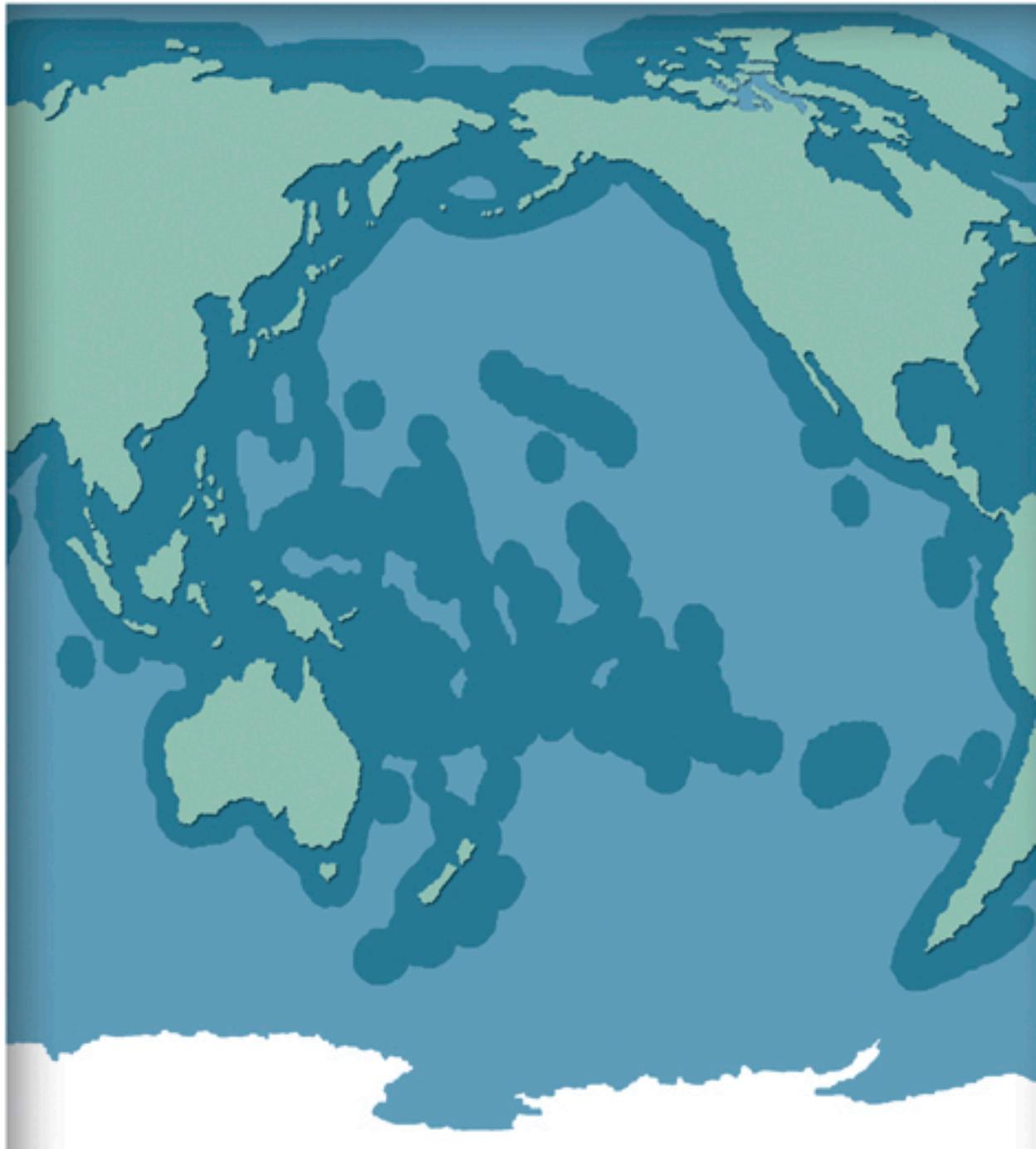




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Military and Intelligence Gathering Activities in Exclusive Economic Zones: Consensus and Disagreement

A Summary of the Bali Dialogue



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A Summary of the Bali Dialogue

A Policy and Research Planning Workshop
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and
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This report was drafted by Mark J. Valencia, workshop co-coordinator, based on the notes of Jenny Miller Garmendia, with input from Jon Van Dyke and Hasjim Djalal.

This document summarizes discussions held and conclusions reached at the Bali Dialogue, a meeting of senior officials and analysts from countries of the Asia Pacific region co-sponsored by the East-West Center and the Center for Southeast Asian Studies. The Dialogue facilitated unofficial, frank, and not-for-attribution discussions of issues concerning military and intelligence gathering activities in the Exclusive Economic Zones. This summary reflects the diverse perspectives of the participants and does not necessarily represent the views of the East-West Center, the Center for South East Asian Studies, Indonesia, or any particular participant.

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Introduction

Four recent incidents in exclusive economic zones (EEZ) add new urgency to the need for managing conflict or potential conflicts in the EEZs:

- The collision between a U.S. surveillance plane and a Chinese jet fighter over China's EEZ (the EP3 incident) and subsequent 'close encounters'
- The violent pursuit by the Japanese coast guard of a boat in Japan's EEZ suspected to be of North Korean origin (the mystery ship incident)
- The seizing by Israeli forces in the Red Sea of a vessel carrying arms purportedly for the PLO
- The protest by Vietnam regarding Chinese live fire exercises in its claimed EEZ

These and other incidents raise a variety of contentious issues regarding navigation rights and the limits, if any, on foreign military and intelligence gathering activities in the EEZ. As technology advances, misunderstandings regarding such activities and resultant incidents will increase. In particular, since September 11, 2001, many nations, and certainly the United States, have increased their scrutiny of both military and commercial aircraft and ships approaching from near and far. To avoid further such incidents, the relevant parties need to come to an understanding regarding military and intelligence gathering activities in the EEZ.*

