Article

Surveying in the Exclusive Economic Zone:
Possible Guidelines for Rights and Duties

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Abstract

Following incidents in the Asia-Pacific region where coastal States have disputed the rights of other States to conduct hydrographic surveys, military surveys and military intelligence collection activities in the Exclusive Economic Zone (EEZ) without their prior consent, a series of unofficial (or 'Track Two') meetings has been held around the region to address relevant issues. The last of these meetings was held in Tokyo in September 2005 when agreement was reached on Guidelines for Navigation and Overflight in the Exclusive Economic Zone. This paper discusses the background to these guidelines, including the reasons why they are considered necessary, the incidents that have occurred in the region, and the main contentious issues that have arisen between coastal and investigating States.

Résumé

A la suite des incidents survenus dans la région de l'Asie et du Pacifique où les Etats côtiers ont contesté les droits d'autres Etats d'exécuter des levés hydrographiques, des levés militaires et des activités de collecte de renseignements militaires dans leur Zone Économique Exclusive (ZEE), sans leur consentement préalable, une série de réunions non officielles a été organisée dans la région afin de traiter de questions y relatives. Lors de la dernière de ces réunions qui s'est déroulée à Tokyo, en septembre 2005, un accord a été trouvé sur les directives en matière de navigation et concernant le survol de la zone économique exclusive. Cet article traite du fondement de ces directives, y compris des raisons pour lesquelles elles sont jugées nécessaires, des incidents survenus dans la région ainsi que des principaux points de litige survenus entre les Etats côtiers et les Etats qui effectuent des opérations d'investigation.

Resumen

Posteriormente a los incidentes acaecidos en la región de Asia-Pacífico, donde los Estados costeros se han disputado los derechos de otros Estados a efectuar levantamientos hidrográficos, levantamientos militares y actividades de recogida de datos de inteligencia militar en la Zona Económica Exclusiva (ZEE) sin su consentimiento previo, se han celebrado una serie de reuniones no oficiales (o 'Paralelas') alrededor de la región para tratar temas pertinentes. La última de estas reuniones se celebró en Tokio en Septiembre del 2005, donde se llegó a un acuerdo sobre las Directivas para la Navegación y Sobrevuelo en la Zona Económica Exclusiva. Este artículo trata sobre los antecedentes de estas directivas, incluyendo las razones por las que se consideran necesarias, los incidentes que han tenido lugar en la región y los temas contenciosos principales que han surgido entre los Estados costeros e investigadores.

Introduction

The Exclusive Economic Zone (EEZ) regime was a major development in the international law of the sea, which emerged from the Third UN Conference on the Law of the Sea (UNCLOS III) that culminated in the 1982 UN Convention on the Law of the Sea (UNCLOS). Military activities in the EEZ were a controversial issue at UNCLOS III and continue to be so in State practice. Some coastal States claim that other States cannot carry out military activities in or over their EEZs without their consent, and have sought to apply restrictions on navigation and overflight in their EEZs that are not accepted by other States.

Hydrographic surveying has become caught up in this controversy. This is largely because the United States has likened 'military surveys' to hydrographic surveys claiming that both types of survey are related to the freedoms of navigation and overflight available to other States in the EEZ of a coastal State. As UNCLOS Part XIII and Article 56(1)(b)(ii) bring marine scientific research in the EEZ clearly under the jurisdiction of the coastal State, the validity of the claimed similarity between military and hydrographic surveying depends largely on maintaining a distinction between hydrographic surveying and marine scientific research.

The issues involved have become particularly contentious in the Asia-Pacific region where there has been a series of incidents and disputes that could easily have spiralled out of control into open conflict. With the aims of clarifying the rights and duties of both coastal States and user States in an EEZ, and of providing an important regional Maritime Confidence and Security Building Measure (MCSBM), a group of senior officials, legal experts and maritime specialists (now known as the EEZ Group 21) has been meeting in the region to address relevant issues. The meetings have been sponsored primarily by the Ship and Ocean Foundation of Japan (now the Ocean Policy Research Foundation) with the objective of producing a set of non-binding, voluntary principles ('Guidelines'), which would provide the basis for a common understanding and approach to issues arising from the implementation of the EEZ regime.

The last meeting of the EEZ Group 21 held in Tokyo, 15-16 September 2005, reached agreement on 'Guidelines for Navigation and Overflight in the Exclusive Economic Zone'. The proposed Guidelines are non-binding in nature. They set out broad principles of common understanding regarding certain aspects of navigation and overflight in the EEZ, including military and intelligence gathering activities, but do not create legally binding obligations between States. In keeping with their non-binding nature, the Guidelines are framed in exhortatory rather than obligatory language. They may be generally regarded as reflecting the need for better understanding of the rights and obligations of States conducting activities in the EEZ of another country. They represent a consensus among the Group 21 members on issues that are at present contentious and a potential source of tension and dispute in the region. The introduction to the Guidelines, the Guidelines themselves and the membership of EEZ Group 21 are attached as Annexes A, B and C respectively to this paper.

The proposed Guidelines reflect a consensus in the EEZ Group 21 that trends over the years with technology and the wider utility of hydrographic data have brought hydrographic surveying and marine scientific research much closer together. Perhaps paradoxically, the arguments for purely military surveys in the EEZ being outside the jurisdiction of the coastal State are now stronger than those supporting an unrestricted right to conduct hydrographic surveying in the EEZ without the permission of the coastal State. This paper traces the process and arguments by which this consensus was reached.

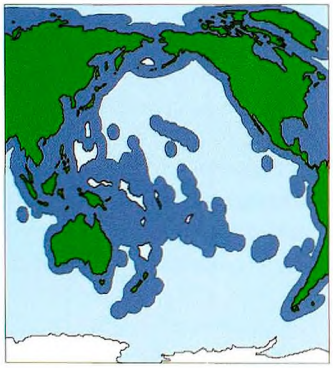
Background

Negotiation of the EEZ regime at UNCLOS III was difficult and complex with widely divergent points of view about the status of the new zone. One major group, the 'territorialists', mainly comprising developing countries, saw the EEZ as an extension of national jurisdiction in which the coastal States would enjoy sovereignty subject to certain limitations. However, this position was sharply disputed by the maritime powers, led by the United States and the then Soviet Union, who saw the zone as a part of the high seas where coastal States had some rights over offshore resources. The compromise reached was that the EEZ should be regarded as a separate zone in its own right (*'sui generis'*),

which was neither high sea nor territorial sea (Churchill and Lowe, 1999, p.166).

