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Abstract

Military activities in the an exclusive economic zone (EEZ) were a controversial issue at the Third UN Conference on the Law of the Sea (UNCLOS III) and remain so in State practice. Some coastal States claim that other States cannot carry out military activities, including naval exercises and military surveying, in their EEZ without their consent, and have sought to apply restrictions on navigation and overflight in this zone. This “thickening” of jurisdiction over activities in the EEZ is strongly opposed by other States, particularly the major maritime powers. This contribution addresses some of the practical considerations associated with this division of views. It highlights the need for compromise between the positions of some coastal States on the one hand and the major maritime powers on the other. Because relevant disputes involve military activities, it is unlikely that they would be brought before a court or tribunal under article 297 paragraph 2 or 3 of the 1982 UN Convention on the Law of the Sea (UNCLOS).

Keywords

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The Regime of the Exclusive Economic Zone: Military Activities and the Need for Compromise?

Sam Bateman

I. Introduction

Military activities in the ~~the~~ exclusive economic zone (EEZ) were a controversial issue at the Third UN Conference on the Law of the Sea (UNCLOS III) and remain so in State practice. Some coastal States claim that other States cannot carry out military activities, including naval exercises and military surveying, in their EEZ without their consent, and have sought to apply restrictions on navigation and overflight in this zone. This “thickening” of jurisdiction¹ over activities in the EEZ is strongly opposed by other States, particularly the major maritime powers. This contribution addresses some of the practical considerations associated with this division of views. It highlights the need for compromise between the positions of some coastal States on the one hand and the major maritime powers on the other. Because relevant disputes involve military activities, it is unlikely that they would be brought before a court or tribunal under article 297 paragraph 2 or 3 of the 1982 UN Convention on the Law of the Sea (UNCLOS).²

The issues involved are particularly contentious in the Asia-Pacific region, where there have been incidents and disputes that might easily have escalated into open conflict. This propensity for disputation is largely due to the maritime geography of the Western Pacific, with its numerous islands and archipelagoes, and the unique chain of seas between the mainland of East Asia and the off-lying archipelagic chain stretching from

¹ “Thickening jurisdiction” occurs when States seek to deepen their jurisdiction over activities, such as navigation and marine environmental protection, in their offshore zones beyond that which is customarily accepted under international law. It might be distinguished from “creeping jurisdiction” when States use devices, such as excessive straight territorial sea baselines or historic bay claims, to extend the geographical area of their offshore zones. Wayne S. Ball, “The Old Grey Mare, National Enclosure of the Oceans”, *Ocean Dev. & Int’l L.*, Vol. 27, Nos 1-2, 1996, p. 103.

² United Nations Convention on the Law of the Sea, 10 December 1982, UN Doc. A/CONF.62/122, 1982, reprinted in the *Law of the Sea Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index*, 1983 and 21 *ILM* 1261, 1982 (referred to in this paper as the UNCLOS). UNCLOS art. 298(1)(b) provides that disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, are optional exceptions to section 2 of UNCLOS Part XV dealing with Compulsory Procedures Entailing Binding Decisions.

Japan through Taiwan to the Philippines and Indonesia.³ Large areas of the Western Pacific are enclosed as EEZs by one country or another, but the limits of maritime jurisdiction in the region are often uncertain due to the lack of maritime boundaries and problematic claims to straight territorial sea baselines.⁴

II. Background

Negotiation of the EEZ regime at UNCLOS III was both difficult and complex, with divergent views about the status of this new zone, which would grant coastal States rights over marine resources out to 200 nautical miles from territorial sea baselines. 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 would be regarded as a separate zone in its own right (“*sui generis*”); the EEZ is neither high seas nor territorial sea.⁵

Now, some ~~twenty-five~~25 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 uses the expression “international waters” to describe collectively the high seas, the EEZ and the contiguous zone.⁶ While “international waters” might be convenient operational short-hand to describe the area of ocean where the United States perceives there are high seas freedoms of navigation, clearly it is a misnomer. EEZs are not international waters. The

³ The relationship between regional geography, the law of the sea and security in the context of navigational regimes and EEZs was explored in Sam Bateman, “Security and the Law of the Sea in East Asia: Navigational Regimes and Exclusive Economic Zones” in David Freestone, Richard Barnes and David Ong (eds), *The Law of the Sea: Progress and Prospects*, Oxford, Oxford University Press, 2006, pp. 365-387.

