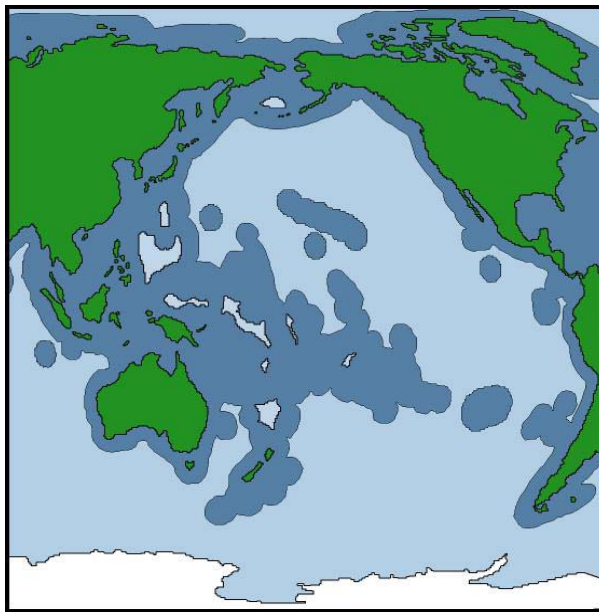


Guidelines for Navigation and Overflight in the Exclusive Economic Zone EEZ Group 21



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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.

* Bali (June 2002), Tokyo (February 2003), Honolulu (December 2003), Shanghai (October 2004), and Tokyo (September 2005).

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:

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.

Second, the Guidelines constitute an important regional confidence-building measure providing general principles for activities that some States currently regard as contentious.

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.

**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 utilize 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 recognized 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 organization.
- 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 warning 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 recognized 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.
- b. 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.
- c. 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

- a. 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.
- b. 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.
- c. 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.
- d. 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.

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