Now some twenty-five years later, this political 'tug of war' has not gone away. The United States has steadfastly maintained a liberal interpretation of the rights and freedoms other States enjoy in the EEZ of a coastal State, and has coined the expression 'international waters' to describe collectively the high seas, the EEZ and the contiguous zone (Thomas and Duncan, 1999, p. 19). On the other hand, some coastal States have sought to strengthen the extent of their jurisdiction over their EEZ by for example, claiming that other States should only conduct military activities in that zone with their consent.

In particular, different opinions exist as to whether coastal State jurisdiction extends to hydrographic surveying and the collection of other marine environmental data that is not resource-related or is not done for scientific purposes. While UNCLOS has established a clear regime for marine scientific research, there is no specific provision in the Convention for hydrographic surveying. Some coastal States require consent with respect to hydrographic surveys conducted in their EEZ by other States while it is the opinion of other States that hydrographic surveys can be conducted freely in the EEZ (CSCAP, 2002, pp. 3-4).



Exclusive Economic Zones in the Pacific Ocean

The United States regards military surveying as similar to hydrographic surveying and thus part of the high seas freedoms of navigation and overflight and other international lawful uses of the sea related to those freedoms, and conducted with due regard to the rights and duties of the coastal State (CSCAP, 2002, footnote 3, p.3). The position of the United States is that while coastal State consent must be obtained in order to conduct marine scientific research in its EEZ, the coastal State cannot regulate hydrographic surveys or military surveys conducted beyond its territorial sea, nor can it require notification of such activities (Thomas and Duncan, 1999, p. 130). Similarly, the United Kingdom regards Military Data Gathering (MDG) as a fundamental high seas freedom available in the EEZ. However, other States, including China, have specifically claimed that hydrographic surveys might only be conducted in their EEZs with their consent (SOF and EWC, 2003, p.7). In December 2002, China announced that it had enacted a new law explicitly requiring Chinese approval of all survey and mapping activities in China's EEZ and stating that unapproved ocean-survey activity will be subject to fines and confiscation of equipment and data (SOF and EWC, 2003, p.39).

These issues are proving particularly problematic in the Asia-Pacific region. Large areas of this region are enclosed as EEZ by one country or another, and many regional countries have large EEZs in which they tend to jealously protect their rights, particularly at a time when countries are paying much greater attention to the resource potential of their offshore areas. Furthermore, there are many conflicting and overlapping claims to maritime jurisdiction in the region and relatively few maritime boundaries have been agreed. Meanwhile, naval capabilities in the region are improving rapidly and increased attention is being given to intelligence collection and marine environmental research to support naval operations. To some extent, the EEZ regime has been a cause of maritime militarisation in the region with the protection of large maritime zones and marine resources, along with the existence of conflicting claims to offshore areas, often being used as justification for acquiring new maritime capabilities, including missile- armed patrol vessels and maritime strike aircraft.

In these circumstances, it is not surprising that incidents have already occurred involving disputes between coastal States and other States over their respective rights and duties in the EEZ. Research vessels claiming to be conducting military surveys have been warned out of the EEZs of some coastal States, a Chinese fighter aircraft crashed after colliding with a U.S. intelligence collection aircraft in China's EEZ off Hainan in April 2001, and alleged 'spy ships' have been pursued out of Japan's EEZ with one vessel even being sunk after hot pursuit into China's EEZ. Coastal State legislation and off-

shore activities are beginning to conflict with increasing naval activities of non-coastal States in the region, including exercises, intelligence gathering and research, and their accompanying technological developments.

The explanation of these disputes can be traced back to the considerable ambiguity in the EEZ regime, as established by UNCLOS, and a range of perspectives in Asia with regard to interpreting and implementing the regime. Agreement on the EEZ concept at UNCLOS III included many compromises between coastal States and maritime powers resulting in intentional ambiguity in some of its provisions. It was formulated more than 25 years ago in very different political and technological circumstances than those that exist at present. Tensions and misunderstandings may increase unless some greater clarity and awareness of the EEZ regime is provided and agreed.

Balance of Rights and Duties

The basic problem with the EEZ regime lies in the need to find an appropriate balance between the rights and duties of the coastal State and those of other States (Churchill and Lowe, 1999, p.175). In the EEZ, coastal States have sovereign rights over natural resources, both living and non-living, and other economic activities, such as the production of energy from water current and winds (UNCLOS Article 56(1)(a)). They also have jurisdiction with regard to the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment (including the conservation of species), as well as other rights and duties, as provided for in UNCLOS Articles 56(1)(b) and (c)). However, the sovereign rights to marine resources gained under the EEZ regime are not without their costs in terms of obligations of the coastal State for preserving and protecting the marine environment and conserving species in the EEZ, and for having due regard to the rights and duties of other States in its EEZ (UNCLOS Article 56(2)).

All other states have freedom of navigation and overflight in the EEZ, as well as the freedom to lay submarine cables and pipelines, and other internationally lawful uses of the sea related to those freedoms (UNCLOS Article 58(1)). However, in exercising these freedoms, other States are required to have due regard to the rights and duties of the coastal State (UNCLOS Article 58(3)). It has proven very difficult to define an operational test to distinguish between an action that has due regard to the rights and duties of the other party, and one that does not.

A view from the United States is that the EEZ regime "does not permit the coastal state to limit traditional non-resources related high seas activities in this EEZ, such as task force manoeuvring, flight operations, military exercises, telecommunications and space activities, intelligence and surveillance activities, marine data collection, and weapons' testing and firing" (Doran, 1995, p.341). Those words were written about ten years ago and would most likely now be qualified at least by recognition of the need for such activities to be conducted with due regard to the rights and duties of the coastal State. For example, scheduling an exercise in an area of intensive fishing activity declared by the coastal State, or in a marine park or marine protected area declared by the coastal State as required by UNCLOS Article 194(5), could be considered not to have due regard to the rights and duties of the coastal State.

Marine Scientific Research

UNCLOS does not define the key terms 'marine scientific research', 'survey activities', 'hydrographic survey', or 'military survey' (Galdorisi and Vienna, 1997, p.164). Indeed attempts at UNCLOS III to include a definition of marine scientific research in the Convention were not successful (Soons, 1994, p.6). *Marine scientific research* is the general term used to describe those activities undertaken in ocean and coastal waters to expand scientific knowledge of the marine environment (Thomas and Duncan, 1999, footnote 50, p.21). There is a tendency in practice to use the term 'marine scientific research' loosely when referring to all kinds of data collection (research) conducted at sea. However, not all data collection conducted at sea necessarily comes within the scope of the marine scientific research regime established by UNCLOS Part XIII. Many argue that other activities, such as resource exploration, prospecting and hydrographic surveying are governed by different legal regimes. However, these activities may be difficult to distinguish in practice (Bateman, 2005, pp. 166-169),

and this is a large part of the problem.

