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## **AIR DEFENCE IDENTIFICATION ZONES: IMPLICATIONS FOR FREEDOM OF OVERFLIGHT AND MARITIME DISPUTES**

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### **Abstract of Paper:**

On 23 November 2013, China declared an Air Defence Identification Zone (ADIZ) in the East China Sea. This ADIZ overlaps with the existing ADIZs of Japan, Korea and Taiwan. The Chinese ADIZ provoked criticism and raised many concerns from various governments and commentators in the region. First, does this ADIZ violate the principle of freedom of overflight in areas beyond territorial sea? Second, can China use the ADIZ to strengthen its claim to sovereignty over disputed islands? Third, does the declaration of an ADIZ strengthen China’s argument that foreign military aircraft have no right to engage in surveillance and reconnaissance activities in the airspace above its exclusive economic zone? Fourth, does China intend to declare an ADIZ in the airspace above the South China Sea, and if so, would this exacerbate existing disputes over sovereignty claims and maritime claims in the South China Sea? This paper attempts to answer some of these questions. It looks at the status of ADIZ and state practice in this regard. It examines China’s ADIZ in the East China Sea and the reactions of other states to China’s ADIZ. It discusses the implication of a possible China’s ADIZ in the South China Sea. It concludes that as state practice concerning ADIZ is neither uniform nor consistent, there is a need to develop “rules of the road” to ensure that any ADIZ follow best international practice in order to minimize the risk of collisions or other incidents.

## **AIR DEFENCE IDENTIFICATION ZONES: IMPLICATIONS FOR FREEDOM OF OVERFLIGHT AND MARITIME DISPUTES**

### **Introduction**

Airspace is governed by two fundamental principles. First, the principle of sovereignty governs the airspace above the land territory of a State and the airspace above the belt of territorial sea adjacent to its coast known as the territorial sea. Second, the principle of freedom of overflight governs the airspace above the seas outside the limits of the territorial sea of any State.

An Air Defence Identification Zone (ADIZ) is neither permitted nor prohibited by any international agreement. Its status under international law is unclear. An ADIZ is a zone beyond the territorial sea in which a State unilaterally declares that aircraft entering the zone must identify themselves in order to protect its security from attack by hostile aircraft. Foreign aircraft may exercise freedom of overflight within the zone, but if they fail to identify themselves in advance they are subject to being interrogated or intercepted so that the coastal State can determine whether or not they have a hostile intent.

The law and practice governing ADIZs has recently become a matter of concern in Asia after China declared an ADIZ in the East China Sea on 23 November 2013.<sup>1</sup> The Chinese ADIZ substantially overlaps with the existing ADIZs of Japan, and to a smaller extent, to that of Korea and Taiwan. The Chinese ADIZ provoked criticism from Governments and commentators.<sup>2</sup> Although it has been alleged that the Chinese ADIZ is contrary to the practice of other States, this is a difficult argument to make because the practice of States that have declared ADIZs is neither uniform nor consistent. Therefore, it may be wiser for interested States to acknowledge that China has justifications as much as other States do to declare an ADIZ. Discussions could then focus on the development of “rules of the road” to ensure that any the extent, scope and operation of ADIZs and interceptions follow best international practice in order to minimize the risk of collisions or other incidents.

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<sup>1</sup> Statement by the Government of the People’s Republic of China on Establishing the East China Sea Air Defence Identification Zone Xinhua News Agency (23 November 2013), online: [http://news.xinhuanet.com/english/china/2013-11/23/c\\_132911634.htm](http://news.xinhuanet.com/english/china/2013-11/23/c_132911634.htm) (all website addresses in this paper were accurate as at 21 October 2014)

<sup>2</sup> See, for example, Statement of the Secretary of State on the East China Sea Air Identification Zone (23 November 2013), online: <http://www.state.gov/secretary/remarks/2013/11/218013.htm>; Statement of the Minister of Foreign Affairs of Japan on the ‘East China Sea Air Defence Identification Zone’ by the Ministry of National Defense of the People’s Republic of China (24 November 2013), online: [http://www.mofa.go.jp/press/release/press4e\\_000098.html](http://www.mofa.go.jp/press/release/press4e_000098.html).

The declaration of the ADIZ by China has raised three other concerns. First, can China use the ADIZ to strengthen its claim to sovereignty over the Diaoyu/Senkaku Islands? Second, does the declaration of an ADIZ strengthen China's argument that foreign military aircraft have no right to engage in surveillance and reconnaissance activities in the airspace above its exclusive economic zone (EEZ)? Third, does China intend to declare an ADIZ in the airspace above the South China Sea, and if so, would this exacerbate existing disputes over sovereignty claims and maritime claims in the South China Sea?

