

The 11th South China Sea International Conference
“Cooperation for Regional Peace and Development”

Hanoi, 6-7 November 2019

**The Misperception on China’s East China Sea ADIZ:
Technical Flaws and legal Facts**

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Introduction

- Notable misperceptions on China's ECS ADIZ
- Part I. Legal facts regarding China's ECS ADIZ
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- Part III. Requiring an aircraft not entering national airspace to identify itself – not just China
- Conclusion

Notable misperceptions on China's ECS ADIZ

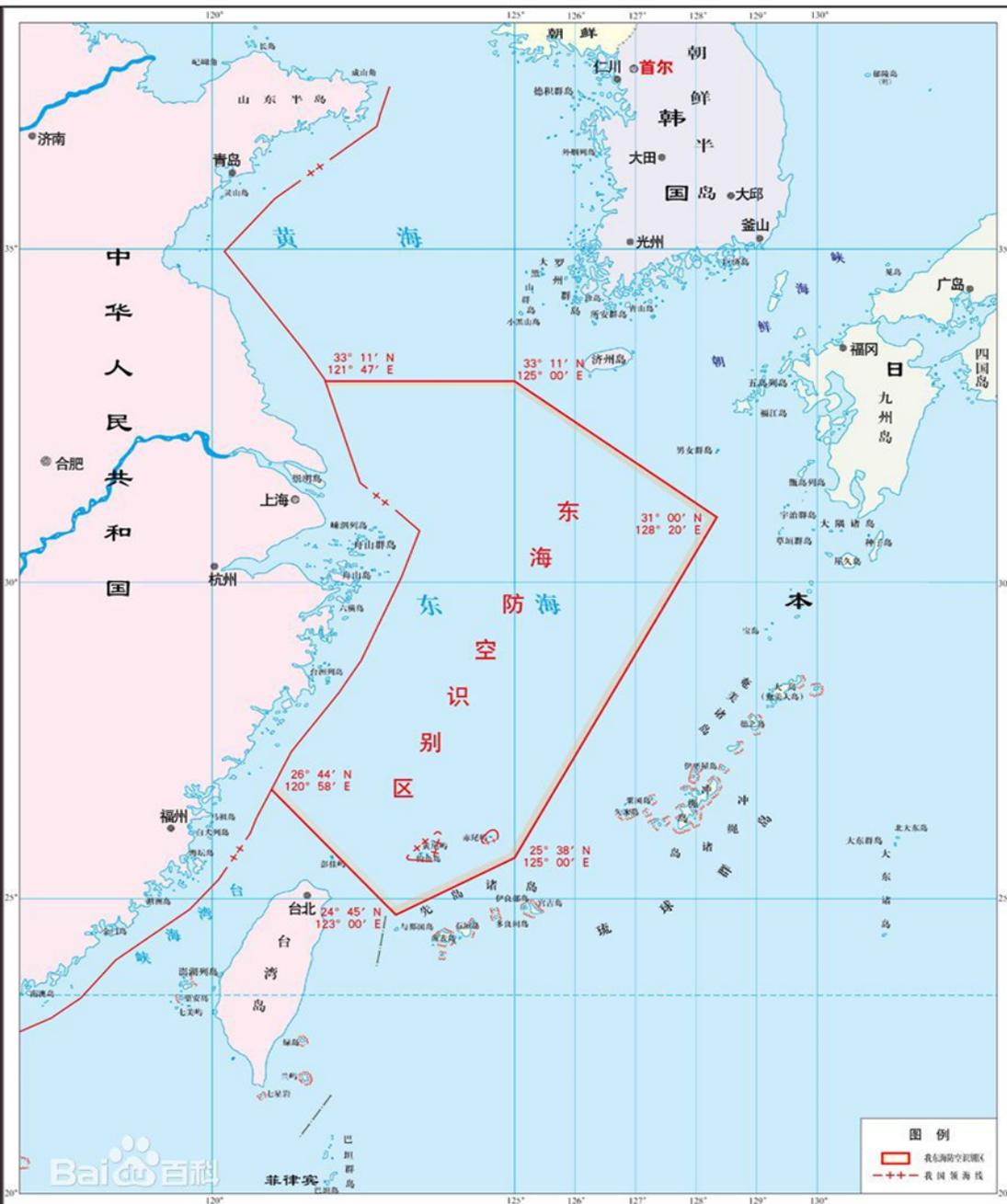
- I. the ECS ADIZ includes the *disputed* Diaoyu Dao/Senkaku Islands
- II. China's ADIZ rules do not distinguish between *civil* and *state* aircraft
- III. the Chinese rules apply to all aircraft flying in the ADIZ, and make no exception for aircraft not intending to enter Chinese national airspace

