

Rules-Based Maritime Security in Asia: A View from New Delhi

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ABSTRACT

The Rules-Based Order (RBO) underpins the global maritime trading and security system. A subject of growing discussion and debate in strategic studies circles, it is seen by many as a prerequisite for seaborne trade and commerce, and a crucial factor in formulating national security policy. While many Asian powers have a shared understanding of the principles of maritime conduct, regional states have tended to situate the RBO within the framework of “balance of power”, with a focus on countering Chinese aggression in the littorals. This paper examines the Rules-Based Order in Asia from a ‘maritime operations’ lens, evaluating India’s options in the near and extended neighbourhood. It argues that notwithstanding growing discord with Beijing, New Delhi could devise a protocol of maritime engagement to reduce conflict and improve cooperation in the commons. In doing so, the two Asian powers could come to an understanding on the normative principles of interaction in the littorals. Even so, there are likely to be no easy options for New Delhi.

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INTRODUCTION

The Rules-Based Order (RBO) constitutes the foundation for the international maritime trading and security system. A subject of growing deliberation in strategic studies circles and policy establishments, it has come to be regarded as a prerequisite for seaborne trade and commerce, and a crucial factor in the formulation of national security policy. The issue of RBO has also gained currency in official discourse in some Indo-Pacific states. Some treat RBO as a conceptual prism for the evaluation of emergent challenges in littoral-Asia; others see it as a device to generate consensus around clearly defined standards of acceptable behaviour in the regional littorals.¹

In recent months as China has sought to consolidate power and influence in the South China Sea, the question of ‘rules-based security’ is back in focus. Beijing’s expansive island-building program in the Spratly group of islands, and aggressive ‘grey zone’ activity in the adjoining seas have caused disquiet in Southeast Asia, where many view China’s actions as undermining international law.² With Chinese militia boats operating close to the shores of Indonesia, Vietnam, Malaysia and the Philippines, and their coast guard and naval intelligence ships expanding presence operations in areas as far as the Australia³ and Japan’s Senkaku islands,⁴ there are growing concerns that Beijing might be working on a plan to dominate the Pacific littorals (See Table 1).

As China’s neighbours see it, Chinese posturing at sea represents intimidation through the use of military force. Consequently, Southeast Asian states have scaled up naval, coast guard and militia operations in their own near-seas.⁵ While Vietnam has used its fishing fleets to assert sovereignty over spaces close to the Spratly islands,⁶ Indonesian navy and coast guard ships have engaged in pushback against Chinese fishing activity around the Natuna islands.⁷ Both Jakarta and Hanoi have

underscored the importance of a regional rules-based order, but their efforts have met with little results, as China has persisted with its belligerent stance.⁸

Table 1. Recent Instances of Violation of Maritime Rules in the South China Sea

Date	Incident
March 2020	Chinese ship rams Vietnamese fishing boat
March 2020	Chinese fishing boat rams Japanese warship in the East Sea
June 2019	A Chinese vessel rammed a Filipino boat anchored near Reed Bank in the South China Sea.
March 2019	A Vietnamese fishing boat capsized after being rammed by a Chinese vessel in the South China Sea's contested Paracel Islands
July 2019	China deploys oil rig, Haiyang Dizhi 8 (HD8, in Vietnam's waters
July 2019	Chinese boats ram and sink a Filipino boat near reed bank ⁹
Sept 2019	Chinese Type 052 Luyang II-class destroyer nearly collided with the USS Decatur in the South China Sea
Sept 2019	PLAN frigate confronts a Royal Navy warship was passing through the South China Sea. ¹⁰
Aug 2018	Royal Australian Navy ships had been challenged by PLAN vessels when transiting through the same region.
Aug 2019	Two Chinese fighter jets buzzed a Canadian warship in the East China Sea earlier
April 2019	Indonesian patrol vessels rammed by two Vietnamese CG ships after intercepting a fishing boat
May 2019	Chinese survey vessel Haiyang Dizhi 8, accompanied by several coast guard and maritime militia vessels, encroached into Malaysia's exclusive economic zone (EEZ).

Author's own, using various open sources.

