The People’s Republic of China’s Assertion of Jurisdiction over Airspace by Means of an East China Sea Air Defense Identification Zone

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Disclaimer

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Abstract

The People’s Republic of China’s Assertion of Jurisdiction over Airspace by Means of an East China Sea Air Defense Identification Zone

On November 23, 2013, the People’s Republic of China (China) announced the establishment of an Air Defense Identification Zone (ADIZ) in the East China Sea. China’s move incited strong criticisms from its neighbors, adding to regional tension. In addition, many scholars and commentators have been quick to choose sides as to whether China violated international law by establishing the ADIZ. Unfortunately, vague assertions one-way or the other have not been supported by careful legal analysis.

A review of the most relevant sources of international law, treaties and State practice, demonstrate that China’s establishment of the ADIZ is lawful. Even so, China’s ADIZ has created tensions among various States that can be addressed in various ways so as to avoid serious aviation incidents.
# Table of Contents

I. Introduction ........................................................................................................... 1

II. Concept and Existence of ADIZs ............................................................................ 4
   A. What are ADIZs? ............................................................................................... 5
   B. States with ADIZs ............................................................................................ 7
      1. Australia ........................................................................................................... 8
      2. Canada ............................................................................................................ 10
      3. China ............................................................................................................. 11
      4. Finland .......................................................................................................... 12
      5. India .............................................................................................................. 12
      6. Japan ............................................................................................................. 13
      7. Myanmar ...................................................................................................... 14
      8. The Philippines ............................................................................................. 14
      9. Republic of Korea .......................................................................................... 15
     10. Taiwan .......................................................................................................... 15
     11. Thailand ....................................................................................................... 16
     12. Turkey .......................................................................................................... 16
     13. United States ............................................................................................... 17
   C. Key Characteristics of ADIZs ............................................................................. 23
   D. Are ADIZs Still Appropriate? .......................................................................... 26

III. The Legality of ADIZs under the Law of the Sea as of 2013 .................................. 30
   A. Customary Rules Prior to 1958 ...................................................................... 32
   B. 1958 Law of the Sea Conventions ................................................................... 33
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Applicable Text of the UNCLOS</td>
<td>41</td>
</tr>
<tr>
<td>2. UNCLOS Negotiating History Relating to ADIZs</td>
<td>47</td>
</tr>
<tr>
<td>3. Subsequent Practice of the States</td>
<td>48</td>
</tr>
<tr>
<td>4. Views of Scholars as to the Permissibility of ADIZs under the Law of the Sea Treaties and Customary International Law</td>
<td>52</td>
</tr>
<tr>
<td>D. Conclusion</td>
<td>58</td>
</tr>
<tr>
<td>IV. The Legality of ADIZs under International Aviation Law as of 2013</td>
<td>59</td>
</tr>
<tr>
<td>A. Customary Rules and Treaties on International Aviation Practice Prior to 1944</td>
<td>61</td>
</tr>
<tr>
<td>B. 1944 Convention on Civil Aviation (Chicago Convention)</td>
<td>64</td>
</tr>
<tr>
<td>1. Applicable Text of the Chicago Convention</td>
<td>67</td>
</tr>
<tr>
<td>2. Negotiating History Relating to ADIZs</td>
<td>75</td>
</tr>
<tr>
<td>3. Subsequent Practice of States</td>
<td>77</td>
</tr>
<tr>
<td>4. Views of Scholars as to the Permissibility of ADIZs under the Chicago Convention and Customary International Aviation Law</td>
<td>80</td>
</tr>
<tr>
<td>C. Conclusion</td>
<td>85</td>
</tr>
<tr>
<td>V. The Legality of China’s ADIZ</td>
<td>86</td>
</tr>
<tr>
<td>A. Establishment of the ADIZ</td>
<td>87</td>
</tr>
<tr>
<td>B. Legal Position of China</td>
<td>89</td>
</tr>
<tr>
<td>C. Legal Positions of Other States</td>
<td>91</td>
</tr>
</tbody>
</table>
1. Japan......................................................................................................................... 91
2. The Philippines......................................................................................................... 92
3. Republic of Korea.................................................................................................... 93
4. Taiwan...................................................................................................................... 94
5. United States........................................................................................................... 95
D. Legal Positions of Scholars and Commentators..... 97
E. Conclusion................................................................................................................ 102

VI. Proposals for Addressing Conflict over China’s ADIZ..................................................103

VII. Conclusion..............................................................................................................106
I. Introduction

On November 23, 2013, the Ministry of National Defense for China announced the existence of a new East China Sea ADIZ and released corresponding rules\(^1\) and a map of the zone,\(^2\) effective immediately.\(^3\) According to the rules, all aircraft entering the ADIZ: (1) must abide by certain restrictions within the East China Sea ADIZ; (2) must provide identification information; and (3) should follow the instructions of the administrative organ of China’s ADIZ.\(^4\) Most importantly, failure to cooperate in the identification or refusal to follow instructions may lead to China’s armed forces taking emergency defensive measures.\(^5\)

China’s actions have left the international community questioning the legality of its actions and the effect these measures will have on stability and the status quo in East Asia and ultimately the world. U.S. Secretary of

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3 Announcement of the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone of the P.R.C., supra note 1.
4 Id.
5 Id.
The United States is deeply concerned about China’s announcement that they’ve established an “East China Sea Air Defense Identification Zone”. . . . Freedom of overflight and other internationally lawful uses of sea and airspace are essential to prosperity, stability, and security in the Pacific. We don’t support efforts by any State to apply its ADIZ procedures to foreign aircraft not intending to enter its national airspace . . . . We urge China not to implement its threat to take action against aircraft that do not identify themselves or obey orders from Beijing . . . .

Furthermore, during a daily U.S. Department of State press conference, a Department of State spokesperson, Marie Harf, provided a less diplomatic response to questions regarding China’s ADIZ. She stated that the East China Sea ADIZ is not consistent with international aviation practice or international norms respecting navigational freedoms. She added that China’s “provocative behavior” is not characteristic of a major power that should be upholding international norms and promoting peace and stability. Finally, she stated that during United States conversations with Chinese diplomats on the ADIZ, the United States made it clear that it “will not recognize the ADIZ, that the Chinese should not implement the ADIZ, and [that it] should

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not take any action against aircraft that do not identify themselves if they’re entering the ADIZ.”

Despite the stern words by Secretary Kerry and Ms. Harf, the United States has taken a mixed approach to responding to China’s ADIZ. Consistent with United States policy, practice and interpretation of ADIZs, the U.S. Department of Defense instructed U.S. military aircraft not to follow the rules for China’s ADIZ, unless the aircraft intend to enter China’s territorial or territorial seas airspace, and has maintained routine military exercises and missions in the ADIZ. For safety purposes, the U.S. Federal Aviation Administration, however, has instructed U.S. chartered civil airlines to follow the ADIZ rules and identification requirements.

While it is clear that the United States and other countries do not agree with China’s announcement of the East China Sea ADIZ and have made statements that China’s actions violate “international norms”, it is much less clear whether China’s actions in establishing the ADIZ did in fact violate international law or were declared and

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10 Daily Press Briefing, Marie Harf, supra note 7.
implemented incorrectly. The most relevant sources of international law, treaties and State practice relating to the law of the sea (Part III) and international aviation law (Part IV) demonstrate that China’s establishment of the ADIZ is lawful (Part IV).

Even so, there are various ways to address the conflict over China’s ADIZ, allowing China, its neighbors and the world community to forgo the potential for miscalculation and disaster (Part IV). Greater uniformity across the boundaries of territorial and international airspace is necessary to address longstanding problems of air sovereignty. It is the lack of agreement on such issues that produces legal uncertainty with regard to air law and sovereignty over national airspace.

II. Concept and Existence of ADIZs

The establishment of an ADIZ is not a novel concept. In the 1950s, the United States established the first ADIZs following World War II and the onset of the Cold War to prevent and guard against surprise attacks from the Soviet Union. While the United States maintains ADIZs

over both coastal waters and its national territory, ADIZs are typically established beyond the State’s territory and territorial sea and provide for early detection of aircraft approaching or entering the State’s sovereign airspace.

This Part defines ADIZs, briefly distinguish ADIZs from other State controlled airspace, review various State practices and conclude with a discussion as to whether ADIZs are still appropriate. While the rules and parameters of ADIZs differ from State to State, there is a consensus on the definition of ADIZs as discussed below.

A. What are ADIZs?

The international community, through the International Civil Aviation Organization (ICAO), defines ADIZs as “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 services.

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14 See generally Convention on International Civil Aviation (Chicago Convention), Dec. 7, 1944, 61 Stat. 1180, 15 UNTS 295. The ICAO is a U.N. specialized agency created in 1944 by the Chicago Convention. According to the ICAO’s website, it “works with the Convention’s 191 Signatory States and global industry and aviation organizations to develop international Standards and Recommended Practices (SARPs) which are then used by States when they develop their legally-binding national civil aviation regulations.” The ICAO oversees over 10,000 SARPs in the 19 Annexes to the Chicago Convention. See the ICAO’s website for more information: http://www.icao.int/about-icao/Pages/default.aspx.
In short, ADIZs are airspaces that typically extend beyond a State’s national territory and territorial seas where States set reporting obligations through implementing national laws requiring aircraft to report certain information, to include identification, location and flight plans, to local air traffic control before approaching the national territory and airspace in order for authorities to determine if the aircraft is a threat to national security.

If aircraft do not provide the specified reporting and identification requirements established by the State exercising control over the airspace, the aircraft may be susceptible to interrogation, interception, a forced landing, or in the worst-case scenario, shot down. Currently, approximately 15 countries have active ADIZs. ADIZs are not Flight Information Regions (FIR). While similar in nature to ADIZs, FIRs are defined areas of airspace within which aircraft are required to provide flight information and alerting services. The ICAO

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16 Welch, supra note 12; see also Peter A. Dutton, Caelum Liberam: Air Defense Identification Zones Outside Sovereign Airspace, 103 Am. J. Int’l L. 691, 691 (2009).
establishes FIRs for the safety of civil aviation and can encompass both national and international airspace.\textsuperscript{18}

No international treaty expressly authorizes the use and establishment of ADIZs but, as noted in Parts III, IV and V, international law does not expressly prohibit the establishment of ADIZs either. Unlike the amount of criticism following China’s establishment of its ADIZ, many States have established ADIZs without challenge and the international aviation community quietly complies with the rules and reporting requirements for the ADIZs.\textsuperscript{19}

B. States with ADIZs

As stated previously, the United States established the first ADIZs in the 1950s. Other countries that currently maintain ADIZs include Australia, Canada, China, Finland, India, Japan, Myanmar, Pakistan, Philippines, South Korea, Sri Lanka, Taiwan, Thailand and Turkey.\textsuperscript{20}

Unfortunately, while ADIZs exist in States other than the United States, the various national implementing laws concerning the establishment of the ADIZs is in the native language of each State and is not readily available. In addition, the rules establishing ADIZs and the reporting

\textsuperscript{18} The Commander’s Handbook on the Law of Naval Operations, supra note 8, at para. 2.7.2.2.
\textsuperscript{19} Head, supra note 12, at 182.
\textsuperscript{20} E-mail from Elton Schmitt, supra note 17.
requirements for each ADIZ in those countries are scarce.\textsuperscript{21} As provided below, information on the various ADIZs was taken from each State’s Aeronautical Information Publication (AIP). Information on the ADIZs for Pakistan and Sri Lanka is not provided.

While a detailed analysis of the various States’ ADIZs would be helpful to better analyze where China’s ADIZ conformed with or deviated from established norms, the analysis is confined to information found in secondary literature and the AIPs. The following subsections discuss the States with ADIZ regulations published in their respected AIPs.

1. Australia

Australia defines an ADIZ as “airspace of defined dimensions within which identification of all aircraft is required.”\textsuperscript{22} Australia requires specific reporting requirements when a flight intends to operate within an ADIZ. While Australia carves out a few exceptions to the

\textsuperscript{21} During the course of preparing this thesis, the author consulted the U.S. Federal Aviation Administration (FAA) and Jeppesen, a Boeing Company. Neither could provide more than a cursory overview of the various States’ ADIZs. This simple overview included the countries that currently maintain ADIZs and the location of the ADIZs. Jeppesen, A Boeing Company, http://ww1.jeppesen.com/index.jsp (last visited Apr. 30, 2014) (Jeppesen provides comprehensive, accurate, and timely navigational air and sea transportation information to the global aviation community. Jeppesen products include navigation charts and information concerning international restrictive airspaces).

\textsuperscript{22} Aeronautical Information Publication Book, pt 2, s 1.1.2 (May 29, 2014)(Austl.)(emphasis added).
reporting requirements,\textsuperscript{23} based on published guidance, all aircraft operating within an ADIZ are required to following the reporting requirements.\textsuperscript{24} Reporting includes, but is not limited to, position, departure notices, intended deviations, tracks and altitudes and landing points.\textsuperscript{25} In addition, Australia has published interception procedures for aircraft that do not comply with the ADIZ reporting requirements.\textsuperscript{26} Ultimately, if an aircraft is identified as “hostile”, that aircraft can be engaged by fighter aircraft and destroyed.\textsuperscript{27}

Unlike U.S. policy that will be discussed below, Australia does not differentiate between aircraft intending to penetrate Australian territorial airspace or those that are simply operating within an ADIZ not intending to penetrate Australian territorial airspace. In addition, Australia does not differentiate between civil or State aircraft; therefore, it requires all aircraft operating within its ADIZ to comply with reporting requirements.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{23} Id. at pt 2, s 1.1.4.
\item \textsuperscript{24} Id. at pt 2, s 1.1.3.
\item \textsuperscript{25} Id. at pt 2, ss 1.1.3, 1.1.5, 1.1.6, 1.1.7, 1.2.1, 1.3.1.
\item \textsuperscript{26} See generally Id. at pt 2, s 1.4.
\item \textsuperscript{27} Id. at pt 2, s 1.4(c).
\end{itemize}
\end{footnotesize}
2. Canada

In 1951, Canada established ADIZs with similar regulations to those of the United States.\textsuperscript{28} Canada defines ADIZs as "[a]irspace of defined dimensions extending upwards from the surface of the earth within which certain rules for the security control of air traffic apply."\textsuperscript{29} Like the United States’ written regulations, the Canadian regulations require filing of flight plans and en route position reporting for any aircraft that will operate within a coastal ADIZ.\textsuperscript{30} In addition, the Canadian rules expressly provide that a violation of the rules could result in in-flight interception by military interception aircraft, are applicable to military aircraft as well as civil aircraft, and apply to all aircraft about to enter the ADIZ, regardless of whether or not the destination is Canada.\textsuperscript{31}

The regulations differ in two significant ways from the U.S. regulations - Canada requires all aircraft passing

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\textsuperscript{28} Canadian Department of Transport, Air Services Branch, NOTAM 22/54 Rules for the Security Control of Air Traffic, superseding NOTAM 13/54, SOR/1954-64 (Can.).
\textsuperscript{29} Aeronautical Information Publication Canada, Part 1, Table 2.2.4, July, 24, 2014 (Can.).
\textsuperscript{30} NOTAM 22/54 Rules for the Security Control of Air Traffic, supra note 28.
\textsuperscript{31} Id. at § 2.10.1.
\end{flushleft}
through the Canadian zone even though not flying to Canada to provide identification information.32

3. China

China uses the definition for ADIZ as found in ICAO Annex 1533 and defined in Part II. A. above. According to China’s AIP, China requires all aircraft operating within the East China Sea ADIZ to provide flight plan identification, radio identification, transponder identification, and logo identification regardless of whether the aircraft is intending to penetrate China’s territory or territorial seas airspace.34 In addition, China warns that it will deploy fighter interceptors to intercept any aircraft that does not comply with China’s ADIZ regulations.35

Like Canada’s regulations, China’s regulations differ from the U.S. regulations in that China requires all aircraft passing through the Chinese ADIZ even though not flying to China to provide identification information.