Part I.

Establishing an ADIZ that includes or encloses “contested territory” is legally acceptable.

If including the *indisputable* territory of another country in an ADIZ is not contrary to international practice, China’s enclosure of *contested* territory should not be criticized either.

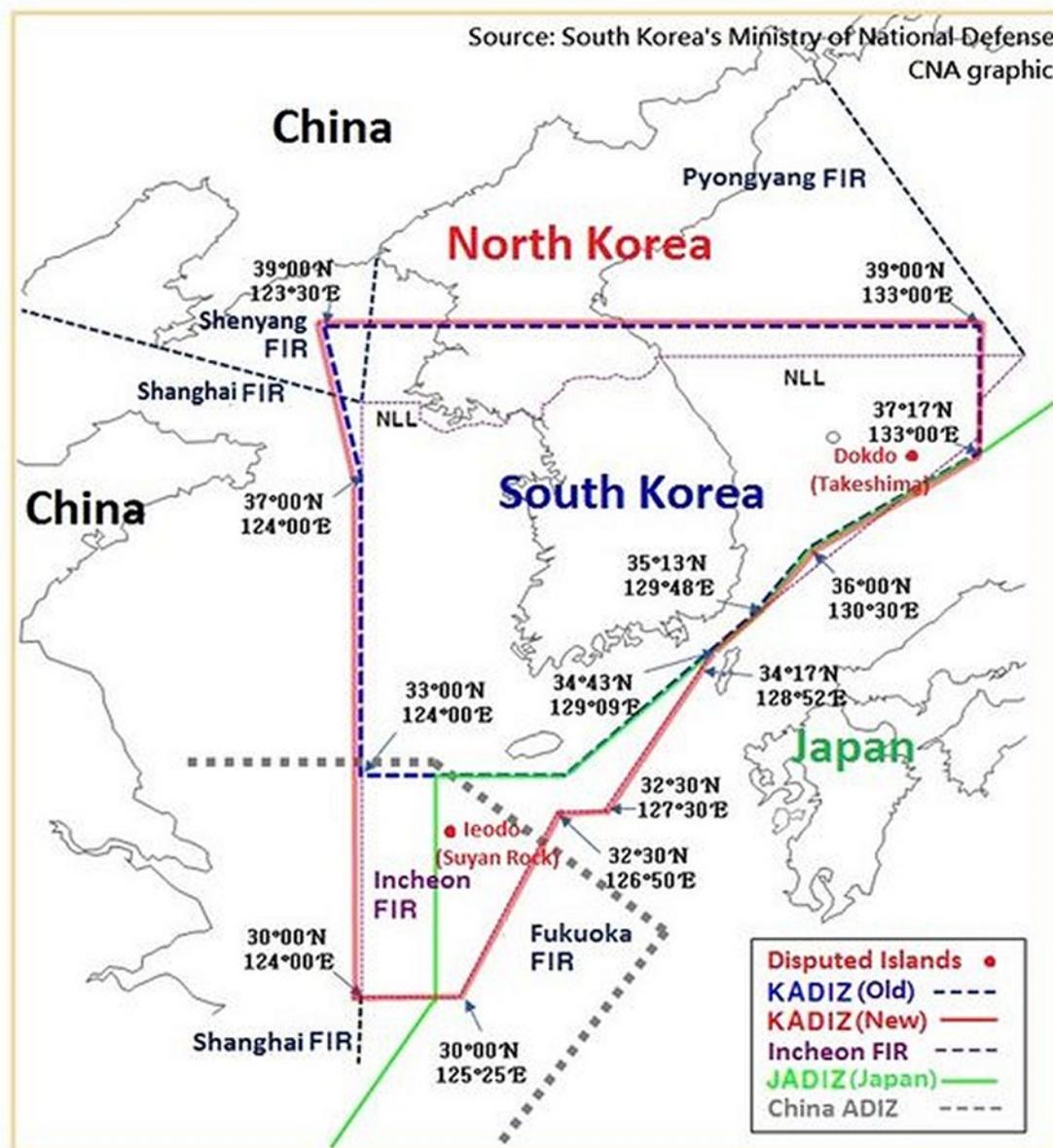
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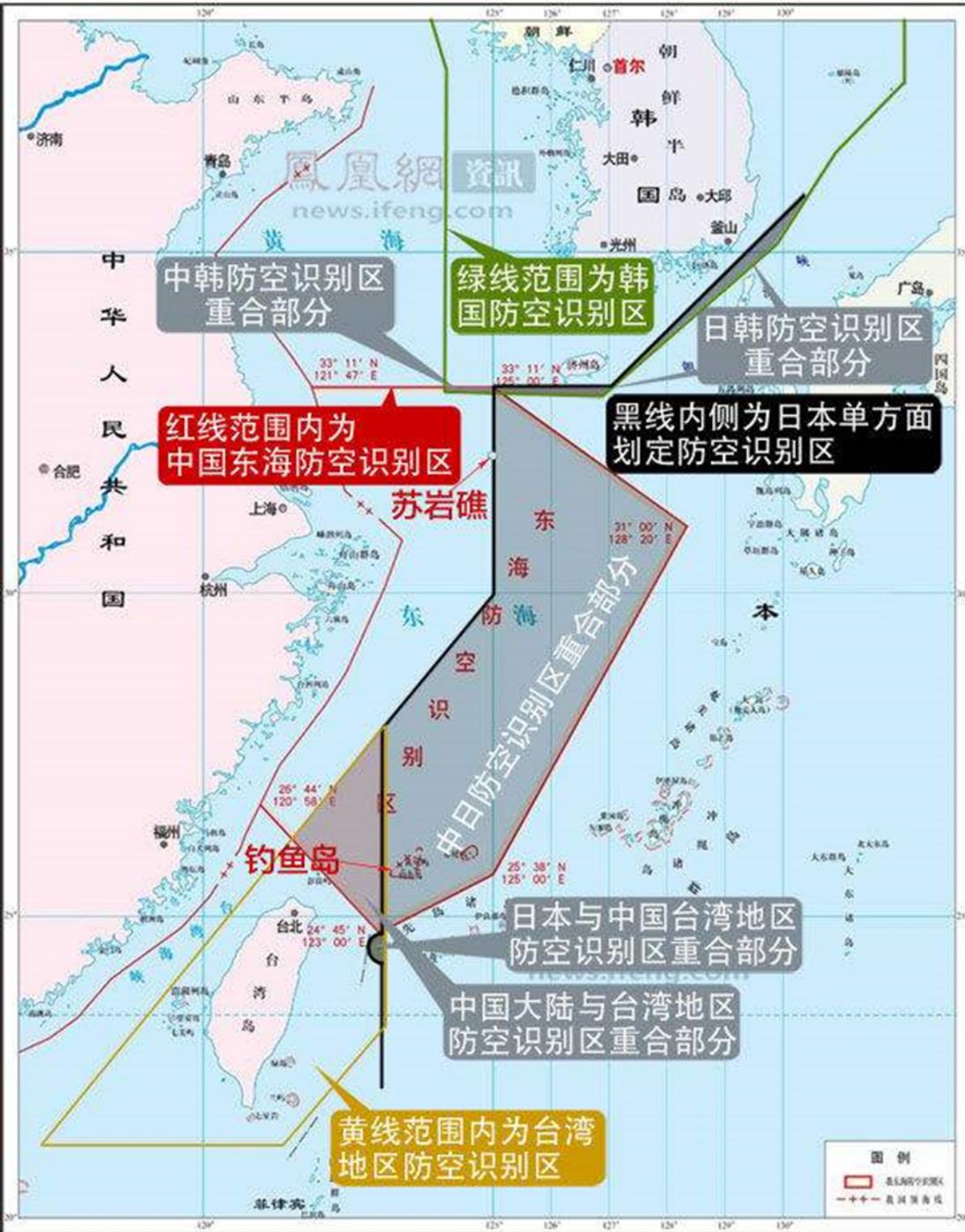
The November 2013 Chinese Government Statement announcing the ECS ADIZ