Counter-action by China's neighbours in the South China Sea has had an impact on the negotiations for a regional Code of Conduct (CoC). As China has moved to assert greater control over hotspots in Southeast and East Asia, dialogue has stalled.¹¹ With the prospects of a regional code fast receding, ASEAN has expressed "serious concerns" over the absence of a "conducive environment" for CoC negotiations.¹² Regional states have highlighted the 1982 UNCLOS (United Nations Convention on the Law of the Sea) as legal basis for territorial disputes, "legitimate interests" and "all activities in the oceans and seas"—a signal to Beijing that negotiations for a code of conduct will not be on China's terms. With tit-for-tat exercises by the US Navy and the PLAN in the South China Sea, regional stability appears more perilous than ever.¹³

From an Indian perspective, three developments in the regional littorals call attention to the need for maritime norms. First, there has been a rise in the presence of China's research and survey vessels in the Eastern Indian Ocean. After the Indian Navy expelled the Shiyan 1, a Chinese research vessel found intruding into the exclusive economic zone off the coast of India's Andaman and Nicobar Islands in September 2019, there is concern in India's security establishment over Chinese maritime presence in the neighbourhood.¹⁴ At a time when there is talk of a China-backed plan to construct a canal across the Thai isthmus¹⁵ and a secret agreement for a Chinese naval base on the Cambodian coast,¹⁶ a surge in Chinese presence in the eastern Indian Ocean has triggered disquiet in New Delhi. To add to India's discomfort, China's mining operations in the South Indian Ocean have expanded considerably;¹⁷ so too has the presence of Chinese fishing boats in areas close to India's territorial waters.¹⁸

Analysts are also considering a second factor: the growing presence of Chinese intelligence ships in the IOR and the Western Pacific.¹⁹ The

People's Liberation Army Navy (PLAN) has been deploying its Dongdiao class intelligence-gathering ships in the Eastern Indian Ocean to keep an eye on the Indian naval installations, and a spy ship was spotted close to the eastern sea border near the Andaman and Nicobar Islands late last year. While such activity is not without precedent, the fact that Chinese intelligence ships are now venturing close to Indian islands is a disconcerting development.

Third, Chinese militia operations in the South China Sea have been focused on the region's Western end close to the Indian Ocean and seem to target countries that India has been closely involved with in regional security initiatives. Since September 2018, when a PLAN Type 052C destroyer came within 45 yards of the *USS Decatur* near Gaven reef in the South China Sea,²⁰ China's naval and militia operations have harassed regional maritime forces, including the coast guards of Vietnam and Indonesia. In January this year, China sparked a major confrontation with Indonesia when dozens of Chinese fishing vessels, along with a coast guard escort, entered waters off the Natuna Islands, within Jakarta's exclusive economic zone. In April, days after a Chinese fishing boat rammed a Japanese warship and caused a meter-long gash on its side,²¹ another Chinese ship struck and sunk a Vietnamese fishing boat, and then prevented Vietnamese coast guard ships from rescuing the fishermen.²²

This paper examines the security order in littoral-Asia from a maritime-operations lens, evaluating India's options. It argues that despite a shared understanding of common principles of maritime conduct, regional states (including India) have viewed 'rules-based' security through the prism of strategic autonomy and 'balance of power'. Consequently, the maritime rules-based system has never been properly upheld. Yet, it is possible for India to devise a protocol of regional engagement that would reduce the possibility of conflict with

China and ensure practical cooperation, notwithstanding the present odds that seem heavily stacked against such an endeavour.

RULES-BASED ORDER: CONCEPTUAL UNDERPINNINGS

The RBO debate has manifold layers. At its heart lie questions about how states perceive their stakes in the international system: how they see rules, norms and principles emerge; and how these rules serve national interests in a contested geopolitical environment. In the 21st century, Asia has come to acquire prominence in the international order, even exert influence in matters of global security and economic development. As the region gains greater significance within the international system, Asian states have become more willing to exchange views and ideas on how to design governance systems to optimise efficiency. Having a rules-based framework allows for a baseline level of predictability, or regularity around maritime interactions that reduces the possibility of conflict. The concept suggests the existence of not only a “system” but a “society of states whose members share a sense of common interests in the elementary goals of social life; rules prescribing behavior that sustains these goals; and institutions that help to make these rules effective.”²³

In theory, a rules-based order is an instrument of multilateralism that facilitates common responses to non-traditional security challenges, such as natural disasters and transnational crime. The purpose of maritime rules is to establish a certain level of operational cooperation between agencies that would meet the common interests of all partners. Advocates of a norms-based architecture highlight multinational maritime crisis operations in the aftermath of the 2004 Indian Ocean tsunami, joint-relief operations after Typhoon Haiyan, counter-piracy initiatives in the Western Indian Ocean and Southeast

Asia, and the search missions for Malaysian Airlines flight MH370 and Air-Asia flight QZ850.²⁴

In practice, however, the ‘rules’-narrative is often deployed by Pacific powers to preserve a favourable balance of power in littoral-Asia. Since the 2016 Arbitration Tribunal’s decision that rejected Chinese claims in the SCS, regional powers have focused on protecting their near seas from Chinese incursions.²⁵ The norms-based maritime order has largely been a way of preventing Beijing from undertaking unilateral measures to establish hegemony in littoral Southeast Asia by permanently altering facts on the ground.