UNCLOS Part XIII provides that coastal States have the exclusive right to regulate, authorise and conduct marine scientific research in their EEZ (including the contiguous zone) and on their continental shelf. Part XIII then establishes an implied consent regime that allows other States and competent international organisations to proceed with a marine scientific research project in the EEZ or on the continental shelf under certain circumstances even though the consent of the coastal State may not have been forthcoming in accordance with the procedures in UNCLOS Articles 246-252. In normal circumstances, the coastal State shall grant its consent to marine scientific research projects carried out for peaceful purposes in order to increase scientific knowledge of the marine environment (sometimes characterised as 'pure' scientific research) (UNCLOS Article 246(3)). The coastal State is to ensure that such consent will not be delayed or unreasonably denied although UNCLOS Article 246(5) sets out several specific situations when the coastal State may withhold consent (including when such research is of direct significance to the exploration and exploitation of natural resources, both living and non-living).

Hydrographic Surveying

Hydrographic surveying is listed in UNCLOS Article 21(1)(g), along with marine scientific research, as an activity under the jurisdiction of the coastal State in the territorial sea. UNCLOS Article 19(2)(j) prohibits 'research or survey activities' generally during innocent passage through the territorial sea, and UNCLOS Article 40 states that foreign marine scientific research and hydrographic ships may not carry out any research or survey activities during transit passage through a strait used for international navigation without the prior authorisation of the coastal State. This latter article also applies to archipelagic sea lanes passage under UNCLOS Article 54. Hydrographic surveying is not mentioned in Part V of UNCLOS dealing with the EEZ or indeed anywhere else in the Convention. The primary use of the data collected by hydrographic surveys is to compile nautical charts, and other documents to facilitate and ensure the safety of navigation and for use by others concerned with the marine environment such as ocean engineers, oceanographers, marine biologists and environmental scientists.

Because surveying is mentioned separately to marine scientific research in several UNCLOS articles, it is argued that hydrographic surveying is not part of the marine scientific research regime (Soons, 1982, p.125). For example, Soons considers that hydrographic surveying might be regarded as an internationally lawful use of the sea associated with the operation of ships or submarine cables and pipelines in accordance with Article 58 of UNCLOS, and can therefore be conducted freely in the EEZ Soons, 1982, p.157). However, it would be subject to coastal State jurisdiction if the activity were in connection with the exploration and exploitation of the natural resources of the zone. This would be the case, for example, if the hydrographic survey was being conducted as preliminary to, or in conjunction with a geophysical investigation of the oil and gas potential of a particular sea area.

In operational terms, hydrographic surveying is invariably a clear and distinct activity that, despite its use of similar equipments to that used in other forms of marine scientific research, is not easily confused with other forms of marine scientific research. It is fairly obvious when a ship is conducting a hydrographic survey. It will be underway and following a regular pattern of sounding lines whereas a ship undertaking other activities, including oceanographic research and military surveys, may be more random in its movements stopping on occasions to conduct experiments or to take bottom samples. Similarly an aircraft undertaking a hydrographic survey, using Light Detection and Ranging (LIDAR) equipment, will be flying a fixed and systematic path. Conceivably submarines could undertake hydrographic surveys but if the data was only for the safety of surface navigation, their use would not be economic.

Military Surveys

Military surveys are activities undertaken in the ocean and coastal waters involving marine data collection (whether or not classified) for military purposes (Roach and Smith, 1994, p. 248). Such data is important, even essential, for effective submarine operations, Anti-submarine Warfare (ASW), Mine warfare and Mine Countermeasures (MCM), particularly in waters such as the South and East China Seas where oceanographic and underwater acoustic conditions vary widely with uneven bottom

topography, fast tidal streams and a relatively high level of marine life. Roach and Smith have observed that:

> Military surveys can include oceanographic, marine geological, geophysical, chemical, biological and acoustic data. Equipment used can include fathometers, swath bottom mappers, side scan sonars, bottom grab and coring systems, current meters and profilers. While the means of data collection used in military surveys may sometimes be the same as that used in marine scientific research, information from such activities, regardless of security classification, is intended not for use by the general scientific community, but by the military (Roach and Smith, 1994, p. 248).

China took military action and lodged protests over 'hydrographic survey' operations by the USNS Bowditch (AGS-21) in China's EEZ in 2000 and again in 2002. Bowditch is one of the seven Oceanographic Survey Ships that are part of the 24 ships in the U.S. Military Sealift Command's Special Mission Ships Program (Photo courtesy of the US Military Sealift Command, www.msc.navy.mil)

Military surveying is an expression largely coined by the United States. The United Kingdom talks about MDG in similar vein but the term 'military data gathering' may be less problematic because it does not include the word 'survey'. These terms are not specifically addressed by UNCLOS, and there is no language stating or implying that coastal States may regulate their conduct in any manner by coastal States outside their territorial sea or archipelagic waters (Roach and Smith, 1994, p. 248). Thus the United States "reserves the right to engage in military surveys outside foreign territorial seas and archipelagic waters", and that to "provide prior notice or request permission would create an adverse precedent for restrictions on mobility and flexibility of military survey operation" (Roach and Smith, 1994, p. 249). Similarly the United Kingdom believes that States have a right to engage in MDG anywhere outside foreign territorial seas and archipelagic waters without prior notice to, or permission from the coastal State.

Some military intelligence collection activities conducted in the EEZ might also be considered as coming within the scope of 'scientific research', and thus within the scope of the marine scientific research regime in the UNCLOS (SOF and EWC, 2003, p.6). However, the United States and other maritime powers are strongly of the view that while these activities are within the scope of research, they are associated with the freedoms of navigation and overflight in the EEZ and not under the jurisdiction of the coastal State. Intelligence collection data is only used for military purposes and is not released for public purposes. Again the boundaries between 'military surveys' and 'intelligence collection' may be difficult to determine, and one vessel may concurrently undertake both activities although the external appearance of the vessel (e.g. the aerials on a signals or electronic intelligence vessel), the equipment it is operating (e.g. the type of sonar), and its movements (e.g. whether it is manoeuvring, stopping or continually underway) should give a good lead on the nature of its data collection.

