produced by the Third UN Convention on Law of the Sea, has been called a constitution for the ocean.<sup>19</sup> Yet, despite widespread adherence, ambiguities contained within the document have given rise to competing interpretations of its key tenets. As a consequence, state practice has become a vital source for clarifying and establishing the informal norms of behaviour on East Asia's oceans. As one of the world's largest trading states with a long coastline, UNCLOS and its related institutions is an important mechanism of global governance to China. For example, it is a member of the International Maritime Organization and its ships are thus bound by the IMO's basic rules of the road outlined in the International Regulations for Preventing Collisions at Sea (COLREGS).

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<sup>14</sup> Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (New York: Columbia University Press, 1995).

<sup>15</sup> See Gaye Christoffersen, "Japan and the East Asian Maritime Security Order: Prospects for Trilateral and Multilateral Cooperation," *Asian Perspective*, 33, no. 3 (2009), pp. 107-149.

<sup>16</sup> Su Hao, "An Inquiry into East Asian Maritime Security Order: Can disorder be Turned into Order," conference paper presented to the 5<sup>th</sup> *Berlin Conference on Asian Security*, Berlin, September 30-October 1 2010.

<sup>17</sup> This is Alagappa's "solidarist order". Alagappa, "The Study of International Order," p. 50.

<sup>18</sup> While it could be argued that the international law of the sea lies outside the US led order, due to the fact that the United States has not ratified the UNCLOS document, this view misunderstands the nature of US opposition. Ideological opposition to the revenue redistribution powers of the International Seabed Authority gave way to concerns on the part of the US Navy about the implications of UNCLOS for freedom of navigation. However, in recent years has reversed this view in light of the emerging effort by some UNCLOS signatories to claim larger areas and degrees of maritime jurisdiction. The US Navy now feels it is imperative that the US vessels contribute to the state practice that forms the basis of the informal norms of behavior in East Asia's maritime order.

<sup>19</sup> John R. Stevenson, "Lawmaking for the Seas," *American Bar Association Journal*, vol. 61 (February 1975) pp. 185-190

The paper argues that China's recent moves to enforce its interpretation of select aspects of international maritime law amount to a challenge to some aspects of East Asia's maritime order. It could be argued that many other states have similar quibbles with international law. For example, some of Japan's straight baselines in the Sea of Japan are "of questionable legitimacy" as Japan's coastline does not appear to fulfill the requirements for their use.<sup>20</sup> Japan also claims that all features, regardless of size, qualify as islands entitled to a full EEZ, including the Senkaku/Diaoyu islands, the Dokto/Takeshima islands and Okinotori island. This posture is designed to enlarge the Japan's EEZ claim. However these do not amount to a challenge to East Asia's maritime order because Japan's posture towards these claims does not undermine any of the four pillars in a practical sense.

East Asia's contemporary maritime order rests on four pillars that reflect the region's power structure, institutional mechanisms and norms of accepted behaviour.<sup>21</sup> The structural foundation of the order has existed since the end of World War II and the institutional and normative dimensions of the order have existed at least since the emergence of the EEZ regime as customary international law in the late 1970s. The first two pillars are extensions of the region's power structure defined by the presence of the United States in the region. The first pillar of East Asian maritime order is the function of the United States as an offshore balancer through forward deployed US forces on the territory of its regional allies; Japan, South Korea and access arrangements with Southeast Asian states. This hubs and spokes alliance system has kept the peace in East Asia since the end of World War II by deterring adventurism by Soviet Russia and China and, in combination with domestic constraints, keeping a cap on Japanese defence spending.<sup>22</sup> This system allowed East Asia to experience unprecedented levels of economic growth.<sup>23</sup> US naval forces stationed in East Asia play a role in deterring aggression on the Korean peninsula and across the Taiwan Strait and provide the public good of secure sea lanes. In the post-Cold War era it is clear from recent that the United States still perceives a globally present navy with access to every corner of the globe as the foundation of international order, including East Asia.<sup>24</sup>

The second pillar of East Asian maritime order is the widespread adherence to the freedom of navigation.<sup>25</sup> In a commercial sense this has underwritten East Asia's growth as a region of trading states and in a military sense it allowed freedom of access for US naval vessels. In the case of the former, free access to the seas had fostered not only economic growth within individual East Asian states, but also the creation of robust economic interdependence between

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<sup>20</sup> John M. Van Dyke, "Disputes over Islands and Maritime Boundaries in East Asia," in *Maritime Boundary Disputes, Settlement Processes and the Law of the Sea*, ed. Seoung-Yong Hong and John M. Van Dyke (Leiden: Martinus Nijhoff, 2009), p. 45

<sup>21</sup> Alagappa, "The Study of International Order," p. 52.

<sup>22</sup> James E. Auer and Robyn Lim, "The Maritime Basis of American Security in East Asia," *Naval War College Review* 54, no. 1 (2001), pp. 39-58.

<sup>23</sup> G. John Ikenberry, "American Hegemony and East Asian Order," *Australian Journal of International Affairs* 58, no. 3 (2004), pp. 353-367.

<sup>24</sup> James T. Conway, Gary Roughead and Thad W. Allen, A Cooperative Strategy for 21<sup>st</sup> Century Seapower, October 2007, [www.navy.mil/maritime/Maritimestrategy.pdf](http://www.navy.mil/maritime/Maritimestrategy.pdf), accessed February 18 2011.

<sup>25</sup> Ramses Amer, "Towards a Declaration on 'Navigational Rights' in the Sea-Lanes of the Asia-Pacific," *Contemporary Southeast Asia* 20, no. 1 (1998), pp. 88-102.

East Asian states which creates a powerful disincentive for war. The latter gives the US military the necessary freedom of action to collect intelligence, conduct operations and maintain its deterrent posture, which reinforces the first pillar of the order, America's role as offshore balancer.<sup>26</sup>

The latter two pillars of East Asia's maritime order are a function of the region's institutional and normative structure and do not stem from US military hegemony. The third pillar of East Asia's maritime order is the near universal acceptance of UNCLOS as the rules and norms that govern maritime interaction at sea. On one level, this could be interpreted as little more than rhetoric. All UNCLOS signatories misinterpret the treaty to further their own interests.<sup>27</sup> However, states have employed UNCLOS tools to address the multitude of traditional and non-traditional security challenges that affect the region's oceans. While UNCLOS created or exacerbated a variety of sovereignty and maritime delimitation disputes, East Asian states have also relied on its principles to settle fisheries disputes, negotiate boundary settlements and generally engage in what could most optimistically be called "regime-building".<sup>28</sup> East Asian states have demonstrated that they are capable of sidestepping issues of sovereignty in order conclude bilateral fisheries agreements that manage fish stocks and regulate the application of state jurisdiction.<sup>29</sup> Most recently coastal and user states have managed to negotiate enforcement mechanisms to address piracy in the Malacca Straits and South China Sea which presents a common non-traditional security threat to both coastal and user states.<sup>30</sup>

While it could be argued that the vagaries and inconsistencies of UNCLOS have not contributed to order in East Asia, this perspective misunderstands the definition of order. Recall that order is the state of things; it is not an end in itself as would be the formation of a maritime regime.<sup>31</sup> The fact that UNCLOS has been signed by almost all regional maritime states with the exception of Thailand, Cambodia and North Korea implies that its rules and norms form the bedrock of what states interpret as rules and norms that govern acceptable behaviour. Disagreements exist as to interpretations of the law of the sea, but rather than being a sign of an absence of order, the fact that states use LOS language to convey their disagreements is a sign that UNCLOS is integral to regional maritime order; by using such language to convey their claims, states betray a degree of predictability in their conduct. Sustained disagreements over legal matters that result in confrontation or conflict could be associated with a shift along the spectrum of regional maritime order. States will not adopt a policy in one sector that may undermine their legal position in another. Consistency of a given state's legal interpretation is important.