STRUCTURAL AND OPERATIONAL CONSIDERATIONS

Beyond China’s unchecked aggression in the littorals, there are three interconnected problems in the application of maritime norms. The first issue is the problem of legitimacy. For a system based on rules to be effectively implemented, regional states believe the individual rules must be seen to be observed by all sides. However, the record of big Pacific democracies is seen by many Asian countries to be less than exemplary. Scholars of international relations point out that the United States—the principal proponent of rules-based order—has a record of unilateralism on the world-stage that inspires little confidence. Military interventions in Iraq and Afghanistan, and the trade war with China render the US unfit to be the prime mover of a rules-based international system.²⁶ Similarly, Japan’s refusal to stop its whale-hunt in the Southern Pacific, and Australia’s treatment of refugees seeking asylum, are seen by many as evidence that the rules do not uniformly apply to stakeholders and that powerful states are selective in observing international norms. The propensity of a few to unequally apply the rules, say theorists, has led to a polarisation of opinion over norms in the maritime domain— a phenomenon in clear evidence in the South China Sea.

A related issue is that of equity. Political analysts and policymakers agree that a rules-based order must work to the advantage of all stakeholders, but there is a perception that it serves the geopolitical interests of the big powers. Many say the regime of maritime-access—promoted by the United States and characterised by the free movement of trade, investment and people—is focused squarely on commerce and strategic balance, and largely unresponsive to needs of human security and development.²⁷

A final debility with the rules-norms framework is its lack of enforceability, which leads to cooperation focused mainly on the provisioning of lower-order security goods. Since there is no transcendental and impartial authority that can enforce rules in a fair and consistent fashion, states know they must rely on themselves for their own security.²⁸ This awareness prompts states towards self-interested behaviour, limiting their cooperation to mere law-enforcement in the commons.

Moreover, from a tactical-operational perspective, the key problem with the RBO is the lack of implementation. Experts say the proponents of a ‘rules-based order’ must contend with the differing interpretation of provisions enshrined in the UNCLOS, particularly freedom of navigation of warships in the Exclusive Economic Zones of a foreign state, as well as the freedom to carry out marine scientific research and intelligence gathering and other military activity.²⁹ For some countries like the US, freedom of navigation implies high seas freedoms for warships in a coastal state’s 200-nautical miles exclusive economic zones (EEZs).³⁰ It is only within the 12 nautical miles territorial seas limit that the US believes military ships must abide by the rules of “innocent passage” which preclude military-related activity, but do not still require prior notification or approval of the coastal state.³¹ As China sees it, foreign military ships must obtain prior permission of the

coastal state before entering the EEZs and the 12-nautical mile territorial sea.³² From a Chinese perspective, the USN's freedom of navigation patrols in the South China Sea amount to a display of aggressive intent in China's near-seas (See Table 2).

Table 2. US Naval FONOPs in South China Sea since 2015

27 Oct 2015	USS Lassen	Within 12 nm of Subi Reef, Spratlys
29 Jan 2016	USS Curtis Wilbur	With 12nm of Triton island, Paracels
10 May 2016	USS William P Lawrence	Within 12nm of Ferry Cross Reef
21 October 2016	USS Decatur	Within an excessive claim of territorial waters by China between two land features in the Paracels. But not within 12 nm of said features
24 May 2017	USS Dewey	Within 6 miles of Subi Reef in Spratlys
02 July 2017	USS Stetham	With 12 miles of Triton islands in Paracels
10 August 2017	USS John S McCain	Within 12nm of Mischief Reef
10 October 2017	USS Chafee	Entered excessive straight baseline of Parcel but not within 12 nm of features
17 January 2018	USS Hopper	Within 12nm of Scarborough shoal
23 March 2018	USS Mustin	Within 12nm of Mischief reef, Spratlys
27 May 2018	USS Higgins, USS Antietam	Within 12 nm of Triton and Woody, Paracels
30 September 2018	USS Decatur	Within 12 nm of Gaven and Johnson Reefs, Spratly
26 November 2018	USS Chancellorsville	In vicinity of Paracels
07 January 2019	USS MacCampbell	Within 12 nm of Tree, Triton and Woody Islands of the Paracels

11 February 2019	USS Spruance, USS Preble	Within 12 nm of Mischief Reef in Spratlys
06 May 2019	USS Chung Hoon, USS Preble	With 12 nm of Gaven and Johnson reefs in the Spratlys
19 May 2019	USS Preble	Within 12 Nm of Scarborough Shoal
20 August 2019	USS Wayne E Mayor	With 12nm of Fiery Cross and Mischief reed of the Spratlys
13 September 2019	USS Wayne E Mayor	Paracel islands. Mission challenged the imposition of authorization / notification for innocent passage, and Beijing's 1996 declaration of straight base-lines
20 November 2019	USS Gabrielle Giffords	Within 12 nm of Mischief reef
21 November 2019	USS Wayne E Mayor	Challenged restrictions on innocent passage near the Paracel islands
21 January 2020	USS Montgomery	Challenged restrictions on innocent passage imposed by China, Vietnam and Taiwan in Spratly islands near Fiery Cross and Johnson reef
10 March 2020	USS McCampbell	Challenged maritime claims in the Paracels

Author's own, compiled from open sources.