Based on current and planned asset acquisitions in the Asia-Pacific region, military surveying and intelligence gathering activities in EEZs are likely to become more controversial and more dangerous in the future. In Asia, the disturbing prospects reflect the increasing (and changing) demands for technical intelligence; robust weapons acquisition programs, and especially the increasing Electronic Warfare (EW) capabilities; and the widespread moves to develop Information Warfare (IW) capabilities. Regional countries are expanding or developing submarine forces and face a need to expand their oceanographic knowledge. The scale and scope of intelligence collection activities are likely to expand rapidly over the next decade, involving levels and sorts of activities quite unprecedented in the past. They will not only become more intensive; they will generally be more intrusive. These factors all point to the importance of

confidence-building measures such as the proposed Guidelines.

Development of the Guidelines

The meetings in Bali (June 2002), Tokyo (February 2003), Honolulu (December 2003), Shanghai (October 2004), and Tokyo (September 2005) were designed to delineate the issues and the areas of agreement and disagreement, and to identify and discuss possible voluntary guidelines for such activities, which could reduce conflict potential. Topics covered included recent incidents, operational modalities of various navies and their rules of engagement, the meaning of key terms, initiatives to enhance maritime security, intelligence collection operations and EEZs, means and manner of implementation and enforcement of any agreed rules, options for resolving disagreements, and the way forward.

The title of the meetings 'The Regime of the Exclusive Economic Zone: Issues and Responses' implies that they looked at the EEZ regime in an all-embracing fashion but this was not the case. The meetings focused mainly on the rights and duties of States with regard to the conduct of military activities, surveys and intelligence collection in the EEZs. They paid little attention to the host of other issues associated with implementing the regime, such as the conservation and utilisation of living resources and the rights of land-locked and geographically disadvantaged States. The main articles of UNCLOS addressed at the meetings were Articles 56, 58 and to a somewhat lesser extent, 59. However, they did not consider the full extent of the rights, jurisdiction and duties of the coastal State in its EEZ (Article 56) or indeed, all the rights and duties of other States in the EEZ of a foreign State (Article 58). Most attention with the latter was on activities related to the freedoms of navigation and overflight, and operations by foreign ships and aircraft in an EEZ.

Areas of Agreement

There was agreement that the EEZ is a zone *sui generis*, and that the term 'international waters' used by the United States is misleading. There was also agreement that the exercise of the freedom of navigation and overflight in and above EEZs should not interfere with, or undermine the rights or ability of coastal States to protect and manage their own resources and environment. Moreover, there was agreement that the exercise of such freedoms should not be for the purpose of marine scientific research without coastal State consent subject only to the principle of 'implied consent' set out in UNCLOS Article 252. Participants also agreed on the importance of 'due regard' and that the principle applies to both the coastal State and to a user State. There was also recognition that the interpretation of international law is not static, and that the understanding of the rights and duties of States in the EEZ continues to evolve.

Areas of Disagreement

Areas of disagreement during the meetings generally related to the meaning of terms in the Convention as well as to the meaning of specific articles. For example, there are specific differences with regard to the meaning of 'freedom' of navigation and overflight in and above the EEZ, i.e. whether this freedom can be limited by certain regulations by the coastal State, or whether such freedoms are absolute.

Military Activities

There are different interpretations regarding the precise meaning of the Convention's phrase allowing 'other internationally lawful uses' of the sea in the EEZ, as in UNCLOS Article 58(1), and the nature of the military activities that this phrase might include. The interpretation of this phrase can in turn be affected by the interpretation of such terms as 'due regard', 'abuse of rights', 'peaceful purposes', and the obligation not to threaten or use force against other States. In this context, questions arise as to whether some military and intelligence gathering activities are a lawful exercise of the freedom of navigation and overflight, whether they are an abuse of rights, whether they pay "due regard" to the interests of the coastal State, and whether they are a threat to the peace and security of the coastal State.

Due Regard

There is a considerable range of opinion regarding the meaning of 'due regard'. Some countries, e.g. the United States, interpret 'due regard' as requiring any user State to refrain from activities that

unreasonably interfere with the exercise of the rights of the coastal State. However, others like China, for example, appear to interpret 'due regard' as requiring foreign users of the EEZ to refrain from activities which endanger the sovereignty, security and national interest of the coastal State. An interpretation applicable to many cases would be whether the activity interferes with the rights and interests of the other State. But there is no agreement as to what constitutes such rights and interests, whether the interference must be unreasonable, and whether it must be actual or potential.

Dispute Settlement

There is also disagreement on how to deal with these uncertainties. But leaving the problem unresolved could be dangerous. Incidents are occurring more frequently and even if bilateral arrangements are agreed, their rules may differ depending on the countries and circumstances. The majority of EEZ Group 21 participants shared the concern that national governments may deal with these matters unilaterally in order to protect their security and other interests. If numerous coastal States were to enact unilateral national legislation prohibiting the exercise of military and intelligence gathering activities in and above their EEZ, then the prohibition against conducting such exercises could become part of customary international law through State practice, despite the opposition of some countries, particularly if those countries are not parties to UNCLOS.

Failing the unlikely resolution of these issues by the International Court of Justice or the International Tribunal on the Law of the Sea, these disputes will be addressed through a chaotic and disorderly process whereby countries assert and defend their positions through State practice, followed by protests by countries that disagree, and eventually by the give and take of diplomatic negotiations. It is in this context of avoiding unilateralism that may lead to conflict and of providing a common basis for bilateral and multilateral agreements that this dialogue and the Guidelines were developed.

Consensus

While there continues to be some disagreement whether some military intelligence gathering and 'hydrographic surveys' are marine scientific research and thus under the jurisdiction of the coastal State per UNCLOS Articles 56 (1)(b)(ii) and 246, consensus was reached on the following key issues:

1 States may conduct maritime surveillance for peaceful purposes in areas claimed by other States as EEZ (Guideline IVb).
2 Subject to certain qualifications noted in the Guidelines, military vessels and aircraft have the right to navigate in, or fly over the EEZs of other States, and to engage in other internationally lawful uses of the sea associated with the operations of ships and aircraft (Guideline Va).
3 Ships and aircraft of a State undertaking military activities in the EEZ of another State have the obligation to use the ocean for peaceful purposes only, and to refrain from the threat or use of force, or provocative acts, such as stimulating or exciting the defensive systems of the coastal State; collecting information to support the use of force against the coastal State; or establishing a 'sea base' within another State's EEZ without its consent (Guideline Vb).
4 Military activities by a State in the EEZ of another State should not involve the deployment of systems that prejudice the defense or security of the coastal State, or interfere with or endanger the right of the coastal State to protect and manage its resources and environment (Guideline Ve).
5 Coastal State consent should in normal circumstances be granted for marine scientific research in the EEZ conducted exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all humanity (Guideline VIIIa).
6 Hydrographic surveying should only be conducted in the EEZ of another State with the consent of the coastal State (Guideline IXa).
7 Coastal State consent for hydrographic surveying should normally be granted unless the surveys fall within one of the consent categories in UNCLOS Article 246(5) (Guideline IXb).