* Military and intelligence gathering activities include but are not limited to: (1) navigation on the surface and in the water column (and overflight), including routine cruises, naval maneuvers, and other exercises with or without weapons tests and use of explosives, and projecting "naval presence" as an instrument of foreign policy ("gunboat diplomacy"); (2) providing strategic deterrence in the form of nuclear ballistic missile submarines; (3) surveillance of the potential adversary's naval and other military activities, of which anti-submarine warfare forms an essential part (with the use of various seabed-based devices such as sonar and other acoustic detection systems); (4) emplacement of navigation and communication devices in the sea and on the seabed; (5) emplacement of conventional weapons such as mines; (6) military research; and (7) logistical support, including maintaining naval platforms. (Boleslaw Adam Boczek, The

Military activities in the EEZ were a controversial issue during the negotiation of the text of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and continue to be so in state practice. Some coastal states such as Bangladesh, Brazil, Cape Verde, Malaysia, India, Pakistan and Uruguay contend that other states cannot carry out military exercises or maneuvers in or over their EEZ without their consent. Their concern is that such uninvited military activities could threaten their national security or undermine their resource sovereignty. However, maritime powers such as the United States insist on the freedom of military activities in the EEZ out of concern that their naval and air access and mobility could be severely restricted by the global EEZ enclosure movement. Military activity can take many forms, for example, intelligence gathering, the launching of missiles and planes, and elaborate maneuvers. It is unclear at what point such activities can be reasonably viewed as threatening by the coastal country.

The 1982 Convention does not address this issue directly. Article 58 says that in the EEZ countries have the same freedoms that exist on the high seas, that is, “of navigation and overflight . . . and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships [and] aircraft...” But Article 58 also says that such activities must be exercised in a manner that is “compatible with the other provisions of this Convention.” This language provides room for debate. Those seeking to restrict military activities in their EEZs cite Convention Article 88, which says that the oceans “shall be reserved for peaceful purposes” and

Peaceful Purposes Reservation of the UN Convention on the Law of the Sea *in* Elisabeth Mann Borgese, Norton Ginsburg, and Joseph R. Morgan, eds., *Ocean Yearbook* 8 (1989), University of Chicago Press, pp. 329-330.

question whether a spyplane or military vessel gathering intelligence about the coastal country and its military defenses is engaged in 'peaceful' acts.

A second related and unresolved issue concerns the rights of countries that have not ratified the 1982 Convention -- such as the United States and Canada -- to invoke the Convention's careful balance of rights and duties in the EEZ to justify its activities in the EEZs of other coastal countries. The United States argues that the navigational freedoms codified by the Convention are customary international law. A third unresolved question sharply dividing nations is whether some of the intelligence gathering activities carried out by maritime powers in the EEZs of other coastal nations should be considered 'scientific research' which, under the Convention, is permitted only with the consent of the coastal state. Further complicating the situation are Air Defense Identification Zones (ADIZ) maintained by the United States and other nations, which, in the U.S. case, extends in some places 300 miles out to sea and requires both civilian and military aircraft to identify themselves and in some circumstances to follow the directions of the coastal state.

To address and resolve these and other differences, what is needed is dialogue in a neutral, objective forum, supported by background research, to find common ground and to suggest a *modus operandi* among the involved countries. The East-West Center and the Center for South East Asian Studies, Indonesia, have initiated such a dialogue. The first round, in June 2002, explored the issues, defined areas of understanding and uncertainty, and formulated a multinational, multidisciplinary research and dialogue agenda designed to promote mutual understanding and, ultimately, consensus.

The invited participants to this informal track-two dialogue were a small group of highly placed government officials with responsibilities for formulating policy or negotiating agreements in this area and academic authorities and policy analysts focusing on these issues. All the participants attended the meeting in their personal capacities. They gained a better understanding of the uncertainties involved and the positions and concerns of other countries, and they identified areas where additional research and discussion are needed.

Recent Incidents

In the EP-3 incident, the United States argued that its aircraft was enjoying freedom of navigation. China countered that such freedoms are not absolute and cannot be used to endanger its security. In the mystery boat incident, North Korea, though denying any link to the ship, called Japan's actions “piracy” and “terrorism.” Tokyo said it acted in “self-defense.” These two incidents have some superficial similarities. Both involve possible spying in or over another country’s EEZ. Both resulted in the loss of property and life. And both incidents raise questions of international law regarding the rights of coastal states versus those of foreign boats and aircraft navigating in their EEZs.

The Japanese government intends to introduce a law allowing Japanese forces to arrest suspect foreign ships in its EEZ and, if they resist, to fire at them with domestic legal impunity. The 1982 Convention, ratified by Japan and China, already allows a nation to board, inspect, and arrest a foreign ship in its EEZ to ensure compliance with its laws and regulations governing resource exploitation. Under the Convention, Japan also has the right of “hot pursuit” if it suspects a vessel has violated its EEZ laws.

But in proposing a new law sanctioning the use of force, Japan may be moving

beyond the Convention and international norms. At the time of its pursuit of the suspected spy ship, it thought the boat was a Chinese fishing vessel. According to a 1999 decision by the International Tribunal on the Law of the Sea, in such situations “the use of force must be avoided as far as possible, and where it is unavoidable, it must not go beyond what is reasonable and necessary under the circumstances....Consideration of humanity must apply and all efforts must be made to ensure life is not endangered.” It would appear that the degree of force used by Japan, while perhaps not illegal, was not appropriate. Moreover, a maritime power (such as the United States) would be wary of any law that diminishes freedom of navigation in EEZs. Worse, the liberal use of force could lead to serious incidents between Japan and its maritime neighbors, whose vessels frequently alleged to fish illegally in its EEZ.