32 Id. at para. 2.1; see also Aeronautical Information Publication Canada, supra note 29, at Part 2, CA-6.
34 Aeronautical Information Publication China (中国航行资料汇编) [AIP China] (promulgated by China’s Ministry of National Defense, Nov. 23, 2013, effective Nov. 23) ICAO, Mar. 5, 2014, ENR 5.2(China).
35 Id.
4. Finland

Finland defines an ADIZ as “a zone located inwards from the state border of Finland.”\(^{36}\) It appears that Finland’s definition of an ADIZ was mistranslated into English. Based on the geographical limits provided in ENR 5.2-8 of Finland’s AIP, in a few locations along its coast Finland imposes an ADIZ extending approximately 7 kilometers outwards into the adjacent waters of Finland’s territorial sea.\(^{37}\) Unfortunately, the AIP lacks sufficient detail on the ADIZ’s reporting requirements in order to compare Finland’s ADIZ to other States.

5. India

India uses the definition for ADIZ as found in ICAO Annex 15.\(^{38}\) India has eight ADIZs.\(^{39}\) Generally, no civil or military aircraft can operate to, through or within an established ADIZs without Air Defence Clearance.\(^{40}\) If an aircraft penetrates into or operates within an ADIZ without Air Defence Clearance, it will be liable to interception by fighter aircraft.\(^{41}\)

\(^{36}\) Aeronautical Information Publication SUOMI (Finland), Part 2, ENR 5.2-8, May 30, 2013 (Fin.).
\(^{37}\) Id.
\(^{38}\) ICAO, International Standards and Recommended Practices, supra note 15; see also Manual of Aeronautical Information Services, Airports Authority of India, Chapter 2 (Jan. 2006).
\(^{39}\) Aeronautical Information Publication India, Part 2, ENR 10, Aug. 1, 2007 (India).
\(^{40}\) Id. at Part 2, ENR 11.1.
\(^{41}\) Id. at Part 2, ENR 1.12 (3).
As will be seen below, India’s regulations differ from the United States in that India requires that all aircraft flying to, through or within the established ADIZs to obtain Air Defence Clearance and comply with ADIZ requirements.

6. Japan

Following Japan’s surrender after World War II, U.S. occupying forces demarcated ADIZs off Japan’s coasts. When the occupation forces left Japan, Japanese leaders elected to maintain the ADIZs. Japan defines an ADIZ as “an airspace established by Japan Ministry of Defense to facilitate taking measures against violation of territorial airspace.”  

In Japan’s ADIZ, “Japan Air Self Defense Force identifies aircraft approaching Japanese territorial airspace, and aircraft unidentified by flight plan is liable to in-flight interception.” Japan’s ADIZ overlaps with most of its Exclusive Economic Zone.

While very similar to the U.S. ADIZs, Japan requires aircraft approaching Japanese territorial airspace to comply with its ADIZ reporting requirements even if the aircraft will not penetrate Japanese territorial or territorial sea airspace. For instance, Japan apparently

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43 Id.
requires Taiwanese aircraft entering Japan’s ADIZ to file a flight plan regardless of destination, according to Chinese authorities.\textsuperscript{44}

7. Myanmar

Under the general rules established for Myanmar ADIZ flights, all flights “either originating in or penetrating into” the Myanmar ADIZ must receive Air Defense Clearance.\textsuperscript{45}

8. The Philippines

In the Philippines’ ADIZs “all flights, part or all of which will be conducted within the Philippine’s ADIZ and with indicated cruising airspeeds of 110 knots or greater, are required to file . . . flight plans.”\textsuperscript{46} Flight plans must contain the route, airspeed and altitude within the ADIZ. In addition, the flight plans must estimate where the flight will penetrate the ADIZ.\textsuperscript{47} If an aircraft does not comply with the reporting requirements, the aircraft is subject to interception.\textsuperscript{48}

\textsuperscript{44} Joseph Yeh, Aircraft Intercepted by Japanese Military, THE CHINA POST, Dec. 3, 2013, available at http://www.chinapost.com.tw/taiwan/intl-community/2013/12/03/395089/Aircraft-intercepted.htm (According to Taiwan’s Civil Aeronautics Administration, Japanese aviation authorities have required Taiwanese airliners to submit flight plans when traveling through the overlapping area of Japan’s ADIZ and Taiwan’s Flight Information Region.).
\textsuperscript{46} Aeronautical Information Publication Philippines, Part 2, ENR 5.2(3)(2)(2.1), Nov. 19, 2009.
\textsuperscript{47} Id. at Part 2, ENR 5.2(3)(2)(2.4).
\textsuperscript{48} Id. at Part 2, ENR 1.12.
9. Republic of Korea

The Republic of Korea (ROK) established its ADIZ during the Korean War to block communist forces from proceeding down the Korean peninsula. The ROK requires pilots who want to fly within its ADIZ to submit a flight plan to the Minister of Defense prior to conducting the flight.\textsuperscript{49} Aircraft must establish two-way air-to-ground radio communications, operate secondary surveillance radar transponders, report its position and give position reports every 30 minutes while within the ADIZ.\textsuperscript{50} The ROK’s ADIZ covers most of its claimed airspace.

In response to China establishing its ADIZ in November 2013, the ROK expanded its ADIZ on December 8, 2013 to include the islands of Marado and Hongdo and Ieodo, a submerged rock within the overlapping exclusive economic zones of ROK and China.\textsuperscript{51}

10. Taiwan

The published regulations for Taiwan’s ADIZs\textsuperscript{52} outline the boundary of its ADIZ in subsection 1, and according to subsections 2, 3, 4, and 5, it appears that the regulations

\textsuperscript{50} Id.
\textsuperscript{52} See generally Aeronautical Information Publication Taipei Fir, Part 2, ENR 1.12, Jan. 1, 2009 (Taiwan).
apply only to non-tactical aircraft, i.e., civil aircraft.\textsuperscript{53} Taiwan specifically provides for interception by its Air Force interceptors should aircraft fail to adhere to the ADIZ procedures.\textsuperscript{54} Ultimately, Taiwan warns that an aircraft will be in jeopardy if it does not follow the instruction given by the inceptor.\textsuperscript{55}

11. Thailand

The Bangkok Area Control Centre is responsible for controlling all aircraft within the Thailand ADIZ.\textsuperscript{56} All aircraft flying along the airways shall report at normal reporting points and estimate time over the ADIZ boundary at least 10 minutes in advance.\textsuperscript{57} Aircraft not adhering to the ADIZ rules and procedures will be intercepted by the Royal Thai Air Force and will be attacked if they fail to obey any instructions from the interceptors.\textsuperscript{58}

12. Turkey

Turkey does not publish ADIZ regulations in its AIP.\textsuperscript{59} Instead, Turkey has established ADIZs via Notices to Airmen

\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Thailand Aeronautical Information Publication, Part 1, GEN 3.3, Dec. 10, 2008 (Thailand).
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} See generally Turkey Aeronautical Information Publication, Dec. 27, 2001 (Turkey).
These NOTAMs require reporting positions, an operational transponder and two-way radio communications. The requirements apply to all aircraft entering the ADIZ areas.

13. United States

On September 9, 1950, Congress amended the Civil Aeronautics Act of 1938 to permit the U.S. President to direct the Secretary of Commerce to develop and implement a plan for security control of air traffic. If the Secretary of Commerce determined that a perceived threat endangered U.S. security then, after consulting the Departments of Defense and State, the Secretary could establish security zones in the airspace, prohibiting or restricting flights, not effectively identified by the Air Traffic Services (ATS).

On December 20, 1950, President Harry S. Truman signed Executive Order No. 10,197 directing the Secretary of Commerce to exercise security control over airspace because of security concerns. Subsequent regulations promulgated at the direction of the Secretary of Commerce established

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61 Id.
63 Id.
ADIZs over the territorial United States and in the waters
approaching the United States.\textsuperscript{65}

In 1958, the Federal Aviation Act superseded the Civil Aeronautics Act.\textsuperscript{66} The ADIZ regulations that replaced the regulations under the Civil Aeronautics Act and are currently in force are substantially the same as the original, except for subtle changes in terminology and the number of zones.\textsuperscript{67}

The United States defines an ADIZ as “[a]irspace over land or water in which the ready identification, location, and control of all aircraft…is required in the interest of national security.”\textsuperscript{68} U.S. ADIZs not only include zones over non-sovereign territorial and territorial seas but also over portions of U.S. sovereign territory such as the Washington D.C. metropolitan area.\textsuperscript{69}

Aircraft entering the U.S. ADIZs must comply with flight plan, transponder-on and position reporting requirements.\textsuperscript{70} The stated purpose behind the ADIZs is to

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\textsuperscript{65} 15 C.F.R. 9, 319 (1950).
\textsuperscript{67} 14 C.F.R. §§ 99 et al., supra note 11.
\textsuperscript{68} Id. § 99.3(emphasis added); see also United States of America Aeronautical Information Publication, Part 1, GEN 1.7, Mar 7, 2013 (defining ADIZ as “[a]irspace over land or water, extending upward from the surface, within which the ready identification, the location, and the control of aircraft are required in the interest of national security.”).
\textsuperscript{69} 14 C.F.R. § 91.161 (2014).
\end{flushleft}
ensure that aircraft entering United States domestic airspace provide for identification prior to entry.\textsuperscript{71} The United States justifies the establishment of the ADIZs as necessary to ensure national security, to control illicit drug activities, to minimize unnecessary intercept and search-and-rescue operations, and to decrease the risk of a midair collision and other public hazards.\textsuperscript{72}

The United States maintains five coastal ADIZs. The two continental U.S. ADIZs extend seaward of the United States coastlines by more than 300 nautical miles in some Atlantic areas and more than 400 nautical miles off the coast of southern California.\textsuperscript{73} The United States also maintains an irregularly shaped ADIZ off the coast of Alaska that extends at least 350 nautical miles into the airspace above the Bering Sea and a similar distance into the Arctic Sea.\textsuperscript{74} The ADIZ surrounding Guam extends a

\textsuperscript{72} Dutton, supra note 16, at 699.
radius of 250 nautical miles from the island\textsuperscript{75}, and the Hawaiian ADIZ surrounds the island chain.\textsuperscript{76}

It is U.S. policy to permit foreign State aircraft to operate within the various U.S. ADIZs without complying with the required reporting requirements as long as the State aircraft is not bound for the United States.\textsuperscript{77} The United States does so in recognition of its policy to assert the right of the U.S. military aircraft operating abroad to fly through other ADIZs without complying with the coastal State’s regulations as long as the U.S. aircraft does not intend to enter the coastal State’s national airspace and is not otherwise operating under controlled flight.\textsuperscript{78}

Based on U.S. policy, the United States Navy Commander’s Handbook on the Law of Naval Operations\textsuperscript{79} specifically instructs United States military aircraft to

\textsuperscript{77} The Commander’s Handbook on the Law of Naval Operations, supra note 8.
\textsuperscript{78} Id. at para. 2.13; see also U.S. Dep’t of Defense, Instr. 4540.01, Use of International Airspace by U.S. Military Aircraft and for Missile/Projectile Firings para. 6.4 (Mar. 28, 2007) (instructing U.S. military pilots on the proper procedures for operations in another country’s ADIZ, specifically instructing military aircraft not to follow ADIZ procedures if the aircraft is simply transiting through the foreign ADIZ); U.S. Dep’t of the Air Force, Judge Advocate General’s Dep’t, Air Force Operations and the Law: A Guide for Air and Space Forces 13 (2d ed. 2009).
\textsuperscript{79} The Commander’s Handbook on the Law of Naval Operations, supra note 8.
ignore the ADIZ of other States when operating in coastal areas:

The United States does not recognize the right of a coastal nation to apply its ADIZ procedures to foreign aircraft not intending to enter national airspace nor does the United States apply its ADIZ procedures to foreign aircraft not intending to enter U.S. airspace. Accordingly, U.S. military aircraft not intending to enter national airspace should not identify themselves or otherwise comply with ADIZ procedures established by other nations unless the United States has specifically agreed to do so.\textsuperscript{80}

U.S. law does not distinguish between aircraft entering or not entering U.S. airspace; however, U.S. policy and practice requires only those aircraft bound for U.S. territorial airspace to comply with ADIZ reporting requirements. This being said, the difference between U.S. law and practice can lead to confusion. For example, as stated above, the United States defines an ADIZ as "[a]irspace over land or water in which the ready identification, location, and control of all aircraft . . . is required in the interest of national security."\textsuperscript{81} This language appears to require all aircraft to comply with ADIZ requirements. In addition, in the radio requirements regulation,\textsuperscript{82} the regulation refers to civil aircraft

\textsuperscript{80} Id. at para. 2.7.2.3.
\textsuperscript{81} 14 C.F.R. § 99.3 (emphasis added).
\textsuperscript{82} Id. § 99.9.
in subsection (a)\(^{83}\) but then uses “an aircraft” in subsequent subsections.\(^{84}\) The omission of the word “civil”, could be read to mean that all aircraft, regardless if State or civil, must comply with the radio requirements.

As stated above, it is U.S. policy not to require State aircraft transiting through an ADIZ to report as long as it is not traveling to the United States. The practice and policy of the United States not to apply its ADIZs regulations to foreign State aircraft not bound for the U.S. territorial airspace is a matter of regulatory interpretation and interpretation of relevant international law.\(^{85}\)

From the limited information obtained on other State practice, it appears that the United States may be alone in its specific, policy-based application of ADIZs as the other States examined above require all aircraft to comply with ADIZ requirements regardless if they are civil or State aircraft and regardless of whether the aircraft intends to enter the State’s territory and territorial waters. In addition, as indicated above, since 1950, the national regulations

\(^{83}\) Id. § 99.9(a).
\(^{84}\) See 14 Id. §§ 99.9 (b)-(d) (2014).
\(^{85}\) Dutton, supra note 16, at 699.
for each State are very similar, and as will be
discussed below, should be considered customary
international practice. The following section will
discuss the common characteristics and differences of
the State practice recounted above.

C. Key Characteristics of ADIZs

There are a few key characteristics of ADIZs that can
be gleamed from the various State practice as stated above,
First, a significant number of States required all
aircraft, regardless of if the aircraft is civil or State,
to comply with ADIZ reporting requirements.