Developments with Hydrographic Surveying

In reaching consensus that hydrographic surveying in an EEZ should not be conducted without the consent of the coastal State, the EEZ Group 21 appreciated the many changes since UNCLOS III with the

practice and technology of hydrographic surveying and the utility of hydrographic data (Bateman, 2004, pp. 28-30). Apart from navigational safety, important applications of hydrographic knowledge include planning the exploration and exploitation of marine resources, the determination of seaward limits of national jurisdiction, coastal zone management, national development (including building new ports and harbours), and the delimitation of maritime boundaries (Maschke, 1999, p.9). Also, with the great increase in concern over the health of the world's oceans and seas during the 10-15 years, including acceptance of the 'soft law' in Chapter 17 of Agenda 21 agreed at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro in 1992, the full extent of the responsibility of the coastal States for stewardship of their EEZs on behalf of the international community is now more fully appreciated.

Technology

Until the advent of Global Positioning Systems (GPS), it was extremely difficult for a hydrographic survey to be conducted without the support of the adjacent coastal State. Shore control was essential for accurate position fixing. It may not be a coincidence that hydrographic surveying in the EEZ has only become controversial over the last decade or so with the introduction of GPS. Prior to that time, most hydrographic surveys in the EEZ would only have been possible with the support of the coastal State because the accuracy of the survey depended on having shore stations in the vicinity of the survey area.

Integrated Oceans Management

Integrated oceans management that addresses oceans management on a cross-sectoral basis is now an accepted principle for domestic and regional action. Individual countries are developing national oceans policies to implement effective management arrangements for maritime zones under their national jurisdiction, including the EEZ. At a regional level, the Seoul Oceans Declaration that resulted from the first meeting of Ocean-related Ministers of the Asia Pacific Economic Cooperation (APEC) forum resolved at the domestic level to "Develop and promote, in an integrated manner, better coastal and oceans management using an ecosystem-based approach, including for sub-regional seas, river basins and watersheds adjacent to coastal areas." Good hydrographic data is an essential input to integrated oceans management, and the responsibility for this in the EEZ rests clearly with the coastal State.

Sustainable Development

Hydrographic knowledge of adjacent waters is an element of national infrastructure and sustainable development (IHO, 2001, Chapter 1). Nautical charts provide for the safety of navigation and facilitate maritime economic activity generally, including fishing, tourism and oil and gas exploration and exploitation. Hydrographic data in the EEZ has economic value to the coastal State, which should be in a position to manage and control the release of such data, regardless of how and by whom it was collected. It is very hard these days to identify any hydrographic data, including that collected by military surveying ships, which would not have some potential value to the coastal State. The coastal State requires such data to support developmental activities in the EEZ, both now and in the future, related to its sovereign rights for economic exploitation and its obligation to preserve and protect the marine environment of the zone. It might even be argued that hydrographic surveys now come within the scope of "other activities for the economic exploitation and exploration" of the EEZ, as in UNCLOS Article 56(1)(a).

Economic Value of Hydrographic Data

This argument can be taken further. Hydrographic data is a tradable commodity, as well as an essential element of the national infrastructure of the coastal State. The IHO has recognised this through its attention to the issue of copyright over hydrographic data. Navigational and hydrographic information on nautical charts issued by one country may no longer be freely copied by another State on to its own nautical charts. Just as the coastal State regards marine scientific research data as within its control and jurisdiction, the same might be said about hydrographic data. It is not just the intended functional use of marine scientific research or hydrographic data (i.e. for economic purposes) that establishes the principle of coastal State jurisdiction, but also recognition that such data has value in its own right. It is virtually impossible to say that hydrographic data collected today will not have some value in the future.

State Practice

State practice now appears to support the view

that hydrographic surveying in the EEZ is within the jurisdiction of the coastal State. For example, both Australia and Canada are understood to seek permission of the coastal State before conducting hydrographic surveys in the EEZ of the other State, and other countries, including China, have specific legislation on the issue. Based on a survey conducted by the United Nations (UN, 1989, pp. 143-154), national legislation governing the conduct of marine scientific research in waters under national jurisdiction generally does not specifically identify hydrographic surveying as different to marine scientific research. While the fact that hydrographic surveying is not mentioned separately could support the argument that it is different to marine scientific research, it seems rather more likely that coastal States in not mentioning it, are assuming that it is self-evident that it is captured by the marine scientific research legislation.

Overlaps

Figure 1 is a graphical depiction based on the discussion in this paper of the overlap between marine scientific research, hydrographic surveying and military surveys. It shows the overlap between these three activities. Military surveys, particularly military oceanographic research, overlap to some extent with marine scientific research, but a lot of military surveying does not, particularly that which is more in the form of intelligence collection. Some forms of acoustic research would also have no commercial or economic value. As depicted by the small circle overlapping both marine scientific research and military surveys, hydrographic surveying may be conducted both for civil and military purposes, but the nature of the activity will be essentially the same regardless of the actual purpose of the surveys.

The shaded areas in Figure 1 show the activities that, according to the arguments in this paper, are subject to the jurisdiction of the coastal State. These include all hydrographic surveying, regardless of whether it is conducted for military or civilian purposes, and all marine scientific research with the exception of data collection, which is conducted for purely military purposes and has no economic value. The potential economic value or utility of the data collected in the EEZ has become an important criterion for distinguishing whether or not research should be under the jurisdiction of the coastal State.

Conclusions

Much has changed over the last 25 years and international law is still evolving with regard to the implementation of the EEZ regime. The Guidelines for Navigation and Overflight in the EEZ produced by the EEZ Group 21 are intended to contribute to more effective implementation of the regime and improved oceans management generally. They reflect a clear view that hydrographic surveying in the EEZ should now come within the jurisdiction of the coastal State. Hydrographic data now has much wider application than just for the safety of navigation. It has many uses associated with the rights and duties of a coastal State in its EEZ. The practice and utility of hydrographic surveying have changed much since UNCLOS III, and the distinction between hydrographic surveying and marine scientific research is now much less than it might have been in the past.