The 1982 Convention does not address this issue directly. Yet it seems clear from the Convention and customary international law that foreign aircraft enjoy the freedom to fly over China's EEZ, and that spy boats enjoy the freedom of navigation in Japan's EEZ. What is not clear is whether such freedom is absolute. One view is that what the Convention does not explicitly prohibit is therefore permitted. But the Convention mandates the use of the sea for ‘peaceful purposes’ only, and it prohibits the threat or use of force. It also specifically prohibits intelligence gathering in the 12 nautical mile territorial sea because this is not considered “innocent,” that is, it is “prejudicial to the peace, good order or security of the coastal state.” What is not ‘innocent’ in the territorial sea may not be considered ‘peaceful’ in the EEZ. The key question is whether the particular activity is ‘peaceful.’

In discussing these incidents, it is important to understand what the EEZ is and its origins. Following World War II, only two maritime jurisdictional zones were recognized beyond internal waters, a three nautical mile territorial sea and, beyond it, the high seas. This regime began to change as states increasingly recognized their economic interests and moved to protect them. The Third Law of the Sea negotiations were primarily focused on reconciling these economic interests while preserving the rights of the maritime powers. The territorial sea was set at 12 nautical miles and a 200 nautical mile EEZ was recognized for purposes of protecting sovereign coastal state rights to resources. However, navigational freedoms and certain other residual high seas rights remained operative in the EEZ. This is the legal construct that has existed since 1982. When countries have different interpretations of its details, such disagreements can and do lead to conflict and confrontations.

What is the exact nature of the EEZ? Before 1982 the EEZ did not exist and the high seas began at the outer edge of the territorial sea; since 1982 the high seas have been explicitly defined as beginning at the outer edge of the EEZ. Nevertheless, the U.S. Navy has referred to the EEZ as ‘international waters’ for purposes of navigation, rather than as “the EEZ.” However the term ‘international waters’ as used by the United States in this instance is not a correct legal term. It is used in U.S. Navy manuals to explain to ship operators the difference between waters where freedom of navigation applies and national waters where there are limitations. In using the term ‘international waters’ the United States does not mean to imply any change to the historic compromise that created the EEZ.

Another area of confusion concerns the airspace seaward of the territorial sea. Airplanes have the same freedom of overflight over EEZ waters as they do over the high seas because when the 1944 Chicago Convention was negotiated there was no EEZ, and because Article 87 of the 1982 Law of the Sea Convention expressly recognizes freedom of overflight in the airspace above the EEZ.

However, it should be recognized that international law is dynamic. It evolves from negotiations and from the results of claims made by some states to which other countries object. For example, the EEZ emerged from the Third Law of the Sea Conference as a compromise between those countries wanting a more rigorous and restrictive EEZ regime and those that did not, including the United States.

International law also derives from state practice. For example, the EP3 incident arose out of a regular state practice of surveillance undertaken by some states, which is objected to by others, including China. State practice is hardly static. Indeed, it changes as technology advances. Currently, coastal states are struggling to protect their economic interests and this concern may well spill over into basic security concerns with user state military activities in the EEZ. Unfortunately, the United States, the pre-eminent maritime power, has not yet ratified the Convention so it cannot avail itself of its dispute resolution procedures. Thus, continued discussion of these issues is warranted.

We should be clear that there are significant differences between the EP3 and mystery ship incidents. The mystery ship could have been violating Japan's economic and environmental rights and laws and Japan clearly had a right to inspect it. China had a right to identify the EP3, but because no one has alleged that the EP3 was violating China's economic or environmental rights, an inspection would not normally be justified.

It would seem that some disagreement hinges on the nature of the activity involved. Does the 1982 Convention provide adequate guidance regarding these activities or should we rely on customary rules and state practice? Moreover, some states condemn certain activities in their waters while engaging in these same activities in other states' waters. For example, can a ship passing through the EEZ legally focus its fire-control radar on shore batteries? Can a spy ship in the EEZ announce its purpose and intent and operate with legal impunity? Is there a difference between military surveillance and spying, with the latter possibly having 'hostile intent'?

There are several uses that do not neatly fit into the specific activities allowed for by either user states or coastal states. For example, live fire exercises may adversely affect the environment or living resources. And some reconnaissance activities may also be considered to be in this grey area surrounding 'hostile intent' or 'threat of force.' Another problem is the differential in technology. If a coastal state does not have sufficient technology to detect the presence of user states' vessels or aircraft, then the issue is moot. Perhaps unequal technology must be accounted for in rules of engagement and agreements.

Military and Intelligence Gathering Activities in the EEZ

The EEZ is a special regime, neither high seas nor territorial seas. Clearly, the freedoms of navigation, overflight, and laying of submarine cables exist in the EEZ. But what exactly does that freedom mean? Does it include military intelligence gathering and military exercises? Does freedom mean completely "without regulation or limits" or can regulations limit these "freedoms?"

One view is that the 1982 Convention on the Law of the Sea structures the use of the ocean in a somewhat comprehensive manner. The first paragraph of Article 58 contains text that is not repeated in Articles 87–115. The import is that if the activity is not associated with resources, then it is allowed. However, when user states exercise these rights they have to take into account the rights of coastal states. Thus there is a delicate balance between the economic rights of coastal states and the navigational freedoms of user states (maritime powers) which were led in the negotiations on the Convention by the United States and the then Soviet Union.

Another view holds that there is nothing specific in the Convention permitting military activities in the EEZ. Several countries including Bangladesh, Brazil, Cape Verde, India, Malaysia, Pakistan and Uruguay hold that the Convention does not authorize military activities in the EEZ, especially the use of explosives. The difference in interpretation stems from contrasting legal views: one argues that what is not expressly prohibited is permitted; the other argues that what is not expressly permitted is not allowed.

We need to look at specific user state activities and categorize them as to their impact on coastal states. For example, what is the ‘normal mode’ of a vessel? What is the potential impact of its activity on coastal states? Also, when does the gathering of military intelligence threaten the ‘use of force?’ What is ‘peaceful purpose?’ State practice may offer some help in defining these terms and setting minimum standards. But practice is likely to differ widely among states.