This paper attempts to answer some of these questions. For that purpose, the paper is structured as followed. First, the paper looks at two major principles of international law governing airspace, the principle of national air sovereignty and the principle of freedom of overflight. Second, the paper provides an overview of ADIZ, its status and state practice, notably of the United States, in this regard. Third, it examines China's ADIZ in the East China Sea and the reactions of other states to China's East China Sea ADIZ. Fourth, it discusses the implication of a possible China's ADIZ in the South China Sea. The paper concludes that as state practice concerning ADIZ is neither uniform nor consistent, there is a need to develop rules to ensure that any ADIZ follow best international practice and minimize the risk of collisions or other incidents that may threaten international peace and security.

### **Major Principles of International Law Governing Airspace**

Airspace is governed by two fundamental principles. The first principle governing air space is sovereignty (*aer clausum*), according to which States have sovereignty over the air space above their land territory and above the territorial sea adjacent to their coast. Article 1 of the 1944 Chicago Convention on International Civil Aviation provides that “[t]he contracting States recognize that every State has complete and exclusive sovereignty over the air space above its territory.”<sup>3</sup> Article 2 further provides that that “the territory of a State shall be deemed to be the land territory and territorial waters adjacent thereto”.<sup>4</sup> Similarly, Article 2 of the 1982 United Nations Convention on the Law of the Sea (1982 UNCLOS) provides that the sovereignty of a coastal State extends to an adjacent belt of sea, described as the territorial sea, and to the air space above the territorial sea.<sup>5</sup> Under 1982 UNCLOS, every State has a right to establish a territorial sea up to a limit of 12 nautical miles measured from baselines determined in accordance with the Convention.<sup>6</sup>

The second principle governing air space is freedom of overflight (*caelum liberam*). Freedom of overflight is a freedom of the high seas. Article 2 of the 1958 Convention on the

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<sup>3</sup> Convention on International Civil Aviation, adopted 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947) (CIAC), Art. 1.

<sup>4</sup> CIAC, Art. 2.

<sup>5</sup> United Nations Convention on the Law of the Sea, adopted 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) (UNCLOS), Art. 2.

<sup>6</sup> UNCLOS, Art. 3.

High Seas provides that freedom of the seas includes the right of all States to fly over the high seas.<sup>7</sup> Article 87 of 1982 UNCLOS confirms that freedom of the high seas comprises freedom of overflight.<sup>8</sup> The principle of freedom of overflight outside the territorial sea is not affected by the two regimes under 1982 UNCLOS which give coastal States sovereign rights to explore and exploit the natural resources on their continental shelf and in their exclusive economic zone. Article 78 of 1982 UNCLOS provides that the regime of the continental shelf does not affect the legal status of the superjacent waters or of the air space above those waters.<sup>9</sup> Article 58 of 1982 UNCLOS provides that in the exclusive economic zone (EEZ), all States, whether coastal or land-locked, enjoy the freedom of overflight and other internationally lawful uses of the sea related to this freedom, such as those associated with the operation on aircraft.<sup>10</sup> In short, 1982 UNCLOS makes it clear that the freedom of overflight is the principle governing the airspace above the seas seaward of the outer limit of the territorial sea of any State.

## **ADIZs: Legal Status and State Practice**

### ***What is an ADIZ?***

Annex 15 to the 1944 Chicago Convention on International Civil Aviation defines ADIZ as a “special designated airspace of defined dimensions within which aircraft are required to comply with special identification and/or reporting procedures additional to those related to the provision of air traffic service”.<sup>11</sup> In practical terms, ADIZ is a zone beyond the territorial sea in which a coastal State unilaterally declares that foreign aircraft entering the zone must identify themselves by submitting their Instrument Flight Rules (IFR) or Defense Visual Flight Rules (DVFR) flight plans and/or reporting their location to the coastal State in order to protect its security.<sup>12</sup> Foreign aircraft may exercise freedom of overflight within the zone, but if they fail to identify themselves in advance, they are subject to being interrogated or intercepted so that the coastal State can determine whether or not they have a hostile intent.

ADIZs are a product of the Cold War. The justification for their establishment was national security. They were established to address the concern of a number of states over the

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<sup>7</sup> Convention on the High Seas, adopted 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962), Art. 2.

<sup>8</sup> UNCLOS, Art. 87.

<sup>9</sup> UNCLOS, Art. 78.

<sup>10</sup> UNCLOS, Art. 58.

<sup>11</sup> CIAC, Annex 15, Section 1.1.