- “The zone includes the airspace within the area enclosed by China’s **outer limit of the territorial sea** and the following six points: 33° 11’N (North Latitude) and 121° 47’E (East Longitude), 33° 11’N and 125° 00’E, 31° 00’N and 128° 20’E, 25° 38’N and 125° 00’E, 24° 45’N and 123° 00’E, 26° 44’N and 120° 58’E.”
- In the bottom right corner of the Graphics, there is a legend which describes “- + + -” as the sign for China’s outer limit of the territorial sea.

Source: South Korea's Ministry of National Defense
CNA graphic



- Establishing an ADIZ that includes “contested territory” does not necessarily legitimize a sovereign claim, and is legally acceptable.
- In addition, there are a few precedents for governments establishing an ADIZ over the indisputable territory of another country.



Taiwan authorities' ADIZ (yellow line) overlapping with Japan's ADIZ (black line)

- Japan in 2010 unilaterally declared an extended ADIZ line that completely covered Yonaguni Island, part of which has been covered by Taiwan authorities' ADIZ.
- Japanese officials with the Ministry of Foreign Affairs told the Taipei Times that "ADIZ demarcation is at the discretion of each country, [so] it was natural for Japan not to seek prior approval" from the Taiwan authorities.

Part II.

There is no evidence that China's
ADIZ rules apply to military aircraft.

Some American scholars, without sufficient evidence and thorough analysis, criticize China's ECS ADIZ rules for applying not only to civil aircraft, but also to state aircraft, including military, customs and police aircraft.

Announcement of the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone of the People's Republic of China

The Ministry of National Defense of the People's Republic of China, in accordance with the Statement by the Government of the People's Republic of China on Establishing the East China Sea Air Defense Identification Zone, now announces the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone as follows:

First, aircraft flying in the East China Sea Air Defense Identification Zone must abide by these rules.

Second, aircraft flying in the East China Sea Air Defense Identification Zone must provide the following means of identification:

1. Flight plan identification. Aircraft flying in the East China Sea Air Defense Identification Zone should report the flight plans to the Ministry of Foreign Affairs of the People's Republic of China or the Civil Aviation Administration of China.

2. Radio identification. Aircraft flying in the East China Sea Air Defense Identification Zone must maintain the two-way radio communications, and respond in a timely and accurate manner to the identification inquiries from the administrative organ of the East China Sea Air Defense Identification Zone or the unit authorized by the organ.

3. Transponder identification. Aircraft flying in the East China Sea Air Defense Identification Zone, if equipped with the secondary radar transponder, should keep the transponder working throughout the entire course.

4. Logo identification. Aircraft flying in the East China Sea Air Defense Identification Zone must clearly mark their nationalities and the logo of their registration identification in accordance with related international treaties.

Third, aircraft flying in the East China Sea Air Defense Identification Zone should follow the instructions of the administrative organ of the East China Sea Air Defense Identification Zone or the unit authorized by the organ. 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.

Fourth, the Ministry of National Defense of the People's Republic of China is the administrative organ of the East China Sea Air Defense Identification Zone.

Fifth, the Ministry of National Defense of the People's Republic of China is responsible for the explanation of these rules.

Sixth, these rules will come into force at 10 am November 23, 2013.

There is actually no “applicability” clause in China’s rules, and the full text does not contain any expression of *civil* or *state* aircraft.