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<sup>26</sup> John M. Van Dyke, "North-East Asian Seas: Conflicts, Accomplishments and the Role of the United States," *The International Journal of Marine and Coastal Law* 17, no. 3 (2002), pp. 397-421.

<sup>27</sup> Xavier Furtado, "International Law and the Dispute over the Spratly Islands: Wither UNCLOS?" *Contemporary Southeast Asia* 21, no. 3 (1999), pp. 386-404.

<sup>28</sup> Mark J. Valencia, *A Maritime Regime for North-East Asia* (Hong Kong: Oxford University Press, 1996).

<sup>29</sup> For details see Sun Pyo Kim, *Maritime Delimitation and Interim Arrangements in North East Asia* (The Hague: Martinus Nijhoff Publishers, 2004).

<sup>30</sup> Nazery Khalid, "With a Little Help from My Friends: Maritime Capacity-Building Measures in the Straits of Malacca," *Contemporary Southeast Asia* 31, no. 3 (2009), pp. 424-446; Ian Storey, "Securing Southeast Asia's Sea Lanes: A Work in Progress," *Asia Policy* 6(2008), pp. 95-127.

<sup>31</sup> Sam Bateman, "UNCLOS and Its Limitations as the Foundation for a Regional Maritime Security Regime," *Korean Journal of Defense Analysis* 19, no. 3 (2007), pp. 27-56.

The fourth and final dimension of East Asia's maritime order is the continued salience of national sovereignty; a reflection of the established regional political order. Recognition of national sovereignty and non-interference are longstanding themes of both China's Five Principles of Peaceful Coexistence and ASEAN's Treaty of Amity and Cooperation, now signed by 27 states. As a product of their relative infancy and post-colonial past, sovereignty and territorial integrity concerns are vital to East Asian states.<sup>32</sup> It could be argued that the pursuit of territorial ambitions has been detrimental to regional stability. Japan and South Korea both exercise effective occupation over disputed islands, China and Vietnam fought over islets in the Paracel and Spratly group in 1974 and 1988 and China occupied the Philippine claimed Mischief Reef in 1995. Furthermore, fishermen have been detained, arrested and shot for fishing in the waters of other states. States have engaged in demonstrations of force, detained rival fishermen, bullied international oil companies and otherwise confronted government and civilian vessels from rival states, to the detriment of bilateral relationships.

Nevertheless, these incidents have not escalated; no claimant state has yet escalated their ambitions for maritime space to the degree that they have considered invading or striking against the mainland of rival claimants. A territorial status quo has existed since 1999 which prevents further territorial aggrandizement.<sup>33</sup> Importantly, no state has been willing to escalate a territorial claim to the point that it endangered the freedom of navigation, invoked the involvement of the US military, or otherwise upset the pillars of regional order. The Mischief Reef incident certainly challenged American policymakers to think creatively about the precise nature of America's role in these disputes. The United States opposes the use of force to resolve them and does not take a position on the sovereignty disputes themselves.

Rather, states have pursued a series of confidence building measures. In 2002 China and ASEAN states negotiated a declaration on a code of conduct for the South China Sea, which in turn led to a joint resource exploration memo between three claimant states.<sup>34</sup> Furthermore, states parties have held regional security meetings, held track two talks, pursued confidence building measures and joint development zones and have twice submitted their disputes for third party arbitration. Indeed, in some cases states have institutionalized a degree of their interactions over their disputed spaces, including a tacit agreement not to be provoked by nationalist groups.<sup>35</sup> Likewise, for all the tension surrounding the Senkaku/Diaoyu islands dispute, China has generally refrained from challenging Japan's effective control over the islands, preferring instead to establish its own jurisdictional claim to the surrounding sea areas through resource

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<sup>32</sup> Jean-Marc F. Blanchard, "Maritime Issues in Asia: The Problem of Adolescence," in *Asian Security Order: Instrumental and Normative Features*, ed. Muthiah Alagappa (Stanford CA.: Stanford University Press, 2003), pp. 424-457.

<sup>33</sup> Ralf Emmers, "Maritime Disputes in the South China Sea: Strategic and Diplomatic Status Quo" *IDSS Working Paper* no. 87, Singapore: Institute of Defence and Strategic Studies, 2005. For the argument that China does not seek to evict other states from occupied Spratly features see Greg Austin, *China's Ocean Frontier: International Law, Military Force and National Development* (St. Leonards, NSW: Allen & Unwin, 1998), chapter 10.

<sup>34</sup> Ralf Emmers, *Geopolitics and Maritime Territorial Disputes in East Asia* (London: Routledge, 2010), pp. 76-78.

<sup>35</sup> Youngshik Daniel Bong, "Flashpoints at Sea? Legitimization Strategy and East Asian Island Disputes" (PhD Thesis, University of Pennsylvania, 2002); Chien-peng Chung, *Domestic Politics, International Bargaining and China's Territorial Disputes* (London: RoutledgeCurzon, 2004), p. 58.

development and by denying similar Japanese efforts.<sup>36</sup> Likewise Japan has made only symbolic attempts to reclaim Dokto/Takeshima and the Northern Territories.

These four pillars of order are sustained in different ways. Alagappa identifies eight methods, or pathways, to order derived from schools of International Relations theory.<sup>37</sup> At the most coercive end of the spectrum lies a hegemonic order under which a single state dominates the system and defines the rules and norms of behaviour. At the more cooperative end of the spectrum lies international integration, under which the nation-state ceases to be the primary unit of international politics and national sovereignty gives way to “new centers of loyalty and authority in regional and international communities.”<sup>38</sup> The central argument to his book of course is that all eight to some extent support certain aspects of regional security order in Asia.

Maritime order in East Asia is sustained by a blend of coercive and cooperative methods. The structural aspects of the order have been imposed by the hegemonic state. The American force presence in the region is a relic of Cold War strategic prerogatives that remains useful for policymakers in Washington and policymakers in the region as a counterweight to adventurism; particularly from China. Likewise, it could equally be argued that the activities of American military forces on regional waters are a pillar of the order that has been imposed by the hegemonic state. Regional maritime states such as Vietnam, Malaysia and China do not accept the right of American vessels to conduct military activities in their claimed maritime zones. Furthermore American pressure on Indonesia’s Archipelagic Sea-lane laws has surely soured relations between those two states in the past. Commercial freedom of navigation norms however have been accepted by all states in the region on the basis that they support the economic growth of the world’s most dynamic trading region. The freedom of navigation pillar is thus supported by a blend of hegemonic and cooperative mechanisms.

