

Introduction to the Principles for Building Confidence and Security in the Exclusive Economic Zones of the Asia-Pacific

An Examination of the Security Dimensions of EEZs

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This article introduces the *Principles for Building Confidence and Security in the Exclusive Economic Zones of the Asia-Pacific*, compiled by the Ocean Policy Research Foundation based on research conducted in fiscal 2012 and 2013. The *Principles* were drafted to revise the *Guidelines for Navigation and Overflight in the Exclusive Economic Zone*,¹ issued by the OPRF in 2005.

1. Background and Objectives

Countries have different interpretations of the provisions of the 1982 United Nations Convention on the Law of the Sea concerning the use of ships and aircraft to conduct surveys of resources, hydrographic measurements, military exercises, and data collection in the exclusive economic zone (EEZs) of other countries. Such differences have created discord between coastal and user States, not only hindering the freedom of navigation but also leading to the destabilization of the maritime security environment.

The issue gained prominence in 2001 when an American EP-3 electronic reconnaissance aircraft collided with a Chinese fighter jet in the airspace above China's EEZ off the coast of Hainan Island. At the time, Chinese Marine Surveillance vessels were frequently entering into Japan's EEZ without prior notification—as stipulated in a 2001 note verbale between Japan and China—to conduct maritime survey activities.

The OPRF, recognizing the need for a common international understanding of the articles prescribing the conduct of ships and aircraft in the EEZs of other countries sponsored four international conferences² between fiscal 2003 and 2005 to draft the *Guidelines for Navigation and Overflight in the Exclusive Economic Zone*. The *Guidelines*, representing the collective views of the participants, were subsequently presented to relevant organizations and research institutes both in

¹ The full text of the *Guidelines for Navigation and Overflight in the Exclusive Economic Zone* can be downloaded at https://www.sof.or.jp/en/report/pdf/200509_20051205_e.pdf.

² The first meetings was held in February 2003 in Tokyo, the second in December 2003 in Honolulu, the third in October 2004 in Shanghai, and the fourth in September 2005 in Tokyo. Fifteen experts from 10 countries, including the United States, Russia, China, and Indonesia, as well as the International Tribunal for the Law of the Sea, were invited to these meetings.

Japan and around the world. While the *Guidelines* were introduced in a number of foreign journals and attracted considerable attention, they did not lead to an internationally recognized arrangement.

In 2009, four years after the *Guidelines* were issued, the USNS *Impeccable* ocean surveillance ship was harassed by Chinese trawlers and government ships in China's EEZ south of Hainan Island. Despite the obvious need for an agreement like the *Guidelines*, as demonstrated by the 2001 EP-3 collision, conceivably there were aspects of the document that were unacceptable to some countries. Another thought was that the international situation had undergone great changes since the *Guidelines* were drafted: In 2008, a year before the *Impeccable* incident, the Chinese Navy regularly began conducting activities in the western Pacific. Thus there had been an undeniable shift in the balance of military power in East Asia and the western Pacific since the issuance of the *Guidelines* in 2005. Another major change in the security environment was the intensification of disputes in the East and South China Sea involving the dominion of islands and establishment of maritime boundaries. There was a need to address such changes before the *Guidelines* would be embraced by the international community.

We identified four such shifts, namely, (1) the increasing advance of Chinese naval vessels into the open sea, (2) intensification of disputes over the dominion of islands and establishment of maritime boundaries in East Asian waters (South China Sea and East China Sea), (3) coercive behavior of China Coast Guard and other Chinese law enforcement vessels toward other countries' ships in East Asian waters, and (4) measures to restore US presence in the region in response to these developments and changing perceptions among the member states of the Association of Southeast Asian Nations regarding naval activities in EEZs.

In response, the OPRF implemented a research project over fiscal 2012 and 2013 to review and revise the *Guidelines* to better reflect the changing circumstances.

2. Issues Considered

Many coastal states, especially those in Asia that experienced colonization, claim that activities by foreign military forces in their EEZ violate the UNCLOS provisions specifying that EEZ be reserved for peaceful purposes. The United States, Britain, and other traditional maritime states, meanwhile, believe that the seas beyond territorial waters—including the EEZ—are free, in principle, and that military activities are allowed.

Around 2003–05, when the *Guidelines* were being drawn up, the biggest threats in the maritime domain were pirates around the Strait of Malacca and the islands of Indonesia and terrorism in the seas of the Middle East. The biggest destabilizing factors today—namely, disputes in the South China Sea and around the Senkaku Islands, as well as Chinese advances into the western Pacific—had not yet become prominent. For this reason, most of the Southeast Asian participants in the

Guidelines discussions took the position of coastal states—that military and data collection activities by other states in the EEZ should not be recognized. The participant from China took a similar stance. The *Guidelines* thus sought to strike a balance between the views of both coastal and user States in identifying basic conduct, as legally prescribed by the UNCLOS provisions pertaining to the EEZ. As a result, the *Guidelines* admittedly failed to give enough attention to purely military considerations.

China today increasingly operates naval vessels and conducts data collection activities in other countries' EEZs. Many Southeast Asian countries, particularly Vietnam and the Philippines, therefore, now welcome US naval operations in their coastal waters to counteract China's coercive behavior in the South China Sea. A decade ago, a key topic at international conferences on maritime issues was the clarification of the legal status of the EEZ. For this reason, deliberations on the *Guidelines* were marked by lively debate on how the vaguely worded UNCLOS provisions on the rights and duties of coastal and user States should be interpreted.

Today, however, international conferences gloss over the ambiguities in UNCLOS and give, in what is regarded as a more realistic approach, greater attention to establishing international regimes for resource and environmental protection in the EEZ and to stabilizing the security environment through confidence-building measures and enhanced military transparency.