⁴ Victor Prescott and Clive Schofield, “Undelimited Maritime Boundaries of the Asian Rim in the Pacific Ocean”, *Maritime Briefing*, Vol. 3, No. 1, International Boundaries Research Unit, University of Durham, 2001.

⁵ Robin R. Churchill and Alan V. Lowe, *The Law of the Sea*, 3rd ed., Manchester, Manchester University Press, 1999, p. 166.

⁶ U.S. Navy, *The Commander’s Handbook on the Law of Naval Operations*, NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.7, pp. 1-6, available on website at: <http://www.nwc.navy.mil/ild/publications/nwp%201-14/NWP%201-14%20pub/NWP%201-14M.htm>.

coastal State enjoys certain rights and obligations in its EEZ that distinguishes this zone from international waters. These can, in particular circumstances, impact on the freedoms of navigation and overflight of other States. This would be the case, for example, where the exercise of these freedoms does not have due regard to the rights and duties of the coastal State.⁷

Similarly, 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 its EEZ under UNCLOS.⁸ However, there is a considerable range of opinions regarding the meaning of “due regard” and what precisely are the “rights and duties” of the separate States. The United States believes that the coastal State cannot unduly restrict or impede the freedoms of navigation in and overflight of the EEZ, and its naval commanders are advised that “the existence of an exclusive economic zone need not, of itself, be of operational concern”.⁹ At the other extreme, China appears to interpret “due regard” as requiring foreign users of its EEZ to refrain from activities that endanger its sovereignty, security and national interests. This is an unsatisfactory division of views that reflects the need for some compromises in recognizing the types of activity or regulation that might be contrary to the interests of the other party.

III. 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.¹⁰ 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 the water, currents and winds.¹¹ 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

⁷ UNCLOS art. 58(3).

⁸ UNCLOS art. 56(2).

⁹ A.R. Thomas and James C. Duncan (eds), *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, International Law Studies Vol. 73, Naval War College, Newport, Rhode Island, 1999, p. 130.

¹⁰ Churchill and Lowe, *see note 5*, p. 175.

¹¹ UNCLOS art. 56(1)(a).

species), as well as other rights and duties, as provided for in relevant provisions of UNCLOS.¹² 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.¹³

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.¹⁴ However, in exercising these freedoms, other States are required to have due regard to the rights and duties of the coastal State.¹⁵ It is proving very difficult in practice 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.

IV. Military Activities

It has been said that UNCLOS “is replete with ambiguity concerning military uses of the sea”.¹⁶ With respect to military uses of the EEZ, the Convention does not make clear whether military activities are included in the freedoms of navigation and overflight and other internationally lawful uses of the sea available under UNCLOS articles 58 and 87.¹⁷ Without having to list explicitly their military rights within the EEZ, the maritime powers sought to ensure during UNCLOS III negotiations that the new EEZ regime would not exclude naval operations in the zone. This led to the so-called “Castaneda compromise” with the somewhat over-stated but ambiguous language evident, for example, in articles 58 and 87 of UNCLOS.¹⁸

¹² UNCLOS art. 56(1)(b) and (c).

¹³ UNCLOS art. 56(2).

¹⁴ UNCLOS art. 58(1).

¹⁵ UNCLOS art. 58(3).

¹⁶ Dale G. Stephens, “The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations”, *Cal. W. Int’l L. J.*, Vol. 29, 1998-1999, p. 283.

¹⁷ Churchill and Lowe, *see note 5*, p. 427.

¹⁸ Captain George V. Galdorisi, USN (ret) and Commander Alan G. Kaufman, JAGC, USN, “Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict”, *Cal. W. Int’l L. J.*, Vol. 32, 2001-2002, p. 271.

The United States insists on the freedom of military activities in the EEZ out of concern that its naval and air access and mobility could be severely restricted by any global trend towards “thickening jurisdiction” over the EEZ. The ability to conduct military activities in the EEZ, including military surveying and intelligence collection, is justified on the basis that they are part of the normal high seas freedoms of navigation and overflight that are available in an EEZ under UNCLOS. However, some coastal States, including Bangladesh, Malaysia, India and Pakistan, contend that other States cannot carry out military exercises or manoeuvres in or over their EEZ without their consent. The concern of these States is that uninvited military activities could threaten their national security or undermine their resource sovereignty.