The disagreements over 'freedom of navigation' and 'military activity' in the South China Sea, however, have not prevented regional states from seeking to improve coordination and communication in the contested commons (See Table 3). Three initiatives in recent years have been prominent. First, Asia Pacific states have sought to regulate interaction between naval ships and aircraft through a Code for Unplanned Encounters at Sea (CUES).³³ Signed by 21 countries in the Asia-Pacific region at the Western Pacific Naval Symposium in April

2014, the CUES is meant to “offer safety measures and a means to limit mutual interference, limit uncertainty and facilitate communication when naval ships or naval aircraft encounter each other in an unplanned manner.”³⁴ The CUES is seen by many as a noteworthy effort to create greater predictability in maritime interactions in the Asia-Pacific. It has been put into regular practice by regional navies, including the USN, the Japan Maritime Self-Defense Force, the PLAN, and the Indonesian navy.

The United States and China have also signed a Memorandum of Understanding (MoU) for the safety of air and maritime encounters that outlines rules of behaviour in a way that enables crisis communication to prevent misunderstandings and miscalculation.³⁵ Following a series of dangerous incidents since 2000 between the US navy and the PLAN in the South China Sea—including attempts by Chinese forces to harass US survey ships operating in and over China’s 200-nautical-mile exclusive economic zone—and repeated instances of buzzing US intelligence, surveillance and reconnaissance airborne assets, Washington and Beijing agreed to a set of mutually acceptable norms to prevent future incidents at sea. The agreement is seen to have played a part in establishing a ‘bottom-line’ consensus on military exercises, until the USS Cowpens incident in 2018 reversed things to an earlier version of themselves.

A third arrangement to calm regional tensions is the code of conduct (CoC) discussions between ASEAN and China. Conceived in 2002 as a mechanism to enable interaction and peaceful resolution of differences in the South China Sea, efforts to establish a regional code gathered momentum in 2017, when ASEAN and China endorsed a framework document. In 2019, a draft text was circulated for the consideration of parties, but talks soon ran into rough weather as China sought to take advantage of the COVID-19 crisis to advance its territorial claims, falling back on the use of aggressive force.³⁶

Conscious of the scale of the challenges faced, regional observers remain skeptical about the utility of the aforementioned arrangements in resolving differences between the US and China. Though marginally useful, the CUES, analysts posit, has failed to address operational divergences between the US navy and the PLAN.³⁷ Its key weakness is that it excludes activities by the Chinese coast guard and maritime militia and does not apply to within 12 nautical miles of the disputed features, where much of China's aggressive manoeuvring takes place.³⁸ The China-US agreement on maritime and air encounters, too, has not lived up to expectation. US watchers lament that the arrangement is not strictly binding under international law and can be discontinued by either side.³⁹ Furthermore, the agreement waters down existing legal commitments, even providing an opening for China to further diminish navigational rights.⁴⁰ After an incident in February 2020, when a US Navy P-8A Poseidon maritime patrol aircraft flying in airspace above international waters west of Guam was 'lased' by PRC navy destroyer, American confidence in the CUES and the MoU with China is at an all-time low.⁴¹

As regards the Code of Conduct, it is not a dispute resolution mechanism at all, and has shown little potential to resolve overlapping sovereignty claims in the South China Sea.⁴² Experts say that with claimant and non-claimant states involved in the CoC discussions, negotiations on issues such as military exercises and resources management are likely to be highly complex. Worryingly, China has been insisting on the insertion of a clause that would prevent "parties from holding joint military exercises with countries from outside the region, without prior notification and the explicit expression of no objection from others" – a stance unacceptable to ASEAN.⁴³ Southeast Asian states are also not willing to accept China's position that all sides must "desist from joint oil and gas exploration in their claimed waters

with foreign energy firms”. In such a scenario, it is unlikely that any of the parties will come to entirely accept the others’ priorities. With China getting increasingly aggressive in the South China Sea, many say the CoC is unlikely to come through any time soon.

