

防空識別區適法基礎初探

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關鍵詞：防空識別區、公海自由、飛越自由、管轄權、國家安全、完全且排他

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摘 要

防空識別區之劃設，始於 1950 年之冷戰期間，自領空外界限延伸，基於國家安全，要求進入識別區之各國航空器提交飛航計畫，並對於不服管轄者為監視、攔截或迫降。由於航空器發展較船舶快速，國際法對於國家活動在空域之規範，遠不及在海域之規範；海洋法承認沿海國在領海外之管轄事項，並無法類推適用於空域。但航空器對國家安全具有潛在威脅，各國仍依國內法，在領空外為單方行為之管制措施。

對於防空識別區，國際間多有抗議，但均非基於國際法之主張。國際法並未完全禁止國家管轄權在領土外行使，且不論習慣法或條約規範對於防空識別區均未予規範，亦未有明文禁止。本文首先概列各國防空識別區現況；次就國家空域規範之理論及演繹，探討主權在空域之行使範圍；再分按公約及習慣法檢視防空識別區之適法性；最後分析藉國家安全劃設防空識別區之正當性。據此論結，防空識別區為習慣作法，管制措施不得與公海自由及飛越自由相斥而不相容，以免對公有空域形成排他結果，並宜以條約方式規範，以杜爭議。

An Preliminary Exploration of Air Defense Identification Zone

Lipin Tien

Abstract

Since 1950, around 20 coastal states have established Air Defense Identification Zone (ADIZ) to help protect themselves from unwanted intruders and to warn of potential strikes. Fly-through aircraft must identify themselves to the coastal State and follow specified procedures. Failure to comply may result in interception, forced landing, and even aerial attack. This practice resulted in the extending of state jurisdiction seaward more than 200 nautical miles into the high seas.

Neither customary international law nor treaty law has a general prohibition on ADIZ. Justification for the extra-territorial exercise of jurisdiction claimed in those ADIZs' regulations is rooted in the necessity of national security.

International law recognizes that states have the right to do whatever is necessary for the continuity and development of their existence, subject to the qualification that the rights may not be exercised against international duties. Due to the lack of *opinio juris* and extensive and virtually uniform state practice, this paper proposes that ADIZ is only a usage rather than a custom. Therefore, states have a legitimate right to establish ADIZs given that any part of the high seas is not under the sovereignty claimed by any state, and that the control measures adopted by the coastal State in ADIZs shall be compatible with the general principles of law.

In the future, ADIZ may be recognized as a general practice accepted as law if there are to be more legitimate and uniform state practices and less protest. A multilateral treaty is expected to resolve issues on basic constraints and criteria which states may adopt and enforce in ADIZ.