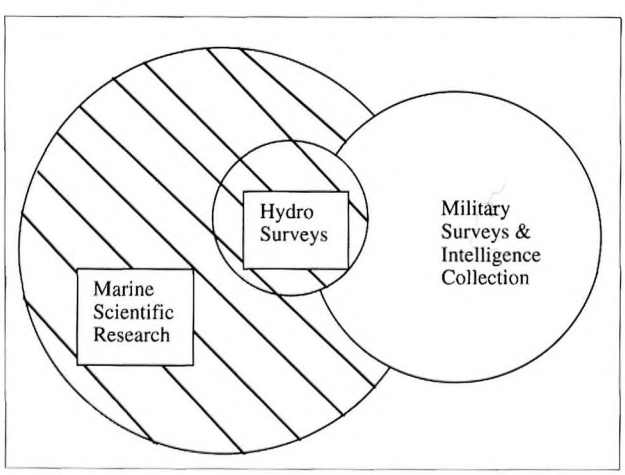


Figure 1: The Overlap between Marine Scientific Research, Military Surveys and Hydrographic Surveying. The shaded area represents activities under the jurisdiction of the coastal State.

Paradoxically the arguments for military surveys in the EEZ being outside the jurisdiction of the coastal State appear stronger than those for hydrographic surveying. The considerations that apply to the rights to conduct hydrographic surveys and military surveys in an EEZ are essentially dif-

ferent. Military surveys might be more easily argued as an ancillary activity to the high seas freedoms of navigation and overflight available in the EEZ. The data collected is for military purposes only and is not normally released to the public, whereas hydrographic data, virtually by definition, has utility and economic value to the coastal State.

Copies of the EEZ Group 21 Guidelines are now to be distributed at a regional and international level. At the regional level, distribution will include APEC, the Association of Southeast Asian Nations Regional Forum (ARF), the Council for Security Cooperation in the Asia-Pacific (CSCAP), and the Western Pacific Naval Symposium (WPNS). At the international level, they will be sent to the UN Division for Ocean Affairs and the Law of the Sea, the International Maritime Organisation, and the International Tribunal on the Law of the Sea. Individual members of the EEZ Group 21 have been asked to promote the Guidelines to their own national authorities.

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Biography

Dr Sam Bateman retired from the Royal Australian Navy with the rank of Commodore (one-star) in 1993 and became the first Director of the Centre for Maritime Policy at the University of Wollongong in New South Wales where he is now a Research Fellow. His naval service as a surface warfare officer included four ship commands (including a frigate and a destroyer), five years in Papua New Guinea and several postings in the force development and strategic policy areas of the Department of Defence in Canberra. His current research interests include regional maritime security, the strategic and political implications of the Law of the Sea, and maritime cooperation and confidence-building. He is Co- Chair of the Council for Security Cooperation in the Asia Pacific (CSCAP) Study Group on Capacity Building for Maritime Security Cooperation, and currently also a Senior Fellow in the Maritime Security Program at the Institute of Defence and Strategic Studies (IDSS) in Singapore.

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ANNEX A

Guidelines for Navigation and Overflight in the Exclusive Economic Zone

Introduction

This document puts forward proposed 'Guidelines for Navigation and Overflight in the Exclusive Economic Zone (EEZ)' developed by a group of senior officials and analysts primarily from countries of the Asia-Pacific region participating in their personal capacities in a series of meetings held from 2002 – 2005.* The Guidelines are a set of non-binding, voluntary principles, which provide the basis for a common understanding and approach to issues arising from the implementation of the EEZ regime, particularly in the Asia-Pacific region. The principles are based on the 1982 UN Convention on the Law of the Sea (the 1982 UNCLOS), State practice, and emerging 'soft' law.

Misunderstandings regarding military activities in foreign EEZs have become all too common. Major incidents include the March 2001 confrontation between the U.S. Navy survey vessel Bowditch and a Chinese frigate in China's EEZ; the April 2001 collision between a U.S. EP3 surveillance plane and a Chinese jet fighter over China's EEZ; the December 2001 Japanese Coast Guard pursuit of and firing at a North Korean spy vessel in its and China's EEZ; and Vietnam's protest against Chinese live fire exercises in Vietnam's claimed EEZ. Navies are expanding and technology is advancing while coastal States are placing increasing importance on control over their EEZs. These opposing trends will result in a higher frequency and intensity of such incidents.

Other factors contribute to the problem. The scale and scope of maritime and airborne intelligence collection activities is becoming more intensive and intrusive. They generate tension and produce defensive reactions and escalatory dynamics. And new threats like trade in weapons of mass destruction, terrorism, piracy, and smuggling of arms, drugs and humans encourage both coastal and maritime States to extend their control or surveillance beyond their territorial seas, in some cases to others' EEZs. Further, given the myriad boundary disputes and overlapping claims in the region, it is not always clear where one nation's jurisdiction ends and another's begins. Confusion and differences of opinion regarding the regime governing military activities in the EEZ further complicates the issue.

Agreement on the EEZ concept included many compromises between coastal States and maritime powers resulting in intentional ambiguity in some of its provisions. It was formulated more than 25

years ago in very different political and technological circumstances than those that exist at present. The ambiguities and lack of clarity should be examined in the light of these changed circumstances and evolving State practice with a view to reaching agreed interpretation.

Importance of These Guidelines

These Guidelines are important for three main reasons. The first is the complexity of the Asian maritime environment with its unique combination of maritime geography, large areas of claimed EEZ, and many conflicting and overlapping claims to maritime jurisdiction. Second, recent incidents indicate that there is considerable ambiguity and range of perspective in Asia with regard to the EEZ regime, particularly the rights and duties of the coastal State vis-à-vis those of user States. Third, coastal State legislation and offshore activities are beginning to conflict with increasing naval activities of non-coastal States in the region, including exercises, intelligence gathering and research, and their accompanying technological developments. Tensions and misunderstandings may increase unless greater clarity and awareness of the EEZ regime are provided and agreed.

Purpose of the Guidelines

The Guidelines serve three main purposes:

1 First, they assist in clarifying the rights and duties of both coastal States and user States and certain terminology with regard to the activities that might be undertaken in an EEZ by foreign ships and aircraft.
2 Second, the Guidelines constitute an important regional confidence-building measure providing general principles for activities that some States currently regard as contentious.
3 Third, they will contribute to more effective oceans management in the region through improved understanding and more effective implementation of the EEZ regime.