Table 3. Dialogue Mechanisms in East Asia

S.No	Dialogue Mechanism	Year
1	Code for Unplanned Encounters at Sea	2014
2	Declaration of the Conduct of Parties (DOC)	2002
3	Discussions towards a Code of Conduct	Ongoing
4	MoU between China and US for Air and Sea incidents	2014
5	MoU between ASEAN and China for cooperation in non-traditional security	2009, 2017
6	ASEAN Senior Officials Meeting on Transnational Crime (SOMTC)	2007
7	Annual consultations are held between China and ASEAN Ministers Meeting on Transnational Crime (AMMTC)	1997
8	Japan -ASEAN annual Senior Officials Meetings on Transnational Crime (SOMTC + Japan).	2003
9	Japan and ASEAN annual Senior Officials Meetings Transnational Crime (SOMTC + Japan).	2013
10	ASEAN + Republic of Korea ministerial meeting on transnational crime	2019
11	ADMM Plus Dialogue	2010
12	China-!SE!N Def Minister’s Informal Meeting	2010

Author’s own, compiled from open sources.

INDIA AND THE RULES-BASED ORDER

India's strategic elite view the 'global system of rules' in the maritime commons as being inherently tied to the "Indo-Pacific" concept and the structural power shift underway in the global maritime system.⁴⁴ Indian observers say the integrated maritime space rimming the Asian continent emphasises the rise of India and China as principal economic and military actors, with a growing ability to transcend their respective sub-regions amidst a worsening geopolitical environment. In this, Indian scholars stress the importance of the Eastern Indian Ocean as a bridge linking the littoral sub-regions of Asia, reminding regional powers of the need to share equally in the burdens of economic development and security.⁴⁵

Even so, Indian reactions to a rules-based order tend to be contradictory. Whilst some political watchers embrace the notion of a rules-based order—viewing it as a rejection of China's aggressive, hegemonic conduct—others regard the concept with more circumspection. The proponents of 'rules' argue for a proactive approach in the maritime domain, injecting greater strategic content into New Delhi's relationships with major East Asian states.⁴⁶ Beyond facilitating smoother maritime operations, supporters of an RBO argue in favour of a viable cooperative architecture for the Indo-Pacific region.⁴⁷ Skeptics, meanwhile, remain wary of the idea of norms in the maritime domain.⁴⁸ Notwithstanding advances in the international legal system – underpinned by UN conventions and global accords – the rule of force, doubters say, continues to trump the rule of law at sea. As realists see it, there is little that the international community can do to bring China to abide by the norms, which renders the rules-based order illusory.⁴⁹

With little consensus on the way forward in the maritime domain, New Delhi's approach has been to leverage the norms-discourse in the

political-economic realm by highlighting the need for transparency and accountability in inter-state interactions, urging synergy in multilateral endeavours. In his 2018 Shangri-La Dialogue speech, Prime Minister Narendra Modi called upon the Indo-Pacific states to adopt a common rules-based order, emphasising regional norms that “must equally apply to all nations individually, as well as to the global commons.”⁵⁰ Mr Modi’s concept of SAGAR (Security and Growth for All in the Region) stresses Indian stakeholderhood in an Indian Ocean system of rules that is fair and equitable.⁵¹ At the 2019 East Asia Summit in Bangkok, the prime minister took the SAGAR doctrine one step further by proposing partnerships in the maritime domain through an “Indo-Pacific Oceans Initiative” aimed at the enhancement of maritime security; sustainable utilisation of marine resources; expansion of maritime trade and transport; and disaster prevention and management.⁵²

India’s foreign policy establishment also stresses the need for a rules-based order, underscoring “emerging geopolitical and geo-economic fault-lines straining globalisation”.⁵³ A viable system of global rules, officials aver, must focus on inclusiveness, sustainability and transparency, and respect the principles of sovereignty and territorial integrity in connectivity initiatives. Yet, New Delhi’s RBO discourse remains largely confined to a high-principles framework, never quite getting to the level of operations in the maritime commons. While emphasising Indian stakes in maritime governance—the importance of protecting the territorial seas, the safe-guarding of Indian islands, and the significance of being an early responder and net-security provider in the Indian Ocean—Indian policymakers and security managers have not quite engaged with the specifics of a RBO framework in the littorals.

Instead, Indian officials have used the rules-discourse to highlight Indian interests in the global international order. Overarching global

themes such as robust multilateralism, multi-polarity in international governance, and viable and sustainable economic practices remain a focal point of political interest. Whilst criticising Chinese predatory practices vis-à-vis Belt and Road Initiative (BRI) projects in South Asia, Indian policy-planners have sidestepped the issue of maritime rules in the littorals.

