

Chapter 8

Territorial Air Space and Air Defense Identification Zones



Territorial Air Space and Outer Space

Air space first became an issue in international law in the twentieth century when aircraft were invented and began flying over territorial land. At first, there were two conflicting views on the matter. There were those who believed that the skies were free and open, and those who believed that the sovereignty of an aerial space belonged to the country below it. However, the use of aircraft for military purposes in World War I proved to be the decisive turning point; eventually, following the war, the Convention Relating to the Regulation of Aerial Navigation (Paris Convention) was signed in Paris in 1919. The Convention stipulated that “every Power has complete and exclusive sovereignty over the air space above its territory.” The Paris Convention was superseded in 1944 by the Convention on International Civil Aviation (Chicago Convention), which was adopted in Chicago; this convention has been maintained until the present day. The fact that every State has complete and exclusive sovereignty over the air space above its territory is an established principle of international law.

The vertical bound of such territory, however, remains undefined. Given the state of aviation, those at the time did not feel the need to define the term “air space,” nor were they particularly hindered by this fact. However, the launch of Sputnik in 1957 marked the start of the space age, and the term “air space” could no longer remain undefined.

Interestingly, there have been many different arguments on this subject. For example, there were some who argued for unlimited territorial air space, in other words that there was no vertical bound on a terrestrial nation’s territorial rights. Then again, the fact that the Earth orbits the sun and rotates on its axis obviously renders this argument an irrational one. In addition, because the Paris Convention and the Chicago Convention stipulated that the air space over which every State had sovereignty was “air space,” there were those who argued that air space was limited to space in which there was air. There were yet others who argued that territorial air

space should be limited to the extent that can be reached through buoyant flight using air flow since these conventions recognized sovereignty over air space at a time when people had envisioned conventional aircraft based on aerodynamic buoyance.

By now, however, different States have already launched thousands of artificial satellites. The UN General Assembly adopted the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies in 1966, which prohibited national appropriation by claim of sovereignty. In light of this, at the very least, it became the dominant view that territorial air space was limited to the perigee of the orbit of a satellite or other spacecraft around the Earth. In terms of a specific number, this limit was 100 km above sea level. In any case, the boundary between territorial air space and outer space is undefined. Of course, the space above an exclusive economic zone (EEZ) or the high seas does not belong to any State, and it is known as “international air space.”¹

Freedom of Flight for Civil Aircraft

Foreign aircraft cannot freely fly through territorial air space. While the right of innocent passage is recognized in territorial seas, no such right is recognized in territorial air space. Nevertheless, for the sake of international transit, it was deemed necessary to scrap the inconvenient practice of seeking permission from a territorial State every time a flight is made and instead establish a system that permitted flight, however limited it may be. Such a regime, first established under the Paris Convention of 1919, currently is based on the Chicago Convention of 1944. In addition to stipulating the general principles of international civil aviation, the Chicago Convention established the International Civil Aviation Organization (ICAO; headquartered in Montreal, Canada) and its mission.

The Chicago Convention applies only to the civil aircraft of the parties to the Convention, including all types of airplanes, helicopters, and airships, but excluding pilotless aircraft. Military or other government aircraft, however, must not fly over or land in another State’s territory, unless so permitted by a special agreement or other means.

Apart from when providing regular air services, civil aircraft hold the right to enter the territory of other parties to the Convention, fly through a territory without landing, or land in the territory for purposes other than transportation such as refueling or maintenance, without needing to seek prior approval. That being said, civil aircraft must of course abide by any landing requests made by the State, follow the flight paths designated by the State, and so on.

¹The development of outer space has advanced significantly in recent years. For more details, see Aoki, Setsuko. 2006. *Nihon no uchū senryaku* (Japan’s Space Strategy). Tokyo: Keio University Press.