Practical problems arise because terms such as *military activities*, *military exercises* and *military surveying* are not particularly precise. As Kaye has noted, UNCLOS “does not deal with security issues to a significant extent” and “almost completely avoids consideration of the laws of naval warfare”.¹⁹ He goes on to note that the *San Remo Manual on Armed Conflicts at Sea* makes it clear that armed conflicts can take place “in certain circumstances, in the EEZ of a neutral State” but that “belligerents must have due regard to the uses to which another State may wish to put its EEZ, and avoid damage to the coastal State”.²⁰

One operational commander from the United States has written 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”.²¹ Those words were written over ten years ago and would most likely be qualified now 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. The basic due regard principle “requires states engaging in military activities not to unreasonably interfere with the exercise of the right of the coastal state to

¹⁹ Stuart Kaye, “Freedom of Navigation in a Post 9/11 World: Security and Creeping Jurisdiction”, in Freestone, Barnes and Ong (eds), *see note 3*, pp. 347-364.

²⁰ *Ibid.*, p. 353.

²¹ Walter F. Doran, “An Operational Commander’s Perspective on the 1982 LOS Convention”, *Int’l J. of Marine & Coastal L.*, Vol. 10, No. 3, 1995, p. 341.

explore and exploit the natural resources of the EEZ”.²² Non-interference with the coastal State’s duty to preserve and protect the marine environment of the EEZ should be added to that principle.

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 article 194(5) of UNCLOS,²³ could be considered not to have due regard to the rights and duties of the coastal State. Similarly, the military activities of other States should not interfere with the legitimate surveillance and enforcement activities of the coastal State aimed at protecting its rights or preventing pollution in the EEZ. It might be regarded as inappropriate, for example, for military forces of another State to order away a *bona fide* surveillance aircraft of the coastal State from their area of operations.

Military activities and exercises can cover a range of naval operations from non-delaying and inoffensive passage exercises by transiting warships through to major exercises or operations involving ships, submarine and aircraft, possibly including the use of live fire. The concepts being considered as part of the U.S. Navy’s Sea Basing programme depend on acceptance of the principle of the freedom to conduct military operations in another country’s EEZ. The ~~mMobile oOffshore bBase (MOB)~~ concept, for example, is essentially a floating airport that could be towed to an area of operations, providing a capability to accept large transport aircraft to rapidly build up, deploy and support expeditionary forces.²⁴ Realities of geography, water depth and weather suggest that such a base would only be possible within the EEZ or territorial sea of a coastal State. However, it would be hardly acting with due regard to the rights and duties of the coastal State if the military activities in the EEZ implied any threat or use of force against the coastal State.

V. Marine Scientific Research

²² Robert Beckman, “Military Activities in the Exclusive Economic Zone: Towards a Common Understanding” in Yang Razali Kassim (ed.), *Strategic Currents*, Singapore: Institute of Defence and Strategic Studies, Nanyang Technological University, 2006, p. 42.

²³ This article requires the coastal State to take the measures necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.

²⁴ Scott C. Truver, “Sea Basing: more than the sum of its parts?” *Jane’s Navy International*, March 2004, pp. 16-21.

UNCLOS article 56(1)(b)(ii) provides that the coastal State has jurisdiction over marine scientific research in its EEZ. However, UNCLOS does not define the key terms “marine scientific research”, “survey activities”, “hydrographic survey” or “military survey”.²⁵ 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.²⁶

The maritime powers believe that “survey activities” are not marine scientific research and point out that UNCLOS distinguishes between “research” and “marine scientific research” on the one hand, and “hydrographic surveys” and “survey activities” on the other, primarily because these are sometimes referred to separately in the Convention.²⁷ While the coastal State might regulate marine scientific research in its EEZ and on its continental shelf, the United States believes that hydrographic survey and military survey activities are freedoms that the coastal State cannot regulate outside its territorial sea.²⁸ They are freedoms captured by the expressions “other internationally lawful uses of the sea” related to freedoms of navigation and overflight in UNCLOS article 58(1) and “*inter alia*” in UNCLOS article 87(1).

Marine scientific research is the general term most often used to describe those activities undertaken in ocean and coastal waters to expand scientific knowledge of the marine environment.²⁹ Marine scientific research includes oceanography, marine biology, fisheries research, scientific ocean drilling and coring, geological/geophysical scientific surveying, as well as other activities with a scientific purpose.³⁰ While marine scientific research was previously conducted only by ships, a variety of other platforms may now

²⁵ George V. Galdorisi and Kevin R. Vienna, *Beyond the Law of the Sea – New Directions for U.S. Oceans Policy*, Westport, Praeger, 1997, p. 164.