The latter two pillars reflect a series of norms and institutions negotiated between states in the region. UNCLOS, and its related organizations such as the IMO, codify the rules of the road on East Asian seas. Also as noted above most maritime states in the region are parties to UNCLOS which has facilitated the establishment of an overlapping bilateral fisheries order in the region. Even states that have not ratified UNCLOS, such as Thailand and Cambodia recognize the value of settling maritime boundary issues to preserve regional stability. The Thai-Malaysia joint development zone stands as an important settlement in a region full of boundary disputes for example. Likewise, the rhetorical commitment to the principles of national sovereignty and non-interference is the cornerstone of the region’s growing institutional architecture. Importantly, this process contributes to the security of the region, yet emerged independently of the United States.<sup>39</sup> Hegemonic order necessarily needs to be accepted by states within the system, but this acceptance does not necessarily need to be explicit. According to power transition theory, great powers tacitly accept hegemonic order as long as they remain satisfied with the status quo. By

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<sup>36</sup> James Manicom, "Beyond Boundary Disputes: Understanding the Nature of China’s Challenge to Maritime East Asia," *Harvard Asia Quarterly* 12, no. 3&4 (2010), pp. 50-52.

<sup>37</sup> These include Alagappa’s pathways to order: Hegemony, Balance of Power; Concert of Powers; Collective Security; International Regimes; Economic Interdependence and Cooperation; Democratic Peace; International Integration. See Alagappa, “The Study of International Order,” pp. 52-64.

<sup>38</sup> *Ibid*, p. 62.

<sup>39</sup> Amitav Acharya, and See Seng Tan, "Betwixt Balance and Community: America, ASEAN and the Security of Southeast Asia," *International Relations of the Asia-Pacific* 6, no. 1 (2006), pp. 37-59.



contrast, explicit acceptance of the need to compromise is necessary for the cooperative pathways that characterize the institutional/normative pillars of regional maritime order. States have negotiated or otherwise been able to mould the order to accept some version of their interests. China has historically accepted these four pillars of East Asia's maritime order, both tacitly and explicitly.

With reference to the structural pillars, according to Robert Ross, China's historical focus on continental security and the lack of vital maritime interests underwrites a bipolar order in East Asia, with American maritime hegemony balancing Chinese continental superiority.<sup>40</sup> For much of the history of Communist China, East Asia's maritime realm was simply not a concern. As China has become maritime oriented, the stability created by US backed maritime order helped underwrite China's primary strategic objectives: a peaceful external environment that allowed a domestic focus on economic growth and the perpetuation of the CCP regime.<sup>41</sup> At the practical level, China was able to free ride off of American SLOC security in order to gain the benefits of secure commercial trade, while not bearing any of the costs. An added bonus was that this maritime order generally restrained Japanese militarism.<sup>42</sup> The US centred 'hubs and spokes' system removed any compelling strategic rationale for Japanese military resurgence, while channelling pressures from within Tokyo and Washington for greater burden sharing towards less controversial responsibilities such as sea lane security up to 1000nm from the Japanese islands. While officially China has long standing objections about the way the US exercises its freedom of navigation – which are illustrated below – China tacitly accepted this American posture, with a few notable exceptions, since the formation of the People's Republic.<sup>43</sup> By free-riding in such a way China could benefit from these efforts without needing to divert resources towards the development of a blue water navy. Indeed, Chinese officials privately admit that the US force presence in Asia has, on balance, supported China's strategic objectives.

China has also adhered to the institutional-normative pillars of regional maritime order. It has employed UNCLOS principles in its efforts to resolve bilateral fisheries disputes. The renegotiation of fisheries agreements was one of the primary reasons South Korea, China and Japan ratified UNCLOS within a year of each other. Although the negotiations were tough and the overlapping web of bilateral agreements is inferior to a multilateral solution, all three states incurred costs to establish a functioning fisheries regime.<sup>44</sup> In China's case, its agreement with Japan put 170,000 fishermen out of work and drastically increased the enforcement burden on Chinese maritime authorities.<sup>45</sup> Chinese scholars point out that China has supported the contemporary maritime order through its participation at UNLOS, which has seen two Chinese

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<sup>40</sup> Robert S. Ross, "Geography of the Peace: East Asia in the Twenty-First Century," *International Security* 23, no. 4 (1999), pp. 106-108.

<sup>41</sup> Michael D. Swaine and Ashley J. Tellis, *Interpreting China's Grand Strategy: Past, Present, and Future* (Santa Monica: RAND 2000).

<sup>42</sup> Robert S. Ross, "Geography of the Peace: East Asia in the Twenty-First Century," *International Security* 23, no. 4 (1999), pp. 81-118; Wu Xinbo, "The End of the Silver Lining: A Chinese View of the Us-Japanese Alliance," *The Washington Quarterly* 29, no. 1 (2005-06), pp. 119-130.

<sup>43</sup> Hugh White, "Why War in Asia Remains Thinkable," *Survival*, 50, no. 6 (2008), p. 89.

<sup>44</sup> Moritaka Hayashi, "Regional Fisheries Management in the East China Sea," in *Recent Developments in the Law of the Sea and China*, ed. Myron H. Nordquist, John Norton Moore, and Kuen-chen Fu (Leiden: Martinus Nijhoff Publishers, 2006), pp. 219-227.

<sup>45</sup> Mark J. Valencia and Yoshihisa Amae, "Regime Building in the East China Sea," *Ocean Development and International Law* 34, no. 2 (2003), p. 195.

maritime law experts elected to the International Tribunal for the Law of the Sea.<sup>46</sup> Furthermore, Li Mingjiang argues that China has been an active participant at regional meetings on non-traditional security issues, which could form the basis of wider regional maritime cooperation.<sup>47</sup> Finally, although China is arguably the most belligerent party to maritime disputes in East Asia, it has been careful not to raise tensions to such a level that it directly engages the US military nor threatens freedom of navigation. Indeed, it could be argued that China's assertive posture towards Japan in the East China Sea has strengthened the US-Japan alliance – the primary US relationship in East Asia. Simultaneously China has bargained hard in its maritime boundary disputes and has settled one, the boundary dispute in the Gulf of Tonkin. China's track record of restraint in the South China Sea is attributed to its desire to win friends in the region, and its relative military weakness.<sup>48</sup> Indeed, realist assessments of the South China Sea dispute in the 1990s noted that contrary to much of the fears of Chinese territorial revisionism, China lacked the naval power necessary to press its claims militarily.<sup>49</sup>

However, recent events indicate Chinese satisfaction with East Asia's maritime order may be eroding. Chinese opinion frequently laments the fact that China's claims to 3 millions square km of maritime space are contested by neighbouring states.<sup>50</sup> Zhang Jingwei argues that encroachment into its claimed sea areas by non claimant states like Australia and the United States is the basis of an encirclement strategy to contain China.<sup>51</sup> While this sentiment is an enduring feature of the Chinese discourse on its maritime ambitions, it has become more popular of late.<sup>52</sup> This more assertive perspective has led to a growing concern from within the region that China's military modernization is moving to support, and perhaps redress, its dissatisfaction with the territorial status quo in maritime East Asia.<sup>53</sup> The next section sets out China's challenges to the maritime order founded on the four pillars outlined above.

### China's First Challenge to Maritime Order

China's behaviour towards acceptable user state behaviour in claimed maritime zones indicates a challenge to East Asia's regional order. UNCLOS outlines several different maritime zones over

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<sup>46</sup> Huang Haixia, "Rough Waves in China's Territorial Seas." *Liaowang*, May 7 2009. A third Chinese judge was recently elected.

<sup>47</sup> Li Mingjiang, "China and Maritime Cooperation in East Asia: Recent Developments and Future Prospects," *Journal of Contemporary China* 19, no. 64 (2010), p. 300.

