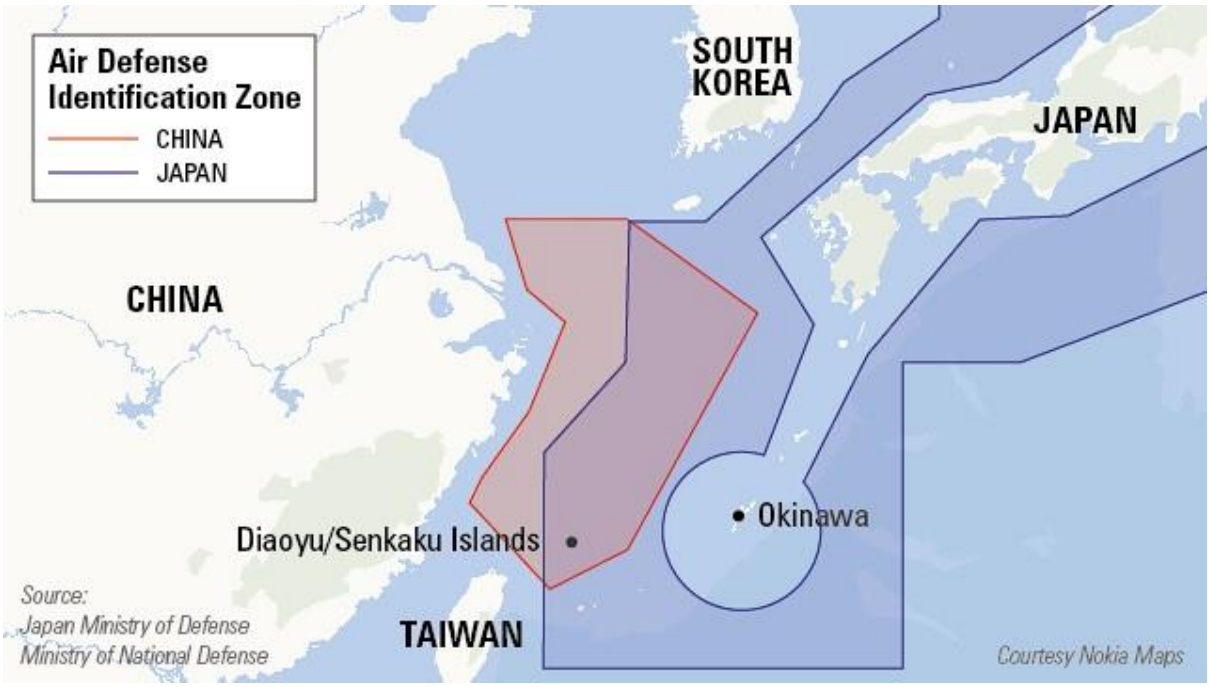
Who owns the airspace? The new Chinese "ADIZ" and what it means

Recent events demarcate special area of airspace

On 23 November China released a map and coordinates that identify a new Air Defence Identification Zone (ADIZ) which requires aircraft to report their flight plans to China, maintain two-way radio and clearly mark their nationalities on their aircraft. The area covered by the ADIZ includes an area of the East China Sea over a territorially disputed island chain known as "Daioyu" in China, and "Senkaku" in Japan. China said it would "adopt defensive emergency measures to respond to aircraft that do not cooperate in the identification or refuse to follow the instructions."

According to CNN, China's claim on the islands extends back to the 1400s when the islands were used as a staging point for Chinese fisherman. Japan says it saw no trace of Chinese control of the islands in an 1885 survey, so it formally recognised them as Japanese sovereign territory in 1895. Japan then sold the islands in 1932 to descendants of the original settlers. The Japanese surrender at the end of World War II in 1945 only served to cloud the issue further. After World War II the islands were administered by the United States occupation force and in 1972 the US returned them to Japan.



Source: CNN

This article will address four questions: Do such unilateral airspace demarcations have a legal basis? Why do it? Are the threats real? What, if anything, can be done to remove the zone?

Do such unilateral airspace demarcations have a legal basis?

It is not the purpose of this article to comment on the politics of territorial sovereignty disputes, so the "why" question on the emergence of this ADIZ may be best left for others to answer. However, it can be said, from an air lawyer's perspective, that sovereignty plays a central role in aviation. The *International Convention on Civil Aviation* (Chicago Convention) is a multilateral treaty that codifies

certain customary international law principles, such as airspace sovereignty, and is essentially the constitution or principal law of international civil aviation. Article 1 of that Convention provides:

> The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

In line with this rule, each State (ie, country) can determine who may fly over and across its territorial boundaries. This principle is firmly established and demonstrated everyday when airlines make scheduled flights across other countries' airspace. Such flights are permitted by the overflown country by virtue of agreements that are part and parcel of the Chicago Convention, or made separately by way of bilateral or multilateral arrangements as between governments. Article 2 of the Convention provides:

> For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.