²⁶ Council for Security Cooperation in the Asia Pacific (CSCAP), *The Practice of the Law of the Sea in the Asia Pacific*, CSCAP Memorandum No. 6, December 2002, available on website at: www.cscap.org, pp. 3-4.

²⁷ J. Ashley Roach and Robert W. Smith, *Excessive Maritime Claims*, International Law Studies, Vol.66, Newport R. I., Naval War College, 1994, p. 247 and Alfred H.A. Soons, *Implementation of the Marine Scientific Research Regime in the South Pacific – Final Report*, FFA Report 95/14 and SOPAC Joint Contribution Report 101, Honiara, Forum Fisheries Agency, 24 October 1994, p. 7.

²⁸ Roach and Smith, *ibid.*, p. 249.

²⁹ Thomas and Duncan, *see note 9*, p. 21.

³⁰ Roach and Smith, *see note 27*, p. 248.

be used, such as submersibles, installations and buoys or ~~o~~~~O~~~~c~~~~e~~~~a~~~~n~~ ~~d~~~~e~~~~d~~~~a~~ ~~a~~~~c~~~~q~~~~u~~~~i~~~~s~~~~i~~~~t~~~~i~~~~o~~~~n~~ ~~s~~~~y~~~~s~~~~t~~~~e~~~~m~~~~s~~ ~~(~~~~O~~~~D~~~~A~~~~S~~~~)~~, aircraft and satellites. New technologies for marine data collection include remotely operated vehicles ~~(~~~~R~~~~O~~~~V~~~~s~~~~)~~, autonomous underwater vehicles ~~(~~~~A~~~~U~~~~V~~~~s~~~~)~~ and seabed landers. This variety of platforms and the ability to collect data remotely serve to complicate arguments regarding the rights to conduct marine scientific research and surveying.

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. Hydrographers generally regard their surveying activities as part of marine scientific research, and most contemporary hydrographic surveys outside the immediate confines of a port are not restricted purely to the collection of hydrographic data.³¹ They employ similar equipments to that used in other forms of oceanographic research. Modern oceanographic and hydrographic survey ships are both fitted with multi-beam, wide-angle precision sonar systems that make it possible to chart continuously a broad strip of ocean floor.

Not all data collection conducted at sea necessarily comes within the scope of the marine scientific research regime established by UNCLOS. Some 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. Coastal States understandably will be suspicious of any form of survey or research being conducted in their EEZ without their consent. Bathymetric charts providing a description of seabed topography are an example of multi-purpose data collection. These charts are a routine output of hydrographic surveys but are also a basic tool of resource exploration and exploitation.

Marine scientific research is sometimes categorized as either “fundamental” or “pure” research on the one hand or “applied”, “commercial” or “military” research on the other, but the distinction between the two categories is often not clear.³² The former refers to marine scientific research intended to add to the scientific knowledge of the

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³¹ A more substantial discussion of issues arising from the conduct of hydrographic surveying in ~~the an~~ EEZ may be found in Sam Bateman, “Hydrographic Surveying in Exclusive Economic Zones: Jurisdictional Issues”, *Int'l Hydrographic Rev.*, Vol. 5, No. 1 (New Series), April 2004, pp. 24-33; and Sam Bateman, “Hydrographic surveying in the EEZ: differences and overlaps with marine scientific research”, *Marine Policy*, Vol. 29, 2005, pp. 163-174.

³² Edward D. Brown, *The International Law of the Sea*, Vol. 1, Aldershot, Dartmouth, 1994, p. 419.

world, regardless of its application, while the latter refers to research conducted for a specific practical purpose.³³ However, this distinction between “pure” and “applied” research is in a Western tradition and may not appeal to Asian nations.³⁴

VI. Military Surveys

Military surveys are activities undertaken in ocean and coastal waters involving marine data collection (whether or not classified) for military purposes.³⁵ 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. 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.³⁶

Military surveying is an expression largely coined by the United States, but the United Kingdom talks about military data gathering in similar vein.³⁷ 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.³⁸ 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

³³ Alfred H.A. Soons, *Marine Scientific Research and the Law of the Sea*, The Hague, Kluwer, 1982, p. 6.

³⁴ Sequoia Shannon and David J. Dzurek, “Scientific Research” in Joseph Morgan and Mark J. Valencia (eds), *Atlas for Marine Policy in East Asian Seas*, Berkeley, University of California Press, 1992, p. 15.

³⁵ Roach and Smith, [see note 27](#), p. 248.

³⁶ *Ibid.*

³⁷ But perhaps the term “military data gathering” is less problematic because it does not include the word “survey”.