<sup>48</sup> On the first point see David Shambaugh, "China Engages Asia: Reshaping the Regional Order," *International Security* 29, no. 3 (2004/2005), pp. 64-99; Emmers, "Maritime Disputes in the South China Sea."

<sup>49</sup> Felix K. Chang, "Beyond the Unipolar Moment: Beijing's Reach in the South China Sea," *Orbis* 40, no. 3 (1996), pp. 353-374; William J. Dobson and M. Taylor Fravel, "Red Herring Hegemon: China in the South China Sea," *Current History* 96, no. 611 (1997), pp. 258-263; Michael G. Gallagher, "China's Illusory Threat to the South China Sea," *International Security* 19, no. 1 (1994), pp. 169-194.

<sup>50</sup> See the survey of opinion in Huang.

<sup>51</sup> Zhang Jingwei "China Adjusts Its Maritime Power Strategy at the Right Moment," *Ta Kung Pao* December 29 2008.

<sup>52</sup> For older work in this vein see Marwyn S. Samuels, *Contest for the South China Sea* (New York: Methuen, 1982); David Winterford, "Chinese Naval Planning and Maritime Interests in the South China Sea: Implications for US and Regional Security Policies," *The Journal of American-East Asian Relations* 2, no. 4 (1993), pp. 369-98; Shee Poon Kim. "The South China Sea in China's Strategic Thinking," *Contemporary Southeast Asia* 19, no. 4 (1998), pp. 369-87.

<sup>53</sup> See for instance, Jae-hyung Lee "China's Expanding Maritime Ambitions in the Western Pacific and the Indian Ocean," *Contemporary Southeast Asia* 24, no. 3 (2002), pp. 549-68; Robert Kaplan, The Geography of Chinese Power, *Foreign Affairs* 89, no. 3 (2010).

which states have differing degrees of sovereign jurisdiction. A state's sovereignty is absolute over its internal waters, near absolute save for innocent passage rights in the territorial sea, and limited to economic rights in the Exclusive Economic Zone (EEZ). China's interpretation of accepted rights and norms of behaviour within these zones challenges East Asia's maritime order because, through its practice of trying to enforce its interpretation, China in effect limits the navigational freedoms it had previously supported, if only tacitly.

China's position is assisted by poorly defined concepts in UNCLOS. The EEZ regime is a union between two separate, pre-existing definitions of ocean space, 'high seas' where flag-state laws apply and 'territorial waters', where coastal states have near-absolute sovereignty. The EEZ is best understood as a compromise between the economic rights of coastal states and the transit rights of user states. It grants coastal states exclusive jurisdiction over resource exploitation and other commercial activities, while maintaining navigational and communication freedoms for user states.<sup>54</sup> China maintains that the coastal state's jurisdiction over the EEZ extends not only to economic rights such as fisheries and hydrocarbon resource production – which are clearly outlined in article 57 – but also to all forms of scientific research. There is an explicit effort to define the rights and responsibilities surrounding Marine Scientific Research (MSR) under Part XIII of UNCLOS, but not distinguish it from other research activities which occur at sea.<sup>55</sup> Thus, the concept of MSR does not cover all manner of research possible in an EEZ. As Hayashi notes, article 19(2) refers to research *or* survey activities (thereby drawing a distinction) and articles 21(1) and 40 distinguish between MSR and hydrographic surveys.<sup>56</sup> This implies that at minimum hydrographic surveys are outside the restrictions outlined in Part XIII, although UNCLOS does not explicitly outline regulations for them.

States that favour free use of the sea, such as the United States, use this ambiguity to argue that activities omitted from these definitions – including military reconnaissance and bottom sounding – do not require the consent of the coastal state. As Sam Bateman argues, this depends on the type and intent of the survey conducted.<sup>57</sup> Surveys that take place in an EEZ which are aimed at resource exploitation require coastal state permission under Part V; they are part of coastal state jurisdiction over resource exploitation in the EEZ and include exploratory surveys. Alternatively, some argue that hydrographic surveys should not require coastal state permission because the data collected is of universal benefit, does not prejudice the security of the coastal state, and is intended to provide safe navigation.<sup>58</sup> The US argues that military intelligence gathering activities are not subject to coastal state jurisdiction because, unlike scientific research,

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<sup>54</sup> Churchill and Lowe, *The Law of the Sea*, chapters 9 and 13.

<sup>55</sup> MSR is loosely defined as a set of principles such as: it will be conducted exclusively for peaceful purposes, it will be conducted in ways consistent with the scientific methods compatible with the convention, it will not interfere with other legitimate uses of the sea outlined in the convention and it will be conducted in ways consistent with the environmental protections outlined in the convention. See UNCLOS, Part XIII, article 240. For a discussion of definitions from the Chinese perspective see Zhang Haiwen, "The Conflict between Jurisdiction of Coastal States on MSR in EEZ and Military Survey," in *Recent Developments in the Law of the Sea and China*, ed. Myron H. Nordquist, John Norton Moore, and Kuen-chen Fu (Leiden: Martinus Nijhoff Publishers, 2006), pp. 317-331.

<sup>56</sup> Moritaka Hayashi, "Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms," *Marine Policy* 29, no. 1 (2005), p. 130.

<sup>57</sup> Sam Bateman, "Hydrographic Surveying in the EEZ: Differences and Overlaps with Marine Scientific Research," *Marine Policy* 29, no. 2 (2005), p. 165.

<sup>58</sup> R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed. (Manchester: Manchester University Press, 1999), p. 405, fn 3.

the information gathered is not publicly disseminated and because military intelligence gathering activities are consistent with the norm of freedom of navigation and over flight through an EEZ.<sup>59</sup>

China's legal perspective is not new; its attempts to enforce it through state practice are. China was an active participant in the negotiations towards UNCLOS III in the late 1970s having only recently emerged from three decades of diplomatic isolation as the talks commenced. China's opposition to some elements of UNCLOS is long standing; what is new is the way China is articulating its view. China has always asserted a greater degree of state coastal state jurisdiction over maritime zones than that envisioned by Western naval powers. While often couched in the language of its role as a champion of the developing world, these concerns were rooted in China's suspicion of foreign governments, the security concerns of a weak naval power in a region dominated by two superpower navies and the general developing world proclivity for a thick interpretation of state jurisdiction over new maritime zones to maximize control for coastal states.

For example, China has long argued that a distinction needs to be drawn between rules for merchant vessels and rules for military vessels. On July 23 1974 Chinese negotiator Ling Ching argued as much at the 13<sup>th</sup> meeting of the Section Committee, Second Session saying "the [innocent] passage of foreign military vessels ... must be clearly distinguished from that of foreign merchant vessels." Indeed, the Chinese delegation dismissed Soviet arguments that free passage for military vessels contributed to a growth in international trade saying "that increase could hardly have been brought about by the free passage of warships and nuclear submarines."<sup>60</sup> Indeed, while banning innocent passage for warships in the territorial sea is inconsistent with the letter of UNCLOS, China is among several coastal states that has forbidden the unauthorized entry into the territorial sea, or adjacent airspace of any foreign military vessels or aircraft in their domestic legislation.<sup>61</sup> In any event, UNCLOS does not distinguish between innocent passage for military and merchant shipping. China has nevertheless made its interpretation clear; that coastal states should determine whether military vessels are entitled to innocent passage through the territorial sea.<sup>62</sup>

Likewise, the Chinese delegation viewed marine and scientific research as cover for espionage by the superpowers and even accused the Soviets of equipping fisheries vessels to conduct such operations in its waters.<sup>63</sup> China argued that, "the coastal state's consent should be required for any marine scientific research carried out in waters over which it had jurisdiction."<sup>64</sup> Both these reservations are reflected by Chinese domestic laws today. China also sought coastal state permission for the laying of submarine cables and pipelines in the EEZ as well as to extend all

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<sup>59</sup> Bateman, "Hydrographic Surveying in the EEZ," p. 167.