The 1972 US/Soviet Prevention of Incidents On and Over the High Seas Agreement (INCSEA) may be relevant, as well as their 1989 agreement on prevention of

dangerous military activities. These agreements recognize that there are issues not covered by the Convention and that these must be addressed in bilateral or multilateral arrangements. We should also examine the relationship between the Convention and other instruments. It would also be useful to consider soft law and a pragmatic approach. For example, some would argue that the use of explosives would seem to be prohibited in the EEZ because it would introduce harmful substances, negatively impact living resources, and interfere with economic activities of the coastal state. This example gives some indication of how we can do a case-by-case analysis of activities and produce meaningful results. But we must also explore prevention, enforcement, and compliance with any standards that are delineated. The coastal state must specify and demonstrate what is endangered and why and not just simply declare that the activity “endangers” the environment.

Another view holds that the Convention is very specific about which military activities are not allowed. In the territorial sea and the EEZ anything that threatens the sovereignty of the coastal state is prohibited. Specific activities listed in Article 19(2)(a) such as intelligence gathering, the launching and landing of aircraft or military devices, and the interference with communication are not allowed in the territorial sea. Can it be therefore inferred that they are permitted in the EEZ? This view holds that this proscription in one jurisdictional zone but not the other was purposeful. On the other hand, Article 19(2)(a) may be interpreted in different ways by different states. Some of the activities listed as not allowed in the territorial sea, for example, acts interfering with coastal state communications, would not be allowed anywhere. Thus state practice may be the best guide.

Rules of Engagement

We need to focus on the specifics of permissible activities and the rules, if any. There are agreed regulations for commercial flights but not for military flights. There are agreed rules for scientific research in the EEZ but not for hydrographic surveying. Can military exercises in the EEZ, including live firing, be undertaken without rules or limits?

Some hold the view that there is no absence of rules, although they are an abstraction from the 1982 Convention, for example, Article 56(2) and 58(3). These articles hold that there are rights so long as there is no disregard of the rights of others. Also there is a set of modalities as to how such activities are carried out. For example, there are notices to airmen and mariners as well as a body of *de facto* navy procedures that have been built up over time. So the answer hinges on the meaning and interpretation of “due regard.” Some would argue that ‘due regard’ is subject to the regulation of the coastal state because the 1982 Convention provides that the user state “shall” [must] comply with the regulations of the coastal state. Others would argue that the coastal state must have ‘due regard’ for the navigational rights of others. It is apparently a matter of balancing these interpretations of ‘due regard.’

Regarding hydrographic surveying and scientific research, the matter is one of intent. Some data collected by a navy are not shared outside that navy and are not released for economic purposes. These data are only used for military purposes, for the protection and defense of ships and submarines. However, hydrographic surveying can also be for the making of charts to be released and used internationally.

It would seem that some countries have double standards on these issues. Japan asserts navigational and even salvage rights in China’s EEZ but in practice opposes

navigation rights to certain North Korean vessels in its EEZ. China disapproves of certain U.S. military activities in its EEZ but undertakes live fire exercises in Vietnam's claimed EEZ and intelligence-gathering in Japan's claimed EEZ. The United States asserts its rights in others' EEZs but supported Japan's action against the mystery boat in Japan's EEZ. Clearly guidelines are needed to avoid these contradictions and double standards.

But we should keep in mind that the zone in question is an exclusive *economic* zone, not an exclusive *security* zone. So if the activity is 'peaceful' and does not damage or threaten the environment or resources, then it should be allowed. But who should decide whether the activity affects the environment or resources? There is also the question of whether the foreign activity interferes with the ability of the coastal state to manage its resources, e.g., via surveillance and enforcement activities.

In this connection, what is the legal status of Air Defense Identification Zones (ADIZ)? The fundamental purpose of the ADIZ, originated by the United States, was to facilitate air traffic into the United States. The United States needed to sort out for interception those aircraft that do not respond to requests for identification. Many of these aircraft turn out to be U.S. military aircraft. But if an aircraft chooses to not identify itself, it may be intercepted. So a foreign aircraft must identify itself if it wishes to enter U.S. airspace and, on occasion, such aircraft may be 'turned back.' Yet the principles of permission, authorization, or prior notification as required by some countries, including China, are unacceptable to the United States. Indeed, U.S. Air Force planes do not identify themselves when entering a foreign ADIZ even if the plane is not

intending to enter the airspace of the foreign country. The United States does not tell even its friends what it is doing in their EEZs.

Regarding interception, the United States does not challenge the right of China to intercept its aircraft over China's EEZ, but it feels that in the EP3 incident China violated the unwritten rules for interception. Clearly, problems occur when countries do not agree on or follow the unwritten 'rules.' During the Cold War, both the U.S. and Soviet navies engaged in dangerous harassment, leading to serious incidents and stimulating the need for the INCSEA agreement. Perhaps an extension or expansion of INCSEA to other countries would be appropriate. There are already commonly understood 'rules of the road' for mariners. For example, if a warship encounters a fishing vessel in its EEZ, the warship must give way to the fishing vessel. Perhaps similar 'rules of the road' could be established for military activities.

Relevance of the 1982 Law of the Sea Convention and Recent Court Decisions

Some countries have specifically stated that others cannot undertake military activities in their EEZs: Bangladesh, Brazil, Cape Verde Islands, India, Malaysia, Pakistan, and Uruguay. Others have specifically stated the opposite: Germany, Italy, the Netherlands, and the United States. Clearly, differences of opinion abound. France argues it has the right to demand fishing vessels transiting its EEZ to notify it of their activities. If a ship does not notify the authorities, then it is liable to seizure. Costa Rica requires prior notification for transit of fishing vessels. Malaysia has promulgated an "innocent passage" and prior notification regime for its EEZ originally aimed particularly at Thai fishing boats. Vietnam and Thailand have agreed that Thai boats transiting Vietnamese waters must retract their nets; if they do not they can be arrested.