NAVIGATING A COMPETITIVE DYNAMIC

Operational aspects of ‘rules-based security’, however, bear greater attention. Maritime theorists aver that any system of maritime rules must thrive on legitimacy, consensus and dialogue. In Asia, however, naval competition and strategic brinkmanship have served to undermine the process of dialogue and rule-making. China’s rapid modernisation of its navy has pushed Southeast Asian states into reactive mode, each moving to expand their naval fleets, inducting larger platforms, developing underwater combat capability to deny China tactical space in the littorals.⁵⁴

The competitive dynamic is also at work in the Western IOR, where regional powers have been jostling for strategic space, setting up bases in the Horn of Africa and the Persian Gulf. Implicit threats of the closure of key chokepoints—Bab el Mandeb and the Suez Canal – have led to an aggravation of regional tensions, leading to fears that the putative rules-based order could fast unravel. Beijing’s first Indian Ocean logistics base in Djibouti – were the PLA is reported to have undertaken the construction of a massive pier⁵⁵ to dock its frontline warships – only complicates the security dynamic for India, leading to fears that China could set up multiple ‘dual-use’ outposts along important SLOCs in the Indian Ocean. Analysts say these ostensible civilian commercial sites could be upgraded for military use to support China’s fishing fleet and intelligence gathering activity.⁵⁶

For its part, the Indian navy has been clear about its preference for norms of interaction in the maritime commons.⁵⁷ With China's economic interests in the Indian Ocean growing rapidly, Indian officials underscore the need for regional rules.⁵⁸ Many point to Chinese presence in the Bay of Bengal and the Northern Indian Ocean, where the PLAN in January this year held exercises with the navies of Iran and Pakistan.⁵⁹ With the Chinese-built and operated port at Gwadar now fully operational,⁶⁰ and growing Pakistan naval acquisitions from China,⁶¹ Indian influence in South Asia, analysts aver, is under threat from China. Rising suspicion that Chinese infrastructure in Sri Lanka, Bangladesh and Myanmar has a maritime military dimension⁶² has prompted the Indian navy to expand its mission-based deployments in key Indian Ocean chokepoints.⁶³

When it comes to maritime rules, however, India is faced with a dilemma. While expressing support for the principle of freedom of navigation and over-flight in international waters and the peaceful resolution of disputes in the South China Sea, New Delhi has reservations about the United States' Freedom of Navigation patrols near the Chinese held Spratly and Parcel Islands (See Table 2).⁶⁴ From an Indian standpoint, unannounced forays by foreign naval ships through territorial waters and EEZs of another coastal state under the rubric of "innocent passage" or "freedom of navigation" are a problematic proposition.⁶⁵ In 1995, when it ratified the UNCLOS, New Delhi had clarified its position in a declaration that read thus: "The Government of the Republic of India understands that the provisions of the convention do not authorize other states to carry out in the EEZ and on the continental shelf military exercises or maneuvers, in particular those including the use of weapons or explosions, without the consent of the coastal state".⁶⁶ US offers for joint patrols in the Asian commons do not elicit an enthusiastic response from Indian policymakers because US

freedom of navigation patrols have in the past challenged Indian claims in the territorial waters and exclusive economic zones.⁶⁷

The logic of US FONOPS also has implications for the defence of the Andaman and Nicobar Islands (ANI). In the absence of the legal status of an archipelago, Indian analysts observe that the ANI remains vulnerable to incursions by foreign warships. US navigation patrols in the South China Sea could encourage greater PLAN maritime activism near the ANI, ironically, employing the same tactics as the US Navy in the Pacific littorals. The problem for India is that its declared maritime zones around islands territories are not consistent with legal principles.⁶⁸ New Delhi's declaration of straight base-lines delineating zones around the Andaman and Nicobar Islands (on the Western edge) are incompatible with the provisions of article 7 and 47 of the UNCLOS (meant specifically for archipelagic states).⁶⁹

The increasing deployment of autonomous underwater systems in the littorals adds another layer of complexity to the discussion of rules. According to analysts, the use of unmanned underwater systems in maritime Asia is on the rise and is fuelling naval competition between China and the United States.⁷⁰ In December 2019, China is said to have deployed a fleet of 12 underwater drones in the Southern Indian Ocean for the gathering of Oceanographic data.⁷¹ The US, too, has been deploying unmanned platforms in the South China Sea to keep an eye on Chinese maritime activity. One such US underwater drone was seized by the Chinese navy in the waters off the Philippines in 2016.⁷²

Even if no US drones have been found operating in Chinese EEZs and territorial waters, experts say greater US-China friction in the commons could cause a strategic escalation.⁷³ The fact that many of these underwater drones are dual-use (with information gathered ostensibly for civilian purposes having utility in military operations) the legality of

their deployment is questionable. With both UNCLOS and the 1972 IMO Convention on the International Regulations for Preventing Collisions at Sea (COLREGs) silent on underwater drone operations, the maritime community finds itself in uncharted waters.⁷⁴