The Chicago Convention thus made a distinction between irregular flight and regular international air services. The freedom of flight was only recognized for irregular flight, whereas regular flight, which primarily takes the form of international air services, was not liberalized. Regular flight was instead regulated by the International Air Services Transit Agreement and the International Air Transport Agreement; international air services could only be conducted upon the conclusion of bilateral aviation agreements. At present, States around the world have concluded an intricate network of aviation agreements. As things currently stand, negotiations on such agreements impact the interests of the States involved and are therefore usually very problematic.²

Air Defense Identification Zones

In general, a coastal State establishes an air defense identification zone (ADIZ) over a fixed area above its EEZ or the high seas for ensuring its own security. In establishing an ADIZ, the State requests all aircraft flying through it to present their flight plans and report their position, in an attempt to swiftly and accurately identify and confirm the position of such aircraft.

This practice was first begun by the United States in 1950. In order to be able to identify, locate, and control all aircraft within a certain distance from the coast, the US required, under domestic law, that all applicable aircraft report their position and other information, and established penal provisions for those who violated the law. Subsequently, many other countries, including Canada, France, Iceland, the United Kingdom, and the Soviet Union, took similar measures.

In Japan's case, this was done for the sake of easily identifying aircraft flying in the vicinity of Japan, which was deemed to assist the implementation of effective measures against aerial incursions of Japan's territory, as stipulated in the Self-Defense Forces (SDF) Act. For the ADIZ implemented by Japan's Defense Agency, the pilots of SDF aircraft that fly through the zone are obligated to report the time and location at which they expect to enter the zone, among other information, to a radar site. The scope of the Act is stipulated in accordance with a government directive on flight in the ADIZ.³ Civil aircraft, meanwhile, are identified through the reporting of their flight plans and other relevant information by the Ministry of Land, Infrastructure, Transport, and Tourism (Fig. 8.1).

In addition, to avoid accidental collisions between Japanese SDF aircraft and the military aircraft of the Republic of Korea (ROK), a dedicated hotline has been established between the two countries. This was first proposed by the ROK side in 1990, and the two sides voluntarily established measures in July 1995 for preventing

²Sakamoto, Akio and Miyoshi, Susumu. 1999. *Shin kokusai kōkūhō* (New International Aviation Law). Tokyo: Yūshindō Kōbunsha.

³Defense Agency Directive No. 36, 1969.