Legal Status

The proposed Guidelines are non-binding in nature. They set out broad principles of common understanding regarding military and intelligence gathering activities in the EEZ but do not create legally binding obligations between States. In keeping with their non-binding nature, the Guidelines are framed in exhortatory rather than obligatory language.

The Guidelines may be generally regarded as reflecting the need for better understanding of the rights and obligations of States conducting activities in the EEZ of another country. They represent a consensus among the participants on issues that are at present contentious and a potential source of tension and dispute in the region.

ANNEX B

Guidelines for Navigation and Overflight in the Exclusive Economic Zone (EEZ)

Preamble

Participants in the Dialogue on 'The Regime of the EEZ: Issues and Responses':

Bearing in mind the purposes and principles of the United Nations concerning the maintenance of international peace and security and the promotion of friendly relations between States;

Recognizing that the 1982 United Nations Convention on the Law of the Sea (the 1982 UNCLOS) establishes a new regime for the seas and oceans which balances fairly the interests of all States;

Affirming the duty of all States to utilise the oceans for peaceful purposes as stipulated in the 1982

UNCLOS Article 301;

Acknowledging the obligation of all States to preserve and protect the marine environment;

Considering that the EEZ is neither high seas nor territorial sea and is subject to a specific legal regime under the 1982 UNCLOS;

Desiring to ensure the safety and security of navigation in the EEZ;

Recognizing the rights, jurisdiction and duties of the coastal State in the EEZ as provided in Article 56 of the 1982 UNCLOS;

Recognizing the rights and duties of other States in the EEZ as provided in Article 58 of the 1982 UNCLOS;

Recognizing a need for balance between the rights and duties of a coastal State in its EEZ and the rights and duties of other States;

Mindful that the sovereign rights and jurisdiction exercised by a coastal State in its EEZ differ from the sovereignty it exercises in its internal waters, archipelagic waters (if any), and territorial sea;

Recognizing that Article 300 of the 1982 UNCLOS prohibits the abuse of rights, jurisdiction and freedoms recognised under the Convention;

Acknowledging the importance of resolving disputes by peaceful means; and

Convinced that these Guidelines will promote understanding of the rights and duties of States conducting military and intelligence gathering activities in the EEZ of another State, and thus contribute to peace, good order, and security at sea, particularly in the Asia Pacific region;

Hereby recommend the following non-binding Guidelines for Navigation and Overflight in the EEZ.

I. Definitions

a. For the purposes of these Guidelines:

1. 'abuse of rights' means the unnecessary or arbitrary exercise of rights, jurisdiction and freedoms, or interference with the exercise of rights by another State, or the abuse or misuse of powers by a State causing injury to another State;
2. 'Exclusive Economic Zone' means an area referred to as such in relevant Articles of the 1982 UNCLOS;
3. 'hydrographic survey' means a survey having for its principal purpose the determination of data relating to bodies of water. A hydrographic survey may consist of the determination of one or several of the following classes of data: depth of water, configuration and nature of the seabed; directions and force of currents; heights and times of tides and water stages; and location of topographic features and fixed objects for survey and navigation purposes;
4. 'marine environment' is the physical, chemical, geological and biological components, conditions and factors which interact and determine the productivity, state, condition and quality of the marine ecosystem, the waters of the seas and the oceans and the airspace above those waters, as well as the seabed and ocean floor and subsoil thereof;
5. 'marine scientific research' means activities undertaken in the marine environment to enhance scientific knowledge regarding the nature and natural processes of the seas and oceans, the seabed and subsoil;
6. 'military activities' means the operations of military vessels, aircraft and devices, including intelligence gathering, exercises, trials, training, and weapons practices;
7. 'military surveys' refers to activities undertaken in the marine environment involving data collection for military purposes;
8. 'peaceful uses/purposes' in the context of the EEZ means that uses of that zone, or the purposes of activities conducted therein or thereabove, must not threaten or use force;
9. 'surveillance' means the observation by visual or any technical means of activities on, over or under the seas and oceans; and
10. 'threat of force' means a coercive attempt to compel another State to take or not to take certain specific action, or an action that is directed against the territorial integrity or political independence of that State, or against any of its assets or people, or taken

in any other manner inconsistent with the UN Charter.

II. Rights and duties of the coastal state

a. A coastal State may, in accordance with international law, regulate navigation in its EEZ by ships carrying inherently dangerous or noxious substances in their cargo.
b. The coastal State should have due regard for other States' freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines.
c. Each State using another State's EEZ should ensure that its vessels and aircraft with sovereign immunity, act, as far as is reasonable and practicable, in a manner consistent with the 1982 UNCLOS.
d. In recognition of its rights and obligations with regard to the management of the marine environment and marine living and non-living resources, the coastal State may, on a temporary basis, place qualifications on the freedom of navigation in areas with special circumstances in its EEZ, such as major fishing grounds and marine protected areas. These arrangements may be made permanent by reference to the competent international organisation.
e. Any restriction on navigation and overflight imposed by a coastal State in its EEZ due to its weapons tests and exercises, or any other operational activity, should be temporary, in specified areas only, and only if such suspension is essential for the carrying out of such tests and exercises.

III. Rights and duties of other states

a. While exercising the freedoms of navigation and overflight in an EEZ, States should avoid activities that unreasonably prejudice the peace, good order or security of the coastal State.
b. States' exercise of the freedoms of navigation and overflight should not interfere with or endanger the rights of the coastal State to protect and manage its own resources and their environment.
c. The exercise by other States of the freedoms of navigation and overflight should not interfere with the rights of the coastal State with regard to its establishment and use of artificial islands, installations and structures in its EEZ.

IV. Maritime surveillance

a. The right of a coastal State to conduct maritime surveillance in its EEZ should not be impeded by other States exercising their rights in that zone. In this context, the foreign State must have due regard to the rights and duties of the coastal State.
b. Maritime surveillance may be conducted by States for peaceful purposes in areas claimed by other States as EEZ. This surveillance should not prejudice the jurisdictional rights and responsibilities of the coastal State within its EEZ.
c. States should develop arrangements for the sharing of surveillance information with coastal States.