<sup>12</sup> Jaemin Lee, ‘China’s Declaration of an Air Defense Identification Zone in the East China Sea: Implications for Public International Law’, (2014) 18 *American Society of International Insights* 1, online: <http://www.asil.org/insights/volume/18/issue/17/china%E2%80%99s-declaration-air-defense-identification-zone-east-china-sea>.

possibility of massive nuclear attacks by hostile long-range bombers.<sup>13</sup> The purpose was to enable the attacked states to have more time to apply their defensive aircraft and ground-to-air missiles. In today's world, with the advance of technology, nuclear attacks would not necessarily come from aircraft but from ground-based or ship-based missiles, ADIZs are useful only to States engaged in wars involving the use of aircraft.<sup>14</sup>

### ***ADIZs under International Law***

An ADIZ is neither permitted nor prohibited by any international agreement. The 1944 Chicago Convention on International Civil Aviation states that over the high seas, the rules of the air shall be those established under the Convention.<sup>15</sup> The Convention does not provide for the right of states to establish ADIZs on the high seas. This right is nowhere to be found in UNCLOS either. The EEZ, a new regime created by UNCLOS, is not a security area. In the EEZ, coastal States only have the sovereign rights for the purpose of exploring and exploiting, conserving and managing natural resources and jurisdiction as provided for in the Convention with regard to artificial islands, installations and structures, marine scientific research and the protection of the marine environment.<sup>16</sup> Beyond the territorial sea, coastal States may establish a contiguous zone of up to 24 nautical miles from the baseline to exercise control over customs, fiscal, immigration and sanitary issues, but not security.<sup>17</sup> For these reasons, some authors have opined that an ADIZ is an encroachment on the principle of the freedom of overflight.<sup>18</sup> Others, however, maintained that even though there is no treaty basis for an ADIZ right, given state practice since 1950s with few protests, the legal basis may be found in customary international law.<sup>19</sup>

The Statute of the International Court of Justice (ICJ) describes international customs as 'general practice accepted as law'.<sup>20</sup> In the *Asylum* case, the ICJ held that the relevant

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<sup>13</sup> Elizabeth Cuadra, 'Air Defense Identification Zones: Creeping Jurisdiction in the Airspace', (1977) 18 *Virginia Journal of International Law* 485, at 496.

<sup>14</sup> Elizabeth Cuadra, 'Air Defense Identification Zones: Creeping Jurisdiction in the Airspace', (1977) 18 *Virginia Journal of International Law* 485, at 496.

<sup>15</sup> CIAC, Art. 12.

<sup>16</sup> UNCLOS, Art. 56.

<sup>17</sup> UNCLOS, Art. 33.

<sup>18</sup> See, for example, Elizabeth Cuadra, 'Air Defense Identification Zones: Creeping Jurisdiction in the Airspace', (1977) 18 *Virginia Journal of International Law* 485.

<sup>19</sup> Jaemin Lee, 'China's Declaration of an Air Defense Identification Zone in the East China Sea: Implications for Public International Law', (2014) 18 *American Society of International Insights* 1, online: <http://www.asil.org/insights/volume/18/issue/17/china%E2%80%99s-declaration-air-defense-identification-zone-east-china-sea>. See also J Ashley Roach, 'Air Defence Identification Zones', (2012) 1 *The Max Planck Encyclopedia of Public International Law* 232, online: <http://opil.oup.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e237> and Peter A. Dutton, 'Caelum Liberum: Air Defense Identification Zones Outside Sovereign Airspace', (2009) 103 *American Journal of International Law* 691.

<sup>20</sup> Statute of the International Court of Justice, adopted 26 June 1945, 33 UNTS 993, Art 38(1)(a) (entered into force 24 October 1945) (ICJ Statute);

practice must be constant and uniform.<sup>21</sup> In the Nicaragua case, it elaborated that “for a new customary rule to be formed, not only must the acts concerned ‘amount to a settled practice’, but they must be accompanied by *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is evidence of a belief that the practice is rendered obligatory by the existence of a rule of law requiring it.”<sup>22</sup> To conclude that the legality of ADIZs is settled under customary international law, one has to prove that the norm has met the threshold as determined by the ICJ.

But regardless of whether or not ADIZ has become a customary rule, it is still a fact that many states have established and enforced their ADIZs with relatively few objections. It is also true that international law does not prohibit the establishment of ADIZs. On the other hand, it can be argued that an ADIZ does not prohibit or limit the freedom of overflight. It is not a “no-fly zone”. It merely requires that a foreign aircraft exercising the freedom of overflight identify itself so as to protect the security interests of the coastal State. Despite the fact that the legality of ADIZs under international law is not clear, most States comply with them because doing so can enhance security and safety by providing clear rules and areas for the operation and possible interception of aircraft near territorial airspace.