- The U.S., as the first country to establish ADIZs and whose ADIZ practices are used as precedent by other countries, had similarly ambiguous provisions (see 15 Fed. Reg., December 27, 1950):

§ 620.1 *Basis and purpose.* The regulations prescribed in this part contain rules and regulations which have been found necessary in the interest of national security to identify, locate, and control U.S. and foreign aircraft operated within areas designated by the administrator of Civil Aeronautics as air defense identification zones (ADIZ)

§ 620.2 *Definitions.* As used in this part the words listed below shall mean:

(f) *Foreign aircraft.* An aircraft other than a United States aircraft defined in paragraph (1) of this section.

(1) *United States aircraft.* (1) An aircraft registered with the Administrator of Civil Aeronautics as a “civil aircraft of the United States” (2) an aircraft of the national-defense forces of the United States, or (3) an aircraft of the Federal Government, or of a State, Territory or Possession of the United States, or the District of Columbia, or of any political subdivision thereof which has been registered with the Administrator of Civil Aeronautics.

From 1961 to 2003 the U.S. made it clear that the ADIZ rules only applied to civil aircraft, though in 2004 U.S. ADIZ regulations were amended to indicate that the rules apply to “all aircraft”.

From 1961 to 2003

- **1961**

§ 620.1 Purpose.—“This part establishes rules which have been found necessary in the interest of national security to identify, locate and control **all civil aircraft** operated within areas designated as Air Defense Identification Zones (ADIZs) or Defense Areas.”

- **2003**

§ 99.1 Applicability.—“(a) This part prescribes rules for operating **civil aircraft** in a defense area, or into, within, or out of the United States through an Air Defense Identification Zone (ADIZ), designated in subpart B.”

The 2004 amendment

§ 99.1 Applicability.—“(a) This part prescribes rules for operating **all aircraft** (except for Department of Defense and law enforcement aircraft) in a defense area, or into, within, or out of the United States through an Air Defense Identification Zone (ADIZ) designated in subpart B.”

§ 99.3 Definitions.—“*Air defense identification zone* (ADIZ) means an area of airspace over land or water in which the ready identification, location, and control of **all aircraft** (except for Department of Defense and law enforcement aircraft) is required in the interest of national security.”

Based on the FAA official interpretation, the 2004 amendment was made to cover **all *civil* and *public* aircraft** in the definition except for U.S. DoD and law enforcement aircraft.

- According to an Advisory Circular issued by the FAA, ***public* aircraft status exists only within U.S. airspace**; an aircraft operating outside of the U.S. loses its PAO (Public Aircraft Operations) status and is either *civil* or *state* (including military), depending on its official designation.
- The 2004 amendment has no substantial impact on foreign military aircraft, to which the U.S. ADIZ rules still do not apply, especially in “international airspace”.

- **See 49 U.S. Code, § 40102. Definitions.**

(41) “public aircraft” means any of the following:†

(A) Except with respect to an aircraft described in subparagraph (E), an aircraft used only for the United States Government, except as provided in section 40125(b).†

(B) An aircraft owned by the Government and operated by any person for purposes related to crew training, equipment development, or demonstration, except as provided in section 40125(b).†

(C) An aircraft owned and operated by the government of a State, the District of Columbia, or a territory or possession of the United States or a political subdivision of one of these governments, except as provided in section 40125(b).†

(D) An aircraft exclusively leased for at least 90 continuous days by the government of a State, the District of Columbia, or a territory or possession of the United States or a political subdivision of one of these governments, except as provided in section 40125(b).†

(E) An aircraft owned or operated by the armed forces or chartered to provide transportation or other commercial air service to the armed forces under the conditions specified by section 40125(c). In the preceding sentence, the term “other commercial air service” means an aircraft operation that (i) is within the United States territorial airspace; (ii) the Administrator of the Federal Aviation Administration determines is available for compensation or hire to the public, and (iii) must comply with all applicable civil aircraft rules under title 14, Code of Federal Regulations.†

(F) An unmanned aircraft that is owned and operated by, or exclusively leased for at least 90 continuous days by, an Indian Tribal government, as defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122), except as provided in section 40125(b).†

Compared to the 70-year old U.S. ADIZ regime, China's ADIZ is still in development.