Second, the majority of States also require compliance
with ADIZ reporting requirements even if the aircraft are
entering the ADIZ with no intentions to penetrate the
airspace of the State’s territory or territorial seas. For
example, the published rules for ADIZs of Australia,
Canada, India, the Philippines, Myanmar, Taiwan and Turkey
require the filing of flight plans for foreign aircraft
operating in their ADIZ without any reference to the
destination of the aircraft.86

This indicates that China’s ADIZ requirements imposed
on all aircraft, including civil and State, entering
regardless of whether the aircraft will penetrate Chinese

86 Jeppesen Sanderson Inc., “Airway Manual WH-II Enroute Date – Pacific:
territorial or territorial sea airspace, is in conformity with the majority of States who maintain ADIZs.

Third, it may be common practice for States to notify its neighbors, especially those that its ADIZs may overlap with, that it plans on establishing an ADIZ. Unfortunately, the majority of the information on the various States’ ADIZs does not contain detailed information as to whether States’ with established ADIZs overlap with ADIZs established by other States. That said, it is well known that the United States and Canada maintain overlapping ADIZs by agreement of the two States.

Additionally, in response to China’s establishment of its ADIZ in November 2013, the ROK expanded its ADIZ on December 8, 2013 to include the islands of Marado and Hongdo and Ieodo, a submerged rock within the overlapping exclusive economic zones of the ROK and China. According to news sources, the ROK consulted China prior to extending its ADIZ.87

Furthermore, the western section of Japan’s original ADIZ resulted in only half of the Yonaguni Island being part of Japan’s ADIZ and the western half of the island being part of Taiwan’s ADIZ. On June 25, 2010, Japan extended its ADIZ around the entire island thereby

87 Sang-ho, supra note 51.
overlapping with part of Taiwan’s ADIZ. While Taiwan did not condone the move, it did not object to Japan’s actions.88

Based on this history, States typically notify neighboring States prior to expanding or imposing ADIZs. The shock of China’s ADIZ would have been eliminated had China advised its neighbors that it was implementing an ADIZ that would overlap the ADIZs of its neighbors.

Nonetheless, despite slight nuances, the rules establishing the various States’ ADIZ are consistent. China’s ADIZ reporting requirements are similar to the majority of the States, including the United States. The difference in the application of ADIZ rules is a matter of U.S. policy and not its actual law. U.S. policy differs from not only China but many States, including Canada, in which the United States shares control of an ADIZ.

Ultimately, States recognize ADIZs 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.89 Since 1950, States have established and maintained ADIZs, and other States have abided by the rules and requirements set out in the

89 Welch, supra note 12.
national laws of the States imposing the ADIZs. This continued State practice, with slight variations, establishes a customary practice among States as it relates to the establishment and use of ADIZs. Despite State practice, even as recent as December 2013, to establish ADIZs, there is an ongoing debate as to whether ADIZs are still appropriate as discussed below.

D. Are ADIZs still appropriate?

When China announced the establishment of the East China Sea ADIZ, it reinvigorated the debate as to whether ADIZs are still appropriate. As will be discussed in following sections, ADIZs are not explicitly permitted or prohibited by international law. In addition, it is generally stated that ADIZs appear to have an insignificant effect on international air travel. Typically, as long as the procedural requirements of the various ADIZs are complied with, ADIZs do not have significant effect on flights that would otherwise be allowed over the territory or territorial seas of States.

While justification for continued use of ADIZs appears to be linked to national security and necessity, arguably new systems and advanced technology render ADIZs obsolete.

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90 Id.
The purpose behind the establishment of the U.S. ADIZs was to prevent surprise attacks, like that on Pearl Harbor, and to ensure safety of international air travel.\textsuperscript{93} In 1950, the United States' main concern was the reach of long-range bombers. The early ADIZs established a buffer system to give the United States notice of an attack and time to deploy defense measures.\textsuperscript{94} While the concern for long-range bombers attacks on the United States mainland has diminished considerably, new technology has ushered in concerns that the ADIZ buffer area will not be able to protect against the new threats.

That said, David Welch\textsuperscript{95} articulates the benefits of establishing ADIZs. While ADIZs serve as a security mechanism, Welch states that ADIZs also serve additional purposes:

\begin{quote}
An ADIZ can help reduce the risk of midair collisions, combat illicit drug flows, facilitate search-and-rescue missions, and reduce the need for fighter jet sorties for purposes of visual inspection. This last point is the most important: ADIZs can increase transparency, predictability, and strategic stability by reducing uncertainty on both sides about when, where, and how aerial interceptions might take place.\textsuperscript{96}
\end{quote}

\textsuperscript{94} Cuadra, \textit{supra} note 91, at 495.
\textsuperscript{95} David A. Welch is the CIGI Chair of Global Security at the Balsillie School of International Affairs and a senior fellow at the Centre for International Governance Innovation.
\textsuperscript{96} Welch, \textit{supra} note 12.
Welch illustrates his point by recalling the 1960 incident where the Soviet Union shot down a U.S. reconnaissance aircraft over international waters. He opined that if the Soviet Union had an established ADIZ and identification procedures in place, the aircraft likely would not have been shot down.\textsuperscript{97}

That view, however, is doubtful given the U.S. Department of Defense’s position that U.S. military aircraft are not required to comply with another State’s ADIZ if the aircraft is not intending to enter the State’s national airspace.\textsuperscript{98} Ultimately, the heightened tensions between the two countries, not the lack of an ADIZ, resulted in the destruction of the U.S. reconnaissance aircraft.

While Welch opines that ADIZs are not prohibited by international law, he concedes that one of the main issues with ADIZs is that there are no international agreements governing ADIZs and there is no explicit authorization or prohibition against establishing the zones.\textsuperscript{99}

Because States only have the right to regulate the airspace above their sovereign territory and territorial

\textsuperscript{97} Id.
\textsuperscript{98} The Commander’s Handbook on the Law of Naval Operations, supra note 8, at para. 2.7.2.3.
\textsuperscript{99} Welch, supra note 12.
seas, Welch opines that “countries are not legally obliged to comply with another countries’ ADIZ requirements in international airspace, but they tend to do so because of the security and safety benefits to all. An air defense identification zone is about security and safety, not politics or law.”

Another scholar, Peter Dutton, states that it was a different time when ADIZs were first established.

[T]he landscape of international law was relatively simple: airspace over sovereign territory, including a narrow 3-mile band over territorial waters, was fully sovereign. All remaining airspace reflected the status of the high seas; that is, it was a zone in which all States equally enjoyed navigation and overflight freedoms.

The change in both maritime and aviation law since the early establishment of ADIZs, led Mr. Dutton to suggest that questions have been raised “as to whether these legal developments have affected the status of maritime airspace or established new authorities that allow coastal States to regulate foreign aircraft in the airspace beyond the territorial sea in derogation of the overflight freedoms of other States.”

If weaponry has advanced to the point that ADIZs may not provide the necessary security that they did in the

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100 Id.
102 Id. at 692.
1950s, there appears to be no need to continue to maintain the zones. If there is no basis to maintain the zones, there is also no need for additional States to establish such zones. While ADIZs may no longer be necessary because of advances in technology, it is unlikely that States with established ADIZs will terminate the zones any time soon.

With a general foundation of the concept and existence of ADIZs, Part III discusses rules relating to the law of the sea, while Part IV deals with rules relating to international aviation law, to determine whether there is a basis in either for the continuing establishment and use of ADIZs.

III. The Legality of ADIZs under the Law of the Sea as of 2013

The principle of freedom of the seas recognizes that the surface of the high seas and the superjacent airspace are free for use by all.103 In accordance with the United Nations Convention on the Law of Seas (UNCLOS), airspace over the high seas is open to aircraft of all States, including military aircraft.104 It is noted that the freedom of the high seas and the airspace above it is grounded in customary international law, and States that

are not parties to the UNCLOS are guaranteed the same protections and freedoms as those States that are parties to the UNCLOS.\textsuperscript{105}

As will be seen in the sections that follow, since World War II, various treaties have delimited territorial and high seas areas and have restricted the free use of the seas. For example, the UNCLOS expanded the original three-mile limit of a coastal State’s territorial sea to twelve miles in response to the creeping jurisdiction of States demanding the increase to enhanced security, environmental protection, and natural resource exploitation.\textsuperscript{106} This expansion extended the coastal state’s authority to limit the use its territorial sea up to twelve miles.

While treaties have carved out exceptions to the principle of the freedom of the seas, as will be seen in the sections below, there is no international agreement that either permits or prohibits the establishment and use of ADIZs, ADIZs are permissible under customary international law and the UNCLOS.


A. Customary Rules Prior to 1958

For centuries, the primary basis for the law of the sea was found in customary international law. According to the Romans, the sea was res communis – preserved for the entire community. Presumably the Romans thought that the seas belonged to everyone.107 After the fall of Rome and well into the fifteenth and sixteenth centuries, the notion of res communis changed into res nullis, where States with strong navies saw the seas belonging to no one, and therefore, laid claim to large areas of the world’s oceans and seaways.108 However, with the growth of maritime trade and additional navies, the States with large navies were unable to maintain control over the vast areas of the ocean that they claimed.

In the early seventeenth century, Hugo Grotius published his Mare Liberum. In the pamphlet, he opposed the notion of res nullim and advocated for mare liberum – the freedom of the seas.109 The concept of mare liberum was accepted by the international community and became

107 MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS 20 (2013)
108 Id.; see also Andrew S. Williams, The Interception of Civil Aircraft Over the High Seas in the Global War on Terror, 59 A.F. L. REV. 73, 94 (2007).
considered customary international law. However, by the middle of the twentieth century, due to advances in technology, concern for the environment and the outward creeping of the jurisdiction of many coastal States into the seas beyond the three mile territorial sea, it became necessary to develop a treaty based regime for the use and exploitation of the oceans.

B. 1958 Law of the Sea Conventions

High Seas (CFCLR) entered into force on March 20, 1966; as of August 17, 2014, there are 39 parties to the Convention, including United States.\textsuperscript{114} The Convention on the Continental Shelf (CCS) entered into force on June 10, 1964; as of August 17, 2014, there are 58 parties to the Convention, including the United States.\textsuperscript{115} Finally, the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes (OPSD) entered into force on September 30, 1962; as of August 17, 2014, there are 38 parties to the Optional Protocol. The United States is not a party.\textsuperscript{116}

While the four Conventions and the Optional Protocol did not specifically authorize the use or establishment of ADIZs, there is nothing in the Conventions of Optional Protocol that would specifically prohibit the establishment of the ADIZs either, and as will be discussed below, when confronted with whether to address ADIZs, the Convention elected not to do so.

The CTS established the rules for the territorial sea and the contiguous zones.\textsuperscript{117} Article 1, paragraph 1, of the CTS confirms that the sovereignty of the State extends “beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.”\textsuperscript{118} Article 2 of the CTS further provides that the coastal State’s sovereignty extends to the airspace over the territory and territorial sea.\textsuperscript{119} Section II of the CTS articulates the baseline for measuring the territorial sea at the low-water line along the coast.\textsuperscript{120} While Section III of the CTS provides for the innocent passage of ships through the territorial sea of a coastal State, there is no discussion as to the right of innocent passage of aircraft within the territorial sea of a coastal State.\textsuperscript{121} In summary, it is established law that a State has sovereignty within the airspace over its territory and territorial sea.\textsuperscript{122} In addition, there is no right to innocent passage for aircraft over a State’s territorial sea.\textsuperscript{123}

\begin{itemize}
\item \textsuperscript{117} See generally Convention on the Territorial Sea and the Contiguous Zone, supra note 113.
\item \textsuperscript{118} Id. at 206.
\item \textsuperscript{119} Id. at 207.
\item \textsuperscript{120} Id. at 208.
\item \textsuperscript{121} See generally Id. at 214-220.
\item \textsuperscript{122} Id. at 207.
\item \textsuperscript{123} Id. at 214-220.
\end{itemize}
In Article 1 of the CHS, the high seas are defined as “all parts of the sea that are not included in the territorial sea or in the internal waters of a State.”\textsuperscript{124} In addition, and more importantly for ADIZ purposes, Article 2 provides that the high seas are “… open to all nations, no State may validly purport to subject any part of them to its sovereignty” and the freedoms over the seas include the freedom of navigation.\textsuperscript{125} The definition of the high seas and the freedoms that are guaranteed in and over the high seas appears to be at conflict with the lawful establishment of an ADIZ.

Furthermore, in Article 2 of the CCS, States are specifically permitted to authorize exclusive, but limited, sovereignty rights over the continental shelf.\textsuperscript{126} In Article 3, the CCS makes it clear that State sovereignty over the continental shelf does not “affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.”\textsuperscript{127}

The 1958 Conventions appear to prohibit the use of ADIZs over the high seas but do not specifically state so in the Conventions or Optional Protocol. This is not to say that the International Law Commission completely

\textsuperscript{124} Convention on the High Seas, supra note 114, at 82.
\textsuperscript{125} Id. at 82-83.
\textsuperscript{126} Convention on the Continental Shelf, supra note 116, at 312.
\textsuperscript{127} Id. at 314.
ignored the interplay of the law of the air and law of the sea. During the drafting of the articles on the contiguous zones, the Commission discussed air zones over which a coastal State may exercise control, but stated that the problem of establishing the airspaces did not "come within the regime of the high seas." Specifically, the committee elected not to address the issues of ADIZs within the 1958 Conventions.

In addition, E. Pepin, Director of the Institute of International Air Law, McGill University, prepared in 1957 a comparative study of the relevant provisions of air law and the proposed rules that would ultimately appear in the 1958 Conventions. Pepin pointed out that the notion that a State has exclusive and complete sovereignty over the airspace above its territory is articulated in Article 1 of the Chicago Convention and that the sovereignty over the territorial airspace extended to territorial waters adjacent to the land as provided in Article 2.

As stated in Section III of the CTS, there is no right to innocent passage for aircraft over a State’s territorial

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130 Id. at 65.
As Pepin pointed out, the Chicago Convention did not give the right of innocent passage to aircraft over the territory of a State or its territorial sea. According to Pepin, neither the Chicago Convention nor the prior conventions on the law of the air, formulated the freedom of flight over the high seas. In this regard, the CHS established new rules for air law. While the Chicago Convention did not specify that aircraft have freedom of flight over the high seas, it can be argued that the idea of freedom of flight over the high seas was considered a matter of customary law when the ICAO, in Article 12 of the Chicago Convention, and not each State to the Chicago Convention, was delegated responsibility to make rules governing the high seas.