So this would seem to make it clear that a country can control its airspace as long as this includes "land areas and territorial waters adjacent thereto …" which are, in essence, *controlled* by the country. However, there are definitions elsewhere in the Convention and in the *United Nations Convention on the Law of the Sea* which indicate that "territorial waters" only include a distance of 12 nautical miles from the low water line along a country's coast. This rule has been adopted for the purposes of international civil aviation.

Other forms of "zone", such as Exclusive Economic Zones (a 200 nautical mile area from the shore, which have their own set of rules under the *Convention on the Law of the Sea*), and ADIZs are, strictly speaking not within the territorial sovereignty of the relevant country unless one is referring to the part that is within 12 nautical miles of the low water line on the shore. This means countries cannot typically unilaterally exclude others or control behaviour (in airspace) within such zones. In practice they do!

Many countries including the United States and Japan have established an ADIZ in international airspace near their territorial borders. Foreign aircraft transiting through an ADIZ are typically required to identify themselves before actually entering that country's airspace. The general motivating purpose is to give the country an early warning zone for the interception of potentially unfriendly aircraft.

For example, Canada and the United States set up an ADIZ along the coast of the United States following the September 11, 2001 terrorist attacks to "serve as a national defence boundary for aerial incursion". Rules put in place at federal level required aircraft to file flight plans to announce the fact they would transit the ADIZ, and certain radio and instrumentation requirements to ensure they could be tracked while in the ADIZ. Failure to comply with these rules would result in interception by fighter aircraft. ADIZ and temporary flight restrictions (such as a temporary restriction on being within 30 miles of the President's aircraft) are still employed to maintain national security in the United States. The Chinese ADIZ is different in that it has been reported to apply ambiguously to *all* aircraft, even those *not intending* to fly to China. This creates issues of its own, but our analysis of ADIZs continues.

An ADIZ like China's occurs over the "high seas". The Chicago Convention relevantly provides in Article 12:

> … Over the high seas, the rules in force shall be those established under this Convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable.

Thus, if you fly over a particular country, provided it is one which has ratified the Chicago Convention, you do so subject to the laws of that country. However, if you fly over the high seas, you do so subject to a complex set of rules on airspace responsibility set up by and through the International Civil Aviation Organisation (ICAO) - the United Nations organisation for civil aviation established under the Chicago Convention. This is set up under Article 12 of the Chicago Convention which says that the rules of the air over the high seas "shall be those established under this Convention".

In essence then, although they tend to be used by certain countries, most often for military advance warning reasons, ADIZs are not recognised by pure international law as zones within which a country automatically has sovereignty, but they can, arguably, be used to acquire it (see below). In other words, there is no firm basis in law for setting up an ADIZ. Criticisms can thus be levelled at the Chinese ADIZ for the legality of the zone, but not without doing so for all the other countries which employ them. This being the case, only the practical questions remain.

Why do it?

Both China and Japan want the island chain as their own and are using means available to them, short of armed conflict to acquire it.

The demarcation of the ADIZ follows actions as recently as September this year in which Japan took steps to exercise sovereignty over the disputed island by considering stationing government workers there. Japan had installed a sovereignty marker as long ago as 1895 and yet the islands remain in dispute. The purpose of the ADIZ, as much as the installation of workers is to, in a way, acquire the character of nationhood in these islands. In international law, sovereignty arises by use. Thus the tribunal in the Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (*Territorial Sovereignty and Scope of the Dispute* (1998) stated that sovereignty arises by:

> an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis.

This formulation is a more recent restatement of the leading case on the subject: *Island of Palmas Case (Netherlands/United States of America)* (Award of 4 April 1928).

It is thought that China hopes to acquire a status of sovereignty over the islands by virtue of using an ADIZ to control access to the relevant airspace, over a period of time.

Are the threats real?

In recent days both US and Japanese aircraft have tested the veracity of the Chinese restrictions on flight within the ADIZ, and nothing sinister has resulted. While aircraft are not strictly legally bound to comply with the ADIZ requirements, for the reasons set out above, many are choosing to out of an abundance of caution. News reports have indicated that many Asian airlines and Qantas have all

decided to comply with the flight plan filing requirements of the ADIZ when in the region of the ADIZ. This is a pragmatic way forward, but legal theorists would argue that by acknowledging the ADIZ the airlines are assisting China in its attempt at securing sovereignty over the islands. We express no opinion on this one way or another but merely note the risks to aviation from a practical (and historical) perspective, given similar tensions in the past.

In the past, airspace incursions at times of political or military tension have led to hostilities erroneously directed against passenger carrying civil airliners. The examples described below demonstrate such tragedies. They are presented to ensure we all remember the lessons of the past at times when such territorial tensions have the capacity to again cause air disasters whether or not that is the intention.