- Some allowance should be made for ambiguities in Chinese ADIZ rules as detailed regulations have not yet been announced. Therefore, at least for now, it is not reasonable to assume that Chinese ADIZ rules apply to “all aircraft”, or that there are substantial differences between the Chinese and American ADIZ rules in this regard.
- If American rules may be allowed to use relatively vague terms such as “U.S. and foreign aircraft” and “all aircraft” that could be interpreted otherwise as “civil aircraft” and received little criticism ever since, it is unfair to criticize Chinese rules for using the term “aircraft” without distinguishing between civil and state aircraft.

Part III.

Requiring an aircraft not entering territorial airspace to identify itself – not just China.

In the opinion of some American scholars, unlike China's ADIZ rules, U.S. ADIZ rules do not apply to aircraft not intending to enter national airspace.

When discussing ADIZ, the U.S. officials usually argue that (quote from *The Commander's Handbook on the Law of Naval Operations*):

- The legal basis for ADIZ regulations is the right of a State to establish reasonable conditions of entry into its territory. Accordingly, an aircraft approaching national airspace can be required to identify itself while in international airspace as a condition of entry approval. ADIZ regulations promulgated by the United States apply to aircraft bound for U.S. territorial airspace and require the filing of flight plans and periodic position reports. **The United States does not recognize the right of a coastal State 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.**

The above policy is surprisingly inconsistent with current U.S. ADIZ rules.

- The U.S. ADIZ rules “literally” apply to not only aircraft bound for U.S. territorial airspace, but also aircraft operating out of the U.S. (whose point of departure is within the U.S.) bound for any other country through its ADIZs.
- Aspects of U.S. ADIZ rules appear to be inconsistent with the U.S. position that a coastal State does not have the right to apply its ADIZ procedures to foreign aircraft not intending to enter national airspace.

“ § 99.1 Applicability” of *14 CFR* as below:

(a) This subpart prescribes rules for operating all aircraft (except for Department of Defense and law enforcement aircraft) in a defense area, or into, within, or out of the United States through an Air Defense Identification Zone (ADIZ) designated in subpart B.

The ADIZ rules of numerous countries not only apply to aircraft operating into or from the national airspace of the declaring country through its ADIZ, but also aircraft merely passing through its ADIZ.

- In actuality, Canada, South Korea, Japan, the Philippines, Australia and Taiwan authorities similarly do not make a clear distinction in their published identification procedure rules between aircraft entering their territorial airspace and aircraft merely passing through their ADIZ. Perhaps, they have taken as precedent U.S. ADIZ rules from before 1961.
- Interestingly, although the applicability criteria of the original American rules were restricted in the 1961 amendment, other countries which had declared ADIZs before or after 1961 did not follow suit and make their own ADIZ rules match with the updated U.S. ADIZ rules, but stuck to the provisions of the original, broadly applicable, American ADIZ rules.

- Pre-1961 American ADIZ rules had broad “applicability”:

§ 620.1 *Basis and purpose.* The regulations prescribed in this part contain rules and regulations which have been found necessary in the interest of national security to identify, locate, and control U.S. and foreign aircraft operated within areas designated by the administrator of Civil Aeronautics as air defense identification zones (ADIZ)

§ 620.10 *Scope.* Aircraft shall not be operated into or within an Air Defense Identification Zone (ADIZ) prescribed by the Administrator in Subpart C of this part, in violation of the following rules.

Conclusion

- Though a common legal framework governing the establishment or enforcement of ADIZs does not exist, in my opinion, scholars should work together to help policymakers develop an international-law-based comprehensive understanding about the theory and practice of ADIZs.
- After carefully studying the U.S. ADIZ rules and other countries' ADIZ practices, we find that the ECS ADIZ rules are not unlike those of other countries, and that a lack of knowledge of China's ADIZ policies has fuelled misperceptions in the international community.

The views expressed here are those of Dr. Cao Qun alone, and are non-mainstream at present. Any comments or criticisms are welcomed.

Thanks for your attention!

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