As for ADIZs, Pepin did not think that they are compatible with the 1958 Conventions. Specifically, he drew a comparison between the purpose of contiguous zones, i.e., customs, fiscal and sanitary regulations, and that of the ADIZs. When drafting the Conventions, the commission

133 Id. at 67.
134 Id. at 67; see also Convention on the High Seas, supra note 114, at 82-83.
135 Chicago Convention, supra note 14, at art. 12.
136 The Law of the Air and the Draft Articles Concerning the Law of the Sea Adopted by the International Law Commission, supra note 130, at 68.
137 Id. at 70.
specifically excluded “security” as a special right in the contiguous zone and left self-defense concerns of the State to the general principles of international law and the United Nations Charter. 138 Because the stated purpose of the ADIZs is to assist with national security, Pepin opined that analogizing ADIZs to the special exercise of control over the contiguous zone by a coastal State was incorrect. Ultimately, Pepin concluded that while the ADIZs are not compatible with the 1958 Conventions, he saw no protest to ADIZs that have been established since 1950. 139

While the 1958 Conventions and Optional Protocol did not establish a legal basis for the use or establishment of the ADIZs, they did not specifically prohibit the establishment either. Based on applicable international law in 1958, to include customary international law recognition of the rule of freedom of aviation over the high seas, Pepin correctly concluded that ADIZs were not compatible with the 1958 Conventions. 140 That said, Pepin also recognized that there had been no protests to the ADIZs that had been in use since 1950. 141 This early recognition of State practice and acquiescence and the next

138 Id. at 71.
139 Id.
140 Id. at 70.
141 Id. at 71.
sixty years of use of the ADIZs have resulted in customary practice.


The UNCLOS is an international agreement resulting from years of negotiating the rules applicable to the Law of the Sea and defines the rights and responsibilities of signature parties in their use of the world's seas. The UNCLOS was adopted in 1982.\textsuperscript{142} It incorporated the four 1958 Conventions discussed above. While the Convention concluded in 1982, the UNCLOS did not come into force until 1994. As of August 2014, 166 States have ratified or acceded to the Convention. The United States is not a party to the convention.\textsuperscript{143}

The UNCLOS incorporated years of negotiations and compromises, existing treaties, and current and evolving customary international law into a thorough legal regime for the use of the seas. The right to freedom of overflight over the world’s high seas is codified in the UNCLOS. While the UNCLOS extended jurisdictional or sovereignty rights for coastal States, coastal States must only exercise those rights that have been articulated in

\textsuperscript{142} UNCLOS, supra note 104.
the UNCLOS and are subject to the limitations imposed by
the UNCLOS.144

The legal status of the seas and the resulting UNCLOS
are of significant importance to the understanding of the
freedom of the air above the seas, for any exercise of
sovereignty or jurisdictional powers over the seas in turn
restricts the freedom to use the airspace above the seas.

1. Applicable Text of the Law of the UNCLOS

There are numerous articles in the UNCLOS that set out
rules for the use of the airspace above the sea. To begin
with, in Article 2 the UNCLOS defines the legal status of
the territorial sea and the airspace over it: the
sovereignty of a coastal State extends “beyond its land
territory and internal waters…to an adjacent belt of sea,
described as the territorial sea. This sovereignty extends
to the airspace over the territorial sea.”145 A State has
the right to establish its territorial sea not to exceed 12
nautical miles from baselines established in the UNCLOS.146
Note that this means a State could establish a smaller
territorial sea if it elects to do so.

In addition, while a ship is entitled to innocent
passage through a coastal State’s territorial waters, the

144 Hailbronner, supra note 93, at 494.
145 UNCLOS, supra note 104, at art. 2, at 27.
146 Id., art. 3, at 27.
UNCLOS is silent on the innocent passage of aircraft through a coastal State’s territorial waters.\textsuperscript{147} This silence is evidence that the UNCLOS elected to treat ships differently than aircraft with regard to certain areas established under the UNCLOS. The UNCLOS left no doubt that a State may regulate the airspace above the areas in which it exercises complete sovereignty: its territory, internal waters and territorial sea. As a State moves further from its coastline towards the high seas, the State’s rights with regard to exercising jurisdiction or sovereignty diminish.

There are special rules that apply to straits and archipelagic States. In straits, all ships and aircraft enjoy the right of transit passage for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone (EEZ).\textsuperscript{148} Furthermore, in accordance with Article 39, paragraph 3, civil aircraft that transit over straits are required to observe the Rules of the Air established by the ICAO and military aircraft are required to comply with such safety measures and operate with due regard for the safety of navigation.\textsuperscript{149} So while there is a certain amount of

\textsuperscript{147} Id., art. 17, at 30.
\textsuperscript{148} Id., art. 38, at 37.
\textsuperscript{149} Id., art. 39(3), at 37.
freedom for aircraft to operate within a strait, such aircraft have limits placed on overflight, too.

The sovereignty of archipelagic States extends to the airspace over the archipelagic territory and territorial waters.\textsuperscript{150} Therefore, unless the archipelagic State sets up sea lanes for sea and air passage, there is no right for aircraft to transition the archipelagic State’s territorial sea.\textsuperscript{151}

As stated above, a coastal State’s power to regulate the waters that extend from its territorial sea diminishes the further it moves from its shoreline. For example, a coastal State has limited control over the contiguous zone, not to exceed 24 nautical miles from the baseline in which the territorial sea is measured, to its territorial sea.\textsuperscript{152} In the contiguous zone, the coastal State may prescribe national laws to prevent and punish “infringement of its customs, fiscal, immigration or sanitary laws . . . within its territory or territorial sea.”\textsuperscript{153} While the State has a certain amount of control over the zone, it may not regulate in areas outside those specifically listed in Article 33.

\textsuperscript{150} Id., art. 49, at 41.
\textsuperscript{151} Id., arts. 52-53, at 42.
\textsuperscript{152} Id., art. 33, at 35.
\textsuperscript{153} Id.
An additional example of the extent of a State’s power to regulate beyond its territorial sea is a State’s authority to declare an EEZ beyond and adjacent to its territorial sea not to exceed 200 nautical miles.\textsuperscript{154} In the established EEZ, the coastal State has “sovereignty rights for the purpose of exploring and exploiting, conserving and managing the natural resources.”\textsuperscript{155} The coastal State has jurisdiction within the EEZ to establish and use artificial islands, installations and structures; to conduct maritime scientific research; and to protect and preserve the maritime environment.\textsuperscript{156} While a coastal State has the right to establish an EEZ and has limited jurisdiction over the EEZ, the UNCLOS specifically states that within the established EEZ all States continue to enjoy the freedoms of navigation and overflight as provided for in UNCLOS, Article 87.\textsuperscript{157}

Many States look to Article 59 to advance an argument that they are permitted to regulate further the activities within the established EEZs and if other States do not agree with the rights or jurisdiction that the coastal

\textsuperscript{154} Id., arts. 55, 57, at 43-44.
\textsuperscript{155} Id., art. 56, at 43.
\textsuperscript{156} Id., art. 56, at 43-44.
\textsuperscript{157} Id., art. 58, at 44.
State is exercising within its established EEZ, the parties should negotiate.\textsuperscript{158} Article 59 provides

In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State of States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as the international community as a whole.\textsuperscript{159}

While the majority of States agree that the EEZ permits States only to exercise the powers permitted by the UNCLOS, a few States, namely Brazil and China, have asserted State sovereignty over the EEZ thereby permitting them to regulate, and in practice limit, freedom of overflight in the zones. If EEZs, which cover about 40 percent of the earth’s ocean surface, are considered subject to the coastal State’s sovereignty, freedom of overflight would be “drastically curtailed.”\textsuperscript{160}

Article 87 sets out the freedoms provided for within the high seas and specifically lists the freedom of overflight belonging to all States over the high seas.\textsuperscript{161} Therefore, while a coastal State may exercise limited control over the EEZ, it is prohibited from interfering

\textsuperscript{158} Id., art. 59, at 44.
\textsuperscript{159} Id.
\textsuperscript{160} Hailbronner, supra note 93, at 493.
\textsuperscript{161} UNCLOS, supra note 104, art. 87, at 57.
with the freedoms provided in Article 87, to include freedom of overflight. A coastal State may enact rules that limit the freedom of overflight if those rules are tailored to regulate the areas within the control of the coastal State within the EEZ.\textsuperscript{162}

A coastal State has even fewer rights over the continental shelf. A coastal State has the right to explore and exploit the natural resources in the continental shelf, which is deemed to extend up to 200 nautical miles from the State’s baselines and possibility beyond that point, but cannot exceed 350 nautical miles.\textsuperscript{163} This right is exclusive to the coastal State and no other State may attempt to explore or exploit the coastal State’s continental shelf without the coastal State’s permission.\textsuperscript{164} Freedom of overflight is preserved over a coastal State’s continental shelf, and the coastal State cannot interfere with any other State’s freedom to navigation the waterways or airspace above the continental shelf.\textsuperscript{165}

Finally, the freedoms guaranteed over the high seas as articulated in Article 87 limit what States may regulate within the high seas. Ultimately, no State can claim

\textsuperscript{162} Id., arts. 56 & 86, at 43-44 and 57.
\textsuperscript{163} Id., arts.76-77, at 54.
\textsuperscript{164} Id., art. 77, at 54.
\textsuperscript{165} Id., art. 78, at 54.
sovereignty over the high seas\textsuperscript{166} as the high seas are preserved for the use by all States.\textsuperscript{167}

While there are additional UNCLOS articles that reference aircraft and overflight, such as those that dealing with piracy over the high seas,\textsuperscript{168} there is nothing in the UNCLOS that specifically authorizes or prohibits the establishment and use of ADIZs.

2. UNCLOS Negotiating History Relating to ADIZs

As stated above with regard to the negotiating history of the 1958 Conventions and Optional Protocol, the International Law Commission of the 1958 Conventions and Optional Protocol discussed the use of ADIZs but determined that the Conventions, and more specifically, the Convention on the High Seas, were not the mechanisms in which to specifically establish or regulate the use of the airspace above the high seas.\textsuperscript{169}

In the negotiating history of the UNCLOS,\textsuperscript{170} there is no significant discussion on the topic of ADIZs. Much like the International Law Commission during the drafting of the

\textsuperscript{166} Id., art. 89, at 57.
\textsuperscript{167} Id., art. 87, at 57.
\textsuperscript{168} Id., arts. 100-107, at 57-59.
\textsuperscript{169} See generally note 129.
1958 Conventions and Optional Protocol, the UNCLOS Drafting Committee relied on the ICAO to regulate airspace above both land and sea and did not use the multiple sessions or the resulting Articles of the UNCLOS to establish and regulate the airspace regime over the high seas. Therefore, while airspace was addressed in limited fashion throughout the UNCLOS, the establishment of ADIZs was not specifically codified within the UNCLOS.  

As will be seen in the next subsection, States have used the various Law of the Sea Conventions to regulate the airspace above the waters beyond their territorial sea.

3. Subsequent Practice of the States

As stated throughout the discussion above, some States use the establishment of the EEZ regime in the UNCLOS to argue that States have more control over the seas beyond the States’ territorial seas. While the majority of States agree that the EEZ permits States to exercise only the powers permitted by the UNCLOS, a few States, namely Brazil and China, have asserted State sovereignty over their established EEZs thereby permitting them to regulate, and in practice limit, freedom of overflight in the zones.

In the 1990s, Brazil took its interpretation of the EEZ one-step further and petitioned the Legal Committee for

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171 See generally, UNCLOS, supra note 104.
the ICAO for its concurrence with Brazil that the airspace over the EEZ should be designated as national airspace. The Legal Committee rejected Brazil’s proposal specifically finding that Brazil’s attempt to equate the EEZ as national airspace contradicted the UNCLOS and the customary international law establishing freedom of overflight over the high seas.\textsuperscript{172} Based on the Legal Committee’s rejection of Brazil’s proposition, it can be reasoned that “freedom of overflight in the airspace above the EEZ remains fundamentally unchanged by international treaty law developments in the second half of the twentieth century.”\textsuperscript{173}

China also views its established EEZ as falling under its jurisdiction to regulate as it deems fit.\textsuperscript{174} China has demanded compliance with its national laws while either in the waters or airspace above its EEZ. China has also attempted, without success, to require the United States and other States conducting military exercises within its


\textsuperscript{173} Dutton, supra note 16, at 694; see also Nicholas M. Poulantzas, The Right of Hot Pursuit in International Law 343 (2d ed. 2002); Hailbronner, supra note 93, at 505.

\textsuperscript{174} See generally Ronald O’Rourke, Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress, Congressional Research Service 7-5700, at 4-7 (Mar. 14, 2014);
EEZ to provide notice of much activities to China. While delegates to the UNCLOS discussed broadening a coastal State’s rights and jurisdiction within the State’s established EEZ, the UNCLOS rejected the proposals and Article 58 preserved the freedom of navigation and overflight over the high seas.

Despite the views of Brazil and China, the majority of the delegations that participated in the UNCLOS supported the view that all States enjoy the traditional freedoms of navigation of the high seas to include the laying of submarine cables and pipelines and other internationally lawful uses of the sea such as the freedom to use the airspace over the high seas.

The United States practice with regard to the use of the high seas is similar to that of the majority of delegations at the UNCLOS. The United States is committed to protecting and promoting the rights and freedoms of navigation and overflight guaranteed to all nations under international law. The United States has the world’s

177 UNCLOS, supra note 104, at 44.
178 Pedrozo, supra note 174, at 10.
largest EEZ and derives major economic benefits from the
exploration and exploitation of the vast ocean waters. The
United States also depends on the oceans as highways for
commerce and national security and on the internationally
recognized rights and freedoms of navigation and overflight
of the seas.\textsuperscript{180}

The United States is not a party to UNCLOS, but
believes the rules set out by the UNCLOS reflect customary
practice.\textsuperscript{181} The United States rejects excessive maritime
claims, meaning those claims that are inconsistent with, or
in direct violation of, the international law of the sea.
On March 10, 1983, President Ronald Reagan announced the
policy of the United States:

\begin{quote}
[T]he United States will exercise and assert its
navigation and overflight rights on a world wide
basis in a manner that is consistent with the
balance of interests reflected in the Convention
[on the Law of the Sea]. The United States will
not, however, acquiesce in unilateral acts of
other states designed to restrict the rights and
freedoms of the international community in
navigation and overflight and other related high
seas uses.\textsuperscript{182}
\end{quote}

Ultimately, the UNCLOS reaffirmed the preexisting
customary international law that restrictions on overflight
are reserved to the airspace over State territory and a

\begin{footnotesize}
\textsuperscript{180} Id.
\textsuperscript{181} Id.
\textsuperscript{182} Ronald Reagan, Statement on United States Oceans Policy, (Mar. 10,
1983).
\end{footnotesize}
State’s territorial waters. While a few States have attempted to use the new zones established by the UNCLOS to broaden the State’s authority and control of the seas beyond the State’s territorial sea, these States have not been successful and have been met with opposition by other States. The UNCLOS does not confer aerial defense rights, such as the establishment of ADIZs, to coastal States nor does the UNCLOS permit undue, unnecessary restrictions on the freedom of overflight.

4. View of Scholars as to Permissibility of ADIZs under the Law of the Sea Treaties and the Law of the Sea Customary International Law

When China announced the establishment of its ADIZ, scholars took to journals and blogs to defend or criticize the use of ADIZs. Arguments for or against the establishment of ADIZs are not new. This subsection will briefly touch on a few of the most cited scholars.