EVOLVING A COOPERATIVE FRAMEWORK

To prevent misunderstanding and miscalculation at sea, some Indian analysts⁷⁵ have suggested an India-China ‘incidents at sea’ agreement with objectives similar to the US–USSR ‘INCSEA’ pact of 1972.⁷⁶ In the late 1960s, after several incidents between the US Navy and the Soviet Navy – including military planes passing near one another and ships in near-collisions–Moscow and Washington signed an ‘incidents at sea’ agreement in 1972. The pact provides for collision avoidance and non-interference in the “formations” of the other party, also requiring surveillance ships to maintain a safe distance from the object of investigation so as to avoid “embarrassing or endangering the ships under surveillance”.⁷⁷ The INCSEA pact sought the use of international signals when ships manoeuvred near one another, asked ships not to simulate attacks or to illuminate the bridges of the other side’s ships; and informing vessels when submarines are exercising near them. It also required aircraft commanders to use the greatest caution and prudence in approaching aircraft and ships of the other party and provides for notice three to five days in advance, as a rule, of any projected actions that might “represent a danger to navigation or to aircraft in flight”.⁷⁸

At first glance, the idea of an India-China maritime pact seems impractical. With the clash at Galwan still fresh in the minds of Indian officials and policymakers, New Delhi is likely to be ill-disposed to the idea of maritime cooperation with China. Yet, after committing to a military disengagement in Eastern Ladakh, India and China would be

keen to explore ways to avoid future confrontation, including at sea. The key to preventing accidental encounters in the littorals would be to pursue confidence-building measures, whilst acknowledging the other's cross-regional interests. Indian planners have in the past discussed CBMs with China, but Beijing's interest has been limited to cooperation in the India Ocean. For New Delhi, however, any cooperative arrangement with Beijing that does not recognise Indian stakes in the Western Pacific is a non-starter. A pact confined to the Indian Ocean, Indian officials say, creates the false impression that China's stakes in the IOR are legitimate, but not Indian stakes in the South China Sea.⁷⁹

Another suggestion is to evolve a regional maritime governance framework through the Indian Ocean Rim Association (IORA). The body's pan-Indian Ocean character is well suited to evolve a holistic maritime system for the Indian Ocean, and it has since the 2017 'Jakarta Concord', given high priority to maritime security, focusing on issues such as disaster-response, blue-economy, capacity building, and infrastructure creation.⁸⁰ The association has enjoined states to reinforce maritime safety and security by institutionalising cooperative mechanisms such as White Shipping Agreements and the establishment of an Information Fusion Centre for strengthening Maritime Domain Awareness (MDA).⁸¹ A Maritime Safety and Security Working Group helps build capacities, enhance cross-border cooperation and knowledge sharing, and promote harmonised implementation of the international regulations.

While China (an IORA dialogue partner) has been wary of India's Indian Ocean strategy, it has been willing to work alongside IORA to contribute to the security of the regional littorals, including in the Pacific.⁸² Evolving rules for maritime conduct in Asia's littoral spaces, however, needs more than an understanding between India and China; it also requires rim association countries to coordinate with the ASEAN

Regional Forum and the Council for Security Cooperation in the Asia-Pacific (CSCAP). Developing area-wide norms on freedom of navigation, over-flight, and military activities in regional chokepoints and EEZs will not likely be possible, without professional inputs from the Indian Ocean Naval Symposium (IONS) - a grouping of Indian Ocean navies that seek to improve maritime cooperation amongst littoral states. Unfortunately, coordination between IORA and the IONS has so far been lacking. With political differences between many regional states unresolved, an Indian Ocean multilateral organisation seems unsuited to evolve a framework for rules of conduct in the littorals.⁸³

A third proposal is for South Asian and Southeast Asian navies and coast guards to agree to a set of rules in the EEZs that clearly outline rules of engagement – directives that would define the conditions, circumstances, degree and manner in which to use force or employ provocative means to deter a seemingly hostile maneuver or incursion.⁸⁴ Observers say a system of rules in the Indo-Pacific could work well if Asian maritime agencies take all possibilities into account. Conflict avoidance provisions must reaffirm international rules of the road, restrict most forms of harassment, regulate communications at sea, and provide advance notice for close quarter exercises. Even in areas where international law is vague such as military activity in the EEZs, partner states would have to agree upon a set of principles to be followed.