In 1954 a Cathay Pacific aircraft enroute from Bangkok to Hong Kong was fired at by Chinese fighter interceptors, without warning. The aircraft crash landed killing some of the passengers, drowning others. The Chinese apologised and promised compensation claiming their military mistook the aircraft for a Chinese Nationalists' military aircraft, implying they would not knowingly open fire against unarmed civil aircraft.

Cold war tensions in 1983 led to Soviet forces shooting down a Korean Airlines passenger B747 which was flying from New York to Seoul and which unwittingly strayed into Soviet Union territory away from its intended flight path. The aircraft strayed through a mixture of pilot error and a lack of technology now commonplace on such airliners that helps aircraft remain fixed on their intended track. However, it was noted that the pilots did not take heed of Soviet warnings and non-radio communications to exit the airspace they had unwittingly entered. Sadly, 246 passengers and 23 crew died as a result of this tension and the innocent mixup.

Likewise, an Iran Air A300 flying from Tehran to Dubai in 1988 was shot down by a US guided missile cruiser, the USS Vincennes, when it was mistaken by the US forces as a fighter jet scrambled to attack. The aircraft was on its normal path but did not respond to radio calls on military channels (as it was a civilian aircraft) warning it that it would be attacked. As a result 274 passengers and 16 crew died when the aircraft was hit by a surface to air missile. The US ship had been deployed to protect the sealanes in the Strait of Hormuz and tensions were high as the ship had just drawn small arms fire from Iranian patrol vessels.

What, if anything, can be done to remove the zone?

Following flight 007 a new provision of the Chicago Convention was adopted by ICAO member nations in 1985. Article 3*bis* unanimously was adopted by the 25th (Extraordinary) Session of the ICAO Assembly in which it was recognised that "every State must refrain from resorting to the use of weapons against civil aircraft in flight". Surprisingly, there was no explicit rule in that vein prior to these tragic events although it was and is believed to be a principle of international law that it is prohibited to use weapons against civil aircraft in flight. Under international law this rule does not prevail over the ability of a nation to reasonably defend itself against armed attack (such as a terrorist attack using a civilian airliner).

The ICAO Council met on Friday 29 November 2013 in Montreal. Japan's representative in conjunction with the US proposed that the member nations of ICAO should discuss how to respond

to the establishment of the Chinese ADIZ as it was "feared to threaten the order and safety of international civil aviation" in the airspace above the East China Sea. But what, if anything, can be done legally to dispute the ADIZ or generally contradict such unilateral airspace demarcations?

ICAO States may temporarily restrict or prohibit access to their airspace for military purposes but these restrictions and prohibitions must be made in territorial airspace (Article 9 of the Chicago Convention). Also, such nations have what is termed "freedom of action" which means that they may disregard the terms of the Chicago Convention in times of war. However, no war exists at present so there must be some other choice to roll back the ADIZ if the global aviation community feels that any particular ADIZ is a breach of international air law, as it may well be.

The option is available under Article 84 for nations to bring disputes in international aviation to the ICAO Council for arbitration. This remains an option for Japan or other interested nations, but the nation which brings the dispute, if it is a member of the ICAO Council, cannot participate in the arbitration itself. If this fails, or as an alternative, a case may be taken to the International Court of Justice at the Hague. Airspace disputes have reached the ICAO Council on a number of occasions and largely resolved due to the diplomatic "good offices" of ICAO rather than fulsome engagement with the arbitration procedure itself. The arbitration procedure thus far in the ICAO's history has demonstrated that ICAO may not be the right forum for highly charged political aviation legal disputes. Examples of arbitrations include the Pakistan and India disputes over prohibited airspace demarcations in 1952 (dealing with Pakistani airspace prohibitions which prevented Indian aircraft overflying Indian territory to Afghanistan over Pakistani territory) and another dispute between the same nations in 1972. Many of the other disputes involve political overtones (eg, Cuba v United States in relation to a Cuban fighter jet destroying a US passenger aircraft over the high seas in 1996), and United Kingdom v Spain (in which the UK disputed the Spanish establishment of a prohibited airspace zone in the Bay of Algeciras, such that it prevented takeoffs from the British Airport of Gibraltar).

Conclusions

The Chinese ADIZ situation provides examples of the limits of international air law.

Rules are in place giving countries power over certain parts of the airspace, but not all. However, as international law is largely reliant on agreements and consultation between countries/governments, and reciprocity, when nations take unilateral action such as setting up an ADIZ then the world is forced to take note whether or not such a move is, strictly speaking, legal – or, practically speaking, "challengeable" on legal grounds.

The consequences of errors and innocent mistakes on civil air transport in such situations demand that safety trump political or legal jousting over territorial sovereignty. It is hoped that diplomatic efforts will ensure this primary issue will remain at the forefront of the minds of the nations involved.

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