

**PRINCIPLES FOR BUILDING CONFIDENCE AND SECURITY
IN THE EXCLUSIVE ECONOMIC ZONES
OF THE ASIA-PACIFIC**

30th October 2013

I. INTRODUCTION

These Principles have their origin in the *Guidelines for Navigation and Overflight in the Exclusive Economic Zone (EEZ)* issued by the Ocean Policy Research Foundation (OPRF) in 2006¹. The Guidelines were met with some criticism due to concerns that they restricted unduly the freedoms of navigation and overflight available in an EEZ. As a consequence, the Guidelines have not been discussed or endorsed by any regional inter-governmental forum. Some background to the Guidelines, as well as an explanation of why they were considered necessary, is included below.

The objective of the Guidelines remains valid: a non-binding document is required to offer some guidance on interpreting rights and duties in an EEZ and to serve as a confidence-building measure that may reduce the risks of incidents in EEZs. If anything, the need for such a document has become even more urgent than when the Guidelines were originally developed. Incidents continue to occur in the EEZs of East Asia between ships of both regional and extra-regional countries, and may even be becoming more frequent. These incidents show that there is no common understanding of the rights and duties of the different parties in an EEZ. It is only a matter of time before a more serious incident occurs that could have grave ramifications for regional peace and stability.

Against this background, the OPRF initiated a review the Guidelines with a view toward making them more widely acceptable. This effort unfolded over two meetings convened by the OPRF – the first in Hakone in October 2012 and the second in Tokyo in October 2013. Participants in these meetings included some of the original EEZ Group 21 members who developed the Guidelines.

The original Guidelines were considered too ambitious in their scope by covering more activities and in greater detail than was acceptable to some stakeholders in regional maritime security. Rather than sticking with the term *Guidelines*, it was decided to refer to the new document as the *Principles for Building Confidence and Security in the Exclusive Economic Zone of the Asia-Pacific*. This change reflected the fact that the new document was rather less detailed and broader in its guidance than the earlier Guidelines. However, the Principles still reflect the spirit and intentions of the Guidelines.

The *Principles* focus on the central issues of misunderstanding and ambiguity with regard to rights and duties in the EEZ: the interpretation of the term ‘due regard’, the lack of a universal definition of ‘marine scientific research’ and the scope of activities in the EEZ contrary to the norm that the EEZ should be reserved for peaceful purposes.

Background to the Guidelines

The Guidelines were put together over several meetings of the EEZ Group 21 between 2002 and 2005

¹ The Guidelines are available at: https://www.sof.or.jp/en/report/pdf/200509_20051205_e.pdf

in response to two conflicting trends: the expansion of naval force structure and naval activities in the region, and enhanced marine awareness and jurisdictional enforcement by the region's coastal States. Another source of disagreement was the attempt of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) Articles 58(3) and 56(2) to balance coastal State and user State rights and its failure to define 'equity' and 'relevant circumstances' in Article 59.

Article 58(3) of UNCLOS provides that in exercising their rights and performing their duties in the EEZ, "States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State," in accordance with the Convention provisions and other rules of international law in so far as they are not incompatible with Part V of UNCLOS. In turn, under Article 56(2), the coastal State is required to have due regard to the rights and duties of other States in exercising its rights and performing its duties in the EEZ.

This attempt to balance rights and interests of States is further explained in UNCLOS Article 59:

In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

The Convention, however, gives no clear guidance either as to the meaning of 'due regard' or what constitutes 'equity', other than 'relevant circumstances', and the respective importance of the interests involved to the parties as well as the international community as a whole. Thus there are no specific criteria to resolve disagreements, except perhaps that the activity concerned should not interfere with the 'rights and interests' of the States concerned. There is no agreement on what constitutes such rights and interests nor is there agreement as to whether the interference must be unreasonable, and whether it be actual or potential.

If these terms remain undefined and States interpret them individually in their own interests, incidents would continue and could threaten relations and even peace in the region. Furthermore, as technology advances, misunderstandings regarding military and intelligence gathering activities in foreign EEZs are bound to increase. Technological advances include the increasing use of unmanned vehicles, such as drones for aerial surveillance and autonomous underwater vehicles (AUVs) for underwater bathymetric surveys.

Basic Principle

The basic principle that underpins both the Guidelines and these Principles is that in having due regard to the rights and duties of the coastal State, military activities conducted lawfully by another State in

and above the EEZ of a coastal State should not:

- interfere with or endanger the rights and jurisdiction of the coastal State to protect and manage its resources and environment; or
- involve marine scientific research.

These Principles seek to provide criteria that illustrate activities contrary to the basic principle. The Principles are commended for consideration in relevant international organisations and regional inter-governmental forums.

II. DEFINITIONS

1. For the purposes of these Principles:

- (a) “aircraft” means manned and unmanned aerial vehicles;
- (b) “exclusive economic zone” means an area referred to as such in Part V and other relevant Articles of the United Nations Convention on the Law of the Sea (UNCLOS);
- (c) “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 bottom; 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 purposes²;
- (d) “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;
- (e) “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 for the benefit of all mankind;
- (f) “maritime surveillance” means the observation by visual or any technical means of activities on, over or under the seas and oceans;
- (g) “military activities” means operation of military vessels, aircraft, or devices, or other vessels, aircraft, or devices used for military purposes;
- (h) “peaceful purposes” or “peaceful uses” are those consistent with the Charter of the United Nations;
- (i) “ships” mean manned and unmanned surface vessels, submarines and other underwater vehicles.