³⁸ Roach and Smith, [see note 27](#), p. 248.

restrictions on mobility and flexibility of military survey operation”.³⁹ Similarly the United Kingdom believes that States have a right to engage in military data gathering 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 UNCLOS.⁴⁰ 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 aerals 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) might give a good lead on the nature of its data collection.

Based on current and planned naval and defence acquisitions in the Asia-Pacific region, particularly the growth of regional submarine fleets, military surveying and intelligence-gathering activities in EEZs will increase in the future. These activities might also become more controversial and more dangerous in the region. This trend reflects the increasing demands for technical intelligence; rapidly expanding weapon and sensor acquisition programmes, including electronic warfare (EW)-capabilities; and widespread moves to develop Information Warfare (IW)-capabilities. The growth and wider use of submarine forces creates a need for better oceanographic knowledge.

It is not surprising that incidents have already occurred in the Asia-Pacific region, 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

³⁹ *Ibid.*, p. 249.

⁴⁰ Mark J. Valencia, *The Regime of the Exclusive Economic Zone: Issues and Responses*, East-West Center, Honolulu, 2003, p. 6.

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. There are regular press reports of protests over the activities of research vessels of one country in the claimed EEZ of another.

VII. Prospective Guidelines

A group of senior officials, legal experts and maritime specialists from the Asia-Pacific region (now known as the EEZ Group 21) met between 2002 and 2005 with a view towards clarifying the rights and duties of States in respect of military activities, intelligence collection and surveying in the EEZ.⁴¹ The Ship and Ocean Foundation of Japan (now the Ocean Policy Research Foundation) was the major sponsor of these meetings.⁴² The aim was to produce 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 meetings were an ambitious undertaking that sought to provide an important regional maritime confidence and security building measure (MCSBM).

The last meeting of the EEZ Group 21 held in Tokyo on 15-16 September 2005 reached agreement on "Guidelines for Navigation and Overflight in the Exclusive Economic Zone" ("Guidelines").⁴³ The Guidelines set out broad principles of common understanding regarding certain aspects of navigation and overflight in the EEZ, including military and intelligence-gathering activities. The Guidelines are written in exhortatory rather than obligatory language, and do not create legally binding obligations between States. They may be generally regarded as reflecting the need for better understanding of the rights and obligations of States wishing to conduct activities in the EEZ of another country.

⁴¹ The meetings were held in Bali (June 2002), Tokyo (February 2003), Honolulu (December 2003), Shanghai (October 2004), and Tokyo (September 2005).

⁴² Other sponsors of separate meetings included the East-West Center, Honolulu; the Centre for South East Asian Studies, Jakarta; and the School of International and Public Affairs, Shanghai Jiao Tong University.

⁴³ The Guidelines are available at: http://www.sof.or.jp/topics/2005_e/051205_01.html. A discussion of the Guidelines, along with the composition of EEZ Group 21, may also be found in Sam Bateman, "Prospective Guidelines for Navigation and Overflight in the Exclusive Economic Zone", *Maritime Studies* 144, September/October 2005, pp. 17-28. http://www.sof.or.jp/topics/2005_e/pdf/20051205_e.pdf

The EEZ Group 21 agreed that the EEZ is a zone *sui generis*, and 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 resources and environment. For example, the coastal State may, on a temporary basis, place qualifications on the freedom of navigation in areas where special circumstances exist in its EEZ, such as major fishing grounds and marine protected areas, and that these arrangements may be made permanent by reference to the competent international organization.⁴⁴ The Guidelines include a list of areas in ~~the~~ an EEZ where military activities should not be conducted by another State (e.g. in marine parks or marine protected areas declared by the coastal State as required by UNCLOS article 194(5), or in areas with intensive fishing activities declared by the coastal State).⁴⁵

The EEZ Group 21, perhaps paradoxically, recognised that the arguments for military surveys in the EEZ, being outside the jurisdiction of the coastal State, appear stronger than those for hydrographic surveys. The considerations that apply to the rights to conduct hydrographic surveys and military surveys in an EEZ are essentially different. 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.

In reaching consensus that hydrographic surveying should only be conducted in an EEZ with the consent of the coastal State,⁴⁶ 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.⁴⁷ 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.

⁴⁴ EEZ Group 21, *Guidelines for Navigation and Overflight in the Exclusive Economic Zone*, Guideline II.d.

⁴⁵ *Ibid.*, Guideline V.d.

⁴⁶ *Ibid.*, Guideline IX.a.