Other incidents are relevant. The Saiga case provides guidance on the use of force, but it leaves many questions unanswered regarding coastal state regulations over activities in the EEZ. What can a coastal state do in its EEZ to protect its resources? The judgments in the Red Crusader case and the I'm Alone case also argue against the use of excessive force. Indeed, they require countries to engage in significant other steps before using force, and they make it difficult for states to justify the use of force based on a 'state of necessity.' Specifically, the coastal state cannot fire without warning and should do everything possible to protect human life.

This leads to several hypothetical questions. What if the mystery ship had been a warship and did not respond to Japanese Coast Guard queries and orders to stop? What if two warships of different countries appear about to engage in conflict in a third coastal state's EEZ? What can the coastal state do? Can the coastal state argue that the warships are about to damage its environment? Of course, once combat begins, the vessels would be in violation of the 1982 Convention and its "peaceful purposes" reservation. So then the coastal state could become involved in enforcement. In a coastal state's EEZ, does a warship have to identify itself if requested to do so? And what of the Tongan-registered vessel carrying arms from Iran which was captured by Israeli forces on the high seas? What law justifies such action?

What if the vessel is a declared or known smuggler of drugs? Can a coastal state enforce its customs laws in its EEZ? The United States argues that it cannot. It can observe and stop the vessel if the flag state agrees. But if a ship appears to be attempting to deceive the coastal state as to its flag or registry, is that grounds for stopping the vessel or engaging in hot pursuit?

The Peaceful Purposes Reservation

What is the relevance of the peaceful purposes reservation, Article 88 and Article 301, to the regime of military and intelligence gathering activities in the EEZ? More fundamentally, are military activities by their very nature peaceful or not?

By consensus it was agreed that the 1982 Convention should not contain specific articles on arms control because these matters were to be handled by the UN Committee on Arms Control and Disarmament. Thus there are few specifics in the text to guide us. Article 58(2) refers to Article 88, thus establishing that the EEZ is reserved for peaceful purposes. Article 246(3), on the general principles of marine scientific research, also refers to the peaceful purposes of the research in reference to marine scientific research in the EEZ and on the continental shelf. The most critical problem for the Third Committee was the issue of military activities. Indeed, there was an attempt, led by Brazil, to specify the withholding of consent at discretion, including consent for military research. But Brazil's position was not accepted because others wanted to add their own concerns to this article.

There may need to be a distinction between 'peaceful use' and 'peaceful purposes.' Moreover, since it can be argued that most military activities are carried out for 'peaceful purposes,' there should be a difference between 'peaceful purposes' and non-military purposes. In other treaties, for example, those on outer space and the moon, there are prohibitions against specific activities. But these prohibitions are not found in the 1982 Convention. Thus the general provisions in the Convention must be viewed in the context of other international agreements such as the declaration of the UN General Assembly on Peaceful Relations or the provisions on non-placement of weapons on the

seabed. A key foundation for the peaceful purposes reservation is ‘good faith.’ Article 300 refers to ‘good faith’ and that is why Article 301 on peaceful purposes follows Article 300. But the question remains: what activities are ‘peaceful’ and what are not ‘peaceful?’ And is there a difference between ‘peaceful’ activities on the high seas and in the EEZ?

Article 58(1) says that in the EEZ “other internationally lawful uses” are allowed. What does that mean? Should we try to define it? Some argue we should refer to the historical background of the negotiations on the Convention; others would prefer to let the International Tribunal on the Law of the Sea decide. We also need to look at state practice in this regard.

What about military activities that are not listed? It can be argued that these activities were lawful before the Convention and are thus lawful now. Also, if they are not specifically prohibited it can be argued that they are permitted. However, some nations have adopted national laws prohibiting such activities. For example, China apparently prohibits hydrographic surveying in its EEZ without its consent. A second issue is the case of non-parties to the Convention such as the United States. Can they enjoy all the Convention’s rights? States differ on the answer.

The key to understanding state practice may lie in the practical interpretation of ‘due regard.’ ‘Due regard’ is usually left to the ship’s captain or aircraft pilot to decide. The United States gives its commanders guidelines for ‘due regard’ as well as for ‘hostile intent.’ However some ‘due regard’ situations cannot be left to the operator on the spot such as the very scheduling of exercises in another country’s EEZ. And what about the practice of other countries’ navies and air forces? For example, some navies will take a

first strike before returning fire, but the U.S. Navy will fire first if it detects 'hostile intent' as it unilaterally defines and determines it. And the South Korean Navy has issued new operational guidelines that allow firing for effect at suspicious ships in its waters after only a single warning round.

The rubric of 'good faith' may have no application to intelligence gathering. After all, the purpose of at least some intelligence gathering by states is to gain advantage over other states. However, it can also be argued that military intelligence gathering is a force for peace because it acts as a deterrent. Moreover, there are many intelligence gathering activities that are part of arms control verification agreements and serve a critical role in confidence building and thus peacekeeping. Therefore there is a continuum in both good theory and practice of 'good faith.'

Take the example of the use of fire control radar. When Iraq turns on its fire control radar, the United States considers it a hostile act and attacks. But the United States has turned on its fire control radar in China's EEZ. What is the difference? The United States views the determination of 'hostile intent' as very specifically context-based. And there are specific guidelines to help commanders determine hostile intent and the appropriate response. Sometimes turning on fire control radar can be a means of communication or it can be a probe designed to elicit a reaction. Thus it is difficult to categorize hostile intent without context. In general, however, U.S. commanders are instructed that 'peaceful purposes' means non-aggressive actions.

To this point, we have discussed the actions and intentions of states. But we should also address the new dimensions of international affairs brought to the fore by the

‘war on terrorism.’ Creative approaches are required to address the new situation. Law can help, but supporting policy and practice will also be needed.

Technology has dramatically changed the art of warfare and intelligence gathering. There have been vast improvements in the range and accuracy of both weaponry and intelligence collection so that, in the age of Aegis, satellites, aircraft carriers, missiles, and over-the-horizon weaponry and intelligence collection, extending restrictions in the EEZ is largely ineffective and irrelevant. Nevertheless, there are still some distinct advantages in being able to operate in and over foreign EEZs, such as showing the flag or testing the response of the coastal state, and thus maritime powers will resist any restrictions on such activities.