### *ADIZs of the United States*

The United States was the first nation to establish ADIZs. In 1950, it declared the world’s first ADIZs to reduce the risk of a surprise aerial attack from the Soviet Union. Under the United States Federal Aviation Regulations, ADIZ is defined as an airspace “over land or water in which the ready identification, location and control of all aircraft [...] is required in the interest of national security”.<sup>23</sup> The rule is that “[n]o person may operate an aircraft into [...] an ADIZ unless the person files a DVFR [Defense Visual Flight Rules] flight plan containing the time and point of ADIZ penetration.”<sup>24</sup>

Today, the United States has five zones (West Coast, East Coast, Alaska, Hawaii and Guam).<sup>25</sup> The ADIZ of the continental coast of the United States extends out more than 300 nautical miles in some Atlantic areas and more than 400 nautical miles off southern California.<sup>26</sup> The United States also has an ADIZ off the coast of Alaska that extends out at least 350 nautical miles into the airspace above the Bering Sea and a similar distance into the

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<sup>21</sup> Colombian-Peruvian Asylum Case (Colombia v. Peru), Judgment, (1950) ICJ Report 266, at 277.

<sup>22</sup> Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Judgment, (1986) ICJ Reports 14, at 44.

<sup>23</sup> 14 C.F.R. §99.3.

<sup>24</sup> 14 C.F.R. §99.9.

<sup>25</sup> For the coordinates of these ADIZs, see 14 C.F.R. §99.41-49 (2009).

<sup>26</sup> Peter A. Dutton, ‘Caelum Liberum: Air Defense Identification Zones Outside Sovereign Airspace’, (2009) 103 *American Journal of International Law* 691.

Arctic Sea from Alaska's northern coast.<sup>27</sup> In addition, it also has ADIZ off Hawaii and Guam that extend out more than 250 miles.<sup>28</sup>

The United States has stated that the requirement of the foreign aircraft to identify itself in advance only applies to aircraft intending to enter the air space over US territory, and that the requirement of prior identification can be justified as a "condition of entry" into its territory. Consequently, the official policy of the United States is that it does not recognize the right of a coastal State to apply its ADIZ procedures to its aircraft not intending to enter the national airspace of that State.<sup>29</sup> Its policy is that its military aircraft not intending to enter national airspace will not identify themselves or otherwise comply with ADIZ procedures established by other States, unless it has specifically agreed to do so.<sup>30</sup>

### ***ADIZs in Asia***

The ADIZ of Japan was established by the United States during the U.S. military occupation of the Ryukyu Islands after the Second World War.<sup>31</sup> In September 1969, the United States transferred the management of Japan's ADIZ to the Japanese government. Japan extended this zone twice, one in 1972 and the other in 2010.<sup>32</sup> The ADIZ in Korea was established by the United States in 1951 during the Korean War. ADIZ were also declared in the Philippines, Malaysia, India, Viet Nam, Myanmar and Taiwan during the Cold War.<sup>33</sup>

### **China's ADIZ in the East China Sea**

#### ***Declaration of ADIZ by China in 2013***

On 23 November 2013, the Ministry of National Defence (MND) of China announced the establishment of an ADIZ in the East China Sea contiguous to the Chinese coastline.<sup>34</sup> The rules for the ADIZ provided that aircraft flying within the zone should report their flight

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<sup>27</sup> Peter A. Dutton, 'Caelum Liberum: Air Defense Identification Zones Outside Sovereign Airspace', (2009) 103 *American Journal of International Law* 691.

<sup>28</sup> Peter A. Dutton, 'Caelum Liberum: Air Defense Identification Zones Outside Sovereign Airspace', (2009) 103 *American Journal of International Law* 691.

<sup>29</sup> Commander's Handbook on the Law of Naval Operations (US Navy, US Marine Corps, US Coast Guard, 2007), 13.

<sup>30</sup> Commander's Handbook on the Law of Naval Operations (US Navy, US Marine Corps, US Coast Guard, 2007), 13.

<sup>31</sup> Elizabeth Cuadra, 'Air Defense Identification Zones: Creeping Jurisdiction in the Airspace', (1977) 18 *Virginia Journal of International Law* 485, at 495.

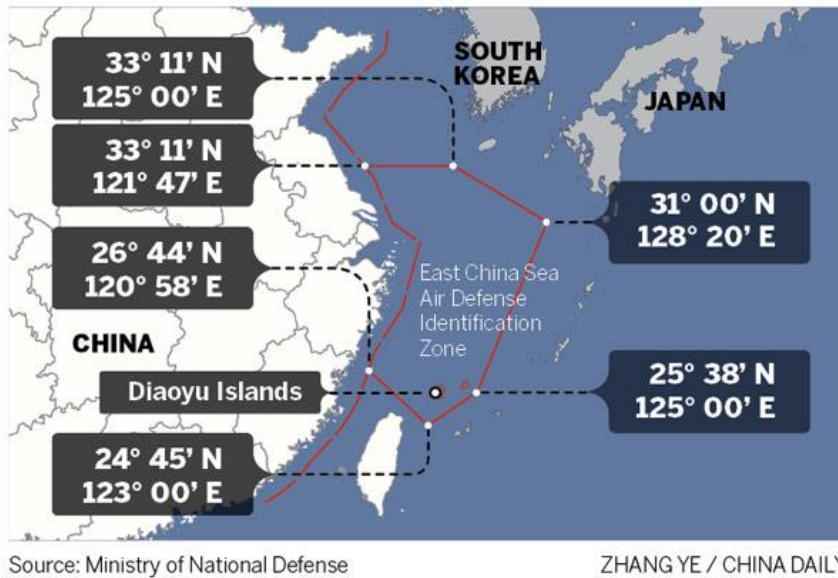
<sup>32</sup> Ministry for Foreign Affairs of Japan, Press Conference, Revision to Air Defense Identification Zone (ADIZ) Line (Jun. 25, 2010), online: [http://www.mofa.go.jp/announce/fm\\_press/2010/6/0625\\_01.html](http://www.mofa.go.jp/announce/fm_press/2010/6/0625_01.html).