⁴⁷ These changes are discussed more fully in Bateman, "Hydrographic Surveying in Exclusive Economic Zones: Jurisdictional Issues", [see note 31](#).

Areas of disagreement during the EEZ Group 21 meetings related to the meaning of terms in UNCLOS, as well as to the meaning of specific articles. For example, there were 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. There were different interpretations regarding the precise meaning of the Convention's phrase allowing “other internationally lawful uses” of the sea in the EEZ,⁴⁸ 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”,⁴⁹ and the obligation not to threaten or use force against other States. Questions arose 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.

While the Guidelines recognise that States have the right to conduct military activities in the EEZ of another, this right is a qualified one. A recent writer has noted that this right is limited by four general principles: firstly, the EEZ must be used for peaceful purposes; secondly, coastal States must have due regard to the rights and duties of other States, and *vice versa*; thirdly, States must not act in a manner which would constitute an abuse of their rights; and lastly, in exercising their rights and duties under UNCLOS, States have a duty to cooperate with each other.⁵⁰ The ~~latter-last-mentioned~~ principle requires that a State carrying out military activities in an EEZ, or planning to carry out such activities, should cooperate with the coastal State, and notify or consult with it. If these military activities were taken to include military surveys, it would seem unlikely that the United States or some other maritime powers would accept this limitation.

VIII. Conclusions

⁴⁸ UNCLOS art. 58(1).

⁴⁹ UNCLOS art. 88, read in conjunction with UNCLOS art. 58(2), reserves the EEZ for “peaceful purposes”.

⁵⁰ Beckman, [see note 22](#), pp. 42-43.

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. UNCLOS was formulated more than 25 years ago in very different political and technological circumstances to those that exist at present. Even the concept of what constitutes a “major maritime power” has changed. The shift in the balance of global maritime power towards the Asia-Pacific region is possibly the most significant development impacting on issues discussed in this [paper-chapter](#). China, India and Japan are all now major maritime powers and their interpretation of the rights and duties of States in EEZs vary from those held by the major Western maritime powers at the time of UNCLOS III. These three countries are all on record as taking restrictive views of the rights and duties of a State wishing to undertake military activities in the EEZ of another State. However, the United States and other countries regard these views as contrary to the principle of acting with due regard to the rights of other States in the EEZ of a coastal State, and as a potential abuse of rights by the coastal State.

The discussion in this [paper-chapter](#) draws mainly on experiences in the Asia-Pacific region but this is not to say that they are specific to this region. They might also appear elsewhere in the world reflecting a wide-ranging difficulty with putting the general rules of UNCLOS into practice. Just as Europe has introduced regional variations and agreements on marine environmental protection, and pollution control in particular, it is not improbable that we will see regional codes of conduct and bilateral or multilateral arrangements on the EEZ regime in the Asia-Pacific region. The development of these measures would reflect the extent of EEZs in the region, and the importance [that](#) regional countries attach to their rights and duties in that zone. The EEZ Group 21 Guidelines are a “soft law” contribution to this process, although they are yet to gain endorsement in any official forum.

The explanation of the problems discussed in this [paper-chapter](#) can be traced back to ambiguity in the EEZ regime, as established by UNCLOS, and to the range of perspectives, very evident in the Asia-Pacific region, with regard to rights and duties under the regime. As time goes by, leaving these problems unresolved might become increasingly dangerous. Even if bilateral arrangements are agreed between parties with opposing views (such as between China and the United States), these rules might not be acceptable to other

countries. There is a risk also 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 activities in and above their EEZ, then this prohibition could become customary international law through State practice, despite the opposition of some countries. It might be better to anticipate this development through a process of negotiated compromise. These issues are unlikely to be resolved by application to the International Court of Justice or the International Tribunal on the Law of the Sea. However, advisory opinions might be sought from those bodies and these could be helpful in resolving the current situation.

Some compromises between the parties with opposing views would avoid a disorderly process whereby countries assert their positions through State practice, followed by protests by countries that disagree, and eventually by diplomatic negotiations. This is an unsatisfactory situation for operational commanders who are potentially faced ~~by~~with conflicting opinions on what activities they might freely undertake in an EEZ and what they might not. Most of the Western Pacific is enclosed as an EEZ by one country or another, and it would clearly be beneficial for regional relations and security if some compromise ~~were~~was reached between the opposing views that are evident at present. The most basic compromise would be some acceptance of the types of activity that might be regarded as an abuse of rights, or an absence of due regard to the rights and duties of the coastal State in its EEZ.