Further, the new threats today are weapons of mass destruction and smuggling of drugs and humans that may indeed require the extension of control beyond the territorial sea. The authority and capability of coastal states may indeed need to be enhanced to meet these new threats. Perhaps a Maritime Defense Identification Zone is required.

There are already some international responses underway in the effort to curb crime. Although the authority of the flag state is still in effect, what is new is the trend toward closer cooperation in inspecting ships, including fishing vessels on the high seas under the 1995 UN Agreement on Highly Migratory and Straddling Fish Stocks. Japan and Russia have reached an accord on cooperation in the detention of suspicious ships and in the fight against drugs, arms, and seafood smuggling. The International Maritime Organization has begun a program of automatic identification.

Areas of Consensus

- The EEZ is neither territorial sea nor high seas.

- If the activity demonstrably impinges on the economic resources or marine environment of the coastal state, the coastal state has a right to take preventive action.
- The coastal state, in the exercise of its jurisdictional authority, should not interfere with or negatively affect internationally lawful uses of the sea.
- There is freedom of navigation, overflight, and laying of submarine cables in the EEZ.
- These freedoms are subject to the principles of ‘due regard’ and the non-abuse of the rights of others.
- Military vessels are subject to immunity, but the flag states are liable for any damage these vessels cause to the environment and resources of other states.
- No specific rules exist governing military activities in the EEZ except that they be peaceful, that is, non-hostile, non-aggressive, that they refrain from use of force or threat thereof, and that they do not adversely affect economic resources or the environment.
- At a minimum, consultations among countries as to rules of the road, rules of engagement, and communications protocol, can enhance transparency and clarify existing international norms.
- Given the numerous and broad areas of disagreement including even the need for any agreement, it is unlikely that consensus on respective rights and freedoms, the meaning of terms, codes of conduct, or even rules of engagement can be reached in the near future. However, continuing dialogue is important to clarify different states’ positions and practices on these issues.

Areas of Disagreement

There are many areas of disagreement ranging from interpretation of relevant provisions of the Law of the Sea Convention to the means of resolving disagreements or even the need to do so. For example, states disagree on the meaning of freedom of navigation and overflight, ‘other internationally lawful uses,’ ‘due regard,’ non-abuse of rights, ‘peaceful’ activities, hostile intent, ‘threat of force,’ and the differences between hydrographic surveying and marine scientific research. States have fundamental disagreement over whether military activities in the EEZ should have any limits, including self-identification as a ship or aircraft passes through another country’s EEZ. Submarines do not and will not identify themselves and some feel an airplane not flying towards land does not need to do so. States also disagree about the circumstances under which a foreign ship can be stopped and boarded in a country’s EEZ, including when its nationality is in doubt.

The views on how to address these disagreements are disparate and wide-ranging. Some feel there is no need for rules because there is no pattern of behavior or incidents requiring them as there was prior to the INCSEA agreement. Others feel that these issues were discussed in great detail during the UNCLOS negotiations and that the resulting Convention contains the consensus and necessary guidance. And yet others believe the best approach is to do nothing and let customary practice and evolving soft law resolve these issues over time. Indeed, new practices and domestic laws are being developed in this area, for example, by Japan, and these may eventually become accepted practice.

However, some believe that the situation is sufficiently urgent, complicated, and rife with misunderstanding that concerned states should be pro-active. Some of these

proponents of action favor *ad hoc* confidence-building measures and consultations on a bilateral or regional basis. Eventually a code of conduct might be developed that would include commitments: (1) to give due regard to other users and uses; (2) to refrain from use of force or the threat thereof; and (3) to exercise good faith in both communication and actions.

The United States is already involved in consultations with China and others to improve transparency and understanding of the Convention and the ‘rules of the road.’ However, it would not favor binding arrangements or codes of conduct. In its view, the interpretation and execution of rules of engagement are best left to ship and airplane commanders. But even if the U.S. bilateral efforts are successful, there is still a need for mutual understanding between the Asian nations on these issues. Others would prefer third party settlement of differences, although some, like the United States, will likely refuse to accept such a means of settlement regarding military matters.

Clearly there is a need for greater communication and transparency within the region. Further dialogue and research is needed on the meaning of relevant Convention provisions. The results of a continuing dialogue could be introduced into the Committee for Security Cooperation in the Asia Pacific (CSCAP) Maritime Working Group or the ASEAN Regional Forum.

Critical Questions for Research and Dialogue

The Bali Round made it clear that in any subsequent Round we need to involve more ‘operators’ of military vessels and aircraft from a wider range of countries so that we can gain a better idea of their interpretation of the rules of engagement and if and how they differ in critical ways. Moreover, it is also clear that despite the preferences of some

maritime powers, there are ambiguities and disagreements regarding interpretation of some critical Convention provisions and thus a need to focus on and clarify these differing interpretations. And more bilateral ‘understandings’ are needed within the Asian region.

There is also a need to consider the impact on the existing regime, institutions and state practice of: new technology; the aftermath of September 11, 2001; and any increasing fragmentation of national authority; and the increasing use of the sea for nefarious purposes. In this way, this continuing Dialogue and supporting research can contribute to agreements or arrangements that are currently being negotiated and/or implemented. To manage conflict three ingredients are necessary: dialogue, confidence building measures, and cooperative efforts. A working group on these issues should be established and sustained.

In summary, a draft agenda for a second Dialogue Round might include the following:

1. A summary of the Bali Round
2. Country Perspectives on Critical Questions:
 - a. What are the constraints, if any, on freedom of navigation and overflight in the EEZ?
 - b. What constitutes a threat of force?
 - c. What constitutes hostile intent?
 - d. What are peaceful activities and what are non-peaceful activities in the EEZ?
 - e. What is the difference between hydrographic surveying and marine scientific research?