<sup>33</sup> Elizabeth Cuadra, 'Air Defense Identification Zones: Creeping Jurisdiction in the Airspace', (1977) 18 *Virginia Journal of International Law* 485, at 495.

<sup>34</sup> Statement by the Government of the People's Republic of China on Establishing the East China Sea Air Defense Identification Zone, Xinhua News Agency (23 November 2013), online: [http://news.xinhuanet.com/english/china/2013-11/23/c\\_132911634.htm](http://news.xinhuanet.com/english/china/2013-11/23/c_132911634.htm)

plans to the Ministry of Foreign Affairs or the Civil Aviation Administration of China, regardless of whether or not they were intended to enter the air space of China.<sup>35</sup> Aircraft flying in the ADIZ must maintain the two-way radio communications respond in a timely and accurate manner to the identification inquiries and follow the instructions of the MND, the administrative organ of the ADIZ.<sup>36</sup> The rules further provided that in the event that aircraft do not cooperate in the identification or refuse to follow the instructions, China's armed forces will adopt *defensive emergency measures*.<sup>37</sup>

### CHINA AIR DEFENSE IDENTIFICATION ZONE



China's ADIZ overlaps in some areas with the ADIZs of Japan, South Korea, and Taiwan. China's ADIZ includes the airspace above the Senkaku / Diaoyu Islands which are controlled by Japan and over which Japan, China and Taiwan claim sovereignty. China's ADIZ also includes the airspace above Socotra Rock (Ieodo in Korean and Suyan Jiao in Chinese), a submerged on which Korea has constructed a research installation that lies in the area of overlapping EEZ claims of China and Korea.

<sup>35</sup>Statement by the Government of the People's Republic of China on Establishing the East China Sea Air Defense Identification Zone Xinhua News Agency, Nov. 23, 2013 [http://news.xinhuanet.com/english/china/2013-11/23/c\\_132911634.htm](http://news.xinhuanet.com/english/china/2013-11/23/c_132911634.htm)

<sup>36</sup>Statement by the Government of the People's Republic of China on Establishing the East China Sea Air Defense Identification Zone Xinhua News Agency, Nov. 23, 2013 [http://news.xinhuanet.com/english/china/2013-11/23/c\\_132911634.htm](http://news.xinhuanet.com/english/china/2013-11/23/c_132911634.htm)

<sup>37</sup>Statement by the Government of the People's Republic of China on Establishing the East China Sea Air Defense Identification Zone Xinhua News Agency, Nov. 23, 2013 [http://news.xinhuanet.com/english/china/2013-11/23/c\\_132911634.htm](http://news.xinhuanet.com/english/china/2013-11/23/c_132911634.htm)





### ***Reactions to China's ADIZ***

Several objections have been raised by Japan, the United States and others against China's ADIZ.

First, some objections have been made because China's ADIZ regulations require reporting by aircraft entering the ADIZ even if they do not intend to enter Chinese airspace. In a statement issued after China's ADIZ declaration, the United States said that it does not apply its ADIZ procedures to foreign aircraft not intending to enter U.S. national airspace and that it does not support efforts by any State to apply its ADIZ procedures to foreign aircraft not intending to enter its national airspace.<sup>38</sup> On 27 November 2014, only four days after the Chinese declaration, the United States flew two US Air Force B52 bombers from Guam through Chinese ADIZ without giving China any prior notification.<sup>39</sup> The United States also made it clear that it would continue to follow its national policy of not notifying the coastal State if its military aircraft entered the ADIZ of another State without the intention of entering the air space under the sovereignty of that country.<sup>40</sup> It should be noted, however, that China is not the only State that require aircraft entering their ADIZ to report even if they

<sup>38</sup> Statement of the Secretary of State on the East China Sea Air Identification Zone (23 November 2013), online: <http://www.state.gov/secretary/remarks/2013/11/218013.htm>.

<sup>39</sup> Zachary Keck, 'US Bombers Challenge China's Air Defense Identification Zone', *The Diplomat* (27 November 2013), online: <http://thediplomat.com/2013/11/us-bombers-challenge-chinas-air-defense-identification-zone/>.