<sup>60</sup> Quoted in Elizabeth Van Wie Davis, *China and the Law of the Sea Convention: Follow the Sea* (Lewiston: Edwin Mellen Press, 1995), p. 84.

<sup>61</sup> Statement of Chinese delegate Shen Wenliang August 25 1980 cited in *Ibid.*, p. 98.

<sup>62</sup> Kim, "The 1992 Chinese Territorial Sea Law in Light of the UN Convention," p. 901.

<sup>63</sup> Statement by Chinese delegate Ling Ching August 5 1974 cited in Davis, *China and the Law of the Sea Convention: Follow the Sea*, p. 87.

<sup>64</sup> Statement by Chinese delegate Lo Yu-ju, April 17 1975 cited in *Ibid.*, p. 89.

coastal state laws to vessels transiting the EEZ.<sup>65</sup> China's restrictive view on navigational freedoms for military vessels in its maritime zones in longstanding.

As China's maritime awareness grew it passed domestic laws to reinforce its position. Article 9 of China's 1998 EEZ law explicitly states that marine scientific research requires Chinese approval, but is silent on the issues of alternative forms of research as well as military activities. China's domestic legislation was equally silent on this issue until it amended the Law on Surveying and Mapping in 2002. The amendment defines 'survey' in the broadest possible terms to include "all survey and mapping activities conducted in Chinese national airspace, land and sea areas," which could be interpreted to include data gathered by foreign military vessels.<sup>66</sup> Other amendments to Chinese law claim Chinese ownership over all data collected; mandate that all research be undertaken as a joint venture with a Chinese entity and that these activities not be prejudicial to Chinese national security. China views all activities conducted by military vessels in its EEZ, including non-MSR research, as a kind of battlefield preparation, and thus prejudicial to the security of China.<sup>67</sup>

The United States has conducted aerial and maritime research, surveillance and reconnaissance activities in international waters and airspace of rival countries in the late 1940s. At present it is unknown when and with what frequency Chinese authorities began registering their opposition to these activities, either through diplomatic protest or through interception operation. One such interception ended tragically in April 2001 when an American EP-3 reconnaissance plane collided with a Chinese F-8 interceptor, killing the Chinese pilot, and was forced to land on Hainan Island. More recently, Chinese aircraft and vessels have also physically opposed American marine survey activities in China's claimed EEZ. Just prior to the EP-3 incident the USNS Bowditch was confronted by a Jianghu III class frigate in the Yellow Sea which passed 100 yards away and by PLA reconnaissance aircraft. This behaviour reportedly continued for several months.<sup>68</sup> In March 2009, the USNS Impeccable was confronted by a flotilla of five Chinese vessels, including two civilian fishing trawlers, as it towed a sonar array in the South China Sea. Likewise, the USNS Bowditch was confronted by Chinese air and naval forces in 2002, and again in March 2009 in the Yellow sea. The USNS Victorious was buzzed by Chinese airplanes a month later.

The Impeccable incident exemplifies the nature of the legal dispute.<sup>69</sup> The Impeccable was confronted 75nm off the coast of Hainan Island, which places it within the Chinese EEZ, as it towed a sonar array. American scholars are quick to point out that states are entitled to freedom of navigation through a coastal state's EEZ and thus, the Impeccable did nothing wrong. Ian Townshend-Gault and Clive Schofield conclude that it is highly unlikely that such a survey by the Impeccable could be considered as an impingement on China's coastal state economic

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<sup>65</sup> Yann-huei Billy Song, "China's Ocean Policy: EEZ and Marine Fisheries," *Asian Survey* 29, no. 10 (1989), p. 986.

<sup>66</sup> Julie Guifang Xue, "Surveys and Research Activities in the EEZ: Issues and Prospects," in *Military Activities in the EEZ: A U.S.-China Dialogue on Security and International Law in the Maritime Commons*, ed. Peter Dutton (New Port: Naval War College Press, 2010), p. 98.

<sup>67</sup> Ren Xiaofeng and Cheng Xizhong, "A Chinese Perspective," *Marine Policy* 29, no. 2 (2005), pp. 139-146.

<sup>68</sup> Shirley A. Kan, "US-China Military Contacts: Issues for Congress," *CRS Reports for Congress*, RL32496 (Washington DC, 2010), pp. 53-54.

<sup>69</sup> James Kraska, "The Legal War Behind the Impeccable Incident," *World Politics Review*, March 16, 2009.

rights.<sup>70</sup> It is unlikely that the US government would seek commercial gain from the data collected by the survey. By contrast, the Chinese argue the United States is abusing its freedom of navigation entitlements to conduct intelligence gathering operations, which are prejudicial to the security of the Chinese state.<sup>71</sup> According to Mark Valencia, American forces are testing China's ability to detect foreign vessels and aircraft by "tickling" their radar stations, interfering with ship to shore communications and attempting to detect how Chinese submarines enter and leave their bases.<sup>72</sup> According to Ji Guoxing, these types of activities are counter to UNCLOS Article 301, which stipulates that parties shall refrain from threatening the sovereignty of any state when exercising their rights at sea.<sup>73</sup> Some Chinese authors also take issue with the fact that a non-signatory to the convention, the United States, is making arguments about the interpretation of the convention's clauses on freedom of navigation and marine research.<sup>74</sup>

China's active rejection of American activities challenges two of the four pillars of East Asia's maritime order. It is inconsistent with the interpretation that the coastal state does not have jurisdiction over research activities other than MSR and that non-combat military activities are permitted in the EEZ. Peter Dutton points out that while some states reject the legality of military exercises in the airspace over the EEZ, the vast majority of the 159 UNCLOS signatories either explicitly or tacitly support the American view that such activities are not subject to coastal state jurisdiction.<sup>75</sup> If the rules and norms of behaviour in this regard shifted to China's favour, American military vessels would find their freedom of action severely constrained, their military initiative lost and their task of securing sea lanes and deterring aggression more difficult. While established Western naval power such as Great Britain, Germany, the Netherlands and France support the American position, other states adopt the Chinese attitude towards military research activities in the EEZ such as Bangladesh, Brazil, Cape Verde, India, Malaysia, Pakistan and Uruguay.<sup>76</sup> While China's views on military vessels dates to the 1970s, by asserting this posture through EEZ enforcement China appears to be trying to limit navigational freedoms for military vessels and in so doing, undermine the deterrent posture of the US military that underwrites East Asia's maritime order. China's perspective thus undermines the American role as an offshore balancer.

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<sup>70</sup> Ian Townsend-Gault and Clive Schofield, "Hardly Impeccable Behaviour: Confrontations between Foreign Ships and Coastal States in the EEZ," *International Zeitschrift* 5 (April 2009), accessed September 9, 2009, <http://www.zeitschrift.co.uk/indexv5n1.html>

<sup>71</sup> Zhang, "The Conflict between Jurisdiction of Coastal States on MSR in EEZ and Military Survey," pp. 317-331.