In 1978, prior to the 1982 UNCLOS, Elizabeth Cuadra examined the legality of ADIZs as they relate to the 1958 Law of the Sea Conventions, 1958 Optional Protocol and customary international law. Cuadra conclude that there is no analogy of ADIZs to the contiguous zones since security is not stated as one of the purposes for which coastal
States may enact national laws to exercise control within the coastal State’s contiguous zone.\textsuperscript{183} In addition, Cuadra relied on the 1958 CHS, Article 2, to state that States are prohibited from subjecting any part of the airspace over the high seas to their sovereignty.\textsuperscript{184} In addition to reviewing the CHS, Cuadra looked at the CTS and the Chicago Convention.

Cuadra reasoned that the drafters of the CTS and CHS had taken into account the Chicago Convention which made the “establishment and modification of rules of navigation in the airspace over the high seas the exclusive domain of international regulation, precluding States from enacting regulations effective over the high seas”\textsuperscript{185} when drafting the 1958 Conventions. Reading the three conventions together, Cuadra concluded that “States are specifically prohibited from any unilateral attempts to regulate air traffic in the airspace beyond their territorial seas, even for the purpose of ‘security’.”\textsuperscript{186}

In 1983, after the UNCLOS was submitted for ratification, Kay Hailbronner examined the legal justification for the establishment of ADIZs. She noted that States justify the establishment of ADIZs “by analogy

\textsuperscript{183} Cuadra, supra note 91.
\textsuperscript{184} Id.
\textsuperscript{185} Id.
\textsuperscript{186} Id.
to the contiguous zone concept or by the doctrine of necessity” to defend national security.187

Hailbronner first examined the argument advanced that the reason behind imposing ADIZs, national security and necessity, are similar to the reasons granted to the coastal States to regulate conditions in its contiguous zone. The argument is that since coastal States are permitted to prescribe national laws to prevent and punish infringement of the coastal State’s customs, fiscal, immigration or sanitary laws, States are permitted to enact national laws pertaining to the ADIZs in order to use ADIZs to protect against infringement on the coastal State’s national security.188

Like Cuadra above, Hailbronner points out that this analogy is not proper as it “neglects the essential factor that neither the Convention [UNCLOS] itself nor earlier drafts and codifications recognize special security rights in the contiguous zone.”189 Specifically, the 1958 Conventions and the UNCLOS allow and restrict the exercise of authority for specific purpose in the EEZ, not including security.190

187 Hailbronner, supra note 93, at 516.
188 Id. at 516-518.
189 Id. at 518.
190 Id.
Hailbronner next examined whether a State’s concern for national security was a valid reason to establish an ADIZ and concluded that it was not. Most States with ADIZs advance the proposition that ADIZs are necessary to preserve national security and ensure safety of international air travel. While the UNCLOS, Article 39, addresses a coastal State’s security and defense with regard to the transient passage of ships and aircraft through straits, the UNCLOS does not give coastal States the right to aerial defense.

Hailbronner concluded that the identification of approaching aircraft may help with national security, but the enforcement measures, including the potential interception of foreign aircraft and prosecution of pilots for violating the rules of the ADIZ, were not justified under customary international law and such preventive measures should only be taken in case of imminent danger “if the doctrine of necessity is to be kept within reasonable limits.”

Hailbronner concluded that permanent ADIZs raise the question concerning the coastal State’s jurisdiction, and specifically referenced UNCLOS, Article 89, that prohibits

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191 UNCLOS, supra note 104, at 37.
192 Id.
193 Id. at 518.
194 Id. at 517.
any State from subjecting any part of the high seas to its sovereignty.\(^{195}\)

In a 2009 article, Peter Dutton called into question whether the change in the international law of the sea affected the status of maritime airspace or established new authorities that allowed coastal States to regulate aircraft in airspace beyond the territorial sea thereby inhibiting the accepted rule of both customary international law and treaties that airspace over the high seas is as free as the sea.\(^{196}\)

Dutton opined that the establishment of the EEZ via the UNCLOS in waters that had previously been considered the high seas provided fodder for States to establish new rights over these areas.\(^{197}\) While the rules establishing EEZs are straight forward, Article 59 left the door open to States to the UNCLOS to incorporate additional national laws to regulate the maritime space, and also the airspace, in the EEZs.\(^{198}\) Ultimately, Dutton concluded that while the UNCLOS did not provide legitimacy for the establishment and use of ADIZs of the territorial seas of coastal States, the historical practice of the States have legitimized ADIZs.\(^{199}\)

\(^{195}\) Id. at 517; see generally UNCLOS, supra note 104, at 57.
\(^{196}\) Dutton, supra note 16, at 692.
\(^{197}\) Id. at
\(^{198}\) UNCLOS, supra note 104, arts. 56, 58, 59 and 87, at 43-57.
\(^{199}\) Dutton, supra note 16, at 706-707.
Despite the popularity of Dutton’s article, in a 2014 article, Christopher Lamont reiterated the views of Hailbronner and Cuadra and concluded that “while international law does not prohibit States from declaring ADIZs in non-territorial airspace, it does prohibit States from restricting air navigation outside of territorial airspace and thus certain reporting requirements demanded on the part of States may extend beyond what is permissible under international law.” 200 In addition, Lamont opined that while ADIZs may not violate international law, ADIZs have “no basis in existing international conventions or treaties and therefore fall outside of existing international regulatory frameworks, which govern aircraft operating in international airspace.” 201

While it is true that current and historical treaty regimes governing the law of the sea and aviation law do not regulate ADIZs, Lamont failed to address the issue raised by Dutton that ADIZs are now a matter of customary international aviation law. Cuadra and Hailbronner both considered customary international law as possibly giving a coastal State authority to establish ADIZs, but both felt that customary international law had not developed to that extent.

201 Id. at 189.
point at the time of their articles. While the various Law of the Sea conventions do not specifically grant States authority to establish and maintain ADIZs, it is important to note that they do not specifically prohibit ADIZs either. That said, customary practice of the States may have led to the establishment of customary international law as it applies to ADIZs.

D. Conclusion

The UNCLOS extends State rights to delineated areas of the sea; however, the UNCLOS does not explicitly permit or prohibit States to establish ADIZs. States and most scholars find it hard to reconcile the general support for freedom of overflight against a State’s indefinite restriction of such freedom with a State’s need to protect its territory from unidentified aircraft.

While there is no evidence from a treaty perspective that lends legal legitimacy to the establishment of ADIZs, ADIZs have not been challenged as being inconsistent with existing law and many States have acquiesced to the creation and use of ADIZs. Existing ADIZs have been accepted on a case-by-case basis by States and this State practice is supportive of a rule of customary international law.

202 Cuadra, supra note 91, at 99; Hailbronner, supra note 93, at 517.
Similar to the maritime treaty regime, the next section concludes that the aviation treaty regime does not explicitly permit or prohibit States from establishing ADIZs. That said, as discussed above and will be discussed below, ADIZs have been established and are governed by the rules of customary international aviation law.

IV. The Legality of ADIZs under International Aviation Law as of 2013

Aviation law, like the Law of the Sea, evolved as lex specialis and was born out of necessity to address the law of the airspace both above a State’s territory and outside of it. The early aviation law pioneers recognized that the principle of caelum liberam, i.e., freedom of the skies, “flowed from the principle that, above the high seas, ‘airspace is also the legal regime of the subjacent territory, [and therefore] the airspace is also free above the sea, as [is] the sea itself.’”

Similar to the Law of the Sea discussion above, there is no international law treaty regime specifically establishing or articulating the rules governing ADIZs. The use of ADIZs has developed from State practice as

203 See generally Chicago Convention, supra note 14.
204 Dutton, supra note 16, at 692.
indicated in Part II above. In addition, the ICAO, the agency created by the Chicago Convention to work with all parties interested in aviation to develop international SARPs which are then used by States when they develop their legally-binding national civil aviation regulations, has formulated a definition of an ADIZ and has provided example language, if a State elects to establish and maintain an ADIZ, to include in the State’s AIP.

As the regulatory agency for the Chicago Convention, the ICAO’s duties include a quasi-legislative role in promoting international uniformity in aeronautical regulations, procedures, standards and practices. In many cases, these quasi-legislative matters are even followed by nonmember States. Against this background, States have established and maintained ADIZs across the world.

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208 ICAO, Specimen AIP Aeronautical Information Publication, http://www.icao.int/safety/information-management/Documents/Specimen%20AIP%20incl.%20Amdt.2.pdf (last visited Aug. 21, 2014) (the specimen AIP is published as part of the ICAO’s Aeronautical Information Management (AIM)).

209 John R. Brock, Legality of Warning Areas as Used by the United States, 21 JAG J. 69, 69 (1966-1967)
A. Customary Rules and Treaties on International Aviation Practice Prior to 1944

While World War II compelled aviation forward,\textsuperscript{210} aviation was born on September 19, 1783, when the Montgolfier bothers in Lyons, France, successfully flew a silk balloon filled with hot air 1500 feet.\textsuperscript{211} Since that time, aircraft have rapidly developed into sophisticated machinery.

Local French police were the first to regulate air travel when in 1784 Paris police prohibited balloon flights without special permissions.\textsuperscript{212} Throughout the late nineteenth century and early twentieth century, international aviation law scholars struggled with the concept of freedom of the air. While scholars thought that the concept of freedom of the air should be similar to that of freedom of the seas, many struggled with the concept of a subjacent State having sovereignty over the airspace above its territory and reconciling this with the notion of innocent passage for foreign aircraft.\textsuperscript{213}

\textsuperscript{210} DAVID JOHNSON, RIGHTS IN AIR SPACE 44 (1965); see generally Peter H. Sand, James T. Lyon & Geoffrey N. Pratt, An Historical Survey of International Air Law Since 1944 (unpublished research project, McGill University) (on file with the McGill Law Journal).
\textsuperscript{211} Id. at 5.
\textsuperscript{212} Id. at 10.
\textsuperscript{213} Id. at 21.
As early as 1911, the International Law Association, a private body of international law scholars and practitioners, began asserting the existence of powers of a State over the airspace above its territory. These powers included the right of every State to “enact such prohibitions, restrictions, and regulations as it may think proper in regard to the passage of aircraft through the airspace above its territories and territorial waters.”

Similarly, a growing number of States also began passing national legislation and regulations governing the airspace above the State’s territory and territorial waters. The international community responded in official form in 1919. In 1919, the Paris Conference took place to address the need for uniform regulation of airspace for the safety of the individuals flying the aircraft and those on the ground in harm’s way in the event of a crash. The Convention Relating to the Regulation of Aerial Navigation (Paris Convention) is a product of the 1919 Paris Conference. The Paris Convention ended the two decades old debate over whether airspace was free like the high seas or formed part of the sovereign territory of the subjacent

\[\text{\textsuperscript{214}} \text{Id.} \]

\[\text{\textsuperscript{215}} \text{See generally Id. at 22.} \]

\[\text{\textsuperscript{216}} \text{Convention Relating to the Regulation of Aerial Navigation, art. 1, Oct. 13, 1919, 11 L.N.T.S. 173 (hereinafter referred to as the Paris Convention).} \]
The Paris Convention unequivocally confirmed that States have “complete and exclusive sovereignty” over their airspace. According to Michael Milde, “This principle has become an axiom and a cornerstone of international air law ever since.”

Article 1 of the Paris Convention stated, "every Power has complete and exclusive sovereignty over the air space above its territory." Article 1 did not confer a new right to air sovereignty but simply recognizes the right existed. As Milde notes, “[T]he Paris Conference considered the principle to be a firm part of the customary international law that was to be only formally recognized by a codified instrument”. While the Paris Convention recognized and codified the principle, scholars expressed doubt that this principle, an observable practice of States for less than two decades, gained the status of customary international law.

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217 Petras, supra note 106, at 9-10.
219 Id.
220 Paris Convention, supra note 215, at Art. 1 (it should be noted that Article 1 asserted that every State and not just the parties to the Paris Convention had complete and exclusive sovereignty over the airspace above their territory); see also John C. Copper, Contiguous Zones in Aerospace-Preventive and Protective Jurisdiction, 7 U.S.A.F. JAG L. Rev. 15, 15 (1965).
221 JOHNSON, supra note 209, at 22.
222 MILDE, supra note 217, at 11.
223 Petras, supra note 106, at 10; see also JOHNSON, supra note 209, at 23-24.
The Paris Convention came into force in 1922 after 11 States ratified the treaty. The United States did not ratify it because of the Convention’s tie to the League of Nations.\textsuperscript{224} As discussed below, the Paris Convention was superseded by the Chicago Convention.\textsuperscript{225}

B. 1944 Convention on Civil Aviation (Chicago Convention)

In 1944, the Chicago Convention reaffirmed the right of every State to complete sovereignty over its national airspace, i.e., the airspace above its territory and adjacent territorial waters.\textsuperscript{226} The International Court of Justice (ICJ) confirmed a State’s sovereignty over its territory and territorial sea in \textit{The Case Concerning Military and Paramilitary Activities in and against Nicaragua}. The court stated

The basic legal concept of State sovereignty in customary international law, expressed in inter alia, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the airspace above its territory. As to the superjacent airspace, the 1944 Chicago Convention on Civil Aviation (Art. 1) reproduces the established principle of the complete and exclusive sovereignty of a State over the airspace above its territory.\textsuperscript{227}

\textsuperscript{224} Id.
\textsuperscript{225} See generally Chicago Convention, supra note 14.
\textsuperscript{226} Id. at arts. 1 and 2.
\textsuperscript{227} Military and Paramilitary Activities in and Against Nicaragua (Nicar. V. U.S.), 1986 I.C.J. 14, 111 (June 27).
Customary international law, the Paris Convention, the Chicago Convention and the ICJ firmly confirm the right of a State to control the airspace above its landmass and its adjacent waters. As stated before, the Chicago Convention does not explicitly regulate the establishment or use of ADIZs, but arguably does implicitly acknowledge the permissibility of ADIZs.

The Chicago Convention was hailed as a "monumental drafting achievement."228 Participants agreed on the Convention's 96 articles in only 37 calendar days.229 The treaty entered into force on 4 April 1947, only 30 days after the United States became the requisite twenty-sixth nation to submit notice of ratification.230 As of April 2014, 190 States are parties to the Convention including China.231

Generally, the Chicago Convention is most noteworthy for two accomplishments: it recognized and codified certain principles of substantive public international law; and it

229 The International Civil Aviation Conference was held in Chicago from November 1, 1944 to December 7, 1944.
230 Chicago Convention, supra note 14, at art. 92 (Article 92 states, "[T]his Convention...shall come into force...after deposit of the twenty-sixth [ratification in the archives of the Government of the United States of America].").
231 An official list of parties to the Chicago Convention is available at http://www.icao.int/MemberStates/Member%20States.Multilingual.pdf.
established the ICAO.\textsuperscript{232} John C. Cooper\textsuperscript{233} identified four basic principles of public international law set down by the Convention: (1) territorial sovereignty; (2) national airspace; (3) freedom of the airspace over the high seas; and (4) nationality of aircraft.\textsuperscript{234}

The Chicago Convention was drafted during the early days of the rapid expansion of civil aviation and prior to the 1958 Law of the Sea Conventions and Optional Protocol and the 1982 UNCLOS. At the time the Chicago Convention was drafted, the oceans and airspaces above land and water were divided via customary international law between territory, territorial waters and high seas.