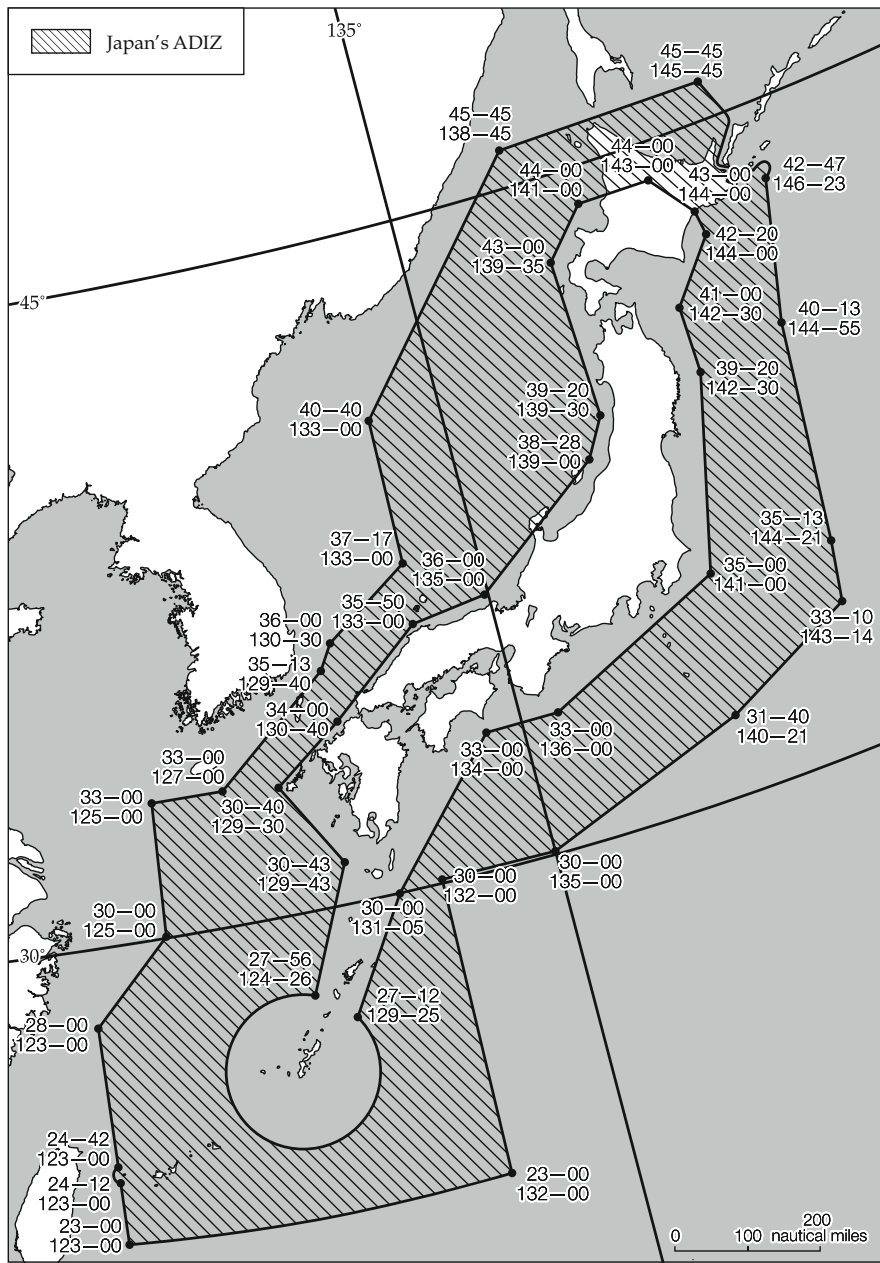


Fig. 8.1 Japan's ADIZ

accidental collisions, whereby each side would inform the other of the flight plans of any of its military aircraft that intended to enter the other's ADIZ. The notification would be made through the Aeronautical Fixed Telecommunication Network (a network for civil aviation) or on-board radio.⁴ Therefore, no scramble will be made in principle against applicable aircraft entering the area, provided their flight plans have been notified. Furthermore, aircraft must constantly monitor the international air distress frequency when flying within the ADIZ or in the vicinity of the territorial air space of another country. Consultations between the Japanese and ROK sides continued thereafter, and they decided to set up a dedicated hotline⁵ for the notification of flight plans between the two sides in order to prevent accidental collisions more effectively. The hotline went into operation in September 1997.

The issue, in terms of international law, occurs when Japan's ADIZ is applied to foreign aircraft operating beyond Japan's territorial air space in air space above its EEZ or the high seas (not when it is applied internally to SDF aircraft or when issuing scramble orders in response to external information). This is because all aircraft have the freedom to fly in air space above EEZs or the high seas. The grounds for the unilateral establishment of such an ADIZ are not necessarily clear, although some have attempted to justify it by likening it to the case of contiguous zones and calling for the restriction of the freedom of the high seas (in this case the freedom of flight above them) to protect a coastal State's legal interests, or by citing the principle of self-defense.

Another type of air space is flight information regions (FIRs), in which each State has the responsibility to provide aircraft with air traffic control services, flight assistance services, and flight navigation services, to ensure safe and efficient flight. The ICAO-designated FIRs were established for air spaces that include territorial air space and air space over the high seas, with smooth air traffic, rather than sovereignty over air space, in mind. FIRs are not named after any State and are instead named after the control center or flight information center providing the flight services in it. The FIRs under Japanese jurisdiction are the Tokyo FIR and the Naha FIR, and flight services are provided by their respective air traffic control centers. Thus ADIZs and FIRs differ in purpose and usually also scope.

⁴The area in question is the space above the EEZ and high seas south of 37° north latitude, which is adjacent to the ADIZs of both countries.

⁵The hotline was set up between Japan Air Self-Defense Force's Kasuga Air Base in Kasuga, Fukuoka Prefecture on the Japanese side and Osan Air Base on the ROK side.

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