- f. What is the meaning of due regard and who does, or should, decide?
 - g. What are internationally lawful uses of the sea?
 - h. How and when might military activities affect resources and the environment and thus be subject to that regime?
 - i. What activities should *not* be allowed in the EEZ?
3. Commonalities and Differences of Operational Modalities and Rules of Engagement Among Navies Operating in the Region
4. The Implications of New Technology
5. The Implications of 11 September 2001 and its Aftermath
6. Combating International Terrorism, Piracy, and Drug and Human Smuggling: Options and Issues
7. Specific Cases
8. Options for Resolving Disagreements:
 - a. Natural Evolution of ‘Customary Practice’
 - b. Promotion of Bilateral or Multilateral Consultations to Increase Transparency and Common Understanding Including Interpretation of the 1982 UN Convention on the Law of the Sea
 - c. *Ad hoc* Confidence Building Measures
 - d. A Code of Conduct
 - e. Facilitate Implementation of Improved Sets of Instruments
 - f. Ocean Peace Keeping (OPK)
 - g. Establishment of an *Ad Hoc* Working Group.

APPENDIX I

MILITARY AND INTELLIGENCE GATHERING ACTIVITIES IN
EXCLUSIVE ECONOMIC ZONES:
CONSENSUS AND DISAGREEMENT

THE BALI DIALOGUE

A Policy and Research Planning Workshop
Hotel Nikko Bali, 27–28 June 2002
Co-sponsored by the East-West Center
and the Center for South East Asian Studies, Indonesia

MEETING CO-CHAIRS
CHARLES E. MORRISON AND HASJIM DJALAL

TENTATIVE AGENDA

27 JUNE, THURSDAY

8:45 a.m.	Welcome: Introduction, Overview, Objectives, and Ground Rules of the Dialogue	Charles E. Morrison and Hasjim Djalal
9:00 a.m.	Session I: Recent Incidents: Logistical	Facilitator: Mark J. Valencia 1. U.S. EP3 incident over China's EEZ 2. Unidentified boat incident in Japan's EEZ Announcements
10:30 a.m.	COFFEE	
10:50 a.m.	Session II: Military and Intelligence Gathering Activities in the EEZ	Facilitator: Hasjim Djalal What military and intelligence gathering activities are/should be allowed in the EEZ and what is/should be prohibited? a. Navigation b. Overflight c. Intelligence gathering d. Hydrographic surveying (Is it distinct from marine scientific research?)

		<p>e. Marine scientific research (When does spying or collection of data for military purposes become marine scientific research and thus subject to the consent regime?)</p> <p>f. Installations and devices on the seabed</p> <p>g. Naval exercises with and without live firing</p> <p>h. Launching of weapons and aircraft in foreign EEZs</p>
12:00 noon	LUNCH	
1:15 p.m.	Session III: Rules of Engagement	<p>Facilitator: Hasjim Djalal</p> <p>What are or should be the rules of 'engagement' for foreign military vessels and aircraft in the EEZ? (ADIZ; the practices of states since 1982 regarding the EEZ; technological advances and legal uncertainties)</p>
2:30 p.m.	COFFEE	
2:50 p.m.	Session IV: Relevance of 1982 Law of the Sea Convention, Recent Court Decisions	<p>Facilitator: Jon Van Dyke</p> <p>What bearing do state practice, the 1982 Law of the Sea Treaty, and recent international court decisions have on military and intelligence gathering activities in the EEZ and the rights and duties of states in others' EEZs? The EEZ regime; interests of coastal states and maritime powers; residual rights; regime of semi-enclosed seas; rights of landlocked and geographically landlocked nations</p>
4:30 p.m.	END	
5:30 p.m.	RECEPTION	
7:00 p.m.	HOTEL BUFFET DINNER	

28 JUNE, FRIDAY

9:00 a.m.	Session V: The Peaceful Purposes Reservation	Facilitator: Hasjim Djalal What is the relevance of the peaceful purposes reservation (Articles 88 and 301) to the regime of military and intelligence gathering activities in the EEZ? Does it affect some, all or none?
10:30 a.m.	COFFEE	
10:50 a.m.	Session VI: Areas of Consensus	Facilitator: Hasjim Djalal In what areas might there be consensus?
12:00 noon	LUNCH	
1:15 p.m.	Session VII: Areas of Disagreement and Their Resolution	Facilitator: Hasjim Djalal How should areas of disagreement be resolved?
2:30 p.m.	COFFEE	
2:50 p.m.	Session VIII: Critical Questions for Research and Dialogue	Facilitators: Hasjim Djalal, Mark J. Valencia and Jon Van Dyke What are the critical questions that require further discussion and research?
4:00 p.m.	Concluding Remarks	Hasjim Djalal, Jon Van Dyke, Mark J. Valencia
4:30 p.m.	END	
	DINNER AND SHOW AT BUMBU BALI RESTAURANT	

APPENDIX II

LIST OF PARTICIPANTS

1. RADM. (ret.) Kazumine Akimoto
Counselor
Ship and Ocean Foundation
Kaiyo Senpaku Building
1-15-16 Toranomom
Minato-Ku
Tokyo 105-0001
Japan
Facsimile: 81-3-3502-2033
UGJ72265@nifty.com
2. Ambassador Nguyen Qui Binh
Permanent Representative of Vietnam
to the United Nations and
other International Organizations
18A, Chemin Francois Lehmann
1218 Grand Saconnex - Geneva
Switzerland
Facsimile: 41-22-798-0724
quybinh@hotmail.com
mission.vietnam@ties.itu.int
3. Dr. Hasjim Djalal
Special Adviser to the Minister
Department of Ocean Exploration & Fisheries
Jalan, Kemang IV, No. 10A
Jakarta Selatan
Indonesia
Facsimile: 62-21-7179-1920
hdh@cbn.net.id
4. Dr. Dino Patti Djalal
Director for North and Central American Affairs
Department of Foreign Affairs
Jakarta
Indonesia
Facsimile: 011-62-21-385-4566
dinodjalal@dinodjalal.com