<sup>40</sup> Statement of the Secretary of State on the East China Sea Air Identification Zone (23 November 2013), online: <http://www.state.gov/secretary/remarks/2013/11/218013.htm>.

do not intend to enter national airspace. Japan requires Taiwanese aircraft entering its ADIZ to file flight plans regardless of destination.<sup>41</sup> Australia, Myanmar, and Taiwan also require such reporting.<sup>42</sup>

Second, objections have been made because China's ADIZ includes the Senkaku/Diaoyu Islands whose sovereignty is in dispute between China and Japan and Socotra Rock, a submerged feature on which Korea has constructed a research installation that lies in the area of overlapping EEZ claims of China and Korea.<sup>43</sup> The argument is that, by declaring an ADZ that included the Senkaku/Diaoyu islands and Socotra Rock, China was attempting to enhance its sovereignty/maritime claims over the Senkaku/Diaoyu Islands and Socotra Rock. However, the fact that China's military aircraft fly over the airspace above a disputed feature would not enhance China's sovereignty or jurisdiction claim, especially if Japan or South Korea objected to such flights.

It should also be noted that the Senkaku/Diaoyu Islands are within the ADIZ of Japan. In fact, some reports indicate that Japan regularly scrambles aircraft if Chinese aircraft approach these islands, even though the islands are uninhabited and a Chinese aircraft passing over them would pose no threat to the security of Japan.<sup>44</sup> Furthermore, some of the ADIZ of other countries also include offshore geographic features that are in dispute. South Korea's ADIZ, on the other hand, covers Tokdo, a group of small islands claimed by Japan.<sup>45</sup> Following China's ADIZ declaration, South Korea announced that it extended its ADIZ to include Socotra Rock.<sup>46</sup>

Third, objections were made because China failed to consult its neighbours before declaring its ADIZ. Consultation may be considered an exercise of due regard. It may be a practice that States should consider before declaring ADIZs over areas of maritime dispute. In the case of China's ADIZ, tensions could have been mitigated if China had engaged in any form of consultation with Japan, South Korea and the United States.<sup>47</sup> However, it is doubtful that there is a clear and consistent practice that States declaring an ADIZ first

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<sup>41</sup> Eric Heginbotham, 'The Foreign Policy Essay: China's ADIZ in the East China Sea', Lawfare Blog (24 August 2014), online: <http://www.lawfareblog.com/?p=37889>.

<sup>42</sup> Eric Heginbotham, 'The Foreign Policy Essay: China's ADIZ in the East China Sea', Lawfare Blog (24 August 2014), online: <http://www.lawfareblog.com/?p=37889>.

<sup>43</sup> See Madison Park, 'Why China's New Air Zone Incensed Japan, US', CNN (27 November 2013), online: <http://edition.cnn.com/2013/11/25/world/asia/china-japan-island-explainer/>.

<sup>44</sup> See 'Japanese fighter scrambles against foreign aircraft hit record high', Kyodo News International (7 July 2014), online: <http://www.globalpost.com/dispatch/news/kyodo-news-international/140709/japanese-fighter-scrambles-against-foreign-aircraft-hi>

<sup>45</sup> Eric Heginbotham, 'The Foreign Policy Essay: China's ADIZ in the East China Sea', Lawfare Blog (24 August 2014), online: <http://www.lawfareblog.com/?p=37889>.

<sup>46</sup> Zachary Keck, 'South Korea to Air Defense Identification Zone', The Diplomat (2 December 2013), online: <http://thediplomat.com/2013/12/south-korea-to-expand-its-air-defense-identification-zone/>

<sup>47</sup> Lee Woon Jae, 'Tension on the Air: The Air Defense Identification Zones on the East China Sea', (2014) 7 *Journal of East Asia International Law* 274, at 279.

consult neighbouring States or States where an overlapping ADIZ would result. It seems highly unlikely that the United States would have consulted China and Russia before establishing ADIZs off the coasts of Japan and Korea. It appears that Japan did consult Taiwan before extending its ADIZ in 2010. However, consultation means prior notification rather than consent. Despite that fact that Taiwan registered an objection after being consulted, Japan proceeded to amend its ADIZ.<sup>48</sup>

Fourth, concerns have been raised that tensions could increase if China undertake 'defensive emergency measures' or uses its ADIZ to justify its exercise of freedom of overflight in the area of its ADIZ near the disputed Senkaku/Diaoyu Islands. Some commentators have opined that one reason that China may have declared the ADIZ was to counter that fact that Japan was intercepting Chinese aircraft in its ADIZ near the equidistance line between the two States, many miles from the Japanese coast.<sup>49</sup> After declaring an ADIZ in the same area, China could argue that Japan is under a corresponding obligation to give China notice if its aircraft enter the China's ADIZ.