² International Hydrographic Organization (IHO), International Hydrographic Dictionary. 5th Edition, *Special Publication No. 32*, Monaco: IHO, 1994, item 5206, p. 237 (dictionary available at http://www.iho.int/iho_pubs/standard/S-32/S-32-eng.pdf)

III. DUE REGARD IN THE EEZ

1. Rights and duties in the EEZ

- (a) The EEZ is a separate and distinct maritime zone, which is neither territorial sea nor high seas. The exercise of sovereign rights and jurisdiction by the coastal State in its EEZ, and the exercise of the rights and freedoms of other States in the EEZ require both parties to act in good faith, taking affirmative steps to observe the legitimate authority of the other to use the shared space.
- (b) In the EEZ, the coastal State and other States have duties and enjoy rights, jurisdiction and freedoms, which are functional.
 - (i) The coastal State has exclusive rights and jurisdiction over specific activities as provided for in UNCLOS. Other States, in the exercise of the rights and freedoms in the EEZ, shall observe and respect the coastal State's exclusive rights and jurisdiction and should not infringe or take actions that diminish these exclusive rights.
 - (ii) All States enjoy rights and freedoms to conduct other activities in the EEZ, as provided for in UNCLOS. The coastal State shall not interfere with the exercise of these rights and freedoms.

2. Duties of the coastal State

- (a) The coastal State shall have due regard to the rights and freedoms of other States in its EEZ.
- (b) The coastal State expects all other States to observe its rights and jurisdiction in its EEZ.

3. Duties of other States

- (a) In the EEZ of a coastal State, other States shall have due regard for the coastal State's rights and jurisdiction.
- (b) In the EEZ, other States expect the coastal State to observe their rights and freedoms.

IV. MARITIME SURVEILLANCE

1. In exercising their rights to conduct maritime surveillance in an EEZ, States should observe internationally accepted rules and bilateral agreements.
2. Maritime surveillance may be conducted by States in areas claimed by other States as EEZ. Such surveillance should respect the sovereign rights and jurisdiction of the coastal State within its EEZ.
3. States are encouraged to share maritime surveillance information.

V. MILITARY ACTIVITIES

1. Military vessels and aircraft, and other government vessels and aircraft enjoy 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.
2. Ships and aircraft undertaking military activities in the EEZ of another State have the obligation to refrain from the threat or use of force against the territorial integrity or political independence of the coastal or any other State.
 3. States intending to carry out a military exercise or maneuvers in the EEZ of another State are encouraged to inform the coastal and other States through timely Notices to Mariners and Airmen of the time, date and areas involved in the exercise, and if possible, invite observers from the coastal State.
 4. Within the EEZ of a coastal State, other States are encouraged to avoid military activities,
 - (a) in areas rich in living or non-living resources;
 - (b) in areas of active resource exploration and exploitation;
 - (c) in special areas adopted in accordance with Article 211 (6)(a) of UNCLOS;
 - (d) in marine parks or marine protected areas declared by the coastal State in accordance with internationally accepted standards;
 - (e) in areas subject to ships' routing and traffic separation schemes adopted in accordance with internationally accepted standards;
 - (f) 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 States;
 - (g) in other areas that have been identified as particularly sensitive in accordance with internationally accepted standards; or
 - (h) otherwise interfere with the coastal State's duties to protect the marine environment and conserve the living resources of its EEZ.
 5. If there are high sea areas immediately adjacent to the coastal State's EEZ, a State undertaking military exercises should, so far as is reasonable and practicable, limit them to these areas.

VI. NON-DISRUPTION OF ELECTRONIC SYSTEMS

1. States operating in the EEZ should not interfere with the communications, computers, and other electronic systems of the coastal State, or make broadcasts that adversely affect its defence or security.
2. The coastal State should not interfere with the communications, computers, and other electronic systems of vessels or aircraft of other States operating in its EEZ.

VII. MARINE SCIENTIFIC RESEARCH

1. The coastal State should in normal circumstances grant consent for marine scientific research conducted in its EEZ exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind.

2. The coastal State is not obliged to grant consent to marine scientific research projects set forth under Article 246 paragraph 5 of UNCLOS, such as those that have direct significance for the exploration and exploitation of living and non-living resources under its jurisdiction.
3. States conducting marine scientific research in the EEZ have a duty to provide information to the coastal State in accordance with Article 248 of UNCLOS, and to comply with Article 249 of UNCLOS, particularly with regard to the participation of the coastal State in marine scientific research projects.
4. Hydrographic surveying in the EEZ requires consent of the coastal State when the data collected affect the exclusive rights and jurisdiction of the coastal State.
5. These Principles apply also to aircraft, unmanned systems and remotely operated vehicles used to conduct research or collect data in an EEZ.

VIII. PROVISIONAL ARRANGEMENTS

1. In areas where boundaries between adjacent EEZs have not been agreed, the coastal States concerned, pending agreement on these boundaries, are encouraged to delimit overlapping areas and enter into provisional arrangements of a practical nature in areas of overlapping claims in accordance with Article 74 of UNCLOS. Such arrangements include standard operating procedures, information-sharing, prior notification of military activities in areas of overlapping claims, and cooperation with marine scientific research, law enforcement and fisheries management.

IX. TRANSPARENCY OF LEGISLATION

1. States are encouraged to make their policy statement and legislation regarding their EEZs as transparent and as widely known as possible.
2. A copy of such policy statement and legislation should be provided to the Secretary-General of the United Nations to increase transparency.

Participants of the International Conference on Navigation and Overflight in the Exclusive Economic Zone in Tokyo in October 2013

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