<sup>72</sup> Mark J. Valencia, "The South China Sea Brouhaha: Separating Substance from Atmospherics," *Policy Forum* 10-044, August 10, 2010, accessed August 11, 2010, <http://www.nautilus.org/publications/essays/napsnet/policy-forums-online/security2009-2010/the-south-china-sea-brouhaha-separating-substance-from-atmospherics>.

<sup>73</sup> Ji Guoxing, "The Legality of the "Impeccable Incident"," *China Security* 5, no. 2 (2009), p. 18.

<sup>74</sup> Zhang Haiwen, "Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States?—Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ," *Chinese Journal of International Law* 9 (2010), pp. 31-47.

<sup>75</sup> Peter A. Dutton, "Caelum Liberam: Air Defense Identification Zones Outside Sovereign Airspace," *American Journal of International Law* 103, no. 4 (2009), p. 697-699.

<sup>76</sup> Yang Fang, "Exclusive Economic Zone (EEZ) Regime in East Asian Waters: Military and Intelligence Gathering Activities, Marine Scientific Research (MSR) and Hydrographic Surveys in an EEZ," *RSIS Working Paper* no. 198, (May 21 2010), p. 9.

### China's Second Challenge to Maritime Order

China's second challenge to East Asia's maritime order stems from the method with which it makes claims to maritime space. Under UNCLOS, states are entitled to claim maritime zones in very specific ways, under very specific conditions and with very specific limits. While controversy continues in East Asia as to the preferred method of claiming maritime zones – the EEZ versus the continental shelf – there is widespread adherence to the basic process of doing so. Maritime zones – such as the territorial sea, EEZ and continental shelf – are measured from baselines that run along the coast; baselines are a connection of coastal base points identified by the coastal state. The waters landward of these baselines are classified as internal waters. There are two aspects of China's claimed maritime zones which are inconsistent with UNCLOS that lie at the heart of China's second challenge to regional maritime order. The first aspect is China's claim to base points along its coast line. Forty-nine such base points were listed in China's Declaration on the Territorial Sea in May 1996.<sup>77</sup> Several of these were criticized by neighbouring powers South Korea and Japan, as well as by the US, on the grounds that they were inconsistent with the UNCLOS criteria for a base point. Many of China's base points are too far from the coast, or too far apart – several are separated by over 100nm – for being suitable features for use as a base point. While some have defended China's claims on the basis of the inherent competence of a coastal state to delimit its territorial waters, other have pointed out that this norm is subject to abuse and it would be absurd if every minor indentation on a coastline called for straight baselines.<sup>78</sup>

According to Article 7 paragraph 4 of UNCLOS, “straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of baselines to and from such elevations has received general international recognition.”<sup>79</sup> Several of China's base points are beneath the ocean's surface at high tide; they therefore cannot be used as base points unless either of the conditions noted above obtain. In February 2010 Beijing announced that it had completed a five year project to install thirteen structures on various maritime features along its coast that function as base points.<sup>80</sup> As there is little international acceptance of China's straight baseline claim, China's effort to mark these features with lighthouses and other structures is designed to reinforce its justification of these base points.

This situation has important implications for the interaction between US and Chinese forces in an era where Washington and Beijing dispute the accepted norms and rules surrounding what vessels and aircraft can do in the waters of East Asia. For example, one of these base points, Waikejiao, is located 73km from the Chinese coast.<sup>81</sup> From the Chinese perspective, the newly constructed lighthouse on this feature reinforces its status as a base point. The waters to the west of this feature are, in the Chinese view, the internal waters of the Chinese state over which it has absolute sovereignty. By contrast, from the American perspective Waikejiao, as well as seven

<sup>77</sup> Declaration of the Government of the People's Republic of China on the baselines of the territorial sea, 15 May, 1996. [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN\\_1996\\_Declaration.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1996_Declaration.pdf).

<sup>78</sup> See Jeanette Greenfield, *China's Practice in the Law of the Sea* (Oxford: Clarendon Press, 1992), p. 72; Hyun-Soo Kim, "The 1992 Chinese Territorial Sea Law in Light of the Un Convention," *International and Comparative Law Quarterly* 43, no. 4 (1994), p. 899.

<sup>79</sup> UN Convention on the Law of the Sea, Part II, Article 7, paragraph 4.

<sup>80</sup> Peh Shing Huei, "Beijing Lays Markers for East China Sea," *The Straits Times*, February 9, 2010

<sup>81</sup> Will Clem, "Engineers Finish Marking Of Sea Borders," *South China Morning Post*, February 10, 2010

other features used as base points, do not meet UNCLOS criteria.<sup>82</sup> Thus, the waters west of these features would be viewed by Washington as some combination of Chinese territorial sea and EEZ, wherein its vessels have at least the right to innocent passage, if not the right of free navigation through the EEZ.

This dispute has important implications for regional order. While Washington does not recognize China's straight baseline claims, to be consistent with this perspective, American vessels and aircraft may ignore the excessive baseline claims and conduct surveillance and research activities within them. Indeed, this is precisely the purpose of the Freedom of Navigation (FON) operations system employed by the State Department in order to actively express Washington's rejection of what it views as excessive maritime claims. For instance, the US conducted war games in the Gulf of Sidra to oppose the Libyan claim of full sovereignty over these waters, which resulted in an exchange of fire.<sup>83</sup> Furthermore, American forces routinely exercise their transit rights to guard against excessive claims by coastal states. For example, American ships transited the Lombok Strait in 1957 following Indonesia's archipelagic waters claim. Such an operation would be consistent with the American argument that these activities are permitted within China's EEZ and its rejection of these base points. Consistent with its claim, China views the area within these base points as internal waters, and would thus view the presence of an American military vessel as a violation of Chinese sovereignty and as an invasion of the Chinese state. While it is unlikely that Washington would conduct an FON operation in China's waters, the fact remains that China and the United States disagree not only on what US vessels can do in the Chinese EEZ, but also the very location of the waters in which differing degrees of sovereign authority lie.

A second aspect of China's maritime claims that could challenge regional order is the opaque nature of its claim to "indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and ... sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof."<sup>84</sup> The basis of China's claims to the Spratly islands and South China Sea have long been unclear, based on a combination of historical usage arguments and a mysterious map with nine lines encompassing all of the South China Sea. China formalized this map as the basis of its claim to the South China Sea when it attached the map to its protest note to Malaysian, Vietnamese and Philippine extended continental shelf claims submitted to the United Nations in 2009. The line extends well beyond any conceivable 200nm EEZ entitlement, and the nature of the jurisdiction claimed by China – over the waters, seabed and subsoil – does not suggest an extended continental shelf as the basis for its claim. As a consequence, the international community is left to interpret China's claims for itself.<sup>85</sup> US Secretary of State Hilary Clinton made an effort at the ASEAN Regional Forum in 2010 reminding China that "legitimate claims to maritime space in the South China Sea should be derived solely from

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<sup>82</sup> US Department of State, "Straight Baseline Claim: China," *Limits in the Seas*, No. 117 (Bureau of Oceans and International Environmental and Scientific Affairs), 1996, p. 6.

<sup>83</sup> For details of the latter see Dutton, "Caelum Liberam," pp. 701-702.

<sup>84</sup> Communications received with regard to the joint submission made by Malaysia and Vietnam to the CLCS, *China*, CML/17/2009, May 7 2009, [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2009re\\_mys\\_vnm\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf), accessed February 16 2011.