Fifth, concerns were expressed by some commentators that China may use its ADIZ in order to support its position that foreign military aircraft have no right to fly over its EEZ on reconnaissance or surveillance missions.<sup>50</sup> The argument is that the ADIZ declaration, a seaward extension of one aspect of national security may serve as precedent for seaward extensions of other aspects.<sup>51</sup> Military activities in the EEZ indeed have been a source of tension between the United States and China for several years, beginning with an Incident in April 2001 involving a collision over the South China Sea between the United States Navy EP-3 reconnaissance plane and Chinese People's Liberation Army naval F-8 fighter.<sup>52</sup> In China's views, the surveillance flight conducted by the United States violated the principle of freedom of overflight and 1982 UNCLOS because the surveillance by the United States plane was conducted in airspace in China's EEZ and posed a 'serious threat to the national security of China'.<sup>53</sup> As recently as July 2014, Chinese officials stated that the United States had no right to conduct such activities in air space above China's EEZ even after it sent a naval

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<sup>48</sup> Ministry for Foreign Affairs of Japan, Press Conference, Revision to Air Defense Identification Zone (ADIZ) Line (Jun. 25, 2010), online: [http://www.mofa.go.jp/announce/fm\\_press/2010/6/0625\\_01.html](http://www.mofa.go.jp/announce/fm_press/2010/6/0625_01.html).

<sup>49</sup> See Eric Heginbotham, 'The Foreign Policy Essay: China's ADIZ in the East China Sea', Lawfare Blog (24 August 2014), online: <http://www.lawfareblog.com/?p=37889>.

<sup>50</sup> See Wendell Minnick, 'China Incident with US P-8 Sparks Debate on Pacific Posture', Defense News (31 August 2014). See also Andrew S. Erickson and Emily de La Bruyere, 'Going Maverick: Lessons from China's Buzzing of a U.S. Navy Aircraft', The Wall Street Journal (25 August 2014), online: <http://blogs.wsj.com/chinarealtime/2014/08/25/going-maverick-lessons-from-chinas-buzzing-of-a-u-s-navy-aircraft>

<sup>51</sup> Elizabeth Cuadra, 'Air Defense Identification Zones: Creeping Jurisdiction in the Airspace', (1977) 18 *Virginia Journal of International Law* 485, at 486.

<sup>52</sup> See 'China-US Aircraft Collision Incident of April 2001: Assessments and Policy Implications', CRS Report for Congress (10 October 2001).

<sup>53</sup> 'Chinese FM Spokesman Gives Full Account of Air Collision', Xin Hua News, Apr. 3, 2001, online: <http://news.xinhuanet.com/english/20010404/393124A.htm>.

vessel to spy on the international Rim of the Pacific (RIMPAC) exercises near Hawaii.<sup>54</sup> This issue reflects a fundamental dispute between China and the United States on the interpretation and application of the provisions of 1982 UNCLOS. The United States maintains that the sovereign rights and jurisdiction of coastal States in their EEZ is limited to the regulations on marine scientific research, regulations on the exploration and exploitation of the natural resources and regulations on protection and preservation of the marine environment. The United States maintains that 1982 UNCLOS fails to give coastal States any jurisdiction to regulate foreign aircraft outside its territorial sea. Rather, 1982 UNCLOS preserves the freedom of overflight for all States in the air space above the EEZ. Further, the United States argues that the conduct of aerial surveillance and reconnaissance in the air space above the EEZ is a lawful use of the sea relating to the freedom of overflight that is recognized in article 58 of 1982 UNCLOS. In short, the US position is that the EEZ is an economic zone, not a security zone.<sup>55</sup>

### **Implication of a potential China's ADIZ in the South China Sea**

The main concern in Southeast Asia that was raised following China's declaration of an ADIZ in the East China Sea was that China would also declare an ADIZ in the South China Sea. Given the fact that tensions are already high between China and Vietnam and between China and the Philippines, this is understandable.

Statements from officials and commentators in China indicated that China may declare an ADIZ in the South China Sea at some time in the future.<sup>56</sup> If so, the question is "where"? China has a major naval base on the island of Hainan and it has other facilities along its southern coast in Guangzhou province. It may find national security justification to declare an ADIZ off its southern coast, extending about 100 nm, and as far as the median line in the Gulf of Tonkin. If it were extended further south up to 150 nm or more, it would include the Paracels, which are occupied by China, but also claimed by Viet Nam. As the HD-981 oil rig incident demonstrated, the Paracels are a major source of tension between China and Viet Nam. Therefore, if China were to declare an ADIZ that included the Paracels, it is likely to greatly exacerbate relations between China and Viet Nam.

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<sup>54</sup> Shannon Tiezzi, 'China's RIMPAC Spying: Having Your Cake and Eating It Too', *The Diplomat* (1 August 2014), online: <http://thediplomat.com/2014/08/chinas-rimpac-spying-having-your-cake-and-eating-it-too/>.