Any optimism about a possible rules-based order, however, ought to be tempered with caution. The protracted negotiations that preceded the CUES (2014) are instructive of the hurdles inherent in evolving a code of security conduct. The Western Pacific Naval Symposium has had, since 2003, a voluntary code for un-alerted encounters at sea. At the symposium meet in 2012 in Malaysia, however, when members

sought to formalise the CUES for maritime forces in the Asia Pacific, China rejected the proposal.⁸⁵ Vice Admiral Ding—PLAN deputy commander—stated that China felt that certain parts of CUES (2003) needed to be further discussed and that the word ‘code’ implied a legally binding agreement which was not acceptable to China. Ding argued that the territorial sea should be deleted from the applicable scope of the code as foreign warships entering China’s territorial sea need to seek prior authorisation from China’s government (and therefore, there would be no un-alerted encounters between Chinese and foreign warships). Further, China held that the WPNS is not authorized to formulate a Code for Un-alerted Encounters at Sea for public vessels and state aircraft, and that the code could only apply to naval warships and naval aircraft.⁸⁶

Following China’s objections, a review of the original CUES-2003 produced modifications to a number of provisions in ways that would satisfy Beijing. Unlike its predecessor, which described ‘Unplanned Encounters at Sea’ to cover coast guards, marine surveillance and fisheries agencies, CUES 2014 is limited to naval ships and naval aircrafts.⁸⁷ While CUES 2003 applied to the high seas, territorial waters, contiguous zones, exclusive economic zones, and in the archipelagic waters of archipelago states, the 2014 iteration does not specify the maritime zones in which it operates. Crucially, China did not allow key elements of its aggressive posture at sea to be regulated by CUES. When Japanese Defence Minister Itsunori Onodera suggested at the WPNS press conference that the CUES 2014 would ban such dangerous behaviour as radar-locking on ships and aircraft of other countries at sea, China expressed the view that all “sides concerned should not misinterpret deliberately the CUES, which is a technical regulation under the multi-lateral framework, and make a selective reading of it to make a fuss.”⁸⁸

A LIKELY SCENARIO


Amongst the many possibilities, it seems China would be least inclined to sign up to a binding regional code that would comprehensively cover all maritime operations. What Beijing might be open to consider is a bilateral/multilateral MoU with India and other Bay of Bengal states that would cover certain kinds of operations, but which could also serve as a basis for establishing regional rules. To be sure, India would want the scope of the pact to cover a wider maritime space in Asia. As improbable as it seems, a regional code of behavioural norms could prove helpful in establishing an effective RBO. There is an example in South Asia that gives cause for optimism. In 2005, the Indian Coast Guard (ICG) and Pakistan Maritime Security Agency (PMSA) signed a memorandum of agreement for exchange of information on EEZ violations, apprehended vessels, marine pollution, natural disasters/calamities, smuggling, illicit trafficking, piracy, and coordination in search and rescue. The pact has worked well and was extended in March 2016 for a further five years.⁸⁹

There is also a precedent for India-China cooperation in the maritime domain. The IN and PLAN have worked together on the antipiracy initiative off the coast of Somalia,⁹⁰ and there also exists a bilateral Memorandum of Understanding for cooperation in the field of ocean science and technology (2003), which seeks to promote development and cooperation in areas such as integrated coastal zone management, sea-based resources exploration and exploitation technology, and marine resources.⁹¹ While New Delhi's political appetite for cooperation with Beijing is at an all-time low—given recent developments on the Himalayan border—a broader understanding on maritime principles, and the terms of naval engagement in overlapping areas of interest could prove mutually beneficial.

To be sure, a regional pact on maritime rules as such would be hard to reach, and might need concessions from all sides, with many rounds of structured negotiations. But the idea for New Delhi would be to get China to agree to a cooperative framework on largely favourable terms while Beijing is amenable to accept such a proposal. Since law enforcement capacities are likely to be stretched in a post-COVID-19 world, it might be desirable to come to an understanding on the normative principles of interaction in the littorals. It could even drive greater regional collaboration by pushing China to accepting a cooperative regime of maritime operations.

Admittedly, at the present juncture a regional agreement on maritime rules seems a remote possibility. The imperative to counter China triumphs over any competing impulse. For the moment, India's pressing need is to improve maritime interoperability, and communications with partner navies to deal with China's expanding presence in India's near-region. Beyond equitably dividing the burden of security, a collaborative approach with the United States, Japan and Australia would ensure the creation of leverage to keep potential violations by China at bay. The Indian Navy would also need to scale up its operations and domain awareness to keep a watchful eye on the developments in Indian Ocean.⁹² Issues of equipment incompatibility with partners, diverse operational and communications procedures, will need to be immediately addressed.

In the long term, however, accepting a 'rules-based' model of maritime security would entail greater tactical synergy, operational engagement and strategic trust between maritime agencies in South and Southeast Asia. It would need New Delhi to look beyond the marginal confines of its immediate neighbourhood. Vital as it is to the rules-based order in Asia, the Indian navy will need to align its priorities with partner navies and expand its presence in regions of strategic

interest. Dealing with China in the maritime domain will need a healthy amalgamation of cooperation and deterrence. More importantly, it will need some unconventional thinking by military and foreign policy decision-makers. 

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