<sup>85</sup> For one such interpretation see Robert Beckman, "South China Sea: Worsening Dispute or Growing Clarity in Claims?" *RSIS Commentaries* no. 90, August 16, 2010.



legitimate claims to land features.”<sup>86</sup> It is unclear which feature among the Spratly islands meets the criteria of an island to serve as the basis for an EEZ that extends as far south as Indonesia. As Sam Bateman as indicated, China certainly seems to interpret its jurisdictional rights as extending this far; a Chinese patrol vessel forced the release of Chinese fishermen detained for fishing in Indonesian waters recognized by China.<sup>87</sup>

These claims to the South China Sea are longstanding; the map itself was drawn by the Republic of China in 1947. As noted above, the South China Sea disputes have been characterized by a degree of stability since the territorial status quo was consolidated in the late 1990s. It is China’s recent posture towards the South China Sea disputes that amounts to a challenge to maritime order. China has asserted its presence in the South China Sea region with more vigour than ever before and, for the first time since 1995, sparked concerns that it seeks to limit freedom of navigation and possibly limit the accessibility of the region to US military forces. While much has been made of individual incidents, taken as a whole the series of events in 2010 illustrates a far more active posture from China than has been witnessed previously and one that seems to reject aspects of the rules and norms of behaviour in East Asia that has previously accepted, if only tacitly. Rumours surfaced in April 2010 that senior Chinese officials has intimated to their American counterparts that the South China Sea was a ‘core interest’ on par with Taiwan, Tibet and Xinjiang province and that American interference was unwelcome.<sup>88</sup> While this claim was never repeated by Chinese officials, subsequent events indicate a consensus within Beijing that China rejects the legitimacy of the American presence in East Asia.<sup>89</sup> Secretary of State Hilary Clinton reiterated the American commitment to freedom of navigation and stability in the South China Sea and for the first time stated its willingness to “facilitate initiatives and confidence building measures consistent with the [2002 ASEAN-China] declaration”.<sup>90</sup> Foreign Minister Yang Jiechi reacted angrily calling the remarks an “attack on China.”<sup>91</sup> Ministry of Defense Spokesman Colonel Geng Yan-sheng subsequently claimed that China has “indisputable sovereignty” over the South China Sea, but would permit freedom of navigation through these waters.<sup>92</sup> Most mysterious was the Chinese expedition to plant of a flag on the seabed of the South China Sea. This incident is peculiar because such gestures have exacerbated maritime boundary disputes elsewhere in the world. In August 2007 a Russian expedition planted a flag pole on the seabed of the Arctic Ocean and was widely condemned by Canada and European Arctic states.

The strident Chinese reaction to the restatement of American policy on the South China Sea in July 2010 indicates a collective dissatisfaction in Chinese policymaking circles with the two pillars of East Asia’s maritime order that stem from the region’s power structure. Rather than being seen as a stabilizing element, US forces are now seen as an unwelcome, yet highly mobile,

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<sup>86</sup> Secretary of State Hilary Clinton, “Remarks at Press Availability,” National Convention Center, Hanoi, July 23 2010, [www.state.gov/secretary/rm/2010/07/145095.htm](http://www.state.gov/secretary/rm/2010/07/145095.htm), accessed February 16 2011.

<sup>87</sup> Sam Bateman, “The South China Sea: When Elephants Dance,” *RSIS Commentaries* no. 91, August 16, 2010.

<sup>88</sup> Edward Wong, “Chinese Military Seeks to Extend Its Naval Power,” *New York Times*, April 23 2010.

<sup>89</sup> For an analysis of the implication of the alleged ‘core interests’ remark see Michael Swaine, “China’s Assertive Behavior Part One: ‘Core Interests,’” *China Leadership Monitor* no. 35 (2010).

<sup>90</sup> Clinton, “Remarks at Press Availability,” 2010.

<sup>91</sup> “Foreign Minister Yang Jiechi Refutes Fallacies on the South China Sea Issue,” Chinese Ministry of Foreign Affairs, July 26 2010, [www.fmprc.gov.cn/chn/gxh/tyb/zyxw/t719371.htm](http://www.fmprc.gov.cn/chn/gxh/tyb/zyxw/t719371.htm), accessed February 16 2011.

<sup>92</sup> Cheng Guangjin and Wu Jiao, “Sovereign Waters are not in Question,” *China Daily*, July 21, 2010.

presence in a Chinese sphere of influence. In the words of PLA Major-General Luo Yuan “the so-called forward presence means that the United States can send its gunboats to every corner of the world ... This way, the United States can even claim the Yellow Sea and the South China Sea is covered within its security boundary.”<sup>93</sup> As noted above, while the basis of China’s perception of its maritime realm is longstanding, the degree with which it actively enforces its claimed jurisdiction has increased particularly after the EP-3 incident in 2001. Chinese authorities have been asserting their interpretation of their claims on all who use these areas including US forces, Vietnamese fishermen, Japanese survey vessels and coast guard ships and international oil companies, to the detriment of regional stability.<sup>94</sup>

#### Assessing China’s Challenge: Implications for Maritime Order

China’s challenge to East Asia’s maritime order can be observed if its actions reflect a desire to modify or reject any of the four pillars of East Asia’s maritime order to which it has previously adhered. By this measure, China’s recent practice challenges the two structural pillars of the existing regional maritime order in East Asia in two ways. First, by choosing to physically enforce its claimed jurisdiction over research activities in the EEZ China appears prepared to resist navigational freedoms for military vessels with force. This increases uncertainty and undermine American freedom of action in East Asia’s waters. Second, as the two states differ over the definition of their waters landward of China’s baselines, this area could be the site of future maritime confrontations between a rising China and a hegemonic United States. China and the US dispute the location of China’s maritime zones along some sections of its coast which renders the status of waters on the landward side ambiguous. Likewise, it is unclear what status China ascribes to the waters of the Spratly islands and the southern extremities of the South China Sea. This serves to increase operational uncertainty for American forces in East Asia which is inconsistent with the regional maritime order China has hitherto accepted.

In some sections of the US government, China’s practice, combined with the nature of its military modernization – focused on niche asymmetric capabilities – is viewed as part of a broader strategy to deny US forces access to East Asian waters. The Pentagon has labelled this an anti-access, area denial (A2AD) strategy that blends technologies such as land attack cruise missiles and anti-ship ballistic missiles with China’s interpretation of its jurisdiction over military activities in its EEZ to make the East Asian littoral a dangerous operational environment for US forces.<sup>95</sup> Peter Dutton summarizes the problem thusly:

the combination of their [China’s] territorial claims over the islands of the South China Sea and China’s “unique” interpretation of international law of the sea relating to coastal state authorities to limit or prohibit foreign military activities in the exclusive economic zone does appear to be part of a Chinese plan to achieve in the South China Sea exclusive military control over the water space within their U-

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<sup>93</sup> Luo Yuan, “PLA General : US engaging in gunboat diplomacy,” *People’s Daily*, August 12 2010.

<sup>94</sup> Raul Pedrozo, “Beijing’s Coastal Real Estate,” *Foreign Affairs Snapshot*, November 15 2010, [www.foreignaffairs.com/articles/67007/raul-pedrozo/beijings-coastal-real-estate](http://www.foreignaffairs.com/articles/67007/raul-pedrozo/beijings-coastal-real-estate), accessed April 21 2011.