<sup>55</sup> See Raul (Pete) Pedrozo, 'Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone', (2010) 9 *Chinese Journal of International Law* 9-29. See also Zhang Haiwen, 'Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? - Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ', (2010) 9 *Chinese Journal of International Law* 31-47.

<sup>56</sup> See Zachary Keck, 'China's Drafting a South China Sea ADIZ', *The Diplomat* (31 January 2014), online: <http://thediplomat.com/2014/01/chinas-drafting-a-south-china-sea-adiz/>; Zachary Keck, 'PLA Officer: China Must Establish South China Sea ADIZ', *The Diplomat* (22 February 2014), online: <http://thediplomat.com/2014/02/pla-officer-china-must-establish-south-china-sea-adiz/>.

One of the major islands in dispute between China and the Philippines are in Scarborough Shoal, which is a large reef with 4-6 small rocks that are above water at high tide. Scarborough Shoal is more than 500 nm from the coast of China, and only about 124 nm from the coast of the Philippines. Since it is well within the EEZ of the Philippines measured from its coast,<sup>57</sup> it would be extremely provocative if China were to declare an ADIZ that extended so far from its own coast. This same argument applied to the Spratly Islands, which are the major islands in dispute in the South China Sea. They are very close to the coasts of Viet Nam, the Philippines, Malaysia and Brunei, and between 570 and 600 nautical miles from the Chinese island of Hainan. Any declaration of an ADIZ so far from China that included islands occupied and claimed by several States would be certain to raise grave concerns in ASEAN countries and be views as an aggressive and provocative move by China. In addition, the declaration of an ADIZ deep into the South China Sea would almost certainly be opposed by the United States and other States outside of the region. They would view it as part of threat to the freedoms of navigation and overflight in the South China Sea.

### **Conclusion: A Practical Solution regarding the Establishment and Operation of ADIZs**

China is reportedly spending large amounts of money to increase the capabilities of its air force and improve its ability to identify aircraft above the seas off its coast. In the East China Sea, China has overlapping EEZ claims with its neighbours as well as a sovereignty dispute Japan over the Senkaku/Diaoyu Islands. Given that China's ADIZ overlaps significantly with those of its neighbours, there are likely to be an increased number of interceptions by China of aircraft in its ADIZ. At the same time, as China sends its aircraft into the ADIZ of its neighbours, there are likely to be an increased number of interceptions of Chinese military aircraft by its neighbours. In addition, the United States is likely to continue to fly reconnaissance missions in the air space above China's EEZ without providing any notification to China.

One practical way to deal with this problem is for all the sides to agree that the principle of international law governing the air space outside the territorial sea of any State is freedom of overflight. They could also agree that foreign military aircraft flying over an uninhabited offshore feature poses no threat to the security of the States claiming sovereignty over that island. Furthermore, the States concerned could agree that flights over disputed offshore features or over disputed maritime zones, as well as the failure to respond to or object to such flights, are without prejudice to the sovereignty or maritime claims of the States concerned.

Given that some foreign aircraft will enter the ADIZ of other States without giving prior notification, the coastal State concerned is likely to send up its own military aircraft to investigate. In order to minimize the risk of such an incident getting out of hand, it would be

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<sup>57</sup> Republic of the Philippine, Official Gazette, 'Philippines Position on Bajo de Masinloc (Scarborough Shoal) and the Waters within its Vicinity' Department of Foreign Affairs (18 April 2012), online: <http://www.gov.ph/2012/04/18/philippine-position-on-bajode-masinloc-and-the-waters-within-its-vicinity/>

in the interests of all of the States concerned to follow established 'rules of road' and best international practices in such cases. In fact, such rules of the road already exist for the interception of civilian aircraft. They are set out in article 3bis of Chicago Convention, which was adopted in 1984. Similar rules of the road should be adopted for the interception of military aircraft.

In the South China Sea, where sovereignty and maritime disputes are even more complex and involve even more States, for the sake of regional peace and stability, it is advisable that no State should declare and enforce an ADIZ. If an ADIZ were claimed by China in the South China Sea in any area other than a narrow band adjacent to China's coast, it is almost certain to provoke much criticism on both legal and political grounds. It may also lead to incidents that threaten international peace and security. The Philippines had an ADIZ of 225 nm and Viet Nam had an ADIZ of 150 nm established during the Cold War<sup>58</sup> that do not seem to be enforced at present. A China's declaration of an ADIZ in the South China Sea may make Viet Nam and the Philippines consider reactivating and even expanding their ADIZs.

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<sup>58</sup> Elizabeth Cuadra, 'Air Defense Identification Zones: Creeping Jurisdiction in the Airspace', (1977) 18 *Virginia Journal of International Law* 485, at 509.