The Chicago Convention focused mainly on State sovereign authority over the airspace of its own territory and territorial waters.\textsuperscript{235} The Chicago Convention retained for the International Civil Aviation Authority (ICAO) the ability to issue rules of the air with respect to the airspace of the high seas and established the ICAO to adopt Standards and Recommended Practices to govern aviation practices across the globe and over the high seas.\textsuperscript{236}

\begin{footnotesize}
\textsuperscript{232} Chicago Convention, supra note 14, at art. 44; see also Paul S. Dempsey, Public International Air Law 43 (2008).
\textsuperscript{233} John C. Cooper represented the United States at the 1944 Chicago Conference.
\textsuperscript{234} John C. Cooper, Backgrounds of International Public Air Law, 1 Y.B. Air & Space L. 3 (1967).
\textsuperscript{235} Chicago Convention, supra note 14, at arts. 12, 38.
\textsuperscript{236} Id. at arts. 12, 37, 54(1), 90.
\end{footnotesize}
applicable text of the Chicago Convention as it relates to ADIZs will be discussed below. While there are a total of 96 Articles in the Chicago Convention, the following only discusses those Articles that are relevant to the establishment and operation of an ADIZ.

1. Applicable Text of the Chicago Convention

The Preamble of the Chicago Convention states that the purpose of the Convention is to create and preserve international aviation security. Article 1 of the Convention recognizes the exercise of sovereignty over a State’s territorial airspace. Article 1 does not limit the right to territorial airspace sovereignty to only contracting States; the Chicago Convention recognized that every State has such sovereignty.

Article 2 of the Convention defines the territory referred to in Article 1 as “the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection, or mandate of such State”. Therefore, maintaining the same understanding as articulated in Article 2 of the UNCLOS.

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238 Id. at art. 1.
239 Id.
240 Id. at art. 2.
241 UNCLOS, supra note 104, art. 2, at 27.
Article 3 articulates the general rule that the Convention “shall be applicable to civil aircraft, and shall not be applicable to State aircraft.”\textsuperscript{242} State aircraft are defined in Article 3(b) as “aircraft used in military, customs and police services”.\textsuperscript{243} While the Chicago Convention generally only regulates civil aircraft and does not regulate “State” aircraft, the States that have established ADIZs, as discussed in Part II above, do not differentiate between the types of aircraft for purposes of the ADIZs.

Article 3(b) also recognizes the need to protect territorial sovereignty, a State’s right to self-defense, the general safety of the people of the world and the freedom of aerial navigation. Article 3 (b) states:

\begin{quote}
[E]very State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.\textsuperscript{244}\textsuperscript{245}
\end{quote}

Furthermore, Article 3(b) recognizes that a State is entitled to require an aircraft to land if it flies above its territory without authorization or if the State has

\begin{footnotes}
\begin{enumerate}
\item Id., art. 3, at 27.
\item Id.
\item The reference to the United Nations Charter is to a State’s inherent right to self-defense found in Article 51 of the Charter.
\item Chicago Convention, supra note 14, at art. 3.
\end{enumerate}
\end{footnotes}
reasonable grounds to believe that the aircraft is being used for a purpose inconsistent with the Chicago Convention. Article 3(b) further restricts the State’s actions with regard to an unauthorized aircraft to those that are “appropriate” and “consistent with relevant rules of international law”. In Article 3(c), State aircraft are restricted in that “[n]o State aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization”.

Article 5, paragraph 1, of the treaty grants "nonscheduled flights" (e.g., charter flights) of other States the freedom to fly into or across the territory of another State while in transit, and the freedom to make stops for non-traffic purposes, such as refueling or maintenance.

Article 6 of the Convention establishes traffic rights for "scheduled" international air services. Article 6 prohibits any scheduled air service from operating “over or into the territory of a contracting State, except with the special permission or other authorization of that State.”

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247 Id.
248 Id. at art. 5.
249 Id. at art. 6.
Article 9(a) of the Chicago Convention permits a State to restrict or prohibit aircraft from flying over certain areas of its territory “for reasons of military necessity or public safety” as long as such restrictions or prohibitions affect all countries equally. In addition, the excluded areas must be of a “reasonable extent and location as not to interfere unnecessarily with air navigation”.

Article 12 articulates the rules of the air. Specifically, States will adopt rules to regulate “every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to flight and maneuver of aircraft there in force.” In addition, Article 12 sets out the rules that will govern over the high seas, namely “the rules in force shall be those established under this Convention.”

Therefore, it is the responsibility of the ICAO to establish rules that govern the operating of civil aircraft over the high seas. Rules for operating aircraft over the territory of a State and the high seas have been adopted.

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250 Id. at art. 9.
251 Id. (emphasis added).
252 Id. at art 12.
253 Id.
and published by the ICAO and are located in Annex 2 of the Chicago Convention.\textsuperscript{254} The foreword of Annex 2 states that “over the high seas, therefore, these rules apply without exception”.\textsuperscript{255} This language is unclear as to whether States may supplement the rules established by the ICAO over the high seas.

Article 37 of the Chicago Convention requires each contracting State to collaborate to ensure uniformity of international air standards and procedures.\textsuperscript{256} Article 37 also gives ICAO the authority to adopt and amend international standards and recommended practices and procedures.\textsuperscript{257}

Article 38 permits States that find in impracticable to comply with all international aviation standards and procedures to give the ICAO immediate notification of the differences in the State’s practice.\textsuperscript{258}

Part II of the Chicago Convention specifically establishes and organizes the ICAO.\textsuperscript{259} The ICAO is responsible for ensuring the safe and orderly international civil aviation throughout the world, ensuring the rights of

\textsuperscript{255} Id.
\textsuperscript{256} Chicago, supra note 14, at art. 37.
\textsuperscript{257} Id.
\textsuperscript{258} Id. at art. 38.
\textsuperscript{259} See generally Id. at arts. 43-66.
the contracting States are fully respected and have a fair opportunity to operate international airlines, and promoting safety of flight.\textsuperscript{260} One of the main functions of the ICAO is to adopt international standards and practices, designated in Annexes, for use by all contracting States.\textsuperscript{261}

The Chicago Convention contains a dispute resolution provision in Article 84. If two or more disputing contracting States cannot settle a dispute by negotiations, on application by any State concerned in the disagreement, the dispute will be decided by the ICAO Council.\textsuperscript{262}

As a general rule, when a civil aircraft is not over a State’s territory or territorial seas, it is only required to abide by the rules articulated by the ICAO. Article 12 of the Chicago Convention and its annexes, specifically Annex 2, contain detailed provisions designed to promote safety. Since States did not establish ADIZs until after the Chicago Convention, it is not surprising that the Convention does not explicitly refer to ADIZs or the control of airspace beyond the territory of States. With that said, as stated above and in accordance with Article

\textsuperscript{260} \textit{Id.} at art. 44.
\textsuperscript{261} \textit{Id.} at art. 54.
\textsuperscript{262} \textit{Id.} at art. 84.
54, the ICAO is responsible for adopting regulations and practices for international aviation.\(^{263}\)

While the Chicago Convention was concluded in 1944, the ICAO has been adopting and amending the various Annexes and rules and practices since 1944. Having reviewed the applicable documents, there are a handful of documents adopted by the ICAO that discuss ADIZs and only in generalities. For example, as stated before, the ICAO has formulated a definition of an ADIZ\(^{264}\) and has provided example language, if a State elects to establish and maintain an ADIZ, to include in the State’s AIP.\(^{265}\)

As discussed in Part III, scholars look to Articles 3, 9 and 12 of the Chicago Convention to fashion their arguments as to why ADIZs are permissible under the Chicago Convention. Scholars also analogize flight information regions (FIRs) to ADIZs when making an argument that ADIZs have a legal basis in treaty law.

The ICAO divided international airspace, to include the high seas, into FIRs, "for which a State is responsible and with whose aeronautical authorities all foreign civil

\(^{263}\) Id. at art. 54.
aircraft are required to co-operate.\textsuperscript{266} FIRs generally involve a State that has undertaken responsibility for providing air traffic control services.\textsuperscript{267} Noting the difference between State and civil aircraft identified earlier, the purpose of a FIR is to facilitate navigation. A few States appear to abuse the power delegated to them by the ICAO and attempt to use FIRs to regulate State aircraft:

Some nations, however, purport to require all military aircraft in international airspace within their FIRs to comply with FIR procedures, whether or not they utilize FIR services or intend to enter national airspace. The United States does not recognize the right of a coastal nation to apply its FIR procedures to foreign military aircraft in such circumstances. Accordingly, U.S. military aircraft not intending to enter national airspace need not identify themselves or otherwise comply with FIR procedures established by other nations, unless the United States has specifically agreed to do so.\textsuperscript{268}

ADIZs should also be distinguished from the use of temporary restricted airspace for a limited training purpose by the world’s militaries. There is nothing in the

\textsuperscript{266} ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 321 (2d ed. 2010); see generally Chicago Convention, Air Traffic Services, Annex 11, 13th ed., amendment 49 (Nov. 14, 2013).


Paris or Chicago Conventions that prohibits a State from temporarily restricting the use of a portion of the international airspace while conducting military exercises or missions. When this happens, the State establishes a safety zone where it conducts the operations for a short period of time and then reopens the airspace once the exercise or mission is complete. Other States tend to comply, as long as “they are not too extensive or prolonged”.269

Again, while there are no specific Articles from the Chicago Convention that govern ADIZs, the Articles provided above provide the framework for international aviation. The next subsection explores the negotiating history of the Chicago Convention as it relates to ADIZs.

2. Negotiating History Relating to ADIZs

Unfortunately, there is no useful negotiating history in terms of the establishment or use of ADIZs because of the short time that it took to draft the Chicago Convention270, because the first ADIZs were not established until six years after the Convention,271 and because the

269 Aust, supra note 265, at 293.
270 The International Civil Aviation Conference was held in Chicago from November 1, 1944 to December 7, 1944.
271 See generally 14 C.F.R. § 99, supra note 11.
Chicago Convention itself does not contain technical rules for air navigation.\textsuperscript{272}

As an alternative, the 1957 study prepared by Pepin prior to adoption of the 1958 Law of the Sea Conventions provides some insights into the meaning of the Chicago Convention.\textsuperscript{273} The study was prepared to address the various references, both explicitly and implicitly, to international aviation law in the draft Articles of what would become the 1958 Law of the Sea Conventions and Optional Protocol.\textsuperscript{274} In paragraphs 39, 47, 48 and 49 of this document, Pepin discusses the establishment and use of ADIZs.\textsuperscript{275}

In paragraph 39, Pepin recognized the controversy over States establishing off-shore ADIZs that extend into the high seas.\textsuperscript{276} In paragraph 49, while he would not opine as to whether ADIZs conflicted with the Chicago Convention, he concluded that the Chicago Convention, including the negotiating history, did not contemplate the use of such zones.\textsuperscript{277} In addition, he expressed doubt as to whether the establishment of ADIZs was compatible with the Articles in

\begin{itemize}
  \item \textsuperscript{272} See generally Chicago Convention, supra note 14; see also Sand, Lyon & Pratt, supra note 209, at 129-130.
  \item \textsuperscript{273} See generally Pepin Study, supra note 130.
  \item \textsuperscript{274} Id. at 64.
  \item \textsuperscript{275} Id. at 69-71.
  \item \textsuperscript{276} Id. at 69.
  \item \textsuperscript{277} Id. at 71.
\end{itemize}
the draft of the 1958 Law of the Sea Conventions and Optional Protocol.\textsuperscript{278} Finally, despite States’ claims, he concluded that ADIZs were not used to ensure safety of air traffic and were not necessary in the interest of national security.\textsuperscript{279}

This document, which was prepared to address aviation concerns as they related to the 1958 Law of the Sea Conventions and Optional Protocols, demonstrates that there is no meaningful history prior to or during the drafting of the Chicago Convention that supports the establishment and maintenance of ADIZs. That said, the next subsection discusses the subsequent practice of States with regard to ADIZs.

3. Subsequent Practice of the States

As stated in Part II above, various States have established ADIZs since the Chicago Convention in 1944. The typical justification for the establishment of an ADIZ is based on national security and aviation safety. In addition, as stated above, the Chicago Convention itself does not explicitly or implicitly grant States the authority to establish ADIZs. However, it appears that the ICAO has acquiesced to the establishment of ADIZs.

\textsuperscript{278} Id. at 70.
\textsuperscript{279} Id. at 70-71.
The ICAO has provided a definition of an ADIZ in Annex 15 to the Chicago Convention\textsuperscript{280} and has provided example language, if a State elects to establish and maintain an ADIZ, to include in the State’s AIP.\textsuperscript{281} While not typically a theory advanced by States, a State could argue that the ICAO, as the regulatory mechanism for the Chicago Convention and therefore the international aviation community as a whole, recognizes the use of ADIZs. This again, strengthens the argument that while ADIZs may not grounded in any treaty regime they are permitted under international law as a matter of custom.

The practice of States since the Chicago Convention is to simply establish the ADIZs, publish the rules regarding the zones and hope that aircraft quietly follow the rules. In addition, States generally rely on the right to self defense and defense of other States under Article 51\textsuperscript{282} of the U.N. Charter and the principle of necessity to advance the argument that the ADIZs are permitted.

A State has an avenue of recourse under the Chicago Convention if the State feels that a party to the

\textsuperscript{280} ICAO, International Standards and Recommended Practices, supra note 15.
\textsuperscript{282} See generally U.N. Charter art. 51.
convention is acting contrary that State’s obligations under the treaty. If violations to the treaty of disagreements deriving for obligations under the treaty occur, parties may initiate the dispute settlement provisions in Article 84 of the Chicago Convention. That said, most States resort to diplomatic exchanges and negotiation between the offending and offended States prior to invoking the dispute settlement procedures of the ICAO. As it happens, the ICAO Council has never issued a dispute settlement decision regarding the use of ADIZs.

Given the State practice as detailed in Part II, and the fact that it appears that the ICAO has acquiesced to the use of ADIZs by providing guidance for State when publishing information on its ADIZ in its AIP, establishment of ADIZs now appears to be fully in accordance with customary international law.

While ADIZs are topics for commentators and scholars, ADIZs received little to no attention at the various Conferences on the Law of the Sea and Chicago Conference leaving States to continue to establish and maintain ADIZs with no applicable treaty rules. The next subsection

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283 Chicago Convention, supra note 14, at art. 84.
explores the various views of the scholars with regard to
the establishment of ADIZs under the Chicago Convention.