5. Captain David Grimord
Staff Judge Advocate
US Pacific Command
Box 64022
Camp HM Smith, Hawaii 96861-4022
U.S.A.
Facsimile: 808-477-1194
dlgrimor@hq.pacom.mil

6. Professor Ji Guoxing
Deputy Director
Shanghai Center for RimPac Strategic
and International Studies
88-3 Tongren Road, Suite 4008
Shanghai 200040
China
Facsimile: 86-21-3222-0270
gx_ji@hotmail.com

7. Dr. Charles E. Morrison
President
East-West Center
1601 East-West Road
Honolulu, Hawaii 96848-1601
U.S.A.
MorrisoC@EastWestCenter.org

8. Commander Greg O'Brien
Judge Advocate General's Corps, U.S. Navy
International Law Department
Center for Naval Warfare Studies
U.S. Naval War College
686 Cushing Road
Newport, Rhode Island 02841
U.S.A.
Facsimile: 401-841-3579
obrieng@nwc.navy.mil

9. Professor Jin-Hyun Paik
Seoul National University
School of International & Area Studies
San 56-1 Sinlim-Dong, Kwanak-Gu
Seoul 151-742
Republic of Korea
Facsimile: 02-873-0654
jhpaik@snu.ac.kr

10. RADM. (ret.) William T. Pendley
U.S. Navy
10 Walden Lane
Bluffton, South Carolina 29910
U.S.A.
Facsimile: 843-705-6276
Pendleyw@aol.com

11. Dr. Jonathan Pollack
Chair
Strategic Studies
U.S. Naval War College
686 Cushing Road
Newport, Rhode Island 02841-1207
U.S.A.
Facsimile: 401-841-4161
pollackj@nwc.navy.mil

12. Captain Ashley Roach
Office of the Legal Adviser
U.S. Department of State
820 S. Quincy Street
Arlington, Virginia 22204-1562
U.S.A.
Facsimile: 202-736-7115
roachja@ms.state.gov

13. Dr. Shigeki Sakamoto
Professor of International Law
Kansai University
Yamate 3-3-35, Sulta-shi
Osaka 564-0073
Japan
sakamoto@ipcku.kansai-u.ac.jp

14. Captain Joe Skinner
Director of International Affairs
Commander and Chief, U.S. Pacific Fleet
250 Makalapa Drive N51
Pearl Harbor, Hawaii 96860-3131
U.S.A.
skinneje@cpf.navy.mil
15. Professor Norman Su Tao
Institute of the Law of the Sea
Ocean University of Qingdao
No. 5, Yu Shan Road
Qingdao
China 266003
Facsimile: 05-32-203-2833
hyfyjy@mail.ouqd.edu.cn
16. Colonel Aji Sularso
Republic of Indonesia Navy
Dispotmar, Mabes TNI AL
Cilangkap Jakarta 13870
Indonesia
Facsimile: 62-21-871-1849
spica@centrin.net.id
17. Dr. Mark J. Valencia
Senior Fellow
East-West Center - Research
1601 East-West Road
Honolulu, Hawaii 96848-1601
U.S.A.
Facsimile: 808-944-7399
valencim@ewc.hawaii.edu
18. Professor Jon Van Dyke
William S. Richardson School of Law
University of Hawaii
2515 Dole Street, Law #239
Honolulu, Hawaii 96822
U.S.A.
Facsimile: 808-956-5569
jvandyke@hawaii.edu

19. Judge Alexander Yankov
International Tribunal for the Law of the Sea
Complex “Yavorov” Block 73
1111 Sofia, Bulgaria
Facsimile: 49-40-3560-7325
yankov@itlos.org

20. Dr. Zou Keyuan
Research Fellow
East-Asian Institute
National University of Singapore
AS5, Level 4, 7 Arts Link
Singapore 117571
Facsimile: 65-6779-3409
eaizouky@nus.edu.sg

OBSERVERS

Mr. Koichi Takagi
Special Adviser
Ship and Ocean Foundation
Kaiyo Senpaku Building
1-15-16 Toranomom
Minato-Ku
Tokyo 105-0001
Japan
Facsimile: 81-3-3502-2033
k-takagi@sof.or.jp

Ms. Rumi Ariyoshi
Legal Affairs Division
Treaties Bureau
Ministry of Foreign Affairs
2-2-1 Kasumegaseki, Chiyoda-ku
Tokyo 100
Japan

Major Laut (KH) Kresno Buntoro
Legal Office
Ministrial of Defense
Jakarta Timur 13870
Indonesia

Major Laut (P) Atok Dushanto
Intelligence Staff Office
TNI Headquarters
Jakarta Timur 13870
Indonesia

RAPPORTEUR

Ms. Jenny Miller Garmendia
Degree Fellow
East-West Center
1601 East-West Road
Honolulu, Hawaii 96848-1601
U.S.A.
genevra@hawaii.edu

CONFERENCE SUPPORT STAFF

Mr. Hardenis Rais
External Logistic Support
Center for South East Asian Studies
Jl Taman Cilandak III, No. 2
Jakarta 12440
Indonesia
Facsimile: 62-21-765-7570

Mr. Bambang Witjaksono
Conference Facilities Support
Center for Southeast Asian Studies
Jl Taman Cilandak III, No. 2
Jakarta 12440
Indonesia
Facsimile: 62-21-765-7570

Ms. Joyce Gruhn
Secretary
East-West Center
1601 East-West Road
Honolulu, Hawaii 96848-1601
U.S.A.
Telephone: 808-944-7575
Facsimile: 808-944-7380
GruhnJ@EastWestCenter.org

Ms. Penny Higa
Program Officer
East-West Center
1601 East-West Road
Honolulu, Hawaii 96848-1601
U.S.A.
Telephone: 808-944-7131
Facsimile: 808-944-7380
HigaP@EastWestCenter.org