The OPRF's attempt to create guidelines for conduct in the EEZ was the first in the world and may have been a factor in the potentially overly ambitious endeavor to be comprehensive, both in the scope of issues covered and the details examined. Consequently, it may have resulted in conduct in the EEZ being prescribed too narrowly.

In the light of the transformed security environment since the *Guidelines* were formulated, participants for the workshops in fiscal 2012 and 2013 to update the document were selected with a view to providing new perspectives on approaches to stabilizing the highly fluid security environment.

3. Project Overview and Results

During the first year of the project, an international drafting committee comprising a small number of core members met³ to review the *Guidelines* and identify areas for revision. A draft outline was created, which was subsequently presented to relevant foreign organizations to gain their input.

In fiscal 2013, a second international meeting was held⁴ to deliberate on the draft outline prepared

³ The meeting was held in October 2012 in Hakone, Japan, inviting as core members eight experts from the United States, Australia, China, the Philippines, and Japan.

⁴ The meeting was held in October 2013 in Tokyo, inviting one expert each from South Korea and

the previous year and to draw up the *Principles for Building Confidence and Security in the Exclusive Economic Zones of the Asia-Pacific* as the final report of this project.

Principles was chosen for the title, rather than *Guidelines*, to avoid restricting activities in the EEZ more than necessary. The title also explicitly points to the importance of building confidence among the relevant parties.

The full text of the Principles can be found as Attachment 1.

A. Contents

The respective Table of Contents of the *Guidelines* and *Principles* are as follows:

<i>Guidelines</i>	<i>Principles</i>
I. Definitions	I. Introduction
II. Rights and Duties of the Coastal State	II. Definitions
III. Rights and Duties of Other States	III. Due Regard in the EEZ
IV. Maritime Surveillance	IV. Maritime Surveillance
V. Military Activities	V. Military Activities
VI. Non-interference with Electronic Systems	VI. Non-interference with Electronic Systems
VII. Suppression of Piracy and Other Unlawful Activities	VII. Marine Scientific Research
VIII. Marine Scientific Research	VIII. Provisional Arrangements
IX. Hydrographic Surveying	IX. Transparency of Legislation
X. Transparency of Legislation	

The *Principles* has one fewer chapter, modifying the overly comprehensive nature of the *Guidelines* in both scope and detail. The issues addressed in the “Rights and Duties of the Coastal State” and the “Rights and Duties of Other States” of the *Guidelines* are dealt with in the chapters on “Maritime Surveillance” and “Military Activities” in the *Principles*, while “Suppression of Piracy and Other Unlawful Activities” was deleted based on the recognition that international antipiracy activities have now become quite common. Instead, “Due Regard in the EEZ” was added out of the belief that confidence-building was essential to reaching agreement on legal interpretations in the international security environment today. The chapter on “Provisional Arrangements” was also added in anticipation of future regional or bilateral agreements regarding the EEZ.

B. Military Activities

Vietnam, in addition to the eight core members invited the previous year.

Military intelligence gathering activities and exercises in foreign EEZs are the biggest sources of friction among States, as demonstrated by the EP-3 and *Impeccable* incidents. Addressing this issue can thus be regarded as the chief aim of the *Principles*.

China appears to be employing a double standard as its naval activities rapidly expand geographically—advancing into the open sea—and become increasingly active. While China points to the concept of the peaceful use of the oceans in criticizing US intelligence gathering activities in its EEZ around Hainan Island, it seems to have no qualms conducting similar activities and exercises in Japan’s EEZ or around US bases on Guam. China, like the United States, has the need to gather foreign intelligence for its own national security. Lack of reliable information on the intentions and capacity of foreign forces can give rise to speculation and misinterpretation, which could have the dangerous consequence of escalating a dispute into open conflict. The key to avoiding such a scenario is enhancing transparency, which would also serve to promote trust. At the same time, activities by foreign forces in a State’s own coastal waters are certain to raise security concerns. Military exercises in the EEZ, moreover, could at times threaten the sovereign rights and jurisdiction of a coastal State to protect its maritime resources and the environment.

In the light of the above, the *Principles* outline the following regarding intelligence gathering activities (called “maritime surveillance” in the document) and military exercises in foreign EEZs.

1. Maritime surveillance may be conducted by States in areas claimed by other States as EEZ.
2. 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.
3. In exercising their rights to conduct maritime surveillance in an EEZ, States should respect the sovereign rights and jurisdiction of the coastal State within its EEZ.
4. 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.
5. 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 of the time, date and areas involved in the exercise (and if possible, invite observers from the coastal State) through timely Notices to Mariners and Airmen.
6. When within the EEZ of a coastal State, other States are encouraged to avoid military activities—
—in areas rich in living or non-living resources;
—in areas of active resource exploration and exploitation;
—in marine parks or marine protected areas declared by the coastal State in accordance with internationally accepted standards; and
—in areas subject to ships’ routing and traffic separation schemes adopted in accordance with internationally accepted standards.

7. 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.

C. Public Communication Activities

In February 2014, the *Principles* was presented to the secretary general of the International Maritime Organization with the request that reference be made to the document when establishing relevant international arrangements. The OPRF will coordinate its activities with the experts who authored the *Principles* and actively seek opportunities to communicate its contents broadly to the international community.

**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 2006⁵. 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

⁵ 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 purposes⁶;
- (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.

⁶ 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

RADM (Ret.) Kazumine AKIMOTO	Japan
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Prof. Moritaka HAYASHI	Japan
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Introduction to the Principles for Building Confidence and Security
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