4. View of Scholars as to the Permissibility of
ADIZs under the Chicago Convention and
Customary International Aviation Law

Scholars disagree on whether the Chicago Convention
permits the establishment and maintenance of ADIZs beyond a
State’s territorial sea. A Note for the Columbia Law
Review in 1961, after observing that Article 6 of the
Chicago Convention prohibited the operation of scheduled
air service over the territory and territorial sea of a
State unless with the State’s permission,285 argued that the
ADIZ regulations that require aircraft entering a State’s
sovereign airspace to provide identification information
was in conformity with Article 6 of the Convention.286 In
addition, it found that ADIZ regulations that apply to
aircraft entering a State’s sovereign airspace were also
valid under Article 11 of the Chicago Convention which
requires aircraft to comply with regulations of the State
with regard to entry into its sovereign airspace.287

The Note also considered whether States can impose
ADIZ restrictions and reporting requirements over the high

285 Note: Legal Aspects of Reconnaissance in Airspace and Outer Space, 61
286 Id.
287 Id.
seas if an aircraft is not intending to penetrate the State’s sovereign airspace.\textsuperscript{288} The author did note that there is no indication in Article 12 as to whether the power to regulate the high seas is left only to the ICAO and was intended to exclude coastal States from regulating into the high seas.\textsuperscript{289} After reviewing Article 12 of the Chicago Convention that grants the ICAO the authority to govern the airspace of the high seas, the author found no basis in the Chicago Convention that permitted States to impose such restrictions.\textsuperscript{290} Ultimately, the author concluded that international law prohibited States from unreasonably interfering with aircraft over the high seas.\textsuperscript{291}

In 1963, Ivan Head recognized the principle articulated in Articles 1 and 2 of the Chicago Convention and Article 2 of the 1958 CHS that the legal character of airspace is determined by the subjacent land or sea.\textsuperscript{292} Head opined that “if it is permissible for a state to exercise controls on the surface of the sea beyond its normal territorial jurisdiction, then it may be equally

\textsuperscript{288} Id.
\textsuperscript{289} Id.
\textsuperscript{290} Id. at 1090.
\textsuperscript{291} Id. at 1094.
\textsuperscript{292} Ivan Head, supra note 12, at 185.
permissible to exercise similar controls in the air so long as these are...reasonable.”293

In 1977, Elizabeth Cuadra opined that while no international treaty regime supported the establishment of ADIZs, she could envision that the zones may become a matter of customary international law if ADIZs continue to be used, enforced and complied with and additional States impose ADIZs.294

In 1983, Kay Hailbronner opined that ADIZs violate the two main principles of international aviation law.295 The first principle recognizes that every State has “full and absolute sovereignty of the air above its territory and territorial waters” including the airspace above.296 The second principle recognizes that the area above the high seas is free to all States and shall not be subject to the sovereignty of any State.297 Hailbronner relied on Article 12 of the Chicago Convention to conclude that it is up to the Council of the ICAO and not States to establish rules governing the airspace above the high seas and for States

293 Id. at 190.
294 Cuadra, supra note 91, at 507.
295 See generally Hailbronner, supra note 93, at 490-492.
296 Id. at 490.
297 Id.
to arbitrarily impose an eternal restriction over the high seas violates international aviation law.298

In 2007, Lt Col Andrew Williams argued that Article 11 of the Chicago Convention permitted States to establish ADIZs. He stated that States were permitted to “establish reasonable conditions of entry into their territorial airspace, provided that the conditions are applied to the aircraft of all contracting States ‘without distinction’ as to their nationality.”299 Unfortunately, while the broad language of Article 11 lends support to Williams’ argument, Williams makes this matter-of-fact, bold statement without providing justification or analysis.

In 2001, Bourbonniere and Haeck opined that while ADIZs “are not based upon any specific treaty dispositions”, they are “nonetheless consistent with the Chicago Convention.”300

In 2010, after taking into account the multiple opinions from scholars, Lt Col Christopher Petras opined that while the establishment of ADIZs under the Chicago Convention is debatable, “a State’s right to establish an ADIZ as a means of placing reasonable conditions for entry

298 Id. at 491-492.
299 Williams, supra note 108, at 96; see also Chicago Convention, supra note 14, at art. 11.
into its territory is generally accepted, whether as a manifestation of the right of self-defense or a customary right born out of State practice.”  

Petra also recognized that States do not have sovereignty over the airspace that extends beyond the State’s territorial sea. That said, Petras opined that a State may lawfully require identification procedures for aircraft that will enter the

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301 Petras, supra note 106, at 63 (citing Myers S. McDougal, et al., Law and Public Order in Outer Space, 306-11 (1963) (noting that establishing the U.S. ADIZ in 1950 was dictated by security concerns and that other States promulgated similar regulations – “[a]ll of these claims by states, as long as they are reasonable, are commonly regarded as being in accord with international law”); 2 Restatement (Third), Foreign Relations Law of the United States §521 n.2 (1987) (noting the United States and other states have established ADIZ and similar zones and “[t]hese zones have been generally accepted”); Dempsey, supra note 231, at 35 (noting that States have claimed authority to impose ADIZ “relying upon the customary international law principle of self defense, and Article 51 of the U.N. Charter”); Peter P.C. Haanappel, The Law and Policy of Air Space and Outer Space: A Comparative Approach 18-19(2003) (arguing that ADIZ “can be legally based upon the general right of self-defense under Article 51 of the Charter of the United Nations”); Bourbonniere & Haeck, supra note 299, at 954 (arguing that ADIZ have been legitimized by State practice); McDougal, et al., supra, at 310 (“[A]fter over a decade of the enforcement of the ADIZ and CADIZ, as far as is known, no protests [were] made to the governments of the United States and Canada.”); Ivan L. Head, supra note 12, at 182 (noting that in 1950 the attitude of most States affected by establishment of the U.S. ADIZ “was not one of protest; it was one of quiet compliance”); Romana Sadurska, Threats of Force, 82 Am. J. Int’l L. 239, 261 (1988) (noting that the United Kingdom’s creation of a 150-nautical-mile “protection zone” around the Falklands after the cessation of hostilities with Argentina in July 1982 did not evoke international concern outside of Latin America); Id. at 260 n.116 (noting that no State has ever challenged the validity of the Australian ADIZ); but see Niels Van Antwerpen, Cross-Border Provision of Air Navigation Services 100 (2008) (“The legality of ADIZ and CADIZ rest much more on comity and tolerance by other States than on strict law.”); Boleslaw A. Bocek, International Law: A Dictionary 202 (2005) (“The so-called air defense identification zones ... and similar zones extending off the coasts hundreds of miles beyond the territorial sea are of dubious validity in international law.”); Hailbronner, supra note 93, at 500 (“The legality of establishing large defense zones in which foreign aircraft not complying with certain identification requirements could be intercepted is still doubtful under customary international law.”)).

302 Petras, supra note 106, at 64.
State’s territory and territorial sea airspace (sovereign airspace), a State cannot lawfully require an aircraft that is not bound for the State’s sovereign airspace to comply with the State’s ADIZ rules and procedures.\textsuperscript{303}

In 2014, Christopher Lamont opined that while States are not prohibited from establishing ADIZs in non-territorial airspace under international law, the reporting requirements imposed within the ADIZs is prohibited under international aviation law as the requirements wrongfully restricts air navigation.\textsuperscript{304} Lamont concludes that international aviation law, and specifically the Chicago Convention, does not provide a legal basis for the establishment of ADIZs.\textsuperscript{305} Again, while Lamont relied on the treaty regimes to express his opinion, he did not take into consideration whether ADIZs may be established and maintained as a matter of customary international law.

C. Conclusion

The Chicago Convention recognizes a State’s right to control the airspace over its territory and territorial waters; however, like the UNCLOS, the Chicago Convention does not explicitly permit or prohibit States to establish ADIZs that extend over the high seas. As stated above,

\begin{flushleft}
\textsuperscript{303} Id.  \\
\textsuperscript{304} Lamont, supra note 199, at 187-202.  \\
\textsuperscript{305} Id. at 193.
\end{flushleft}
States and scholars find it hard to reconcile the general support for freedom of overflight of the high seas with the reality that many states restrict such freedom for an extended period of time so as to protect its territory from unidentified aircraft.

As stated before, while there is no evidence from a treaty perspective that lends legal legitimacy to the establishment of ADIZs, ADIZs have not been challenged as being inconsistent with existing law and States have acquiesced to the creation and use of ADIZs. The practice of those States with established ADIZs and the practice of the States across the world that comply with the rules articulated by the States with ADIZs establish the customary practice of ADIZs. Part V will discuss China’s ADIZ, and based on the treaty regimes and development of customary international law discussed in the Parts III and IV, determine whether China violated international law when it established its ADIZ in November 2013.

V. The Legality of China’s ADIZ

This Part discusses China’s ADIZ, the legal positions for and against China’s ADIZ by China and other States, and the view of several scholars and commentators that have opined on China’s ADIZ.
A. Establishment of the ADIZ

On November 23, 2013, the Chinese government for the first time publicly announced the establishment of an ADIZ.\(^{306}\) China’s ADIZ covers a significant part of the East China Sea contiguous to the Chinese coastline and overlaps in some areas with the ADIZs of Japan, South Korea, and Taiwan.\(^{307}\) It also includes the airspace above several islands, rocks and reefs that are currently under dispute with Japan and South Korea, including the Senkaku (in Japanese) or Diaoyu (in Chinese) Islands and the Socotra Rock (known as Suyan Jiao in Chinese and Ieodo in Korean).\(^{308}\)

Also on November 23, 2013, China’s Ministry of National Defense published the following rules that must be followed by aircraft flying in China’s East China Sea ADIZ.

1. Aircraft flying in the East China Sea Air Defense Identification Zone must abide by these rules.

2. Aircraft flying in the East China Sea Air Defense Identification Zone must provide the following


\(^{307}\) The A to Z on China’s Air Defense Identification Zone, WALL STREET JOURNAL, November 27, 2013; Rick Gladstone and Matthew L. Wald, China’s Move Puts Airspace in Spotlight, N.Y. TIMES, November 27, 2013; Dutton, supra note 16, at 691.

\(^{308}\) As stated above, on Dec. 8, 2013, South Korea extended its ADIZ to include the Ieodo rock in response to the establishment of the Chinese ECS ADIZ. See Sang-ho, supra note 51.

(3) Aircraft flying in the East China Sea Air Defense Identification Zone should follow the instructions of the administration organ of the East China Sea Air Defense Identification Zone or the unit authorized by the organ.

(4) China’s armed forces will adopt defensive emergency measures to respond to aircraft that do not cooperate in the identification or refuse to follow the instructions.309

China’s neighbors and the United States quickly questioned China’s actions after the ADIZ was announced. In addition, the secrecy behind the establishment of the ADIZ and the various landmasses that the zone encompasses that are in dispute between the various States, lead to increased tensions in the region. The next section will discuss China’s legal position and policy rational behind establishing the ADIZ.

B. Legal Position of China

On November 23, 2013, China’s Defense Ministry spokesman, Yang Yujun, responded to questions regarding the establishment of China’s ADIZ. This question/answer session provides the best overview of China’s legal position on the establishment of the ADIZ.

Yujun stated that an ADIZ is a zone of airspace beyond a State’s territorial airspace in which a country may “identify, monitor, control and dispose of entering aircraft.” He further stated that China’s ADIZ was a necessary measure of China’s exercise of self-defense in order to protect China’s sovereignty, maintain flying order and preserve territorial security.

Yujun stated that the ADIZ is legally sound and is in accord with common international practices. While he did not expand on the common international practices he referenced in his statement, Yujun noted that more than 20 countries have established ADIZs and that China’s actions in establishing the ADIZ were in conformity with the U.N.

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311 Id.
Charter, international law and practices and Chinese national laws.\textsuperscript{312}

Yujun further stated that the identification rules established by China’s ADIZ are in line with international practices, and China will take immediate measures to address air threats.\textsuperscript{313} Finally, Yujun paid homage to the international aviation community when he stated that China continues to recognize and respect States’ rights of freedom of overflight as set out in international law.\textsuperscript{314}

At a press conference on November 25, 2013, two days after China announced the establishment of and rules for the ADIZ, Foreign Ministry Spokesperson, Qin Gang, stated that the aim of the ADIZ was “at safeguarding state sovereignty and the security of territory and territorial airspace and maintaining flight order.”\textsuperscript{315}

Shortly after the announcement of the ADIZ, Chinese military experts turned to the media to validate the ADIZ and make statements that the ADIZ was in accord with international common practices.\textsuperscript{316} Military expert Meng Xiangqing stated said that a country has a right to set up

\textsuperscript{312} Id.
\textsuperscript{313} Id.
\textsuperscript{314} Id.
an ADIZ, without the permission of other countries, “if the move does not violate international laws, breach other countries’ territorial sovereignty or affect the freedom of flight.”

In addition, Yin Zhuo stated that China’s ADIZ was necessary to maintain the “the sovereignty and security of the country’s territory and airspace.”

In summary, China’s legal position is relatively simple. Other States have established and maintained ADIZs since 1950, and China is entitled to establish an ADIZ or ADIZs to protect its territorial integrity. China firmly believes that its ADIZ was properly established in accordance with governing international law, mainly relying on the Article 51 of the U.N. Charter to argue that the ADIZ is need for self-defense.

C. Legal Position of Other States

1. Japan

When Japan learned of the establishment of China’s ADIZ, it demanded the immediate revocation of the ADIZ and instructed both its military and civil aircraft not to follow the rules established for the zone by China.
Prime Minister Shinzo Abe criticized China for not coordinating its ADIZ with its neighbors and vowed to safeguard Japan's territory, saying, "We will take steps against an attempt to change the status quo by use of force as we are determined to defend the country's sea and airspace."\(^{321}\)

Japanese Foreign Minister, Fumio Kishida, criticized China's ADIZ for unduly infringing on the freedom of flight within international airspace and for overlapping Japanese territorial airspace over the Senkaku islands, potentially leading to a miscalculation or an accident that could escalate into an armed conflict.\(^{322}\) Kishida argued that China's ADIZ was invalid, and despite China's claims to the contrary, threatened civil aviation.\(^{323}\)

2. Philippines

The Philippines' Foreign Affairs Secretary, Alberto del Rosario, expressed concern about China establishing an additional ADIZ in the South China Sea.\(^{324}\) The Philippines

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\(^{322}\) Martin Fackler, Japan Rejects China's Claim to Air Rights Over Islands, N.Y. TIMES, Nov. 24, 2013, at A4.

\(^{323}\) Announcement of the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone of the P.R.C., supra note 1.

criticized China’s ADIZ as a threat to safety and the national security of the affected States. In addition, the Philippines saw China’s ADIZ as a subterfuge for essentially transforming the airspace into China’s domestic airspace, thereby infringing on international aviation and compromising the safety of civil aircraft in the zone.325

3. Republic of Korea

On Wednesday, Nov. 27, 2013, ROK’s Foreign Minister warned that China’s ADIZ over the East China Sea would lead to worsening tensions in the area. The South Korean government also declared that it did not recognize China’s ADIZ.326 In addition, on December 8, 2013, the ROK announced that it was expanding its ADIZ to include airspace falling within both China and Japan’s ADIZs covering the area over the submerged reef called Ieodo.327 The expanded ADIZ follows the boundaries of the ROK’s existing FIR assigned to the ROC for civilian air traffic control by the ICAO. By using the same area in which reporting is already required by ICAO, the new boundaries of the ROC’s ADIZ would have no impact on civilian flights.