V. Military activities

a. With the exception of the qualifications noted elsewhere in these guidelines, military vessels and aircraft have the right to navigate in, or fly over the EEZs of other States, and to engage in other internationally lawful uses of the sea associated with the operations of ships and aircraft.
b. Ships and aircraft of a State undertaking military activities in the EEZ of another State have the obligation to use the ocean for peaceful purposes only, and to refrain from the threat or use of force, or provocative acts, such as stimulating or exciting the defensive systems of the coastal State; collecting information to support the use of force against the coastal State; or establishing a 'sea base' within another State's EEZ without its consent. The user State should have due regard for the rights of others to use the sea including the coastal State and comply with its obligations under international law.
c. Warships or aircraft of a State intending to carry out a major military exercise in the EEZ of another State should inform the coastal State and others through a timely navigational warn-

ing of the time, date and areas involved in the exercise, and if possible, invite observers from the coastal State to witness the exercise.

d. Military activities in the EEZ of other States should not hamper the search and rescue operations of the coastal State in its EEZ. States should co-operate in any such search and rescue operations.
e. Military activities by a State in the EEZ of another State should not involve the deployment of systems that prejudice the defense or security of the coastal State, or interfere with or endanger the right of the coastal State to protect and manage its resources and environment.
f. Military activities of a State in the EEZs of other States should not cause pollution or negatively affect the marine environment or marine living resources, including mammals. In particular, if prohibited by the laws of the coastal State, such activities in a coastal State's EEZ should not involve live weapons fire, underwater explosions or creation of sound waves and dangerous or radioactive materials that may directly or indirectly harm marine life or cause marine pollution.
g. Military activities by another State should not be conducted:
    1) in areas which have been announced by the coastal State as temporarily closed for the purposes of safety of navigation and overflight;
    2) in areas with intensive fishing activities declared by the coastal State;
    3) in areas with special circumstances adopted in accordance with Article 211 (6)(a) of the 1982 UNCLOS;
    4) in marine parks or marine protected areas declared by the coastal State as required by Article 194 (5) of the 1982 UNCLOS;
    5) in areas with intensive navigation and near sea lanes and traffic separation schemes; and
    6) near submarine cables and pipelines on the seabed of the EEZ clearly marked by the coastal State on large-scale charts recognised by the coastal State.
h. If there are high seas immediately adjacent to the coastal State's EEZ, a State undertaking military exercises should make every possible effort to limit them to the high seas.

VI. Non-interference with electronic systems

a. The activities of another State in the EEZ of a coastal State should not interfere with the communications, computer, and electronic systems of the coastal State, or make broadcasts that adversely affect the defense or security of the coastal State.
b. The coastal State should not interfere with the communications, computer, and electronic systems of vessels or aircraft of another State exercising its freedoms of navigation or overflight in or over the coastal State's EEZ.
c. In order to make subparagraphs a and b effective, States should conclude agreements regarding mutual non-interference with communications, computer and electronic systems.

VII. Suppression of piracy and other unlawful activities

a. Ships in an EEZ are subject to the exclusive jurisdiction of their flag State, except in circumstances provided by the 1982 UNCLOS or other international treaties.
h. States may act in an EEZ of another State to seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property onboard.
h. To suppress terrorism and illicit traffic in drugs, persons, arms, and Weapons of Mass Destruction (WMD), their delivery systems, and related materials, States should:
    1) board and search any vessel flying their flag in their EEZ that is reasonably suspected of transporting terrorists or being engaged in illicit traffic in drugs, persons, arms, and WMD, their delivery systems, or related materials, and seize such cargoes that are identified as such; and
    2) consent, under appropriate circumstances, to the boarding and search of their own flag vessels by other States, and to the seizure of terrorists or drugs, persons, arms, and WMD-related cargoes on such vessels that may be mutually identified as such by both States.
d. The boarding and search of a foreign flag vessel in an EEZ without the consent of the flag State is not justified solely because it is suspected of

illegal trafficking in WMD, their delivery systems, or related materials.

e. In cases of arrest or detention of foreign vessels in the EEZ of a coastal State, the arresting vessel should through appropriate channels inform the coastal State of the action taken.

VIII. Marine scientific research

b. Coastal State consent should in normal circumstances be granted for marine scientific research conducted exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all humanity.

c. Marine scientific research that has direct use for living and non-living resource exploration and exploitation, conservation and management is entirely under the jurisdiction of the coastal State, which is not obliged to grant consent to such research by foreign vessels.

d. Overflight by manned or unmanned aircraft of one State over the EEZ of another State should not be conducted for the purpose of marine scientific research without the consent of the coastal State.

e. States should fulfill their obligations to provide information to the coastal State in accordance with the 1982 UNCLOS Article 248, and to comply with certain conditions in the 1982 UNCLOS Article 249, particularly with regard to the participation of the coastal State in marine scientific research projects.

IX. Hydrographic surveying

a. Hydrographic surveying should only be conducted in the EEZ of another State with the consent of the coastal State. This does not apply to the collection of navigational data by a ship required for safe navigation during the ship's passage through an EEZ.

b. Coastal State consent for hydrographic surveying should normally be granted unless the surveys fall within one of the consent categories in the 1982 UNCLOS Article 246(5).

c. The Guidelines in Articles VIII and IX also apply to aircraft, Autonomous Underwater Vehicles (AUVs), Remotely Operated Vehicles (ROVs) and other remotely operated devices of a State conducting research or collecting data in an EEZ.

X. Transparency of legislation

a. Those States with policies and/or legislation regarding military activities in their EEZs should make them as transparent and as widely known as possible, including to the military authorities of other States that are frequently using or navigating their EEZs.

b. The dissemination or the receipt of the legislation by other States should not and does not constitute recognition of or refusal thereof by the receiving States of the legality of the legislation, unless specifically so stated by the receiving States or authorities.

c. A copy of those laws should also be deposited with the UN Secretary-General, and be made available for easy reference by any interested States, authorities, or persons, with a view to increasing transparency and mitigating any hostile intentions.

d. Military vessels and aircraft of a State exercising the freedoms of navigation and overflight in the EEZ of another State should observe and comply with the coastal State's legislation on the basis of goodwill, or comply under protest.

e. Where States disagree, dialogue should be initiated either at the bilateral or regional level.

XI. Non-prejudicial clause

a. Nothing contained in these Guidelines, or activities taking place pursuant to them, should be interpreted as prejudicing the position of any State in its claims to sovereign rights or jurisdiction in its claimed EEZ, or its rights and responsibilities therein under the 1982 UNCLOS.

ANNEX C
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This project was sponsored primarily by the Ocean Policy Research Foundation of Japan (OPRF) and supported by a grant from The Nippon Foundation. Co-sponsors included the Center for Southeast Asian Studies, Indonesia, the East-West Center and the School of International and Public Affairs at Shanghai Jiao Tong University.