<sup>95</sup> Office of the Secretary of Defense, *Military and Security Developments Involving the People’s Republic of China*, Annual Report to Congress, 2010, chapter three.

shaped, nine-dashed line. Such control is tantamount to the control a sovereign exercises over its zones of maritime sovereignty.<sup>96</sup>

However, as noted above, China's view on foreign military vessels in its waters reflect long standing Chinese statements and reservations with regard to the rules and norms of acceptable behaviour at sea. Its shift from this rhetorical rejection, but *de facto* acceptance to active resistance is evidence that a rising China seeks to modify East Asian maritime order. International relations theory expects rising powers to mould global norms to reflect their preferences as they rise. The ability of the hegemonic power to accommodate these norms determines the outbreak of hegemonic war. In this context it is worthwhile to consider the implications of this challenge for the United States.

It is imperative that American policymakers view a Chinese A2AD strategy in its proper context. A2AD supposes that China seeks to deny access to the East Asian littoral to achieve a military objective. It remains unclear that if American forces were denied access to the East Asian littoral, China would abandon decades of strategic restraint and modify the broader security order in the region, for instance by conquering Taiwan, or by seizing disputed territories such as the Senkaku/Diaoyu islands. At best the strategic rationale that underlines China's changing posture towards regional maritime order is incomplete. For instance, there is emerging evidence that China seeks to redefine where and under what conditions US forces can be deployed in the Yellow Sea. In response to the sinking of the South Korean vessel Cheonan by North Korea, the US held a series of war games in waters near North Korea as a demonstration of force. China took the opportunity to redefine what it viewed as legitimate behaviour by insisting the exercises not take place in the Yellow Sea.<sup>97</sup> Deputy Chief of the Armed Forces General Staff General Ma Xiaotian warned Washington not to deploy the USS George Washington to the Yellow Sea.<sup>98</sup> Far from being an effort to soften the blow to Pyongyang, this was an attempt by Beijing to restrict American access to the Yellow Sea. Problematically, Chinese policy towards American naval operations in the Yellow Sea has been inconsistent. The USS George Washington was deployed to the Yellow Sea in November 2009 and did not elicit any Chinese objection. However, in October 1994 a Chinese Han submarine stalked a carrier battle group led by the USS Kitty Hawk in the same waters. PLA aircraft flew in to intercept American aircraft tracking the submarine. China subsequently warned that its forces would open fire should such an incident be repeated.<sup>99</sup> However, no such confrontations have been repeated in the Yellow Sea. Yet, in the wake of the Impeccable incident the USNS Victorious was confronted by civilian fishing trawlers in the Yellow Sea in May 2009. The precise status Beijing accords the Yellow Sea is thus unclear. In any event, as Ralph Cossa argued, Chinese objections to the deployment of the carrier made its deployment a necessity in order to defend freedom of navigation entitlements.<sup>100</sup> The USS George Washington thus returned to the Yellow Sea in November 2010 to conduct a second exercise with South Korean forces.<sup>101</sup>

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<sup>96</sup> See for example Peter Dutton, "Testimony to the United States Senate Committee on Foreign Relations," *Hearing on Maritime Issues and Sovereignty Disputes in East Asia*, July 15 2009.

<sup>97</sup> "Strategic Jousting between China and America," *The Economist*, July 29, 2010.

<sup>98</sup> Michael Richardson, "Steering a Fine Line in the Yellow Sea," *Straits Times*, August 23, 2010.

<sup>99</sup> Kan, "US-China Military Contacts," p. 40.

<sup>100</sup> Ralph Cossa, "Not China's Coastal Waters," *Japan Times*, September 1, 2010.

<sup>101</sup> S. Korea, "U.S. conduct joint drill amid NK's threats of rockets," *Korea Herald*, November 28 2010.

China's 'unique' perspective on maritime order is longstanding and still evolving. It is rooted in the developing world experience of colonization and the calculations of a developing state that lacked the naval power to protect its maritime approaches – as China was in the early 1970s – yet which also had historical experience with foreign invasion by these approaches. China's view is thus not part of a long term strategic hedge designed to give China the legal means necessary to limit freedom of action by the US military decades after the fact. Yet, despite this posture, China has conveyed its objections to American activities inconsistently and infrequently. As a consequence, the challenge to East Asian maritime order is not the Chinese interpretation of accepted legal norms, but its practice of asserting this perspective with greater frequency and vigour than ever before. In doing so China has shifted from the tacit acceptance of the structural pillars of regional maritime order to explicit rejection. While China may have always denied freedom of navigation for military vessels in word, its deeds amount to the challenge to order. In this fashion, China's posture is distinct from other states that share its interpretation of international maritime norms. However, China is not wholly dissatisfied with East Asia's maritime order. It generally accepts UNCLOS as the basis for the rules and norms of behaviour, but views these in a utilitarian way. This is not unlike other coastal states in the region that interpret UNCLOS in a way that suits their interests. Furthermore, it does not appear interested in threatening the territorial sovereignty of regional states.

The United States has always defended the freedom of the seas and has a vital strategic interest in ensuring these freedoms in East Asia. This role is becoming more risky. American vessels and aircraft may ignore China's excessive baseline claims and conduct surveillance and research activities within them. This would be consistent with the American argument that these activities are permitted within China's EEZ and its rejection of these base points. Consistent with its claim, China views the area within these base points as internal waters, and would thus view the presence of an American military vessel as a violation of Chinese sovereignty and as an invasion of the Chinese state. China's strident response in the cases of the Impeccable incident and the EP3 collision indicates that its reaction to US forces operating within its claimed internal waters would be severe.

### Conclusion

China's rise will be felt to different degrees in different sections of the international system. This paper has illustrated how China is challenging certain elements of East Asia's maritime order. This is not to suggest that China is advancing an alternative international order, or challenging existing mechanisms of global governance simply because its posture towards some law of the sea questions is inconsistent with that of the United States; many states misuse and misinterpret UNCLOS for their own ends. However, China's uses and abuses of international maritime law, and the practice it uses to enforce them do challenge two of the pillars of East Asia's regional order. Whereas the structural underpinnings of East Asia's maritime order have in the past been sustained by the hegemony of the United States, China's challenge indicates that the elements of the first and second pillar are shifting from a hegemonic pathway to a power balancing pathway. Under these conditions order is characterized by the contest between powerful states to pursue their own preferred interpretation of an order that reflects their preferences. Cooperation is possible, but is not the preferred course of action; states prefer to pursue their goals through internal and external balancing behaviour.<sup>102</sup>

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<sup>102</sup> Alagappa, "The Study of International Order," p. 54-55.

Chinese behaviour thus far seems broadly consistent with the institutional/normative pillars of regional maritime order. It generally accepts UNCLOS language as the basis for regional rules and norms and continues to address maritime issues in this way. For instance it is fully engaged with the UN process for making claims to extended continental shelves. Likewise, China continues to display relative caution with regard to escalating its maritime disputes. It has not tried to conquer any disputed spaces by force and has twice signed cooperative joint exploration agreements with rival claimant states, Vietnam, the Philippines and Japan. These have not been implemented due to the domestic nationalist sentiment that is aroused by maritime disputes and does not represent a Chinese rejection of this pillar of regional maritime order. At this stage it would be speculative to suggest that this posture may change if China is able to modify the first two pillars of East Asia's maritime order.