325 Id.
according to Kim Min-seok, a spokesman for the South Korean Defense Ministry.\textsuperscript{328} At the time that it expanded its ADIZ, South Korea also requested that China, Japan and South Korea meet to discuss the administration of the overlapping areas of the ADIZ.\textsuperscript{329} In addition, in December 2013, in an effort to promote cooperation in the area, South Korea reversed its earlier policy and instructed civilian aircraft to file flight plans with the Chinese when flying in China’s ADIZ.\textsuperscript{330}

4. Taiwan

On Nov. 26, 2013, President Ma Ying-jeou expressed serious concerns to China over the establishment of China’s ADIZ. While China’s ADIZ overlaps slightly with Taiwan’s ADIZ, Ma stated that it would have no impact on Taiwan forces to conduct military exercises. In addition, Ma did not view China’s ADIZ as being connected to a claim for extended airspace or territorial sovereignty.\textsuperscript{331} Moreover,

\textsuperscript{328} Id.
\textsuperscript{329} Id. (according to Sang-Hun, the United States hailed the ROK’s actions of reaching out to its neighbors prior to extending its ADIZ as the proper way to amend its ADIZ).
Ma stated that all parties should work together to address any issues China’s ADIZ may cause.\textsuperscript{332}

5. United States

The United States has taken a somewhat confusing response to the establishment of China’s ADIZ. As stated in the Part I, the U.S. Secretary of State, John Kerry, voiced concerns immediately following the announcement,\textsuperscript{333} and during a daily U.S. Department of State press conference, Marie Harf, stated that the East China Sea ADIZ is not consistent with international aviation practice or international norms respecting navigational freedoms.\textsuperscript{334} While the United States has voiced concerns and alleged that China’s actions are inconsistent with international law, it has not “condemned China’s ADIZ as a violation of international law.”\textsuperscript{335}

In addition, within days of China announcing the ADIZ, the United States sent F-16 fighter jets into the designated area.\textsuperscript{336} While the United States said that the


\textsuperscript{333} Press Statement, John Kerry, supra note 6.

\textsuperscript{334} Daily Press Briefing, Marie Harf, supra note 7.

\textsuperscript{335} Julian Ku, Why the U.S. is Not Invoking International Law to Oppose China’s ADIZ, OPINIO JURIS (Dec. 8, 2013, 12:02 PM), http://opiniojuris.org/2013/12/08/china-correct-adiz-necessarily-violate-international-law-doesnt-make-right/.

\textsuperscript{336} Thom Shanker, U.S. Sends Two B-52 Bombers Into Air Zone Claimed by China, N.Y. TIMES, Nov. 27, 2013, at A1.
jets were on a pre-existing mission, many viewed the act as a test of China’s resolve to police the ADIZ.\footnote{Phil Stewart & David Alexander, Defying China, U.S. Bombers Fly into East China Sea Zone, REUTERS, Nov. 26, 2013, http://www.reuters.com/article/2013/11/26/us-china-defense-usa-idUSBRE9AP0X320131126.}

Shortly after the announcement, the FAA issued a notice to airmen in the civil flying community to abide by the rules China published with regard to the ADIZ.\footnote{FAA, REGULATIONS REGARDING FLIGHT PLAN SUBMISSIONS IN THE EAST CHINA SEA AIR DEFENSE IDENTIFICATION ZONE (ADIZ) OF PEOPLE’S REPUBLIC OF CHINA, A1916/13 NOTAMN (2013); see also Peter Baker & Jane Perlez, Airlines Urged by U.S. to Give Notice to China, N.Y. TIMES, Nov. 29, 2013, at A1.} While some viewed this move as the United States backing down from its initial concerns with the ADIZ, the United States had to weigh its diplomatic concerns against the safety and protection of U.S. civil aviation, and elected to protect the latter.

6. Failure to Articulate Legal Positions

While these various States have taken positions on China’s ADIZ, they have not provided detailed legal analyses as to why they are opposed to China’s ADIZ. These States main concerns with China’s ADIZ appear to be that China’s ADIZ overlaps with the established ADIZs of its neighbors, that China’s ADIZ covers landmasses that various States claim to be part of their sovereign territory, or (for the United States) that the rules governing China’s ADIZ do not conform to U.S. policy. Ultimately, it appears
that these States have left the debate as to whether China’s ADIZ is legal to the scholars and commentators and have approached the issue from a diplomatic viewpoint.

D. Legal Position of Scholars and Commentators

The legal positions regarding the establishment of China’s ADIZ are as diverse as the legal positions discussed above regarding the establishment of ADIZs generally under the UNCLOS or Chicago Convention. China’s ADIZ is criticized because the establishment of the ADIZ was a surprise to China’s neighbors and the global aviation community, because China did not adequately consult with or even inform other States before establishing the ADIZ, and because the rules of the ADIZ are contrary to U.S. policy and practice.339 When China established its ADIZ, it sparked commentators and scholars to reexamine whether ADIZs are supported by international law, and if supported by international law, whether China’s ADIZ conforms with that law.

Zachary Keck opines that China’s ADIZ is part of China’s “lawfare strategy toward maritime disputes.”\textsuperscript{340} While Keck does not opine on whether the ADIZ is legal, Keck argues that China is using the ADIZ to establish its sovereignty over the Diaoyu/Senkaku Islands through the use of military strength and international law.\textsuperscript{341} According to international law, the States acquire sovereignty over an area by exercising sovereignty over the area for a reasonable period of time.\textsuperscript{342} Julian Ku argues that while China’s ADIZ overlaps with Japan, South Korea and Taiwan’s ADIZs, China is correct in asserting that China’s ADIZ does not violate international law and is consistent with the U.N. Charter.\textsuperscript{343} Ku recommends that China follow the United States’ lead and only apply its ADIZ to aircraft intending to enter Chinese


\textsuperscript{341} Id.; see also Julian Ku, Why the U.S. is Not Invoking International Law to Oppose China’s ADIZ, OPINIO JURIS (Dec. 8, 2013, 12:02 PM), http://opiniojuris.org/2013/12/08/china-correct-adiz-necessarily-violate-international-law-doesnt-make-right/.

\textsuperscript{342} Id.; see generally Convention on the Rights and Duties of States, art. 1, Dec. 26, 1933, 49 Stat. 3097 (while an inter-American treaty, article 1 provides the general requirements recognized in international law to establish a “State”. Article 1 provides, a state as a person of international law should possess the following qualifications: a ) a permanent population; b ) a defined territory; c ) government; and d) capacity to enter into relations with the other states).

\textsuperscript{343} Julian Ku, Meanwhile, China Draws a Provocative, Dangerous, But Perfectly Legal Air Defense Identification Zone in the East China Sea, OPINIO JURIS (Nov. 24, 2013, 9:00 PM), http://opiniojuris.org/2013/11/24/world-iran-china-draws-air-defense-identification-zone-east-china-sea/.
territorial airspace. By doing so, Ku opines that tensions would be alleviated throughout the area.\textsuperscript{344}

James Steinberg and Michael O’Hanlon opine that while there is nothing wrong with China establishing an ADIZ, the way in which it did so was incorrect. Steinberg and O’Hanlon argue that China’s actions would not have been met with opposition had it consulted with its neighbors and explained its rationale behind establishing the ADIZ to its neighbors and tailored the implementing regulations to meet the goal of the ADIZ, i.e., national security.\textsuperscript{345}

Rick Gladstone and Matthew Wald point out that there are three issues with China’s ADIZ. First, it overlaps with the Senkaku/Diaoyu Islands that Japan claims sovereignty to. Second, China imposes requirements that other countries do not, i.e., that all aircraft passing through the zone and not intending to penetrate China’s territorial airspace are required to comply with the reporting regulations established in the ADIZ. Third, China did not coordinate its ADIZ with the ICAO.\textsuperscript{346}

\textsuperscript{344} Id.
\textsuperscript{346} Gladstone & Wald, supra note 306, at A14.
In Rory Metcalf’s article, *What's Wrong With China’s Air Defense Identification Zone (And What’s Not)*, Metcalf argued that if China's new zone did not include disputed maritime territory, if its requirements for compliance applied only to aircraft heading into Chinese airspace, and if neighbors like Japan and South Korea had been consulted ahead of the announcement, then there would be little or nothing for others to object to. Indeed, it could have been part of a wider strategy of cooperation to reduce maritime security risks in North Asia.³⁴⁷

Michael Swaine stated, while China is entitled to establish an ADIZ, “its failure to reassure other nations as well as clearly define the enforcement and intended impacts of the zone has undermined any purported stabilizing intentions and damaged China’s larger strategic interests.”³⁴⁸

The scholars are correct as a factual matter: China did not consult its neighbors prior to implementing the ADIZ, China’s ADIZ encompasses landmasses it claims are part of its territory but other States also claim are part of their territory, and China’s requires all aircraft simply entering its airspace to comply with the declared identification requirements. Yet these facts do not establish any violation of international law.

³⁴⁷ Medcalf, supra note 338.
³⁴⁸ Swaine, supra note 319.
First, there is no requirement according to treaty or customary international law that States establishing ADIZs consult with other States or the ICAO before declaring an ADIZ. While Article 38 of the Chicago Convention requires States to give immediate notice to the ICAO when a State’s regulations or practices do not comply with international standards or procedures, a State is not required to give prior notice to the ICAO regarding establishment of an ADIZ.\textsuperscript{349} In addition, China’s ADIZ appears to comply with international customary aviation regulations and practices and therefore, does not require China to provide notice under Article 38.\textsuperscript{350} In addition, while it is common courtesy to place other States on notice, and China could have alleviated the surprise factor of its announcement by notifying its neighbors prior to announcing the ADIZ, there is no requirement that China do so.

Second, while China’s ADIZ encompasses disputed territories, this does not per se make China’s ADIZ illegal. While China should have pursued diplomatic avenues or sought the assistance from international agencies to address the territorial disputes prior to establishing the ADIZ, China is not required to do so.

\textsuperscript{349} Chicago Convention, supra note 14, at art. 38.
\textsuperscript{350} Id.
Third, many scholars opine that China is acting contrary to international aviation law by requiring all aircraft entering the ADIZ to comply with the declared identification requirements. As stated in Part II, China’s requirement for all aircraft entering the ADIZ to comply with reporting requirements is consistent with the regulations established by the majority of States, including the United States. While U.S. policy only requires aircraft intending to enter territorial airspace and not just transiting the ADIZ to comply with U.S. reporting requirements, statutorily the U.S. requirements are similar to those of China. In addition, China’s requirements conform with State practice. As Ku points out above, China could have alleviated tensions by following the United States’ lead and only apply its ADIZ to aircraft intending to enter Chinese territorial airspace, but China is not required to do so.

E. Conclusion

China has every right to establish an ADIZ in the East China Sea and elsewhere along its territorial borders. The timing of China’s announcement, during a period of already

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high tensions in the Asia-Pacific area, China’s failure to provide advance warning to and consultation with its neighbors, and China’s inclusion of disputed territories within the ADIZ have undoubtedly increased tensions in the area. That said, the increase in tensions does not invalidate or lead to the conclusion that China’s ADIZ is unlawful. The next Part explores proposals for addressing the conflict over China’s ADIZ.

VI. Proposals for Addressing Conflict over China’s ADIZ

The establishment of an ADIZ is not regulated by any treaty regime but is permissible as a matter of customary international law. There are a number of possible ways to address the lack of international legislation governing ADIZs.

First, States are in the best position to establish international norms. While State practice as applied to the establishment and use of ADIZs varies, it is apparent that, after 60 years, ADIZs are a part of the international aviation landscape. International norms are created through State practice; however, a better way to create norms is through the treaty process. In the seven decades since the Chicago Convention was negotiated, much has changed not only in terms of aviation but also in maritime law.
It is time to revisit the Chicago Convention. An amendment to the Chicago Convention,\(^{352}\) and not just a rule, standard or procedure adopted by the ICAO in accordance with Part II of the Chicago Convention,\(^{353}\) is necessary to define the parameters within which each State can establish ADIZs or other areas outside their territorial airspace. International guidance is a must to promote uniformity of regulation and to ensure aviation safety. Developing international legislation to build mutual trust and reconcile divergent views will secure the safety of the airways while giving States a voice in developing the regulations.

Second, the ICAO alternatively could adopt new international standards and recommended practices and procedures regarding ADIZs in accordance with Article 37 of the Chicago Convention.\(^{354}\) While feasible, these adopted international standards and recommended practices and procedures are less likely to promote complete uniformity in regulation; indeed, States are free, in accordance with Article 38, to deviate from the international standards and recommended practices and procedures.\(^{355}\)

\(^{352}\) See generally Chicago Convention, \textit{supra} note 14, art. 94.
\(^{353}\) \textit{Id.} at arts. 43-66.
\(^{354}\) \textit{Id.} at arts. 37, 44.
\(^{355}\) \textit{Id.} at art. 38.
Third, the United Nations could establish a new agency to come up with recommendations to address not only China’s ADIZ but ADIZs in general. The U.N. General Assembly could establish an agency similar to the U.N. Committee on the Peaceful Uses of Outer Space (UNCOPUOS) or authorize the UNCOPUOUS itself to solicit input and provide recommendations for addressing the general issues with the establishment and use of ADIZs. In the past, the UNCOPUOS has sent questionnaires to States to solicit a consensus on the definition of aerospace objects. A United Nations agency dealing with airspace or the UNCOPUOS may create a similar questionnaire to solicit consensus from States on the proper rules and regulations for ADIZs, ultimately leading to established rules governing ADIZs.

In addition to establishing written international guidance for the establishment and use of ADIZs, it is critical to the security of the Asia-Pacific area for all parties to meet and agree to disagree peacefully until set rules are established for aviation in the Asia-Pacific area. Until there is a meeting of the minds, there will no resolution to the conflict.

Such cooperation is possible. For example, in April 2014, 20 nations around the Pacific, including China and Japan, developed a naval code to reduce the risk of
accidental encounters at sea from spiraling into conflict. Currently, lack of formal “rules of the road” for encounters between aircraft or aircraft entering various zones across the Pacific increases the risk that an incident could escalate sharply, possibly causing loss of life and inciting diplomatic crises. A similar air code is in order to reduce the threat of accidental encounters.

VII. Conclusion

ADIZs are still appropriate given the advances in technology. Despite a lack of explicit authority to establish such zones under the main maritime and aviation treaty regimes that operate in international law, State practice over the past 70 years demonstrates that the right of States to declare ADIZs has become a matter of customary international law.

As such, there is no international law prohibition against China establishing an ADIZ. While China’s ADIZ encompasses disputed territories and its reporting requirements are inconsistent with U.S. policy, China’s ADIZ does not violate international law.

Rather than argue over the legality of China’s ADIZ, it would be more fruitful for China and its Asia-Pacific neighbors to focus on other ways of addressing the airspace tensions over the East China Sea, before matters escalate.
and an international incident happens. Various paths for doing so, including at the ICAO, at the United Nations, or through regional cooperation, are available. The broader lesson from China’s action is that the time has come to reevaluate international law relating to the freedom of navigation over the high seas, so as to take account of the reality of ADIZs, as the current systems and the rhetoric in that regard has evolved little over the past seven decades.